The Prison Litigation Reform Act

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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." Most courts have held that an action is brought for PLRA purposes when the prisoner tenders the complaint to court[6]—a point that may precede actual filing by

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[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] O'Neal v. Price, 531 F.3d 1146, 1151-52 (9th Cir. 2008) (applying 28 U.S.C. § 1915(g) (the "three strikes" provision) (citing Vaden v. Summerhill, 449 F.3d 1045, 1050 (9th Cir. 2006)) (applying 42 U.S.C. § 1997e(a) (administrative exhaustion)); Ford v. Johnson, 362 F.3d 395, 399-400 (7th Cir. 2004). *Contra*, Perryman v. San Francisco Sheriff's Dept., 2012 WL 1038724, *2-3 (N.D.Cal., Mar. 27, 2012) (adopting date of formal filing); Ellis v. Guarino, 2004 WL 1879834, *6 (S.D.N.Y. Aug. 24, 2004). *See* nn. 433, 1425, below, for more on this subject.

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."[7] Case law to date holds that military prisoners are "prisoners" under the PLRA,[8] as are persons held in privately operated prisons and jails[9] or juvenile facilities.[10] 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,[11] though results may vary depending on whether the facility is restrictive enough that the plaintiff can be said to be "confined" in it.[12]

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).

[7] 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 21, below.

[8] Marrie v. Nickels, 70 F.Supp.2d 1252, 1262 (D.Kan. 1999).

[9] *See* Roles v. Maddox, 439 F.3d 1016, 1017-18 (9th Cir. 2006), *cert. denied*, 549 U.S. 905 (2006); Boyd v. Corrections Corporation of America, 380 F.3d 989, 993-94 (6th Cir. 2004), *cert. denied*, 544 U.S. 920 (2005); Ross v. County of Bernalillo, 365 F.3d 1181, 1184 (10th Cir. 2004); Lodholz v. Puckett, 2003 WL 23220723, *4-5 (W.D.Wis., Nov. 24, 2003), *reconsideration denied in part,* 2004 WL 67573 (W.D.Wis., Jan. 13, 2004) (all holding the PLRA exhaustion requirement applicable to persons held in private prisons).

[10] Christina A. ex rel. Jennifer A. v. Bloomberg, 315 F.3d 990, 994-95 (8th Cir. 2003) (holding attorneys' fees provisions apply to juveniles); Alexander S. v. Boyd, 113 F.3d 1373, 1383-85 (4th Cir. 1997), *cert. denied*, 522 U.S. 1090 (1998) (same); Troy D. v. Mickens, 806 F.Supp.2d 758, 767 (D.N.J., Aug. 25, 2011) (holding exhaustion requirement applies to juveniles); Lewis v. Gagne, 281 F.Supp.2d 429, 433 (N.D.N.Y. 2003) (same).

[11] 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 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-Matiyn 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

Persons who are civilly committed are generally not prisoners,[13] 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,[14] nor are persons held in connection with immigration proceedings.[15] However, persons who are civilly committed in connection with criminal proceedings that are still pending remain pre-trial detainees and are therefore prisoners.[16] This category includes criminal defendants held in mental hospitals because of incompetency to assist in their defense.[17] A defendant psychiatrically confined after a finding of not guilty by reason of insanity is civilly committed and therefore not a prisoner,[18] but a person committed pursuant to statutory requirement after a "guilty but insane" verdict is a prisoner.[19] The same is true of a person serving a prison sentence who is committed to a mental health

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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).

[12] 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 he 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).

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

[14] Merryfield v. Jordan, 584 F.3d 923, 927 (8th Cir. 2009); Michau v. Charleston County, S.C., 434 F.3d 725, 727-28 (4th Cir. 2006), *cert. denied*, 548 U.S. 910 (2006); Troville v. Venz, 303 F.3d 1256, 1260 (11th Cir. 2002); Page v. Torrey, 201 F.3d 1136, 1139-40 (9th Cir. 2000); Matherly v. Johns, 2012 WL 2953671, *2 (E.D.N.C., July 19, 2012) (holding civil commitment under Adam Walsh Act does not make person a prisoner under PLRA, and rejecting argument that court should require exhaustion in its discretion); Esparza v. Baca, 2008 WL 4500673, *4 (C.D.Cal., Sept. 30, 2008) (holding civilly committed sex offender was not a prisoner even if he remained in prison awaiting a hearing); McClam v. McDonald, 2008 WL 4177217, *3 (D.S.C., Sept. 8, 2008). *Contra*, Willis v. Smith, 2005 WL 550528, *10 (N.D.Iowa, Feb. 28, 2005) (holding that a person civilly committed as a sexually violent predator after completion of his sentence was a prisoner for PLRA purposes); *see* McClellan v. Marshall, 2009 WL 2407630, *5-6 (C.D.Cal. 2009) (person whose parole violation term had expired who was being held pending a determination whether he should be civilly committed as a sex offender was a prisoner).

[15] Agyeman v. I.N.S., 296 F.3d 871, 885-86 (9th Cir. 2002); LaFontant v. INS, 135 F.3d 158 (D.C.Cir. 1998); Mohamed v. Lowe, 2008 WL 5244935, *1 (M.D.Pa., Dec. 16, 2008); Bromfield v. McBurney, 2008 WL 4426827, *2 (W.D.Wash., Sept. 26, 2008); Gashi v. County of Westchester, 2005 WL 195517, *1 (S.D.N.Y., Jan. 27, 2005); *see* Andrews v. King, 398 F.3d 1113, 1121-22 (9th Cir. 2005) (stating that PLRA "three strikes" provision did not apply to dismissals of actions brought while a plaintiff was in INS custody "so long as the detainee did not also face criminal charges"); Galeas v. Neely, 2010 WL 4975497, *1 n.2 (W.D.N.C., Dec. 1, 2010) (holding prisoner serving a criminal sentence who also had an immigration detainer was a prisoner for PLRA purposes), *aff'd*, 412 Fed.Appx. 650 (4th Cir. 2011) (unpublished), *cert. denied*, 131 S.Ct. 2966 (2011).

[16] 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).

[17] Gibson v. City Municipality of New York, 692 F.3d 198, 201-02 (2d Cir. 2012) (per curiam); Henson v. Kelley, 2012 WL 734189, *2 (S.D.Ill., Feb. 14, 2012), *report and recommendation adopted*, 2012 WL 734171 (S.D.Ill., Mar. 6, 2012); Banks v. Thomas, 2011 WL 1750065, *2 (S.D.Ill., May 6, 2011); Ruston v. Church of Jesus Christ of Latter-Day Saints, 2007 WL 2332393, *1 (D.Utah, Aug. 13, 2007); In re Rosenbalm, 2007 WL 1593207, *2 (N.D.Cal., June 1, 2007) (noting that such hospitalization is part of the criminal proceeding under state law); Gibson v. Commissioner of Mental Health, 2006 WL 1234971, *6 (S.D.N.Y., May 8, 2006) (applying "three strikes" provision to a criminal defendant hospitalized as incompetent to stand trial), *relief from judgment denied*, 2006 WL 2192865 (S.D.N.Y., Aug. 2, 2006).

[18] Koloctronis v. Morgan, 247 F.3d 726, 728 (8th Cir. 2001); Lewis v. Oklahoma Dept. of Mental Health, 2012 WL 5574174, *1 (N.D.Okla., Nov. 15, 2012); Banks v. Thomas, 2011 WL 1750065, *2 (S.D.Ill., May 6, 2011); Mullen v. Surtshin, 590 F.Supp.2d 1233, 1240 (N.D.Cal. 2008), *leave to file for reconsideration denied*, 2009 WL 734673 (N.D.Cal., Mar. 18, 2009); Phelps v. Winn, 2007 WL 2872465, *1 (D.Mass., Sept. 27, 2007) (so holding, notwithstanding that the plaintiff is held by the Bureau of Prisons).

[19] Lewis v. Oklahoma Dept. of Mental Health, 2012 WL 5574174, *1 (N.D.Okla., Nov. 15, 2012); Magnuson v. Arizona State Hosp., 2010 WL 283128, *1 n.5, *2 (D.Ariz., Jan. 20, 2010).

facility, even one operated by a mental health department and not a correction department.[20] One court has held that a prisoner paroled to a mental hospital is not a prisoner.[21]

Persons who are not lawfully subject to detention are not prisoners.[22] Prospective prisoners are not prisoners; an arrestee is not a prisoner even if he is subsequently jailed,[23] and someone who has been sentenced to prison but has not yet surrendered is not a prisoner because he is not yet "confined" in a correctional facility, even though he may be within the prison system's legal custody.[24]

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.[25] However, persons released on parole to residential facilities

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[20] McQuilkin v. Central New York Psychiatric Center, 2010 WL 3765847, *10 (N.D.N.Y., Aug. 27, 2010), *report and recommendation adopted*, 2010 WL 3765715 (N.D.N.Y., Sept. 20, 2010); Jones v. Sherman, 2010 WL 3277135, *3 n.1 (E.D.Ky., Aug. 18, 2010); Roland v. Wenz, 2010 WL 2834828, *3 n.7 (N.D.N.Y., July 16, 2010), *report and recommendation adopted*, 2010 WL 2817485 (N.D.N.Y., July 16, 2010).

[21] Abdul-Matiyn 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. 26, 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 7, above.

[22] 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).

[23] 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.

[24] Jasperson v. Federal Bureau of Prisons, 460 F.Supp.2d 76, 87 (D.D.C. 2006).

[25] Talamantes v. Leyva, 575 F.3d 1021, 1023-24 (9th Cir. 2009); Norton v. The City Of Marietta, OK, 432 F.3d 1145, 1150 (10th Cir. 2005); Nerness v. Johnson, 401 F.3d 874, 876 (8th Cir. 2005) (per curiam); Cox v. Mayer, 332 F.3d 422, 425-26 (6th Cir. 2003) (dictum); Ahmed v. Dragovich, 297 F.3d 201, 210 n.10 (3d Cir. 2002) (citing cases); Janes v. Hernandez, 215 F.3d 541, 543 (5th Cir. 2000), *cert. denied*, 531 U.S. 1113 (2001); Greig v. Goord, 169 F.3d 165, 167 (2d Cir. 1999); Doe v. Washington County, 150 F.3d 920, 924 (8th Cir. 1998); Kerr v. Puckett, 138 F.3d 321, 322 (7th Cir. 1998); Robinson v. Sheppard, 2012 WL 2358252, *1 n.2 (S.D.Tex., June 20, 2012) (holding parolee was unaffected by three strikes provision); Murray v. Raney, 2012 WL 5985543, *4 (D.Idaho, Nov. 29, 2012) (holding parolee is not a prisoner required to exhaust); Bell v. Zuercher, 2011 WL 5191800, *3 (E.D.Ky., Oct. 31, 2011) (holding released prisoner need not exhaust even if he had plenty of time to do so before release); Poindexter v. Boyd, 2011 WL 5008351, *4 (W.D.Ky., Oct. 20, 2011) (person released from jail to obtain medical care was not a prisoner); Cantley v. West Virginia Regional Jail and Correctional Facility Authority, 728 F.Supp.2d 803, 820 (S.D.W.Va. 2010); Wormley v. U.S., 601 F.Supp.2d 27, 44 (D.D.C. 2009); Mabry v. Freeman, 489 F.Supp.2d 782, 785-86 (E.D.Mich. 2007); Bisgeier v. Michael [sic] Dept. of Corrections, 2008 WL 227858, *4 (E.D.Mich., Jan. 25, 2008) ("While there may be certain conditions imposed upon Plaintiff as a parolee, there can be no doubt that he is neither 'confined,' 'incarcerated,' nor 'detained in' any jail, prison, or other correctional

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.[26] Persons on home detention are not prisoners either.[27] 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, unlike the administrative exhaustion requirement, the bar on actions for mental or emotional injury without physical injury, 42 U.S.C. § 1997e(e), applies to cases filed by released prisoners, asserting that the congressional purpose of weeding out frivolous cases would be served thereby.[28] However, almost all (and the better reasoned) decisions follow the statutory language and hold that § 1997e(e) does not apply to cases filed after release from prison.[29] This approach

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facility."); Hoffman v. Tuten, 446 F.Supp.2d 455, 468 (D.S.C. 2006); Keel v. CDCR, 2006 WL 2402100, *2 (E.D.Cal., Aug. 18, 2006) (holding parolee was not a prisoner); Lake v. Schoharie County Com'r of Social Services, 2006 WL 1891141, *4 (N.D.N.Y., May 16, 2006) (rejecting argument that the PLRA's "underlying policy considerations" supported applying the attorneys' fees limits to a released prisoner); Rose v. Saginaw County, 232 F.R.D. 267, 275-77 (E.D.Mich. 2005); Wilson v. Hampton County, 2005 WL 2877725, *3 (D.S.C., Oct. 31, 2005) (relying on *Greig v. Goord*); Black v. Franklin County, Kentucky, 2005 WL 1993445, *4-5 (E.D.Ky., Aug. 16, 2005); *see* Connor v. California, 2011 WL 1595995, *3 (E.D.Cal., Apr. 27, 2011) (rejecting argument that grievance rule requires parolees to exhaust), *report and recommendation adopted*, 2011 WL 2909762 (E.D.Cal., July 15, 2011).

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.

[26] 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. 11, above.

[27] Blank v. Eavenson, 2012 WL 685460, *4 (N.D.Tex., Feb. 14, 2012), *report and recommendation adopted*, 2012 WL 690671 (N.D.Tex., Mar. 1, 2012).

[28] Cox v. Malone, 199 F.Supp.2d 135, 140 (S.D.N.Y. 2002), *aff'd,* 56 Fed.Appx. 43, 2003 WL 366724 (2d Cir. 2002) (unpublished); *accord*, Lipton v. County of Orange, NY, 315 F.Supp.2d 434, 456-57 (S.D.N.Y. 2004). The *Cox* holding, though affirmed by non-precedential opinion, disregards the plain language of the statute that such actions may not "be brought by a prisoner confined in a jail, prison, or other correctional facility." 42 U.S.C. § 1997e(e). A person on parole, like Mr. Cox, is not usually "a prisoner confined" in one of the listed types of institutions.

[29] *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 § 1997e(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).

Further, later New York decisions have directly refused to follow *Cox v. Malone, supra*, on the grounds that the Circuit decision is explicitly non-precedential under governing rules and that the district court's analysis is incorrect. In re Nassau County Strip Search Cases, 2010 WL 3781563, *3-7 (E.D.N.Y., Sept. 22, 2010) (citing *Kerr*

is consistent with the Supreme Court's instruction to district courts not to supplement the text of the PLRA based on judges' policy views.[30] The handful of decisions holding that the administrative exhaustion requirement of 42 U.S.C. § 1997e(a) applies to cases filed after release are now mostly overruled.[31] Several decisions have stated that a federal regulation, which states that the Federal Bureau of Prisons Administrative Remedy Program applies to former prisoners, requires released federal prisoners to exhaust.[32] 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.[33]

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.[34] (A prisoner who is merely

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and *Harris*); McBean v. City of New York, 260 F.R.D. 120, 142-43 (S.D.N.Y. 2009) (same); Kelsey v. County of Schoharie, 2005 WL 1972557, *1-3 (N.D.N.Y., Aug. 5, 2005) (same). Courts elsewhere have also rejected *Cox*. Rose v. Saginaw County, 232 F.Supp.2d 267, 277 (E.D.Mich. 2005); Sutton v. Hopkins County, Ky., 2005 WL 3478152, *3-4 (W.D.Ky., Dec. 19, 2005) (following *Rose*).

[30] 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 § 1997e(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).

[31] *See* Villescaz v. City of Eloy, 2008 WL 1971394, *2-5 (D.Ariz., May 2, 2008) (rejecting reliance on PLRA's language and legislative history, relying instead on "traditional principles of administrative law"); Reyes v. State of Oregon, 2005 WL 1459662, *2 (D.Or., June 21, 2005) (same as *Morgan*); Morgan v. Maricopa County, 259 F.Supp.2d 985, 991 (D.Ariz. 2003) (requiring exhaustion of post-release filings on policy grounds). Other decisions had rejected *Morgan*'s reasoning, *see* Valdivia v. County of Santa Cruz, 2008 WL 4065873, *2-4 (N.D.Cal., Aug. 27, 2008); Zaragoza v. Maricopa County, 2006 WL 581219, *2-3 (D.Ariz., Mar. 3, 2006); Thomas v. Baca, 2005 WL 697986, *2-3 (C.D.Cal., Mar. 23, 2005), or noted its inconsistency with Ninth Circuit precedent. *See* Kritenbrink v. Crawford, 313 F.Supp.2d 1043, 1047-48 (D.Nev. 2004) (citing Page v. Torrey, 201 F.3d 1136, 1139 (9th Cir. 2000)). *Villescaz*'s reliance on "traditional principles of administrative law" ignores both the Supreme Court's holding that an exhaustion requirement is contrary to the legislative intent underlying § 1983, except to the extent that Congress prescribes otherwise, *see* Patsy v. Board of Regents of State of Fla., 457 U.S. 496, 503-15 (1982), and its more recent holding that the language of the PLRA, not judicial views of its underlying policies, determines its interpretation. Jones v. Bock, 549 U.S. 199, 216-17 (2007). However, the matter is now academic, since the Ninth Circuit has now ruled categorically that "only those individuals who are prisoners (as defined by 42 U.S.C. § 1997e(h)) at the time they file suit must comply with the exhaustion requirements of 42 U.S.C. § 1997e(a)." Talamantes v. Leyva, 575 F.3d 1021, 1024 (9th Cir. 2009).

[32] *See* Maree-Bey v. Nash, 53 Fed. Appx. 240 (4th Cir. 2002) (unpublished); Bloch v. Samuels, 2006 WL 2239016, *3-4 (S.D.Tex., Aug. 3, 2006) (plaintiff was in custody in a halfway house); *accord*, Blevins v. Wells, 2011 WL 1518656, *3 (D.Colo., Mar. 14, 2011) (implying same view for state prison system), *report and recommendation adopted*, Blevins v. Wells, 2011 WL 1518655 (D.Colo., Apr. 20, 2011).

[33] *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).

[34] *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); Bowen v. Michigan Dept. of Corrections, 2010 WL 956000, *4 (E.D.Mich., Mar. 15, 2010); 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); Becker v. Vargo, 2004 WL 1068779, *3 (D.Or., Feb. 17, 2004) (same), *report and recommendation adopted*, 2004

released to another prison or jail system remains a prisoner, and must exhaust the grievance process of the system where the claim arose.[35]) 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.[36] However, the majority holding is that if the plaintiff was a prisoner at the time of original filing, an amended complaint filed after release does not exempt the case from the PLRA.[37] 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.[38] In cases where persons are released and reincarcerated,

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WL 1071067 (D.Or., Mar. 12, 2004) *and* 2004 WL 1179332 (D.Or., May 27, 2004); Richardson v. Romano, 2003 WL 1877955, *2 (N.D.N.Y., Mar. 31, 2003). Some decisions have declined to apply the exhaustion requirement to dismiss cases of plaintiffs released after filing. *See* cases cited in n.232.

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.

[35] Figueroa v. Oklahoma Dept. of Corrections, ___ Fed.Appx. ___, 2012 WL 5359523, *3 (10th Cir., Nov. 1, 2012) (unpublished).

[36] 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, 2003 WL 21396665, * 4 (S.D.N.Y., June 16, 2003) (following *Morris*, citing other cases), *on reargument*, 2003 WL 22052978 (S.D.N.Y., Sept. 3, 2003); Morris v. Eversley, 205 F.Supp.2d 234, 241 (S.D.N.Y. 2002) (holding that considerations of judicial efficiency and economy weigh against dismissal); Prendergast v. Janecka, 2001 WL 793251, *1 (E.D.Pa., July 10, 2001) (holding that the PLRA ceases to apply when a post-release amended complaint is filed); Dennison v. Prison Health Services, 2001 WL 761218, *2-3 (D.Me., July 10, 2001) (holding that exhaustion issue was moot as to released prisoner); Ovens v. State of Alaska, Dept. of Corrections, 2000 WL 34514101, *3 (D.Alaska, Mar. 13, 2000) (holding that a prisoner released after filing "is now on the same footing as any other former prisoner who would not be required to exhaust"); *see* Jackson v. Traquina, 2009 WL 3296677, *2 (E.D.Cal. 2009) (treating amended complaint as commencing action for exhaustion purposes because amendment drastically changed action, from putative class action for injunction to action for plaintiff's own damages); *see also* Segalow v. County of Bucks, cited in n. 39, below.

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.

[37] Harris v. Garner, 216 F.3d at 973-76 (holding that filing of amended complaint does not change plaintiffs' status); Ahmed v. Dragovich, 297 F.3d 201, 210 (3d Cir. 2002); DeFreitas v. Montgomery County Correctional Facility, 2012 WL 2920219, *6-7 (E.D.Pa., July 18, 2012) (holding *Prendergast,* cited in the previous footnote, is overruled by *Ahmed v. Dragovich*), *order entered*, 2012 WL 2920277 (E.D.Pa., July 18, 2012); Jackson v. Gandy, 877 F.Supp.2d 159, 175 (D.N.J., June 29, 2012); Brown v. Ghosh, 2010 WL 3893939, *3 (N.D.Ill., Sept. 28, 2010); Prescott v. Annetts, 2010 WL 3020023, *3-4 (S.D.N.Y., July 22, 2010) (same); Barrett v. Maricopa County Sheriff's Office, 2010 WL 46786, *4 (D.Ariz., Jan. 4, 2010) (same); Barnhardt v. Tilton, 2009 WL 3300090, *3 (E.D.Cal. 2009) (same).

[38] Harris v. City of New York, 607 F.3d 18, 24 (2d Cir. 2010) (plaintiff whose suit is dismissed under three strikes provision but has been released can refile and seek *in forma pauperis* status like any other non-prisoner litigant); Cox v. Mayer, 332 F.3d 422, 425-26 (6th Cir. 2003); Dixon v. Page, 291 F.3d 485, 488 n.1 (7th Cir. 2002); Ahmed v. Dragovich, 297 F.3d 201, 210 (3d Cir. 2002); Dilworth v. Goldberg, 2011 WL 3501869, *15 (S.D.N.Y., July 28, 2011) (declining to dismiss case refiled after release for non-exhaustion, notwithstanding that plaintiff previously filed some of the same claims while incarcerated), *report and recommendation adopted*, 2011 WL 4526555 (S.D.N.Y., Sept. 30, 2011); Reddic v. Evans, 2011 WL 2181311, *3 n.1 (N.D.Cal., June 3, 2011); Bloothoofd v.

whether the plaintiff was incarcerated at the time the suit was filed determines whether he or she is a prisoner for PLRA purposes.[39] A prisoner who begins exhaustion and is released before the process is complete, then files suit after reincarceration, may be found to have failed to exhaust if the grievance system remained available after release.[40] 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.[41] 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.[42]

Danberg, 2011 WL 1230268, *3 (D.Del. Mar 31, 2011) (approving plaintiff's filing of new action after release to avoid the exhaustion requirement); Bloothoofd v. Danberg, 2011 WL 1287973, *2-3 (D.Del., Mar. 17, 2011) (same); Michalski v. Krebs, 2010 WL 1032647, *2 (S.D.Ill., Mar. 17, 2010) (plaintiff whose case is dismissed for non-exhaustion can refile without exhaustion after release); Ladd v. Dietz, 2007 WL 160762, *1 (D.Neb., Jan. 17, 2007); *see* Chrisman v. Smith, 2010 WL 503043, *2 (S.D.Cal., Feb. 5, 2010) (noting refiling where court dismissed for non-exhaustion).

[39] *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 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); Jewkes v. Shackleton, 2012 WL 3028054, *5 (D.Colo., July 23, 2012); McCullough v. Yates, 2011 WL 773233, *3-4 (E.D.Cal., Feb. 28, 2011); Smedley v. Reid, 2010 WL 391831, *4 (S.D.Cal., Jan. 27, 2010); Shembo v. Bailey, 2009 WL 129974, *2-3 (W.D.N.C. 2009); Soto v. Erickson, 2007 WL 1430201, *4 & n.4 (E.D.Wis., May 11, 2007), *relief from judgment denied*, 2007 WL 2209257 (E.D.Wis., July 27, 2007); Colby v. Sarpy County, 2006 WL 519396, *1 (D.Neb., Mar. 1, 2006); Gibson v. Brooks, 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 practicably 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 any provision allowing late filings for good cause. Soto v. Erickson, 2007 WL 1430201, *4 & n.4. *See* Duvall v. Dallas County, Tex., 2006 WL 3487024, *4 (N.D.Tex., Dec. 1, 2006) (directing defendants to submit proof of their 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).

[40] 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 contrast, in *Cohron v. City of Louisville, Ky.*, 2012 WL 1015789, *2-3 (W.D.Ky., Mar. 22, 2012), 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.

[41] Gilliam v. Holt, 2008 WL 906479, *6 (M.D.Pa., Mar. 31, 2008).

[42] Turner v. Grant County Detention Center, 2008 WL 821895, *5 (E.D.Ky., Mar. 26, 2008); In re Bayside Prison Litigation, 2007 WL 327519, *4 (D.N.J., Jan. 30, 2007); *see* Zimmerman v. Schaeffer, 654 F.Supp.2d 226, 258

Prisoners cease to be prisoners upon death and therefore litigation on their behalf is not subject to the PLRA,[43] though a case filed by a prisoner before death remains a case brought by a prisoner.[44] Prisoners' relatives or estates bringing an action for a prisoner's death are not themselves prisoners.[45] However, suits brought by prisoners' conservators or guardians, who do not have their own separate claims, have been held to be suits brought by prisoners.[46] In cases filed by both prisoners and non-prisoners as plaintiffs, the non-prisoners' claims are not governed by the PLRA.[47] However, a non-prisoner who intervenes in a prisoner's action may be subject to PLRA requirements because the case was initially brought by a prisoner; filing a

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(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.

[43] Anderson v. County of Salem, 2010 WL 3081070, *2 (D.N.J., Aug. 5, 2010); Torres Rios v. Pereira Castillo, 545 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., Oct. 28, 2005); Simmons ex rel. Estate of Simmons v. Johnson, 2005 WL 2671537, *2 (W.D.Va., Oct. 20, 2005); Greer v. Tran, 2003 WL 21467558, *2 (E.D.La., June 23, 2003); Treesh v. Taft, 122 F.Supp.2d 887, 890 (S.D.Ohio. 2000); *see* Lister v. Prison Health Services, Inc., 2006 WL 1733999, *1-2 (M.D.Fla., June 22, 2006) (holding that a 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).

[44] 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.").

[45] Anderson v. County of Salem, 2010 WL 3081070, *2 (D.N.J., Aug. 5, 2010); Torres Rios v. Pereira Castillo, 545 F.Supp.2d 204, 206 (D.P.R., Aug. 28, 2007) (noting that an estate cannot be imprisoned or accused, convicted, or sentenced for a criminal violation, and it therefore not a prisoner); Netters v. Tennessee Dept. of Correction, 2005 WL 2113587, *3 n.3 (W.D.Tenn., Aug. 30, 2005); Greer v. Tran, 2003 WL 21467558, *2 (E.D.La., June 23, 2003); *see* Rivera-Rodriguez v. Pereira-Castillo, 2005 WL 290160, *5-6 (D.P.R., Jan. 31, 2005) (holding that a prisoner's guardian is not a prisoner).

[46] 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.

[47] *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, 2012 WL 1229884, *7 n.3 (D.Colo., Apr. 12, 2012) (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 2077040, *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.

separate complaint and seeking consolidation, though time-wasting, is more prudent.[48] A "protection and advocacy" organization is not a prisoner.[49]

Civil actions do not include habeas corpus and other post-judgment proceedings challenging criminal convictions or sentences or their calculation.[50] Most courts have now held that habeas proceedings not arising from the original criminal conviction or sentence are also not civil actions for PLRA purposes.[51] Under that holding, habeas challenges to prison disciplinary convictions resulting in the loss of good time are not governed by the PLRA,[52] 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,[53] though it is questionable at this point whether habeas is a proper vehicle for such challenges.[54]

In most circuits, including the Second, mandamus and other extraordinary writs are considered civil actions when the relief sought is similar to that in a civil action, but not when the writ is directed to criminal matters.[55] However, challenges to seizures of property related to

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[48] *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).

[49] Alabama Disabilities Advocacy Program v. Wood, 584 F.Supp.2d 1314, 1316 (M.D.Ala. 2008).

[50] *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 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.

[51] Malave v. Hedrick, 271 F.3d 1139, 1140 (8th Cir. 2001), *cert. denied*, 537 U.S. 847 (2002); Walker v. O'Brien, 216 F.3d 626, 633-36 (7th Cir.), *cert. denied,* 531 U.S. 1029 (2000), *overruling* Newlin v. Helman, 123 F.3d 429 (7th Cir. 1997), *cert. denied*, 522 U.S. 1054 (1998); Blair-Bey v. Quick, 151 F.3d 1036, 1039-41 (D.C.Cir.), *on rehearing*, 159 F.3d 591 (D.C.Cir. 1998); Davis v. Fechtel, 150 F.3d 486, 488-90 (5th Cir. 1998); McIntosh v. U.S. Parole Commission, 115 F.3d 809, 811-12 (10th Cir. 1997).

[52] Walker v. O'Brien, 216 F.3d at 638-39.

[53] U.S. v. Basciano, 369 F.Supp.2d 344, 348 (E.D.N.Y. 2005) (holding that a petitioner seeking release from administrative detention to general population was not subject to PLRA exhaustion, though habeas exhaustion rules applied).

[54] 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 can 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.

[55] *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 F. Appx. 772 (3d Cir. 2007) (per curiam) (unpublished) (holding mandamus petitions are not civil actions or appeals, but "if a prisoner files a 'mandamus petition' that actually would initiate an appeal or a civil action, the PLRA applies" (citing Madden v. Myers, 102 F.3d 74, 77 (3d Cir. 1996)); In re Jacobs, 213 F.3d 289,

criminal proceedings have so far been treated as civil actions,[56] as have motions for disclosure of matters before a grand jury.[57] Decisions are divided concerning motions made under the caption of a criminal prosecution addressing conditions of confinement related to the prosecution.[58] (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.[59]) In general, motions in already filed civil cases addressed to those cases' subject matter are not considered separate "actions" requiring exhaustion under the PLRA.[60] A motion by a non-party to intervene in an already filed case requires exhaustion.[61]

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289 n.1 (5th Cir. 2000); In re Smith, 114 F.3d 1247 (D.C.Cir. 1997); In re Nagy, 89 F.3d 115 (2d Cir. 1996); Keys v. Department of Justice, 2009 WL 648926, *3 (M.D.Pa., Mar. 10, 2009).

[56] U.S. v. Minor, 228 F.3d 352 (4th Cir. 2000) (holding that an equitable challenge to a completed forfeiture is a civil action); U.S. v. Jones, 215 F.3d 467, 469 (4th Cir. 2000) (holding that a motion under Rule 41(e), Fed.R.Crim.P., for the return of seized property is a civil action); U.S. v. Lacey, 172 F.3d 880, 1999 WL 143881 (10th Cir., Mar. 17, 1999) (unpublished) (assuming that civil forfeiture case is subject to fees requirement); Pena v. U.S., 122 F.3d 3 (5th Cir. 1997) (same as *Jones*); U.S. v. Belton, 2007 WL 3046254, *1-2 (E.D.Wis., Oct. 16, 2007) (same as *Jones*).

[57] U.S. v. Campbell, 294 F.3d 824, 826-29 (7th Cir. 2002).

[58] 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, and that holding has now been applied under the PLRA. Nickerson v. Price, 2009 WL 1956284, *2 (E.D.Tex., July 6, 2009) (citing U.S. v. Miramontez, 995 F.2d 56, 58 (5th Cir. 1993)). One court has cited the § 1997e(a) as requiring exhaustion before moving in the sentencing court with regard to sentence calculation. U.S. v. Woods, 2009 WL 279098, *2 (N.D.Okla., Feb. 5, 2009). This is wrong. How long one is to be confined is not the same as the conditions of confinement.

[59] *See* U.S. v. Luong, 2009 WL 2852111, *2 (E.D.Cal., Sept. 2, 2009) (rejecting requests for orthopedic boots and jail law library visits).

[60] Biggins v. Biden, 2009 WL 631631, *1 (D.Del., Mar. 11, 2009) (motion for relief from judgment should not have been treated as a separate action); Ayyad v. Gonzales, 2008 WL 2955964, *2 (D.Colo., July 31, 2008) (motion for preliminary injunction against "Special Administrative Measures" that interfered with access to counsel need not be exhausted); Clarkson v. Coughlin, 2006 WL 587345, *3 (S.D.N.Y., Mar. 10, 2006) (motion to enforce judgment in a class action does not require exhaustion); Arce v. O'Connell, 427 F.Supp.2d 435, 440-41 (S.D.N.Y. 2006) (same as

The PLRA exhaustion requirement is not explicitly limited to civil actions; the statute refers generally to "action[s] . . . with respect to prison conditions."[62] PLRA exhaustion law has nonetheless generally not been applied in habeas proceedings, since habeas corpus has its own pre-existing exhaustion requirement.[63]

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,[64] while the exhaustion of administrative remedies provision applies only to prisoners' actions "with respect to prison conditions."[65] 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."[66] 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."[67] Whether police and courthouse holding cells are prisons has not been settled.[68]

Prospective relief is defined as "all relief other than compensatory money damages."[69] 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,[70] though the Second Circuit has expressed considerable doubt about that conclusion without ruling on the question.[71] One circuit has held that an order that does no more than

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Clarkson); *see* Green v. Peters, 2000 WL 1230246, *5 (N.D.Ill., Aug. 24, 2000) (when defendants move to terminate a judgment, plaintiffs need not exhaust in order to contest the motion). If a prisoner seeks relief about matter not already part of the case, exhaustion will be required. Andreas v. Cate, 2009 WL 3817467, *2 (E.D.Cal., Nov. 13, 2009) (motion for injunctive relief about non-renewal of medication, filed in case about exposure to excessive heat, dismissed for non-exhaustion); Williams v. Blagojevich, 2009 WL 3579019, *1 (S.D.Ill., Oct. 27, 2009).

[61] Georgacarakos v. Wiley, 2009 WL 1594800, *4-5 (D.Colo., Mar. 23, 2009).

[62] 42 U.S.C. § 1997e(a).

[63] *See* § IV.B.1, below.

[64] 28 U.S.C. § 1915(a)(2).

[65] 42 U.S.C. § 1997e(a).

[66] 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").

[67] 18 U.S.C. § 3626(g)(5).

[68] *See* n.4, above.

[69] 18 U.S.C. § 3626(g)(7).

[70] *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); 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).

[71] *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).

enforce an earlier order or decree is not prospective relief within the statute's meaning.[72] Attorneys' fees, even those awarded for monitoring compliance with an injunction, are not prospective relief.[73] Orders issued in the course of pre-trial case management are not prospective relief.[74] One federal circuit has held that punitive damages are prospective relief, a holding discussed further below.[75] A couple of district court decisions have dubiously characterized § 3626 as a limited waiver of sovereign immunity.[76]

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[77] (the "need-narrowness-intrusiveness" standard). Courts have disagreed whether the findings must be made on a provision-by-provision basis,[78] or the order need only be considered as a whole.[79] At least one circuit has held that the findings need not have been made explicitly made "so long as the

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[72] Jones-El v. Berge, 374 F.3d 541, 545 (7th Cir. 2004). A more 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 decree contained "general directives" to remedy various conditions, and subsequent orders "were increasingly more specific and prescriptive, thus reducing—and sometimes eliminating—the discretion" defendants had under the initial consent decree. United States of America, v. Territory of the Virgin Islands, 884 F.Supp.2d 399, 408-09 (D.V.I. 2012).

[73] Carruthers v. Jenne, 209 F.Supp.2d at 1299-1300.

[74] 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*, 129 S.Ct. 2852 (2009).

[75] *See* § III.F, below.

[76] Tanner v. Federal Bureau of Prisons, 433 F.Supp.2d. 117, 122 n. 6 (D.D.C.2006); *accord*, McIntosh v. Lappin, 2012 WL 4442766, *10 (D.Colo., Aug. 13, 2012), *report and recommendation adopted in part*, 2012 WL 4442760 (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.

[77] 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).

[78] *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).

[79] *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).

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."[80]

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.[81] Courts have also held that they cannot grant prospective relief that is not directly related to the claims in the complaint.[82] In particular, some courts have held that they cannot grant relief with respect to obstructions to the plaintiff's ability to litigate the case.[83] 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."[84]

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.[85] That requirement does not appear in, and does not apply to, the PLRA provision governing the initial entry of relief.[86] Courts are also to give substantial weight to adverse impacts on public

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[80] 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)).

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

[82] *See, e.g.*, Herrera v. Gardner, 2010 WL 4138426, *3 (E.D.Cal., Oct. 19, 2010) (holding plaintiff who sued about parole issues could not get injunction on protection from harm claim without adding that claim by amended complaint).

[83] *See, e.g.*, Wade v. Fresno Police Dept., 2010 WL 4006688, *2 (E.D.Cal., Oct. 12, 2010) (declining to enjoin retaliation, require access to the law library, etc.; "Plaintiff is not entitled to any relief that is not narrowly drawn to correct the violation of his rights at issue in this action."), *report and recommendation adopted*, 2010 WL 5168988 (E.D.Cal., Dec. 14, 2010); West v. Federal Bureau of Prisons, 2009 WL 3112042, *2 (E.D.Cal., Sept. 23, 2009) (declining to order transfer in assault case where plaintiff complained of new threats by his assailants), *report and recommendation adopted*, 2009 WL 3837196 (E.D.Cal., Nov. 16, 2009); Buchanan v. Santos, 2009 WL 1322547, *5 (E.D.Cal., May 8, 2009) (declining to enjoin future retaliation since doing so would not remedy the violations in the complaint).

[84] Turner v. Sacramento County Sheriff, 2010 WL 4237023, *1 (E.D.Cal., Oct. 21, 2010), *report and recommendation adopted*, 2010 WL 5317331 (E.D.Cal., Dec. 20, 2010); *accord*, Edwards v. High Desert State Prison, 2012 WL 469865, *1 n.1 (E.D.Cal., Feb. 7, 2012) (acknowledging in a PLRA case that All Writs Act may allow relief against non-parties), *report and recommendation adopted*, 2012 WL 1081821 (E.D.Cal., Mar. 29, 2012); Mitchell v. Downing, 2010 WL 5060648, *1 n.2 (E.D.Cal., Dec. 6, 2010) (same), *report and recommendation adopted*, 2011 WL 346315 (E.D.Cal., Feb. 1, 2011); 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); *see* Funtanilla v. Tristan, 2009 WL 539689, *1-2 (E.D.Cal., Feb. 27, 2009) (declining to order officials to return materials needed to litigate, but requesting defendants' counsel to file a report on the status of plaintiff's access to legal materials, and directing Magistrate Judge to remedy the situation "as justice requires").

[85] 18 U.S.C. § 3626(b)(3).

[86] 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, Indiana Dept. of Correction, 2012 WL 6738517, *24 (S.D.Ind., Dec. 31, 2012); Kress v. CCA of Tennessee, LLC,

safety or criminal justice operations,[87] 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."[88] Courts are also directed to avoid requiring or permitting officials to violate state or local law unless necessary to correct violations of federal rights.[89]

The restrictions of 18 U.S.C. § 3626(a) apply only to the fashioning of prospective relief[90] and have no implications for other aspects of litigation, *e.g.*, decisions on class certification.[91] 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 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."[92] 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. . . .

2011 WL 3154804, *2 (S.D.Ind., July 26, 2011), *aff'd*, 694 F.3d 890 (7th Cir. 2012). **CHECK—AND CHECK WHETHER PLATA UNDERMINES THIS**

[87] 18 U.S.C. § 3626(a)(1); *see* Mitchell v. Skolnik, 2012 WL 2503075, *2 (D.Nev., June 28, 2012) (denying injunction, noting that plaintiff's injunctive motion "does not attempt to make any showing that the requested relief will not have an adverse impact on public safety or the operation of the criminal justice system" and court cannot therefore make determinations about public interest and balance of hardships); Abdul-Aziz v. Ricci, 2011 WL 6887182, *9 (D.N.J., Dec. 29, 2011) (holding request for restoration of job and backpay would adversely impact prison operations, since plaintiff's job had probably been filled); Funches v. McDaniel, 2011 WL 1871304, *6 (D.Nev., Mar. 31, 2011) (citing risks to safety and security in declining injunction against restraining plaintiff during movement around the prison), *report and recommendation adopted*, 2011 WL 1869809 (D.Nev., May 16, 2011); Coleman v. Schwarzenegger, 2010 WL 99000, *2 (E.D.Cal., Jan. 12, 2010) (where record showed that prison population could be reduced without adversely affecting safety, court would not assess measures chosen by defendants; defendants directed to inform court if compliance requires violating state law and address the statutory factors justifying such relief), *aff'd sub nom.* Brown v. Plata, ___ U.S. ___, 131 S.Ct. 1910, 1941-44 (2011).

[88] Brown v. Plata, ___ U.S. ___, 131 S.Ct. 1910, 1942 (2011).

[89] 18 U.S.C. § 3626(a)(1)(B).

[90] Williams v. Edwards, 87 F.3d 126, 133 (5th Cir. 1996).

[91] Shook v. El Paso County, 386 F.3d 963, 969-71 (10th Cir. 2004), *cert. denied*, 544 U.S. 978 (2005); Anderson v. Garner, 22 F.Supp.2d 1379, 1383 (N.D.Ga. 1997). In *Shook*, the district court on remand, notwithstanding having been reversed, said: "The PLRA did not add new elements to the class certification process, and the PLRA's 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.

[92] Fed.R.Civ.P. 54(c).

> 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.[93]

Nonetheless, several misguided decisions have applied the § 3626(a) standards at the pleading stage, usually where prisoners were proceeding *pro se*.[94] Treating these standards as establishing 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.[95]

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[93] Henderson v. Thomas, 2012 WL 3846439, *13 (M.D.Ala., Sept. 5, 2012) (citations omitted).

[94] *See, e.g.*, Wheeler v. Aliceson, 2013 WL 56960, *9 (E.D.Cal., Jan. 3, 2013) (holding that if plaintiff files an amended complaint, he must plead facts consistent with the elements of the prospective relief standards); Jackson v. Yates, 2012 WL 14018, *5-6 (E.D.Cal., Jan. 4, 2012) (holding demand for injunctive relief to make defendants and non-parties "stop attacking disabled inmates, medical staff complete injury reports and immediately report assault and batteries upon inmates, and that Plaintiff be transferred to Vacaville State Prison" went "beyond the constitutional violations alleged" and was not cognizable); Smith v. Martuscello, 2012 WL 4450025, *7 (N.D.N.Y., May 24, 2012) (holding prayer for declaratory relief inadequately pled under PLRA because it is "both vague and broad"), *report and recommendation adopted*, 2012 WL 4378125 (N.D.N.Y., Sep. 25, 2012); Victor v. Lawler, 2011 WL 3584699, *6 (M.D.Pa., May 25, 2011) ("Victor's prayer for relief [in injunctive motion] is cast broadly and would invite the Court to intervene in prison housing, discipline, grievance and library access issues, as well as proscribing the content of conversations between Victor and prison staff."), *report and recommendation adopted*, 2011 WL 6003923 (M.D.Pa., Nov. 30, 2011); I.S.B. v. State of South Dakota Com'r of Admin., 2011 WL 1316594, *3 (D.S.D., Apr. 1, 2011) (holding relief demanded required intrusion in state criminal justice system as well as management of county jails contrary to § 3626, and complaint therefore failed to state a claim); Mitchell v. Skolink, 2011 WL 868300, *4 (D.Nev., Mar. 9, 2011) (holding relief demanded in complaint excessively intrusive); Arnold v. Sullivan, 2009 WL 224077, *5 (E.D.Cal., Jan. 29, 2009) (holding at preliminary screening that the injunctive relief sought was vague and not appropriately tailored to the violation, so the case should proceed only for damages); Cassini v. Lappin, 2009 WL 224147, *3 (E.D.Cal., Jan. 29, 2009) (holding at preliminary screening that relief sought was not tailored to the violation and the plaintiff was not entitled to it); *see also* Pinson v. Prieto, 2012 WL 7006131, *10 (C.D.Cal., July 2, 2012) (recommending striking plaintiff's remedial demand in response to motion to dismiss), *report and recommendation adopted*, 2013 WL 427108 (C.D.Cal., Feb. 1, 2013); Fitzpatrick v. Georgia Dept. of Corrections, 2012 WL 5207474, *13 (S.D.Ga., Sept. 12, 2012) (dismissing claim for injunctive relief on motion to dismiss in counselled case), *report and recommendation adopted as modified*, 2012 WL 5207472 (S.D.Ga., Oct. 22, 2012); Abdul-Aziz v. Ricci, 2011 WL 6887182, *9 (D.N.J., Dec. 29, 2011) (granting summary judgment because injunctive relief requested was vague and request for restoration of job and backpay would adversely impact prison operations).

Similarly, where one plaintiff sought a preliminary injunction, the court stated he "does not present a prayer for relief which is 'narrowly drawn, extend[s] no further than necessary to correct the harm . . ., and [is] the least intrusive means necessary to correct that harm. 18 U.S.C. § 3626(a)(2)." Breeland v. Fisher, 2012 WL 4105090, *6 (M.D.Pa., July 25, 2012), *report and recommendation adopted*, 2012 WL 4104561 (M.D.Pa., Sept. 18, 2012). The court does not explain how it derives a pleading requirement from the language of § 3626(a)(2), which it quotes selectively. **SHOULD THIS GO IN THE TEXT? IS IT PRO SE? *YES*** *Accord*, Booze v. Wetzel, 2012 WL 6137561, *4 (M.D.Pa., Nov. 16, 2012) (holding preliminary injunction motion deficient because prayer for relief does not conform to need-narrowness-intrusiveness requirement), *report and recommendation adopted*, 2012 WL 6138315 (M.D.Pa., Dec. 11, 2012).

[95] Jones v. Bock, _____ (citing Leatherman) **CHECK**

2. Settlements

Injunctive settlements must meet the standards and the findings requirement of § 3626(a) in order to be enforceable in federal court.[96] Settlements that do not meet the PLRA standards are not prohibited, but these must be entered as "private settlement agreements" not enforceable in federal court.[97] The only federal court remedy after such a settlement is reinstatement of the action.[98]

This requirement that an agreed injunctive order be supported by judicial findings of a federal law violation is a major change from prior law[99] 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 no

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[96] 18 U.S.C. §§ 3626(a), 3626(c)(1); *see, e.g.*, Martinez v. Maketa, 2011 WL 2222129, *1 (D.Colo., June 7, 2011) (noting parties' stipulation that court should make PLRA-required findings); Clark v. California, 739 F.Supp.2d 1168, 1229 (N.D.Cal. 2010) (noting parties' agreement that relief in settlement met the statutory requirements for approval); McBean v. City of New York, 2007 WL 2947448, *2-3 (S.D.N.Y., Oct. 5, 2007) (approving settlement, linking detailed requirements to findings); Laube v. Campbell, 333 F.Supp.2d 1234 (M.D.Ala. 2004) (approving settlement under PLRA standard). *Compare* Lancaster v. Tilton, 2006 WL 2850015, *13-14 (N.D.Cal., Oct. 4, 2006) (refusing to approve a modified settlement in the absence of evidence of an ongoing violation).

[97] 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).

[98] *See* Ghana v. New Jersey State Parole Bd., 2011 WL 3608633, *3 (D.N.J., Aug. 15, 2011) (holding absent a consent decree meeting PLRA requirements, plaintiff's only federal court remedy for breach was reinstatement); Rouser v. White, 707 F.Supp.2d 1055, 1060, 1072-73 (E.D.Cal. 2010) (granting injunction upon showing of violation of federal rights despite prior private settlement agreement).

One court has entered 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).

[99] 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).

more than a recitation of the statutory terms,[100] sometimes with reservations that arguably undermine their import.[101]

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.[102] The pre-PLRA rule that defendants must have an opportunity to propose remedies in the first instance is preserved under the PLRA,[103] 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.[104] Injunctions entered under the PLRA remain subject to appellate review for abuse of discretion.[105]

The Supreme Court has said: "Narrow tailoring requires a fit between the remedy's ends and the means chosen to accomplish those ends."[106] However, the practical meaning of

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[100] *See, e.g.*, Etters v. Young, 2012 WL 1950415, *2 (E.D.N.C., May 30, 2012) ("The parties have stipulated, and the court finds, that the relief provided in the parties' settlement agreement is narrowly drawn, extends no further than necessary to correct the violation of a Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.")

[101] *See* 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 conclusory 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).

[102] Gilmore v. California, 220 F.3d 987, 1006 (9th Cir. 2000); Smith v. Arkansas Dept. of Correction, 103 F.3d 637, 647 (8th Cir. 1996) (holding PLRA "merely codifies existing law and does not change the standards for determining whether to grant an injunction"); Hadix v. Caruso, 461 F.Supp.2d 574, 586-87 (W.D.Mich. 2006) (holding PLRA's "actual standards are consistent with traditional norms of non-interference with state regulation of prisons"), *remanded on other grounds,* 2007 WL 2753026 (6th Cir., Sept. 21, 2007) (per curiam); Morales Feliciano v. Calderon Serra, 300 F.Supp.2d 321, 339-40 (D.P.R. 2004) ("This language mimics long standing requirements for injunctive relief under Rule 65 of the Federal Rules of Civil Procedure. . . . [T]his is the old 'over broadness' doctrine used to measure garden variety injunctive relief under Rule 65."), *aff'd*, 378 F.3d 42, 54-56 (1st Cir. 2004), *cert. denied*, 543 U.S. 1054 (2005); Dodge v. County of Orange, 282 F.Supp.2d 41, 71-72 (S.D.N.Y. 2003), *appeal dismissed, remanded on other grounds*, 103 Fed.Appx. 688, 2004 WL 1567870 (2d Cir. 2004). *Compare, e.g.,* Toussaint v. McCarthy, 801 F.2d 1080, 1086-87 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069); Dean v. Coughlin, 804 F.2d 207, 213 (2d Cir. 1986); Duran v. Elrod, 760 F.2d 756, 760-61 (7th Cir. 1985) (all stating pre-PLRA restrictions on federal court injunctive powers).

[103] 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).

[104] Graves v. Arpaio, 623 F.3d 1043, 1047 (9th Cir. 2010) (citing Lewis v. Casey, 518 U.S. 343, 363 (1996)).

[105] Fields v. Smith, 653 F.3d 550, 554 (7th Cir. 2011) (citing Brown v. Plata, ___ U.S. ___, 131 S.Ct. 1910, 1957 (2011) (Scalia, J., dissenting)); Thomas v. Bryant, 614 F.3d 1288, 1321 (11th Cir. 2010); Crawford v. Clarke, 578 F.3d 39, 43 (1st Cir. 2009).

[106] Brown v. Plata, ___ U.S. ___, 131 S.Ct. 1910, 1939 (2011) (internal quotation marks omitted).

"narrowly drawn" and "least intrusive" is not always clear,[107] and many decisions address the subject on an *ad hoc* basis without stating any general principles.[108] Some decisions have cited this standard as a makeweight in support of conclusions they seemingly have reached for other

[107] *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).

[108] *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); 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); 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 official capacity); Matthews v. Ambridge, 2012 WL 6589264, *10 (D.Nev., Dec. 17, 2012) ("Nor will the Court issue an amorphous broad-based order barring use of 'Plaintiff's artwork' in prison disciplinary proceedings." 18 U.S.C. § 3626(a)(1) "proscrib[es] broad-based intrusive injunctive orders in prison litigation"); White v. Lindermen, 2012 WL 5040850, *2 (D.Ariz., Oct. 18, 2012) (holding request for injunction allowing plaintiffs to possess as many law books as necessary to understand the issues in the action was "too general and broad" under the PLRA); Williamson v. Roberts, 2012 WL 4544348, *4 (W.D.Pa., Oct. 1, 2012) (holding "there are clearly less drastic and less intrusive means for remedying Plaintiff's complaints [about legal property access] than by ordering Plaintiff's transfer"); Gonzalez v. Zika, 2012 WL 4466584, *12 (N.D.Cal., Sept. 26, 2012) (declining to order agoraphobic prisoner to be single celled, but ordering Interdisciplinary Treatment Team to reinstate its recommendation for single celling, with plaintiff to seek further relief if necessary); Native American Council of Tribes v. Weber, 2012 WL 4119652, *25 (D.S.D., Sept. 19, 2012) (holding complete ban on tobacco denied religious rights of Native American prisoners, but reinstating the prior policy allowing individual possession of tobacco was not the most narrowly tailored remedy because of security concerns), *injunction entered*, 2013 WL 310633 (D.S.D., Jan. 25, 2013) (discussing relationship of individual provisions to record); Countryman v. Palmer, 2012 WL 4340659, *4 (D.Nev., Aug. 7, 2012) (holding demand to reinstate all 2009 religious programs was not narrowly drawn to remedy a three-day deprivation of religious exercise), *report and recommendation adopted*, 2012 WL 4339048 (D.Nev., Sept. 19, 2012); Mitts v. Obandina, 2012 WL 4060013, *2 (S.D.Ill., Aug. 27, 2012) (declaring an injunction to provide prescribed medical care *pendent lite* "the least intrusive means to correct the treatment deficiency"), *report and recommendation adopted*, 2012 WL 4059982 (S.D.Ill., Sept. 14, 2012); Pinson v. Prieto, 2011 WL 6294479, *4 (C.D.Cal., Dec. 13, 2011) (holding demand for "review of existing policies and procedures regarding housing members of gangs in the general population of agency facilities" was not narrowly drawn to correct plaintiff's complaint that gang members had a contract on him and he needed protection); Hughes v. Lavender, 2011 WL 2457840, *1, 6 (S.D.Ohio, June 16, 2011) (holding demand for examination by experienced infectious disease physician and "evaluation of the condition of Mr. Hughes's liver, immune system, and back, as well as a prescribed course of treatment which will restore and maintain their full function as they existed at the time of his commitment to [jail]," was not narrowly drawn); Chan v. County of Sacramento, 2011 WL 2636262, *4 (E.D.Cal., July 5, 2011) (declining to recommend specific procedures, but directing defendants to send plaintiff to a dentist competent to perform root canals, permanent fillings, and dentures in order to develop and act on a treatment plan); Flynn v. Doyle, 630 F.Supp.2d 987, 993-94 (E.D.Wis., Apr. 24, 2009) (enjoining defendants to submit a plan to ensure that medication is dispensed by persons with credentials equal to Licensed Practical Nurses, that they are trained in prison procedures, and that medication orders are timely processed and dispensed); Perez v. Cate, 2009 WL 440508, *4 (N.D.Cal., Feb. 23, 2009) (where prisoners transferred out of state lost the benefit of an agreement governing prison dental care, least restrictive and intrusive remedy was not to enjoin the transfers, but possibly to exclude prisoners acknowledged to have dental problems of a certain degree of urgency); Ashanti v. Tilton, 2009 WL 413593, *4 (E.D.Cal., Feb. 18, 2009) (enjoining defendants to provide kosher food to Muslim prisoner as the least restrictive means of enforcing his dietary rights), *report and recommendation adopted*, 2009 WL 541220 (E.D.Cal., Mar. 2, 2009); Farnam v. Walker, 593 F.Supp.2d 1000, 1017-18 (C.D.Ill. 2009) (enjoining defendants to follow plaintiff's experts medical treatment recommendations, but only until they got the patient to a Cystic Fibrosis Center; selecting an alternate medical device that poses less security risk); *see Appendix A for additional authority on this point*. *But see* Rezaq v. Nalley, 2010 WL 5157317, *4 n.4 (D.Colo., Aug. 17, 2010) (holding transfer is not precluded as a remedy by prospective relief provisions), *report and recommendation adopted*, 2010 WL 5157313 (D.Colo., Dec. 14, 2010).

reasons.[109] The requirement to avoid unnecessary violations of state law has so far been little litigated.[110]

It is clear that enjoining defendants to follow the language of a statute they have violated is appropriate under the PLRA.[111] Most courts have held that upon finding a policy unconstitutional in a non-class action, they can simply enjoin the policy,[112] though a few have held that they must restrict relief to the plaintiffs in the suit.[113] Systemic relief is permissible if

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

[110] *See* Robinson v. Delgado, 2010 WL 3448558, *13 (N.D.Cal., Aug. 31, 2010) (making findings permitting violation of state law if necessary); Coleman v. Schwarzenegger, 2010 WL 99000, *2 (E.D.Cal., Jan. 12, 2010) (directing defendants to inform the court if compliance with its orders requires violating state law, and to address the statutory factors justifying such relief), *aff'd sub. nom.* Brown v. Plata, ___ U.S. ___, 131 S.Ct. 1910 (2011); Perez v. Hickman, 2007 WL 1697320, *2-4, 7 (N.D.Cal., June 12, 2007) (ordering increase in salaries paid to prison dentists, contrary to state law, and finding PLRA standards met); Hadix v. Caruso, 2007 WL 162279, *1 (W.D.Mich., Jan. 16, 2007) (adopting parties' agreement that medical personnel working for the court monitor should be employees of the monitor and not the state; "The advantage of this amendment is that it avoids complications of state law which prevent hiring outside the civil service system and likewise avoids possible violations of state collective bargaining agreements with state employees.").

[111] 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).

[112] *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 prohibition on receipt of materials downloaded from the Interent); Ashker v. California Dep't 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."); Couch v. Jabe, 737 F.Supp.2d 561, 574 (W.D.Va. 2010) (enjoining prison 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).

[113] *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); 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

supported by proof of a systemic violation;[114] the command that remedies extend no further than necessary to remedy the violation of the rights of a "particular plaintiff or plaintiffs"[115] 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."[116] Conversely, if a violation is narrowly focused on one or a few individuals, or on part of a system, relief should be focused accordingly.[117] Allowing the defendants to propose a remedial plan in the first instance has been said to be the least intrusive means to correct violations,[118] though one recent decision has cautioned against adopting operational details of a defendants' plan that are not required by federal law.[119] Agreements between the parties are "strong evidence," if not dispositive, that provisions reflecting those agreements comply with the needs-narrowness-intrusiveness requirement,[120] and tracking existing agency or institutional policy is further evidence of PLRA

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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 *Soneeya 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.

[114] 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").

[115] 18 U.S.C. § 3626(a)(1)(A).

[116] 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.*

[117] *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); Robinson v. Tifft, 2012 WL 2675467, *3 (N.D.Fla., June 1, 2012) (holding plaintiff's "requests for continuous audio and video recording in every dormitory, and for the defendants to be charged with unidentified federal crimes is not narrowly tailored to plaintiff's identified harm of being sprayed with a chemical agent"), *report and recommendation adopted*, 2012 WL 2675469 (N.D.Fla., July 6, 2012); Hall v. Martin, 2012 WL 1579334, *16 (W.D.Mich., Mar. 29, 2012) (stating in dictum that an order reinstating plaintiff to a diet that was available in the prison would be less intrusive than compelling implementation of a new menu system and would probably satisfy the PLRA), *report and recommendation adopted*, 2012 WL 1579321 (W.D.Mich., May 3, 2012), *reconsideration dismissed*, 2012 WL 4856392 (W.D.Mich., Oct. 12, 2012); Robinson v. Delgado, 2010 WL 3448558, *11-14 (N.D.Cal., Aug. 31, 2010) (enjoining officials to allow non-Jewish prisoner whose beliefs required a kosher diet to participate in kosher meal program; declining broader relief as to operation of religious meal program).

[118] 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.

[119] Westefer 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).**ELABORATE?**

[120] 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*, 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-

compliance.[121] Plaintiffs' proposals may be deemed narrow and non-intrusive if the defendants do not come forward with anything.[122] 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."[123] A declaratory judgment holding a practice unlawful "will not in any way be intrusive nor will it negatively impact public

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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) (declining to approve agreed order with "conclusory and collusive" stipulated findings of violation). *Cf.* Native American Council of Tribes v. Weber, 2012 WL 4119652, *25 (D.S.D., Sept. 19, 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).

[121] 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 did not cure the violation." *Id.* at 354-55; *accord*, Skinner v. Lampert, 2006 WL 2333661, *12 (D.Wyo., Aug. 7, 2006); Riley v. Brown, 2006 WL 1722622, *15 (D.N.J., June 21, 2006); Ruiz v. Johnson, 154 F.Supp.2d 975, 994 (S.D.Tex. 2001) (noting that defendants' policies were constitutional but must be effectuated; "The court cannot conceive of a less intrusive alternative, and neither party has proffered one."); *see* Handberry v. Thompson, 446 F.3d 335, 350 (2d Cir. 2006) (affirming requirement to provide Temporary Education Plans for school-age prisoners as consistent with defendants' own policies or proposals); Gates v. Cook, 376 F.3d 323, 337 (5th Cir. 2004) (affirming aspects of injunction even though defendants said they were already doing what they had been ordered to do; issue framed as one of mootness). *But see* Westefer v. Neal, 682 F.3d 679, 682-86 (7th Cir. 2012) (disapproving injunctive settlement that incorporated defendants' revised operational procedures because the resulting order was more specific than constitutional requirements; injunction should direct adoption of policies complying with constitutional requirements and then verify that the policies do so). **ELABORATE?** On remand, the district court declined to order defendants to submit proposed amendments to the state Administrative Code. Westefer v. Snyder, 2012 WL 4904522, *2 (S.D.Ill., Oct. 15, 2012).

[122] Plata v. Schwarzenegger, 2008 WL 4847080, *8 (N.D.Cal., Nov. 7, 2008) (noting state's failure to propose less intrusive measures, refusing to stay funding of court-mandated construction program); Gammett v. Idaho State Bd. of Corrections, 2007 WL 2684750, *4-5 (D.Idaho, Sept. 7, 2007) (adopting plaintiffs' proposal for treatment for transsexual prisoner where defendants said they could not provide treatment). *But see* Thomas v. McNeil, 2009 WL 605306, *1 (M.D.Fla., Mar. 9, 2009) (where defendants defined to submit a proposal, court "[took] into consideration" plaintiffs' suggestions but drew from several sources including defendants' terms, procedures, and regulations governing related circumstances), *judgment entered*, 2009 WL 605306 (M.D.Fla., Mar. 9, 2009), *aff'd*, Thomas v. Bryant, 614 F.3d 1288 (11th Cir. 2010).

[123] *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, . . . [t]he 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).

safety," though the court that said so additionally held that the plaintiff was entitled to a permanent injunction.[124]

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,"[125] 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."[126]

Although the PLRA requires that remedies be tailored to violations, it allows highly intrusive or burdensome remedies where the record supports their necessity.[127] In this

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[124] Lindh v. Warden, Federal Correctional Inst., Terre Haute, Ind., 2013 WL 139699, *16 (S.D.Ind., Jan. 11, 2013).

[125] *Benjamin,* 156 F.Supp.2d at 350.

[126] *Id.* On appeal, the court agreed emphatically. 343 F.3d at 53-54 (". . . [I]t 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 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 3412806 (D.Idaho, Dec. 9, 2005). *But see* Westefer v. Neal, 682 F.3d 679, 682-86 (7th Cir. 2012) (disapproving injunctive order 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). **ELABORATE?**

[127] Brown v. Plata, ___ U.S. ___, 131 S.Ct. 1910, 1928-29 (2011) ("Courts may not allow constitutional violations to continue simply because a remedy would involve intrusion into the realm of prison administration."); Coleman v. Brown, 428 Fed.Appx. 743, 744-45 (9th Cir. 2011) (unpublished) (affirming order to double rate of admission to two mental health facilities based on record of unconstitutional mental health care including failure to provide inpatient care and suicides among prisoners awaiting admission); Gates v. Cook, 376 F.3d 323, 337, 341-42 (5th Cir. 2004) (requiring prison to meet American Correctional Association and National Commission on Correctional Health Care standards in mental health program; requiring provision of 20 foot candles of light in cells); Indiana Protection and Advocacy Services Com'n v. Commissioner, Indiana Dept. of Correction, 2012 WL 6738517, *24 (S.D.Ind., Dec. 31, 2012) ("The remedy may be as complex as the evidence of the violation. . . ."); Kosilek v. Spencer, ___ F.Supp.2d ___, 2012 WL 3799660, *53-54 (D.Mass., Sept. 4, 2012) (directing defendants to provide gender reassignment surgery where the record showed that was the only satisfactory treatment for plaintiff's condition; leaving questions of where to perform the surgery, who would do it, and appropriate security measures and subsequent placement to defendants pursuant to PLRA); Armstrong v. Brown, 2012 WL 113723, *15-18

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."[128] The failure of earlier less intrusive measures and recalcitrance by defendants or their agents may support more intrusive relief.[129] As one court put it, in ordering appointment of a receiver to take over a large 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."[130] 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"[131] does not prohibit these actions if they could have been taken under the courts' existing equitable powers.[132]

(N.D.Cal., Jan. 13, 2012) (where state prison system backed up prisoners into county jails, directing a statewide procedure for enforcing disability rights of those state prisoners), *modified and corrected on other grounds*, 2012 WL 1225911 (N.D.Cal., Apr. 11, 2012), *amended and superseded on other grounds, adhered to in pertinent part*, 857 F.Supp.2d 919 (N.D.Cal. 2012); Plata v. Schwarzenegger, 2008 WL 4847080, *6-7 (N.D.Cal., Nov. 7, 2008) (declining to stay prior order requiring provision of $250 million to receiver for improvements in medical care); Perez v. Hickman, 2007 WL 1697320, *2-5, 7 (N.D.Cal., June 12, 2007) (requiring increases in salaries for prison dentist contrary to state law, and requiring the creation of a hiring unit within the prison system); *see Appendix A for additional authority on this point. But see* Hadix v. Caruso, 2006 WL 1361415, *2 (W.D.Mich., May 15, 2006) (allowing defendants to substitute a $7.8 million fire safety program for previously ordered $98 million program where the court found it would satisfy constitutional requirements), *reconsideration denied*, 2006 WL 1851231 (W.D.Mich., June 30, 2006).

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

[129] 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 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."), *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 *Skinner v. Uphoff*).

[130] Plata v. Schwarzenegger, 2005 WL 2932253, *25 (N.D.Cal., Oct. 3, 2005); *see id.,* *27-28 (explaining why other remedies would be ineffective).

[131] 18 U.S.C. § 3626(a)(1)(C).

[132] Plata v. Schwarzenegger, 2008 WL 4847080, *7 (N.D.Cal., Nov. 7, 2008).

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.[133] Even if they were made, relief may be terminated after the passaged 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.[134] Most courts hold that any existing relief should be adapted to conform to the current record if an ongoing violation is found.[135] Relief may not be continued based on the prospect of future violations,[136] but the court may reimpose relief after termination if a new showing of

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[133] 18 U.S.C. § 3626(b)(2); *see* United States of America v. Territory of the Virgin Islands, 2012 WL 3194974 (D.V.I., Feb. 8, 2012) (finding various orders subject to termination for failure to make required findings as to particular relief; hearing on current conditions to be held); *see also* cases cited in nn. 79-80, above, concerning the requirements for PLRA findings.

[134] 18 U.S.C. § 3626(b); *see* Pierce v. County of Orange, 526 F.3d 1190, 1208-13 (9th Cir. 2008) (finding ongoing violations with respect to exercise and religious access in segregation, terminating other judgment provisions), *cert. denied,* 129 S.Ct. 597 (2008); Benjamin v. Fraser, 264 F.3d 175 (2d Cir. 2001) (affirming findings of continuing and ongoing violations); United States of America, v. Territory of the Virgin Islands, 884 F.Supp.2d 399, 418-19 (D.V.I., Feb. 8, 2012) (holding five-year-old findings "too dated" to bar termination, but could serve as "an appropriate factual foundation" if "properly updated"); Graves v. Arpaio, 2008 WL 4699770, *2-3 *et passim* (D.Ariz., Oct. 22, 2008) (partly terminating relief, partly preserving or modifying relief based on current record; considering evidence covering a one-year period), *aff'd*, 623 F.3d 1043 (9th Cir. 2010); Hart v. Agnos, 2008 WL 2008966, *4-5 (D.Ariz., Apr. 25, 2008) (limiting discovery to evidence from previous calendar year, stating parties must prove the relevance and admissibility of older evidence); Lancaster v. Tilton, 2007 WL 4570185, *5 (N.D.Cal., Dec. 21, 2007) (though "current" means when termination motion is made, "instantaneous snapshot" is impossible; court says record made over previous 13 months is adequate); U.S. v. Commonwealth of Puerto Rico, 2007 WL 1119336, *2-3 (D.Puerto Rico, Apr. 10, 2007) (continuing and modifying relief by agreement, supported by court monitor's report describing current conditions); Skinner v. Lampert, 2006 WL 2333661, *6-13 (D.Wyo., Aug. 7, 2006) (partly terminating and partly continuing relief in inmate assault class action); Balla v. Idaho Bd. of Correction, 2005 WL 2403817, *5-10 (D.Idaho, Sept. 26, 2005) (finding ongoing violations merited retention of crowding-related relief), *clarified, reconsideration denied*, 2005 WL 3412806 (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. Schneiter, 2006 WL 2168682, *1-3 (W.D.Wis., July 31, 2006).

[135] 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*, 129 S.Ct. 597 (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).

[136] Para-Professional Law Clinic at SCI-Graterford 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).

constitutional violation is made and if the court has retained jurisdiction of other aspects of the case.[137] The majority of courts have held that the plaintiffs have the burden of proof in a termination proceeding.[138]

The termination provision has been upheld against challenges based on separation of powers, due process, and equal protection grounds.[139]

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 relief, and one year after the date of an order denying an earlier motion to terminate.[140] 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.[141]

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.[142] During that period, the suspended relief may not be coercively enforced, even if the termination motion followed the request for enforcement.[143] Appellate proceedings may "reset" the time preceding the automatic stay so it starts anew when district court proceedings resume.[144]

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[137] Hadix v. Caruso, 461 F.Supp.2d 574, 589 (W.D.Mich. 2006), *remanded on other grounds*, 2007 WL 2753026 (6th Cir., Sept. 21, 2007) (per curiam).

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.

[138] Guajardo v. Texas Dep't of Criminal Justice, 363 F.3d 392, 395 (5th Cir. 2004) (per curiam); Laaman v. Warden, 238 F.3d 14, 20 (1st Cir. 2001); United States of America, v. Territory of the Virgin Islands, 884 F.Supp.2d 399, 415 (D.V.I., Feb. 8, 2012); Imprisoned Citizens Union v. Shapp, 11 F.Supp.2d 586, 604 (E.D.Pa. 1998), *aff'd*, 169 F.3d 178 (3d Cir. 1999). *Contra*, Gilmore v. California, 220 F.3d 987, 1007-08 (9th Cir. 2000) (analogizing a PLRA termination proceeding to a Rule 60(b) motion to modify a judgment); *accord*, Graves v. Arpaio, 623 F.3d 1043 (9th Cir. 2010) (reaffirming *Gilmore* holding).

[139] 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).

[140] 18 U.S.C. § 3626(b).

[141] Graves v. Arpaio, 2010 WL 4778000, *2-3 (D.Ariz., Nov. 17, 2010).

[142] 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) (postponing automatic stay in juvenile conditions case because of allegations of physical and mental abuse and delays and inaction in responding to them); Skinner v. Uphoff, 410 F.Supp.2d 1104, 1112 (D.Wyo. 2006) (postponing 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).

[143] 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.

[144] Lancaster v. Tilton, 2007 WL 4145963, *1 (N.D.Cal., Nov. 19, 2007) (citing Benjamin v. Jacobson, 172 F.3d 144, 166 (2d Cir.) (en banc), *cert. denied*, 528 U.S. 824 (1999)).

The automatic stay provision, too, has been upheld against a separation of powers challenge.[145] Private settlement agreements not enforceable in federal court are not subject to the termination provisons.[146]

C. Prisoner Release Orders

In addition to the general provisions concerning prospective relief, the PLRA includes special provisions restricting "prisoner release orders,"[147] defined as "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."[148] These provisions were virtually unused until recently.[149] 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.[150] Such orders may be entered only by a three-judge federal court,[151] which must make findings by clear and convincing evidence that "(i) crowding is the primary cause of the violation

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[145] Miller v. French, 530 U.S. 327 (2000); *see also* Merriweather v. Sherwood, 235 F.Supp.2d 339, 343-44 (S.D.N.Y. 2002) (upholding provision against due process challenge).

[146] Shultz v. Wells, 73 Fed.Appx. 794, 2003 WL 21911330, *1 (6th Cir. 2003) (unpublished); Davis v. Gunter, 771 F.Supp.2d 1068, 1071-72 (D.Neb. 2011); York v. City of El Dorado, 119 F.Supp.2d 1106, 1108 (E.D.Cal. 2000).

[147] 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-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).

[148] 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).

[149] *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).

[150] 18 U.S.C. § 3626(a)(3)(i-ii). 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).

[151] *See* Coleman v. Schwarzenegger, 2007 WL 2122636 (E.D.Cal., July 23, 2007), *appeal dismissed*, 2007 WL 2669591 (9th Cir., Sept. 11, 2007); Plata v. Schwarzenegger, 2007 WL 2122657 (N.D.Cal., July 23, 2007) (both requesting the Ninth Circuit to appoint a three-judge court to consider a population limit on the California prison system), *appeal dismissed,* 2007 WL 2669591 (9th Cir., Sept. 11, 2007); Roberts v. County of Mahoning, Ohio, 495 F.Supp.2d 784, 786 (N.D.Ohio 2007) (noting appointment of three-judge court and entry of prisoner release order by consent).

of a Federal right; and (ii) no other relief will remedy the violation of the Federal right."[152] The actual remedy imposed by the court must also conform to the more general need-narrowness-intrusiveness provisions discussed above.[153] In framing a remedy, the court may make its own judgment as to the likely efficacy of remedies proffered by defendants.[154]

Certain law enforcement officials and other officeholders are entitled to intervention as of right to oppose such an order.[155] 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.[156]

D. Preliminary Injunctions

Preliminary injunctions must meet the same need-narrowness-intrusiveness standards as other prospective relief.[157] They are limited in duration to 90 days, but courts may enter sequential preliminary injunctions if the factual justification for relief continues to exist.[158] 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."[159]

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[152] 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.

[153] Brown v. Plata, ___ U.S. ___, 131 S.Ct. at 1940.

[154] Brown v. Plata, ___ U.S. ___, 131 S.Ct. at 1937-39.

[155] 18 U.S.C. § 3626(a)(3)(F); *see* Ruiz v. Estelle, 161 F.3d 814, 821-27 (5th Cir. 1998) (upholding intervention provisions), *cert. denied,* 526 U.S. 1158 (1999); Coleman v. Schwarzenegger, 2007 WL 3020078, *1-3 (E.D.Cal., Oct. 10, 2007), *on reconsideration in part*, 2007 WL 3355071 (E.D.Cal., Nov. 9, 2007), *vacated on reconsideration,* 2008 WL 397295 (E.D.Cal., Feb. 8, 2008) (addressing roles of intervenors); Bowers v. City of Philadelphia, 2006 WL 2601604, *4-7 (E.D.Pa., Sept. 8, 2006) (all construing the prisoner release order provision).

[156] Balla v. Idaho Bd. of Correction, 2005 WL 2403817 (D.Idaho, Sept. 26, 2005), *clarified, reconsideration denied*, 2005 WL 3412806, *1 (D.Idaho, Dec. 9, 2005).

[157] 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, 2012 WL 3570732, *5 (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); 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).

[158] Mayweathers v. Newland, 258 F.3d 930, 936 (9th Cir. 2001); Farnam v. Walker, 593 F.Supp.2d 1000, 1004, 1018-19 (C.D.Ill. 2009) (holding successive preliminary injunctions are permissible; granting injunction and setting conference date near 90-day deadline to discuss possible entry of successive injunction); Riley v. Brown, 2006 WL 1722622, *7-16 (D.N.J., June 21, 2006) (granting second injunction after expiration of first); *see* Gammett v. Idaho State Bd. of Corrections, 2007 WL 2684750, *4 (D.Idaho, Sept. 7, 2007) (holding termination and automatic stay procedures do not apply to preliminary injunctions).

[159] *See* Stewart v. Davis, 2011 WL 4383662, *5 (S.D.Ohio, Sept. 19, 2011) (demand for "full-blown investigation of the day to day operations" of a jail plus the grant of all relief sought in the complaint would be substantially

E. Special Masters

The use of special masters has been limited in prison conditions litigation,[160] 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[161] and does not displace the courts' pre-existing equitable authority to appoint a receiver.[162]

F. Punitive Damages as Prospective Relief

Prospective relief is defined as "all relief other than compensatory money damages."[163] 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.[164] The court did not comment on the potential Seventh Amendment problem its holding presents, since it calls for reexamination of the jury's judgment about the need for deterrence,[165] 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

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intrusive; § 3626(a)(2) cited); Ocasio v. McDaniel, 2009 WL 4377541, *5 (D.Nev., Nov. 30, 2009) (applying adverse impact requirement to deny injunction to require prisoners to purchase regular pens that have been used as weapons); Barendt v. Gibbons, 2009 WL 2982802, *4 (D.Nev., Sept. 11, 2009) (same as *Ocasio*); Lyons v. Bisbee, 2009 WL 801821 (D.Nev., Mar. 25, 2009) (holding adverse impact provision weighed against preliminary injunction limiting search practices); Leon v. Schaff, 2007 WL 3025694, *4 (D.N.J., Oct. 15, 2007) (citing adverse impact clause in denying injunction to remove plaintiff who was being investigated for assault from segregation); Silva v. Mayes, 2005 WL 1111230 (W.D.Wash., May 9, 2005), *report and recommendation adopted*, 2005 WL 1377906 (W.D.Wash., June 3, 2005). *But see* McNearney v. Washington Dept. of Corrections, 2012 WL 3545267, *16 (W.D.Wash., June 15, 2012) (finding "no evidence in this case that either public safety or operation of the criminal justice system is impacted" by injunction requiring medical treatment), *report and recommendation adopted*, 2012 WL 3545218 (W.D.Wash., Aug. 16, 2012), *modified*, 2013 WL 392489 (W.D.Wash., Jan. 31, 2013).

[160] 18 U.S.C. § 3626(f); *see* Balla v. Idaho State Bd. of Correction, 2011 WL 108727, *2 (D.Idaho, Jan. 6, 2011) (appointing special master to help resolve case pending 30 years); Roberts v. County of Mahoning, 495 F.Supp.2d 670, 692 (N.D.Ohio 2005) (finding case of overcrowded and understaffed jail sufficiently complex to warrant appointment of a special master); *see also* Webb v. Goord, 340 F.3d 105, 111 (2d Cir. 2003) (noting that the PLRA has "substantially limited" the use of special masters in prison litigation), *cert. denied*, 540 U.S. 1110 (2004). *Cf.* McCormick v. Roberts, 2012 WL 1448274, *2 (D.Kan., Apr. 26, 2012) (noting special masters are now permitted only at the remedial stage).

[161] Benjamin v. Fraser, 343 F.3d 35, 44 (2d Cir. 2003) (holding that a court monitor without quasi-judicial powers was not a special master for PLRA purposes and that the PLRA special master provisions did not apply to pre-existing court agents); *accord*, Handberry v. Thompson, 446 F.3d 335, 351-52 (2d Cir. 2006) (applying *Benjamin* holding to find "special monitor" in jail education case not governed by PLRA special master provisions); Laube v. Campbell, 333 F.Supp.2d 1234, 1239 (M.D.Ala. 2004) (applying *Benjamin* holding to find a "healthcare monitor" not governed by PLRA special master provisions); Hadix v. Caruso, 465 F.Supp.2d 776, 810-11 (W.D.Mich. 2006) (creating Office of Independent Monitor over medical care system without reference to special master provision), *amended on reconsideration*, 2007 WL 162279 (W.D.Mich., Jan. 16, 2007), *remanded on other grounds,* 2007 WL 2753026 (6th Cir. 2007) (per curiam).

[162] Plata v. Schwarzenegger, 603 F.3d 1088, 1093-96 (9th Cir. 2010).

[163] 18 U.S.C. § 3626(g)(7).

[164] Johnson v. Breeden, 280 F.3d 1308, 1325 (11th Cir. 2002).

[165] *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.").

and declaratory relief.[166] *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."[167] 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.[168] 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 . . ."[169] makes no sense applied to an award of damages. The same is true of the provisions for termination of prospective relief.[170] 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."[171]

To date there is little law actually applying the *Johnson* holding.[172] However, one district court has surpassed *Johnson*'s absurdity by holding that the prospective relief provisions abolish punitive damages altogether in prison cases.[173]

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[166] *See, e.g.*, Seminole Tribe of Florida v. Florida, 517 U.S. 44, 170 (1996) (distinguishing "prospective relief" from "retrospective monetary relief"); Landgraf v. USI Film Products, 511 U.S. 244, 273-74 (1994) (majority opinion) and *id.* at 293 (dissenting opinion) (clearly using "prospective relief" to refer to injunctions); Franklin v. Gwinnett County Public Schools, 503 U.S. 60, 75-76 (1992) (distinguishing prospective relief, an equitable remedy, from monetary relief).

[167] *Id.* at 1325 (citing Stenberg v. Carhart, 530 U.S. 914, 942 (2000)).

[168] 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).

[169] 18 U.S.C. § 3626(a)(1)(B).

[170] 18 U.S.C. § 3626(b).

[171] 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).

[172] One court concluded that *Johnson* supplemented rather than supplanted existing punitive damages law, and concluded 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' 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. In *Rieara v. Sweat*, 2007 WL

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."[174] However, the litigation is almost entirely about the statute's interpretation and application; it is not facially unconstitutional.[175]

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."[176] The PLRA's mandatory exhaustion requirement replaced the former discretionary approach to exhaustion[177] and, according to the Supreme Court, 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."[178] Thus, the fact that prior grievance

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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.

[173] Margo v. Bedford County, 2008 WL 857507, *10 (W.D.Pa., Mar. 31, 2008).

[174] 42 U.S.C. § 1997e(a).

[175] Williams v. Wright, 2010 WL 1904570, *3-4 (S.D.Ga., Mar. 25, 2010), *report and recommendation adopted*, 2010 WL 1904563 (S.D.Ga., May 10, 2010).

[176] 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.")

[177] Salahuddin v. Mead, 174 F.3d 271, 274 n. 1 (2d Cir. 1999).

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*, 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 (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. 424-426, below.

[178] Booth v. Churner, 532 U.S. 731, 741 n. 6 (2001); *accord*, Porter v. Nussle, 534 U.S. at 523-24; Boyd v. Corrections Corporation of America, 380 F.3d 989, 998 (6th Cir. 2004) and cases cited (holding that prisoners' subjective belief the process will be unresponsive does not excuse exhaustion), *cert. denied*, 544 U.S. 920 (2005); Alexander v. Tippah County, Miss., 351 F.3d 626, 630 (5th Cir. 2003), *cert. denied*, 541 U.S. 1012 (2004); Myers v. City of New York, 2012 WL 3776707, *4-5 (S.D.N.Y., Aug. 29, 2012), *appeal dismissed*, No. 12-3824 (Nov. 8, 2012); Brown v. Brown, 2012 WL 2116575, *3 (E.D.Cal., June 6, 2012) (holding claim against Governor concerning prison staffing must be exhausted even though Governor doesn't work in the prison), *report and*

decisions or standing prison policy seem to dictate the response does not justify non-exhaustion.[179] However, the Court has more recently stated that the statutory term "exhausted" has the same meaning as in administrative law,[180] and it has drawn on the understanding of the term in habeas corpus as well,[181] leading one Justice to suggest that the exceptions to exhaustion requirements recognized in those bodies of law should apply as well under the PLRA.[182] 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.[183]

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.[184] 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.[185] The Supreme Court has held that non-exhaustion is an affirmative defense to be raised by defendants;[186] it follows that the defense can be waived by failure to do so, as the Second Circuit had already held.[187] The Second Circuit has also held that "special circumstances" may justify failure to exhaust and allow the prisoner to

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recommendation adopted, 2012 WL 3886103 (E.D.Cal., Sept. 6, 2012); Aldin v. Workman, 2010 WL 1444879, *4 (S.D.Ill., Mar. 17, 2010) (holding fact that plaintiff's Ramadan-related grievance could not be completed before Ramadan was over, and his feeling that he was dealing with "dictators," did not excuse non-exhaustion), *report and recommendation adopted*, 2010 WL 1444877 (S.D.Ill., Apr. 9, 2010); Camino v. Scott, 2006 WL 1644707, *5-6 (D.N.J., June 7, 2006) (holding plaintiff's belief that officials were "circl[ing] the wagons" did not excuse failure to file a grievance).

[179] Murray v. Arizona Dept. of Corrections, 2007 WL 2069831, *2 (D.Ariz., July 13, 2007) (regulation forbidding 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).

[180] Woodford v. Ngo, 548 U.S. 81, 93 (2006).

[181] *Woodford*, 548 U.S. at 92.

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

[183] 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. 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.

[184] 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).

[185] 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. 803-807, 1070-1071 concerning equitable tolling.

[186] Jones v. Bock, 549 U.S. 199, 213-17 (2007).

[187] *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.

proceed without exhaustion if remedies are no longer available.[188] 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,[189] 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.[190] These holdings are discussed in more detail in appropriate sections below. The Supreme Court decision in *Woodford v. Ngo*,[191] 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.[192]

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.[193] 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.[194]

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. . . ."[195] Its terms are not restricted to "civil actions" as are some other PLRA provisions.[196] 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.[197] Such a proceeding would still be subject to the habeas corpus exhaustion requirement, which is arguably more rigorous.[198] Decisions are

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[188] Giano v. Goord, 380 F.3d 670, 676 (2d Cir. 2004); *accord*, Brownell v. Krom, 446 F.3d 305, 311-13 (2d Cir. 2006).

[189] Abney v. McGinnis, 380 F.3d 663, 667 (2d Cir. 2004).

[190] 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).

[191] 548 U.S. 81 (2006).

[192] *See* §§ IV.E.7 and IV.E.8, below.

[193] Jones v. Bock, 549 U.S. 199, 218-19 (2007).

[194] 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).

[195] 42 U.S.C. § 1997e(a). The meaning of the term "prisoner" is discussed in § II, above.

[196] *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).

[197] Carmona v. U.S. Bureau of Prisons, 243 F.3d 629, 632-34 (2d Cir. 2001); *accord*, Dominguez v. Adler, 2010 WL 121112, *3 n.2 (E.D.Cal., Jan. 7, 2010) (dictum); Lewis v. Whitehead, 2006 WL 3359639, *2 (D.S.D., Nov. 15, 2006); Monahan v. Winn, 276 F.Supp.2d 196, 204 (D.Mass. 2003). Occasionally a court gets this wrong. *See, e.g.*, Yannucci v. Stansberry, 2009 WL 2421546, *3 (E.D.Va., July 28, 2009).

[198] *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)

mixed on whether a motion by the defendant in a criminal proceeding that affects prison conditions requires exhaustion.[199] 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.[200] A suit filed under the general federal question jurisdiction statute, 28 U.S.C. § 1331, raising federal constitutional claims must be exhausted.[201]

A motion to enforce the terms of a judgment is not a separate "action" requiring exhaustion,[202] nor is a request for further relief in already-filed litigation.[203]

The exhaustion requirement applies generally to private prisons and jails and to private contractors operating in prisons and jails,[204] 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.[205]

(noting that habeas exhaustion could be waived by court); Perez v. Zenk, 2005 WL 990696, *2 (E.D.N.Y., Apr. 11, 2005); *see also* nn. 658-660, below, for conflicting Supreme Court dicta and separate opinions on this subject.

[199] *See* n. 58, 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).

[200] O'Guinn v. Lovelock Correctional Center, 502 F.3d 1056, 1060-61 (9th Cir. 2007) (holding there is no exception to PLRA exhaustion for the ADA); Carlson v. Parry, 2012 WL 1067866, *12 (W.D.N.Y., Mar. 29, 2012); Spires v. Burgos, 2006 WL 2802004, *1 (S.D.Ga., Sept. 28, 2006); Miller v. Wayback House, 2006 WL 297769, *5 (N.D.Tex., Feb. 1, 2006), *aff'd*, 253 Fed.Appx. 399 (5th Cir. 2007); Kearns v. Johnson County Adult Detention Center, 2006 WL 148889, *2 (D.Kan., Jan. 19, 2006); McClure v. Oregon Dept. of Corrections, 2005 WL 425469, *7 (D.Or., Feb. 23, 2005) and cases cited; Chamberlain v. Overton, 326 F.Supp.2d 811, 815-16 (E.D.Mich. 2004). The exhaustion required by the PLRA would be exhaustion of the prison grievance system or other internal complaint system. In New York, prison officials were partially successful in arguing that the ADA requires exhaustion of the Department of Justice disability complaint procedure *and* the prison grievance system, though they subsequently withdrew that argument. *See* nn. 850-856, below.

[201] Vaughn v. Butcher, 2011 WL 4344206, *1, 3 (E.D.Tex., Sept. 14, 2011).

[202] Clarkson v. Coughlin, 2006 WL 587345, *3 (S.D.N.Y., Mar. 10, 2006); *accord*, Clark v. California, 739 F.Supp.2d 1168, 1232 (N.D.Cal. 2010); Arce v. O'Connell, 427 F.Supp.2d 435, 440-41 (S.D.N.Y. 2006).

[203] Coleman v. Schwarzenegger, 2008 WL 4813371, *2 (E.D.Cal., Nov. 3, 2008); *see* § IV.E.5, below, for a related discussion. One court has also held that a motion for a preliminary injunction in an already-filed case seeking improved attorney-client access is not a civil action requiring exhaustion. Ayyad v. Gonzales, 2008 WL 2955964, *2 (D.Colo., July 31, 2008) (challenge to "Special Administrative Measures"). Decisions are mixed on motions for jail conditions-related and other collateral relief made in the context of criminal proceedings. *See* nn. 56-58, above.

[204] *See* n. 9, above; Baker v. Allen, 2006 WL 2226351, *6 (D.N.J., Aug. 3, 2006) (holding exhaustion requirement applies to private medical contractor); *see also* Pri-Har v. Corrections Corp. of America, Inc., 154 Fed.Appx. 886, 888, 2005 WL 3087891, *2 (11th Cir., Nov. 18, 2005) (unpublished) (holding a federal prisoner in a private prison must exhaust the private prison's remedy system, not the Bureau of Prisons'). *Compare* Watkins v. Corrections Corporation of America, 2006 WL 581243, *1 (N.D.Ohio, Mar. 8, 2006) (stating it is "likely" that federal prisoner in a private prison must use the federal prisoners' grievance procedure; dismissing on that basis) *with* 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).

[205] *See* Calhoun v. Horning, 2009 WL 2913418, *2-3 (D.Md., Sept. 2, 2009) (holding state grievance system was not intended to provide a remedy against private health care contractors, so contractors could not raise the exhaustion defense) (citing Adamson v. Correctional Medical Services, Inc., 359 Md. 238, 753 A.2d 501 (Md. 2000)); *accord*, Wilson v. Maryland Div. of Corrections, 2011 WL 2118956, *2 n.4 (D.Md., May 25, 2011); Marshall v. Friend, 2010 WL 2367360, *1 n.1 (D.Md. June 9, 2010); *see also* nn. 222, 925-927, citing additional relevant case law.

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,[206] but 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,[207] though the plaintiff must have satisfied any state law exhaustion requirement.[208]

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.[209] 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.[210]

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."[211] So prior

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[206] *See* Johnson v. State of La. ex rel. Dep't of Public Safety & Corr., 468 F.3d 278, 280 (5th Cir. 2006) ("The PLRA's exhaustion requirement applies to all Section 1983 claims regardless of whether the inmate files his claim in state or federal court."); Gibbs v. Ozmints, 2010 WL 2926164, *7 (D.S.C., July 23, 2010) (applying exhaustion requirement to constitutional claim filed in state court not under § 1983), *aff'd*, 421 Fed.Appx. 272 (4th Cir. 2011) (unpublished); Blakely v. Ozmint, 2006 WL 2850545, *2 (D.S.C., Sept. 29, 2006) (applying exhaustion requirement in § 1983 action removed from state court based on federal question); Hodge v. Louisville/Jefferson County Metro Jail, 2006 WL 1984723, *4 (W.D.Ky., July 12, 2006) (same); Alexander v. Walker, 2003 WL 297536, *2 (N.D.Cal., Feb. 10, 2003) (same).

[207] Edison v. GEO Group, 2013 WL 459891, *2 (E.D.Cal., Feb. 4, 2013); Lino v. Celaya, 2012 WL 4793115, *2 (S.D.Cal., Oct. 9, 2012); Wright v. Carrasco, 2012 WL 1094446, *4 (N.D.Cal., Mar. 30, 2012); Johnson v. Thaler, 2010 WL 3543266, *14 (S.D.Tex., Sept. 10, 2010); Baker v. County of Sonoma, 2010 WL 1038401, *20 (N.D.Cal., Mar. 19, 2010); B v. Duff, 2009 WL 2147936, *8 (N.D.Ill., July 17, 2009); Labat v. Louisiana Community and Technical College System, 2009 WL 1181267, *2 (M.D.La., May 1, 2009); Grajeda v. Horel, 2009 WL 302708, *3 (N.D.Cal., Feb. 6, 2009); Hagopian v. Smith, 2008 WL 3539256, *3 (E.D.Mich., Aug. 12, 2008); Shaheed-Muhammad v. Dipaolo, 393 F.Supp.2d 80, 92 n.5 (D.Mass. 2005); Torres v. Corrections Corp. of America, 372 F.Supp.2d 1258, 1262 (N.D.Okla. 2005); Artis-Bey v. District of Columbia, 884 A.2d 626, 631 (D.C. 2005).

[208] Martinez v. California, 2009 WL 649892, *2-3 (E.D.Cal., Mar. 11, 2009) (holding plaintiff's supplemental tort claims required notice of claim, not prison grievance, under state law); Hendon v. Baroya, 2006 WL 1791349, *2 (E.D.Cal., June 27, 2006) (noting that plaintiff must satisfy any state law exhaustion requirement to pursue a state law claim in federal court), *report and recommendation adopted*, 2008 WL 482868 (E.D.Cal., Feb. 20, 2008).

[209] B v. Duff, 2009 WL 2147936, *12 (N.D.Ill., July 17, 2009).

[210] Brewer v. Corrections Corp. of America, 2010 WL 398979, *4 (E.D.Ky., Jan. 27, 2010), *motion to amend denied*, 2010 WL 2464967 (E.D.Ky., June 15, 2010).

[211] Porter v. Nussle, 534 U.S. 516, 532 (2002); s*ee, e.g.*, Cutter v. Wilkinson, 544 U.S. 709, 723 n. 12 (2005) (noting claims under Religious Land Use and Institutionalized Persons Act must be exhausted); Krilich v. Federal Bureau of Prisons, 346 F.3d 157, 159 (6th Cir. 2003) (holding that intrusions on attorney-client correspondence and telephone conversations are prison conditions notwithstanding argument that attorney-client relationship "transcends the conditions of time and place"); U.S. v. Carmichael, 343 F.3d 756, 761 (5th Cir. 2003) (holding that statutorily required collection of DNA is a prison condition), *cert. denied*, 540 U.S. 1136 (2004); Castano v. Nebraska Dept. of Corrections, 201 F.3d 1023, 1024 (8th Cir. 2000) (holding the failure to provide interpreters for Spanish-speaking prisoners is a prison condition), *cert. denied*, 531 U.S. 913 (2000); Creech v. Reinke, 2012 WL 1995085, *5-9 (D.Idaho, June 4, 2012) (holding method of executing capital prisoners is a prison condition), *appeal dismissed*, No. 12-35453 (9th Cir., June 5, 2012); Woltz v. FCI Beckley, 2011 WL 4916102, *2-3 (S.D.W.Va., Oct. 17, 2011) (holding complaint that prison staff improperly required inmates to name the prison as their place of residence for

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.[212]) 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"[213] is now overruled. If it happened in prison, most likely it's a prison condition.[214]

There is some ambiguity about when events or circumstances during post-arrest intake involve prison conditions.[215] Complaints that arise in halfway houses or residential treatment

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the Census was about prison conditions); Searcy v. U.S., 668 F.Supp.2d 113, 121 (D.D.C., Nov. 9, 2009) (discipline of prisoner for allowing another to use his telephone account was about prison conditions despite claim that it was about "monies held in the Treasury"); Voits v. Washington County, 2009 WL 2392953, *2 (D.Or., July 29, 2009) (allegation of removal of funds from prisoner's account after disciplinary proceeding was about prison conditions); Pryor v. Harper, 2006 WL 2583302, *2 (S.D.Ohio, Sept. 7, 2006) (holding an order by prison officials that the 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).

[212] 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).

[213] Marvin v. Goord, 255 F.3d 40, 42-43 (2d Cir. 2001), *overruled in pertinent part*, Porter v. Nussle, 534 U.S. 516 (2002).

[214] 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.

[215] 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 on arrest is not a prison condition but excessive force after 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

programs are likely to be considered as about prison conditions if the plaintiff is there because of a criminal conviction or charge and is not free to leave.[216] 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.[217]

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.[218] Similarly, another court held that claims against police officers based on an interrogation and a refusal to allow the

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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).

[216] *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. Pataki, 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. 11, 26, above, concerning whether such institutions are "prisons" and their residents "prisoners."

[217] *See* Bost v. Adams, 2006 WL 1674485, *5 (S.D.W.Va., June 12, 2006) (holding challenge to a restriction on the time a prisoner could serve in a community corrections center was not about prison conditions); Belk v. Federal Bureau of Prisons, 2004 WL 5352260, *14 (W.D.Wis., Oct. 15, 2004) (challenge to transfer from prison camp to halfway house involved a "quantum change" in level of custody and was not about prison conditions); Tristano v. Federal Bureau of Prisons, 2004 WL 5284511, *12 (W.D.Wis., Oct. 15, 2004) (same as *Belk*); Monahan v. Winn, 276 F.Supp.2d 196, 204 (D.Mass. 2003) (holding that a Bureau of Prisons rule revision that abolished its discretion to designate certain offenders to community confinement facilities did not involve prison conditions).

[218] Almahdi v. Ridge, 2006 WL 3051791, *2 (3d Cir., Oct. 27, 2006) (unpublished); *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.

plaintiff to call an attorney were not prison conditions claims, even though the interrogation took place in the jail.[219] These outcomes make sense because if the people responsible are not prison employees, the prison grievance system cannot do anything about the problem, and the remedy is not really "available" within the meaning of the statute.[220] Outcomes are mixed with respect to complaints about outside medical facilities[221] and private medical providers within the prison.[222]

Cases challenging the legitimacy of incarceration itself are not about prison conditions.[223] Courts have reached differing decisions on matters related to parole release or revocation.[224] In

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[219] Battle v. Whetsel, 2006 WL 2010766, *3 n.4 (W.D.Okla., July 17, 2006). *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).

[220] *See* § IV.G, below, concerning the definition of "available."

[221] In *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 unlikelihood 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"), *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).

[222] Stevens v. Goord, 2003 WL 21396665, *5 (S.D.N.Y., June 16, 2003) (holding that private corporation that managed specialty care in prison and provided off-site acute hospital care for prisoners 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). *Contra*, Giampaolo v. Bartley, 2010 WL 2574203, *4 (S.D.Ill., June 23, 2010) (holding private contractor did not "fall[] outside the grievance process," since it was not in terms excluded and prison system supervised medical provider pursuant to contract), *report and recommendation adopted*, 2010 WL 2574203 (S.D.Ill., June 23, 2010).

[223] Regelman v. Weber, 2011 WL 1085685, *3 (W.D.Pa., Mar. 21, 2011) (holding false arrest plaintiff "is complaining about the very fact of confinement, not the conditions of confinement, and the PLRA does not apply to such claims"); White v. Thompson, 2007 WL 628121, *2-3 (S.D.Ga., Feb. 26, 2007) (holding false imprisonment claims not about prison conditions); Fuller v. Kansas, 2005 WL 1936007, *2 (D.Kan., Aug. 8, 2005) (holding claims of false arrest and imprisonment are not prison conditions claims under the statute), *aff'd*, 175 Fed.Appx. 234 (10th Cir. 2006); Wishorn v. Hill, 2004 WL 303571, *11 (D.Kan., Feb. 13, 2004) (holding detention without probable cause is not a prison condition). *But see* Ates v. Terry, 2012 WL 3096065, *2 (M.D.Ga., June 29, 2012) (holding claim of failure to release timely should have been exhausted because grievance policy makes release date calculation grievable; not addressing "prison conditions" language), *report and recommendation adopted*, 2012 WL 3096063 (M.D.Ga., July 30, 2012).

[224] *Compare* Coleman v. Dumeng, 2012 WL 467133, *3 (S.D.N.Y., Feb. 14, 2012) (challenge to parole condition is not about prison conditions), *appeal dismissed*, No. 12-1168 (2d Cir., Aug. 20, 2012); Hernandez-Vazquez v. Ortiz-Martinez, 2010 WL 132343, *4 (D.P.R., Jan. 8, 2010) (delayed parole hearing is not a prison condition); Garcia-Delgado v. Puerto Rico, 2009 WL 2168811, *2 (D.P.R., July 17, 2009) (failure to decide a parole application is not a prison condition); L.H. v. Schwarzenegger, 519 F.Supp.2d 1072, 1081 n.9 (E.D.Cal., Sept. 19, 2007) (holding parole violation procedures are not prison conditions); Swimp v. Rubitschun, 2006 WL 3370876, *6 n.1 (W.D.Mich., Nov. 20, 2006) (holding challenge to a parole decision was not about prison conditions); Valdivia v. Davis, 206 F.Supp.2d 1068, 1074 n.12 (E.D.Cal. 2002) (holding that a challenge to parole revocation procedures was not a "civil action with respect to prison conditions" under 18 U.S.C. § 3626(g)(2)) *with* Morgan v. Messenger,

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.[225] 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)."[226] 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.[227]

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.[228]

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."[229] 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.[230] Most courts have held that the exhaustion requirement, like other PLRA provisions, applies to cases filed during confinement even if the plaintiff has been released,[231] but some have declined to dismiss in those circumstances.[232]

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, but grievance system was not available for it because it had no authority over the Parole Commission).

[225] *See, e.g.*, Zapata v. Scibana, 2004 WL 1563239 (W.D.Wis., July 9, 2004) (holding PLRA exhaustion requirement inapplicable to habeas challenge to good time calculation), *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 complaint of improper denial of early release was not about prison conditions and habeas proceeding was not subject to PLRA exhaustion requirement), *report and recommendation adopted*, 2004 WL 1175736 (N.D.Tex., May 26, 2004).

[226] Farnworth v. Craven, 2007 WL 793397, *3 (D.Idaho, Mar. 14, 2007).

[227] *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, 643-44 (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).

[228] Bolden v. Stroger, 2005 WL 283419, *1 (N.D.Ill., Feb. 1, 2005). However, the court held that a claim of exclusion of persons with mental illness from pre-release programs was about prison conditions. *Id.*, *2.

[229] 42 U.S.C. § 1997e(a).

[230] *See* n. 427, below; *see also* nn. 433, below, concerning when a case is considered filed for this purpose.

[231] *See* cases cited in nn. 34-36, above.

The Second Circuit, like most courts, has held that the PLRA eliminated the option to stay a case pending exhaustion.[233] In my view, now reinforced by the most recent 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 *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.[234] The view that such action should be permitted is supported by the Supreme Court's recent holding that courts applying the PLRA should not deviate from the usual practices of civil litigation,[235] which include the discretionary granting of stays.[236]

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[232] *See* cases cited in n. 431, below.

[233] Neal v. Goord, 267 F.3d 116, 122 (2d Cir. 2001); *accord,* Medina-Claudio v. Rodriguez-Mateo, 292 F.3d 31, 36 (1st Cir. 2002); Sharpe v. Medina, 2011 WL 3444230, *3 (D.N.J., Aug. 8, 2011), *aff'd*, 450 Fed.Appx. 109 (3d Cir. 2011); Williams v. Nash, 2009 WL 1955856, *2 (N.D.Cal., July 6, 2009); Mosley v. Hudson, 2009 WL 1044611, *2 (E.D.Tex., Apr. 20, 2009) ("No statutory basis now exists for placing a stay on the action; instead, completion of the exhaustion process is a mandatory prerequisite for filing the lawsuit."); McCaffrey v. Winn, 2006 WL 344961, *1 (D.Mass., Feb. 14, 2006); Fleming v. Lindner, 2005 WL 3287488, *4 (E.D.Cal., Dec. 6, 2005); Lyons v. Trinity Services Group, Inc., 2005 WL 3273730, *1 (S.D.Fla., Aug. 29, 2005).

[234] In *Brown v. Walker*, 2009 WL 2447977, *2 (S.D.Ill., July 7, 2009)*, 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 *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 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 *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 *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 *Ouellette v. Maine State Prison*, 2006 WL 173639 (D.Me., Jan. 23, 2006), *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." *Id.*, *4; *see also* 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). *But see* McCaffery v. Winn, 2005 WL 2994370, *1 (D.Mass., Nov. 8, 2005), *on reconsideration*, 2006 WL 344961, *1 (D.Mass., Feb. 14, 2006) (initially granting a stay, then concluding the court lacked authority to do so).

[235] Jones v. Bock, 549 U.S. 199, 212-14 (2007).

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.[237] 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). . . ."[238] 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,[239] 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."[240]

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,[241] though such motions can be used to reinstate cases dismissed for non-exhaustion as a result of mistakes,[242] or in some instances where the case was dismissed under legal rules that were subsequently invalidated.[243] The Sixth Circuit has held that the plaintiff

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[236] *See* Cruz v. Jordan, 80 F.Supp.2d 109, 124-25 (S.D.N.Y. 1999) (holding PLRA's change in exhaustion requirement "does not mean that Congress intended to eliminate equitable stays where the interest of justice require a stay rather than a dismissal").

[237] Sapp v. Kimbrell, 623 F.3d 813, 823-24 (9th Cir. 2010) (holding prison officials' "improper screening of an inmate's administrative grievances renders administrative remedies 'effectively unavailable' such that exhaustion is not required under the PLRA") (citing cases)). Such instances are discussed in §§ IV.E, IV.E.7, and G.2-3, *passim*.

[238] Pavey v. Conley, 544 F.3d 739, 742 (7th Cir. 2008), *cert. denied*, 129 S.Ct. 1620 (2009); *see* Swisher v. Porter County Sheriff's Dept., 2012 WL 3776363, *4 (N.D.Ind., Aug. 29, 2012) (holding remedies unavailable because plaintiff was no longer in the jail and would not be allowed to use the grievance system, and it could no longer change his jail conditions anway), *reconsideration denied*, 2013 WL 550507 (N.D.Ind., Feb. 11, 2013) .

[239] There is extensive case law at this point, including in the Seventh Circuit, on circumstances which may make a theoretically available remedy unavailable to a particular prisoner. *See* § IV.G.1, below. *Pavey* makes no reference to this body of law, even prior Seventh Circuit precedents in the area. At least one early post-*Pavey* decision holds that where defendants had refused to respond to several of plaintiffs' grievances, "and have otherwise inhibited their ability to file meaningful complaints," plaintiffs "would be given the proverbial 'runaround'" if required to try to exhaust again, and therefore could proceed with their litigation. Kress v. CCA of Tenn., 2010 WL 2694986, *6 (S.D.Ind., July 2, 2010).

[240] One other court has imposed a similar "do-over" requirement, though a more limited one. In *Giano v. Goord*, 380 F.3d 670, 680 (2d Cir. 2004), the Second Circuit held that a prisoner whose non-exhaustion is found to be justified by "special circumstances" (as opposed to estoppel or unavailability of remedy) must seek to exhaust remedies if they remain available; if not, the prisoner may proceed with the litigation.

[241] Kath v. Ippolito, 132 Fed.Appx. 763, 2005 WL 1253961 (10th Cir., May 27, 2005) (unpublished); Rhodes v. Dull, 2009 WL 839062, *2 (N.D.Cal., Mar. 30, 2009); Funk v. Schwarzenegger, 2009 WL 393652, *1 (E.D.Cal., Feb. 10, 2009) (advising plaintiff that a new post-exhaustion complaint should not bear the docket number of the dismissed action; a new *in forma pauperis* application or filing fee is required); Williams v. Ramirez, 2006 WL 2475339, *2 (E.D.Cal., Aug. 28, 2006), *report and recommendation adopted*, 2006 WL 3227722 (E.D.Cal., Nov. 6, 2006); Baggett v. Smith, 2006 WL 1851221, *1 (W.D.Mich., June 29, 2006); Okoro v. Krueger, 2006 WL 1494637, *1-2 (E.D.Mich., May 30, 2006). *But see* Bleau v. Diguglielmo, 2009 WL 764881, *16 n.33 (E.D.Pa., Mar. 20, 2009) (noting that the court treated a post-dismissal "motion for reinstatement" after exhaustion as a motion to amend, and granted it).

[242] Freeman v. King, 2006 WL 3751094, *1 (S.D.Miss., Dec. 18, 2006) (noting grant of Rule 60(b) relief where plaintiff remedied a pleading error); Siddiq v. Champion, 2006 WL 958584, *3 (W.D.Mich., Apr. 10, 2006) (allowing supplementation of grievance documentation to show that plaintiff had in fact exhausted).

[243] *See, e.g.*, Okoro v. Hemingway, 481 F.3d 873, 874 (6th Cir. 2007) (directing relief under Rule 60(b) based on intervening *Jones v. Bock* decision). However, courts have generally declined to reopen long-concluded cases that

need not pay a new filing fee when re-filing a claim that was previously dismissed for non-exhaustion.[244] Other courts have generally assumed without analysis that a new filing fee is due.[245]

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.[246] Another court directed that the grievance appeal deadline be held open because the prisoner may have missed it out of "excusable confusion."[247] 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,[248] or have made dismissal contingent upon officials' allowing the prisoner to pursue a new grievance.[249] An early post-*Woodford v. Ngo*[250] 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.[251]

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had been dismissed under rules invalidated in *Jones v. Bock*. *See, e.g.*, Chambers v. Straub, 2009 WL 152135, *1 (E.D.Mich., Jan. 21, 2009); Saunders v. Goord, 2007 WL 1434974, *2 (S.D.N.Y., May 15, 2007), *reconsideration denied,* 2007 WL 1650057 (S.D.N.Y., June 5, 2007); Harris v. Terrell, 2007 WL 593636, *1 (D.Kan., Feb. 21, 2007) (same).

[244] Owens v. Keeling, 461 F.3d 763, 772-74 (6th Cir. 2006). The court explained that the filing fee is required of parties "instituting" a civil action, 28 U.S.C. § 1914(a), and that re-filing a now-exhausted claim is not "instituting" suit but merely following the court-prescribed procedure for curing the initial complaint's deficiency. *Accord*, Hernandez-Arredondo v. Hollingsworth, 2012 WL 3046006, *1 (S.D.Ill., July 25, 2012) (dismissing for non-exhaustion, but waiving the filing fee if plaintiff refiles the same case after exhaustion); Goodson v. Cortney, 2006 WL 3314537, *1-2 (D.Kan., Oct. 24, 2006).

[245] *See, e.g.*, Miller v. Elam, 2011 WL 1549398, *3 (E.D.Cal., Apr. 21, 2011); Jones v. Nalley, 2010 WL 3805422, *2 n.2 (S.D.Ill., Sept. 23, 2010); Almond v. Pollard, 2010 WL 3122553, *2 (W.D.Wis., Aug. 5, 2010); Rider v. Goldy, 2010 WL 580985, *2 n.1 (E.D.Cal., Feb. 12, 2010) ("In addition, the new complaint should be accompanied by a properly completed, updated application to proceed *in forma pauperis*."), *vacated on other grounds*, 2010 WL 1854101 (E.D.Cal., May 6, 2010); Rhodes v. Dull, 2009 WL 839062, *2 (N.D.Cal., Mar. 30, 2009); McGuinness v. Missouri Dept. of Corrections, 2009 WL 790614, *2 (W.D.Mo., Mar. 23, 2009); Caldwell v. Jin, 2008 WL 5115039, *2 (W.D.Pa., Dec. 4, 2008).

[246] Ullrich v. Idaho, 2006 WL 288384, *3 (D.Idaho, Feb. 6, 2006).

[247] Cardona v. Winn, 170 F.Supp.2d 131 (D.Mass. 2001). *But see* McCaffery v. Winn, 2006 WL 344961, *1 (D.Mass., Feb. 14, 2006) (after having directed the parties to cooperate in completing the administrative process, concluding on reconsideration that the court lacked authority to do anything other than dismiss).

[248] 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).

[249] 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).

[250] 548 U.S. 81 (2006) (holding that the PLRA requires "proper exhaustion," *i.e.*, compliance with all rules of the prison grievance system).

[251] George v. Morrison-Warden, 2007 WL 1686321, *4 (S.D.N.Y., June 11, 2007).

Dismissal for non-exhaustion is generally without prejudice.[252] Some courts, including the Second Circuit, have held that it may be with prejudice if it is clear that remedies are no longer available, *e.g.*, because they are time-barred.[253] (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 *non sequitur*.[254]) The Seventh Circuit has held–correctly, in my view–that all dismissals for non-exhaustion should be without prejudice, since, *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.[255] Further, defendants can and sometimes do waive the exhaustion defense in litigation.[256] These questions' importance is diminished after the Supreme Court's holding that prisoners must comply with the procedural

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[252] Gallagher v. Shelton, 587 F.3d 1063, 1068 (10th Cir. 2009) ("Ordinarily, a dismissal based on a failure to exhaust administrative remedies should be without prejudice."); Bryant v. Rich, 530 F.3d 1368, 1379 (11th Cir. 2008), *cert. denied*, 129 S.Ct. 733 (2008); O'Guinn v. Lovelock Correctional Center, 502 F.3d 1056, 1059 (9th Cir. 2007); Boyd v. Corr. Corp. of Am., 380 F.3d 989, 994 (6th Cir. 2004), *cert. denied*, 544 U.S. 920 (2005); Davis v. Buchanan, 2012 WL 3945312, *2 (D.S.C., July 30, 2012), *report and recommendation adopted*, 2012 WL 3945391 (D.S.C., Sept. 10, 2012); Wheeler v. Schuetzle, 2009 WL 1974312, *4 (D.N.D., July 8, 2009) (citing numerous Eighth Circuit unpublished decisions), *aff'd*, 369 Fed.Appx. 764 (8th Cir. 2010).

[253] Berry v. Kerik, 366 F.3d 85, 87-88 (2d Cir. 2004); Steele v. Federal Bureau of Prisons, 355 F.3d 1204, 1213 (10th Cir. 2003), *cert. denied*, 543 U.S. 925 (2004); Griffith v. Anderson, 2010 WL 993014, *13 (M.D.Ala., Feb. 17, 2010) (dismissing with prejudice where prisoner was no longer in the same prison and the remedy was unavailable to him), *report and recommendation adopted,* 2010 WL 993147 (M.D.Ala., Mar. 16, 2010); Brewer v. Corrections Corp. of America, 2010 WL 398979, *3 (E.D.Ky., Jan. 27, 2010), *motion to amend denied*, 2010 WL 2464967 (E.D.Ky., June 15, 2010). One district court has stated: "The dismissal of a prisoner's civil rights lawsuit based on his failure to exhaust his administrative remedies typically warrants a dismissal with prejudice," though the case at hand was one where exhaustion would have been time-barred. Patterson v. Stanley, 2012 WL 3648018, *5 (E.D.Tex., Aug. 9, 2012), *report and recommendation adopted*, 2012 WL 3647986 (E.D.Tex., Aug. 23, 2012).

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. *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. *See* nn. 25-31, above.

[254] *See* Pough v. Almager, V.M., 2010 WL 796748, *11 (S.D.Cal., Mar. 4, 2010) (holding *Woodford v. Ngo* overrules prior Ninth Circuit law, and dismissal is with prejudice where grievance would be time-barred), *objections overruled*, 2010 WL 1031153 (S.D.Cal., Mar. 19, 2010); Wilkinson v. Slankard, 2010 WL 308039, *5 (E.D.Cal., Jan. 19, 2010); Goudlock v. Hernandez, 2009 WL 2982825, *6 (S.D.Cal., Aug. 4, 2009) (same as *Pough*); Bean v. McConnell Unit, 2007 WL 4354412, *5 (S.D.Tex., Dec. 11, 2007); Garcia v. Inmate Trust Fund, 2007 WL 419097, *5 (S.D.Tex., Feb. 5, 2007).

[255] Ford v. Johnson, 362 F.3d 395, 401 (7th Cir. 2004); *accord*, Biggs v. Hunt, 2012 WL 3613073, *3 (E.D.N.C., Aug. 21, 2012) (following *Ford*); Thompson v. Jones, 2012 WL 3686749, *6 (N.D.Ill., Aug. 24, 2012) (citing *Ford*, noting plaintiff might be able to proceed in state court); McCloy v. Correction Medical Services, 794 F.Supp.2d 743, 751-52 (E.D.Mich., Mar. 31, 2011) (noting it is impossible to foresee the context in which the claim might be raised again); Mathis v. Lange, 2011 WL 1118622, *7 (W.D.Mich., Mar. 10, 2011) (same as *Lawson*), *report and recommendation adopted*, 2011 WL 1116785 (W.D.Mich., Mar. 25, 2011); Lawson v. Holmes, 2010 WL 2640419, *6 (W.D.Mich., June 2, 2010) (rather than dismiss with prejudice, court should "wait and see whether the State 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), 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 phrase in *Pavey* can be read as saying anything one way or the other about the nature of dismissal for non-exhaustion.

[256] *See* § IV.D.3, below.

rules of the prison's administrative system, including time limits, or their claims will be procedurally defaulted;[257] 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,[258] 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."[259] 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*[260] 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 by Congress.[261] There seems no apparent reason why the PLRA should require abandonment of the usual practice under the *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.[262] However, plainly meritless claims can be dismissed on the merits without considering exhaustion.[263]

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[257] Woodford v. Ngo, 548 U.S. 81, 92-95 (2006).

[258] 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).

[259] Underwood v. Wilson, 151 F.3d 292, 296 (5th Cir. 1998), *cert. denied*, 526 U.S. 1133 (1999). At least one district court has held that this disposition is appropriate only if the whole case is not exhausted. Cantoral v. Dretke, 2005 WL 2297222, *4 (E.D.Tex., Sept. 19, 2005). Another has held that dismissal with prejudice is inappropriate where the problem is ongoing and can be grieved again. Perez v. Woodard, 2009 WL 838485, *3 (E.D.Tex., Mar. 27, 2009).

[260] *See, e.g.*, Barnes v. Brownlow, 2008 WL 2704868, *3 (E.D.Tex., July 7, 2008); McGrew v. Teer, 2008 WL 2277818, *2 (M.D.La., June 3, 2008); Johns v. Edwards, 2007 WL 1958962, *3 (E.D.La., June 28, 2007) (all following *Underwood v. Wilson*).

[261] *Jones*, 549 U.S. at 212-16, 221-24.

[262] 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), *cert. denied*, 129 S.Ct. 1620 (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'."); 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.

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.[264] That means failure to exhaust is not failure to state a claim except where non-exhaustion is apparent on the face of the complaint.[265] 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.[266] One circuit had also held that prisoners cannot amend their complaints to cure inadequate pleading of exhaustion,[267] a rule that is now meaningless except in cases where the complaint shows failure to exhaust on its face.[268]

This holding 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[269] 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.[270] However, this authority, too, is generally limited to non-exhaustion that is apparent on the face of the complaint.[271] Further, the Second Circuit has held that plaintiffs are "entitled

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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. 375, below.

[263] 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).

[264] Jones v. Bock, 549 U.S. 199, 212-16 (2007); *see* Kinser v. County of San Bernardino, 2011 WL 4801899, *2 (C.D.Cal., Aug. 25, 2011) (plaintiff was not required to plead reason for not exhausting), *report and recommendation adopted*, 2011 WL 4802850 (C.D.Cal., Oct. 11, 2011).

[265] Jones v. Bock, 549 U.S. at 214-15 (noting that a complaint may fail to state a claim if its allegations *establish* an affirmative defense); *accord*, Anderson v. XYZ Correctional Health Services, Inc., 407 F.3d 674, 681 (4th Cir. 2005); Snider v. Melindez, 199 F.3d 108, 111-12 (2d Cir. 1999) (dictum); Henry v. Medical Dept. at SCI-Dallas, 153 F.Supp.2d 553, 555-56 (M.D.Pa. 2001).

[266] 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).

[267] Baxter v. Rose, 305 F.3d 486, 488 (6th Cir. 2002).

[268] It is also probably abrogated even for those cases by *Jones v. Bock*'s holding that the PLRA's screening requirement does not justify deviating from the usual procedural practice of federal courts except to the extent that the statute specifies. *Jones*, 549 U.S. at 212-16. The free amendment of complaints is part of that usual practice, see Fed.R.Civ.P. 15(a), and the PLRA says nothing about limiting amendment of complaints. *See* Conway v. Wilkinson, 2007 WL 901531, *2 (S.D.Ohio, Mar. 26, 2007) (holding amendment to address exhaustion is permitted in light of *Jones* since it is no longer an attempt to cure a deficiency). *Contra*, Fisher v. Ohio Dept. of Corrections, 2009 WL 2246183, *5 (S.D.Ohio, July 23, 2009) (holding *Baxter* rule survives *Jones*).

[269] *See* § IX, below, concerning screening and dismissal.

[270] Snider v. Melindez, 199 F.3d 108, 111-12 (2d Cir. 1999); *accord*, Anderson v. XYZ Correctional Health Services, Inc., 407 F.3d 674, 682 (4th Cir. 2005).

[271] 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

to notice and an opportunity to be heard" before such dismissal unless it is "unmistakably clear" that the complaint is subject to dismissal.[272]

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. 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.[273] One recent decision states that non-exhaustion must be "crystalline" on the face of the complaint to justify dismissal.[274]

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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,' as the saying goes.").

[272] 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.

[273] 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."); *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."); 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*

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."[275] 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.[276] 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."[277] (Nonetheless, the pernicious practice of relying on check marks and questionnaire answers to determine exhaustion persists in some jurisdictions.[278]) A number of courts have rejected arguments that if the

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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).

[274] Yasin v. Bragg, 460 Fed.Appx. 345, 346 (5th Cir. 2012) (unpublished).

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

[276] *Snider*, 199 F.3d at 113.

[277] 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); 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 grieveable. . . . 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).

[278] *See* Conklin v. Director TDCJ-CID, 2012 WL 3637454, *6 (E.D.Tex., July 27, 2012), *report and recommendation adopted*, TDCJ-CID, 2012 WL 3637025 (E.D.Tex., Aug. 21, 2012); McMillan v. Weaver, 2012 WL 3704853, *2 (S.D.Ga., July 31, 2012), *report and recommendation adopted*, 2012 WL 3704836 (S.D.Ga., Aug. 27, 2012); Tolbert v. Clark, 2009 WL 2423764, *1 (W.D.N.C., Aug. 3, 2009); Nickles v. Taylor, 2009 WL 2230931, *2 (D.N.J., July 24, 2009); Dynel v. Liles, 2009 WL 1446294, *3 (E.D.Tex., May 21, 2009); Winfield v. Soloman, 2008 WL 2169521, *1-2 (E.D.Cal., May 23, 2008); White v. Director of Corrections, 2007 WL 4210405, *1 (E.D.Cal., Nov. 28, 2007), *report and recommendation adopted*, 2008 WL 732783 (E.D.Cal., Mar. 17, 2008); Brisbane v. Dewitt, 2006 WL 3541858, *2 (D.S.C., Dec. 7, 2006); Williams v. Uy, 2004 WL 937598, *1 (N.D.Tex., Apr. 30, 2004), *appeal dismissed*, 111 Fed.Appx. 310 (5th Cir. 2004). In *Randolph v. City of New York Dept. of Correction*, 2007 WL 2660282, *7-8 (S.D.N.Y., Sept. 7, 2007), the court points out that reading such brief and ambiguous information to show non-exhaustion is inconsistent with the Supreme Court's holding in *Jones v. Bock* that exhaustion is an affirmative defense, as well as with the "case-specific" Second Circuit analysis of exhaustion

prisoner includes any exhaustion-related information or documentation in the complaint, any gaps in that presentation mean that non-exhaustion is apparent on the face of the complaint.[279] Others, however, continue to dismiss, or to demand that plaintiffs establish exhaustion, based on mere inferences from their *pro se* pleadings.[280]

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questions, which requires a factual record. *Accord*, Cole v. Stepp, 2010 WL 5647117, *3 (S.D.Fla., Nov. 1, 2010) ("It cannot be assumed . . . that 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).

[279] Yasin v. Bragg, 460 Fed.Appx. 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 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); Mims v. Wexford Health Sources, 2012 WL 6187117, *3 (N.D.Ill., Dec. 12, 2012); Hoang Minh Tran v. Gore, 2012 WL 5511765, *8-9 (S.D.Cal., Nov. 14, 2012); Thomas v. Palakovich, 2012 WL 1079441, *5 (M.D.Pa., Mar. 30, 2012) (holding statement in complaint that exhaustion is not required to seek damages or where it is futile was not a concession of non-exhaustion), *order entered*, 2012 WL 1078250 (M.D.Pa., Mar. 30, 2012); Gssime v. Watson, 2012 WL 540926, *6 n.2 (E.D.N.Y., Feb. 16, 2012) (rejecting argument that statements in the complaint about internal affairs investigations established the failure to exhaust a grievance); Brown v. Timmerman-Cooper, 2012 WL 2829827, *2-3 (S.D.Ohio, July 10, 2012) (declining to dismiss based on defendants' arguments based on gaps in complaint attachment; disapproving defendants' failure to move for summary judgment and submit the relevant evidence); Hendricks v. Wessell, 2011 WL 7637312, *3 (S.D.Ohio, Dec. 5, 2011) ("Neither can a failure to exhaust be inferred based on the fact that Mr. Hendricks did allege that he took some steps to seek administrative remedies.").. *See Appendix A for additional authority on this point*. One district has virtually adopted a form response to this argument. *See, e.g.*, Carson v. Monroe, 2008 WL 822150, *4 (W.D.Mich., Mar. 26, 2008) ("The fact that Plaintiff attaches grievances to his complaint or to other pleadings that may not show exhaustion of every issue presented is of no consequence, because Plaintiff has no duty to show exhaustion. The burden lies solely with a defendant to show that Plaintiff failed to exhaust grievance remedies."); *accord*, Titlow v. Correctional Medical Services, 2008 WL 2697306, *7 (E.D.Mich., July 3, 2008); Threatt v. Arredia, 2008 WL 762232, *7 (W.D.Mich., Mar. 19, 2008); Carson v. Riley, 2008 WL 746850, *3 (W.D.Mich., Mar. 18, 2008); Branham v. Bergh, 2008 WL 724947, *4 (W.D.Mich., Mar. 17, 2008); Floyd v. Caruso, 2008 WL 680419, *4 (W.D.Mich., Mar. 7, 2008). *But see* Moore v. Bennette, 517 F.3d 717, 725 (4th Cir. 2008) (dismissal upheld where court gave prisoner the opportunity to address exhaustion and he made it clear that his claim of exhaustion was based entirely on grievances attached to his complaint).

[280] *See, e.g.*, Cullinan v. Mental Health Management Correctional Services, Inc., 2012 WL 2178927, *3-4 (D.Mass., June 11, 2012) (denying motion to 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

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[281] or its inability to provide a particular remedy,[282] or that the prisoner began the process but it is not completed.[283] Some courts have inferred non-exhaustion from their own calculations of the time the case was filed compared to the length of the grievance process.[284] 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,[285] or that the administrative remedy actually was available for the claim the plaintiff raised.[286] 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.[287]

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 it 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

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grieving, 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).

[281] *See, e.g.*, Dunton v. W.V.R.J., 2009 WL 4348330, *1 (W.D.Va., Dec. 1, 2009) ("Dunton states that he filed this lawsuit instead of filing complaints and grievances at WVRJ, because officials there are 'known to misplace' these items."); Thornton v. Clemons, 2009 WL 236058, *4 (W.D.Okla., Jan. 30, 2009) (dismissing where plaintiff stated he did not grieve because the grievance system did not work properly).

[282] *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.'").

[283] *See, e.g.*, Brown v. Brewton, 2012 WL 5287957, *2 (S.D.Ga., Sept. 24, 2012) (dismissing because questionnaire answer said "Awating" a final answer), *report and recommendation adopted*, 2012 WL 5287955 (S.D.Ga., Oct. 24, 2012), *reconsideration denied*, 2012 WL 5874469 (S.D.Ga., Nov. 20, 2012); Shouse v. Madsen, 2010 WL 276543, *1 (W.D.Va., Jan. 19, 2010) ("Plaintiff states in his complaint that he 'hasn't finished exhausting his administrative remedies but has filed his informal complaint and grievance' and other request forms."). Even so, if the plaintiff has waited for a final grievance response for longer than the specified time for a response, the failure to receive an answer should not mean non-exhaustion. **CROSS REF**

[284] Coleman v. Lappin, 2011 WL 4586922, *7-8 (E.D.Ky., Sept. 29, 2011); Moran v. Jindal, 2011 WL 2118735, *2 (M.D.La., May 25, 2011), *appeal dismissed*, 450 Fed.Appx. 353 (5th Cir. 2011); Bazemore v. Castaneda, 2011 WL 1675394, *3 (W.D.Tex., Apr. 28, 2011); Clark v. Cain, 2011 WL 1743618, *3 (M.D.La., May 6, 2011); Foster v. Moore, 2011 WL 1447612, *2 (E.D.Ky., Apr. 14, 2011); Howard v. Phillips, 2011 WL 1428074, *2 n.3 (W.D.Va., Apr. 13, 2011) (dismissing where plaintiff complained of events six days before the complaint); Schaller v. U.S., 2011 WL 1791591, *6 (N.D.Fla., Mar. 21, 2011) (holding non-exhaustion was apparent on the face of the complaint where plaintiff filed suit before the time for a final response was expired, even if he never got a response), *report and recommendation adopted*, 2011 WL 1775687 (N.D.Fla., May 10, 2011); Williams v. Boardman, 2010 WL 367794, *1 (E.D.Cal., Jan. 27, 2010) (plaintiff filed before time to decide grievance had passed).

[285] Aquilar Avellaveda v. Terrell, 478 F.3d 1223, 1225 (10th Cir. 2007).

[286] *See* Mojias v. Johnson, 351 F.3d 606, 610 (2d Cir. 2003).

[287] 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, *see* McKay v. Cook County Dept. of Corrections, 2012 WL 567276, *1 (N.D.Ill., Feb. 17, 2012), and to submit an amended complaint if that will clarify matters. *See* Johnson v. Bryant, 2011 WL 5118415, *2-3 (N.D.Ill., Oct. 26, 2011).

whether the inmate exhausted all administrative remedies."[288] Some district courts have taken this 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.[289]

Such a requirement appears contrary to *Jones*'s holding that the defendants must raise the exhaustion defense.[290] 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,[291] 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

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[288] 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*.

The rationale as well as the result of *Anderson* appears 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 particular." *Anderson*, 407 F.3d at 682. 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." Jones v. Bock, 549 U.S. 199, 212 (2007).

[289] 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."); 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"); Carmichael v. Ozmint, 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).

[290] 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.")

[291] 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."[292] 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."[293] However, similar practices persist in other jurisdictions, without yet having attracted appellate attention.[294]

There are many other post-*Jones* decisions that either demand information, or additional 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.[295] In other cases, *Jones* is not mentioned at all.[296] The same type of error crops up at later stages in other cases.[297] Of course many other

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[292] Carbe v. Lappin, 492 F.3d 325, 327-28 (5th Cir. 2007); *see* 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).

[293] Torns v. Mississippi Dept. of Corrections, 301 Fed.Appx. 386, 389, 2008 WL 5155229 (5th Cir. 2008) (unpublished).

[294] *See, e.g.*, Rose v. Bamberg, 2012 WL 1859146, *2 (D.S.C., Apr. 30, 2012) (holding that "no" answer to exhaustion question on form complaint made non-exhaustion apparent on the face of the complaint), *report and recommendation adopted*, 2012 WL 1858922 (D.S.C., May 22, 2012); Vejar v. California Dept. of Correction, 2011 WL 6000769, *2 (C.D.Cal., Nov. 30, 2011) ("In order to make sure that a prisoner has complied with the foregoing exhaustion requirements, this Court requires prisoners bringing § 1983 civil rights actions to use the Court-approved civil rights complaint form, which contains instructions that are tantamount to general orders of this Court and require the inmate to 'attach copies of papers related to the grievance procedure.'" (quoting form)) (dictum); McNaughton v. Maricopa County Correctional Health Services, 2010 WL 2927419, *8 (D.Ariz., July 21, 2010) (annexing form complaint instructing prisoners to "disclose whether you have exhausted the inmate grievance procedures or administrative appeals for each count in your complaint. If the grievance procedures were not available for any of your counts, fully explain why on the lines provided."); Edwards v. Haws, 2008 WL 5377995, *2 (C.D.Cal., Dec. 23, 2008); Harvey v. Ponder, 2008 WL 5071131, *3 (N.D.Cal., Nov. 26, 2008); *see also* Aliksanian v. Goodstein, 2009 WL 412199, *2 (C.D.Cal., Feb. 18, 2009) (noting that complaint not on the approved form did not allege or show exhaustion). These decisions do not acknowledge *Jones v. Bock*.

[295] *See* Jones v. Hejirika, 2012 WL 5207616, *1 n.1 (D.Md., Oct. 19, 2012) (noting at screening plaintiff provides no "evidence" of exhaustion, stating he should provide copies of administrative proceedings if he refiles his claim); Geddings v. Bullock, 2012 WL 1402467, *2-3 (W.D.N.C., Apr. 23, 2012) (citing *Jones*, but describing incomplete allegations about exhaustion and stating non-exhaustion is shown on the face of the complaint); Jones v. Plessas, 2010 WL 2824767, *3 (E.D.Cal., July 15, 2010) (citing *Jones*, but stating that attached exhibits plus failure to mention exhaustion in complaint "raise a presumption" of non-exhaustion, and since he is suing 28 defendants, "it is imperative" that he show exhaustion of each claim before the court screens an amended complaint); Lowe v. Ball, 2010 WL 1141262, *1 (E.D.Ky., Mar. 22, 2010) (citing *Jones*, but describing court's practice of asking for a demonstration of exhaustion where a plaintiff fails to complete the four pages of the complaint form that address administrative remedies); Brooks v. City of Pine Knot, 2009 WL 3414929, *1 (E.D.Ky., Oct. 21, 2009) (citing *Jones*, but noting court had issued order at initial screening seeking more information about exhaustion, and then dismissing based on the information provided); King v. Rios, 2008 WL 4272178, *2-3 (E.D.Ky., Sept. 12, 2008) (citing *Jones*, but noting court had issued an order at initial screening asking about plaintiff's failure to allege or show that he completed the grievance process); Spaulding v. Oakland County Jail Medical Staff, 2007 WL 2336216, *2 (E.D.Mich., Aug. 15, 2007) (where prisoner pled that he didn't file grievances because he "never could obtain one," dismissing for non-exhaustion because he "does not allege facts indicating that it was inconceivable or next to impossible for him to obtain a grievance form nor that he made an effort to comply with the grievance procedure despite not having possession of a grievance form"; *Jones* cited).

[296] *See* Beamon v. Newhart, 2013 WL 442689, *4 (E.D.Va., Feb. 1, 2013) ("Plaintiff has failed to allege and present evidence that he completely exhausted his institution's administrative remedies."); 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); Riddick v. Herlock, 2012 WL 6042351, *6 (E.D.Va., Nov. 30, 2012); 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"); Stewart v. King County Health Dept., 2012 WL 4719073, *3 (W.D.Wash., Sept. 26, 2012) ("The complaint is also defective because there is no indication Mr. Stewart exhausted his administrative remedies at the King County Jail."), *report and recommendation adopted as modified*, 2012 WL 4717880 (W.D.Wash., Oct. 2, 2012); Myers v. Jackson, 2012 WL 3637742, *1-3 (D.Kan., Aug. 23, 2012) (dismissing at screening because materials filed with complaint did not prove exhaustion), *appeal dismissed*, --- Fed.Appx. ----, 2012 WL 6582150 (10th Cir., Dec. 18, 2012); 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); Blurton 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); *see Appendix A for additional authority on this point.* In *Ortega v. Ritchie*, 2012 WL 2931242, *3 (N.D.Cal., July 18, 2012), the court noted its prior dismissal because it was "not readily apparent" that plaintiff had exhausted, then paradoxically held that once he had alleged exhaustion, it was the defendants' burden to raise the defense. *See also* Victor v. Lawler, 2011 WL 1107013, *6 (M.D.Pa., Feb. 24, 2011) (citing failure to address exhaustion as a reason for denying motion for preliminary injunction), *report and recommendation adopted*, 2011 WL 1059614 (M.D.Pa., Mar. 23, 2011); U.S. v. Woods, 2009 WL 279098, *2 (N.D.Okla., Feb. 5, 2009) (dismissing motion for clarification of criminal sentence raising sentence calculation where plaintiff failed to attach copies of administrative dispositions or describe their disposition with specificity; *Jones* not cited); U.S. v. Nelson, 2008 WL 4279806, *2 (N.D.Okla., Sept. 15, 2008) (same); *see* Lee v. Tache, 2009 WL 3818368, *2 (S.D.Cal., Nov. 12, 2009) (where complaint disclosed non-exhaustion, plaintiff must plead that an exception to the exhaustion requirement applied).

[297] Booze v. Wetzel, 2012 WL 6137561, *8 (M.D.Pa., Nov. 16, 2012) (holding motion for preliminary injunction deficient because plaintiff has not "shown" exhaustion), *report and recommendation adopted*, 2012 WL 6138315 (M.D.Pa., Dec. 11, 2012); Maynard v. Hale, 2012 WL 3401095, *7 (M.D.Tenn., Aug. 14, 2012) (granting motion to dismiss based on pleading rules overruled in *Jones v. Bock*), *report and recommendation approved*, 2012 WL 4979842 (M.D.Tenn., Oct. 17, 2012); Payne v. Elie, 2012 WL 748285, *3 (D.Ariz., Mar. 7, 2012) (denying motion to amend based on futility because the plaintiff did not allege exhaustion of the new claim); Rountree v. Livingston, 2010 WL 4919602, *2 (E.D.Tex., Oct. 27, 2010) (granting motion to dismiss where plaintiff "has not demonstrated that he exhausted administrative remedies before he filed this lawsuit"), *report and recommendation adopted*, 2010 WL 4919665 (E.D.Tex., Nov. 24, 2010); Baggett v. Goings, 2010 WL 3489158, *2 (E.D.Tex., July 13, 2010) (granting motion to dismiss where plaintiff alleged that after Hurricane Ike, no remedy existed, but "plaintiff offers no support for this assertion"), *report and recommendation adopted*, 2010 WL 3489156 (E.D.Tex., Sept. 1, 2010); Berrios-Romero v. Compass Group North America, 727 F.Supp.2d 54, 58 (D.P.R. 2010) (granting motion to dismiss

decisions get *Jones* right.[298] 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 at screening for failure to exhaust requires that the affirmative defense be obvious on the face of the *complaint* itself. . . ."[299]

One court has held that a plaintiff must demonstrate exhaustion in order to obtain a default judgment.[300]

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.[301] 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

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where plaintiff neither pled exhaustion nor informed the court about the details of his grievances); Rice v. Wayne County Dept. of Social Services, 2010 WL 2690347, *5 (E.D.N.C., Mar. 8, 2010) (recommending dismissal for non-exhaustion "[b]ecause Plaintiff has failed to allege that he has exhausted any available administrative remedies"), *report and recommendation adopted*, 2010 WL 2679991 (E.D.N.C., July 1, 2010); Mays v. Untig, 2010 WL 936206, *3 (D.N.J., Mar. 12, 2010) (granting motion to dismiss, supported by a "certification" but not converted to summary judgment, because plaintiff's responses did not establish exhaustion); Whiteside v. Collins, 2009 WL 4281443, *3 (S.D.Ohio, Nov. 24, 2009) ("The plaintiff-prisoner bears the burden of proving that a grievance has been fully exhausted. . . ."), *report and recommendation adopted,* 2010 WL 1032424 (S.D.Ohio, Mar. 17, 2010); Johnson v. Vail, 2009 WL 1283142, *3 (W.D.Wash., May 7, 2009) (citing failure to allege exhaustion in granting motion to dismiss), *aff'd*, 397 Fed.Appx. 403 (9th Cir. 2010) (unpublished).

[298] *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.").

[299] Kincaid v. Sangamon County, 435 Fed.Appx. 533, 536 (7th Cir. 2011) (unpublished) (emphasis supplied); *accord*, Sherman v. Aguilar, 2012 WL 1107752, *6 (S.D.Cal., Apr. 2, 2012) (passing references in plaintiff's deposition did not support dismissal on motion to dismiss), *appeal dismissed,* No. 12-55730(9th Cir., May 29, 2012).

[300] 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.

[301] *See* 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) .

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). This statement, while technically correct, ignores the fact that numerous factual issues may arise concerning either the availability of remedies and 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.

of material factual dispute remains with the defendants.[302] 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,"[303] are erroneous. 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.[304]

Defendants' burden of establishing non-exhaustion[305] encompasses, first, showing that there was an available remedy at the relevant time and place for the particular complaint raised by the prisoner.[306]

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[302] Surles v. Andison, 678 F.3d 452, 456 (6th Cir. 2012) (rejecting argument that once defendants come forward on summary judgment with some evidence of non-exhaustion, burden shifts to plaintiff to show exhaustion; defendants must show the absence of factual disputes); 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"); Young v. Moreno, 2012 WL 1836088, *4 (C.D.Cal., May 8, 2012) ("Should a defendant submit declarations and/or other documentation demonstrating an absence of exhaustion, making a prima facie showing, the prisoner plaintiff has a burden of production to refute that showing, although he may rely on statements made under penalty of perjury in the complaint if the complaint shows that the plaintiff has personal knowledge of the matters stated and calls to the court's attention those parts of the complaint upon which the plaintiff relies."), *report and recommendation adopted*, 2012 WL 1835631 (C.D.Cal. May 17, 2012); Ramirez v. Martinez, 2009 WL 2496647, *4 (M.D.Pa., Aug. 14, 2009).

[303] Johnson v. District of Columbia, 869 F.Supp.2d 34, 38 (D.D.C. 2012) (emphasis supplied). So is *Garcia v. Steed*, 2010 WL 3001849, *1 (D.Kan., July 28, 2010), in which the defendants moved for a more definite statement concerning exhaustion, and the court 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.

[304] *See* 401-403, below for further discussion of this issue.

[305] If plaintiff does not respond to a summary judgment motion asserting non-exhaustion, the defendants' statement of material facts may be taken as admitted, and summary judgment granted regardless of the adequacy of defendants' evidence. Bell v. Blume, 2009 WL 5172969, *3 (M.D.Pa., Dec. 30, 2009).

[306] *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."); Dubois v. Washoe County Jail, 2013 WL 100940, *2 (D.Nev., Jan. 7, 2013) (declining to dismiss absent allegations about the grievance policy); 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); Whiteside v. Collins, 2012 WL 4361253, *12 (S.D.Ohio, Sept. 25, 2012) (declining to dismiss for failure to appeal grievances where defendants failed to show that the particular grievances were appealable); Johnson v. Cantrall, 2012 WL 5398473, *1 (W.D.Okla., Sept. 17, 2012) (declining to dismiss where defendants did not identify any remedy available to plaintiff under the circumstances), *report and recommendation adopted*, 2012 WL 5398469 (W.D.Okla., Nov. 2, 2012); Albadry v. Wiepper, 2012 WL 3726698, *5 (E.D.Tenn., Aug. 27, 2012) (declining to dismiss, despite admission in complaint of non-exhaustion, where defendants did not show a remedy was available for the plaintiff's problem); Washington v. Correction Corp. of America, 2012 WL 2127914, *2 (E.D.Okla., June 11, 2012) (declining to dismiss where defendants submitted no evidence of a grievance process); Hampton v. Brown, 2012 WL 1491914, *3-4 (W.D.La., Mar. 5, 2012) (declining to dismiss for

It is also defendants' burden to establish that a remedy was made known to prisoners.[307]

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).[308]

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non-exhaustion absent evidence that a grievance system was functioning in the relevant prison), *report and recommendation adopted*, 2012 WL 1491903 (W.D.La., Apr. 26, 2012); Roberts v. Jones, 2012 WL 1072218, *4 (W.D.Okla., Feb. 29, 2012) (declining to dismiss for non-exhaustion where defendants did not show that the issue was grievable), *report and recommendation adopted*, 2012 WL 1142514 (W.D.Okla., Mar. 30, 2012); Rotondo v. Ryan, 2012 WL 424384, *3 (D.Ariz., Feb. 9, 2012) (declining to dismiss where defendants failed to submit evidence of how the plaintiff could have exhausted their process); Rahim v. Sheahan, 2001 WL 1263493, *6-7 and n.3 (N.D.Ill., 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.'"); Raines v. Pickman, 103 F.Supp.2d 552, 555 (N.D.N.Y. 2000) (holding "it is [defendants'] burden to come forward to show that an administrative remedy exists for plaintiff to pursue in reference to his claims of excessive force"); *see Appendix A for additional authority on this point; see also* n.950 (citing cases so holding with respect to prisoners transferred away from the place where the claim arose before they had grieved). *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. *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).

[307] Brown v. Drew, 452 Fed.Appx. 906, 908 (11th Cir. 2012) (unpublished) (noting in case where grievance response arrived too late to appeal, "nothing in the record establishes that Brown was aware or could readily become aware of his right to request an extension of time to resubmit his appeal"); 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.Ill., June 30, 2011); Hazel v. McElvogue, 2011 WL 1543880, *2 (D.S.C., Apr. 21, 2011) (noting defendants failed to meet their burden to show that plaintiff received notice of the grievance policy), *aff'd*, 440 Fed.Appx. 213 (4th Cir. 2011) (unpublished); Brown v. Fischer, 2010 WL 5797359, *3 (N.D.N.Y., Dec. 8, 2010) ("Other than the limited advice provided by the librarian, the record does not establish that Brown received an inmate handbook or any other guidance about DOCS administrative grievance program."), *report and recommendation adopted*, 2011 WL 552039 (N.D.N.Y., Feb. 9, 2011); Williams v. Turner, 2010 WL 3724827, *2 (W.D.Ark., Sept. 17, 2010) (noting defendants failed to provide any information about "how inmates . . . are informed of the grievance procedure"); Reynolds v. Metcalf, 2009 WL 2971272, *3 (D.Or., Sept. 9, 2009) (having previously held that defendants failed to meet their burden, court dismisses for non-exhaustion after defendants made an appropriate record of their publicization and plaintiff's knowledge of the remedy), *aff'd*, 398 Fed.Appx. 263 (9th Cir. 2010) (unpublished); Buckner v. Jones, 2009 WL 2136505, *6 (M.D.Ala., July 15, 2009) (evidence that the plaintiff received a jail handbook in 1999 did not establish that he was informed of the procedures applicable in 2007); Wetzel v. Slidell Police Dept., 2009 WL 1507575, *4 (E.D.La., May 28, 2009) (defendants must show a remedy was made known to the plaintiff).**CHECK—INCONSISTENT LAW IN OTHER FOOTNOTES**

[308] Holland v. Prince George's County, Md., 2011 WL 530559, *3 (D.Md., Feb. 8, 2011); Abner v. County of Saginaw County, 496 F.Supp.2d 810, 823 (E.D.Mich. 2007), *vacated in part on reconsideration on other grounds*, 2007 WL 4322167 (E.D.Mich., Nov. 28, 2007); Duvall v. Dallas County, Tex., 2006 WL 3487024, *4 (N.D.Tex., Dec. 1, 2006); Dutcher v. County of LaCrosse, WI, 2005 WL 2100979, *2 (W.D.Wis., Aug. 30, 2005); Moore v. Baca, 2002 WL 31870541, *2 (C.D.Cal. 2002). In *Gulas v. Bernalillo County Sheriff*, 2007 WL 2562847, *2 (10th Cir., Sept. 5, 2007) (unpublished), the court reversed a district court initial screening dismissal of a complaint which

Defendants must also reliably establish the failure to exhaust.[309] 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 completely conclusory,[310] reflected an inadequate or inadequately explained records search,[311] failed to set out how records were

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stated that the plaintiff had not exhausted, in part because the complaint on its face did not establish that he was a prisoner at the time of filing.

[309] One court in dicta usefully summarized what such a showing should involve:

> . . . [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. Furthermore, the assertion that a Department paralegal searched some records somewhere and did not find a grievance filed precisely "on March 12, 2008" by a plaintiff who alleges that he "sent" his grievance on that date (presumably to the warden at the local facility rather than the Department) leaves room for doubt. Weldon's narrowly cabined testimony does not preclude the possibility that the March 12 grievance was received or "filed" on March 13 or any other date. Neither the records search nor the testimony about it should be framed so narrowly. 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.

Dupry v. Gehrig, 2009 WL 2579055, *3 (W.D.La., Aug. 20, 2009); *accord*, Baker v. County of Missaukee, 2011 WL 1670953, *8 (W.D.Mich., Mar. 28, 2011) (stating "defendants would be required to move for summary judgment, supply the court with both the relevant grievance policies and an authenticated factual record of all grievances pursued by plaintiff and the results thereof and demonstrate the manner in which plaintiff has failed to exhaust each claim"), *report and recommendation adopted*, 2011 WL 1670949 (W.D.Mich., May 3, 2011); Williams v. Turner, 2010 WL 3724827, *2 (W.D.Ark., Sept. 17, 2010) (noting failure to provide "an affidavit or any other information stating that Plaintiff's jail file was searched and no grievances were submitted regarding the issues in his complaint"); Kiger v. Clairborne, 2009 WL 2222710, *4 (W.D.La., July 24, 2009).

[310] *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); 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); Branham 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).

[311] 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.) (noting that defendants' affidavit does not state whether the plaintiff exhausted his appeals; their "Appeal

maintained or revealed an unreliable system,[312] rested on hearsay,[313] failed to address relevant issues raised by the plaintiff,[314] or otherwise failed to establish officials' claims.[315] (In a

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Record" lacks a foundation and is not shown to be complete), *cert. denied*, 540 U.S. 810 (2003); 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); *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).

[312] Sheridan v. Reinke, 2012 WL 1067079, *5 (D.Idaho, Mar. 28, 2012) (declining to dismiss where defendants did not retain copies of grievance forms deemed to be insufficient, so defendants could not refute allegation that plaintiff received no response to his submissions); Turley v. Cowan, 2012 WL 996957, *6-7 (S.D.Ill., Mar. 23, 2012) (finding defendants' records sufficiently inaccurate, based on documentation in the record, that the court declines to infer lack of exhaustion from them); Badwi v. Hedgpeth, 2012 WL 479192, *4 (N.D.Cal., Feb. 14, 2012) (citing demonstrated inaccuracies in prison's grievance records); Kress v. CCA of Tenn., 2010 WL 2694986, *5-6 (S.D.Ind., July 2, 2010) (holding that at a hearing "it became evident . . . that there was no reliable system" of record-keeping concerning prisoner complaints); Ortiz v. Kilquist, 2007 WL 2908003, *3 (S.D.Ill., Oct. 3, 2007) (noting defendants' failure to disclose record-keeping practices in denying summary judgment); *see* Bickel v. Miller, 2009 WL 5111795, *4 (W.D.Pa., Dec. 18, 2009) (grievance documents without a supporting affidavit or authentication cannot conclusively establish non-exhaustion); Davis v. Michigan Dept. of Corrections, 2008 WL 1820926, *1-2 (W.D.Mich., Apr. 4, 2008) (unauthenticated documents could not be considered on a summary judgment motion).

[313] 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. William, 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).

[314] 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).

[315] *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); Hubbard v. Hougland, 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); Hisle 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

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.[316]) Several decisions have

(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); 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); Phipps 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); *see Appendix A for additional authority on this point.*

[316] *See* 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."); Hopkins v. Livingston, 2013 WL 503711, *4 (N.D.Cal., Feb. 8, 2013); Sapp v. Collins, 2012 WL 5357476, *3 (N.D.Fla., Oct. 15, 2012) (noting plaintiff submitted a report of an investigation conducted in response to his grievance), *report and recommendation adopted*, 2012 WL 5357467 (N.D.Fla., Oct. 31, 2012); Cohen v. Wagner, 2012 WL 1548294, *2 (E.D.Pa., May 1, 2012) (noting memo to plaintiff from prison staff member acknowledging grievance that defendants denied existed); Brown v. McCullough, 2012 WL 670001, *3 (E.D.Cal., Feb. 29, 2012) (noting plaintiff's submission of a receipt-stamped grievance that defendants denied existed), *report and recommendation adopted*, 2012 WL 1082499 (E.D.Cal., Mar. 29, 2012); Rocha v. Twilleger, 2012 WL 573875, *6 (D.Colo., Jan. 3, 2012) (noting defendants denied existence of Step 3 grievance but later found it after plaintiff maintained he had filed it), *report and recommendation adopted*, 2012 WL 573849 (D.Colo., Feb. 22, 2012); Schiro v. Clark, 2011 WL 7116315, *7 (D.Nev., Dec. 8, 2011) (noting plaintiff produced a grievance appeal, and had filed a second grievance about the lack of response to that appeal, that the defendants deemed abandoned because they had no record of it), *report and recommendation adopted*, 2012 WL 275392 (D.Nev., Jan. 31, 2012); Brown v. Kavanaugh, 2011 WL 7031500, *4 (E.D.Cal., Dec. 15, 2011) (noting plaintiff had attached the earlier grievance to a later grievance), *report and recommendation adopted*, 2012 WL 116572 (E.D.Cal., Jan. 13, 2012); Towns v. Cowan, 2011 WL 6302888, *2 (S.D.Ill., Nov. 15, 2011) (finding plaintiff sufficiently supported authenticity of grievance defendants denied he had filed), *report and recommendation adopted*, 2011 WL 6303254 (S.D.Ill., Dec. 16, 2011); Keller v. Thomas, 2011 WL 5026225, *6 (S.D.Ill., Oct. 21, 2011) (noting plaintiff's production of grievance, time and date stamped, and finding that he had in fact submitted it despite defendants' lack of a record); Peacher v. Travis, 2011 WL 4529388, *4 (N.D.Ind., Sept. 28, 2011) (noting plaintiff's production of a signed document from a grievance official acknowledging his filing a grievance at the time in question); Aguirre v. Guerro, 2011 WL 6814032, *3-4 (C.D.Cal., Sept. 20, 2011) (noting documentary evidence of receipt of grievance defendants disputed), *report and recommendation adopted*, 2011 WL 6814015 (C.D.Cal., Dec. 22, 2011); Lacey v. Braxton, 2011 WL 3320801, *8 (W.D.Va., Aug. 1, 2011) (noting the plaintiff produced a grievance response documenting completion of the process), *aff'd*, 463 Fed.Appx. 222 (4th Cir. 2012), *cert. denied*, 133 S.Ct. 534 (2012); Hicks v. Irvin, 2011 WL 2213721, *8 (N.D.Ill., June 7, 2011); Jones v. Lantz, 2011 WL 2144651, *5 (D.Conn., May 31, 2011) (plaintiff produced notes from counselor responding to his inquiries about the fate of his grievances); Hughes v. Lavender, 2011 WL 1337155, *8-9 (S.D.Ohio, Apr. 6, 2011), *report and recommendation adopted*, 2011 WL 2457840

held that defendants' summaries or characterizations of prisoners' grievances do not sufficiently establish what matters were and were not exhausted.[317] The absence of a record confirming 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.[318] If plaintiffs attach exhaustion-related documentation to their complaints, officials may not establish non-exhaustion

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(S.D.Ohio, June 16, 2011); McMichael v. Pallito, 2011 WL 1135341, *7 (D.Vt., Jan. 27, 2011), *report and recommendation adopted*, 2011 WL 1113233 (D.Vt., Mar. 24, 2011); Colston v. McLeod, 2011 WL 673941, *4 (W.D.Mich., Feb. 17, 2011); Chizum v. Marandet, 2011 WL 611895, *2 & n.1 (N.D.Ind., Feb. 15, 2011) (noting this is not the first time officials had submitted an affidavit claiming non-exhaustion only to be confronted with officials documents confirming exhaustion); *see Appendix A for additional authority on this point*.

[317] Wyatt v. Terhune, 315 F.3d 1108, 1120 (9th Cir. 2003) (holding the court must see "evidence . . . establishing that the 'Appeal Record' is what defendants say it is"); Jones v. Allie, 2013 WL 461442, *12 (S.D.Cal., Feb. 6, 2013) (holding court cannot determine what plaintiff grieved where defendants provided only their responses to the grievances); Willis v. Vasquez, 2012 WL 5388763, *7-8 (C.D.Cal., Sept. 27, 2012) (holding defendant did not meet its burden because he did not show what issues were raised in plaintiff's grievance appeal), *report and recommendation adopted*, 2012 WL 5388664 (C.D.Cal., Nov. 1, 2012); Young v. Moreno, 2012 WL 1836088, *4 (C.D.Cal., May 8, 2012) (holding defendant "has not submitted the inmate appeal forms filed by Plaintiff so that the court can determine the nature and scope of the grievance asserted by Plaintiff." Review of the grievance body's decisions is not conclusive as to what the plaintiff complained of.), *report and recommendation adopted*, 2012 WL 1835631 (C.D.Cal., May 17, 2012); Young v. Wexford Health Sources, 2012 WL 621358, *10 n.5 (N.D.Ill., Feb. 14, 2012); Jones v. McGuire, 2012 WL 439429, *2-3 (E.D.Cal., Feb. 9, 2012), *vacated*, 2012 WL 691626 (E.D.Cal., Mar. 2, 2012) (finding exhaustion established, ordering defendants to show cause why sanctions should not be imposed for belated production of underlying documents); 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* Sawyer v. Cole, 2012 WL 551900, *3 (D.Nev., Jan. 18, 2012) (noting discrepancies between summary report and actual grievance documentation and "continuing problem" of defense lawyers' failure to submit actual documents), *report and recommendation adopted*, 2012 WL 553072 (D.Nev., Feb. 17, 2012).

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).

[318] 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 non-receipt 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); 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); *see Appendix A for additional authority on this point*.

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.[319] A plaintiff's inability to remember with certainty whether he pursued a grievance or not does not meet defendants' burden of establishing non-exhaustion.[320]

Officials must also show what prisoners were required to do to exhaust.[321] 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.[322]

3. Waiver

As an affirmative defense, exhaustion may be waived by failure to raise it, or to raise it timely.[323] Ordinarily, affirmative defenses including exhaustion are required to be pled in the

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[319] Webb v. Caruso, 2012 WL 950039, *4 (W.D.Mich., Feb. 21, 2012) (holding defendants' showing that grievance attached to the complaint did not exhaust the claim did not establish that plaintiff had not exhausted through another grievance), *report and recommendation adopted*, 2012 WL 949976 (W.D.Mich., Mar. 20, 2012); Edwards v. New Jersey, 2011 WL 4950192, *3 (D.N.J., Oct. 18, 2011); Marshall v. Sobina, 2011 WL 4729033, *11 (W.D.Pa., Sept. 16, 2011), *report and recommendation adopted*, 2011 WL 4731122 (W.D.Pa., Oct. 5, 2011); Nible v. Knowles, 2010 WL 3245325, *3 (E.D.Cal., Aug. 17, 2010); Rebaldo v. Jenkins, 660 F.Supp.2d 755, 763 (E.D.La. 2009).

[320] Brown v. Kochanowski, 2012 WL 4127959, *8 (D.Kan., Sept. 19, 2012); Carter v. Morrison, 2010 WL 701799, *10 (E.D.Pa., Feb. 24, 2010), *aff'd*, 429 Fed.Appx. 114 (3d Cir. 2011).

[321] Breeland v. Baker, 439 Fed.Appx. 93, 96 (3d Cir. 2011) (unpublished) ("Without any showing concerning the specific policy that Breeland allegedly violated," summary judgment for non-exhaustion was inappropriate); Lawson v. Youngblood, 2012 WL 6047161, *1 (E.D.Cal., Dec. 5, 2012); Lassiter v. Sherrer, 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) (declining 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. Kernell, 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).

[322] 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. *See* cases cited in nn. 726-727.

[323] 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); 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); Victor v. SCI

answer or raised by motion to dismiss.[324] An omitted exhaustion defense may be asserted in an amended answer,[325] but courts may deny such amendments when they are sought late in the

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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 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 were unexhausted).

One circuit has held that because exhaustion is mandatory, it cannot be waived, and it concluded that exhaustion is a pleading requirement rather than an affirmative defense on that basis. Steele v. Federal Bureau of Prisons, 355 F.3d 1204, 1209 (10th Cir. 2003), *cert. denied*, 543 U.S. 925 (2004). The Supreme Court's holding that exhaustion is not a pleading requirement presumably undermines *Steele*'s reasoning about waiver. *See* Jones v. Bock, 549 U.S. 199, 212-16 (2007).

[324] Rule 8(c), Fed.R.Civ.P.; Ray v. Kertes, 285 F.3d 287, 295 & n.8 (3d Cir. 2002); Jones v. Montalbano, 2012 WL 847373, *2 n.1 (E.D.N.Y., Mar. 13, 2012) (holding exhaustion waived by failure to raise it in an initial motion to dismiss); Edwards v. Horn, 2012 WL 473481, *9 n.9 (S.D.N.Y., February 14, 2012) (holding exhaustion waived by failure to raise it by motion to dismiss), *report and recommendation adopted*, 2012 WL 760172 (S.D.N.Y., Mar. 8, 2012); Colton v. Scutt, 2011 WL 6090152, *2 (E.D.Mich., Dec. 7, 2011) (holding exhaustion waived by failure to raise it in initial motion to dismiss or at any reasonable time thereafter); Blaylock v. Montalbano, 2011 WL 4711890, *2 n.2 (E.D.N.Y., Sept. 30, 2011) (holding exhaustion waived by failure to raise it in the first responsive pleading); Johnson v. Doyle, 2011 WL 846141, *5 (E.D.Mo., Mar. 8, 2011) (holding exhaustion waived by omission from answer); Presti v. Dellacamera, 2010 WL 466006, *2-3 (D.Conn., Feb. 4, 2010) (defense held waived at summary judgment stage because defendants did not plead it in their answer); Phipps v. Sheriff of Cook County, 681 F.Supp.2d 899, 906 (N.D.Ill. 2009) ("An affirmative defense is waived if it is not asserted in a party's answer or in a subsequent motion to dismiss." Defendants waived by raising defense only at summary judgment.); Anaya v. Campbell, 2009 WL 3763798, *3 (E.D.Cal., Nov. 9, 2009) (exhaustion defense was untimely where motion to dismiss was made after answer had been filed), *report and recommendation adopted*, 2009 WL 5197892 (E.D.Cal., Dec. 23, 2009); Murray v. Goord, 668 F.Supp.2d 344, 356 (N.D.N.Y. 2009) (defendants waived exhaustion by failing to plead it, even though complaint acknowledges non-exhaustion); Calvert v. State of New York, 2009 WL 3078864, *6 (W.D.N.Y., Sept. 24, 2009) (finding waiver where defendants didn't plead exhaustion in their answer and filed their motion to amend their answer after the court deadline for such motions); Charity v. Carroll, 2009 WL 2425712, *3 (E.D.Cal., Aug. 7, 2009) (similar to *Anaya v. Campbell*), *report and recommendation adopted*, 2009 WL 3164867 (E.D.Cal., Sept. 29, 2009); Mendez v. Kham, 2008 WL 821968, *4 (W.D.N.Y., Mar. 26, 2008) (omission from answer waived exhaustion defense); Brown v. Kirk, 2007 WL 1377650, *8 (D.S.C., May 8, 2007) (holding failure to plead exhaustion in answer waived the defense); *see Appendix A for additional authority on this point. But see* Chatman v. Felker, 2010 WL 3271461, *2 (E.D.Cal. Aug 18, 2010) (holding exhaustion defense, once pled, is not waived by failure to raise it in first motion to dismiss, since a motion is not a pleading); Almashleh 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).

[325] *See* Combs v. Lehman, 2010 WL 1537289 (W.D.Wash., Apr. 15, 2010) (allowing amendment of answer to assert exhaustion defense); Stephenson v. Dunford, 320 F.Supp.2d 44, 48-49 (W.D.N.Y. 2004) (allowing amendment of answer to assert exhaustion 22 months after Supreme Court decision showed the defense was available), *vacated*

case.[326] The filing of an amended complaint ordinarily revives defendants' right to raise exhaustion and other defenses.[327] There is some variation in procedural practice among federal courts.[328] For example, some courts allow exhaustion to be raised for the first time by summary

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and remanded on other grounds, 2005 WL 1692703 (2d Cir., July 13, 2005); Stevens v. Goord, 2003 WL 21396665, *4 (S.D.N.Y., June 16, 2003) (allowing revival of waived exhaustion defense), *on reargument*, 2003 WL 22052978 (S.D.N.Y., Sept. 3, 2003); *see* Jackson v. District of Columbia, 254 F.3d 262, 267 (D.C.Cir. 2001) (holding it was not an abuse of discretion to construe a "notice" by one party that it would rely on another party's exhaustion defense as an amended answer properly raising the defense).

[326] Carr v. Hazelwood, 2008 WL 4556607, *4 (W.D.Va., Oct. 8, 2008) (defense waived where defendants did not plead it until five months before trial and did not seek summary judgment based on it until two months before trial), *report and recommendation adopted*, 2008 WL 4831710 (W.D.Va., Nov. 3, 2008); Mendez v. Barlow, 2008 WL 2039499, *2 (W.D.N.Y., May 12, 2008) (where the court has set a cut-off date for such motions, the liberal standard for amendment of pleadings is inapplicable; waiver enforced based on "undue delay"); Abdullah v. Washington, 530 F.Supp.2d 112, 115 (D.D.C. 2008) (denying amendment to answer asserting exhaustion defense five years after filing; plaintiff would be prejudiced because discovery was closed and plaintiff might have formulated discovery differently if exhaustion had been asserted); Becker v. Indiana State Prison/Indiana Dept. of Correction, 2007 WL 2710474, *3-4 (N.D.Ind., Sept. 12, 2007) (denying defendants' request to amend answer to assert non-exhaustion because it was not filed until summary judgment motion was fully briefed); Thomas v. Keyser, 2004 WL 1594865, *2 (S.D.N.Y., July 16, 2004) (declining to allow revival of defense); Hightower v. Nassau County Sheriff's Dep't, 325 F.Supp.2d 199, 205 (E.D.N.Y. 2004) (same), *vacated in part on other grounds*, 343 F.Supp.2d 191 (E.D.N.Y., Nov. 1, 2004).

[327] Massey v. Helman, 196 F.3d 727 (7th Cir. 1999), *cert. denied*, 532 U.S. 1065 (2001); Jackson v. Gandy, 877 F.Supp.2d 159, 176 (D.N.J., June 29, 2012) (holding exhaustion was not waived where raised in the answer to an amended complaint); Howard v. City of New York, 2006 WL 2597857, *6 (S.D.N.Y., Sept. 6, 2006). *But see* Carr v. Hazelwood, 2008 WL 4556607, *3 (W.D.Va., Oct. 8, 2008) (holding defendant cannot as a matter of right add a new affirmative defense of exhaustion in response to an amended complaint that does not change the theory of plaintiff's case), *report and recommendation adopted*, 2008 WL 4831710 (W.D.Va., Nov. 3, 2008).

[328] 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(h)." Cohron v. City of Louisville, Ky., 2012 WL 1015789, *1 (W.D.Ky., Mar. 22, 2012).

judgment motion.[329] One creative defendant has unsuccessfully sought to raise an otherwise waived exhaustion defense by pretrial motion *in limine*.[330]

Pleading aside, the exhaustion defense may be waived by failing to pursue it reasonably promptly during the course of the litigation.[331] 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.[332] 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

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[329] Panaro v. City of North Las Vegas, 432 F.3d 949, 952 (9th Cir. 2005) (holding exhaustion and other affirmative defenses may be raised at the summary judgment stage if the adverse party is not prejudiced); Ford v. Alexander, 2013 WL 66147, *3, *5 (N.D.Ohio, Jan. 4, 2013) (noting plaintiff had notice and an opportunity to respond to the motion); 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), *report and recommendation adopted as modified*, 2011 WL 4368842 (E.D.La., Sept. 19, 2011); McGregor v. Jarvis, 2010 WL 3724133, *6 (N.D.N.Y., Aug. 20, 2010) (district court could construe exhaustion defense raised by summary judgment motion as a request to amend the answer to assert it), *report and recommendation adopted*, 2010 WL 3724131 (N.D.N.Y., Sept. 16, 2010); Parks v. Falge, 2009 WL 4823386, *3 (D.Nev., Dec. 8, 2009) (applying *Panaro*); 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); Baker v. Beard, 2006 WL 1725557, *3 (M.D.Pa., June 21, 2006) (similar to *Panaro*); *see* Knight v. Kaminski, 331 Fed.Appx. 901, 904 (3d Cir. 2009) (defendants who failed to meet their burden on summary judgment could raise exhaustion again in a second summary judgment motion), *cert. denied*, 130 S.Ct. 522 (2009). *Contra*, Wright v. Goord, 2006 WL 839532, *5 (N.D.N.Y., Mar. 27, 2006); Mayoral v. Illinois Dept. of Corrections, 2002 WL 31324070, *1 (N.D.Ill., Oct. 17, 2002); *see* Burnette v. Bureau of Prisons, 2009 WL 1650072, *3 (W.D.La., June 10, 2009) ("An affirmative defense may be raised on a motion for summary judgment only if that motion is the first pleading responsive to the substance of the allegations.").

[330] Henderson v. Peterson, 2011 WL 2838169, *11 (N.D.Cal., July 15, 2011). *But see* 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).

[331] 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); Norington 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). *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), *aff'd*, 412 Fed.Appx. 565 (4th Cir. 2011) (unpublished).

[332] Drippe v. Tobelinski, 604 F.3d 778, 781 (3d Cir. 2010) (citing Jones v. Bock, 549 U.S. 199 (2007)).

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.[333] It is not clear whether the court intended to hold that missing the dispositive motions 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.[334] 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.[335] In some cases, courts have allowed relief from waiver based on changes in exhaustion law during a case's pendency.[336]

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[333] *Drippe*, 604 F.3d at 782-83 (citing Lujan v. National Wildlife Federation, 497 U.S. 871 (1990)).

[334] 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).

[335] *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); 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).

[336] *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 520508, *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

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.[337] They may also waive compliance with particular rules simply by accepting non-compliant actions by the prisoner.[338] 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.[339]

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,[340] it cannot 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.[341] 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.[342] Courts have rejected efforts to litigate exhaustion by motion *in limine*.[343]

Many courts have addressed exhaustion on motion for summary judgment as a matter of course.[344] In some cases, motions under Rule 12(b)(6) are converted to summary judgment

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exhaust, and could therefore proceed without exhaustion if remedies were no longer available, because his actions were 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).

[337] *See* cases cited in nn. 726-727, below.

[338] 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).

[339] Jewkes v. Shackleton, 2012 WL 5332197, *4-5 (D.Colo., Oct. 29, 2012). The *Jewkes* court distinguished between waiver ("the intentional relinquishment of a known right") and forfeiture ("the failure to make a timely assertion of a right"), and held that the non-assertion of timeliness in the grievance process constituted forfeiture because there was no evidence that it was intentional. Most courts do not make this distinction and use waiver indiscriminately. **DOES THIS GO IN THE TEXT?**

[340] 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*.

[341] *See* § IV.D.1, above.

[342] *See* n. 184, above.

[343] 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); Salaam v. Merlin, 2011 WL 4073363, *1 (D.N.J., Sept. 9, 2011) (converting motion *in limine* to summary judgment); Henderson v. Peterson, 2011 WL 2838169, *11 (N.D.Cal., July 15, 2011) (holding summary judgment the appropriate procedure).

[344] *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. Johnson, 277 F. Appx. 370, 379-80 (5th Cir. 2008) (vacating grant of summary judgment, holding prisoner entitled

because they are supported by extrinsic matter.[345] (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.[346])

If there is a material factual dispute, summary judgment must ordinarily be denied, and the factual dispute reserved for the trier of fact.[347] Exhaustion disputes would therefore go to a jury if one has been requested, and several courts have so held, in some cases because

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to opportunity for discovery in connection with motion); Fields v. Okla. State Penitentiary, 511 F.3d 1109, 1112-13 (10th Cir. 2007); Williams v. Beard, 482 F.3d 637, 639-40 (3d Cir. 2007) (reversing summary judgment on exhaustion and remanding for further proceedings); Hunsaker v. Turley, 2012 WL 3613264, *2 (D.Utah, Aug. 22, 2012) (discussing summary judgment procedure re exhaustion); Makdessi v. Clarke, 2012 WL 293155, *3 (W.D.Va., Jan. 31, 2012) (denying summary judgment where plaintiff alleged prison staff interference with his exhaustion efforts); Frees v. Duby, 2010 WL 4923535, *3-4 (W.D.Mich., Nov. 29, 2010) (strongly arguing for summary judgment under Sixth Circuit law).

[345] 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; *see* 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 conflict on existing record, directing discovery under Rule 56(f) on exhaustion with leave to renew motion thereafter).

[346] Several courts have declined to convert when presented with extrinsic materials on a motion to dismiss, sometimes citing, *e.g.*, "plaintiff's incarceration, his pro se status, and the lack of any discovery, the Court declines to convert defendants' motion." Dowdy v. Hercules, 2010 WL 169624, *4 (E.D.N.Y., Jan. 15, 2010); *accord*, Taylor v. Hillis, 2011 WL 6341090, *4 (W.D.Mich., Nov. 28, 2011), *report and recommendation adopted*, 2011 WL 6370094 (W.D.Mich., Dec. 19, 2011); Huertas v. Sobina, 2010 WL 3304263, *6 (W.D.Pa., July 14, 2010), *report and recommendation adopted*, 2010 WL 3304254 (W.D.Pa., Aug. 20, 2010); Robinson v. Caruso, 2009 WL 6315300, *10 (E.D.Mich., Sept. 25, 2009), *report and recommendation rejected on other grounds*, 2010 WL 1257497 (E.D.Mich., Mar. 29, 2010); Perez v. Westchester County Dept. of Corrections, 2007 WL 1288579, *3 n.6 (S.D.N.Y., Apr. 30, 2007); Doe v. Torres, 2006 WL 290480, *8 (S.D.N.Y., Feb. 8, 2006).

[347] Numerous courts have so held in connection with exhaustion disputes. *See, e.g.*, Ferguson v. Cole, 2011 WL 666103, *3 (N.D.N.Y., Jan. 24, 2011) (party opposing dismissal for non-exhaustion "may delay the ultimate determination as to its validity until trial by showing that there is a genuine issue of material fact to be determined" (citations omitted)), *report and recommendation adopted*, 2011 WL 666094 (N.D.N.Y., Feb. 14, 2011); Barner v. Bentley, 2009 WL 366327, 4 (W.D.Va., Feb. 12, 2009); Maraglia v. Maloney, 499 F.Supp.2d 93, 94-97 (D.Mass. 2007); Rhodan v. Schofield, 2007 WL 1810147, *7 (N.D.Ga., June 19, 2007); Lunney v. Brureton, 2007 WL 1544629, *10 n.4 (S.D.N.Y., May 29, 2007), *objections overruled,* 2007 WL 2050301 (S.D.N.Y., July 18, 2007); Piggie v. Moore, 2007 WL 1521440, *1 (N.D.Ind., May 22, 2007); Ramos v. Rosevthal, 2007 WL 1464436, *1 n.1 (D.Neb., May 17, 2007); Cain v. Dretke, 2006 WL 1663728, *3 (S.D.Tex., June 13, 2006); Blount v. Johnson, 373 F.Supp. 615, 619 (W.D.Va. 2005), *vacated on other grounds*, 2005 WL 2246558 (W.D.Va., Sept. 15, 2005); Donahue v. Bennett, 2004 WL 1875019, *6 (W.D.N.Y., Aug. 17, 2004); Kendall v. Kittles, 2004 WL 1752818, *5 (S.D.N.Y., Aug. 4, 2004); Branch v. Brown, 2003 WL 21730709, *12 (S.D.N.Y., July 25, 2003), *judgment granted on other grounds*, 2003 WL 22439780 (S.D.N.Y., Oct. 28, 2003); Williams v. MacNamara, 2002 WL 654096, *4 (N.D.Cal., Apr. 17, 2002); *see also* Foulk v. Charrier, 262 F.3d 687, 697-98 (8th Cir. 2001) (resolving exhaustion claim on appeal based on trial evidence); Parker v. Robinson, 2008 WL 2222040, *6-7 (D.Me., May 22, 2008) (resolving exhaustion issue as part of bench trial on the merits); Moody v. Pickles, 2006 WL 2645124, *5 n.15 (N.D.N.Y., Sept. 13, 2006) (resolving exhaustion claim after judgment based on trial evidence); *see* Jewkes v. Shackleton, 2012 WL 5332197, *1-3 (D.Colo., Oct. 29, 2012) (noting defendants who lost summary judgment motion on exhaustion presented the same evidence at trial and then by Rule 50 motion).

affirmative defenses are usually for the jury,[348] in others because factual disputes in general are usually viewed as the province of the jury.[349]

However, a series of federal appellate decisions have departed from this usual practice in various ways. 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.[350] 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

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[348] 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. Servello, 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).

[349] Abraham v. Costello, 861 F.Supp.2d 430, 435 (D.Del., May 17, 2012) (assuming disputed evidence of non-exhaustion is for the jury); Archuleta v. Nanney, 2012 WL 1340389, *1 (D.Colo., Apr. 18, 2012) (noting that exhaustion was tried to a jury); Harris v. Brown, 2011 WL 2221167, *3 (E.D.Mich., Apr. 20, 2011) (stating a reasonable jury could believe plaintiff's account of exhaustion), *report and recommendation adopted*, 2011 WL 2183402 (E.D.Mich., June 6, 2011); Proper v. Crawford County Correctional Facility, 2010 WL 3829640, *7 (W.D.Pa., Sept. 24, 2010) (credibility determinations about exhaustion "are best left to the jury"); Jones v. Carroll, 628 F.Supp.2d 551, 558 (D.Del. 2009) (question whether plaintiff failed to exhaust because he was too medicated after surgery to do so was for the jury); Daher v. Kasper, 2008 WL 553644, *4 (N.D.Ind., Feb. 26, 2008) (question whether plaintiff complied with a rule barring "multiple unrelated issues" was for the jury); Kendall v. Kittles, 2004 WL 1752818, *5 (S.D.N.Y., Aug. 4, 2004) (holding credibility issues about access to grievance forms and whether the plaintiff was told his claim was nongrievable "are properly for a jury.").

[350] Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir.), *cert. denied*, 540 U.S. 810 (2003).

Several decisions from one district court have held that *Wyatt* has been overruled in this regard by the Supreme Court's holding in *Jones v. Bock*, 549 U.S. 199, 216 (2007), that failure to exhaust is an affirmative defense that defendants must plead and prove. *See, e.g.*, Percival v. Knowles, 2007 WL 2827789, *5 (E.D.Cal., Sept. 27, 2007), *report and recommendation adopted*, 2008 WL 440330 (E.D.Cal., Feb. 15, 2008); Chatman v. Johnson, 2007 WL 2023544, *3 (E.D.Cal., July 11, 2007), *report and recommendation adopted*, 2007 WL 2796575 (E.D.Cal., Sept. 25, 2007). This is an odd and unpersuasive conclusion, since *Wyatt* itself held that non-exhaustion is an affirmative defense. *Wyatt*, 315 F.3d at 1117-18.

concerning it on motion, subject only to the "clearly erroneous" standard of appellate review.[351] To this end, "the court may look beyond the pleadings."[352]

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.[353] Others have not hesitated to make credibility judgments.[354] In some

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[351] Ritza 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* Albino v. Baca, 697 F.3d 1023, 1029-30 (9th Cir. 2012) (noting appellate review of Rule 12(b) decision is under a "slightly different" standard than summary judgment); Wiseman v. Sebok, 2012 WL 2361494, *3 (C.D.Cal., May 10, 2012) (emphasizing *Ritza*'s holdings re fact-finding prerogatives of district court), *report and recommendation adopted*, 2012 WL 2194553 (C.D.Cal., June 15, 2012); Arias v. Bell, 2008 WL 4369309, *1 (S.D.Cal., Sept. 23, 2008) (where plaintiff said a staff member misled him, defendants did not substantiate their non-exhaustion defense without an affidavit from him); Hendon v. Baroya, 2007 WL 3034263, *3 (E.D.Cal., Oct. 16, 2007) (refusing to credit plaintiff's "bare assertion" that he had filed timely grievances absent unspecified "evidence" demonstrating it, where defendants' records did not show timely grievances), *report and recommendation adopted*, 2008 WL 482868 (E.D.Cal., Feb. 20, 2008); Guillory v. Snohomish County Jail, 2007 WL 2069856, *3-4 (W.D.Wash., July 16, 2007) (rejecting sworn testimony that plaintiff received final decision but that his papers had been lost during transfer where records contradicted it); Hazleton v. Alameida, 358 F.Supp.2d 926, 928-33 (C.D.Cal. 2005) (applying *Ritz/Wyatt* rule); Zarco v. Burt, 355 F.Supp.2d 1168, 1171-74 (S.D.Cal. 2004) (same).

[352] 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).

[353] Carreon v. Banke, 2012 WL 5381542, *2 (E.D.Cal., Oct. 31, 2012) (stating "care must be taken not to resolve credibility on paper if it pertains to disputed issues of fact that are material to the outcome"), *report and recommendation adopted*, 2012 WL 5880943 (E.D.Cal., Nov. 21, 2012); Reece v. Sisto, 2012 WL 602921, *2 (E.D.Cal., Feb. 23, 2012); Soto v. Gines, 2012 WL 628265, *4 (S.D.Cal., Jan. 30, 2012) (holding court could not dismiss where grievance had been rejected as untimely but prisoner contended that date stamped on grievance response did not correctly reflect the date that he received), *report and recommendation adopted*, 2012 WL 628618 (S.D.Cal., Feb. 27, 2012); Williams v. Ferguson, 2012 WL 33055, *2 (E.D.Cal., Jan. 6, 2012) ("Thus, it appears that the requirement under Rule 12(d) that motions raising affirmative defenses that require the submission of declarations or other matters extrinsic to the complaint require that the motion be treated as a Rule 56 motion for summary judgment, applies to motions raising the failure of a prisoner to exhaust administrative remedies."); Chatman v. Felker, 2010 WL 3431806, *1-2 & nn. 2-3 (E.D.Cal., Aug. 31, 2010), *report and recommendation adopted*, 2010 WL 3852834 (E.D.Cal., Sept. 29, 2010); Adams v. Subia, 2010 WL 3245248, *1-2 & nn. 2-3 (E.D.Cal., Aug. 16, 2010); Cherer v. Williams, 2010 WL 7697474, *5 (C.D.Cal., July 27, 2010) (holding court can't resolve factual disputes involving credibility on motion); Sutherland v. Herrmann, 2010 WL 2303206, *4-5 (E.D.Cal., June 7, 2010), *report and recommendation adopted,* 2010 WL 3184294 (E.D.Cal., Aug. 6, 2010); Tompkins v. Stephens, 2010 WL 703074, *2-3 (E.D.Cal., Feb. 25, 2010), *report and recommendation adopted*, 2010 WL 1239411 (E.D.Cal., Mar. 26, 2010); Jones v. Felker, 2010 WL 582131, *4 (E.D.Cal., Feb. 12, 2010), *report and recommendation adopted*, 2010 WL 1034097 (E.D.Cal., Mar. 17, 2010); Roberts v. Salano, 2009 WL 1514440, *2 (E.D.Cal., May 27, 2009) ("While the Court may resolve disputed issues of fact on an unenumerated 12(b) motion, . . . it cannot assess the credibility of the parties' differing versions of what occurred."), *report and recommendation adopted*, 2009 WL 2136890 (E.D.Cal., July 16, 2009); Fahie v. Tyson, 2007 WL 3046016, *2-3 (E.D.Cal., Oct. 18, 2007); *see also* Norton v. Contra Costa County Sheriff's Dept., 2008 WL 4279473, *1 n.1 (N.D.Cal., Sept. 11, 2008) (noting analogy to summary judgment, holding court that looks beyond the pleadings must give the prisoner fair notice of opportunity to develop a record). In *Denson v. Gillispie*, 2011 WL 1582441, *3 (D.Nev., Apr. 25, 2011), the court denied a motion to dismiss under the matter in abatement rubric, but said the defendants could raise exhaustion again at summary judgment—contrary to the statement in *Wyatt v. Terhune*, cited in n. 350, above, that summary judgment is on the merits and is not appropriate for exhaustion controversies.

Some district courts have suggested, bizarrely, that the *Wyatt* holding is undermined by *Jones v. Bock*'s holding that exhaustion is an affirmative defense. *See, e.g.* Davis v. Calvin, 2008 WL 5869849, *8 (E.D.Cal., Oct. 1, 2008) (applying summary judgment rules rather than unenumerated motion to dismiss rules), *motion to certify*

instances, courts have held evidentiary hearings to determine exhaustion questions, without indicating whether a hearing is required, or in what circumstances it might be.[355] 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.[356] 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, *Wyatt v. Terhune*, only in passing. Further, the same court has just held that a motion to dismiss for non-exhaustion is subject to the same rule as is a summary judgment motion requiring notice to *pro se* prisoners of the nature and possible consequences of the motion and the need to respond with a factual presentation.[357]

The matter in abatement approach rests on apparently idiosyncratic Ninth Circuit precedent, and until recently, courts outside the Ninth Circuit mostly rejected it or ignored it.[358] Some district courts have articulated strong reasons to reject it. Thus, one court has pointed out contrary to the *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.[359] Another has added the observations that pleas in abatement were abolished in

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appeal denied, 2009 WL 981920 (E.D.Cal., Apr. 10, 2009); Bryant v. Sacramento County Jail, 2008 WL 410608, *2 (E.D.Cal., Feb. 12, 2008) (same), *report and recommendation adopted*, 2008 WL 780704 (E.D.Cal., Mar. 21, 2008). However, *Wyatt* too held that exhaustion is an affirmative defense, and indeed *Jones* cited it for that proposition. *See* Jensen v. Knowles, 2008 WL 5156694, *2 (E.D.Cal., Dec. 9, 2008) and cases cited. *Wyatt* may be wrong, but not for that reason. The Ninth Circuit itself has just confirmed that *Wyatt* is not abrogated by *Jones* and remains the law of the circuit. Albino v. Baca, 697 F.3d 1023, 1029 n.4 (9th Cir. 2012).

[354] *See, e.g.*, 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., Dec. 28, 2009) (discrediting plaintiff's assertion that he filed a grievance because it didn't appear in defendants' records and his previous history showed failure to follow the rules); Valencia v. Reyna, 2009 WL 1507557, *7 (D.Ariz., May 28, 2009) (making credibility judgment against plaintiff on motion).

[355] *See* Morton v. Hall, 599 F.3d 942, 944 (9th Cir. 2010).

[356] Hubbard v. Houghland, 471 Fed.Appx. 625, 626-27 (9th Cir. 2012). *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).

[357] 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. *Accord*, Akhtar v. Mesa, 698 F.3d 1202, 1214-15 (9th Cir. 2012) (enforcing *Stratton* holding).

[358] *See* McCoy v. Goord, 255 F.Supp.2d 233, 251 (S.D.N.Y. 2003) (noting lack of Second Circuit support for matter in abatement approach).

[359] Benavidez v. Stansberry, 2008 WL 4279559, *6-7 (N.D.Ohio, Sept. 12, 2008); *accord*, Frees v. Duby, 2010 WL 4923535, *3-4 (W.D.Mich., Nov. 29, 2010).

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.[360]

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 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."[361] 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*.[362] 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 motion,[363] 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 that summary judgment rules govern when a court addresses matters outside the pleadings on motion.[364]

A month later, however, the court issued a precedential opinion adopting the matter in abatement approach,[365] 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.[366] 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

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[360] Frees v. Duby, 2010 WL 4923535, *3. *But see* Williams v. Ferguson, 2012 WL 33055, *1 n.1 (E.D.Cal., Jan. 6, 2012) (suggesting that it is only the *plea* in abatement that was abolished, and the proper terminology under the Federal Rules is the *motion* with respect to a matter in abatement—which is of course alive and well in the Ninth Circuit, as noted in the text).

[361] Priester v. Rich, 457 F. Supp. 2d 1369, 1377 (S.D. Ga. 2006), *aff'd on other grounds sub nom.* Bryant v. Rich, 2007 WL 1558718 (11th Cir., May 31, 2007) (unpublished), *superseded,* 530 F.3d 1368 (11th Cir. 2008), *cert. denied*, 129 S.Ct. 733 (2008); *accord,* Stanley v. Rich, 2006 WL 1549114, *3 (S.D.Ga., June 1, 2006); Williams v. Rich, 2006 WL 2534417, *4-5 (S.D.Ga., Aug. 30, 2006).

[362] 549 U.S. 199, 212 (2007).

[363] *See* Bush v. Smith, 2007 WL 4224929, *2 (S.D.Ga., Nov. 27, 2007) (dictum); Poole v. Rich, 2007 WL 2238831, *3 (S.D.Ga., Aug. 1, 2007), *aff'd*, 2008 WL 185527 (11th Cir. 2008), *cert. denied*, 129 S.Ct. 119 (2008); Rodriguez v. Vazquez, 2007 WL 2002443, *1, 5 (S.D.Ga., July 5, 2007) (holding plaintiff's version of events more persuasive than defendants'); Stephens v. Howerton, 2007 WL 1810242, *1-3 (S.D.Ga., June 21, 2007) ("rejecting plaintiff's self-serving averments"), *aff'd*, 270 Fed.Appx. 750 (11th Cir. 2008) (unpublished), *cert. denied*, 129 S.Ct. 119 (2008); Sterling v. Smith, 2007 WL 1542538, *3 (S.D.Ga., May 23, 2007); Lucas v. Barnes, 2007 WL 1428884, *3 (S.D.Ga., May 14, 2007). *See also* Amador v. Superintendents of Dep't of Correctional Services, 2007 WL 4326747, *5 n.7 (S.D.N.Y., Dec. 4, 2007) (finding it "proper" for exhaustion to be decided by court, providing little explanation), *appeal dismissed in part, and vacated and remanded in part on other grounds*, 655 F.3d 89 (2d Cir. 2011).

[364] Singleton v. Department of Corrections, 2008 WL 2043505, *1 (11th Cir., May 14, 2008).

[365] Bryant v. Rich, 530 F.3d 1368 (11th Cir. 2008), *cert. denied*, 129 S.Ct. 733 (2008).

[366] Bryant v. Rich, 237 Fed.Appx. 429 (11th Cir., May 31, 2007), *superseded*, 530 F.3d 1368 (11th Cir. 2008), *cert. denied*, 129 S.Ct. 733 (2008); Myles v. Miami-Dade County Correctional and Rehabilitation Dept., 476 Fed.Appx. 364, 366 (11th Cir. 2012) (vacating decision analyzing exhaustion on summary judgment, directing use of matter in abatement procedure as elaborated by appellate court). *But see* Brewington v. Daniels, 2012 WL 6005780, *1 (M.D.Ala., Nov. 7, 2012) (stating that summary judgment remains appropriate when administrative remedies are absolutely time barred or otherwise clearly infeasible), *report and recommendation adopted*, 2012 WL 6005382 (M.D.Ala., Nov. 30, 2012). *Brewington* inaptly cited *Bryant v. Rich*, 530 F.3d at 1375, for that proposition.

exhaustion of administrative remedies consistently as a summary judgment matter, and states that the panel majority has disregarded *Jones v. Bock*'s instruction to follow the usual procedural practice in adjudicating PLRA exhaustion issues.[367] 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 plaintiff's response, assume plaintiff's version is true if there is a conflict, and if the case cannot be dismissed for non-exhaustion on plaintiff's version of the facts, make findings to resolve the factual dispute.[368] It has said nothing about discovery or hearings. Courts in the Eleventh Circuit have been less inhibited than those in the Ninth about deciding credibility issues on motion.[369]

No other circuit has adopted the matter in abatement approach, though a few district courts in other circuits have done so.[370]

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[367] *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.

[368] Turner v. Burnside, 541 F.3d 1077, 1082-83 (11th Cir. 2008).

[369] *See, e.g.*, Singleton v. Department of Corrections, 323 Fed.Appx. 783, 785-86, 2009 WL 1028035 (11th Cir. 2009) (affirming rejection of prisoner's claim that his appeal was filed in the required four days, rather than five, and crediting of prison officials' notation of date), *cert. denied*, 130 S.Ct. 1155 (2010); Williams v. Barrow, 2013 WL 256753, *1 (M.D.Ga., Jan. 23, 2013) (declining to find exhaustion where signature acknowledging grievance response did not appear to be plaintiff's and where plaintiff alleged that his attempts to appeal were ignored); Williams v. Abbett, 2012 WL 6803602, *4 (M.D.Ala., Dec. 13, 2012) (finding non-exhaustion notwithstanding plaintiff's allegations re number of grievances he filed and failure to receive responses to many), *report and recommendation adopted*, 2013 WL 85099 (M.D.Ala., Jan. 8, 2013); Sharpe v. Eutsey, 2010 WL 2178985, *2 (M.D.Ga., Apr. 28, 2010) (court finds that plaintiff did not submit grievances, rejecting his assertion that he tried and they were rejected), *report and recommendation adopted,* 2010 WL 2178986 (M.D.Ga., May 28, 2010); Baker v. Chapman, 2010 WL 1258021, *3-4 (M.D.Ga., Mar. 29, 2010) (finding non-exhaustion where defendants filed 50 declarations to plaintiff's one); Huddleston v. Johnson, 2009 WL 2208165, *7 (S.D.Ala., July 17, 2009) (plaintiff's "self-serving, conclusory allegation" were insufficient without documentary corroboration of exhaustion); Harmon v. Terry, 2009 WL 927951, *2 (M.D.Ga., Mar. 27, 2009) (finding facts in favor of plaintiff: it is more likely that the plaintiff did file his missing appeal than not, since the matter is serious, plaintiff is experienced with the grievance process, and defendants admitted much inefficiency in processing grievance appeals); Milner v. Jennings, 2008 WL 5381826, *5-6 (M.D.Ala., Dec. 23, 2008) (crediting defendants' evidence of non-exhaustion over plaintiff's "conclusory allegations"). *But see* Chestnut v. McClendon, 2012 WL 5497899, *1 (N.D.Fla., Oct. 24, 2012) (dismissing under *Bryant v. Rich* rule after holding an evidentiary hearing), *report and recommendation adopted*, 2012 WL 5497880 (N.D.Fla., Nov. 13, 2012).

The matter in abatement approach has procedural consequences that may victimize *pro se* litigants, since the usual rule of summary judgment, that such litigants are to be given notice of their obligations and of the consequences of failure to respond with evidence of their factual assertions, does not apply. *See* Ferguson v. Burnside, 2010 WL 3982240, *2-3 (M.D.Ga., Oct. 8, 2010) (dismissing where plaintiff stated he had proof of exhaustion, but did not submit it; there is no indication the court gave a warning).

[370] Perotti v. Marlberry, 2012 WL 3112425, *1-2 (E.D.Mich., July 31, 2012). Several district court decisions have adopted the matter in abatement approach without acknowledging the split of authority or the openness of the question in their circuits. *See* Ward v. ARAMARK Corrections Food Service, 2011 WL 1542108, *3 (W.D.Ky., Apr. 22, 2011); Brown v. Correct Care Integrated Health, 2011 WL 590328, *1 (W.D.Ky., Feb. 10, 2011); Keister v. Turner, 2010 WL 4053556, *2 (W.D.Ark., Sept. 22, 2010), *report and recommendation adopted*, 2010 WL 4053551 (W.D.Ark., Oct. 14, 2010); McCauley v. Correctional Medical Services, Inc., 2010 WL 3398743, *3 (W.D.Mich., July 26, 2010) (arguably dictum), *report and recommendation adopted*, 2010 WL 3398704 (W.D.Mich., Aug. 27, 2010); McClain, Jr. v. Alveriaz, 2009 WL 3467836, *3 n.1, *9 (E.D.Pa., Oct. 26, 2009) (finding the facts against the plaintiff based on defendants' claims about their routine practice, rather than any evidence about the particular case, and contrary to plaintiff's testimony); Anderson v. Pruitt, 2009 WL 211711, *1-2 (M.D.N.C., Jan. 29, 2009) (finding

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.[371] 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.[372] 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."[373] 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."[374]

The *Pavey* approach has not banished summary judgment as a means of resolving exhaustion questions where material facts are undisputed. Litigants still seek summary judgment in many cases,[375] and upon the denial of summary judgment the court may hold a hearing.[376] In factually disputed cases, hearings on exhaustion have become a regular practice,[377] though some courts encourage litigants to proceed to the merits instead.[378]

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plaintiff "makes no showing" he could not file a grievance, without explaining why it is the plaintiff's burden, or acknowledging *Jones v. Bock*); *see* Andrade v. Maloney, 2006 WL 2381429, *3 (D.Mass., Aug. 16, 2006) (expressing approval of matter in abatement approach; it is not clear whether it actually adopts the *Wyatt* holding).

[371] Pavey v. Conley, 544 F.3d 739, 742 (7th Cir. 2008), *cert. denied*, 129 S.Ct. 1620 (2009); *see* Cohron v. City of Louisville, Ky., 2012 WL 1015789, *1, 4 (W.D.Ky., Mar. 22, 2012) (cancelling scheduled jury trial in favor of *Pavey* hearing in response to belated motion re exhaustion). *Cf.* Cerome v. Moshannon Valley Correctional Center, 2009 WL 874610, *4 (W.D.Pa., Mar. 27, 2009) ("Exhaustion is not a trial issue, rather it is a preliminary question of law to be determined by the court." (citing cases which do not support the holding)).

[372] Pavey v. Conley, 544 F.3d at 741.

[373] *Pavey*, 544 F.3d at 741.

[374] *Pavey*, 544 F.3d at 741.

[375] *See* Jackson v. Gaetz, 2011 WL 1768744, *3 (S.D.Ill., Apr. 4, 2011) (denying summary judgment to defendants where undisputed facts showed plaintiff had exhausted), *report and recommendation adopted*, 2011 WL 1753532 (S.D.Ill., May 9, 2011); Conley v. Mathes, 2010 WL 3199750, *4 (C.D.Ill., Aug. 10, 2010) (granting summary judgment to defendants on non-exhaustion).

[376] *See* Swisher v. Porter County Sheriff's Dept., 2012 WL 3776363, *4 (N.D.Ind., Aug. 29, 2012) (stating scope of *Pavey* hearing, allowing discovery), *reconsideration denied*, 2013 WL 550507 (N.D.Ind., Feb. 11, 2013); Phelps v. Martin, 2010 WL 331721, *5 (N.D.Ill., Jan. 22, 2010) (denying summary judgment, scheduling a conference to discuss holding an evidentiary hearing).

[377] *See, e.g.*, Johnson v. Dismore, 2012 WL 1855031, *5-6 (S.D.Ill., Apr. 24, 2012) (finding prisoner's testimony credible), *report and recommendation adopted*, 2012 WL 1854928 (S.D.Ill., May 21, 2012); Smith v. Buss, 2011 WL 1118065, *9 (N.D.Ind., Feb. 18, 2011) (finding in prisoner's favor after hearing), *report and recommendation adopted*, 2011 WL 1085009 (N.D.Ind., Mar. 24, 2011); Hopes v. Mash, 2010 WL 3490991 (S.D.Ill., Aug. 31, 2010) (dismissing for non-exhaustion after credibility findings against plaintiff at hearing); Grayson v. Schuler, 2010 WL 3398879, *4-5 (S.D.Ill., July 20, 2010) (crediting plaintiff's testimony that he appealed, got no response, and got no response to his inquiries about it), *report and recommendation adopted*, 2010 WL 3432842 (S.D.Ill., Aug. 30, 2010); Dupree v. Maue, 2009 WL 4678088, *2-3 (S.D.Ill., Dec. 7, 2009) (finding plaintiff did what was necessary to

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 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.[379] 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.[380] 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.[381] Under this view, it is possible for two 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

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exhaust and prison personnel did not act; rejecting defendants' unsupported claim that plaintiff fabricated his account); Ducey v. Flagg, 2009 WL 3065045, *4 (S.D.Ill., Sept. 23, 2009) (finding credible plaintiff's statement that he filed grievances with no response, despite defendants' lack of a record of them); *see also* Smith v. Buss, 2010 WL 1382121, *1 (N.D.Ind., Mar. 29, 2010) (appointing counsel; "A *Pavey* hearing, and a possible trial on the merits, are procedurally too complicated for an untrained *pro se* litigant to navigate."). *Contra*, Bone v. Walker, 2011 WL 1869948, *1 (C.D.Ill., May 16, 2011) (declining to appoint counsel for a *Pavey* hearing; "the issue of exhaustion is not complex").

[378] 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).

[379] 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).

[380] 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).

[381] *Pavey*, 544 F.3d at 742; *accord*, Gebo v. Thyng, 2012 WL 4848883, *1 (D.N.H., Oct. 11, 2012).

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."[382] If summary judgment is denied, therefore, "the judge may resolve disputed facts concerning exhaustion, holding an evidentiary hearing if necessary."[383] 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."[384]

Most recently, 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"[385] and adding that it is "a matter of judicial administration" going to the question whether the court or prison authorities are to decide the case.[386] 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.'"[387] 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.[388] 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."[389] 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."[390] 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 ultimate dispute"[391]—a proposition that fails to account for the jury right as to statutes of limitations.[392]

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[382] Dillon v. Rogers, 596 F.3d 260, 272 (5th Cir. 2010).

[383] *Dillon*, 596 F.3d at 273; *see* Busher v. Taylor, 2012 WL 3637138, *3 (E.D.Tex., Aug. 22, 2012) (finding factual dispute on summary judgment motion, then finding non-exhaustion by "a preponderance of the credible evidence" after an evidentiary hearing), *appeal dismissed*, No. 12-41165 (5th Cir., Jan. 22, 2013); Garner v. Richland Parish Detention Center, 2010 WL 2804313, *5 (W.D.La., Apr. 20, 2010) (ordering hearing pursuant to *Dillon* where non-exhaustion appeared likely but was not established "beyond peradventure"), *report and recommendation adopted*, 2010 WL 2803082 (W.D.La., July 15, 2010).

[384] *Dillon*, 596 F.3d at 273 n.4.

[385] Messa v. Goord, 652 F.3d 305, 308 (2d Cir. 2011) (quoting McCarthy v. Madigan, 503 U.S. 140, 144 (1992)).

[386] *Messa v. Goord*, *id.* (quoting *Pavey*, 544 F.3d at 741).

[387] *Messa*, 652 F.3d at 309 (quoting *Dillon*, 596 F.3d at 272) (emphasis added).

[388] *Messa*, 652 F.3d at 309 (citations omitted).

[389] *Messa*, 652 F.3d at 309 (citation omitted).

[390] *Messa*, 652 F.3d at 310 (quoting *Pavey*, 544 F.3d at 741).

[391] *Messa*, 652 F.3d at 310.

[392] If there are factual issues pertaining both to exhaustion and to the merits, arguably they must be reserved for the jury. So the same court held with respect to jurisdictional issues. 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 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.[393] 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."[394]

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.[395]

Other circuits have either adhered without comment to the summary judgment framework[396] or have departed from it also without comment.[397] A number of district courts

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the Court must leave the jurisdictional issue for the trial. . . ."). Jurisdiction, like exhaustion, is a precondition to the exercise of judicial power. *Alliance for Envtl. Renewal* is cited with approval in *Messa*, 2011 WL 3086827, *3.

[393] *Messa*, 652 F.3d at 308, 310; *see* Bailey v. Fortier, 2013 WL 310306, *1 (N.D.N.Y., Jan. 25, 2013) (noting that the court appointed counsel, allowed limited discovery, and held an evidentiary hearing); Travis v. Morgridge, 2013 WL 227665, *5 (W.D.Mich., Jan. 22, 2013) (following *Messa*, directing evidentiary hearing after denying summary judgment on exhaustion).

[394] Hill v. Curcione, 657 F.3d 116, 125 (2d Cir. 2011).

[395] 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*, 129 S.Ct. 1620 (2009); Bryant v. Rich, 530 F.3d 1368 (11th Cir. 2008), *cert. denied*, 129 S.Ct. 733 (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*.

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.

[396] *See* n. 344, above.

[397] 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).

Some district courts have said that the Third Circuit "signaled its agreement" with *Pavey* that factually disputed exhaustion questions should be decided by the court after an evidentiary hearing. McErlean v. Merline, 2011 WL 540871, *1 n.2 (D.N.J., Feb. 8, 2011) (citing Drippe v. Tobelinski, 604 F.3d 778, 782 (3d Cir. 2010)); *accord*, Keys v. Carroll, 2012 WL 4472020, *7 (M.D.Pa., Sept. 26, 2012) (citing *Drippe*), *reconsideration denied*, 2012 WL 6553620 (M.D.Pa., Dec. 14, 2012); Womack v. Smith, 2011 WL 819558, *6 & n.9 (M.D.Pa., Mar. 2, 2011) (citing *Drippe* as having "agreed with" *Pavey*'s holding re exhaustion and juries; "Factual disputes as to whether a prisoner has exhausted his remedies do not convert the exhaustion question into a jury matter; the court must resolve any factual disputes and determine whether exhaustion requirements have been satisfied."). *Drippe* itself does not support this view; it discusses *Pavey* in the course of rejecting a party's argument based on *Pavey*, without indicating its agreement or disagreement with *Pavey*. *Drippe*, *id.* In at least one subsequent case, it has adhered to the summary judgment framework. Breeland v. Baker, 439 Fed.Appx. 93, 96 (3d Cir. 2011) (unpublished) (reversing summary judgment on exhaustion without prejudice to renewed summary judgment motion); *accord*, Walker v. Walsh, 2012 WL 6094124, *4 (M.D.Pa., Dec. 7, 2012) (holding defendants' documentation could not be considered unless they moved for summary judgment), *order entered*, 2012 WL

have held evidentiary hearings to resolve exhaustion issues with little or no theoretical discussion of why such a procedure is appropriate.[398]

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,[399] though this view has been cogently rejected in other

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6094155 (M.D.Pa., Dec. 7, 2012). *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).

[398] *See, e.g.*, Strickland v. Wang, 2012 WL 5398655, *1 (W.D.Va., Nov. 5, 2012) ("Because the resolution of this dispute is potentially dispositive, the court finds that judicial resources are well spent in an attempt to resolve it before proceeding further."); Garcia v. PrimeCare Medical, Inc., 2012 WL 3704800, *8 (E.D.Pa., Aug. 28, 2012) (stating "[e]xhaustion is a question of law to be decided by the Court," without explanation, citing a decision that does not address the question), *order issued*, 2012 WL 3704806 (E.D.Pa., Aug. 28, 2012); Gebo v. Thyng, 2012 WL 965097, *6 (D.N.H., Mar. 21, 2012) (stating intent to hold evidentiary hearing); Miller v. Taylor, 2011 WL 1045564, *6 (D.Del., Mar. 15, 2011) (same as *Gebo*); Shouse v. Ray, 2010 WL 3385185, *4 (W.D.Va., Aug. 26, 2010) (on summary judgment, court finds factual conflict and refers to magistrate judge for fact-finding, including hearing if necessary); Bradley v. McVay, 2009 WL 256460 (E.D.Cal., Feb. 3, 2009), *report and recommendation adopted*, 2009 WL 800202 (E.D.Cal., Mar. 25, 2009); Sease v. Phillips, 2008 WL 2901966, *6 (S.D.N.Y., July 24, 2008); Peterson v. Roe, 2007 WL 432962, *1 (D.N.H., Feb. 2, 2007) (finding officials credible as to failing to receive appeal, plaintiff credible as to mailing it and as to the unreliability of the internal mail); Parker v. Robinson, 2006 WL 2583730, *1 (D.Me., Sept. 6, 2006) (noting plaintiff had objected to hearing in light of finding that factual disputes precluded summary judgment); Montgomery v. Johnson, 2006 WL 2403305, *1 (W.D.Va., Aug. 18, 2006), *report and recommendation adopted*, 2006 WL 3099651 (W.D.Va. Oct. 30, 2006); *see also* Johnson v. Garraghty, 57 F.Supp.2d 321, 329 (E.D.Va. 1999) (holding that disputed claim that defendants obstructed exhaustion merits an evidentiary hearing). *But see* Mitchell v. Adams, 2008 WL 314129, *14 (E.D.Cal., Feb. 4, 2008) (reserving factual dispute for trial because the court lacks time and resources for an evidentiary hearing), *report and recommendation adopted*, 2008 WL 595922 (E.D.Cal., Mar. 3, 2008). 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).

[399] *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); 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"); Flick v. Vadlamudi, 2010 WL 3884508, *8-9 (W.D.Mich., Aug. 9, 2010) (holding court could take judicial notice of grievance filings because "grievance procedure is an administrative review regulated by the agency's Policy Directives"), *report and recommendation adopted*, 2010 WL 3884126 (W.D.Mich., Sept. 28, 2010); Bennett v. Onua, 2010 WL 2159199, *35 (S.D.N.Y., May 26, 2010) (granting judgment on the pleadings based on extrinsic material including an affidavit, and on ambiguous statements in a form complaint), *reconsideration denied*, 2010 WL 2331964 (S.D.N.Y., June 8, 2010); *see Appendix A for additional authority on this point*.

decisions.[400] Other courts have granted summary judgment in contested cases, either declaring the *pro se* plaintiffs' representations too conclusory or insufficiently detailed to raise a dispute of material fact,[401] or rejecting prisoners' statements in the absence of corroboration.[402] Such

[400] 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, --- F.Supp.2d ----, 2012 WL 4361431, *5 (D.Mass., Sept. 25, 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. Duby, 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). 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 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).

[401] *See, e.g.*, Lowery v. Strode, 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); Lopez v. Wall, 2010 WL 4225944, *4 (D.R.I., Aug. 19, 2010) (holding plaintiff's statement "All grievances to defendant McCutcheaon [sic] were NEVER responded to" insufficient to overcome the McCutcheon Affidavit stating that Plaintiff never filed any Level 2 grievances with the Grievance Coordinator. Plaintiff does not (i) specifically state that he sent Formal Grievance Forms to Grievance Coordinator McCutcheon or (ii) present copies of the grievances he allegedly filed."), *report and recommendation adopted*, 2010 WL 4225872 (D.R.I., Oct. 25, 2010), *motion to reopen denied*, 2011 WL 3667592 (D.R.I., Aug. 22, 2011); McKeighan v. Corrections Corp. of America, 2010 WL 3913227, *7 (D.Kan., Sept. 30, 2010) (rejecting plaintiffs' claims of exhaustion and obstruction for failure to specify dates, persons involved, etc.); White v. Saginaw County Jail, 2010 WL 3867042, *6 (E.D.Mich., Aug. 24, 2010) (granting summary judgment where plaintiff said he had filed grievances and saw grievances being discarded, but did not identify them as related to his complaint or detail the grievances he said he had filed), *report and recommendation adopted*, 2010 WL 3842012 (E.D.Mich., Sept. 28, 2010); *see Appendix A for additional authority on this point. Contra*, 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).

[402] Fuentes v. Balcer, 2013 WL 276679, *6 (W.D.N.Y., Jan. 24, 2013) (stating plaintiff's testimony of assault and intimidation could not support a jury finding of unavailability "in the absence of any supporting documentation or deposition testimony"); Prall v. Ellis, 2012 WL 6707735, *9 (D.N.J., Dec. 26, 2012) (citing lack of documentary corroboration in rejecting plaintiff's and a witness's testimony); Tyler v. Jones, 2010 WL 3843491, *6 (D.Colo., Sept. 19, 2010) (refusing to credit plaintiff's claim of filing final grievance appeal on summary judgment without corroboration), *report and recommendation adopted*, 2010 WL 3943653 (D.Colo., Sept. 23, 2010); Damron v. Sims, 2010 WL 3075119, *1 (S.D.Ohio, Aug. 3, 2010) (holding plaintiffs must submit "some probative evidence" contrary

deviation from the usual summary judgment practice under the Federal Rules is not consistent with the Supreme Court's reasoning in *Jones v. Bock*.[403] 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.[404]

One decision characterized a failure to exhaust as a failure to prosecute, allowing the court to dismiss *sua sponte*,[405] 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,[406] unless the district court certifies it for appeal.[407] Dismissal without prejudice, the usual mode of

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to defendants' claims, even though their verified complaint conflicted with those claims); Jones v. Carroll, 628 F.Supp.2d 551, 557 (D.Del. 2009) (holding plaintiff's affidavit stating that a correction officer had told him housing and security could not be addressed by the grievance program did not raise a material factual issue absent supporting evidence); Martos v. Washington County, 2009 WL 1531692, *7 (W.D.Pa., June 1, 2009) (granting summary judgment despite plaintiff's sworn testimony that he tried to grieve and was obstructed, on ground that testimony was not corroborated); Perotti v. Medlin, 2009 WL 929013, *12-13 (N.D.Ohio, Apr. 2, 2009) (granting summary judgment where plaintiff's "self-serving affidavit" was not corroborated by other evidence of exhaustion).

[403] McDonald v. Dallas County, 2007 WL 2907824, *3 (N.D.Tex., Oct. 5, 2007) (citing Jones v. Bock, e549 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.*, 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 (S.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).

[404] *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).

[405] 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).

[406] 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).

[407] *See* 28 U.S.C. § 1292(b) (allowing certification for appeal of "controlling question of law" under specified circumstances, subject to court of appeals' discretion); Pavey v. Conley, 2006 WL 3715019 (N.D.Ind., Dec. 14, 2006) (certifying question of proper procedural handling of exhaustion for interlocutory appeal); Beltran v. O'Mara, 2006 WL 240558, *4 (D.N.H., Jan. 31, 2006) (declining to certify for interlocutory appeal question whether "total exhaustion" doctrine should be applied).

dismissal in exhaustion disputes,[408] is appealable under some circuits' law.[409] 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,[410] as when the time for filing a grievance has expired,[411] the prisoner has been released and can no longer pursue prison grievances,[412] or the statute of limitations has expired on the claim.[413] 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.[414] District courts' rulings on whether a plaintiff has exhausted are reviewed *de novo.*[415]

E. What Is Exhaustion?

Exhaustion under the PLRA means "proper exhaustion," *i.e.*, "compliance with an agency's deadlines and other critical procedural rules."[416] It also means completing the administrative process by appealing an adverse decision to the highest level of the administrative system.[417]

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 responding thereto has expired."[418] Though there is some dissent on this point,[419] it is hard to see

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[408] *See* nn. 252-255, above.

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

[410] *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).

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

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

[413] Ahmed v. Dragovich, 297 F.3d 201, 207 (3d Cir. 2002); Larkin v. Galloway, 266 F.3d 718, 721 (7th Cir. 2001), *cert. denied*, 535 U.S. 992 (2002).

[414] Juarez v. Alameda, 2007 WL 2989628, *2 (E.D.Cal., Oct. 11, 2007).

[415] Johnson v. Rowley, 569 F.3d 40, 44 (2d Cir. 2009).

[416] Woodford v. Ngo, 548 U.S. 81, 90-91 (2006); *see* § IV.E.7, below, concerning the "proper exhaustion" rule.

[417] "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); 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). 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*, --- Fed.Appx. ----, 2013 WL 93138 (10th Cir. 2013).

[418] 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); Whitington 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); Wilder v. McCabe, 2012 WL 6935346, *5 (D.S.C., Oct. 19,

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.[420] If a prisoner files suit after the time limit for decision has passed,

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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 nofication 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); 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*, 2012 WL 2402593 (S.D.N.Y. Jun 26, 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 (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); *see* 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); 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); *see also Appendix A for additional authority on this point;* 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); *see* Santure v. Hatt, 2011 WL 7445091, *4-5 (E.D.Mich., Dec. 30, 2011) (declining summary judgment based on non-exhaustion where plaintiff produced evidence he had filed a grievance appeal and the rules said an appeal was deemed filed when sent).

[419] In *Shepard v. Cohen*, 2011 WL 284958, *3 (E.D.Cal., Jan. 25, 2011), the court 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 appeal: 1) does not involve a time-sensitive grievance; and 2) is not a result of a prison's action which thwarts a prisoner's attempt to properly exhaust administrative remedies, thus prejudicing a prisoner's ability to bring a federal suit.

There, 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* Williams v. Handmen, 2013 WL 342702, *1 (S.D.N.Y., Jan. 29, 2013) (dismissing for non-exhaustion where

and then grievance authorities issue a late decision, the prisoner has exhausted; the late response does not "un-exhaust" his claim.[421] 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

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plaintiff filed before receiving final response, disregarding that the response was long overdue); 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 *third* level decision); White v. Drake, 2011 WL 4478988, *3 (N.D.N.Y., Aug. 11, 2011), *report and recommendation adopted*, 2011 WL 4478921, *1, *3 (N.D.N.Y., Sept. 26, 2011) (holding plaintiff "will be required to re-commence this action and re-serve Drake even though the exhaustion requirement has now been satisfied and where the delay in completing the administrative process was apparently caused solely by DOCCS delay at the final appeal stage"; appeal decision was delayed several months), *report and recommendation adopted*, 2011 WL 4478921 (N.D.N.Y., Sept. 26, 2011); 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); Gomez v. Scribner, 2009 WL 2058537, *4 (E.D.Cal., July 14, 2009) (holding prisoner 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 that a prisoner who filed a grievance in August 2005 that remained "under investigation" in April 2006, and whose appeal had never been answered, had not exhausted); *compare* Pugh v. Braneff, 2006 WL 1408392, *2 (E.D.Tex., May 19, 2006) (noting that the Texas process takes 90 days). *Contra*, Rodgers v. Lewis, 2012 WL 4158506, *3 (M.D.La., Sept. 18, 2012) (holding plaintiff exhausted after waiting past the deadline for final response, where officials had notified him after the deadline's expiration that "more detailed" investigation was needed).

[420] As discussed below, *see* nn. 444-445 *et seq.*, it is common for prisoners to receive no response at all to their grievances or appeals.

[421] Thomas v. Sheppard-Brooks, 2009 WL 3365872, *6 (E.D.Cal., Oct. 16, 2009), *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 (S.D.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). *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 plaintiff 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 *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.

final deadline.[422] (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.[423])

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.[424] 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.[425] The latter is probably the better argument; after all, seeking any sort

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[422] 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); Olmsted v. Cooney, 2005 WL 233817, *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 Dep't, 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).

[423] 28 C.F.R. § 115.52(d)(1-3).

[424] *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).

[425] *See* Johnson v. Thyng, 369 Fed.Appx. 144, 147-48 (1st Cir. 2010) (unpublished); 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. Scutt, 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 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 permissive 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). *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-

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.[426]

Most courts including the Second Circuit have held that exhaustion must be completed *before* suit is brought.[427] Exceptions to the exhaust-first requirement have on rare occasions been allowed based on individual circumstances.[428] The majority of courts have held that initial

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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).

[426] *See* 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 1568611, *3 (N.D.Ind., Apr. 16, 2010) (where policy said to appeal if dissatisfied with the initial response, and initial response was to set up a meeting with the warden, plaintiff was not obliged to appeal).

[427] 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). 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).

[428] *See* Curry v. Scott, 249 F.3d 493, 502 (6th Cir. 2001) (stating that pre-filing exhaustion is "the preferred practice," but allowing exhaustion prior to filing an *amended* complaint because the suit was filed shortly after the PLRA's enactment and involved some pre-PLRA conduct, and the plaintiff filed a grievance early in the proceedings); Gibson v. Zavaras, 2010 WL 3790994, *5 (D.Colo., Aug. 10, 2010) (holding dismissal of claim exhausted after suit was filed would not serve the purposes of exhaustion, since officials by then would have addressed the claim and an administrative record had been made), *report and recommendation adopted*, 2010 WL 3790894 (D.Colo., Sept. 22, 2010), *reconsideration denied*, 2010 WL 3928012 (D.Colo., Oct. 6, 2010); Georgacarakos v. Wiley, 2010 WL 1291833, *24 (D.Colo., Mar. 30, 2010) (following *Underwood*), *motion to amend denied*, 2011 WL 940803 (D.Colo., Mar. 16, 2011); Jenkins v. Vail, 2009 WL 2900258, *3 n.2 (E.D.Wash., July 22, 2009), *report and recommendation rejected on other grounds*, 2009 WL 2900255 (E.D.Wash., Aug. 31, 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. 234, 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

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,[429] though there are a few contrary decisions.[430] A 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.[431] However, the majority adheres to the view that the time of initial filing determines whether a case was "brought . . . by a prisoner" under § 1997e(a), and therefore must have been exhausted.[432]

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), *pet. for cert. filed*, No. NO. 12-1010 (Feb. 12, 2013), held that the 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.

[429] *See, e.g.*, Smith v. Terry, 491 Fed.Appx. 81, ___, 2012 WL 4465609, *2 (11th Cir. 2012) (unpublished) ("The only facts pertinent to determining whether a prisoner has satisfied the PLRA's exhaustion requirement are those that existed when he filed his original complaint."); Cox v. Mayer, 332 F.3d 422, 428 (6th Cir. 2003) (holding failure to exhaust cannot be cured by a supplemental complaint recounting post-filing exhaustion); Brown v. Warden Ross Correctional Inst., 2012 WL 3527274, *11 (S.D.Ohio, Aug. 15, 2012) (holding amended complaint cannot cure an initial failure to exhaust), *report and recommendation adopted*, 2012 WL 3962817 (S.D.Ohio, Sept. 11, 2012); Siguenza v. Cotero, 2012 WL 3069933, *3-4 (S.D.Cal., June 6, 2012) (holding filing of an amended complaint post-exhaustion did not cure initial non-exhaustion), *report and recommendation adopted*, 2012 WL 3067573, *1-2 (S.D.Cal., July 27, 2012); Brummett v. Sillen, 2011 WL 5826533, *2-3 (E.D.Cal., Nov. 17, 2011) (claims which had been added in an amended complaint before exhaustion could not be preserved by another amended complaint after exhaustion, but had to be dismissed and filed separately); Malouf v. Turner, 814 F.Supp.2d 454, 463 (D.N.J., Aug. 31, 2011); Huggins v. Owens, 2010 WL 4063830, *1 (M.D.Ga., Oct. 15, 2010) ("If the action was improperly brought, it cannot be cured through amendment."); Chatman v. Horsley, 2010 WL 3743637, *3 (N.D.Cal., Sept. 17, 2010), *reconsideration denied*, 2010 WL 4225770 (N.D.Cal., Oct. 21, 2010); Pina v. Tilton, 2010 WL 2803396, *2 (N.D.Cal., July 14, 2010); Puckett v. North Kern State Prison Employees, 2010 WL 1796722, *4 (E.D.Cal., May 3, 2010), *aff'd*, 436 Fed.Appx. 801 (9th Cir. 2011) (unpublished); Burriola v. Nevada, 2010 WL 2326118, *5 (D.Nev., Feb. 8, 2010) ("The commencement of the action—not the filing of the amended and operative complaint—is the date by which a plaintiff must have completely exhausted his administrative remedies. . . ."), *aff'd*, 2010 WL 2326089, *3 (D.Nev., June 8, 2010) (unpublished); Fisher v. Ohio Dept. of Corrections, 2009 WL 2246183, *5 (S.D.Ohio, July 23, 2009); Bailey v. Cate, 2009 WL 2366456, *2 (C.D.Cal., July 29, 2009); Abedi v. Butler, 2009 WL 981664 (E.D.Cal., Apr. 10, 2009); Manago v. Knowles, 2007 WL 1725652, *3 (E.D.Cal., June 13, 2007), *report and recommendation adopted in part*, 2007 WL 2382087 (E.D.Cal., Aug. 17, 2007), *adhered to on reconsideration,* 2007 WL 2505514 (E.D.Cal., Aug. 31, 2007).

[430] *See, e.g.*, Demouchet v. Rayburn Correctional Center, 2009 WL 3052673, *1, *3 (E.D.La., Sept. 17, 2009); Dickerson v. Strain, 2009 WL 2023866, *3 (E.D.La., July 9, 2009) (point "is at least arguable"); Plaster v. Kneal, 2008 WL 4090790, *4 n.1 (M.D.Pa., Aug. 29, 2008); Martinson v. Menifee, 2007 WL 2106516, *4 n.2 (S.D.N.Y., July 18, 2007) (holding claims unexhausted at initial filing, but exhausted at the time of an amended complaint 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).

[431] *See, e.g.*, Minix v. Pazera, 2007 WL 4233455, *2-3 (N.D.Ind., Nov. 28, 2007); Prendergast v. Janecka, 2001 WL 793251, *1 (E.D.Pa., July 10, 2001); *see* Jackson v. Traquina, 2009 WL 3296677, *2 (E.D.Cal. 2009) (treating amended complaint as commencing action for exhaustion purposes because amendment drastically changed action, from putative class action for injunction to action for plaintiff's own damages). *Contra*, Prescott v. Annetts, 2010 WL 3020023, *3-4 (S.D.N.Y., July 22, 2010); Barrett v. Maricopa County Sheriff's Office, 2010 WL 46786, *4 (D.Ariz., Jan. 4, 2010); Barnhardt v. Tilton, 2009 WL 3300090, *3 (E.D.Cal. 2009).

[432] *See* cases cited in n. 34, above.

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*.[433] 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.[434]

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,[435] or whether they need only be exhausted before the plaintiff

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[433] *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). *Contra*, 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. 6, above, and 1425, 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* 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).

[434] Claiborne v. Shockley, 2008 WL 276573, *2 (E.D.Cal., Jan. 30, 2008), *report and recommendation adopted*, 2008 WL 795573 (E.D.Cal., Mar. 24, 2008).

[435] *See* Harbin-Bey v. Rutter, 420 F.3d 571, 580 (6th Cir. 2005) (holding that claims post-dating the original complaint and exhausted after its filing could not be added); *accord*, Smith v. Baker, 2012 WL 6948839, *3-4 (N.D.N.Y., Nov. 13, 2012), *report and recommendation adopted*, 2013 WL 317018 (N.D.N.Y., Jan. 28, 2013); Nunn v. Hunt, 2012 WL 3870365, *2-3 (E.D.N.C., Sept. 6, 2012); Green v. Nish, 2012 WL 4049834, *4 (M.D.Pa., Aug. 27, 2012), *report and recommendation adopted*, 2012 WL 4049974 (M.D.Pa., Sept. 13, 2012); Long v. Obi, 2012 WL 3133805, *1 (E.D.Ark., July 31, 2012); Wood v. Chadwick, 2012 WL 1473400, *1-2 (E.D.N.C., Apr. 27, 2012), *aff'd*, 487 Fed.Appx. 800 (4th Cir. 2012); Green v. Fayette Correctional Facility, 2011 WL 5245525, *2 (W.D.Pa., Oct. 11, 2011), *report and recommendation adopted*, 2011 WL 5245595 (W.D.Pa., Nov. 2, 2011); Burgie v. Golden, 2011 WL 1774761, *2 (E.D.Ark., Apr. 21, 2011), *report and recommendation adopted*, 2011 WL 1774273 (E.D.Ark., May 9, 2011); Garrison v. Byrd, 2011 WL 250122, *2 (E.D.Ark., Jan. 6, 2011), *report and recommendation adopted*, 2011 WL 249786 (E.D.Ark., Jan. 26, 2011); Gann v. Neotti, 2010 WL 2486826, *3 (S.D.Cal., June 15, 2010); Jenkins v. Vail, 2010 WL 2196777, *2 (E.D.Wash., May 6, 2010); Wilkes v. Kemp, 2010 WL 1929877, *5 (S.D.Ga., Feb. 23, 2010), *report and recommendation adopted as modified*, 2010 WL 1930083 (S.D.Ga., May 12, 2010); Hartley v. Clark, 2010 WL 1187880, *1 n.1 (N.D.Fla., Feb. 12, 2010), *report and recommendation adopted,* 2010 WL 1187879 (N.D.Fla., Mar. 23, 2010); Sua v. Espinda, 2010 WL 184314, *2 (D.Haw., Jan. 19, 2010); *see Appendix A for additional authority on this point*; *see generally* Brown v. Warden Ross Correctional Inst., 2012 WL 3527274, *11-13 (S.D.Ohio, Aug. 15, 2012) (canvassing conflicting authority), *report and recommendation adopted*, 2012 WL 3962817 (S.D.Ohio, Sept. 11, 2012).

Similarly, one court has recently invented the rule that intervenors must have exhausted before the filing of the original complaint. Damron v. Sims, 2010 WL 4809090, *1 (S.D.Ohio, Nov. 17, 2010).

seeks to add them to the case.[436] Much of the authority for the first proposition was concentrated in a single judicial district, and has now been overruled.[437]

This question should be easily resolved by the plain words 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 applied to multi-claim cases, and exhaustion should therefore be assessed claim by claim.[438] 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

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[436] *See* Smith v. Olsen, 2011 WL 6792776, *2 (5th Cir., Dec. 28, 2011) (unpublished) (holding new exhausted claims asserted in an amended complaint, later required to be pursued in a separate action, should go forward); Rhodes v. Robinson, 621 F.3d 1002, 1005 (9th Cir. 2010) (holding newly added claims need be exhausted only by the time those claims are tendered to the court; filing of a new complaint "supercedes [sic] any earlier complaint, rendering the original complaint non-existent and, thus, its filing date irrelevant"); Cannon v. Washington, 418 F.3d 714, 719-20 (7th Cir. 2005) (rejecting defendants' argument that new claims could not be added by amendment even if they had been exhausted); *accord*, Akhtar v. Mesa, 698 F.3d 1202, 1209 (9th Cir. 2012) (following *Rhodes v. Robinson*); Barnes v. Briley, 420 F.3d 673, 677-78 (7th Cir. 2005); Robbins v. Payne, 2012 WL 4812495, *3-4 (E.D.Mich., Oct. 10, 2012); Tivis v. Stock, 2012 WL 3609789, *17 n.7 (D.Colo., Apr. 6, 2012) (following *Rhodes v. Robinson*), *report and recommendation adopted in part, rejected in part on other grounds*, 2012 WL 3609778 (D.Colo., Aug. 22, 2012); Mathis v. GEO Group, Inc., 2011 WL 2899135, *5 (E.D.N.C. Jul 18, 2011) (holding new plaintiffs joined in an amended complaint need not have exhausted before initial complaint was filed), *report and recommendation adopted and stay granted*, 2012 WL 43586, *3 (E.D.N.C., Jan. 9, 2012); Carter v. Smith, 2011 WL 2313862, *18 n.10 (E.D.Pa., June 13, 2011), *order entered*, 2011 WL 2312293 (E.D.Pa., June 13, 2011); Shulick v. Michigan Dept. of Corrections, 2010 WL 6859770, *4 (W.D.Mich., Mar. 25, 2010), *report and recommendation adopted as modified*, 2011 WL 2654261 (W.D.Mich., July 6, 2011); *see Appendix A for additional authority on this point*; *see also* Miles v. Daniels, 2004 WL 2110708, *3 (D.Or., Sept. 21, 2004) (declining 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).

[437] *See* Rhodes v. Robinson, 621 F.3d at 1005, *overruling, e.g.*, Williams v. Sullivan, 2009 WL 3624997, *6 (E.D.Cal., Oct. 29, 2009); Knapp v. Cate, 2009 WL 3297309, *8 (E.D.Cal., Oct. 13, 2009); Cohea v. Pliler, 2009 WL 720964, *3 (E.D.Cal., Mar. 13, 2009) (acknowledging conflict with other jurisdictions), *report and recommendation adopted*, 2009 WL 899965 (E.D.Cal., Mar. 31, 2009), *vacated and reinstated*, 2009 WL 961527 (E.D.Cal., Apr. 7, 2009).

Some courts in this circuit remain 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 (E.D.Cal., Mar. 2, 2012), *report and recommendation adopted*, 2012 WL 1068701, *1-2 (E.D.Cal., Mar. 29, 2012), *reconsideration denied*, 2012 WL 2196109 (E.D.Cal., June 14, 2012); Crayton v. Hedgpeth, 2011 WL 1988450, *8 (E.D.Cal., May 20, 2011); Jones v. Felker, 2011 WL 533755, *4-5 (E.D.Cal., Feb. 11, 2011), *report and recommendation adopted*, 2011 WL 1299454 (E.D.Cal., Mar. 29, 2011). As explained in the text, there is no basis for this restrictive view. *See* Wolf v. Reinke, 2011 WL 1898914, *3 n.2 (D.Idaho, May 18, 2011) ("This Court does not read *Rhodes* so narrowly as to require that claims must have arisen after the filing date of the original complaint to be eligible for later amendment.")

[438] Jones v. Bock, 549 U.S. 199, 924 (2007).

over the substantive requirements of the later-enacted § 1997e(a).[439] 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.[440] This holding suggests that the PLRA does not displace ordinary practice under Rule 15, which would allow amendment to add exhausted claims that post-date the original filing.[441] It also suggests that if claims are appropriately brought in the same case 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.[442] Requiring otherwise joinable claims to be litigated separately does not advance the statute's purpose to ease the burden of prison litigation on the judiciary.[443]

What if the prisoner files a grievance and gets no response? The case law is replete with such instances.[444] Failure to respond cannot mean failure to exhaust; otherwise prison officials

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[439] *See* Koch v. Neubarth, 2010 WL 1791141, *1 (E.D.Cal., May 3, 2010); Hall v. Hedgpeth, 2010 WL 532445, *3 (N.D.Cal., Feb. 9, 2010); Colon v. Tilton, 2009 WL 3816905, *2 (E.D.Cal., Nov. 13, 2009); Deherrera v. Mahoney, 2008 WL 5435322, *4 (D.Mont., Aug. 1, 2008).

[440] Jones v. Bock, 549 U.S. 199, 212-16 (2007).

[441] *See* Roundtree v. Adams, 2007 WL 1232173, *8-9 (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)) , *objections overruled*, 2009 WL 3806262 (E.D.Mich., Nov. 12, 2009).

[442] *See, e.g.*, Benyamini v. Sharp, 2009 WL 5205355, *1 (E.D.Cal., Dec. 17, 2009) (holding that a defendant who had been dismissed for non-exhaustion could not be joined again after exhaustion was completed, but had to be sued in a separate action). *But see* Hagan v. Rogers, 570 F.3d 146, 154-55 (3d Cir. 2009); Boriboune v. Berge, 391 F.3d 852, 855-56 (7th Cir. 2004) (both holding that the PLRA does not overturn the joinder rules in other respects).

[443] Jones v. Bock, 549 U.S. 199, 223 (2007) (noting that total exhaustion rule prompting prisoners to file claims in separate suits "would certainly not comport with the purpose of the PLRA to reduce the quantity of inmate suits"); *see* Riggs v. Valdez, 2010 WL 4117085, *5 (D.Idaho, Oct. 18, 2010) (noting waste of resources if claims had to be filed separately and then consolidated), *on reconsideration in part*, 2010 WL 5391313 (D.Idaho, Dec. 22, 2010); Rouser v. White, 2010 WL 843764, *3 (E.D.Cal., Mar. 10, 2010) ("The state's position lacks common sense. Such an interpretation of the PLRA would make it impossible for prisoners to amend complaints to reflect new events or circumstances in continuing violation cases. Instead, they would always be required to file new complaints in order to bring claims arising out of conduct occurring after the filing of the complaint, including retaliation for filing a complaint.").

[444] *See, e.g.,* Santiago v. Anderson, 2012 WL 3164293, *6 (7th Cir. 2012) (unpublished) (noting summary judgment evidence showed submission of an unanswered grievance), *cert. denied*, 133 S.Ct. 769 (2012); Davis v. Corrections Corp. of America, 463 Fed.Appx. 748, 750 (10th Cir. 2012) (unpublished) (noting concession that prison staff did not respond to informal grievances as prison rules required); Smith v. Smith, 2012 WL 5462676, *3 (S.D.Ind., Oct. 18, 2012) (finding that prisoner filed grievances which were never processed), *report and recommendation adopted*, 2012 WL 5462674 (S.D.Ind., Nov. 8, 2012); Palmer v. Hessbrook, 2012 WL 4364654, *4-5 (E.D.Mich., Sept. 25, 2012) (denying summary judgment based on plaintiff's averments that he filed grievances without response and sought to appeal and requested appeal forms without response); Brown v. Kochanowski, 2012 WL 4127959, *8-9 (D.Kan., Sept. 19, 2012) (quoting deposition where plaintiff describes pattern of non-response); Garrett v. Schwatz, 2012 WL 3048364, *4 (S.D.Ill., June 1, 2012) (finding after a hearing that plaintiff's grievance went unanswered),

could keep prisoners out of court by simply ignoring their grievances.[445] Hence, as noted, once a prisoner has filed the final appeal and the deadline for a final response has passed, exhaustion is

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report and recommendation adopted, 2012 WL 3046987, *1 (S.D.Ill., July 25, 2012); Holt v. Bledsoe, 2012 WL 511916, *4-5 (M.D.Pa., Jan. 11, 2012) (denying summary judgment where there was no record of plaintiff's grievance forms, his grievance submitted on plain paper allegedly never reached his counselor, and the Regional Office rejected his complaint of lack of access to the grievance process); Royal v. Knight, 2012 WL 639548, *4-5 (E.D.Cal., Feb. 27, 2012); Joyner v. O'Neil, 2012 WL 560199, *6 (E.D.Va., Feb. 21, 2012) (noting defendants did not dispute plaintiff's claim that his first grievance was never answered); Sykes v. Farris, 2012 WL 443314, *5-6 (S.D.Ill., Jan. 17, 2012) (finding claim of non-response to medical grievance supported by other prison documentation), *report and recommendation adopted*, 2012 WL 458488 (S.D.Ill., Feb. 10, 2012); Pope v. Ross, 2011 WL 5573035, *7 (S.D.Ill., Oct. 6, 2011) (crediting plaintiff's testimony that he submitted his grievance twice and it was destroyed or not returned both times), *report and recommendation adopted*, 2011 WL 5572875 (S.D.Ill., Nov. 16, 2011); Nassar v. Warden, Butler County Jail, 2011 WL 7268004, *5 (S.D.Ohio, Sept. 1, 2011) (holding prisoner who properly pursued grievance but did not receive responses consistently with policy at either stage had no available remedy); Hill v. Best, 2011 WL 4585658, *3 (S.D.Ill., July 26, 2011) (noting failure to respond of a counselor, a grievance officer, and the warden); Contreraz v. Stockbridge, 2011 WL 2620367, *2 (E.D.Cal., June 29, 2011); *see Appendix A for additional authority on this point*; *see also* Williams v. Sanders, 2010 WL 5652767, *2-3 (D.S.C., Oct. 7, 2010) (denying summary judgment where plaintiff, supported by several other prisoners, stated that neither the plaintiff nor anyone else received responses to grievances), *report and recommendation adopted*, 2011 WL 291253 (D.S.C., Jan. 27, 2011); Bailey v. Himelick, 2010 WL 5423723, *5 (N.D.Ind., Dec. 27, 2010) (note that was not actually responsive to grievance was not a response triggering appeal obligation).

[445] 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); Brunson 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) (declining to dismiss where the prisoner had waited two years for a final decision); Jones v. Blanas, 2005 WL 1868826, *3 (E.D.Cal., Aug. 3, 2005); White v. Briley, 2005 WL 1651170, *6 (N.D.Ill., July 1, 2005); Casarez v. Mars, 2003 WL 21369255, *6 (E.D.Mich., June 11, 2003) (holding that prison officials' lack of response to a Step III grievance did not mean failure to exhaust); John v. N.Y.C. Dept. of Corrections, 183 F.Supp.2d 619, 625 (S.D.N.Y. 2002) (rejecting argument, three years after grievance appeal, that plaintiff must continue waiting for a decision).

There are decisions holding exhaustion is not completed until the prisoner receives a decision, even if the prisoner has taken all necessary steps to exhaust; these are obviously wrong for the reason stated in the text. *See* Urena v. Fischer, 2010 WL 2134564, *6 (N.D.N.Y., Apr. 16, 2010), *report and recommendation adopted,* 2010 WL 2133928 (N.D.N.Y., May 27, 2010); Petrusch v. Oliloushi, 2005 WL 2420352, *4 (W.D.N.Y., Sept. 30, 2005) (dictum); Rodriguez v. Hahn, 209 F.Supp.2d 344, 347-48 (S.D.N.Y. 2002); *see also* Hayes v. Rosser, 2009 WL 2601238, *4-7 (C.D.Cal., Aug. 20, 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); Wyatt v. Doe, 2006 WL 1407636, *1 (S.D.Tex., May 19, 2006) (holding a prisoner whose grievance had remained "under exhaustion" 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).

complete.[446] At least one federal court has declined to grant injunctive relief requiring prison officials to process a grievance.[447] State courts may take a different view.[448]

As to failures to respond at an earlier stage, many courts have held that if the grievance system allows prisoners to treat non-response as a denial of the grievance, their failure to appeal the non-response is a failure to exhaust.[449] (The National Standards to Prevent, Detect, and 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.[450]) 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[451]—though if a late decision arrives before suit is filed, the prisoner is obliged to appeal rather than proceed to court.[452] 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.[453] 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. Conversely,

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[446] *See* n. 418, above.

[447] Fulton v. Vasquez, 2011 WL 70497, *2 (E.D.Cal., Jan. 10, 2011).

[448] In re Fosselman, No. HC 5680, Order (Superior Ct., Monterey Cty., Feb. 8, 2008) (finding two grievances had been improperly screened out and directing officials to process them).

[449] Turner v. Burnside, 541 F.3d 1077, 1083-84 (11th Cir. 2008) (where prisoner alleged that the warden tore up his grievance, he would have been obliged to file an appeal from the lack of a decision, except that the warden also threatened him); Cox v. Mayer, 332 F.3d 422, 425 n.2 (6th Cir. 2003); Spigelman v. Samuels, 2013 WL 147846, *1-2 (E.D.Ky., Jan. 14, 2013); Rouse v. Baca, 2012 WL 4498866, *5 (D.N.M., Sept. 25, 2012); Barbati v. Bureau of Prisons, 2012 WL 4119300, *5 (S.D.W.Va., Aug. 22, 2012), *report and recommendation adopted*, 2012 WL 4119865 (S.D.W.Va., Sept. 19, 2012); Malik v. City of New York, 2012 WL 3345317, *7 (S.D.N.Y., Aug. 15, 2012), *report and recommendation adopted*, 2012 WL 4475156 (S.D.N.Y., Sept. 28, 2012); Kelley v. Anderson, 2012 WL 606823, *2 (E.D.Ark., Feb. 1, 2012), *report and recommendation adopted*, 2012 WL 606721 (E.D.Ark., Feb. 24, 2012); Williams v. Janis, 2011 WL 6817886, *4 (S.D.W.Va., Nov. 21, 2011); Alba v. Randle, 2011 WL 4565752, *3 (S.D.Miss., Sept. 29, 2011); Hernandez v. Harrington, 2010 WL 3843773, *1 (W.D.Mich., Sept. 28, 2010) (prisoner who got no response to his grievance or to his inquiry about its status was obliged to appeal the non-response); Gayle v. Benware, 716 F.Supp.2d 293, 298 (S.D.N.Y. 2010); Wallace v. Hanratty, 2010 WL 680342, *2-3 (N.D.Fla., Feb. 18, 2010); Garrott v. LeFrancis, 2010 WL 605310, *3 (W.D.Wash., Feb. 18, 2010) (plaintiff who received no response should have filed another grievance or appealed); Alatorre v. Reese, 2009 WL 1587091, *3 (S.D.Miss., June 5, 2009); *see Appendix A for additional authority on this point; see also* George v. Morrison-Warden, 2007 WL 1686321, *4 (S.D.N.Y., June 11, 2007) (dismissing because the plaintiff failed to appeal the lack of response to his grievances, but holding that his efforts had "earned him a response" and directing the Bureau of Prisons to consider a new appeal timely and respond within 30 days). *But see* Hicks v. Irvin, 2010 WL 2723047, *7 (N.D.Ill., July 8, 2010) (holding where right to appeal lack of decision depends on date grievance was logged, a prisoner who never gets a receipt indicating the date of logging can never timely appeal, and has exhausted).

[450] 28 C.F.R. § 115.52(d)(4).

[451] 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).

[452] Adusah v. Stevens, 2011 WL 867517, *1 (S.D.Ga., Mar. 10, 2011).

[453] Pritchett v. Anderson, 2007 WL 1035140, *3 (S.D.Ga., Apr. 3, 2007) (stating plaintiff "remains in the process" of exhaustion); Sewell v. Ramsey, 2007 WL 201269, *4 (S.D.Ga., Jan. 24, 2007).

if the prisoner cannot appeal without a decision, and is denied a decision, the prisoner has sufficiently exhausted "available" remedies.[454]

Some courts have held that prisoners are obligated to make some effort to follow up when they receive no response to their grievances.[455] This holding is questionable in the absence

[454] 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); Brengettcy v. Horton, 423 F.3d 674, 682 (7th Cir. 2005) (holding prisoner who received no decision 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); Gebo v. Thyng, 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 (N.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).

[455] 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); 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); Njos v. Norwood, 2012 WL 6014761, *11 (C.D.Cal., Oct. 18, 2012) (noting prisoner failed to complain that "unit team" was refusing to process his requests), *report and recommendation adopted*, 2012 WL 6014777 (C.D.Cal., Nov. 30, 2012); Logan v. Emerson, 2012 WL 3292829, *5 (N.D.Ill., Aug. 9, 2012); Mateo v. O'Connor, 2012 WL 1075830, *6-7 (S.D.N.Y., Mar. 29, 2012 (holding prisoner who did not inquire about the fate of a vanished grievance appeal did not exhaust); Harvey v. Menzina, 2012 WL 645893, *2-3 (M.D.La., Jan. 10, 2012) (holding prisoner who waited seven months to inquire about a disappearing grievance failed to exhaust), *report and recommendation adopted*, 2012 WL 641562 (M.D.La., Feb. 28, 2012); Allen v. Oregon, 2012 WL 698361, *10 (D.Or., Jan. 31, 2012), *report and recommendation adopted*, 2012 WL 719000 (D.Or., Feb. 29, 2012); Dunbar v. Barone, 2012 WL 259982, *5 (W.D.Pa., Jan. 27, 2012) (holding that plaintiff should have filed a grievance about the failure to decide his grievances), *aff'd*, 487 Fed.Appx. 721 (3rd Cir. 2012) (unpublished); Norwood v. Nanganama, 2010 WL 4806965, *5-6 (E.D.Cal., Nov. 18, 2010) (holding prisoner whose grievance disappeared and who did not try again failed to exhaust), *report and recommendation adopted*, 2011 WL 94543 (E.D.Cal., Jan. 11, 2011); Goodrick v. French, 2010 WL 3735699, *4 (D.Idaho, Sept. 17, 2010) (holding prisoner who receives no response "must still show that he was reasonably diligent in pursuing relief through the administrative system," independently of anything in the grievance policy), *reconsideration denied*, 2011 WL 675265 (D.Idaho, Feb. 17, 2011); Erickson v. Blades, 2010 WL 3210959, *4-5 (D.Idaho, Aug 12, 2010) ("It is not enough to argue simply that the grievance system doesn't state what to do in the event of a lost grievance or he thought it was too late at that point to 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 Rehabilitation, 2010 WL 1135917, *4 (E.D.Cal., Mar. 22, 2010) (plaintiff who alleged he mailed his grievance and then resubmitted it "was familiar with the grievance process and could have sought further administrative

of a prison rule instructing prisoners what to do in that situation.[456] If there is such a rule, of course, prisoners are obliged to follow it.[457] 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.[458] 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.[459]

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review to remedy any failure to respond"); *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).

[456] *See* 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 appeal as the rules provided); Facey v. Dickhaut, --- F.Supp.2d ----, 2012 WL 4361431, *5 (D.Mass., Sept. 25, 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).

[457] Neal v. Howard, 2012 WL 6000309, *3 (E.D.Okla., Nov. 30, 2012) (noting policy provides "a mechanism to advise the administrative review authority that . . . grievances are not being answered"); Johnson v. Johns, 2011 WL 1304268, *6 (W.D.Okla., Mar. 4, 2011), *report and recommendation adopted*, 2011 WL 1258354 (W.D.Okla., Apr. 1, 2011); Pope v. Wiedow, 2009 WL 3698475, *5 (W.D.Okla., Nov. 4, 2009) (holding prisoner must grieve the failure to respond to a grievance if the grievance policy so requires).

[458] Malone v. Ball, 2009 WL 1376848, *3 (S.D.Ind., May 15, 2009), *report and recommendation adopted*, 2009 WL 1657902 (S.D.Ind., June 11, 2009); *accord*, Knighten v. Mitcheff, 2011 WL 96663, *3 (S.D.Ind., Jan. 10, 2011) (noting that appeal procedures required prisoner to attach the appeal response and fill in the grievance number, which he would not have absent a response).

[459] 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 v. Washington, 300 F.3d 829, 833 (7th Cir. 2002) (holding failure to respond makes remedy unavailable); Clay v. Downs,
2012 WL 6720616, *4 (N.D.Ill., Dec. 27, 2012) (holding 15-month delay in deciding a grievance appeal made the remedy unavailable); Haskins v. DeRose, 2011 WL 2654115, *3 (M.D.Pa., May 20, 2011), *report and recommendation adopted*, 2011 WL 2654112 (M.D.Pa., July 6, 2011); Williams v. Byrd, 2011 WL 1044917, *3

Prisoners whose grievances are rejected with no avenue of appeal available, *e.g.* by returning them unrecorded or "unprocessed," have satisfied the exhaustion requirement.[460] 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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(E.D.Ark., Feb. 24, 2011) (alleged lack of response and absence of record from file raised a factual issue whether plaintiff had exhausted), *report and recommendation adopted*, 2011 WL 1058584 (E.D.Ark., Mar. 22, 2011); Roy v. Dominguez, 2010 WL 1568611, *3 (N.D.Ind., Apr. 16, 2010); Proctor v. Board of County Com'rs of County of Pottawatomie, 2010 WL 711198, *3 (W.D.Okla., Feb. 25, 2010) (holding non-response meant plaintiff had exhausted); *additional authority for this point is collected in Appendix A*; *see* Abney v. County of Nassau, 237 F.Supp.2d 278, 282-83 (E.D.N.Y. 2002) (holding that plaintiff was not obliged to appeal a non-response where the grievance policy did not provide for such an appeal); Artis-Bey v. District of Columbia, 884 A.2d 626, 634 (D.C. 2005) (holding that where regulations required prison officials to respond within 15 days and said a prisoner "may" appeal if no timely response is received, prisoner was not obliged to appeal absent a response). In *Artis-Bey*, the court stated: "In addition to being grounded in the language of the regulation, our interpretation serves the purpose of resolving inmate complaints, if possible, at the lowest administrative level, without escalating the grievance process unnecessarily. . . . If every unconsented delay in response to a grievance required appeal, inmates would have to appeal to higher authorities over grievances that could and should be resolved at lower levels, simply to avoid forfeiting their right to an eventual civil action." 884 A.2d at 635. *But see* Allen v. Tobia, 2003 WL 260708, *4 (N.D.Ill., Jan. 29, 2003) (holding that a month's delay in responding to a non-emergency grievance did not entitle the plaintiff to go directly to federal court where the rules allowed six months for a decision).

[460] Sanders v. Davis, 2012 WL 5830423, *4-5 (S.D.Ill., Oct. 15, 2012) (holding remedies unavailable where officials refused to sign off and to process plaintiff's grievance), *report and recommendation adopted*, 2012 WL 5830401 (S.D.Ill., Nov. 16, 2012); Johnson v. Meier, 842 F.Supp.2d 1116, 1118-19 (E.D.Wis., Feb. 6, 2012) (where grievance was rejected erroneously for failure to present a single issue and decision was not appealable, plaintiff had exhausted); Devbrow v. Gallegos, 2011 WL 4709062, *1 (N.D.Ind., Oct. 4, 2011) (where grievance was rejected without assigning a grievance number, "it is not realistic to speak of appealing," and plaintiff had exhausted); Smith v. Maypes-Rhynders, 2011 WL 4448944, *11 (S.D.N.Y., July 28, 2011) (finding special circumstances excusing exhaustion where grievance appeal was returned without instructions as to correcting defects or other steps to be taken), *report and recommendation adopted*, 2011 WL 4444214, *4 (S.D.N.Y., Sept. 26, 2011); Henry v. Cox, 2011 WL 2693014, *6 (S.D.Ill., June 20, 2011) (where prisoner could not get a response at the prison and appeal body returned his appeal for failure to attach the responses he could not get, prisoner had exhausted), *report and recommendation adopted*, 2011 WL 2683180 (S.D.Ill., July 11, 2011); Wolf v. Reinke, 2011 WL 1898914, *5 (D.Idaho, May 18, 2011) (where staff rejected plaintiff's grievance, claiming the problem was solved, and told him not to complain about it again, he had exhausted); Williams v. Shelton, 2010 WL 1948347, *5 (D.Or., Feb. 24, 2010), *report and recommendation adopted*, 2010 WL 1881769 (D.Or.. May 11, 2010), *adhered to on reconsideration*, 2010 WL 3186637 (D.Or., Aug. 11, 2010); Miller v. Catlett, 2010 WL 444734, *3 (S.D.Cal., Feb. 1, 2010) (where prisoner's staff complaint was rejected on the ground it was really a disciplinary appeal, with no instruction as to what to do to file a staff complaint, plaintiff did not fail to exhaust); 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); *see Appendix A for additional authority on this point.*

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.[461] Conversely, if a grievance is rejected without decision, but there *is* some means to pursue it further, the prisoner must take advantage of it.[462]

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,[463] or gave other responses that proved to be misleading or confusing.[464] The Second

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[461] Glick v. Walker, 385 Fed.Appx. 579, 583 (7th Cir. 2010); Thornton v. Snyder, 428 F.3d 690, 694 (7th Cir. 2005); 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* Boclair 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).

[462] *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.681, 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).

[463] 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 (11th Cir. 1999) (holding that grievance decision that stated it was non-appealable need not have been appealed); Jacobs v. Wallace, 2013 WL 451619, *3 (E.D.Mo., Feb. 6, 2013) (similar to *Baker*, below); Baker v. Yates, 2013 WL 440767, *2-3 (E.D.Cal., Feb. 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.Or., 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. 991-993, below.

[464] 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); Goodman v. Carter, 2001 WL 755137, *2-3 (N.D.Ill., July 2, 2001) (holding that a prisoner who got no response to his grievance, and complained to the Administrative Review Board, which told him to file another grievance, had sufficiently exhausted); 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); *see* Thornton v. Snyder, 428 F.3d 690, 694-96 (7th Cir. 2005) (holding that a prisoner who filed under an emergency grievance

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.[465] 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.[466]

Exhaustion must be done personally; except in class actions, a prisoner cannot rely on another prisoner's exhaustion,[467] unless of course prison procedures so permit.[468] If officials 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.[469]

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procedure, and was told his complaint was not an emergency, but was not instructed either by the response or by the rules that he should therefore file a regular grievance, did not fail to exhaust), *cert. denied*, 547 U.S. 1192 (2006).

[465] Brownell v. Krom, 446 F.3d 305, 312 (2d Cir. 2006). This decision was consistent with the court's prior holdings that non-exhaustion may be justified if prisoners act on a reasonable, even if incorrect, understanding of the rules, *see* Giano v. Goord, 380 F.3d 670, 678 (2d Cir. 2004); Hemphill v. New York, 380 F.3d 680, 689-90 (2d Cir. 2004), and that the actions of prison personnel that inhibit exhaustion may estop them from raising the defense. *Hemphill*, 380 F.3d at 688-89.

[466] 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.

[467] Heng v. Donald, 2011 WL 925726, *5 (M.D.Ga., Jan. 25, 2011), *report and recommendation adopted as modified*, 2011 WL 867556 (M.D.Ga., Mar. 14, 2011); Ambrose v. Walker, 2010 WL 2653342, *4 (S.D.Ill., July 1, 2010); Shariff v. Coombe, 655 F.Supp.2d 274, 286 (S.D.N.Y. 2009); Doss v. Gilkey, 649 F.Supp.2d 905, 913 (S.D.Ill. 2009) (holding imprisoned husband's grievance did not exhaust incarcerated wife's complaint about inability to correspond with him); Davis v. Shaw, 2009 WL 1490609, *3 (S.D.N.Y., May 20, 2009); Johnson v. Killian, 2009 WL 1066248, *5 n.1 (S.D.N.Y., Apr. 21, 2009), *amended on denial of reconsideration*, 2009 WL 1787724 (S.D.N.Y., June 23, 2009); King v. Caruso, 2008 WL 4534076, *1 (W.D.Mich., Sept. 30, 2008); Newman v. Montana Dept. of Corrections, 2007 WL 2461937, *3 & n.2 (D.Mont., Aug. 27, 2007); Cooey v. Taft, 2007 WL 1202718, *2 (S.D.Ohio, Apr. 23, 2007), *stay of execution denied*, 484 F.3d 424 (6th Cir. 2007); Carvajal v. Lappin, 2007 WL 869011, *5 (N.D.Tex., Mar. 22, 2007); *see* § IV.K on exhaustion issues in class actions. Information from other prisoners' grievances may, however, be probative of relevant facts such as whether the remedy is available for particular problems or under particular circumstances. *See* Ellis v. Schwarzenegger, 2010 WL 715721, *3 (E.D.Cal., Feb. 26, 2010).

[468] At least one prison system permits "group grievances" which may be filed by one prisoner on behalf of himself and others, subject to certain requirements. *See* Shirley v. Tuggle, 331 Fed.Appx. 484, 485 (9th Cir. 2009) (defendants failed to establish non-exhaustion where it appeared grievance had been treated as a group grievance); 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); 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 did not comply with grievance rules for such exhaustion), *report and recommendation adopted*, 2009 WL 137138 (W.D.Pa., Jan. 20, 2009).

[469] Pugh v. Goord, 571 F.Supp.2d 477, 491-93 (S.D.N.Y. 2008).

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.[470] This is true *a fortiori* where prison officials refuse to process a grievance or appeal on the ground that the prisoner has already received the relief sought.[471] 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"[472]—though decisions are not unanimous on this point.[473]

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[470] 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); Johnson v. Cantrall, 2012 WL 5398473, *1 (W.D.Okla., Sept. 17, 2012) (holding plaintiff who obtained medical and psychiatric treatment, an internal investigation, and instruction 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), *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), *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 Appendix A for additional authority on this point*. *Contra*, 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. 475-476, below. *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).

[471] 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).

[472] Sulton v. Wright, 265 F.Supp.2d 292, 298-99 (S.D.N.Y. 2003); *accord*, Harvey v. Jordan, 605 F.3d 681, 685 (9th Cir. 2010) (citing *Abney*); Abney v. McGinnis, 380 F.3d 663, 669 (2d Cir. 2004); Hawthorne v. Mendoza-Power, 2011 WL 4375286, *3 (E.D.Cal., Sept. 19, 2011) (following *Harvey* as to recurrence of problems resolved in earlier grievance), *report and recommendation adopted*, 2011 WL 4963146 (E.D.Cal., Oct. 18, 2011); Vitasek v. Maricopa County Sheriff's Office, 2011 WL 1253263, *5-6 (D.Ariz., Apr. 4, 2011) (similar to *Abney*); Nesbitt v. Villanueva, 2011 WL 737617, *4 (N.D.Ill., Feb. 24, 2011) (ruling on facts similar to *Abney*'s); Manning v. Dolce, 2010 WL 3515718, *3-4 (E.D.Mich., July 12, 2010) (prisoner who had won his grievance about dietary restrictions need not exhaust again when that grievance resolution was disobeyed), *report and recommendation adopted*, 2010 WL 3515715 (E.D.Mich., Sept. 8, 2010); Brookins v. McDonald, 2010 WL 2572949, *3-4 (E.D.Cal., June 22, 2010) (prisoner who prevailed at an early stage on request for a prosthetic leg was not required to file a new grievance a year later when fittings were discontinued), *report and recommendation adopted*, 2010 WL 3212862 (E.D.Cal., Aug. 12, 2010); Beckhum v. Hirsch, 2010 WL 582095, *9-10 (D.Ariz., Feb. 17, 2010) (citing *Abney*); Collins v.

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,[474] and others have said that a plaintiff who

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Mendoza-Powers, 2007 WL 2900494, *5 (E.D.Cal., Oct. 1, 2007) (holding prisoner whose request for surgery was granted at an early stage but the surgery was not performed for 14 months had exhausted); Lay v. Hall, 2007 WL 137155, *6 (E.D.Cal., Jan. 17, 2007) (holding prisoner whose grievance decision said he would receive the surgery he sought reasonably believed no further remedy was available), *report and recommendation adopted*, 2007 WL 704560 (E.D.Cal., Mar. 6, 2007); Kaplan v. New York State Dept. of Correctional Services, 2000 WL 959728, *3 (S.D.N.Y., July 10, 2000); 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* Allen v. Reynolds, 2011 WL 2174427, *6-7 (D.Colo., Apr. 28, 2011) (holding plaintiff exhausted available remedies where his grievance about noncompliance with earlier decision was rejected as duplicative), *report and recommendation adopted*, 2011 WL 2174424 (D.Colo., June 3, 2011); Chatman v. Felker, 2011 WL 445685, *6 (E.D.Cal., Feb. 3, 2011) (holding rejection of second grievance as improper, after first grievance favorable decision was not implemented, meant remedies were not available), *report and recommendation adopted*, 2011 WL 1118702 (E.D.Cal., Mar. 28, 2011); Hoskins v. Zank, 2008 WL 283053, *6 (E.D.Wis., Jan. 31, 2008) (declining to dismiss where prisoner received a favorable decision, then appealed late when it wasn't implemented).

[473] *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); 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.

2010 WL 234871, *5.

[474] *See* 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); 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. Thyng, 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

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.[475] 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.[476]

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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 WL 5000140, *4 (S.D.Cal., Nov. 21, 2008), the court held that even though the plaintiff obtained all the relief he sought, he should have appealed further to get a ruling on whether the defendants have violated his constitutional right to court access—contrary to decisions that hold that prisoners do not have to exhaust legal theories. *See* n. 509, below.

[475] *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. Cantrall, 2012 WL 5398473, *1 (W.D.Okla., Sept. 17, 2012) (holding where damages were not available and defendants did not identity 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. 641, below.

[476] *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."); Williams v. Hull, 2009 WL 1586832, *7 (W.D.Pa., June 4, 2009) ("Because there is no futility excepton 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,"[477] 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 grant one of those alternative forms of relief, but then failed to implement their decision.[478]

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).

[477] 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* 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, underttaken 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.

[478] 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*, 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*

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.[479]

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.[480] It rejected as "impracticable" and "counter-intuitive" the State's argument that prisoners should file appeals of favorable decisions just in case they are not implemented.[481] 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

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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). 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); Reece v. Sisto, 2012 WL 602921, *4-5 (E.D.Cal., Feb. 23, 2012) (holding that plaintiff who asked that all dorms receive heat and got a response that his dorm now had adequate heat, and his grievance was fully granted, and who had indicated he was dissatisfied with that result at an *earlier* stage, did not exhaust); 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).

[479] 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 "[a]lthough 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).

[480] 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 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).

[481] 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).

grievance procedure, since that process could have granted further relief such as changes in policy or discipline of staff.[482] 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."[483]

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. 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.[484] 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."[485] Further, the apparent holding of the Second Circuit decisions is dangerously open-ended. Since no matter what relief the prisoner obtains, there will always be something else prison officials could do,[486] it amounts to a holding that prisoners should *always* appeal favorable decisions, 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.[487] 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

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[482] 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.

[483] Ruggiero v. County of Orange, 467 F.3d 170, 178-79 (2d Cir. 2006).

[484] 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.

[485] 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 after receiving the relief he requested in his grievances is not only counter-intuitive, but it is not required by the PLRA. . . ." *Id.*

[486] *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. 475-476, above.

[487] Dixon v. Goord, 224 F.Supp.2d 739, 750-51 (S.D.N.Y. 2002).

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,[488] 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."[489]

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.[490] The New 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."[491] The New York

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[488] *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").

[489] Jones v. Bock, 549 U.S. 199, 218 (2007); *see* Woodford v. Ngo, 548 U.S. 81 (2006) (adopting proper exhaustion rule).

[490] 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 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 offender must include as much descriptive information about the individual as possible." 20 Ill.Admin. Code § 504.810(b); *see* 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).

[491] 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

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).[492] 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."[493] It also retains the above quoted language on the grievance form itself.[494] The September 2012 revision similarly requires "a description of the grievance or request [and] a specific action requested" in addition to identifying information, date of incident or indication that it is ongoing, and whether the prisoner has also complained to a court or other agency.[495]

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."[496] That standard has been endorsed by the Second and Tenth Circuits as well,[497] and in substance by the Ninth Circuit.[498] Its leniency is shown by the Seventh Circuit's holding

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(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).

[492] Appendix C, New York City Department of Correction, Directive 3375R, Inmate Grievance Resolution Program, at attachment (March 4, 1985).

[493] Appendix G, New York City Dep't of Correction Directive 3375R-A, Inmate Grievance Resolution Program at § IV.B.1.a (March 13, 2008) (http://www.nyc.gov/html/doc/downloads/pdf/3375R-A.pdf).

[494] Appendix G, *id.*, at Attachment C.

[495] Appendix H, New York City Dep't of Correction Directive 3376, Inmate Grievance and Request Program at § IV.D.1 (September 10, 2012)
(http://www.nyc.gov/html/doc/downloads/pdf/Directive_3376_Inmate_Grievance_Request_Program.pdf).

[496] 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. Kerner, 404 U.S. 519, 520 (1972).

[497] Kikumura v. Osagie, 461 F.3d 1269, 1283 (10th Cir. 2006); Johnson v. Testman, 380 F.3d 691, 697 (2d Cir. 2004); *accord*, Milan v. Chen, 2008 WL 2229215, *5 (C.D.Cal., Feb. 5, 2008), *report and recommendation adopted*, 2008 WL 2116930 (C.D.Cal., May 14, 2008) *and* 2008 WL 2116959 (C.D.Cal., May 14, 2008).

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 allow prison officials to take appropriate responsive measures." 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.

[498] 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 grieved. 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* 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.

that a prisoner 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[499] (though the Second Circuit has required a surprising degree of specificity in one case applying it[500]). 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.[501]

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).

[499] 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] for 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, ___ F.Supp.2d ___, 2012 WL 601071, *3 (S.D.N.Y., Feb. 22, 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); 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).

[500] *See* Brownell v. Krom, 446 F.3d 305, 310 (2d Cir. 2006), discussed later in this section.

[501] Skinner v. Schriro, 2007 WL 2177326 at (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

Decisions of other courts before *Jones v. Bock* were generally consistent with the notion of a notice pleading standard,[502] and those decisions remain good law where the administrative rules do not demand more.[503] Many decisions have taken a similar approach without much theoretical discussion.[504] One recent decision finds a "useful analog" in Title VII exhaustion law,

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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 physical capacities gave fair notice of his claims despite the absence of detail about his injuries. Jones v. Michigan, 2010 WL 1002633, *6 (E.D.Mich., Mar. 18, 2010). *But see* Ballew v. Black, 2007 WL 914181, *3 (E.D.Ky., Mar. 23, 2007) (holding grievance alleging failure to provide diabetes medication did not exhaust because plaintiff failed to mention having been injured or wanting $2.5 million in damages; grievance policy required grievant to state "all aspects of the issue").

[502] 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).

[503] *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 statutes 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 identify their potential litigable civil rights claims early on but it is to give the correctional institution the opportunity to address (and hopefully resolve) the grieved-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* 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.

[504] *See* 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 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

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.[505] Of course if the grievance process actually results in an investigation of 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.[506] The 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.[507] Several courts

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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); Rhinehart v. Cate, 2013 WL 322533, *2 (N.D.Cal., Jan. 28, 2013) ("By complaining about lockdowns and ask 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); *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).

[505] 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).

[506] 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); 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); Stoltie 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 "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. 726-727, below.

[507] Pintado v. Dora, 2011 WL 794607, *6 (S.D.Fla., Jan. 28, 2011) (where grievance response focused on medical complaints, but grievance and appeal mentioned prisoner was required to do work he was not trained for, latter issue was exhausted), *report and recommendation adopted*, 2011 WL 777887 (S.D.Fla., Mar. 1, 2011); Loeb v. Runnels, 2007 WL 4463491, *2 (E.D.Cal., Dec. 17, 2007); McKinney v. Kelchner, 2007 WL 2852373, *4 (M.D.Pa., Sept. 27, 2007); Masterson v. Campbell, 2007 WL 2536934, *13 n.6 (E.D.Cal., Aug. 31, 2007); Skinner v. Schriro, 2007 WL 2177326, *4 (D.Ariz., July 27, 2007).

have held grievances to have effectively exhausted despite grievance decisions stating that the grievances were insufficiently specific.[508]

As noted above, courts have said that legal theories need not be exhausted.[509] Despite the foregoing, some courts have insisted on what amounts to pleading of legal theories in certain kinds of grievances. In *Brownell v. Krom*,[510] 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.[511] 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

[508] *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 then 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., May 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. 733-744, below.

[509] 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 grieved."); Johnson v. Testman, 380 F.3d 691, 697 (2d Cir. 2004); 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"); Johnson v. Johnson, 385 F.3d 503, 517-18 (5th Cir. 2004); Strong v. David, 297 F.3d 646, 650 (7th Cir. 2002); *see* 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 (N.D.Cal., July 2, 2010) (legal theory of bystander liability need not be grieved; doing so would be "particularly difficult" for prisoners "who have only 15 days to file an inmate appeal and who have limited access to any legal materials"); Sanders v. Williams, 2010 WL 1631767, *13 (D.N.M., Mar. 20, 2010) (legal issues of supervisory liability and Eighth Amendment basis of claim need not be grieved); Smith v. Deluaux, 2009 WL 3482280, *1-2 (W.D.Wis., Oct. 26, 2009) (prisoner challenging disciplinary hearing need not have grieved facts about confinement conditions that would support a claim of a liberty interest to exhaust); Baker v. McDonough, 2009 WL 2244500, *5 (N.D.Fla., July 25, 2009) (rejecting argument that plaintiff exhausted his claim of lack of statutory authority but not his constitutional claims about the same actions); Brown v. Grove, 647 F.Supp.2d 1178, 1185 (C.D.Cal. 2009) (allegation that plaintiff needed medical care, asked for it, and didn't get it exhausted his deliberate indifference claim); Young v. McNeil, 2009 WL 2058923, *5 (N.D.Fla., July 13, 2009).

[510] 446 F.3d 305 (2d Cir. 2006).

[511] *Brownell*, 446 F.3d at 310-11.

didn't have his property.[512] 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.[513] Still, the implication that prisoners ordinarily must file multiple grievances about the same event as they learn new information, 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,[514] though the courts are far from

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[512] 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).

[513] 446 F.3d at 312-13.

[514] *See, e.g.*, Emmett v. Ebner, 423 Fed.Appx. 492, 493 (5th Cir. 2011) (unpublished); Wellington v. Snider, 2012 WL 3999871, *6 (D.Nev., June 19, 2012) (ignoring prisoner's claim that he learned of the retaliatory motive too late for his grievance), *report and recommendation adopted*, 2012 WL 3999851 (D.Nev., Sept. 10, 2012); Goolsby v. Ridge, 2012 WL 1068881, *13-14 (S.D.Cal., Mar. 29, 2012) (holding prisoner who learns late of a retaliatory grievance must add the claim in the later stages of the grievance process or file a new grievance about it); Spencer v. City of Philadelphia, 2012 WL 1111141, *6 (W.D.Pa., Apr. 2, 2012); Maestas v. Legrand, 2011 WL 7416359, *5 (D.Nev., Dec. 9, 2011); Hagan v. Beard, 2011 WL 4592388, *5 (M.D.Pa., Sept. 30, 2011); *see Appendix A for further authority on this point; see also* Ferguson v. Hall, 2012 WL 5355760, *6 (E.D.Cal., Oct. 30, 2012) (holding plaintiff need not label conduct as retaliation where it immediately followed plaintiff's complaint about the same staff member); Perry v. Dickinson, 2012 WL 2559426, *6 (E.D.Cal., June 29, 2012) ("While plaintiff did not have to use the term 'retaliation,' he was required to provide facts that would put jail staff on notice that plaintiff believed his placement in administrative segregation was due to the filing of inmate grievances and requests."); Conkleton v. Muro, 2011 WL 1135370, *12-13 (D.Colo., Jan. 31, 2011) (plaintiff sufficiently exhausted retaliation where the facts he recited were sufficient to convey his belief that he had suffered retaliation), *report and recommendation adopted in part, rejected in part on other grounds*, 2011 WL 1119869 (D.Colo., Mar. 28, 2011); Brown v. Grove, 647 F.Supp.2d 1178, 1185 (C.D.Cal. 2009) (plaintiff sufficiently exhausted retaliation where he did not use that word but a "fair reading" of his grievance showed that he alleged that the acts at issue were retaliatory); Myers v. Johns, 2008 WL 5115249, *11 (N.D.N.Y., Dec. 4, 2008) (where prisoner grieved that defendants treated him improperly based on a prior grievance, he need not have used the word "retaliation"); Gregory v. Ayers, 2006 WL

unanimous on this point.[515] Some decisions have taken a similar approach to discrimination claims where the prisoner grieved some adverse conduct but did not allege in the grievance that the conduct was discriminatory.[516] Decisions are in conflict on the need to specify a conspiracy

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548444, *3 (E.D.Cal., Mar. 3, 2006) (holding prisoner's grievance allegations of underlying conduct by staff did not exhaust his claim that they conspired so other staff members could retaliate against him), *report and recommendation adopted*, 2006 WL 845846 (E.D.Cal., Mar. 31, 2006); Lindell v. O'Donnell, 2005 WL 2740999, *28 (W.D.Wis., Oct. 21, 2005) (holding retaliation claims unexhausted where the reason plaintiff stated for the retaliation was different in grievances from the lawsuits; "In order to exhaust his claims, plaintiff must have alleged sufficient facts to put respondents on notice so they could respond to his complaints. In the context of retaliation claims, this minimal requirement is satisfied when a prisoner specifies the protected conduct and the act of retaliation in which defendants are alleged to have engaged."); *see also* Bonty v. Plaster, 2007 WL 1558500 *3 n.6 (W.D.Okla., May 25, 2007) (holding prisoner who mentioned retaliation need not have identified the legal right at issue too), *vacated in part on other grounds*, 2007 WL 2458789 (W.D.Okla., Aug. 24, 2007). One court has held that where "minor misconduct hearings" were not grievable, the prisoner was obliged to exhaust by raising his complaint of retaliation during the hearing. McDonald v. Briggs, 2010 WL 727583, *10 (E.D.Mich., Feb. 24, 2010). *Cf.* Watson-El v. Wilson, 2010 WL 3732127, *9 (N.D.Ill., Sept. 15, 2010) (holding prisoner could not litigate claim that account was encumbered in order to put pressure on him without having exhausted that "new theory of recovery").

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.

[515] *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 grieved."); Wilson v. Mata, 348 Fed.Appx. 237, 238 (9th Cir. 2009) (unpublished) (holding a grievance that 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); Hernandez-Arredondo v. Hollingsworth, 2012 WL 3047735, *5 (S.D.Ill., June 29, 2012) (holding claims of retaliatory conduct need not be exhausted separately from the underlying facts), *report and recommendation adopted*, 2012 WL 3046006 (S.D.Ill., July 25, 2012); *see Appendix A for additional authority on this point*.

[516] *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 discriminal 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., June 5, 2012); Spencer v. City of Philadelphia, 2012 WL 1111141, *6 (W.D.Pa., Apr. 2, 2012); Andrews v. Evert, 2011 WL 4479480, *2 (N.D.Cal., Sept. 23, 2011) (grievance about shackling that did not mention race did not exhaust discrimination claim); Finch v. Lopez, 2011 WL 6133648, *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 cell based on 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 Stufflebeam without following the proper procedure was indicative of her practice to discriminate," gave sufficient notice of his racial discrimination claim); Banks v. Kartman, 2009 WL 2045942, *3 (W.D.Wis., July 13, 2009) (complaint about discrimination exhausted racial discrimination claim even if it did not specify race); Douglas v. Caruso, 2008 WL 4534061, *8 (W.D.Mich., Sept. 30, 2008) (allegation that plaintiff was treated differently from others similarly situated exhausted equal protection claim). *But see* Parker v. Mulvaney, 2008 WL 4425579, *5 (W.D.Mich., Sept. 26, 2008) (grievance need not assert claim of discrimination, since legal theories are not required in grievances).

claim in a grievance.[517] The courts are 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.[518] 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.[519] 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 not available in the administrative process.[520]

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[517] The Second Circuit has held—correctly, in my view—that conspiracy is a legal theory which prisoners need not grieve; it is sufficient to describe the alleged misconduct adequately. Espinal v. Goord, 558 F.3d 119, 127-28 (2d Cir. 2009); *accord*, Hernandez-Arredondo v. Hollingsworth, 2012 WL 3047735, *5 (S.D.Ill., June 29, 2012) (claims of conspiratorial conduct need not be exhausted separately from the underlying facts), *report and recommendation adopted*, 2012 WL 3046006 (S.D.Ill., July 25, 2012); Ramos v. Monteiro, 2008 WL 4184644, *11 (C.D.Cal., Sept. 8, 2008); *see* Underwood v. Mendez, 2006 WL 860142, *5 (M.D.Pa., Mar. 31, 2006) (holding prisoner who complained of a retaliatory transfer need not also have mentioned conspiracy in his grievance, since it was just a factual allegation supporting his retaliation claim). *Compare* 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); Jackson v. Harrison, 2010 WL 3895478, *11 (C.D.Cal., Aug. 25, 2010) (failure to grieve the presence of an agreement meant plaintiff failed to give notice of the nature of his claims), *report and recommendation adopted*, 2010 WL 3895468 (C.D.Cal., Sept. 28, 2010); Negron v. Bryant, 2010 WL 746727, *5 (M.D.Fla., Mar. 3, 2010); Smith v. U.S., 2008 WL 7313360, *9 (M.D.Pa., Dec. 29, 2008) (conspiracy claim was not 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. Reisch, 2007 WL 951858, *6 (D.S.D., Mar. 26, 2007) (same). *Cf.* Ketzner v. Williams, 2008 WL 4534020, *17 (W.D.Mich., Sept. 30, 2008) (allusion to "combined effort" arguably exhausted conspiracy claim).

[518] *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 *Wilson v. Moore*, *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* 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 *Orafan* and not *Moore*.

[519] Vickery v. Allwood, 2010 WL 2680643, *2 (E.D.Mich., July 6, 2010).

[520] 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), *reconsideration denied*, 2007 WL 1806204 (E.D.Mich., June 21, 2007).

3. Exhausting All Issues

Each claim raised in a suit must have been exhausted in order to be heard.[521] That is the case whether it is raised in the initial complaint or added by subsequent amendment.[522] To be exhausted, claims must have been sufficiently recognizable in the grievance to give prison officials notice that the prisoner was complaining about them.[523] One recent decision finds a

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[521] Jones v. Bock, 549 U.S. 199, 219-20 (2007); Johnson v. Johnson, 385 F.3d 503, 517-19 (5th Cir. 2004) (holding that a prisoner who complained of sexual assault and referred to his sexual orientation in his grievance, but said nothing about his race, did not exhaust his racial discrimination claim); Kaufman v. Baynard, 2012 WL 844480, *14-15 (S.D.W.Va., Feb. 3, 2012) (holding grievance about excessive force did not exhaust all related "new claims" such as subsequent transfer, failure to transfer medical records with her, alleged misconduct at disciplinary hearing, etc.), *report and recommendation adopted*, 2012 WL 844408 (S.D.W.Va., Mar. 12, 2012); Rebaldo v. Jenkins, 2011 WL 2293129, *3 (E.D.La., June 8, 2011) (holding claim of sexual assault did not exhaust claim about failure to provide mental health treatment afterward); Bibbs v. Singh, 2011 WL 1884336, *3 (N.D.Cal., May 18, 2011) (grievance about excessive force incident 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 (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 (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 (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 (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.*

[522] *See* nn. 435-431, above, concerning amendment of complaints and the exhaustion requirement.

[523] 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); 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); 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); Wright v. Langford, 2012 WL 1074508, *3 (M.D.Ga., Mar. 29, 2012) (holding grievance stating only: "My hand is fractured your officers handcuffed me behind my back" did not exhaust a use of force claim), *reconsideration denied*, 2012

"useful analog" 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.[524]

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.[525]

Exactly what constitutes a separate claim for exhaustion purposes is not clear. Some courts have defined them broadly in determining what has been exhausted.[526] 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.[527] A similar

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WL 2989602 (M.D.Ga., July 20, 2012); Tatum v. Shoemaker, 2012 WL 899633, *8 (W.D.Va., Mar. 16, 2012) (holding a use of force grievance did not exhaust claim of excessively tight handcuffs where they were not mentioned); Elvik v. Nevada, 2011 WL 7121452, *7 (D.Nev., Oct. 5, 2011) (grievance which stated that "grievant is lock[ed] up in the med/mental unit, grievant is not getting any treatment" did not exhaust concerning acts and omissions that led to his suicide attempt), *report and recommendation adopted*, 2012 WL 275396 (D.Nev., Jan. 31, 2012); *see Appendix A for additional authority on this point*; *see* Reynolds v. Starcevich, 2012 WL 602935, *6 (E.D.Cal., Feb. 23, 2012) (holding addition of a request for a policy change to a grievance on appeal "changed the issue" and the plaintiff did not exhaust). *But see* Mikko v. Smock, 2012 WL 1079806, *9 (E.D.Mich., Mar. 7, 2012) (holding grievance stating "[t]he unit ventilation system was deliberately left on while the chemical spray was used" exhausted that issue even though the grievance mainly referred to delays in medical care), *report and recommendation adopted in part, rejected in part on other grounds*, 2012 WL 1079811 (E.D.Mich., Mar. 30, 2012); Prochaska v. Heidorn, 2012 WL 359694, *8-9 (E.D.Wis., Feb. 2, 2012) (complaint about failure to obtain medical records exhausted claim about treatment where plaintiff had been told he would get the care if the practitioners got the records); Pough v. Almager, V.M., 2010 WL 796748, *11 (S.D.Cal., Mar. 4, 2010) (plaintiff exhausted claim about kitchen workers' lack of hairnets, since he raised it and it was acknowledged at each level, even though his grievance primarily alleged the denial of hot meals), *objections overruled*, 2010 WL 1031153 (S.D.Cal., Mar. 19, 2010).

[524] Flanagan v. Shipman, 2009 WL 4043063, *6 n.4 (N.D.Fla., Nov. 20, 2009).

[525] Jones v. Bock, 549 U.S. 199, 220-24 (2007); *see* § IV.E.6, below.

[526] *See, e.g.*, Rhinehart v. Cate, 2013 WL 322533, *2 (N.D.Cal., Jan. 28, 2013) (holding that grievance about lockdowns exhausted conditions of lockdowns, such as lack of exercise); Passer v. Steevers, 2010 WL 3210850, *7-8 (E.D.Cal., Aug. 10, 2010) (holding medical care grievances exhausted general adequacy of care for the injuries named, not restricted to particular treatments mentioned), *report and recommendation adopted*, 2010 WL 3636198 (E.D.Cal., Sept. 14, 2010); Masterson v. Campbell, 2007 WL 2536934, *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); 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); Grant v. Cathel, 2007 WL 119158, *5 (D.N.J. Jan. 10, 2007) (holding that a prisoner's complaint that he was not receiving prescribed cancer treatment and medication and was in great pain care sufficiently exhausted a claim that defendants failed to provide an escort to get him to his medical appointments and defendants failed to supervise his medical care; plaintiff's grievance "discuss[ed] the primary grievance underlying his claims, his allegedly inadequate medical treatment"); *see Appendix A for additional authority on this point*.

[527] 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*, 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,

problem may be presented where prison staff are sued for failing to intervene in the unconstitutional actions of other staff members.[528] 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,[529] and some courts have rejected them entirely.[530] As 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

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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. 621-622, below.

[528] 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).

[529] 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).

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

> by prison officials into the failure to protect issues that were brought to their attention would presumably uncover them.[531]

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 grieved.[532] A variation of the same problem arises in connection with "name the defendant" rules, discussed in the next section.[533]

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

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[531] 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).

[532] *See* Fletcher v. Sheets, 2011 WL 3206856, *6 (S.D.Ohio, June 10, 2011) (reference to warden's "unprofessional acts" did not exhaust claim of inadequate training), *report and recommendation adopted*, 2011 WL 3206842 (S.D.Ohio, July 28, 2011); Delaney v. Tilton, 2009 WL 1405008, *4 (E.D.Cal., May 19, 2009) (grievance about officer's sexual harassment did not exhaust claim of failure to respond to complaints about officer), *report and recommendation adopted*, 2009 WL 1953174 (E.D.Cal., July 7, 2009); Hernandez v. Harrison, 2008 WL 4836046, *8-9 (C.D.Cal., Oct. 29, 2008) (grievance about medical care exhausted as to treatment at the prison but not as to the appeal/review process in the central office); Delaney v. Tilton, 2008 WL 5054106, *2-3 (E.D.Cal., Nov. 19, 2008) (grievance about harassment and 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).

[533] *See* n. 621 *et seq.*, below.

responding to complaints of sexual misconduct,[534] 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.[535]

Supervisory liability aside, some "exhaust all claims" decisions, in effect, require uncounselled prisoners to make fine distinctions that many lawyers would miss.[536] As one court has pointed out, this approach would permit prison officials to "obstruct legal remedies to unconstitutional actions by subdividing the grievances, arguing, *e.g.*, that the Christians, Muslims, and Jews must each grieve denial of access to their own communal services,"[537] though

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[534] Amador v. Andrews, 655 F.3d 89, 92-94 (2d Cir. 2011).

[535] *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).

[536] *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), *aff'd*, --- Fed.Appx. ----, 2013 WL 135564 (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).

[537] 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). *But see* English v. Redding, 2003 WL 881000, *4 (N.D.Ill., Mar. 6, 2003) (refusing to apply *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).

courts have generally rejected extreme attempts to manufacture non-exhaustion by subdividing prisoners' complaints.[538] 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.[539] 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.[540]

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.[541] Four Justices then observed that Social Security proceedings are inquisitorial rather than

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[538] *See, e.g.*, 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), *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), *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 *Underwood v. Mendez*, 2005 WL 2300361 (M.D.Pa., Sept. 9, 2005), *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* 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), *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 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).

[539] *See* nn. 514-516, above.

[540] *See* Johnson v. Testman, 380 F.3d 691, 697 (2d Cir. 2004); *see* nn. 496-500, 509, for further discussion of these propositions.

[541] Sims v. Apfel, 530 U.S. 103, 109-10 (2000).

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.[542]

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."[543] The federal prison grievance system similarly is intended "to solve problems and be responsive to issues inmates raise."[544] 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, 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 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.[545]

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."[546] 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.[547] 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."[548]

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[542] *Id*. at 110-12. (Justice O'Connor joined the plurality on narrower grounds. *Id*. at 112-14.)

[543] Appendix D, New York State Dep't of Correctional Services Directive No. 4040, Inmate Grievance Program § 701.1(b) (July 1, 2006).

[544] Kikumura v. Osagie, 461 F.3d 1269, 1284 (10th Cir. 2006) (quoting policy).

[545] 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").

[546] Rule 15(a), Fed.R.Civ.P.

[547] Jones v. Bock, 549 U.S. 199, 212-16, 221-24 (2007).

[548] 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. Portoundo, 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,[549] 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,[550] within

[549] *See* Mayo v. Snyder, 166 Fed.Appx. 845, 848 (7th Cir. 2006) (unpublished) (holding grievance seeking medical care for back pain did not exhaust as to events after the filing of the grievance); Diaz v. Martel, 2012 WL 6097135, *4 (E.D.Cal., Dec. 7, 2012) (holding medical care grievance did not exhaust against doctor who had not treated the patient at the time of the grievance), *report and recommendation adopted*, 2013 WL 417615 (E.D.Cal., Jan. 30, 2013); Toney v. Hakala, 2012 WL 1185028, *3 (E.D.Mo., Apr. 9, 2012) (holding "an IRR alleging inadequate medical care does not serve to exhaust administrative remedies for incidents or conditions that occur *after* an IRR is filed"); Taylor v. Holmes, 2009 WL 2170250, *6 (W.D.Mich., July 21, 2009); Vantassel v. Rozum, 2009 WL 1833601, *3 (W.D.Pa., June 25, 2009) (rejecting notion that a grievance can exhaust post-grievance events in medical care cases); Washington v. Reed, 2008 WL 2230704, *2 (W.D.Mo., May 29, 2008); Laubach v. Scibana, 2008 WL 281545, *6 (W.D.Okla., Jan. 31, 2008), *aff'd*, 2008 WL 5169352 (10th Cir. 2008); Coltar v. Jacinto, 2007 WL 184808, *4 (E.D.Cal., Jan. 19, 2007) (holding incidents post-dating filing of complaint were "*necessarily* unexhausted" in case involving course of treatment of breast lump); Percival v. Knowles, 2006 WL 1581796, *2 (E.D.Cal., June 5, 2006) (holding a grievance about an injury and delay in treatment of it did not exhaust with respect to a claim that after treatment was provided (and after the grievance was filed), aftercare instructions were not followed); Kane v. Winn, 319 F.Supp.2d 162, 223 (D.Mass. 2004) (holding prisoner with ongoing medical complaints had exhausted only up to the date of his grievance).

[550] *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); 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*, 2013 WL 450858 (E.D.Cal., Feb. 4, 2013); Montanez v. Gonzalez, 2012 WL 5208639, *3 (E.D.Cal., Oct. 22, 2012) (similar to *Parzyck*; claim involves denial of medication), *report and recommendation adopted*, 2012 WL 6053628 (E.D.Cal., Dec. 5, 2012); Lopez v. Florez, 2012 WL 3778858, *4 (E.D.Cal., Aug. 31, 2012) (similar to *Parzyck*, *supra*; claim involves denial of medication), *report and recommendation adopted*, 2012 WL 4207306 (E.D.Cal., Sept. 18, 2012); Cowan v. Allen, 2012 WL 3042438, *4 (N.D.Ala., July 5, 2012) (holding once the plaintiff had 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; relying on *Parzyck*); Hightower v. Schwarzenegger, 2011 WL 2620376, *8 (E.D.Cal., June 30, 2011) ("Repeated 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*); Oliverez v. Albitre, 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 complaint).

In *Tillis v. Lamarque*, 2006 WL 644876 (N.D.Cal., 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. *Accord*, Voorhis v. Gaetz, 2009 WL 2230763, *2 (C.D.Ill., July 22, 2009); Patel v. Federal Bureau of Prisons, 2006 WL 1307733, *3 (E.D.Ark., May 11, 2006) (same holding as to plaintiff transferred in the course of the grievance

reason.[551] The same should be true for complaints about other sorts of ongoing violations.[552] 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.[553] 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.[554] But, the court cautioned, a grievance would not exhaust as to future incidents of a more discrete nature (*e.g.*, a month apart).[555]

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process). *But see* Watson v. Sisto, 2011 WL 5155175, *40 (E.D.Cal., Oct. 28, 2011) (declining to allow amendment to assert injunctive medical care claim after transfer because it was not exhausted at the new prison); Maeshack v. Avenal State Prison, 2011 WL 3439194, *4 (E.D.Cal., Aug. 4, 2011) (holding grievance about medical care rendered by one doctor did not exhaust against another doctor who saw the plaintiff after transfer), *report and recommendation adopted*, 2011 WL 6780906 (E.D.Cal., Dec. 27, 2011).

[551] 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 was no administrative record of his current medical status and treatment. Similarly, the court found non-exhaustion in *Barrett v. Cate*, 2011 WL 6753993, *4-5 (E.D.Cal., Dec. 23, 2011), in which the prisoner relied on a 2003 grievance but complained that in 2005-06 different doctors at a different prison improperly reevaluted him rather than following an earlier doctor's opinions.

[552] *See* Williams v. Horel, 2011 WL 4372141, *3-5 (N.D.Cal., Sept. 19, 2011) (rejecting the argument that a grievance about nutritionally and religiously inadequate vegetarian diets exhausted only as to the particular meal described in the grievance).

[553] 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.") 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).

[554] 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).

One court has held that a prisoner who exhausts a claim may sue persons involved with processing the grievance concerning that claim without pursuing a new grievance. 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).

[555] Johnson v. Johnson, 385 F.3d at 521 n.13; *accord*, Trigo v. TDCJ-CID Officials, 2010 WL 3359481, *20 (S.D.Tex., Aug. 24, 2010) (applying *Johnson* to complaint about Hepatitis C treatment); Howard v. Waide, 2008 WL 2814821, *16 (holding grievances about history and risk of gang assault did not exhaust as to gang threats and assault after he had been transferred out of state and returned to a different unit). *But see* Ellis v. Vadlamudi, 568

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 the policy without further exhaustion.[556] This view should apply to instances where the plaintiff is transferred to a different prison or unit but remains subject to the same policy.[557]

Such holdings may not extend to more discrete or factually dissimilar incidents.[558] 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 may present different regulatory and constitutional issues depending on their content.[559] Another

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F.Supp.2d 778, 784-85 (E.D.Mich. 2008) (declining to apply *Johnson* to denial of care for chronic medical condition, instead analogizing to continuing violation rule in statute of limitations analysis).

[556] 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."); Mitchell v. Felker, 2012 WL 2521827, *5 (E.D.Cal., June 28, 2012) (holding grievance about lockdowns 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 lockdowns and got decision upholding the policy need not grieve subsequent lockdowns; "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 lockdowns."), *report and recommendation adopted*, 2012 WL 1130706 (E.D.Cal., Mar. 29, 2012); *see Appendix A for additional authority on this point*.

[557] 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. 490, above, and 603, 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.

[558] *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); 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).

[559] Daker v. Chatman, 2007 WL 4061961, *2 (N.D.Ga., Oct. 31, 2007); *accord*, Miskam v. McAllister, 2011 WL 1549339, *4-5 (E.D.Cal., Apr. 21, 2011) (holding challenge to censorship policy and to one publication did not exhaust policy's application to other publications or existence of a list of banned publications). A grievance challenging the policy does, of course, exhaust with respect to a facial challenge to the policy. Meisberger v. Donahue, 245 F.R.D. 627, 629 (S.D.Ind. 2007).

has held similarly with respect to complaints of "rampant" mishandling of legal mail.[560] 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.[561]

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.[562] 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."[563]

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,[564] assuming the grievance rules permit their consideration.[565] As with other procedural issues, if the grievance body

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[560] Kirkwood v. Ives, 2011 WL 6148665, *4-5 (E.D.Ky., Dec. 9, 2011); *accord*, Hayes v. Radford, 2012 WL 4481213, *7 (D.Idaho, Sept. 28, 2012) (holding exhaustion of several periods of opening legal mail did not exhaust as to a later period after the initial exhaustion).

[561] Evans v. Inmate Calling Solutions, 2011 WL 7470336, *9-10 (D.Nev., July 29, 2011).

[562] Johnson v. Killian, 2009 WL 1066248, *4 (S.D.N.Y., Apr. 21, 2009) (plaintiffs grieved in 2005 but filed suit in 2007 alleging that the new warden's prayer policies were harsher than the ones at issue in the earlier grievance), *amended on denial of reconsideration*, 2009 WL 1787724 (S.D.N.Y., June 23, 2009); Welch v. California Dept. of Corrections, 2007 WL 2156243, *3, 5 (E.D.Cal., July 25, 2007), *report and recommendation adopted*, 2007 WL 2792405 (E.D.Cal., Sept. 26, 2007); O'Bryan v. Bureau of Prisons, 2006 WL 1494024, *4 (E.D.Mich., May 25, 2006).

[563] 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); Ayyad 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 regarding 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).

[564] Bouman v. Robinson, 2008 WL 2595180, *2 (W.D.Wis., June 27, 2008) (allowing consideration of issue raised on appeal where no rule was cited barring amending a grievance appeal and officials considered the issue); Morris v. Hickison, 2008 WL 2261431, *3 (E.D.Cal., June 2, 2008) (holding prisoner complaining of retaliation for filing of grievance could raise that claim in an appeal of the initial grievance), *report and recommendation adopted*, 2008 WL 3976924 (E.D.Cal., Aug. 20, 2008); Edwards v. Hook, 2007 WL 1756347, *4-5 (E.D.Cal., June 18, 2007) (holding plaintiff who grieved an officer's conduct and complained about the lack of a thorough investigation of it in his grievance appeals had exhausted all of the claims; neither the PLRA nor grievance rules required him to "re-start the grievance process" when a new related claim emerges during the process), *report and recommendation adopted*, 2007 WL 2225993 (E.D.Cal., Aug. 2, 2007); Marshall v. Hubbard, 2007 WL 1627534, *4 (E.D.Ark., June 4, 2007) (similar holding in medical care case where post-grievance events were raised in grievance appeals).

[565] *See* Johnson v. Rowley, 569 F.3d 40, 45 (2d Cir. 2009) (holding issue raised on appeal was not exhausted where regulations prohibited amending grievance on appeal); Bailey-El v. Federal Bureau of Prisons, 2007 WL 2461764, *2 (3d Cir., Aug. 29, 2007) (unpublished) (citing 28 C.F.R. § 542.15(b)(2)); Reynolds v. Starcevich, 2012 WL 602935, *6 (E.D.Cal., Feb. 23, 2012) (holding prisoner who added a request for a policy change on appeal changed the issue and hence did not exhaust); Johnson v. Norris, 2009 WL 3823727, *4 (E.D.Ark., Nov. 16, 2009) ("An inmate is not permitted to add additional staff members or issues at the appeal level."); *see also* Newson v. Steele, 2010 WL 3123295, *5 (E.D.Mich., July 1, 2010) ("Plaintiff cannot raise a new issue in a grievance appeal and have it be deemed exhausted, unless the MDOC proceeded to address that new claim on the merits."), *report and recommendation adopted*, 2010 WL 3123288 (E.D.Mich., Aug. 9, 2010).

decides the merits of a grievance appeal raising new matter, rather than invoking its rules to reject it, the matter is exhausted.[566]

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."[567] 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 or the merits of conduct underlying disciplinary charges or related to them are not exhausted by a disciplinary appeal.[568] A suit that attacks the conduct of the disciplinary hearing itself is clearly exhausted by a disciplinary appeal,[569] unless the grievance rules provide

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[566] Conkleton v. Muro, 2011 WL 1135370, *11 (D.Colo., Jan. 31, 2011), *report and recommendation adopted in part, rejected in part on other grounds*, 2011 WL 1119869 (D.Colo., Mar. 28, 2011). *But see* Rodgers v. Tilton, 2011 WL 3925085 (E.D.Cal., Sept. 1, 2011) (holding that a new issue added during the course of exhaustion, but not mentioned in the final decision, was not exhausted).

[567] Jones v. Bock, 549 U.S. 199, 218 (2007).

[568] *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"); 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").

[569] Davis v. Barrett, 576 F.3d 129, 133 (2d Cir. 2009) (disciplinary appeal exhausted due process claim; plaintiff's argument that SHU conditions were atypical and significant so as to require due process did not require a separate grievance); Jenkins v. Haubert, 179 F.3d 19, 23 n.1 (2d Cir. 1999) (holding that disciplinary appeals exhausted plaintiff's challenge to the resulting disciplinary sanctions); Smith v. Deluaux, 2009 WL 3482280, *1-2 (W.D.Wis., Oct. 26, 2009) (same as *Davis v. Barrett*); Portley-El v. Steinbeck, 2008 WL 697383, *10 (D.Colo., Mar. 14, 2008) (holding that a disciplinary appeal exhausted due process claims under rule stating grievance procedure may not be used to seek review of disciplinary convictions; rejecting defendants' argument that constitutional claims could be grieved); Rivera v. Goord, 2003 WL 1700518, *10 (S.D.N.Y., Mar. 28, 2003) (holding that a claim of hearing officer misconduct was exhausted by a disciplinary appeal); Muhammad v. Pico, 2003 WL 21792158, *8 n.22 (S.D.N.Y., Aug. 5, 2003) (holding due process claims exhausted by disciplinary appeal); Sweet v. Wende Correctional Facility, 253 F.Supp.2d 492, 496 (W.D.N.Y. 2003) (holding an appeal from a disciplinary hearing may exhaust if it raises the same issues as the subsequent federal complaint). *But see* Lopez v. Wall, 2010 WL 4225944, *5 (D.R.I., Aug. 19, 2010) (holding rule making "discipline decisions" non-grievable did not apply to allegations of lack of impartiality and falsification of evidence, which were required to be grieved), *report and recommendation*

otherwise.[570] The next question is whether issues 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 prisons' own designation of appropriate remedies under the Supreme Court's "proper exhaustion" holding.[571] 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 justified by special circumstances[572] 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.[573] Remarkably, New York has not clarified the distinction between grievances and

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adopted, 2010 WL 4225872 (D.R.I., Oct. 25, 2010), *motion to reopen denied*, 2011 WL 3667592 (D.R.I., Aug 22, 2011); Spencer v. Cain, 2008 WL 4712825, *2 (M.D.La., Oct. 23, 2008) (claim that disciplinary charges were retaliatory for exercise of free speech was not exhausted by being mentioned in a disciplinary appeal); Rivera v. Nelson, 2006 WL 2038393, *1 (D.Colo., July 17, 2006) (holding that disciplinary appeals exclusively addressed only "the *conviction* that resulted from the disciplinary hearing and the *placement* that resulted from the administrative segregation hearing," and due process claims should have been the subject of separate grievances); *accord*, Ross v. Gibson, 2006 WL 2567853, *2 (D.Colo., Aug. 8, 2006).

[570] 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).

[571] Woodford v. Ngo, 548 U.S. 81 (2006); *see* Lane v. Zirkle, 2012 WL 6860255, *6 (W.D.Pa., Dec. 21, 2012) (holding that plaintiff was required to grieve claims of retaliation, denial of access to courts, due process and equal protection violations even though they arose from a disciplinary incident), *report and recommendation adopted*, 2013 WL 164488 (W.D.Pa., Jan. 15, 2013); James v. Dicus, 2012 WL 6849719, *3 (E.D.Ark., Dec. 5, 2012) (holding that though disciplinary claims cannot be grieved, retaliation and discrimination claims related to the discipline can be grieved), *report and recommendation adopted*, 2013 WL 140891 (E.D.Ark., Jan. 11, 2013); Crump v. Best, 2012 WL 1056806, *16 (E.D.Mich., Mar. 5, 2012) (holding claim that charges were retaliatory was not non-grievable under "clarified" rule stating "Decisions made in hearings conducted by hearing officers of the State Office of Administrative Hearings and Rules . . . and issues directly related to the hearing process (e.g., sufficiency of witness statements; timeliness of misconduct review; timeliness of hearing)" are "non-grievable."), *report and recommendation adopted*, 2012 WL 1021703 (E.D.Mich., Mar. 27, 2012), *reconsideration denied*, 2012 WL 1443817 (E.D.Mich., Apr. 26, 2012); Ragland v. City of St. Louis, Mich., 2012 WL 511827, *4 (E.D.Mich., Jan. 9, 2012) (holding disciplinary appeal did not exhaust claim that charges were retaliatory), *report and recommendation adopted*, 2012 WL 511801, *2 (E.D.Mich., Feb. 16, 2012); Keal v. Washington, 2007 WL 1977155, *2 (W.D.Wash., July 3, 2007) (noting disciplinary appeal must be used to challenge infraction or sanction for infraction, but staff misconduct grievance was the remedy for use of force complaint); Parks v. Dooley, 2011 WL 847011, *16-17 (D.Minn., Feb. 11, 2011) (holding claims of retaliatory false disciplinary charges, threats, coercion, and false testimony at a disciplinary hearing should have been grieved; actual disciplinary dispositions were exhausted through the disciplinary appeal system), *report and recommendation adopted in pertinent part*, 2011 WL 841278 (D.Minn., Mar. 8, 2011). If the designated remedy is a disciplinary appeal, but the prisoner cannot appeal 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).

In *Akhtar v. Mesa*, 698 F.3d 1202, 1210-11 (9th Cir. 2012), in which the plaintiff challenged his disciplinary conviction by grievance under the relevant rules, he also exhausted his claim about the denial to him of the benefit of a decision that he was entitled for medical reasons to a lower bunk.

[572] 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).

[573] 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.");

appeals since that decision.[574] Indeed, it has made in court precisely the opposite argument from that in *Giano*, arguing that a prisoner who *did* file a grievance about a claim of retaliatory false discipline should instead have pursued a disciplinary appeal.[575]

Unclarity in the rules distinguishing grievances and disciplinary appeals is by no means limited to the New York State prisons.[576] There is also evidence that on some occasions, prison

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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."); 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 late 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).

[574] 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.

[575] 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).

[576] *See* McCullough v. Federal Bureau of Prisons, 2012 WL 718845, *3 (E.D.Cal., Mar. 5, 2012) (holding that a disciplinary appeal resulting in expungement of the conviction did not exhaust a complaint that the nominally expunged conviction was retained in the prisoner's file); Riggs v. Valdez, 2010 WL 4117085, *9-10 (D.Idaho, Oct.

personnel have treated complaints as non-grievable, contrary to prison rules, simply because a disciplinary proceeding had been commenced concerning the same subject matter.[577] 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.[578] In that situation, the prisoner may be obliged to raise the overlapping issue in the disciplinary process.[579]

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

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18, 2010) (noting lack of clarity of rule barring grievances about disciplinary "hearing process including findings and sanctions," and prison officials' rebuffing those prisoners who tried to grieve), *on reconsideration in part*, 2010 WL 5391313 (D.Idaho, Dec. 22, 2010); Ortego v. Forcht Wade Correctional Center, 2010 WL 2985830, *3 (W.D.La., Apr. 29, 2010) (noting conflict over whether retaliatory discipline should be pursued via grievance or disciplinary appeal), *report and recommendation adopted in part, rejected in part*, 2010 WL 2990067 (W.D.La., July 27, 2010); Cahill v. Arpaio, 2006 WL 3201018, *2 (D.Ariz., Nov. 2, 2006) (stating jail rules concerning what aspects of a disciplinary incident can be grieved are "sufficiently confusing such that Plaintiff's interpretation that he could not grieve his excessive force claim is reasonable"); *see also* Shaw v. Jahnke, 607 F.Supp.2d 1005, 1011 (W.D.Wis. 2009) (noting confusion of grievance personnel and state lawyers about the relation of exhaustion to disciplinary appeals, suggesting state clarify its rules).

[577] 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).

[578] *See* Tedder v. Johnson, 2012 WL 931990, *6 (D.S.C., Feb. 23, 2012) (citing rule that an incident that results in a disciplinary charge cannot be grieved until the charge is disposed of, and the prisoner then has 15 days to file a grievance), *report and recommendation adopted*, 2012 WL 931979 (D.S.C., Mar. 19, 2012); 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* 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.Colo., July 17, 2006) (holding disciplinary appeal was exclusive only 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").

[579] *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 not directly related to the conduct of the hearing itself could be raised in the disciplinary proceeding.

closely examining the scope of review of disciplinary appeals.[580] 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."[581] Raising an issue in a disciplinary appeal certainly creates that opportunity, whether prison officials choose to take advantage of it or not.[582]

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,"[583] overruling contrary decisions in several circuits. Notice to persons who might later be sued "has not been thought to be one of the leading purposes of the exhaustion requirement."[584] (Some courts seem not to get this point even after *Jones*.[585]) This holding applies equally to damage claims and injunctive claims.[586]

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[580] *See, e.g.,* Benjamin v. Goord, 2002 WL 1586880, *2 (S.D.N.Y., July 17, 2002)*, reconsideration denied*, 2002 WL 31202708 (S.D.N.Y., Oct. 1, 2002); Cherry v. Selsky, 2000 WL 943436, *7 (S.D.N.Y., July 7, 2000).

[581] Porter v. Nussle, 534 U.S. at 525.

[582] 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).

[583] Jones v. Bock, 549 U.S. 199, 218 (2007); *see* Montanez v. Gonzalez, 2012 WL 5208639, *3 (E.D.Cal., Oct. 22, 2012) (similar to *Lewis v. Naku*, below), *report and recommendation adopted*, 2012 WL 6053628 (E.D.Cal., Dec. 5, 2012); Naseer v. Hill, 2010 WL 3472355, *4 (W.D.Wis., Sept. 3, 2010) ("An inmate is only required to put the prison on notice of his claims, not the correct name of each particular actor." Plaintiff mis-named one officer in his grievance); Johnson v. Norris, 2009 WL 3147807, *3 (E.D.Ark., Sept. 25, 2009) (holding grievance stating that prisoner had not seen a medical practitioner about his ailment, without mentioning any names, sufficiently exhausted claims against private prison corporation and staff); Lewis v. Naku, 2007 WL 3046013, *5 (E.D.Cal., Oct. 18, 2007) (holding plaintiff who complained of inadequate medical care for ongoing conditions sufficiently exhausted even though some defendants had not yet treated him at the time of his grievances).

[584] Jones v. Bock, *id.* (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*, Castillo v. Ryan, 2012 WL 2590545, *5 (D.Ariz., July 5, 2012).

[585] *See, e.g.*, Rains v. Harrington, 2013 WL 510139, *10 (S.D.Tex., Feb. 12, 2013) ("Without their names on the grievances, Vatani or Dr. Panchbhavi did not have fair notice that he had a complaint against them."); Richardson v. Folino, 2012 WL 6552916, *14 (W.D.Pa., Dec. 14, 2012) (holding grievance "was not enough to put Dr. Parks on notice that Plaintiff sought to hold him liable for any alleged misconduct on his part"); Cochran v. Farver, 2012 WL 5354961 (E.D.Ark. June 19, 2012) (holding a bystander officer named in a use of force grievance "was, or should have been, on notice that he was included" in the grievance), *report and recommendation adopted in part, rejected in part on other grounds*, 2012 WL 5354992 (E.D.Ark., Oct. 29, 2012); Lilly v. Norman, 2012 WL 996567, *2 (E.D.Mo., Mar. 23, 2012) ("By failing to put Defendant Reed on notice of such claim, Plaintiff failed to exhaust the administrative remedies afforded to him by the PLRA."); Boyles v. Hobbs, 2008 WL 5088174, *9 (E.D.Ark., Nov. 26, 2008) (stating that plaintiff's grievance did not give notice to individuals of their actions or inactions); Vandiver

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."[587] 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,[588] nor do the majority of grievance procedures nationwide.[589] Courts will not reach to infer a requirement of naming defendants from more general requirements in a grievance policy.[590] Nor will they accept assertions of such a rule that is not supported by written policy.[591] The fact that some defendants are named in a grievance does not mean that the plaintiff did not exhaust with respect to those whose names are omitted.[592]

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v. Correctional Medical Services, 2008 WL 117857, *4 (W.D.Mich., Jan. 10, 2008) (naming some parties implied that "no other parties need worry about claims against them"), *aff'd in part, rev'd in part, and remanded*, 326 Fed.Appx. 885 (6th Cir. 2009) (approving lower court's finding that grievance "failed to give the defendants fair notice that the grievance was directed against them").

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 679519 (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.

[586] Peterson v. Morin, 2012 WL 1694775, *1 (S.D.Tex., May 15, 2012) (citing Johnson v. Johnson, 385 F.3d 503, 515–16 (5th Cir. 2004), noting its citation with approval in *Jones v. Bock*), *report and recommendation adopted as modified*, 2012 WL 1694775, *1-2 (S.D.Tex., May 15, 2012).

[587] Jones v. Bock, *id.*

[588] 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 Correction Directive 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).

[589] 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); Long v. Friddle, 2009 WL 50009, *2 (N.D.Tex., Jan. 6, 2009) (Texas has no name the defendant requirement).

[590] 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.").

[591] 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

Some systems do require naming of staff,[593] and some have added such requirements in recent years.[594] 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,[595] though this requirement need not be exacting[596] and decisions on the point are far from unanimous.[597]

(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).

[592] 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). A similar argument has been made (but now rejected on appeal), in cases from a system that does have a name the defendant rule, in opposition to the argument that even in such a system, if the grievance body decides the merits, the claim is exhausted. *See* n. 635, below.

[593] *See, e.g.*, Leonard v. Mohr, 2012 WL 423771, *5 (S.D.Ohio, Feb. 9, 2012) (applying requirement of "if applicable, the name or names of personnel involved"), *report and recommendation adopted*, 2012 WL 936410 (S.D.Ohio, Mar. 20, 2012); Boyles v. Hobbs, 2008 WL 5088174, *8-9 (E.D.Ark., Nov. 26, 2008); Figgs v. Evans, 2008 WL 4328229, *1-2 (S.D.Ill., Sept. 18, 2008) (noting requirement to include name of each involved person, or describe any person whose name is not known); Talley v. Johnson, 2008 WL 2223259, *2 (M.D.Ga., May 1, 2008) (noting requirement to "state fully the time, date, names of facility staff and inmates involved, witnesses, and a narrative of the event"), *report and recommendation adopted*, 2008 WL 2223258 (M.D.Ga., May 23, 2008); Olney v. Hartwig, 2007 WL 438781, *1 (D.Or., Feb. 6, 2007) (citing Oregon policy requiring a separate grievance against each responsible staff member); Jones v. Courtney, 2006 WL 3306850, *4 (D.Kan., Nov. 13, 2006) (noting that Kansas grievance policy requires stating "who is the subject of the complaint" and "what effect the . . . person is having on the grievant"); Lane v. Harris County Jail Medical Dept., 2006 WL 2868944, *5 (S.D.Tex., Oct. 5, 2006) (noting that jail policy demands a written statement that "fully and truthfully explains the incident that occurred," along with the "date, time and location of the incident," and the "names of any Deputies, Staff Members or inmates who were involved or are witnesses"). Some grievance systems do not require naming of defendants but do require, *e.g.*, "sufficient information to identify staff." Gordon v. Joyner, 2010 WL 3001967, *4 (W.D.Ky., July 28, 2010) (quoting state policy).

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).

[594] *See* n. 490, above, concerning revisions in Michigan and Illinois grievance procedures. *See also* Jones v. Felker, 2011 WL 533755, *6 (E.D.Cal., Feb. 11, 2011) (applying pending California rule before its actual effective date), *report and recommendation adopted*, 2011 WL 1299454 (E.D.Cal., Mar. 29, 2011).

[595] Johnson v. Johnson, 385 F.3d 503, 522 (5th Cir. 2004) (exhaustion of some problems "will often require, as a practical matter, that the prisoner's grievance identify individuals who are connected with the problem"); Bryant v. Strong, 2013 WL 504893, *3 (S.D.Tex., Feb. 7, 2013) (following *Johnson*); Palmer v. Fenoglio, 2012 WL 1466562, *5-6 (S.D.Ill., Apr. 2, 2012) (holding grievance about medical problem did not exhaust as to doctor who became involved only after the grievance; name the defendant rule cited), *report and recommendation adopted,* 2012 WL 1466511, *3-4 (S.D.Ill., Apr. 27, 2012), *motion to amend denied*, 2012 WL 2254213 (S.D.Ill., June 15, 2012); Toney v. Hakala, 2012 WL 1185028, *3-4 (E.D.Mo., Apr. 9, 2012) (holding grievances about medical problem did not exhaust as to doctor who became involved only after the grievances); Coomer v. DeFilippo, 2012 WL 870730, *6 (D.N.J., Mar. 14, 2012) (holding plaintiff's naming of one staff member as responsible for his problem meant that he failed to exhaust as to two others, citing policy requiring grievance information to be "clear," "complete," and "specific"), *appeal dismissed*, No. 12-1895 (3d Cir., Aug. 3, 2012) (unpublished); Hudson v. McAnear, 2011 WL 67199, *5 (S.D.Tex., Jan. 10, 2011) (holding plaintiff did not exhaust when he neither named a defendant, described him, or described his conduct), *reconsideration denied*, 2011 WL 486236 (S.D.Tex., Feb. 7, 2011); Goudlock v. Hernandez, 2009 WL 2982825, *6 (S.D.Cal., Aug. 4, 2009) (grievance complaining about failure to respond when he fell from a top bunk did not exhaust as to subsequent inadequate medical care by other defendants); Ammons v. Gerlinger, 2007 WL 5514719, *10 (W.D.Wis., Feb. 12, 2007) (grievance asking to see a doctor did not exhaust claim that staff members had concealed his request for medical assistance), *reconsideration*

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.[598] 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.[599]

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"[600]—a question that has been answered affirmatively in other contexts.[601] One

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denied, 2007 WL 5659413 (W.D.Wis., Mar. 12, 2007); Sanchez v. Penner, 2008 WL 544591, *6-7 (E.D.Cal., Feb. 26, 2008), *report and recommendation adopted,* 2008 WL 892760 (E.D.Cal., Mar. 31, 2008); Todd v. LaMarque, 2007 WL 1982789, *3 (N.D.Cal., July 2, 2007) (holding plaintiff failed to exhaust against officers who failed to intervene in an excessive force incident where their conduct was not described in the grievance); Mason v. Sassi, 2007 WL 672095, *3 (S.D.N.Y., Mar. 6, 2007) ("the grievance must, at least, allude generally to the named defendants or to their conduct").

[596] Roland v. Smith, ___ F.Supp.2d ___, 2012 WL 601071, *3 (S.D.N.Y., Feb. 22, 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").

[597] 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. 550, above. This problem is indistinguishable from the one discussed above in § IV.E.3 under the rubric "Exhausting All Issues."

[598] *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.

[599] Jones v. Bock, 549 U.S. 199, 220-24 (2007).

[600] Espinal v. Goord, 558 F.3d 119, 126 n. 5 (2d Cir. 2009).

Some grievance rules recognize this possibility at least in part. Thus, the Illinois rule says that if the grievant does not know someone's name, he or she can describe the person. *See* Figgs v. Evans, 2008 WL 4328229, *1 (S.D.Ill., Sept. 18, 2008) (citing 20 Ill. Admin. Code § 504.810(b)); *see also* Workman v. Reinke, 2011 WL 4431748, *4-5 (D.Idaho, Sept. 22, 2011) (noting rule that if identity of responsible official is unknown, other "specific information" may suffice—here, the grievances were "reasonably specific as to the actions that he was challenging and the range of dates over which those actions had occurred, and there is no indication that

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 "exhaust per 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.[602]

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.[603]

Courts generally acknowledge that a prisoner cannot be required to provide information he or she does not possess.[604] As the Seventh Circuit has colorfully put it in a case involving a

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administrators were confused about the nature of his problem"). In *Campbell v. Harris*, 2012 WL 3204912, *3 (E.D.Ark., Aug. 3, 2012), the court said the prisoner could have identified defendants by titles or duties in his grievance rather than just referring to them as "security." However, this does not allow for the possibility that the prisoner will not know of someone's involvement at all at the time the grievance is filed, a problem that is likely to arise with claims of supervisory liability.

[601] *See* nn. 703-732, below, on the validity and enforceability of grievance rules; nn. 973-980, below, on whether grievance rules can make remedies unavailable in practice.

[602] Freeman v. Berge, 2004 WL 1774737, *3-4 (W.D.Wis., July 28, 2004); *accord*, McKinnie v. Heisz, 2009 WL 3245410, *2 (W.D.Wis., Oct. 7, 2009); Wine v. Pollard, 2008 WL 4379236, *2 (W.D.Wis., Sept. 23, 2008); Czapiewski v. Bartow, 2008 WL 2622862, *1-2 (W.D.Wis., July 1, 2008) (both reiterating point after *Woodford v. Ngo* and *Jones v. Bock*); *see* Heggie v. Michigan Dept. of Corrections, 2008 WL 5459338, *5 (W.D.Mich., Nov. 26, 2008) (noting that the prisoner stated prison officials had refused to provide him with the names of staff members for his grievance; "The Court refuses to interpret the PLRA so as to immunize prison officials from liability when they refuse to provide a prisoner with relevant information necessary to 'properly' pursue a grievance."), *report and recommendation adopted in pertinent part, rejected in part*, 2009 WL 36612 (W.D.Mich., Jan. 5, 2009).

[603] The majority of decisions cited in this discussion are from the Michigan prison system, since Michigan prisoners have been subject to a prolifically litigated name the defendant rule both under pre-*Jones* case law and post-*Jones* prison policy, though some courts have disputed whether the current Michigan rules actually require naming all defendants. Coleman v. Naples, 2012 WL 4501648, *3 (W.D.Mich., Sept. 28, 2012) (holding that Michigan does not have a name the defendant rule because the command to provide "names of all those involved" is not a procedural rule; it is not on the list of procedural reasons to reject a grievance); Stevenson v. Michigan Dept. of Corrections, 2008 WL 623783, *11 (W.D.Mich., Mar. 4, 2008) (a policy requiring plaintiff to provide "the facts" including "who" did not require naming all defendants). *Cf.* Binion v. Glover, 2008 WL 4155355, *3 (E.D.Mich., July 28, 2008) (commenting on variety of approaches to question), *report and recommendation adopted*, 2008 WL 4097407 (E.D.Mich., Aug. 29, 2008).

[604] Brown v. Sikes, 212 F.3d 1205, 1207-08 (11th Cir. 2000); *accord*, 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 acknowledged the need to investigate the incident); 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); Funk v. Stanish, 2011 WL 1304737, *9 (M.D.Pa., Mar. 31, 2011) (holding plaintiff exhausted where he relied on misinformation about defendant's identify); 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

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."[605] Some have held that a name the defendant requirement can be satisfied by a description of the defendant's position or conduct,[606] or by providing enough information that

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v. Madan, 2005 WL 2416036, *2 (M.D.Fla., Sept. 30, 2005). *But see* Patterson v. Stanley, 2012 WL 3648018, *3 (E.D.Tex., Aug. 9, 2012) (dismissing for failure to name a defendant the plaintiff said he could not identify within the grievance deadline, without suggesting how the plaintiff could have proceeded), *report and recommendation adopted*, 2012 WL 3647986 (E.D.Tex., Aug. 23, 2012); 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 I[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).

[605] Glick v. Walker, 385 Fed.Appx. 579, 582 (7th Cir. 2010) (unpublished); *accord*, 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 a 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.").

[606] *See* Johnson v. Johnson, 385 F.3d 503, 523 (5th Cir. 2004) (holding identification of Unit Classification Committees was sufficient to exhaust as to their members); Charles v. Shaw, 2011 WL 2633743, *5 (N.D.Ill., July 5, 2011) (holding identification of defendant as "The Sgt." was sufficient); Brown v. Darnold, 2010 WL 3702373, *5 (S.D.Ill., Aug. 17, 2010) (holding identification of defendant as nurse on duty, with some information about physical appearance, sufficient to exhaust), *report and recommendation adopted*, 2010 WL 3613934 (S.D.Ill., Sept. 8, 2010); Jarrett v. Pramstaller, 2010 WL 584029, *4 (W.D.Mich., Feb. 16, 2010) (holding "AMF doctor" sufficient); Jackson v. Hornick, 2006 WL 1766839, *2 (W.D.Mich., June 21, 2006) (holding a plaintiff who identified the defendant by the initials of his position (A.DDW of SCC) had exhausted); Iacovone v. Wilkinson, 2005 WL 3299032, *5 (S.D.Ohio, Dec. 2, 2005) (holding that failure to name defendants was not a failure to exhaust where the plaintiff's detailed description of his complaint permitted their identification and he did not know their correct identities), *report and recommendation adopted as modified,* 2006 WL 689102 (S.D.Ohio, Mar. 14, 2006); Gibson v. Shabaaz, 2005 WL 1515396, *7 (S.D.Tex., June 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 administrating 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,

grievance officials could figure out easily enough who was involved.[607] Grievances that state the prisoner's lack of knowledge of responsible persons but sufficiently describe the problem have been held adequate.[608] Some courts have held that naming the relevant entity can sufficiently identify the proper individual defendant,[609] and vice versa.[610] Similarly, some courts have held that naming a department or functional unit that is generally responsible for the subject matter of

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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).

[607] Harper v. Henton, 2012 WL 6595159, *5 (S.D.Ill., Nov. 30, 2012) (holding grievance was sufficient where it described injury and medical encounters sufficiently that defendants could identify the staff involved from his medical records; noting officials decided the grievance on the merits), *report and recommendation adopted*, 2012 WL 6594954 (S.D.Ill., Dec. 18, 2012); Workman v. Reinke, 2011 WL 4431748, *4 (D.Idaho, Sept. 22, 2011) (noting grievances were sufficient where they were "reasonably specific as to the actions that he was challenging and the range of dates over which those actions had occurred, and there is no indication that administrators were confused about the nature of his problem"); White v. Bass, 2011 WL 1303393, *6 (N.D.Ill., Mar. 31, 2011) (holding double-celling grievance including details of cellmate's assault contained sufficient detail for prison officials to address the shortcoming); Conley v. Mathes, 2010 WL 3199750, *3 (C.D.Ill., Aug. 10, 2010); Hall v. Raja, 2010 WL 1258204, *4 (E.D.Mich., Mar. 30, 2010); Childers v. Bates, 2010 WL 1268143, *6-7 (S.D.Tex., Jan. 14, 2010), *report and recommendation rejected on other grounds*, 2010 WL 1268139 (S.D.Tex., Mar. 26, 2010); Burton v. Kakani, 2009 WL 3101046, *2-3 (E.D.Mich., Sept. 23, 2009) (finding substantial compliance where plaintiff provided enough information for officials to identify the defendants, and stating that if the policy requires names under those circumstances, that requirement is not a "critical" rule for exhaustion purposes); Pickelhaupt v. Jackson, 2008 WL 4457823, *12 (E.D.Mich., July 22, 2008), *report and recommendation adopted in part, rejected in part on other grounds*, 2008 WL 4457807 (E.D.Mich., Sept. 30, 2008). *But see* Allen v. Feinerman, 2010 WL 894063, *10 (S.D.Ill., Mar. 10, 2010) (plaintiff did not satisfy naming requirement by attaching 79 pages of exhibits from which their identities could have been gleaned).

[608] Childers v. Bates, 2010 WL 1268143, *6-7 (S.D.Tex., Jan. 14, 2010) (remedy was not "personally available" to plaintiff who couldn't identify a defendant because of a head injury with loss of memory), *report and recommendation rejected on other grounds*, 2010 WL 1268139 (S.D.Tex., Mar. 26, 2010); Contor v. Caruso, 2008 WL 878665, *3 (W.D.Mich., Mar. 28, 2008) (plaintiff who said he did not know who denied his requests for medical care, and asked in his grievance for that person's name, sufficiently put defendants on notice of his claim against a medical provider employee).

[609] 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, *11 (W.D.Mich., Mar. 4, 2008) (naming TriCounty Orthopedic was sufficient to exhaust against a doctor employed by it).

[610] McAdory v. Engelsgjerd, 2010 WL 1131484, *3 (E.D.Mich., Feb 11, 2010) (following *Owens*), *report and recommendation adopted*, 2010 WL 1132548 (E.D.Mich., Mar. 23, 2010); Owens v. Correctional Medical Services, Inc., 2008 WL 4534424, *5 (W.D.Mich., Sept. 30, 2008) (grievance naming a doctor employed by a private medical provider exhausted against the provider, since an organization can only act through its employees); Kelley v. DeMasi, 2008 WL 4298475, *3 (E.D.Mich., Sept. 18, 2008) (naming a Correctional Medical Services employee effectively put CMS on notice). *Contra*, Russell v. Correctional Medical Services, Inc., 2012 WL 3596002, *3 (E.D.Ark., May 21, 2012) (grievance naming "CMS medical employees" did not exhaust against private medical provider itself), *report and recommendation adopted*, 2012 WL 3595998 (E.D.Ark., Aug. 20, 2012); Basat v. Caruso, 2008 WL 275679, *4 (E.D.Mich., Jan. 31, 2008) (plaintiff could not name the Department of Correction in his ADA suit because he didn't name it in his grievance, even though he had named the individual Department employees); Vandiver v. Martin, 304 F.Supp.2d 934, 943-44 (E.D.Mich. 2004) (holding plaintiff failed to exhaust against the corporate medical provider, even though he named individual medical practitioners employed by the provider, because his grievance said only that the provider would be liable if his foot was amputated).

the prisoner's complaint is sufficient,[611] and some have held that if the prisoner identifies the problem so the responsible department is obvious, the prisoner has exhausted.[612] Indeed, one has held that naming "the institution" was sufficient in a case that implicated conditions of the physical plant.[613]

Some courts have held that exhaustion is adequate where individuals have been named in appeals and not the initial stage,[614] where the *response* to the prisoner's grievance identifies a

[611] Green v. Wexford Health Sources, 2013 WL 139883, *5 (N.D.Ill., Jan. 10, 2013) (holding that "where the plaintiff is claiming . . . 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"); Hall v. Raja, 2011 WL 4692281, *4 (E.D.Mich., Oct. 6, 2011) (reference to medical staff sufficiently identified private medical provider, especially since grievance was decided on the merits); Carter v. Smith, 2011 WL 2313862, *18 (E.D.Pa., June 13, 2011) (claims against "the S.C.I.G. hospital staff" and "the medical department" and reference to "internal medical appointments" sufficiently identified private medical provider), *order entered*, 2011 WL 2312293 (E.D.Pa., June 13, 2011); Wojtaszek v. Litherland, 2011 WL 4499692, *4 (S.D.Ill., Sept. 27, 2011) (where plaintiff put forth the facts he knew, court refuses to dismiss against private health provider where plaintiff was denied information about defendants and access to medical services contract); Montilla v. Prison Health Services, Inc., 2011 WL 4467712, *3 (E.D.Pa., Sept. 23, 2011) (references to "medical staff" combined with grievance response stating respondent had "followed up with Medical" and plaintiff should "work with the Medical Department" sufficiently identified the defendants), *aff'd on other grounds*, 457 Fed.Appx. 212 (3d Cir. 2012); Cutler v. Correctional Medical Services, 2010 WL 339760, *5 (D.Idaho, Jan. 22, 2010) (complaint about inadequate medical care sufficiently notified private medical provider and its supervisory personnel of allegation that provider was not performing its duty); Gregory v. Santos, 2010 WL 750047, *5 (S.D.Ill., Jan. 19, 2010) (grievance referring to "the medical department" was sufficient to exhaust against the prison's medical director, who had authority over the plaintiff's medical care, and the corporate medical provider), *report and recommendation adopted as modified,* 2010 WL 750040 (S.D.Ill., Mar. 3, 2010); *see Appendix A for additional authority on this point*. *But see* Haynes v. Ivens, 2010 WL 420028, *5-6 (E.D.Mich., Jan. 27, 2010) (grievance naming "Health Care" did not exhaust against a particular physician's assistant); Jennings v. Bergh, 2008 WL 4534417, *4 (W.D.Mich., Sept. 29, 2008) ("supervisor and admin" was too vague and conclusory to identify any specific parties).

[612] 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 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).

[613] Wallace v. Doe, 2011 WL 2461949, *3 (M.D.Pa., June 17, 2011) (holding sufficient a complaint of being burned on an uncovered radiator after prior complaints to "the institution" about uncovered radiators).

[614] Soto v. Hobbs, 2011 WL 5402906, *4 (E.D.Ark., Oct. 27, 2011) (plaintiff exhausted against a defendant mis-named in the initial grievance whose name he had learned and included in the second stage appeal), *report and recommendation adopted*, 2011 WL 5374577 (E.D.Ark., Nov. 7, 2011); Downing v. Correction Medical Services Inc., 2009 WL 511849, *6 (W.D.Mich., Feb. 26, 2009) (policy required naming defendants, but not necessarily at Step I); Douglas v. Caruso, 2008 WL 4534061, *8 (W.D.Mich., Sept. 30, 2008) (naming a defendant at Step III,

defendant or indicates that officials know his or her identity,[615] or where the claim arises from the defendant's role in processing the grievance.[616] Others held that naming of defendants is not required where the prisoner's complaint concerns a policy and not the unauthorized conduct of staff,[617] 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.[618]

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

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when plaintiff first became aware of that person's involvement, satisfied the grievance policy, which does not say all defendants have to be named in Step I); Stevenson v. Michigan Dept. of Corrections, 2008 WL 623783, *11 (W.D.Mich., Mar. 4, 2008) (naming some defendants at the second grievance stage exhausted against them); Marshall v. Hubbard, 2007 WL 1627534, *4 (E.D.Ark., June 4, 2007) (plaintiff exhausted against a doctor whom he did not name in the original grievance because he had not seen him at the time). *Contra*, Flanory v. Bonn, 2011 WL 4434923, *5 (W.D.Mich., Sept. 23, 2011) (on grievance appeals, prisoner may present additional factual detail but may not name defendants for the first time); Maxwell v. Correctional Medical Services, 2011 WL 1458468, *7 (W.D.Mich., Jan. 18, 2011), *report and recommendation adopted*, 2011 WL 1458547 (W.D.Mich., Apr. 15, 2011); Ketzner v. Williams, 2008 WL 4534020, *16 (W.D.Mich., Sept. 30, 2008) ("It is necessary to undertake a more focused examination of the individuals named in each grievance and the factual allegations made against that individual." Persons must be named in the Step I grievance, and not later in the process, to be named as defendants.); *see also* cases cited in n. 565, above, concerning systems in which grievance rules forbid naming additional persons at later stages of the administrative process.

[615] Diaz v. Palakovich, 2011 WL 4867549, *5 (3rd Cir., Oct. 14, 2011) (noting that one defendant had acknowledged receiving the grievance, and that the grievance response acknowledged that the grievance officer had discussed the grievance with mail room staff); Spruill v. Gillis, 372 F.3d 218, 234 (3d Cir. 2004); McClain v. Kale, 2012 WL 2192242, *4 (M.D.Pa., Apr. 23, 2012) (holding grievance investigator who the plaintiff said lied about his lost property was sufficiently identified by his involvement in the grievance process), *report and recommendation adopted*, 2012 WL 2192271 (M.D.Pa., June 14, 2012) ; Montilla v. Prison Health Services, Inc., 2011 WL 4467712, *3 (E.D.Pa., Sept. 23, 2011) (citing grievance response stating respondent had "followed up with Medical" and plaintiff should "work with the Medical Department" in finding that plaintiff had sufficiently identified the defendants); Hudson v. DeForest, 2010 WL 1141609, *1 (E.D.Mich., Mar. 24, 2010); Kelley v. DeMasi, 2008 WL 4298475, *3 (E.D.Mich., Sept. 18, 2008); Plaster v. Kneal, 2008 WL 4090790, *3-4 (M.D.Pa., Aug. 29, 2008) (declining to dismiss where plaintiff identified the security department, but was told he should appeal to "Central Office Medical," indicating officials were on notice of the relevant persons); Sides v. Cherry, 2007 WL 1411841, * 3 (W.D.Pa., May 10, 2007) (holding policy satisfied where grievance response said "[a]ll staff involved were interviewed regarding your claims" and the defendants were specifically named in the response); Reaves v. Caruso, 2006 WL 2077589, *3 (E.D.Mich., July 24, 2006).

[616] Diaz v. Palakovich, 2011 WL 4867549, *5 (3rd Cir., Oct. 14, 2011) (noting that one defendant responded to the grievance); Williams v. Beard, 482 F.3d 637, 639-40 (3d Cir. 2007) (where the defendant not named in the grievance was the person who received the grievance, and his response showed his knowledge and involvement, plaintiff exhausted); Watkins v. Ghosh, 2011 WL 5981006, *5 (N.D.Ill., Nov. 28, 2011) (contrary rule "could result in a never-ending cycle of grievances that would needlessly delay a prisoner's access to judicial relief"); 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); Sisney v. Reisch, 2007 WL 951858, *5 (D.S.D., Mar. 26, 2007).

[617] *See* Harris v. Moore, 2005 WL 1876126, *2 (E.D.Mo., Aug. 8, 2005); Smeltzer v. Hook, 235 F.Supp.2d 736, 741-42 (W.D.Mich. 2002) (declining to apply rule to policy challenge, since failure to name individuals did not hamper the defendants' investigation).

[618] *See* Hooks v. Rich, 2006 WL 595909, *6 (S.D.Ga., Mar. 7, 2006).

knowingly involved in a violation of law, rule or policy, or personally and knowingly approved or condoned such a violation."[619]

The importance of this issue 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.[620] This concern is particularly 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[621] 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

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[619] 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), *report and recommendation adopted*, 2012 WL 2829861 (S.D.Ohio, July 10, 2012).

[620] *See, e.g.,* Kikumura v. Osagie, 461 F.3d 1269, 1284 (10th Cir. 2006) (noting the inability of incarcerated persons to conduct their own investigations); Sulton v. Wright, 265 F.Supp.2d 292, 298 (S.D.N.Y. 2003) (citing Valentin v. Dinkins, 121 F.3d 72, 74 (2d Cir. 1997) (noting *pro se* prisoners' difficulty in identifying defendants)); Lira v. Director of Corrections of State of California, 2002 WL 1034043, *4 (N.D.Cal., May 17, 2002) (". . . [D]efendants' 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).

[621] *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); 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)*,`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. 527-532, 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.

commenced,[622] and with the impossibility or impracticability of requiring prisoners to make that determination in many cases.[623]

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[624] 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.[625] An integral part of the usual federal practice is that leave to amend complaints shall be "freely given,"[626] 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.[627]

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[622] 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.Me., June 19, 2008), *report and recommendation adopted*, 2008 WL 4791897 (D.Me., Oct. 29, 2008); the court cogently stated:

> . . . [I]t 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 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.").

[623] 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, 2009 WL 2634091, *3 (3d Cir., Aug. 27, 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.").

[624] *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." Woodford v. Ngo, 548 U.S. 81, 102-03 (2006).

[625] Jones v. Bock, 549 U.S. 199, 212-16, 221-24 (2007).

[626] Rule 15(a), Fed.R.Civ.P.

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

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 weeks of the incident complained of. There is nothing in the statute or its legislative history to suggest that Congress had any such intention.[628]

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 responsibility for the problem at issue.[629] Grievance systems generally do not seem to make provision for such supplemental filings,[630] which is not surprising, since those systems were never designed as a rehearsal for litigation, but as quick and informal problem-solving mechanisms.[631] 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.[632] Other decisions seem to hold prisoners to a standard of procedural clairvoyance,

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[628] 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).

[629] *See* Parks v. Corizon Inc., 2012 WL 4049243, *2 (E.D.Ark., Aug. 23, 2012) (holding prisoner who did not learn defendants' names before the grievance deadline expired should have filed untimely grievances naming them), *report and recommendation adopted*, 2012 WL 4024682 (E.D.Ark. Sep 12, 2012).

[630] *See* Victor v. SCI Smithfield, 2011 WL 3584781, *7-8 (M.D.Pa., Aug. 12, 2011) (noting grievance rules provide "an inmate may only file a single grievance for a particular matter").

[631] 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 grieved-of conduct/condition before the dispute moves to litigation. The administrative grievance process is not a dress-rehearsal hurdle to civil litigation. . .").

[632] *Compare* Wells v. Neva, 234 F.3d 1271, 2000 WL 1679441, *2 (6th Cir., Nov. 1, 2000) (unpublished) ("If [a prisoner] had filed a grievance that was denied as duplicative he would have exhausted administrative remedies and been permitted to file a complaint."); Robertson v. McDaniel, 2012 WL 4458147, *2-3 (E.D.Ark., Aug. 30, 2012) (holding rejection as duplicative of a grievance identifying party in a previous grievance raised a factual issue barring summary judgment), *report and recommendation adopted*, 2012 WL 4450826 (E.D.Ark., Sept. 25, 2012); Woods v. Gaetz, 2012 WL 1107758, *3 (S.D.Ill., Apr. 2, 2012) (noting that labelling a grievance as duplicative either means that the issues were already grieved or that the defendants are making the remedy unavailable); Martinez v. Robinson, 2010 WL 3001381, *3 (N.D.Cal., July 29, 2010) (holding plaintiff exhausted his retaliation claim against one defendant where officials repeatedly rejected his grievance as duplicative of an earlier one about other aspects of that incident); Moffat v. Michigan Dept. of Corrections, 2010 WL 3906115, *7 (E.D.Mich., May 21, 2010) (holding grievance adding new defendants that was dismissed as duplicative indicated the agency's belief that the issues had been exhausted), *report and recommendation adopted*, 2010 WL 3905354 (E.D.Mich., Sept. 27, 2010); Jones v. Frontera, 2010 WL 707342, *3 (W.D.Mich., Feb. 22, 2010) (holding grievance adding new defendant exhausted despite dismissal as duplicative); Bey v. Luoma, 2008 WL 4534427, *4 (W.D.Mich., Sept. 30, 2008) (same); Torrez v. McKee, 2008 WL 4534126, *9 (W.D.Mich., Sept. 30, 2008) (holding a grievance that named new defendants was not duplicative); Cromer v. Chaney, 2008 WL 4056314, *8 (W.D.Mich., Aug. 27, 2008) (same as *Torrez*); Sullivan v. Caruso, 2008 WL 356878, *10 (W.D.Mich., Feb. 7, 2008) (same as *Torrez*) *with* Laster v. Pramstaller, 2008 WL 474146, *5 (E.D.Mich., Feb. 15, 2008) (holding a grievance naming a defendant

dismissing their cases for failing to take actions that do not seem to be prescribed in the grievance rules.[633]

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.[634] Earlier district court decisions to the contrary appear now to be overruled.[635]

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that is dismissed as duplicative of an earlier grievance not naming that defendant fails to exhaust); *see* Parker v. Mulvaney, 2008 WL 4425579, *4 (W.D.Mich., Sept. 26, 2008) (stating plaintiff who learns the identity of persons not identified in a Step 1 grievance should file a new step 1 grievance identifying them); *see also* 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).

[633] 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 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.

[634] *See, e.g.*, Reed-Bey v. Pramstaller, 603 F.3d 322, 324-26 (6th Cir. 2010) ("When the State nonetheless decides to reject the claim on the merits, who are we to second guess its decision to overlook or forgive its own procedural bar?"); Glick v. Walker, 385 Fed.Appx. 579, 582-83 (7th Cir. 2010) (unpublished); Robinson v. Johnson, 2009 WL 2634091, *3 (3d Cir., Aug. 27, 2009) (unpublished) (declining to dismiss claims against commissioner and superintendent not named in grievance where the grievance response addressed their policies anyway); Harper v. Henton, 2012 WL 6595159, *5 (S.D.Ill., Nov. 30, 2012), *report and recommendation adopted*, 2012 WL 6594954 (S.D.Ill., Dec. 18, 2012); Smith v. Correctional Medical Services, Inc., 2012 WL 4483529, *2 (W.D.Ark., Aug. 24, 2012), *report and recommendation adopted*, 2012 WL 4483551 (W.D.Ark., Sept. 28, 2012); Hall v. Raja, 2012 WL 1033417, *4-5 (E.D.Mich., Mar. 27, 2012) (reference to "medical staff" rather than naming the medical provider sufficed where the merits were decided); Taylor v. Gayle, 2012 WL 1831740, *2 (S.D.Ill., Mar. 19, 2012) (where plaintiff alleged he was denied medication and his grievance was decided at final stage and found to be resolved because he had received his medication, failure to name the defendant in the grievance did not matter), *report and recommendation adopted*, 2012 WL 1831705 (S.D.Ill., May 18, 2012); Dolis v. Loftus, 2010 WL 3834426, *12 (C.D.Ill., Sept. 20, 2010); Wheeler v. Merchant, 2010 WL 3526452, *2-3 (S.D.Ill., Sept. 2, 2010); Allen v. Correctional Medical Services, Inc., 2010 WL 2663194, *5 (E.D.Mich., July 2, 2010) (applying *Reed-Bey*); Velez v. Michigan Dept. of Corrections, 2010 WL 1254852, *2 (E.D.Mich., Mar. 28, 2010); Smith v. Correctional Medical Services, 2009 WL 3242568, *6 (W.D.Mich., Sept. 30, 2009), *reconsideration denied*, 2010 WL 1753138 (W.D.Mich., Apr. 27, 2010). *But see* Vanzant v. Morris, 2013 WL 495598, *4 (E.D.Ark., Feb. 8, 2013) (declining to apply rule where the relevant conduct, as well as the defendants' names, were omitted from the grievance); Burns v. Eaton, 2013 WL 357563, *3 (E.D.Ark., Jan. 29, 2013) (same as *Vanzant*).

[635] Defendants argued that if the plaintiff names any individuals, they 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. Some courts credited this argument. *See, e.g.*, Downing v. Correction Medical Services Inc., 2009 WL 511849, *8 (W.D.Mich., Feb. 26, 2009); Vartinelli v. Cady, 2009 WL 706083, *8

5. Exhausting Items of Relief

Courts have held that prisoners need not "demand particular relief" to exhaust administrative remedies.[636] The Supreme Court held in *Booth v. Churner* that the 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.[637] The Seventh Circuit held that even under its procedural default rule, now adopted by the Supreme Court,[638] "no administrative system may demand that the prisoner specify each remedy later sought in litigation–for *Booth v. Churner* . . . holds that § 1997e(a) requires each prisoner to exhaust a process and not a remedy."[639] 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.[640]

(E.D.Mich., Mar. 13, 2009); Sanders v. Bachus, 2008 WL 5422857, *6 (W.D.Mich., Dec. 10, 2008); Basat v. Caruso, 2008 WL 4457828, *15 (E.D.Mich., Sept. 30, 2008); Owens v. Correctional Medical Services, Inc., 2008 WL 4534424, *7 (W.D.Mich., Sept. 30, 2008). These decisions would seem to be overruled by *Reed-Bey v. Pramstaller*, *supra*, since it stated its holding that a decision on the merits waives procedural errors without qualification. *But see* Vandiver v. Vasbinder, 2012 WL 4358192, *3 (E.D.Mich., June 21, 2012) (adopting *Downing* 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* Burns v. Eaton, 2013 WL 357563, *3 (E.D.Ark., Jan. 29, 2013) . 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 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*?").

[636] Johnson v. Testman, 380 F.3d 691, 697 (2d Cir. 2004) (quoting Strong v. David, 297 F.3d 646, 650 (7th Cir. 2002)). Courts have enforced grievance rules requiring prisoners to demand *some* relief in their grievances. Iloilo v. Ang, 2010 WL 3260027, *5 (C.D.Cal., May 28, 2010) (finding no exhaustion where plaintiff requested only "an acknowledgment of right to file a law suit" and monetary compensation, and grievances were rejected as "outside the scope of the appeals process"), *report and recommendation adopted*, 2010 WL 3260020 (C.D.Cal., Aug. 10, 2010); Edwards v. Rainey, 2009 WL 742165, *2 (E.D.Okla., Mar. 20, 2009) (dismissing for non-exhaustion where policy required a request for relief but plaintiff's grievances said only that he wanted to exhaust his administrative remedies).

[637] *Booth*, 532 U.S. at 740-41.

[638] Woodford v. Ngo, 548 U.S. 81 (2006).

[639] Strong v. David, 297 F.3d at 649; *accord,* Smith v. Buss, 2011 WL 1118065, *9 (N.D.Ind., Feb. 18, 2011) (holding grievance body improperly rejected grievance for requesting damages), *report and recommendation adopted*, 2011 WL 1085009 (N.D.Ind., Mar. 24, 2011); Patel v. Federal Bureau of Prisons, 2006 WL 1307733, *3 (E.D.Ark., May 11, 2006) (holding it inconsequential that the prisoner did not specifically request a transfer to a medical facility; "It is the responsibility of [prison officials] to provide inmates with needed medical care whether that means the inmate is housed in a medical facility or other institution that has the capability of providing the appropriate care."); Sample v. Lappin, 424 F.Supp.2d 187, 191 (D.D.C., Mar. 31, 2006) (holding prisoner seeking wine during Sabbath and Passover observances need not spell out how it should be provided or who should be responsible); Lira v. Director of Corrections of State of California, 2002 WL 1034043, *4 (N.D.Cal., May 17, 2002), *reversed and remanded on other grounds*, 427 F.3d 1164 (9th Cir. 2005), *cert. denied*, 549 U.S. 1204 (2007).

The suggestion to the contrary in *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 *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 *Booth*. A closer case is presented by *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

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).[641] This holding is not unanimous; some courts have held the opposite,[642] and some have held or suggested that prisoners must exhaust damages demands if the grievance policy so prescribes.[643] 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.

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assignments contrary to his religious beliefs; that relief would have required a separate grievance. In *Miller v. Lawler*, 2012 WL 629280, *11 (M.D.Pa., Feb. 3, 2012), *report and recommendation adopted*, 2012 WL 638796 (M.D.Pa., Feb. 27, 2012), *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.* Clark v. Williams, 619 F.Supp.2d 95, 105 (D.Del., May 31, 2009) (where grievance was declared non-grievable because plaintiff asked for an apology, the remedy was not available).

[640] 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).

[641] 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), *report and recommendation adopted*, 2012 WL 2106369 (C.D.Cal., June 11, 2012); Lopez v. Adams, 2009 WL 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). *But see* 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. 475, above.

In at least one case, the prisoner's grievance was rejected *because* he asked for damages. Smith v. Buss, 2011 WL 1118065, *9 (N.D.Ind., Feb. 18, 2011) (holding rejection invalid), *report and recommendation adopted*, 2011 WL 1085009 (N.D.Ind., Mar. 24, 2011).

[642] Jennings v. Brown, 2011 WL 2160952, *3 (W.D.Tex., June 1, 2011) (holding prisoner whose informal complaint resulted in officer's termination but who did not grieve his damages claim did not exhaust); Hart v. Baldwin, 2009 WL 2185904, *8 (N.D.Iowa, July 23, 2009) (holding that prisoner who failed to ask for damages in his grievance did not exhaust), *report and recommendation adopted in part, rejected in part on other grounds*, 2009 WL 3055304 (N.D.Iowa, Sept. 21, 2009), *aff'd*, 372 Fed.Appx. 684 (8th Cir. 2010); *see also* Pyle v. Martel, 2012 WL 2847909, *6 (C.D.Cal., June 1, 2012) (holding grievance body properly screened out grievance where claim for money damages was added at an intermediate stage), *report and recommendation adopted*, 2012 WL 2847787 (C.D.Cal., July 9, 2012).

[643] 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); Collins v. Walsh, 2012 WL 3536803, *3 (M.D.Pa., Aug. 15, 2012).

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.[644] Under its decision, only the unexhausted claims need be dismissed.[645]

7. The "Proper Exhaustion" Requirement

The Supreme Court, resolving a conflict among circuits,[646] has held that the PLRA exhaustion requirement is governed by a procedural default rule, *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.[647] More precisely, it held that "the PLRA exhaustion requirement requires proper exhaustion,"[648] 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."[649] 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."[650] (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.[651])

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,[652] notwithstanding the concern that numerous courts had previously (and have

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[644] Jones v. Bock, 549 U.S. 199, 220-24 (2007). The Second and Ninth Circuits had already so held. Ortiz v. McBride, 380 F.3d 649 (2d Cir. 2004), *cert. denied*, 543 U.S. 1187 (2005); *accord*, Lira v. Herrera, 427 F.3d 1164, 1170 (9th Cir. 2005), *cert. denied*, 549 U.S. 1204 (2007). *Jones* overruled contrary decisions in several other circuits. *See, e.g.*, Jones Bey v. Johnson, 407 F.3d 801 (6th Cir. 2005), *cert. granted, judgment vacated*, 549 U.S. 1190 (2007).

[645] 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 rejected total exhaustion. Lira v. Herrera, 427 F.3d at 1175-76. Some district courts have continued to use that analysis. *See* Freeman v. California Dept. of Correction and Rehabilitation, 2010 WL 761246, *4 (C.D.Cal., Mar. 1, 2010); Smith v. Woodford, 2009 WL 415612, *4 (N.D.Cal., Feb. 19, 2009); Peoples v. Davis, 2008 WL 4189672, *5 (C.D.Cal., Aug. 29, 2008); Candler v. Woodford, 2007 WL 3232435, *3-4 & n.2 (N.D.Cal., Nov. 1, 2007); Taylor v. Calipatria, 2007 WL 2712225, *6 & n.4 (S.D.Cal., Sept. 13, 2007) (stating "*Lira* is consistent with *Jones*, although *Lira* provides more detailed analysis"). In my view there is no support for preservation of the *Lira* exception in *Jones v. Bock*'s categorical rejection of total exhaustion.

[646] *Compare* Thomas v. Woolum 337 F.3d 720 (6th Cir. 2003) *with* Pozo v. McCaughtry, 286 F.3d 1022, 1023-24 (7th Cir.), *cert. denied,* 537 U.S. 949 (2002).

[647] Woodford v. Ngo, 548 U.S. 81 (2006).

[648] *Woodford*, 548 U.S. at 106.

[649] *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.'").

[650] Jones v. Bock, 549 U.S. 199, 218 (2007).

Some courts have held that if grievance rules make exhaustion or appealing optional, then they are optional for PLRA purposes as well. *See* nn. 177, 424-426, above. This probably pushes the *Jones v. Bock* principle too far, *i.e.*, to the point of conflict with the statute's basic requirement. There is contrary authority in any case.

[651] *See* § IV.E.7.i, below.

[652] *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").

subsequently) expressed about this possibility.[653] Several post-*Woodford* decisions have cited 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.[654]

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[653] *See, e.g.*, Thompson v. California, 2012 WL 6691930, *11 (E.D.Cal., Dec. 21, 2012) (crediting "evidence of Plaintiff's persistent and vehement pleas that his 602 appeals complaining about staff abuse were rejected for improper reasons or not allowed to proceed to the final level of review"), *report and recommendation adopted in part*, 2013 WL 504694 (E.D.Cal., Feb. 8, 2013); Thurmond v. Cool, 2012 WL 601251, *5-7 (D.Nev., Jan. 9, 2012) ("Plaintiff exhausted all *available* remedies by supplying prison officials with his property inventory sheet, addressing his property issue with his caseworker, and filing numerous grievances, which thoroughly explained his simple request. In response, prison officials requested additional unnecessary 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); Kyle v. Feather, 2011 WL 1102735, *2 (W.D.Wis., Mar. 23, 2011) (expressing concern about incentives "for officials to make the grievance process as complicated and difficult as possible, so long as they left a route open for those prisoners savvy enough to find it"); Barker v. Belleque, 2011 WL 285228, *4 (D.Or., Jan. 26, 2011) (finding "the record reflects that plaintiff's good faith effort to [exhaust] was stymied by defendants' unreasonable interpretation and hyper-technical application of the grievance rules"); Allah v. Virginia, 2011 WL 251214, *5 (W.D.Va., Jan. 25, 2011) ("That VDOC has evidently chosen to defend Allah's complaints on procedural vagaries does not demonstrate a failure to exhaust on Allah's part."); Ortego v. Forcht Wade Correctional Center, 2010 WL 2985830, *5 (W.D.La., Apr. 29, 2010) ("The exhaustion doctrine is not served by employing traps to defeat an inmate's claim, especially when the inmate (many of whom are barely literate or illiterate) is not attempting to avoid the administrative procedure."), *report and recommendation adopted in part, rejected in part,* 2010 WL 2990067 (W.D.La., July 27, 2010); Hooks v. Rich, 2006 WL 565909, *5 (S.D.Ga., Mar. 7, 2006) ("The exhaustion requirement is a gatekeeper, not a 'gotcha' meant to trap unsophisticated prisoners who must navigate the administrative process *pro se*."); Ouellette v. Maine State Prison, 2006 WL 173639, *3 n.2 (D.Me., Jan. 23, 2006) (noting that once suit is filed, "the defendants in hindsight can use any deviation by the prisoner to argue that he or she has not complied with 42 U.S.C. § 1997e(a) responsibilities"), *aff'd*, 2006 WL 348315 (D.Me., Feb. 14, 2006); Campbell v. Chaves, 402 F.Supp.2d 1101, 1106 n.3 (D.Ariz. 2005) (noting danger that grievance systems might become "a series of stalling tactics, and dead-ends without resolution"); LaFauci v. New Hampshire Dept. of Corrections, 2005 WL 419691, *14 (D.N.H., Feb. 23, 2005) ("While proper compliance with the grievance system makes sound administrative sense, the procedures themselves, and the directions given to inmates seeking to follow those procedures, should not be traps designed to hamstring legitimate grievances."); Rhames v. Federal Bureau of Prisons, 2002 WL 1268005, *5 (S.D.N.Y., June 6, 2002) "While it is important that prisoners comply with administrative procedures designed by the Bureau of Prisons, rather than using any they might think sufficient, . . . it is equally important that form not create a snare of forfeiture for a prisoner seeking redress for perceived violations of his constitutional rights.").

[654] *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

The Court also dismissed the argument that

> 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.[655]

The 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."[656] It also noted that the habeas corpus exhaustion doctrine is "substantively similar" to the administrative law of exhaustion.[657] 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

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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.").

[655] *Id.* 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," 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. *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 National Center for Education Statistics reported in 1994 that seven out of ten prisoners perform at the lowest literacy levels. Karl O. Haigler et al., U.S. Dept. of Educ., Literacy Behind Prison Walls: Profiles of the Prison Population from the National Adult Literacy Survey xviii, 17- 19 (1994) (available at http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=94102).

[656] *Woodford*, 548 U.S. at 93.

[657] *Woodford*, 548 U.S. at 92.

> 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)).[658]

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."[659] 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.[660]

The central question after *Woodford* is how absolute its "proper exhaustion" holding is.[661] 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.[662] 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. . . .
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> . . . What constitutes justification in the PLRA context "must be determined by looking at the circumstances which might understandably lead usually uncounselled prisoners to fail to grieve in the normally required way."[663]

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[658] *Woodford*, 548 U.S. at 103-04 (concurring opinion).

[659] Booth v. Churner, 532 U.S. 731, 741 n. 6 (2001); *see* Wigfall v. Duval, 2006 WL 2381285, *2-3 (D.Mass., Aug. 15, 2006) (acknowledging tension between the Breyer opinion and *Booth*, indicating its view that estoppel is applicable notwithstanding *Woodford*).

[660] *See* Brookins v. Vogel, 2006 WL 3437482, *3 (E.D.Cal., Nov. 28, 2006), *report and recommendation adopted*, 2007 WL 433155 (E.D. Cal., Feb. 8, 2007); Parker v. Robinson, 2006 WL 2904780, *8, 11 (D.Me., Oct. 10, 2006); Thomas v. Hickman, 2006 WL 2868967, *9 (E.D.Cal., Oct. 6, 2006); Collins v. Goord, 438 F.Supp.2d 399, 411 n.13 (S.D.N.Y. 2006); *see* nn. 667-669, below, for further discussion of this point.

[661] 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.

[662] These lines of cases are addressed more comprehensively in § IV.G.2, below.

[663] Brownell v. Krom, 446 F.3d 305, 311-12 (2d Cir. 2006) (quoting Hemphill v. New York, 380 F.3d 680, 686 (2d Cir. 2004)); Giano v. Goord, 380 F.3d 670, 686 (2d Cir. 2004).

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,[664] though it has assumed the framework remains intact in recent non-precedential decisions,[665] and in a recent 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."[666] 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*), and 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*.[667] Subsequent district court decisions have generally made the same assumption,[668] some explicitly noting Justice Breyer's acknowledgment of Second Circuit caselaw.[669] As one court put it:

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[664] *See* Amador v. Andrews, 655 F.3d 89, 102 (2d Cir. 2011); Reynoso v. Swezey, 238 Fed.Appx. 660, 662 (2d Cir. 2007) (unpublished), *cert. denied*, 552 U.S. 1207 (2008); Boddie v. Bradley, 228 Fed.Appx. 5, 6-7, 2007 WL 595247 (2d Cir. 2007) (unpublished) (all declining to consider effect of *Woodford* on circuit precedent where plaintiff could not prevail under that precedent anyway).

[665] Snyder v. Whittier, 428 Fed.Appx. 89, 91 (2d Cir. 2011) (unpublished); Davis v. New York, 311 Fed.Appx. 397, 399 (2d Cir. 2009) (unpublished). Neither decision refers to any question about the viability of its approach after *Woodford*.

[666] Johnston v. Maha, 460 Fed.Appx. 11, 15 n.6 (2d Cir. 2012) (unpublished).

[667] 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).

[668] *See* Hartry v. County of Suffolk, 755 F.Supp.2d 422, 431 (E.D.N.Y. 2010); Cousin v. Dodrill, 2010 WL 986411, *6 (N.D.N.Y., Feb. 25, 2010), *report and recommendation adopted*, 2010 WL 986405 (N.D.N.Y., Mar. 17, 2010); Pacheco v. Drown, 2010 WL 144400, *21 (N.D.N.Y., Jan. 11, 2010) (finding special circumstances where plaintiff's grievance was incorrectly rejected as non-grievable); Torres v. Anderson, 674 F.Supp.2d 394, 397-98 (E.D.N.Y. 2009); Winston v. Woodward, 2008 WL 2263191, *6 (S.D.N.Y., May 30, 2008) (collecting cases); Hill v. U.S. Attorney's Office, E.D.N.Y., 2009 WL 2524914, *3-5 (E.D.N.Y., Aug. 14, 2009); Shomo v. Goord, 2007 WL 2693526, *6 (N.D.N.Y., Sept. 11, 2007); Snyder v. Goord, 2007 WL 957530, *9-10 (N.D.N.Y., Mar. 29, 2007); MacDonald v. Pedro, 2007 WL 283045, *4-5 (D.Or., Jan. 24, 2007); Hernandez v. Schriro, 2006 WL 2989030, *4 (D.Ariz., Oct. 18, 2006); Hairston v. LaMarche, 2006 WL 2309592, *6 n.9 (S.D.N.Y., Aug. 10, 2006); James v. Davis, 2006 WL 2171082, *16-17 (D.S.C., July 31, 2006); Hernandez v. Coffey, 2006 WL 2109465, *3 (S.D.N.Y., July 26, 2006) (all applying *Hemphill* analysis after *Woodford*), *vacated on other grounds*, 582 F.3d 303 (2d Cir. 2009); *see also* Petty v. Goord, 2007 WL 724648, *8 (S.D.N.Y., Mar. 5, 2007) (holding two months-plus in a mental hospital while plaintiff's grievance was being processed supported a claim of special circumstances excusing failure to complete exhaustion).

[669] Smith v. Baker, 2012 WL 6948839, *3 & n.5 (N.D.N.Y., Nov. 13, 2012), *report and recommendation adopted*, 2013 WL 317018 (N.D.N.Y., Jan. 28, 2013); Holmes v. LeClair, 2012 WL 5880360, *6 n.14 (N.D.N.Y., Oct. 11, 2012), *report and recommendation adopted*, 2012 WL 5880690 (N.D.N.Y., Nov. 21, 2012); Stevens v. City of New York, 2012 WL 4948051, *5 (S.D.N.Y., Oct. 11, 2012) ("The better view . . . is that Justice Breyer accurately described the nature and scope of the Court's reasoning in *Woodford*."); Simmons v. Bezio, 2012 WL 3054127, *4 & n.5 (N.D.N.Y., June 21, 2012), *report and recommendation adopted*, 2012 WL 3062441 (N.D.N.Y., July 26, 2012); Alvarez v. Fischer, 2012 WL 555202, *3 & n.2 (N.D.N.Y., Jan. 27, 2012) (stating it appears *Woodford* did not overrule Second Circuit decisions; citing Justice Breyer's favorable citation of *Giano*), *report and recommendation adopted*, 2012 WL 555398 (N.D.N.Y., Feb. 21, 2012); Madison v. Hoey, 2009 WL 818956, *6 (N.D.N.Y., Mar. 26, 2009); Gonzalez v. Whittaker, 2009 WL 789577, *3-4 (N.D.N.Y., Mar. 20, 2009); Withrow v.

> . . . [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.[670]

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."[671] 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."[672]

Taylor, 2007 WL 3274858, *6 (N.D.N.Y., Nov. 5, 2007); Green v. McBride, 2007 WL 2815444, *2 (S.D.W.Va., Sept. 25, 2007); Bell v. Beebe, 2007 WL 1879767, *4 n.8 (N.D.N.Y., June 29, 2007); Miller v. Covey, 2007 WL 952054, *3 (N.D.N.Y., Mar. 29, 2007); Bester v. Dixion, 2007 WL 951558, *7-8 (N.D.N.Y., Mar. 27, 2007); Fox v. Brown, 2007 WL 586724, *5 (N.D.N.Y., Feb. 21, 2007).

[670] Stevens v. City of New York, 2012 WL 4948051, *6 (S.D.N.Y., Oct. 11, 2012).

[671] Hairston v. LaMarche, 2006 WL 2309592, *8, 11 (S.D.N.Y., Aug. 10, 2006); *see* Parker v. Robinson, 2006 WL 2904780, *7-12 (D.Me., Oct. 10, 2006) (declining to dismiss for non-exhaustion where plaintiff sent his appeal directly to the Commissioner, rather than sending it to the Grievance Review Officer to forward to the Commissioner); Rainge-El v. Moschetti, 2006 WL 1980287, *1 (D.Colo., July 12, 2006) (questioning *Woodford*'s applicability where the plaintiff "did not entirely ignore the prison's administrative grievance machinery").

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.

[672] *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

Though as noted, the Second Circuit has not generally reviewed the status of its analysis post-*Woodford*, it has retreated after *Woodford* from one extension of its analysis. In *Braham v. Clancy,*[673] 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.[674] 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."[675] 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.[676]

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."[677] The Eleventh Circuit has done the same, citing the Seventh Circuit decision as well.[678] 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."[679] It later added: "If prison officials screen out [reject] an inmate's appeals for improper reasons, the inmate cannot pursue the necessary

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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, 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).

[673] 425 F.3d 177 (2d Cir. 2005).

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

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

[676] *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 have believed a disciplinary appeal was his only remedy for a use of force complaint). *Compare* 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).

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

[678] 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 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).

[679] 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."[680] (Some subsequent decisions have held that a prisoner whose grievance is screened out improperly must administratively contest the decision if there is a means to do so.[681])

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.[682] Other circuits have adopted other formulations, though generally with less systematic analysis than the Second Circuit,[683] and sometimes directed to a narrow set of facts.[684]

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*,[685] in which a prisoner

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[680] 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).

[681] Barrett v. Cate, 2011 WL 6753993, *9-10 (E.D.Cal., Dec. 23, 2011); Williams v. Cate, 2011 WL 444788, *8-9, *11 (E.D.Cal., Feb. 8, 2011) (holding that plaintiff need only use a reconsideration procedure once if the rejection is upheld), *report and recommendation adopted in part, rejected in part on other grounds*, 2011 WL 1121965 (E.D.Cal., Mar. 24, 2011); Anderson v. Tilton, 2011 WL 11483, *6 (N.D.Cal., Jan. 4, 2011) (holding prisoner must follow instructions to cure deficiency and resubmit grievance, or contest the screening out).

[682] 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.

[683] *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*, 129 S.Ct. 1620 (2009).

[684] *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 exhausting"); Miller v. Norris, 247 F.3d 736, 740 (8th Cir. 2001) (stating "a remedy that prison officials prevent a prisoner from 'utiliz[ing]' is not an 'available' remedy under § 1997e(a)....").

[685] Giano v. Goord, 380 F.3d 670 (2d Cir. 2004).

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.[686]

This lack of clarity in grievance systems–either in the written rules or in prison officials' actions or instructions in particular cases[687]–is a recurrent theme in prison exhaustion cases.

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[686] *Giano*, 380 F.3d at 679; *accord*, Malik v. District of Columbia, 574 F.3d 781, 785-86 (D.C.Cir. 2009) (declining to find non-exhaustion where transfers were non-grievable and policy did not say whether claim of retaliation would make the transfer grievable); Torres v. Anderson, 674 F.Supp.2d 394, 400 (E.D.N.Y. 2009) (declining to find lack of proper exhaustion for failure to file post-transfer grievance at the prison where the claim arose, rather than the receiving prison, where rule could be read as permissive and not mandatory); 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). *But see* Mccloud v. Roy, 2010 WL 985731, *4 (N.D.N.Y., Feb. 22, 2010) (declining to excuse non-exhaustion based on prisoner's misunderstanding that did not stem from reliance on prison rules), *report and recommendation adopted*, 2010 WL 985737 (N.D.N.Y., Mar. 16, 2010).

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 uncounselled 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.

[687] "Though California's grievance system may be informal and straightforward in the abstract, *see Woodford v. Ngo*, . . . the process was marked with confusion in this particular case." Kidd v. Biggs, 2009 WL 2151836, *4 (E.D.Cal., July 16, 2009) (noting "muddled" notifications and instructions to plaintiff), *report and recommendation adopted*, 2009 WL 3157536 (E.D.Cal., Sept. 28, 2009); *see* Thomas v. Hernandez, 2012 WL 4496826, *3 (S.D.Cal., Sept. 28, 2012) (noting rule that said appeal must be "forwarded to" 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

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.[688] Such examples can be multiplied, in the Second Circuit[689] and elsewhere. Thus, the Seventh Circuit–notwithstanding 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.[690] Similarly, there are many cases in which officials' actions or instructions with respect to particular grievances create uncertainty as to how to proceed.[691] In other cases, the prisoner's knowledge of the facts does not permit

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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).

[688] *Brownell*, 446 F.3d at 312.

[689] *See* 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 (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); 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*.

[690] 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 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; ". . . [W]hen prison officials fail to 'clearly identif[y]' the proper route for exhaustion, they cannot later fault the prisoner for failing to predict the correct choice. . . . The burden is on the Department of Corrections to make grievance procedures clear and easy to follow."). For additional examples of cases where prison complaint procedures are not "relatively simple," because procedures are unclear, actual procedures deviate from written procedures, or prisoners receive confusing or misleading responses or misinformation or no information about grievance rules, *see* nn. 463-465, above, and nn. 991-995, below.

[691] 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,

timely compliance with the grievance rules.[692] In some cases an unsettled legal situation concerning the exhaustion requirement itself has been held to constitute special circumstances justifying failure to exhaust correctly.[693] 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

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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. 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 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* 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).

[692] 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 prisoner 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 passed); Borges v. Piatkowski, 337 F.Supp.2d 424, 427 n.3 (W.D.N.Y. 2004) (holding 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 was justified by special circumstances in not exhausting); *see* Brownell v. Krom, 446 F.3d at 312 (citing system's lack of provision for supplementing or re-filing existing grievances to reflect new information).

[693] In *Rodriguez v. Westchester County Jail Correctional Dept.*, 372 F.3d 485, 487 (2d Cir. 2004), the court held that the plaintiff's belief that he did not have to exhaust an excessive force claim was reasonable, since the court had adopted the same view until reversed by the Supreme Court in *Porter v. Nussle*, 534 U.S. 516 (2002). *Accord*, Wilkinson v. Banks, 2007 WL 2693636, *6 (W.D.N.Y., Sept. 10, 2007) (holding grievance filed a few weeks after *Booth v. Churner* held damages claims must be exhausted satisfied the requirement); Barad v. Comstock, 2005 WL 1579794, *7 (W.D.N.Y., June 30, 2005) ("the question here for special circumstances is not the *actual* state of the law (or the retroactive application of new decisional law . . .), but the *inmate*'s belief of what the law was when he should have grieved the matter and whether that belief is reasonable."); Rivera v. Pataki, 2005 WL 407710, *12 (S.D.N.Y., Feb. 7, 2005) ("Rivera did the best he could to follow DOCS regulations while responding to an evolving legal framework"; noting he had filed at a time when it appeared that his claim need not be exhausted, and had tried to exhaust after dismissal for non-exhaustion mandated by a subsequent Supreme Court decision).

documented system for tracking grievances as they make their way through the various phases of exhaustion."[694]

In my view the most sensible conclusion is that *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.[695] Further, to the extent that lack of clarity in the grievance rules or their application makes the remedy unavailable, *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 *Woodford*, has held that a prisoner who complies with the informal practice has satisfied the exhaustion requirement.[696] 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.[697]

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[694] Spivey v. Chapman, 2012 WL 4936623, *4 (S.D.Ill., Sept. 14, 2012), *report and recommendation adopted*, 2012 WL 4952395 (S.D.Ill., Oct. 17, 2012); *accord*, Spivey v. Love, 2012 WL 5268656, *5 (S.D.Ill., Sept. 14, 2012), *report and recommendation adopted*, 2012 WL 5268635 (S.D.Ill., Oct. 23, 2012).

[695] In *Hairston v. LaMarche*, 2006 WL 2309592 (S.D.N.Y., Aug. 10, 2006), as part of its post-*Woodford* discussion of special circumstances, the court noted the unclarity of New York State administrative appeal procedures in cases where a Superintendent has referred a complaint to the Inspector General for investigation. *Id.*, *9-10. Similarly, in *Sumpter v. Skiff*, 2008 WL 4518996, *6 (N.D.N.Y., Sept. 30, 2008), where the rules governing certain administrative appeals were directly contradicted by the instructions on the decision from which the plaintiff sought to appeal, the court found special circumstances justifying failure to follow the formal appeal rules. *Accord*, Case v. Smith, 2012 WL 4107809, *3 (N.D.N.Y., April 23, 2012) (finding special circumstances where plaintiff alleged that he filed a grievance that was ignored, that a member of the grievance staff told him that his complaint was not grievable, that he was refused assistance, and that he was transferred to another facility where he could not access the law library), *report and recommendation adopted*, 2012 WL 4107812 (N.D.N.Y., Sept. 19, 2012); Triplett v. Rendle, 2012 WL 913711, *5 (N.D.N.Y., Feb. 9, 2012) (finding special circumstances barring summary judgment where prisoner "was justifiably confused by his transfers and the responses to his inquiries and could not determine how to grieve in the normally required way"), *report and recommendation adopted*, 2012 WL 913043 (N.D.N.Y., Mar. 16, 2012); Torres v. Anderson, 674 F.Supp.2d 394, 400 (E.D.N.Y. 2009) (finding special circumstances in failure to make clear whether rule on place of filing post-transfer grievance was mandatory).

[696] Curtis v. Timberlake, 436 F.3d 709, 712 (7th Cir. 2005); *accord*, 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).

[697] 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*, 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); 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); 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; "Perhaps 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*, --- Fed.Appx. ----, 2013 WL 363463 (3rd Cir., Jan. 31, 2013); Rodriguez v. Miramontes, 2012 WL 1983340, *6 (D.Ariz., June 4, 2012) (declining to

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.[698] 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.[699] 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.[700] 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*.[701]

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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) (declining 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) (declining 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 grieve 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).

[698] *See* nn. 991-995, below.

[699] 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. 960-970, below, for further comment on this subject.

[700] *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).

[701] *See* n. 962, below.

d) Is There Any Limit to the Procedural Rules That Can Be Enforced by Procedural Default?[702]

As noted, *Woodford* declined to address the possibility of rules created to trip prisoners up,[703] though that concern had been expressed in numerous pre-*Woodford* decisions.[704] 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.[705]

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.[706] (Rules that are merely burdensome to comply with are enforced.[707])

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."[708] The implication is that there are some procedural rules whose violation is not "critical" and does not threaten the system's functioning.[709] This view is consistent with the earlier holding of the Third

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[702] 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.

[703] *Woodford*, 548 U.S. at 102-03.

[704] *See* cases cited in n. 653, above.

[705] Strong v. David, 297 F.3d 646, 649-50 (7th Cir. 2002).

[706] *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. 745, below.

[707] Payette v. Gerth, 2011 WL 3438562, *3-4 (W.D.Mich., July 14, 2011) (finding non-exhaustion where plaintiff had failed to make required copies, even though he would have had to make the copies by hand with carbon paper), *report and recommendation adopted*, 2011 WL 3439258 (W.D.Mich., Aug. 5, 2011).

[708] *Woodford*, 548 U.S. at 90-91.

[709] 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. 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 2985830, *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,

Circuit that, even under a procedural default rule, compliance need only be "substantial,"[710] 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)."[711] However, that court has not been explicit about what it means by these formulations.[712] Other courts have generally rejected a substantial compliance standard,[713] though as in the Third Circuit, it is not entirely clear what these courts mean by that term.

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 Administrative Remedy"; plaintiff did not resubmit it). *Cf.* Ellison v. New Hampshire Dept. of Correction, 2009 WL 424535, *5 (D.N.H., Feb. 19, 2009), for a vigorous defense of the necessity to use the correct forms for grievances.

[710] Nyhuis v. Reno, 204 F.3d 65, 77-78 (3d Cir. 2000).

[711] Spruill v. Gillis, 372 F.3d 218, 232 (3d Cir. 2004).

[712] The only clue from the Third Circuit as to its meaning appears in an unreported decision in which the prisoner, instructed to attach necessary documents for his final appeal, instead forwarded them with an explanation to the Secretary of Correction. The court said that "it suffices to state that Keys' failure to even attempt compliance with the grievance procedures cannot be sufficiently substantial to act as an excuse. Otherwise, few, if any, single procedural failures would establish a default." Keys v. Craig, 160 Fed.Appx. 125, 126 n.3, 2005 WL 3304140, *1 (3d Cir., Dec. 7, 2005) (unpublished) (dicta); *see* Cullen v. Pennsylvania Dept. of Corrections, 2012 WL 6015724, *8 (W.D.Pa., May 29, 2012) (holdling prisoner was in substantial compliance where he exceeded the two-page limit by half a page, "and it was legible, clear and articulate, such that the additional half page did not pose an impediment to review"), *report and recommendation adopted in part, rejected in part on other grounds*, 2012 WL 6015721 (W.D.Pa., Dec. 3, 2012); Caldwell v. Folino, 2011 WL 4899964, *7 (W.D.Pa., Oct. 14, 2011) (holding prisoner 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 prison 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).

The risk posed by *Woodford*'s holding is that prison officials will reject prisoners' grievances for the most trivial of rules violations,[714] or will promulgate rules designed to trip prisoners up,[715] or having that effect.[716] 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

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[713] 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*).

[714] There is no lack of recent examples of prisoners tripped up by trivial rules violations. *See* Simpson v. Jones, 316 Fed.Appx. 807, 810, 2009 WL 721553 (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); 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*, 130 S.Ct. 249 (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").

[715] *See* n. 490, 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 information and officials refused to provide him a copy of the grievance log so he could obtain it was brushed off by the court. Tigert v. Jones, 2008 WL 2853625, *7-8 (W.D.Okla., July 21, 2008). Subsequently, the Oklahoma system has added a requirement that prisoners correctly complete *and notarize every page* of the grievance. Craft v. Middleton, 2012 WL 3886378, *4 (W.D.Okla., Aug. 20, 2012), *report and recommendation adopted*, 2012 WL 3872010 (W.D.Okla., Sept. 6, 2012).

[716] One court has upheld the application of the Bureau of Prisons' regulation defining a grievance appeal as filed when it is logged as received, holding that even if the plaintiff's assertion that he mailed his appeal and it never arrived was true, the "prison mailbox" rule is inapplicable and he failed to exhaust. Williams v. Burgos, 2007 WL 2331794, *3 (S.D.Ga., Aug. 13, 2007); *accord*, Abreu v. Gostkowski, 2011 WL 4344022, *5-6 (D.N.J., Sept. 14, 2011); Baker v. Drew, 2009 WL 2588905, *4 (M.D.Ala., Aug. 19, 2009); *see* Jones v. Washington, 2011 WL 4434859, *4 (N.D.Cal., Sept. 23, 2011) (holding there is no basis for applying the prison mailbox rule to prison grievances in state prison case). *Contra*, Crum v. U.S., 2008 WL 744727, *8 (W.D.Pa., Mar. 18, 2008) (where plaintiff showed that he submitted his appeal for mailing six weeks before it was received, there was a genuine issue of material fact whether plaintiff was prevented from filing a timely appeal so as to excuse failure to exhaust); *accord*, Schadel v. Evans, 2010 WL 2696456, *2-3 (C.D.Ill., July 7, 2010) (applying prison mailbox rule to state prison grievance despite officials' contrary interpretation).

litigate. This issue has arisen repeatedly (though has not always been recognized) in connection with rules prohibiting grievances from raising "multiple issues,"[717] among others.[718]

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

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[717] In *Moore v. Bennette*, 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 grieve 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 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 plaintiff's 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).

[718] In *Fratis v. Owens*, 168 Fed.Appx. 865, 2006 WL 446066 (10th Cir., Feb. 24, 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, 2006 WL 446066, *1. 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.

requirements frustrate the proper exercise of that procedure by all but the most sophisticated inmates, is the grievance procedure "available" within the meaning of the PRLA [sic]."[719] 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."[720]

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.[721] 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."[722] 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").[723]

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.[724] (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.[725])

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[719] Lafountain v. Martin, 2008 WL 1923262, *15 (W.D.Mich., Apr. 28, 2008), *vacated and remanded*, 334 Fed.Appx. 738 (6th Cir. 2009) (per curiam).

[720] *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)").

[721] *See* Turner v. Safley, 482 U.S. 78 (1987).

[722] Lafountain v. Martin, 2008 WL 1923262, *19.

[723] *Lafountain*, *id.*

[724] *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. 718, above.

[725] Lafountain v. Martin, 334 Fed.Appx. 738, 741 (6th Cir. 2009) (per curiam).

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 cannot rely on that noncompliance to seek dismissal of subsequent litigation for non-exhaustion.[726] Nothing in *Woodford* is to the contrary of those holdings, and many post-*Woodford* decisions are to the same effect.[727] (Similarly, some recent decisions, responding to *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 *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.[728]) Some courts have said that the *Woodford* opinion sets out a "merits test"

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[726] 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.), *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 "restarted" 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), *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), *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 procedual issues in the grievance, might waive such issues, especially in light of uncertainty whether the grievance system was available).

[727] 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, 2009 WL 2634091, *3 (3d Cir., Aug. 27, 2009) (unpublished) (declining to dismiss claims against commissioner and superintendent not named in grievance where grievance response addressed policies they were responsible for); 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"), *report and recommendation adopted in pertinent part, rejected in part*, 2009 WL 36612 (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).

[728] Reed-Bey v. Pramstaller, 603 F.3d 322, 325 (6th Cir. 2010); 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); *accord*, Sanders v. Bachus, 2009 WL 4796739, *4 (W.D.Mich., Dec. 9, 2009); Torrez v. McKee, 2008 WL 4534126, *7 (W.D.Mich., Sept. 30, 2008).

(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.[729] 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."[730] 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.[731] If the

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[729] Jones v. Stewart, 457 F.Supp.2d 1131, 1134-37 (D.Nev. 2006); *accord*, Cohen v. Baca, 2007 WL 1575245, *5 (D.Nev., May 30, 2007). *Cf.* Adefeyinti v. Reed, 2009 WL 3046805, *6-7 (W.D.Wis., Sept. 17, 2009) (where prisoner wrote to grievance appeals office to supplement his complaint, and office responded that he had received a final response and if he was dissatisfied he could commence other legal action, rather than telling him he must restart the grievance process, any argument for further exhaustion was waived).

[730] *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." 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), 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).

[731] 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). Prior district court litigation of this and related issues is probably of limited value after *Reynolds-Bey*. *Compare* Grear v. Gelabert, 2008 WL 474098, *2 n.1 (W.D.Mich., Feb. 15, 2008); Cobb v. Berghuis, 2007 WL 4557856, *1 (W.D.Mich., Dec. 21, 2007) (holding that a grievance rejected for procedural and merits reasons does not exhaust) *with* McCarroll v. Sigman, 2008 WL 659514, *4 (W.D.Mich., Mar. 6, 2008) (finding exhaustion on those facts), *reconsideration granted on other grounds*, 2008 WL 2064796 (W.D.Mich., May 13, 2008); *see* Harris v. West, 2008 WL 695404, *3 (W.D.Mich., Mar. 11, 2008) (finding exhaustion where prisoner's step II grievance was rejected as untimely but his final appeal was addressed on the merits); *see also* Smith v. Gibson, 2012 WL 3656331, *6 (D.Colo., July 18, 2012) (declining to dismiss where "prison officials denied Plaintiff's grievances on the bases of untimeliness, an improper remedy request, and the merits," addressing the merits at an intermediate stage), *report and recommendation adopted*, 2012 WL 3656318 (D.Colo., Aug. 24, 2012). *Contra*, Scott v. Ambani, 2008 WL 597833, *2 (E.D.Mich., Feb. 29, 2008) (finding non-exhaustion where intermediate appeal reached the merits but final appeal did not), *aff'd in pertinent part*, 577 F.3d 642 (6th Cir. 2009). *Cf.* Staples v. Whitney, 2010 WL

purpose of the "proper exhaustion" rule is to preserve the system's ability to "function effectively,"[732] 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.[733] 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,[734] an approach which has led to extreme and unconscionable results.[735] Other courts have stated standards that allow only a narrow scope

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520705, *4-5 (W.D.Mich., Feb. 8, 2010) (declining to dismiss for non-exhaustion where it was unclear whether grievance decision rested on the merits or on a procedural default).

[732] *Woodford*, 548 U.S. at 90.

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

[734] 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."

[735] 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 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

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."[736] 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."[737] 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."[738]

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.'"[739] It would appear that whether a prisoner has exhausted is therefore a question of federal law for federal court determination.[740]

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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.

[736] 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").

[737] Hoeft v. Wisher, 181 Fed.Appx. 549, 550 (7th Cir. 2006) (unpublished).

[738] 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.*

[739] Jones v. Bock, 549 U.S. 199, 218 (2007).

[740] *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)).

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."[741] 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.'"[742] 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.[743]

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[741] Sapp v. Kimbrell, 623 F.3d 813, 824 (9th Cir. 2010); *see* 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); 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).

[742] 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).

[743] In *Moore v. Bennette*, 517 F.3d 717, 722, 729, 730 (4th Cir. 2008), discussed above at n. 718, 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. 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); Thomas v. Hernandez, 2012 WL 4496826, *3 (S.D.Cal., Sept. 28, 2012) (rejecting argument that rule stating appeal must be "forwarded to" the appeals coordinator meant it must be "filed with" the appeals coordinator by the prisoner); Rodriguez v. Miramontes, 2012 WL 1983340, *6 (D.Ariz., June 4, 2012) (rejecting defendants' claim that "working days" include Saturday and Sunday for purposes of determining timeliness); Bishop v. McLaughlin, 2012 WL 1029499, *5 (M.D.Ga., Mar. 26, 2012) (declining to dismiss where grievance with attached front-and-back Witness Statement form was rejected under rule prohibiting attaching more than one page); Mark v. Jackson, 2012 WL 1035879, *4-5 (W.D.Okla., Mar. 12, 2012) (declining to dismiss where grievance appeal was dismissed for using an outdated form, where the policy did not require use of the most current form and defendants identified no deficiencies in what the plaintiff submitted), *report and recommendation adopted*, 2012 WL 1035761 (W.D.Okla., Mar. 28, 2012); Clark v. Jacobs, 2012 WL 579429, *3 (D.Md., Feb. 21, 2012) (declining to dismiss for non-

Several decisions have refused to dismiss for non-exhaustion where a prisoner's grievance had been rejected as duplicative of an earlier grievance.[744]

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exhaustion where grievance body erroneously rejected grievance as duplicative of prior grievance), *aff'd*, 474 Fed.Appx. 197 (4th Cir. 2012) (unpublished); Reeves v. Salisbury, 2012 WL 3206399, *5-6 (E.D.Mich., Jan. 30, 2012) (similar to *Lafountain v. Martin, supra*; stating "but the Court is not required to blindly accept the state's application of the procedural rule"), *report and recommendation adopted in pertinent part, rejected in part on other grounds*, 2012 WL 3151594 (E.D.Mich., Aug. 2, 2012); Johnson v. Meier, 842 F.Supp.2d 1116, 1118-19 (E.D.Wis. 2012) (rejecting finding that plaintiff failed to raise a single clearly identified issue); Calloway v. Byrd, 2011 WL 7172207, *4 (D.S.C., Oct. 18, 2011) (declining 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); Halloum v. Ryan, 2011 WL 4571683, *10 (D.Ariz., Oct. 4, 2011) (holding grievance body "improperly screened" plaintiff's grievance for failure to attach necessary documents, where the grievance on its face included the necessary documents); Chizum v. Marandet, 2011 WL 611895, *3-5 (N.D.Ind., Feb. 15, 2011) (holding rejection of grievance for failure to attempt informal resolution was contrary to administrative record; "Where prison officials render a grievance remedy 'unavailable' by mishandling a prisoner's grievance, the inmate is excused from the exhaustion requirement."); Williams v. Cate, 2011 WL 444788, *10-11 (E.D.Cal., Feb. 8, 2011) (rejecting grievance body's conclusion that plaintiff was improperly trying to change the issue on appeal), *report and recommendation adopted in pertinent part, rejected on other grounds*, 2011 WL 1121965 (E.D.Cal., Mar. 24, 2011); *see Appendix A for additional authority on this point*; *see* n. 768, 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.

[744] 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 grieved incidents is duplicative; most courts have rejected this argument. *See* n. 632, 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. 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). In *Gabby v. Luy*, 2006 WL 167673, *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 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

f) What If the Prisoner Fails To Comply with *Ad Hoc* Directions from Prison Staff with Respect to a Particular Grievance?

Numerous decisions have held that a prisoner who disregards instructions by grievance personnel as to how to proceed fails to exhaust.[745] 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 policy[746]—though one decision is remarkably vociferous concerning the prisoner's obligation to follow erroneous instructions.[747] Where prisoners cannot complete the

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appeal, then filed a new grievance about the same matter, the second grievance was properly rejected as duplicative). In *Gatlin 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. Engelsgjerd, 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).

[745] *See* Thomas v. Parker, 609 F.3d 1114, 1118-19 (10th Cir. 2010), *cert. denied*, 131 S.Ct. 1691 (2011); Cannon v. Washington, 418 F.3d 713, 718 (7th Cir. 2005); Carroll v. Yates, 362 F.3d 984, 985 (7th Cir. 2004); Ford v. Johnson, 362 F.3d 395, 397 (7th Cir. 2004) ("Just as courts may dismiss suits for failure to cooperate, so administrative bodies may dismiss grievances for lack of cooperation; in either case this procedural default blocks later attempts to litigate the merits."); Jernigan v. Stuchell, 304 F.3d 1030, 1032-33 (10th Cir. 2002) (holding that a prisoner who received no response to a grievance and refused the appeals body's direction to try to get one had failed to exhaust); Martin v. Hamilton, 2013 WL 371915, *3 (M.D.Pa., Jan. 30, 2013) (holding prisoner who did not resubmit his appeal as directed failed to exhaust); Ortega v. Ruggiero, 2013 WL 268905, *6 (E.D.Cal., Jan. 23, 2013) (holding prisoner who did not follow instruction to file "Form 22" before resubmitting his grievance did not exhaust); Waddy v. Sandstrom, 2012 WL 2023519, *3-4 (W.D.Va., June 5, 2012) (dismissing for non-exhaustion where prisoner did not timely comply with direction to resubmit with copy of original grievance), *order entered*, 2012 WL 2023543 (W.D.Va., June 5, 2012); Jupiter v. Johnson, 2011 WL 4527791, *7 (M.D.Pa., Sept. 28, 2011) (prisoner who failed to obtain from Chaplain and complete "New or Unfamiliar Religious Components Questionnaire" as directed by grievance staff failed to exhaust); Taylor v. Buss, 2011 WL 4386195, *2 (S.D.Ind., Sept. 20, 2011), *motion to amend denied*, 2011 WL 5024589 (S.D.Ind., Oct. 20, 2011); *see Appendix A for additional authority on this point.*

[746] *See* Peterson v. Gore, 2012 WL 1669431, *5-6 (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).

[747] 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

process because they are unable to comply with officials' instructions, the remedy is unavailable.[748]

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 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.[749]

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."[750]
- "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."[751]

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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).

[748] Patel v. Moron, ___ F.Supp.2d ___, 2012 WL 4450899, *6 (E.D.N.C., Sept. 25, 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).

[749] *See* cases cited in n. 777, below.

[750] 28 C.F.R. § 115.52(b)(1).

- "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."[752]
- 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.[753]
- "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."[754]
- 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 any subsequent steps (*e.g.* appeals).[755]
- "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."[756]
- Disciplinary charges based on sexual abuse complaints are limited to cases "where the agency demonstrates that the inmate filed the grievance in bad faith."[757]

To date there seems to be no case law concerning the interpretation and enforceability of these standards,[758] so it is unclear what would happen if a prisoner asserted the agency's failure

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[751] 28 C.F.R. § 115.52(b)(3).
[752] 28 C.F.R. § 115.52(c).
[753] 28 C.F.R. § 115.52(d)(1-3).
[754] 28 C.F.R. § 115.52(d)(4).
[755] 28 C.F.R. § 115.52(e).
[756] 28 C.F.R. § 115.52(f).
[757] 28 C.F.R. § 115.52(g).
[758] The court in *Porter v. Howard*, 2012 WL 2836637, *4 (S.D.Cal., July 10, 2012), held that PREA itself does not substitute for or exempt prisoners from using prison grievance procedures. The decision antedates the PREA Standards and addresses only the statute. *Accord*, Myers v. Grubb, 2013 WL 352194, *1 (D.Mont., Jan. 29, 2013).

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.

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."[759] Thus a grievance rejected administratively as untimely does not suffice to exhaust.[760] The Court was aware of, and apparently untroubled by, the very short deadlines of most prison grievance systems.[761] The practical result of the "proper exhaustion" 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.[762] (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."[763] To date there seems to be no case law addressing the interpretation or enforceability of this provision.)

The *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.[764] 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.[765] Nor did it say to what extent federal courts are free to re-examine administrative determinations that a

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[759] 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).

[760] *See, e.g.*, Scott v. Ambani, 577 F.3d 642, 647 (6th Cir. 2009).

[761] 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).

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), *motion to amend denied*, 2010 WL 2464967 (E.D.Ky., June 15, 2010).

[762] For example, in *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. *See* 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).

[763] 28 C.F.R. § 115.52(b)(1).

[764] *Woodford*, 548 U.S. at 93.

[765] *See* nn. 658-660, above.

grievance is untimely. Lower courts are divided on this point, as to procedural determinations generally and not just time limits.[766] Some courts have held that grievance bodies' determinations are essentially unreviewable.[767] 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.[768] As noted in the previous section, the cases exercising independent scrutiny have the better of the argument.

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 uncounselled prisoners to fail to grieve

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[766] *See* nn. 733-744, above.

[767] *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).

[768] *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), *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); Williams v. Franklin, 302 Fed.Appx. 830, 832 (10th Cir. 2008) (rejecting determination of untimeliness that was obviously wrong); 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.Cal., 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 incapacited 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* 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.La., Sept. 23, 2010), *report and recommendation adopted*, 2010 WL 4068773 (W.D.La., 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).

in the normally required way,"[769] such as prisoners' misunderstanding of the exhaustion requirement[770] or of the relevant prison regulations,[771] though it noted that those were not necessarily the only circumstances to justify failure to exhaust.[772] 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.[773] 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

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[769] 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.

[770] *Williams, id.* (citing Rodriguez v. Westchester County Jail Correctional Dep't, 372 F.3d 485 (2d Cir. 2004)).

[771] *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).

[772] *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. Brureton, 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).

[773] 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 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).

"available" remedy for purposes of the exhaustion rule;[774] *Woodford* did not purport to construe 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.[775] 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.[776] A number of courts have held that under those circumstances, a prisoner should file a grievance when the obstacle to exhaustion is removed[777]—*e.g.*, after transfer away from a threatening situation,[778] or after recovery from a disabling medical condition.[779] That is, the

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[774] 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); 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.

[775] *See* § IV.G.3, below.

[776] 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).

[777] Morales v. Putnam, 2012 WL 2861436, *10 (M.D.Pa., June 7, 2012) (holding plaintiff who was transferred out of state and could not get grievance forms should have filed an untimely grievance upon return to home state), *report and recommendation adopted*, 2012 WL 2861592 (M.D.Pa., July 11, 2012); Tousignant v. Bergman, 2011 WL 2652571, *4 (D.Ariz., June 30, 2011) (holding plaintiff who did not file a timely grievance because the deadline was past before he developed an infection from his injuries should have filed an untimely grievance); Wright v. State Correctional Institution at Greene, 2009 WL 2581665, *3 (W.D.Pa., Aug. 20, 2009); Guarino v. Hernandez, 2008 WL 4540417, *4 (S.D.Fla., Oct. 9, 2008) ("The law is clear in this Circuit that inmates/prisoners must have sought to file out-of-time grievances and/or grievance appeals in order to exhaust their administrative remedies . . . ."); Mayhew v. Gardner, 2008 WL 4093130, *4-5 (M.D.Tenn., Aug. 22, 2008); Ory v. McHugh, 2008 WL 2756463, *4 (N.D.Fla., July 14, 2008); *see Appendix A for additional authority on this point*.

[778] Bryant v. Rich, 530 F.3d 1368, 1373 (11th Cir. 2008) (holding prisoner who said he didn't grieve for fear of assault should have exhausted after transfer); Gutierrez v. Schult, 2011 WL 5041205, *5 (N.D.N.Y., Sept. 21, 2011) (similar to *Bryant*), *report and recommendation adopted*, 2011 WL 5041293 (N.D.N.Y., Oct. 24, 2011); Champ v. Lafayette, 2011 WL 565648, *3 (M.D.Fla., Feb. 8, 2011) (holding prisoner allegedly threatened at one jail could have exhausted upon transfer to another one); Jones v. Waiawa Correctional Facility, 2010 WL 2813777, *3 (D.Haw., July 15, 2010) (holding prisoner obstructed at one prison should have grieved immediately upon transfer); In re Bayside Prison Litigation, 2008 WL 2387324, *5 (D.N.J., May 19, 2008); Campbell v. Oklahoma County Detention Center, 2008 WL 490619, *5 (W.D.Okla., Feb. 21, 2008) (prisoner who alleged threats should have filed a grievance after transfer); Poole v. Rich, 2007 WL 2238831, *3-4 (S.D.Ga., Aug. 1, 2007) (same as *Bryant v. Rich, supra*), *aff'd*, 312 Fed.Appx. 165 (11th Cir. 2008), *cert. denied*, 555 U.S. 854 (2008); Langford v. Rich, 2006 WL 1549120, *2 (S.D.Ga., June 1, 2006) (holding a prisoner who complained of threats of retaliation at one prison should have filed a grievance upon being transferred); Hemingway v. Lantz, 2006 WL 1237010, *2 (D.N.H., May 5, 2006) (holding a prisoner who said he did not grieve for fear of staff retribution should have done so once 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).

prisoner should file an untimely grievance notwithstanding the holding of *Woodford v. Ngo* that an untimely grievance does not satisfy the exhaustion requirement.[780] This is the sort of counter-intuitive proposition that serves only to victimize unsophisticated litigants, and a number of courts have rejected it.[781] A particularly absurd example of this argument was rejected in *Goebert v. Lee County,*[782] 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

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[779] Looman v. Montana, 2012 WL 5287949, *5 (D.Mont., Aug. 7, 2012) (stating "where an inmate suffers from some physical or mental incapacity which prevents the inmate from filing a grievance within a deadline imposed by the grievance policy, the law of section 1997e(a) requires an inmate to pursue any grievance remedy available under the policy after any asserted incapacity ends"), *report and recommendation adopted*, 2012 WL 5287946 (D.Mont., Oct. 24, 2012); DeVault v. Maricopa County, 2012 WL 748254, *6 (D.Ariz., Feb. 1, 2012), *report and recommendation adopted*, 2012 WL 748371 (D.Ariz., Mar. 7, 2012); Williams v. Ferguson, 2012 WL 33055, *5-6 (E.D.Cal., Jan. 6, 2012); Morales v. Jones, 2011 WL 4396950, *5-6 (N.D.Okla., Sept. 21, 2011) (holding prisoner who could not grieve timely because he had been injured in a stabbing should have requested an extension of time or permission to file an untimely grievance); LaBombard v. Burroughs-Biron, 2010 WL 2264973, *4-6 (D.Vt., Apr. 30, 2010) (prisoner who could not grieve while in medical quarantine should have grieved after release; time limits not discussed), *report and recommendation adopted*, 2010 WL 2265004 (D.Vt., June 2, 2010); Kennedy v. Lopez, 2010 WL 1444871, *6 (C.D.Cal., Mar. 8, 2010), *report and recommendation adopted*, 2010 WL 1444873 (C.D.Cal., Apr. 8, 2010); Smith v. Dominguez, 2010 WL 597979, *2-3 (N.D.Ind., Feb. 17, 2010); *see Appendix A for additional authority on this point*.

[780] 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* 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).

[781] Ollison v. Vargo, 2012 WL 5387354, *2-3 (D.Or., 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 plaintiff 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 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).

[782] 510 F.3d 1312 (11th Cir. 2007).

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."[783]

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.[784] 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.

Several courts have held, before and after *Woodford*, that a grievance about an ongoing complaint was necessarily timely.[785] The most thorough examination of this issue is in a recent

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[783] *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.

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

[785] *See* Cullen v. Pennsylvania Dept. of Corrections, 2012 WL 6015724, *8 (W.D.Pa., May 29, 2012) (holding "the leaky roof was of the continuing event variety, and plaintiff's grievance must be deemed timely"), *report and recommendation adopted in part, rejected in part on other grounds*, 2012 WL 6015721 (W.D.Pa., Dec. 3, 2012); Workman v. Reinke, 2011 WL 4431748, *4 (D.Idaho, Sept. 22, 2011) (holding complaint about six-year-old ongoing garnishment of prison account was timely at least as to the most recent withholding); Soto v. Arpaio, 2010 WL 4116558, *5 (D.Ariz., Oct. 18, 2010) (holding that a grievance about failure to provide mental health care exhausted the seven-month course of delay in treatment); Ellis v. Schwarzenegger, 2010 WL 715721, *2 (E.D.Cal.. Feb. 26, 2010) (stating in dictum that claim of ongoing violation would be timely despite time limit); Parisi v. Arpaio, 2009 WL 4051077, *3 (D.Ariz., Nov. 20, 2009) (". . . [T]he Court finds that no specific date would be required if Plaintiff is complaining about a policy that would affect him on a daily basis; therefore, the Court rejects Defendant's argument that the grievance was outside the time frame."); Hudson v. Radtke, 2009 WL 1597259, *4 (W.D.Wis., June 5, 2009) (holding grievance about confiscated books was timely where the books were still being withheld at the time of the grievance); Perez v. Woodard, 2009 WL 838485, *3 (E.D.Tex., Mar. 27, 2009) (dismissing for non-exhaustion without prejudice because prisoner's complaint was ongoing; court assumes he could grieve again); Velez v. Guldan, 2008 WL 4443269, *8 (N.D.N.Y., Sept. 26, 2008) (complaint about delay in dental care was not untimely because filed after plaintiff began to receive care); Hagopian v. Smith, 2008 WL 3539251, *4 (E.D.Mich., Jan. 31, 2008), *report and recommendation adopted as modified on other grounds*, 2008 WL 3539256 (E.D.Mich., Aug. 12, 2008); Rollins v. Magnusson, 2007 WL 2302141, *5 (D.Me., Aug. 9, 2007) (declining to credit dismissal as untimely, since the plaintiff was "clearly grieving the *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.Wis., 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

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."[786] The court rejected the analogy to *Johnson v. Johnson*,[787] 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.[788] Other kinds of violations, of course, may be deemed to be discrete events as in *Johnson*, with the timeliness of each assessed separately.[789]

"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).

[786] Ellis v. Vadlamudi, 568 F.Supp.2d 778, 784 (E.D.Mich. 2008); *accord*, McAdory v. Engelsgjerd, 2010 WL 1131484, *4 (E.D.Mich., Feb. 11, 2010) (following *Ellis*; in cases involving treatment of chronic conditions, "prison officials may not parse for timeliness each individual treatment decision"), *report and recommendation adopted,* 2010 WL 1132548 (E.D.Mich., Mar. 23, 2010). By similar reasoning, a complaint about an ongoing violation ceases to be timely when the violation stops and it is no longer possible for prison officials to do anything about it. *See* Gruenberg v. Schneiter, 2011 WL 4729785, *3 (E.D.Wis., Oct. 5, 2011) (holding complaint about lack of exercise in segregation and its cumulative effect was untimely when filed only after plaintiff was transferred and no longer lacked exercise opportunity). *But see* Jones v. Kakani, 2012 WL 4450290, *6 (E.D.Mich., June 8, 2012) (holding plaintiff with ongoing problem whose complaint was based on a single medical procedure was not entitled to benefit of *Ellis v. Vadlamudi* holding), *report and recommendation adopted*, 2012 WL 4450149 (E.D.Mich., Sept. 25, 2012); Gara v. Kelley, 2012 WL 3683556, *4 (S.D.Ill., Aug. 24, 2012) (holding medical care complaint was not a continuing violation as to defendant who treated plaintiff for three or four days at the beginning of events). *Compare* O'Neal v. Correctional Medical Services Inc., 2011 WL 7769343, *5 (E.D.Ark., Dec. 1, 2011) (holding time for grievance about botched surgery began to run at the point defendants had told plaintiff healing should be complete, and obviously was not).

[787] 385 F.3d 503, 519 (5th Cir. 2004); *accord*, Ketzner v. Douglas, 2009 WL 1655004, *12-13 (E.D.Mich., June 11, 2009).

[788] *Ellis*, 568 F.Supp. at 785; *accord*, Wojtaszek v. Litherland, 2011 WL 4499692, *3 (S.D.Ill., Sept. 27, 2011) (grievance about course of denial of dental treatment was timely where the final incident was within the grievance time limit); Jones v. Caruso, 2008 WL 4534085, *7 (W.D.Mich., Sept. 2, 2008) (claim of ongoing exposure to second-hand smoke was not limited by "date of incident" on grievance; citing *Ellis*), *report and recommendation adopted in part, rejected in part on other grounds,* 2008 WL 4534081 (W.D.Mich., Sept. 29, 2008); *see* Thomas v. Ulep, 2011 WL 864311, *4 (E.D.Va., Mar. 9, 2011) (suggesting grievance timeliness could not be measured from a date before plaintiff learned of his medical treatment-related injury, though he had complained of the underlying problem earlier).

[789] *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 chaplaincy services in hospital did not exhaust subsequent complaints about these services where plaintiffs never cited repeated denials in a 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).

In *Moreno v. Cortez-Masto*, 2012 WL 553133, *5 (D.Nev., Jan. 19, 2012), *report and recommendation 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 claim is on Defendants' deliberate indifference to a serious threat to his safety, starting in 2006, which culminated in the 2009 rape." *Id.*

A few decisions have rejected any allowance for ongoing violations in applying grievance time limits.[790] One has split the difference by holding that the prisoner must have requested relief from the condition, and been denied, within the relevant grievance deadline period.[791]

Some grievance systems build in discretion to waive time limits; for example, the New York State grievance system permits late grievances for "mitigating circumstances,"[792] which

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[790] *See* Riego v. Carroll, --- F.Supp.2d ----, 2012 WL 4468161, *5 (D.Del., Sept. 28, 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 change; no discussion of ongoing nature of problem), *aff'd*, 407 Fed.Appx. 685 (4th Cir. 2011) (unpublished); Andrade v. Maloney, 2006 WL 2381429, *6 (D.Mass., Aug. 16, 2006) ("I will not toll the filing deadline because the generalized complaint was somehow a continuing violation. To do so 'would undermine the very purpose 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 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 defendants' inaction became "manifest." Johnson v. Townsend, 2007 WL 2407267, *3 (E.D.Ky., Aug. 20, 2007). 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 not exhaust timely); Hoye v. Nelson, 2007 WL 5062014, *7 (W.D.Mich., Oct. 18, 2007) (holding timeliness for a 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 907453 (W.D.Mich., Mar. 28, 2008). *Cf.* McNeil v. Howard, 348 Fed.Appx. 409, 412 (10th Cir. 2009) (holding grievance time limit runs from the beginning of a problem and not its end, so officials will have an opportunity to do something about it; not addressing whether a problem can be treated as ongoing), *cert. denied*, 130 S.Ct. 2105 (2010).

[791] Hart v. Baldwin, 2009 WL 3055304, *16 (N.D.Iowa, Sept. 21, 2009) ("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. . . ."), *aff'd*, 372 Fed.Appx. 684 (8th Cir. 2010). *Cf.* Barker v. Belleque, 2011 WL 285228, *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).

[792] 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); *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 "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 3123029, *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, *5 (S.D.N.Y., Aug. 5, 2008) (allowing unexhausted grievance to go forward where ambiguity of "alleged occurrence" where allowance for late grievances was limited to 45 days after an "alleged occurrence," and the plaintiff thought the "occurrence"

include "*e.g.*, attempts to resolve informally by the inmate," etc.[793] 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.[794] (Similarly, if there is an avenue of appeal or review of a decision that a grievance is untimely, prisoners are obliged to use it to exhaust.[795]) However, if the grievance body decides an arguably out-of-time grievance, the court may construe the decision as granting the waiver.[796] 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.[797] That approach is

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was his surgery and not his knowledge of its side-effects, he reasonably believed no remedy remained available to him).

[793] 7 N.Y.C.R.R. § 701.7(a)(1); Appendix D at § 701.6(g)(1)(i)(a).

[794] 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*), *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 "good cause"); Whitmore v. Jones, 2012 WL 4383888, *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), *report and recommendation adopted*, 2012 WL 4378129 (W.D.Okla., Sept. 25, 2012); Porter v. Howard, 2012 WL 3263789, *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"), *report and recommendation adopted*, 2012 WL 3263778 (E.D.Mich., Aug. 9, 2012); Tafari v. Stein, 2008 WL 1991039, *6 (W.D.N.Y., May 5, 2008), *reconsideration denied*, 2008 WL 3852150 (W.D.N.Y., Aug. 15, 2008); Cordova v. Frank, 2007 WL 2188587, * 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 21500339, *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), *motion to vacate denied,* 2000 WL 1731337 (S.D.N.Y., Nov. 21, 2000); *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). *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).

[795] White v. California Dept. of Corrections and Rehabilitation, 2011 WL 1404935, *3 (E.D.Cal., Apr. 13, 2011).

[796] *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. 808, below.

[797] *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,

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"[798]—implying that being persuaded of it could have made a difference in the outcome.

When a claim is dismissed for non-exhaustion–whether for simple failure to exhaust at all, an error in using the procedures, or reliance on law that has subsequently changed–the deadline for administrative proceedings will almost always have passed.[799] As noted, the Second Circuit has held that where 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).[800] That is, if the system will not entertain the plaintiff's late grievance, the plaintiff need not exhaust. The extent to which this rule survives *Woodford v. Ngo* is, as stated, unclear. 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.[801] Some decisions, however, have simply directed that grievance officials consider grievances on their merits after dismissal for non-exhaustion.[802]

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where earlier grievances had disappeared); Moore v. Louisiana Dept. of Public Safety and Corrections, 2002 WL 1791996, *4 (E.D.La., Aug. 5, 2002) (declining 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. 735-743, 767, above.

[798] 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).

[799] *See* Rohn v. Beard, 2007 WL 4454417, *2 (W.D.Pa., Dec. 17, 2007) (dismissing where grievance filed after prior dismissal was rejected as untimely), *aff'd*, 268 Fed.Appx. 190 (3d Cir. 2008) (unpublished), *cert. denied*, 555 U.S. 861 (2008); Mingilton v. Wright, 2007 WL 1732388, *1-2 (N.D.Tex., June 14, 2007) (dismissing plaintiff's claim that his cellmate threw boiling water mixed with cleaning fluid in his face, since his attempt to exhaust after prior dismissal was rejected as untimely); Regan v. Frank, 2007 WL 106537, *4-5 (D. Haw., Jan. 9, 2007) (same), *motion for relief from judgment denied*, 2008 WL 508067 (D.Haw., Feb. 26, 2008)

[800] 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).

[801] 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.

[802] George v. Morrison-Warden, 2007 WL 1686321, *4 (S.D.N.Y., June 11, 2007) (dismissing for failure to appeal, holding plaintiff's efforts had "earned him a response," directing officials to treat a renewed appeal as timely and respond to it); Hill v. Chalanor, 419 F.Supp.2d 255, 259 (N.D.N.Y. 2006) (finding appeal was "technically

The doctrine of equitable tolling, which several courts have held generally applicable to § 1997e(a),[803] may excuse late grievance filings under some circumstances (though at least one court has said that equitable tolling is inapplicable to prison grievance procedures[804]). In *Gambina v. Dever,*[805] 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.[806] 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 relieving the defendants of their procedural waiver of the exhaustion defense was conditioned on defendants' permitting the plaintiff to exhaust late.[807]

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.[808] Results are mixed in cases where a decision addresses both

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available," 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); Cardona v. Winn, 170 F.Supp.2d 131, 132 (D.Mass. 2001) (directing grievance deadline be held open because the plaintiff might have missed it because of "excusable confusion"); Burgess v. Morse, 259 F.Supp.2d 240, 247 (W.D.N.Y. 2003) (directing "that the IGRC Supervisor consider referral from this Court as a mitigating circumstance" for the plaintiff's untimely filing); *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).

[803] *See* nn. 185, above, and 1070-1071, below.

[804] Diaz v. Rutter, 2007 WL 2683532, *7 (W.D.Mich., Sept. 7, 2007) (holding equitable tolling applies to statutes of limitations but not grievance proceedings).

[805] 2006 WL 894900 (D.Colo., Mar. 31, 2006).

[806] 2006 WL 894900, *3-4; *see* Kelley v. DeMasi, 2008 WL 4298475, *4 (E.D.Mich., Sept. 18, 2008) (tolling the grievance deadline where prisoner was ill and hospitalized during the relevant time period); Anthony v. Gilman, 2008 WL 115531, *2 (W.D.Mich., Jan. 10, 2008) (applying equitable tolling to grievance deadline, but ruling against prisoner on the merits).

[807] 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).

[808] Hill v. Curcione, 657 F.3d 116, 125 (2d Cir. 2011); Riccardo v. Rausch, 375 F.3d 521, 524 (7th Cir. 2004), *cert. denied*, 544 U.S. 904 (2005); Ross v. County of Bernalillo, 365 F.3d at 1186; Pozo v. McCaughtry, 286 F.3d at 1025; Jewkes v. Shackleton, 2012 WL 3028054, *4 (D.Colo., July 23, 2012); Rothman v. Lombardi, 2012 WL 639713, *3 (E.D.Mo., Feb. 27, 2012); 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); *see Appendix A for additional authority on this point*; *see also* 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);Escobedo v. Miller, 2009 WL 2605260, *5 (C.D.Ill., Aug.

timeliness and the merits.[809] Time limits that are not made known to the prisoners cannot be enforced to bar their suits.[810]

If a grievance system has no time limit, delay in filing cannot bar a prisoner's claim for non-exhaustion;[811] an unexhausted claim should be dismissed without prejudice, and the litigant will have the opportunity to seek to exhaust.[812]

F. What Procedures Must Be Exhausted?

The PLRA requires the exhaustion of "such administrative remedies as are available."[813] 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.[814] Courts have declined to require

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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). *Contra*, Gara v. Kelley, 2012 WL 3683556, *4 (S.D.Ill., Aug. 24, 2012) (holding grievance accepted at lower level but rejected as untimely at higher level did not exhaust). *But see* Everett v. Ngu, 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 the basis for it; grievance personnel did not have fair notice of its lateness); 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).

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.

[809] 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).

[810] *See* cases cited in n. 697, above.

[811] Schonarth v. Robinson, 2008 WL 510193, *3-4 (D.N.H., Feb. 22, 2008) (grievance filed two years after the jail was demolished, but otherwise complying with grievance rules, exhausted); *accord*, Cabrera v. LeVierge, 2008 WL 215720, *5-6 (D.N.H., Jan. 24, 2008); Owens v. County of Ingham, 2008 WL 324292, *2 (W.D.Mich., Jan. 7, 2008).

[812] Alexander v. Dickerson, 2008 WL 1827609, *6 (E.D.Tex., Apr. 22, 2008).

[813] 42 U.S.C. § 1997e(a).

[814] Concepcion v. Morton, 306 F.3d 1347, 1353-54 (3d Cir. 2002) (holding that a grievance procedure described in an inmate handbook but not formally adopted by a state agency was an available remedy to be exhausted); *see* Ferrington v. Lousiana Dept. of Corrections, 315 F.3d 529, 531-32 (5th Cir. 2002) (holding grievance system that had been held unconstitutional under state constitution insofar as it divested the state courts of original jurisdiction over tort cases, but continued in operation, remained "available" for purposes of PLRA exhaustion), *cert. denied*,

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*.[815] 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.[816] 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.[817] These holdings only address gross structural characteristics of the

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540 U.S. 883 (2003). *But see* Westefer v. Snyder, 422 F.3d 570, 579 (7th Cir. 2005) (holding a "transfer review" process failed to afford a remedy in part because it was not "effective" for prisoners not informed of the reasons for their transfer).

[815] 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. 177, 424-426, above, for additional authority on both sides of this question.

[816] Schilling v. Transcor America, LLC, 2010 WL 583972, *5 (N.D.Cal., Feb. 16, 2010).

[817] Jones v. Michigan Dept. of Corrections, 2008 WL 762241, *4-5 (W.D.Mich., Mar. 18, 2008); *accord*, Mitchell v. Caruso, 2008 WL 4057913, *5-6 (W.D.Mich., Aug. 28, 2008) (noting that Warden's Forum representatives had declined to raise the plaintiff's issue there); *see* Lovely v. Scutt, 2011 WL 2470051, *2 (E.D.Mich., Apr. 20, 2011) (Warden's Forum is for general issues affecting groups or the entire housing unit; individual issues must be grieved), *report and recommendation adopted*, 2011 WL 2469809 (E.D.Mich., June 20, 2011); Lovely v. Scutt, 2010 WL 3464141, *2 (E.D.Mich., July 9, 2010) (same), *report and recommendation adopted*, 2010 WL 3464109 (E.D.Mich., Aug. 30, 2010); Siggers v. Campbell, 2008 WL 5188791, *3 (E.D.Mich., Dec. 10, 2008) (same), *aff'd*, 652 F.3d 681 (6th Cir. 2011). Other courts have held to the contrary about the Warden's Forum, but without considering the concerns raised in *Jones*. *See* Mario Sentelle Cavin, LLC v. Heyns, 2012 WL 5031503, *6 (W.D.Mich., July 30, 2012) (holding prisoner exhausted by taking general complaint about policy to Warden's Forum, in light of such complaints' exclusion from grievance system), *report and recommendation adopted*, 2012 WL 5002292 (W.D.Mich., Oct. 17, 2012); Berryman v. Granholm, 2007 WL 2259334, *10-11 (E.D.Mich., Aug. 3, 2007) (noting that issues regarding the content of a policy or procedure are properly raised via the Warden's Forum and not the grievance system); Jackson v. Caruso, 2008 WL 828118, *4 (W.D.Mich., Feb. 12, 2008) (same), *report and recommendation adopted as modified on other grounds*, 2008 WL 828116 (W.D.Mich., Mar. 26, 2008). There appears to be a risk of "bait and switch" treatment as between grievances and the Warden's Forum. *See* Siggers v. Campbell, 652 F.3d 681, 687 (6th Cir. 2011) (noting prisoner was advised by staff to raise mail issues at Warden's Forum, where warden stated he would review the policy, but personal complaints about mail were inappropriate).

supposed remedies;[818] as previously noted, an argument that resort to a grievance system is futile is not cognizable under the PLRA.[819]

The prison's rules will determine which remedy must be used if there is more than one.[820] Judicial remedies, including appeals from the agency to a court, need not be exhausted,[821] though there has been a peculiar dispute about this point in South Carolina.[822] Other legal rules unrelated to the PLRA may require exhaustion of judicial remedies in certain cases.[823]

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[818] 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).

[819] *See* n. 178, above.

[820] *See* Woodford v. Ngo, 548 U.S. 81, 92-93 (2006); Riley v. Hawaii Dept. of Public Safety, 2007 WL 3072777, *4-6 (D.Haw., Oct. 17, 2007) (holding sexual assault victims exhausted by completing the emergency grievance procedure as instructed, rather than the regular grievance procedure); Shilling v. Crawford, 2007 WL 2790623, *10 (D.Nev., Sept. 21, 2007) (holding Washington prisoner transferred to Nevada exhausted by using Nevada procedure because that is what the contract between the two states provided for; later noncompliant exhaustion in Washington did not affect validity of exhaustion); Berryman v. Granholm, 2007 WL 2259334, *10-11 (E.D.Mich., Aug. 3, 2007) (noting that issues regarding the content of a policy or procedure are properly raised via the Warden's Forum and not the grievance system).

[821] 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); Black v. Michigan Dept. of Corrections, 2012 WL 994768, *10 (E.D.Mich., Feb. 29, 2012) (prisoner need not seek judicial review of administrative decision re disciplinary conviction), *report and recommendation adopted*, 2012 WL 987781 (E.D.Mich., Mar. 23, 2012); Andrews v. Whitman, 2008 WL 878466, *6 (S.D.Cal., Mar. 28, 2008) (prisoner who received no response to his grievance was not required to petition a state court for a writ of mandate); Thorns v. Ryan, 2008 WL 544398, *3 n.2 (S.D.Cal., Feb. 26, 2008) (same as *Andrews*); Mullins v. Smith, 14 F.Supp.2d 1009, 1012 (E.D.Mich. 1998); *see* Randolph v. Joyner, 2006 WL 2459482, *4, 7 (D.S.C., July 20, 2006) (holding that completion of judicial review of administrative action is not required even if it has been commenced). Consistently with these decisions, the Second Circuit has held that a prisoner who was justified in failing to exhaust or to exhaust properly was obliged to exhaust if administrative remedies remained directly available, but not if he would have to file a court action to be allowed to file an untimely grievance. Giano v. Goord, 380 F.3d 670, 680 (2d Cir. 2004). *Cf.* Charity v. Carroll, 2007 WL 2408527, *5 (E.D.Cal., Aug. 21, 2007) (holding exhaustion through state judicial process sufficed under unique circumstances of case), *report and recommendation adopted*, 2007 WL 2703165 (E.D.Cal., Sept. 14, 2007). *Contra*, Lassalle-Pitre v. Mercado-Cuevas, 839 F.Supp.2d 471, 474-75 (D.Puerto Rico, March 12, 2012) (dismissing for not seeking judicial review of administrative decision, without explanation or acknowledgment of contrary authority); Floyd v. Haire, 2010 WL 3885488, *4 (W.D.Mich., Aug. 4, 2010) (holding plaintiff should have sought judicial review of prison hearing to complete exhaustion), *report and recommendation adopted on other grounds*, 2010 WL 3843779 (W.D.Mich., Sept. 28, 2010).

[822] In that state, there is 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 cases requiring resort to the Administrative Law Court generally do not focus on the distinction between administrative and judicial remedies. *See, e.g.,* Williams v. Harris, 2007 WL 2156669, *6-7 (D.S.C., July 26, 2007); Barr v. Battiste, 2007 WL 1704884, *2-3 n.3 (D.S.C., May 7, 2007), *report and recommendation adopted in part*, 2007 WL 1704858 (D.S.C., June 12, 2007); Haggins v. South Carolina Dept. of Corrections, 2006 WL 2095727, *4 (D.S.C., June 21, 2006), *report and recommendation adopted*, 2006 WL 2090171 (D.S.C., July 25, 2006).

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,"[824] and that ""[c]ompliance with *prison grievance procedures*, therefore, is all that is required by the PLRA to 'properly exhaust.'"[825] 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.[826] (In theory, there could be a difference between the question whether exhaustion of internal remedies is *necessary* and whether it is *sufficient* to satisfy the PLRA, 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

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The contrary cases, which do acknowledge the administrative/judicial distinction, have become much more numerous in recent years. *See, e.g.*, James v. Scarborough, 2011 WL 6026039, *2 (D.S.C., Nov. 10, 2011), *report and recommendation adopted*, 2011 WL 6026036 (D.S.C., Dec. 5, 2011); Adams v. South Carolina Dept. of Corrections, 2011 WL 2436499, *3 (D.S.C., May 23, 2011), *report and recommendation adopted*, 2011 WL 2418664 (D.S.C. 2011); Sampson v. Ozmint, 2010 WL 4929849, *6 (D.S.C., Nov. 2, 2010), *aff'd*, 2010 WL 4930996 (D.S.C., Nov. 30, 2010); Williams v. Ozmint, 2010 WL 3808621, *2 (D.S.C., July 22, 2010) ("The fact that the South Carolina Legislature made a court available to prisoners who wanted to appeal a final decision by a jail facility denying a grievance, . . . does not alter the federal PLRA by extending its administrative exhaustion requirements to include exhaustion in all state judicial forums."), *report and recommendation adopted*, 2010 WL 3814287 (D.S.C., Sept. 23, 2010); Pierre v. Ozmint, 2010 WL 679946, *3 n.5 (D.S.C., Feb. 24, 2010) (same), *aff'd*, 410 Fed.Appx. 595 (4th Cir. 2011) (unpublished); McKeown v. Kernell, 2010 WL 597191, *4 (D.S.C., Feb. 12, 2010) (same); Wolfe v. Bodison, 2010 WL 374567, *4 (D.S.C., Feb. 2, 2010); *see Appendix A for additional authority on this point*.

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." Maradiaga v. Bethea, 2009 WL 2829900, *3 (D.S.C., Sept. 1, 2009), *aff'd*, 363 Fed.Appx. 987 (4th Cir. 2010) (unpublished). Therefore, the court held,, prisoners must appeal to that court, but not further to the South Carolina Supreme Court. *Id.*, *4. Other recent decisions hold that only disciplinary decisions must be appealed to the Administrative Law Court to exhaust. Gallishaw v. DeLoach, 2012 WL 831854, *4 & n.5 (D.S.C., Feb. 16, 2012), *report and recommendation adopted*, 2012 WL 832257 (D.S.C., Mar. 12, 2012), *aff'd*, 474 Fed.Appx. 199 (4th Cir. 2012); Brown v. Ford, 2011 WL 4904437, *2 n.6 (D.S.C., Sept. 15, 2011), *report and recommendation adopted*, 2011 WL 4904458 (D.S.C., Oct 14, 2011); Brown v. Ford, 2011 WL 4352378, *4 n.4 (D.S.C., Aug. 17, 2011), *report and recommendation adopted*, 2011 WL 4352320 (D.S.C., Sept. 16, 2011); Chestnut v. Brown, 2010 WL 2136606, *4 n.3 (D.S.C., Mar. 18, 2010), *report and recommendation adopted,* 2010 WL 2136610 (D.S.C., May 25, 2010), *aff'd*, 395 Fed.Appx. 1 (4th Cir., Sept. 3, 2010) (unpublished). Whether this is because of the PLRA or some other legal rule has not been made clear.

[823] *See, e.g.*, Edwards v. Balisok, 520 U.S. 641 (1997).

[824] Porter v. Nussle, 534 U.S. 516, 524-25 (2002) (emphasis supplied).

[825] Jones v. Bock, 549 U.S. 199, 218 (2007) (emphasis supplied).

[826] *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).

the prison where the prisoner is held,[827] 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. Hill*[828] 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, there is no indication that it intended prisoners also to exhaust state tort claim procedures.[829]

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.'"[830] 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

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[827] 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 a remedy other than for FTCA. *See* n. 839781, below.

[828] Rumbles v. Hill, 182 F.3d 1064 (9th Cir. 1999), *cert. denied*, 528 U.S. 1074 (2000).

[829] *Id.* at 1069.

[830] *Id.* at 1069-70 (quoting Lacey, 990 F.Supp. 1199, 1206 (E.D.Cal. 1997)); *accord*, Macias v. Zenk, 495 F.3d 37, 42-44 (2d Cir. 2007); Devbrow v. Gallegos, 2011 WL 4709062, *1 (N.D.Ind., Oct. 4, 2011) (prisoner whose grievance was rejected without avenue of appeal and was directed to tort system was not obliged to use it); Fegans v. Johnson, 2010 WL 1425766, *12 (S.D.Tex., Apr. 8, 2010); Jones v. Courtney, 2005 WL 562719, *4 (D.Kan., Mar. 7, 2005); Blas v. Endicott, 31 F.Supp.2d 1131, 1132 (E.D.Wis. 1999). *Contra*, William G. v. Pataki, 2005 WL 1949509, *5 (S.D.N.Y., Aug. 12, 2005). *But see* Lemas v. Brown, 2007 WL 2558777, *4 (N.D.Cal., Sept. 4, 2007) (holding it was reasonable that a prisoner with a tort claim who was advised to file a notice of claim and not an "appeal," as grievances are called in California, would have done so).

> relief for matters that are relatively minor and for which *the prison grievance system* would provide an adequate remedy.[831]

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),[832] predecessor to the PLRA,[833] as shown by legislative history[834] and judicial interpretation.[835] When enacting the PLRA, Congress must have been aware that courts had equated the term "administrative remedies" with internal prison grievance procedures and still gave no indication that the judicial interpretation was contrary to its current intent.[836]

Under 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.[837] In effect, the FTCA and *Bivens* claims are

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[831] 141 Cong. Rec. S7526-7527 (May 25, 1995) (emphasis added).

[832] 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).

[833] Intent and usage in predecessor statutes can be highly relevant in construing contemporary statutes. *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), *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).

[834] *See* Report on the Activities of the Committee on the Judiciary, H.R. Rep. 104-879, at 183 (emphasis added) (stating that CRIPA's exhaustion provision "requires prisoners to exhaust the administrative remedies *established by the corrections system* before they may file a lawsuit in federal court") (emphasis supplied); H.R. Conf. Rep. No. 897, 96th Cong. 2d Sess. 9 (1980) (purpose of bill is to "stimulate the development and implementation of effective administrative mechanisms for the resolution of grievances in correctional . . . facilities"); *id.* at 15-17 (discussing exhaustion of remedies in context of "correctional grievance resolution systems"); 125 Cong. Rec. 11976(1978) (statement of Rep. Railsback) (discussing "grievance procedure" in prisons); *id.* at 15441 (statement of Rep. Kastenmeier) (effect of exhaustion provision will be to divert complaints to the State and their local institutions); 125 Cong. Rec. 12491-92 (1979) (statement of Rep. Drinan) (detailing studies of "prison grievance mechanisms"); *id* at 12492 (statement of Rep. Drinan) (§ 1997 intended to encourage "the establishment of grievance mechanisms in State correctional systems"); *id.* at 12493 (statement of Rep. Mitchell) (same); *id.* at 12494 (statement of Rep. Rodino) (referring to development of "correctional grievance mechanisms"); 126 Cong. Rec. 10780 (1980) (statement of Rep. Kastenmeier) (CRIPA "would encourage, but not require, States and political subdivisions to establish correctional grievance mechanisms"); 124 Cong. Rec. 23179 (1978) (statement of Rep. Butler) ("If we had the grievance machinery, and if they were required to go through that grievance machinery, we believe that many of these cases . . . would be quickly resolved, and resolved at the level where they should be resolved and that is where the grievance arises, and that is in the penal institution [or] the local jail.")

[835] 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 "imposes 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").

[836] *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.

[837] Garrett v. Hawk, 127 F.3d 1263, 1266 (10th Cir. 1998) (holding that Federal Tort Claims Act administrative filing is not "available" to prisoner pursuing *Bivens* claim against individual prison staff); Norris v. U.S., 2012 WL 2590010, *3 (E.D.N.C., July 3, 2012) (holding FTCA exhaustion does not exhaust a *Bivens* claim); Champion v.

treated as separate worlds for exhaustion purposes, without much theoretical discussion of why.[838] An exception may or may not exist at the U.S. Marshals Service, where court decisions 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.[839] 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.[840]

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,[841] a state statutory

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Smith, 2012 WL 930858, *2 (E.D.Cal., Mar. 19, 2012) (similar to *Purdum*); Purdum v. Johns, *3 (E.D.N.C., Oct. 25, 2011) (holding FTCA exhaustion did not exhaust plaintiff's *Bivens* claim); Watson-El v. Wilson, 2010 WL 3732127, *9 n.1 (N.D.Ill., Sept. 15, 2010) ("There are separate and distinct administrative exhaustion processes for claims under the FTCA and constitutional claims concerning the conditions of an inmate's confinement."); Paulino v. U.S., 2009 WL 2996678, *15 (E.D.Tex., Sept. 15, 2009) ("There are two different exhaustion procedures for *Bivens* claims and Federal Tort Claims Act claims."); Crum v. Dupell, 2008 WL 902177, *3 (N.D.N.Y., Mar. 31, 2008) ("the exhaustion procedures under the FTCA and under the PLRA for *Bivens* claims differ, and fulfillment of one does not constitute satisfaction of the other"); *see Appendix A for additional authority on this point. Contra*, Kaufman v. Baynard, 2012 WL 844480, *8-11 (S.D.W.Va., Feb. 3, 2012) (holding that dismissal of an FTCA claim for non-exhaustion precludes *Bivens* claim on the same facts under the "judgment bar" of the FTCA), *report and recommendation adopted*, 2012 WL 844408 (S.D.W.Va., Mar. 12, 2012); Valentine v. Lindsay, 2011 WL 3648261, *10 (E.D.N.Y., Aug. 17, 2011) ("According to the plain text of the statute, prison conditions claims, even those brought under the FTCA, must be exhausted through the prison grievance system." (citing Arawole v. Hemingway, 2006 WL 2506972, *3–4 (N.D.Tex., Aug. 11, 2006)).

[838] *See, e.g.*, Ford v. Spears, 2012 WL 4481739, *8 (E.D.N.Y., Sept. 27, 2012) ("Exhaustion under the FTCA is separate and distinct from exhaustion under the PLRA. The FTCA's exhaustion requirements—unlike those under the PLRA—are jurisdictional."); Green v. Ringwood, 2010 WL 1052871, *2 & n.4 (E.D.Ark., Mar. 5, 2010), *report and recommendation adopted*, 2010 WL 1052874 (E.D.Ark., Mar. 23, 2010); Adekoya v. Federal Bureau of Prisons, 2009 WL 1835012, *2 (S.D.N.Y., June 18, 2009), *aff'd*, 382 Fed.Appx. 26 (2d Cir. 2010). *But see* Gaughan v. U.S. 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.

[839] 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).

[840] Satterwhite v. Dy, 2012 WL 748287, *4-5 (W.D.Wash., Mar. 5, 2012).

[841] 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

procedure for seeking a declaratory judgment from a state agency,[842] a state statutory "citizen's complaint" procedure,[843] state medical malpractice administrative procedures,[844] dispute resolution procedures under the Interstate Corrections Compact,[845] or even an Office of the Corrections Ombudsman in the state Department of the Public Advocate, since that office is outside the corrections agency.[846] The Prison Rape Elimination Act (PREA) does not substitute for, or exempt prisoners from, prison grievance procedures,[847] 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.[848]

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.[849] 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,"[850] rejecting the argument that that remedy need not be exhausted because it does not result in action but only in findings or advice,[851] and that it does not even

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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.

[842] Aiello v. Litscher, 104 F.Supp.2d 1068, 1074 (W.D.Wis. 2000); *see* Mooney v. Caruso, 2011 WL 7171361, *5 (W.D.Mich., Dec. 2, 2011) (holding declaratory judgment procedure did not exhaust; "Plaintiff is not permitted to select the state administrative process by which he attempts to resolve this matter before seeking relief in federal court. . . . Pursuant to MDOC policy, Plaintiff was required to resolve this matter through the grievance process. Plaintiff concedes that he failed to do so."); Cadogan v. Bell, 2009 WL 1138506, *5 (E.D.Mich., Jan. 28, 2009) (declaratory judgment procedure does not satisfy exhaustion requirement because it is not part of the institutional grievance procedure), *report and recommendation adopted*, 2009 WL 1138505 (E.D.Mich., Mar. 5, 2009), *reconsideration denied*, 2009 WL 1138511 (E.D.Mich., Apr. 27, 2009); *accord*, Proctor v. Applegate, 661 F.Supp.2d 743, 774 (E.D.Mich. 2009), *motion to certify appeal denied*, 2009 WL 5227540 (E.D.Mich., Dec. 29, 2009).

[843] Evans v. Woodford, 2008 WL 5114653, *2 (E.D.Cal., Dec. 4, 2008).

[844] McGraw v. Hornaday, 2007 WL 2694634, *2 (S.D.Ind., Sept. 10, 2007).

[845] 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).

[846] Tormasi v. Hayman, 2011 WL 463054, *4 (D.N.J., Feb. 4, 2011).

[847] Porter v. Howard, 2012 WL 2836637, *4 (S.D.Cal., July 10, 2012).

[848] *See* § IV.E.7.i, above.

[849] O'Guinn v. Lovelock Correctional Center, 502 F.3d 1056, 1062-64 (9th Cir. 2007).

[850] Burgess v. Garvin, 2003 WL 21983006, *3 (S.D.N.Y., Aug. 19, 2003), *on reconsideration,* 2004 WL 527053 (S.D.N.Y., March 16, 2004); *accord,* William G. v. Pataki, 2005 WL 1949509, *5-6 (S.D.N.Y., Aug. 12, 2005); Scott v. Goord, 2004 WL 2403853, *7 (S.D.N.Y., Oct. 27, 2004); Rosario v. N.Y. State Dept. of Correctional Services, 2003 WL 22429271 *3 (S.D.N.Y., Sept. 24, 2003), *vacated and remanded*, 400 F.3d 108 (2d Cir. 2005) (per curiam).

[851] *Burgess*, 2004 WL 527053, *2; *Rosario*, 2003 WL 22429271, *4. *Compare* In re Bayside Prison Litigation, 190 F.Supp.2d 755, 771-72 (D.N.J. 2002) (holding that a process with no authority except to "'make recommendations for change' to administrative officials" need not be exhausted because it fails to provide for the "responsive action" envisioned in *Booth)*; Freeman v. Snyder, 2001 WL 515258, *7 (D.Del., Apr. 10, 2001) (holding that the "vague, informal process" described by defendants is "hardly a grievance procedure").

investigate most individual complaints submitted to it.[852] Other courts, however, held that exhaustion of the DOJ remedy was not required.[853] The question became moot as to the state Department of Correctional Services (DOCS) because, after one decision requiring DOJ 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.[854] 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.[855]

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.[856]

It is of course possible that a prison system could adopt an external remedy as part of its dispute resolution policy.[857] 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.

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[852] *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.

[853] Degrafinreid v. Ricks, 2004 WL 2793168, *14 n.10 (S.D.N.Y., Dec. 6, 2004); Veloz v. State of N.Y., 339 F.Supp.2d 505, 519 (S.D.N.Y., Sept. 30, 2004) ("Filing a complaint with the DOJ, an external federal agency, does not allow correctional officers to respond directly to inmates' grievances nor does it allow them to remedy the issues raised in the grievance. Requiring prisoners to grieve with external agencies does not serve the underlying purpose of the exhaustion requirement."), *aff'd*, 178 Fed.Appx. 39 (2d Cir., Apr. 24, 2006); Singleton v. Perilli, 2004 WL 74238, *4 (S.D.N.Y., Jan. 16, 2004) (dictum); Shariff v. Artuz, 2000 WL 1219381 (S.D.N.Y., Aug. 28, 2000); *see* Lavista v. Beeler, 195 F.3d 254, 257 (6th Cir. 1999) (holding that resort to the ADA procedures did not suffice to exhaust, stating: "Congress intended the exhaustion requirement to apply to the *prison's* grievance procedures, regardless of what other administrative remedies might also be available.").

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.

[854] *Compare* Rosario v. Goord, 400 F.3d 108 (2d Cir. 2005) (per curiam) (repudiating argument) *with* William G. v. Pataki, 2005 WL 1949509 (S.D.N.Y., Aug. 12, 2005) (accepting argument in action defended by state Division of Parole and Office of Mental Health).

[855] Brown v. Cantrell, 2012 WL 3264292, *7-8 (D.Colo., Feb. 9, 2012), *report and recommendation adopted*, 2012 WL 4050300, *3 (D.Colo., Sept. 14, 2012); Haley v. Haynes, 2012 WL 112946, *1 (S.D.Ga., Jan. 12, 2012).

[856] Burgess v. Garvin, 2004 WL 527053, *5 (S.D.N.Y., March 16, 2004). *Contra*, Haley v. Haynes, 2012 WL 112946, *1 ("It has been this Court's experience that inmates have a keen regard for their rights and a fairly firm grasp of the law.").

[857] *See* Hills v. King County, 2012 WL 1903427, *6 (W.D.Wash., Apr. 23, 2012) (dismissing because plaintiff never filed a disability grievance with the King County Office of Civil Rights, "as required and as explained in the Inmate Information Handbook"), *report and recommendation adopted as modified*, 2012 WL 1903876 (W.D.Wash., May 25, 2012).

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.[858]

In such cases, the specialized system, rather than the inapplicable grievance system, must be exhausted,[859] consistently with the general rule that prisoners must follow the prisons' rules governing administrative remedies.[860] 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

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[858] 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.*

[859] *See* Owens v. Keeling, 461 F.3d 763, 769 (6th Cir. 2006) (holding prisoner who filed classification appeal exhausted, notwithstanding failure to complete inapplicable grievance procedure); Richardson v. Spurlock, 260 F.3d 495, 499 (5th Cir. 2001) (holding that filing an "administrative" appeal rather than the required "disciplinary" appeal did not exhaust); Jenkins v. Haubert, 179 F.3d 19, 23 n. 1 (2d Cir. 1999) (holding that appeal of disciplinary conviction satisfied the exhaustion requirement); Jones v. Golden, 2011 WL 1480315, *2-3 (E.D.Ark., Mar. 9, 2011) (complaint to Central Office Publication Review Committee exhausted), *report and recommendation adopted*, 2011 WL 1479987 (E.D.Ark., Apr. 19, 2011); Gonzalez-Aguilera v. Belleque, 2011 WL 690606, *2 (D.Or., Feb. 16, 2011) (though retaliation claim was non-grievable because misconduct reports could not be grieved, plaintiff was obliged to use system for complaining about discrimination or retaliation for complaining about discrimination); Washington-El v. Beard, 2010 WL 6065083, *8 (W.D.Pa., Dec. 16, 2010) (prisoner whose claims were "inextricably linked" to his administrative confinement exhausted through the administrative confinement remedy, and need not have also filed a grievance), *report and recommendation adopted as modified*, 2011 WL 891250 (W.D.Pa., Mar. 11, 2011); Neff v. Bryant, 2010 WL 3418893, *3 (D.Nev., Aug. 24, 2010) (grievance did not exhaust Security Threat Group classification complaint where there were special requirements for appealing such classification); *see Appendix A for additional authority on this point; see also* Cordero v. Bureau of Prisons, 2005 WL 1205808 (M.D.Pa., Apr. 27, 2005) (noting that Privacy Act claims are excluded from the federal prisons' Administrative Remedy Program but must be exhausted through the Privacy Act administrative process); Alvarez v. U.S., 2000 WL 679009 (S.D.N.Y., May 24, 2000) (holding that since federal Bureau of Prison regulations for administrative remedy excluded tort claims, following the tort claims procedure met the exhaustion requirement). *But see* Jones v. Michigan Dept. of Corrections, 2008 WL 762241, *4-5 (W.D.Mich., Mar. 18, 2008) (holding "Warden's Forum" was not an available remedy because plaintiff did not have a "personal, direct right" to bring an issue to it).

[860] Woodford v. Ngo, 548 U.S. 81, 92-93 (2006).

direct.[861] If the administrative system gives the prisoner a choice among multiple remedies, exhausting one of the choices will satisfy the exhaustion requirement.[862]

One court has held that if a grievance 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.[863] That holding is potentially problematical, 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.[864] For example, that is the case with complaints of sexual abuse by

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[861] Branch v. Stoke, 2009 WL 483893, *5 (D.N.J., Feb. 24, 2009). This issue arises frequently in connection with disciplinary appeals, discussed in § IV.E.3, nn. 568-582. 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 568.

[862] Barkey v. Reinke, 2010 WL 3893897, *6-7 (D.Idaho, Sept. 30, 2010) (holding sexual abuse complaint exhausted where prison had created an alternative to the grievance system in the form of a hotline pursuant to the Prison Rape Elimination Act); Giron v. Garcia, 2010 WL 3001858, *3 (D.Nev., June 2, 2010) (where prisoner exhausted grievance process concerning allowance of religious property, he was not required also to exhaust a procedure for receiving religious property absent an instruction to that effect in the grievance policy), *report and recommendation adopted*, 2010 WL 2870742 (D.Nev., July 19, 2010); *see Cf.* Riley v. Hawaii 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).

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. Wetzel, 2012 WL 6623689, *6 (M.D.Pa., Oct. 26, 2012), *report and recommendation adopted*, 2012 WL 6623688 (M.D.Pa., Dec. 19, 2012); McKinney v. Zihmer, 2010 WL 1135722, *6-7 (M.D.Pa., Mar. 23, 2010), *reconsideration denied*, 2010 WL 1506004 (M.D.Pa., Apr. 13, 2010); Knauss v. Shannon, 2010 WL 569829, *8 (M.D.Pa., Feb. 12, 2010); Carter v. Klaus, 2006 WL 3791342, *3 (M.D.Pa., Dec. 22, 2006).

[863] Brown v. Valoff, 422 F.3d 926, 940-42 (9th Cir. 2005) (holding that when a grievance was referred to the Internal Affairs "staff complaint" process, the prisoner must wait until that process was concluded); Fisher v. Caruso, 2008 WL 205263, *1-2 (E.D.Mich., Jan. 24, 2008) (prisoner whose grievance was referred for formal investigation, and who appealed without waiting for the result, did not exhaust). *But see* Dorch v. Crittenden, 2010 WL 3245769, *5 (E.D.Mich., July 20, 2010) (holding referral to internal affairs had no effect on plaintiff's exhaustion obligations), *report and recommendation adopted*, 2010 WL 5390175 (E.D.Mich., Dec. 22, 2010); Baker v. Finnan, 2009 WL 4506331, *2 (S.D.Ind., Nov. 30, 2009) (dismissing for non-exhaustion absent evidence that referral to internal affairs prevented continuation of the grievance process).

[864] *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); 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 where 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), *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 527918, *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). *But see* Morris v. Barra, 2012 WL 1059908, *8 (S.D.Cal.,

New York State prisoners, a problem compounded by a decision of the Second Circuit.[865] 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.[866]

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 *pro forma* notice that they can appeal regardless of whether there are remaining issues to appeal or relief to be obtained. *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 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).

[865] 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.

[866] 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); Brooks v. Silva, 2012 WL 3637832, *7 (E.D.Ky., Aug. 23, 2012) (declining to dismiss where plaintiff's grievance was referred to internal affairs office and then closed in grievance record system; rejecting Bureau of Prisons' claim that plaintiff was still somehow required to complete the Administrative Review Procedure absent any legal authority to that effect); 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 (D.Md., 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).

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.[867] Prisoners are also entitled to rely on the instructions of prison personnel as to which remedy to use.[868] 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.[869]

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[867] 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'Mara, 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) (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 whethere the prisoner had interpreted the rules reasonable). Issues concerning disciplinary appeals are discussed further at nn. 568-582, above.

[868] 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); 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 grieve where 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. 993, below, concerning prisoners' reliance on prison personnel's advice whether issues are grievable.

[869] Woodford v. Ngo, 548 U.S. 81, 103 (2006); *see* §IV.E.7, above, for further discussion of this point.

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,[870] or cooperating in an internal investigation[871]–will generally not meet the PLRA exhaustion requirement.[872] Of course the provisions of a particular grievance system may lead to a different conclusion,[873] as may the circumstances of a particular case.[874]

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[870] *See* 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.

[871] 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 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); 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*. *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").

[872] *See* Lavista v. Beeler, 195 F.3d 254, 257 (6th Cir. 1999) (holding that Americans with Disability Act procedures did not meet PLRA exhaustion requirement); Townes v. Paule, 407 F.Supp.2d 1210, 1218 (S.D.Cal. 2005) (holding filing of "citizen complaint" rather than prison grievance did not exhaust), *reconsideration denied*, 2006 WL 783384 (S.D.Cal., Jan. 18, 2006).

[873] 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. 862, 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 counsel 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.

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.[875] Some of these are arguably overruled by the Supreme Court's holding that the exhaustion requirement is governed by a procedural default standard,[876] insofar as prison rules prescribe use of the grievance system or some other identified administrative system for

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Simonds, 422 F.Supp.2d 318, 326 (D.N.H. 2006) (holding that a policy stating 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. Dipaolo, 393 F.Supp.2d 80, 96-97 (D.Mass. 2005) (concluding that letters to officials are considered grievances under state law).

[874] 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); De'Lonta v. Pearson, 2011 WL 795934, *6 (E.D.Va., Feb. 24, 2011) (declining to dismiss where prisoner had been advised not to file grievances while they were timely because of the ongoing Internal Affairs investigation, with which she cooperated); Barkey v. Reinke, 2010 WL 3893897, *6-7 (D.Idaho, Sept. 30, 2010) (prisoner who used Prison Rape Elimination Act hotline to report sexual abuse, and was directed to an investigator rather than the grievance process when she complained internally, exhausted); Ray v. Jones, 2007 WL 397084, *2 (W.D.Okla., Feb. 1, 2007) (declining to dismiss for failing to grieve where plaintiff was repeatedly advised that an internal affairs investigation would substitute for the grievance process); *see also* cases cited in n. 991, below.

[875] 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 grrievance 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 *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; *accord*, Molina v. New York, *6, 2011 WL 6010907 (N.D.N.Y., Dec. 1, 2011) (adopting reasoning and holding of *Lewis v. Gagne*).

[876] Woodford v. Ngo, 548 U.S. 81 (2006). *But see* Houseknecht v. Doe, 653 F.Supp.2d 547, 560 (E.D.Pa. 2009) (citing *Camp v. Brennan*, *supra*, and holding defendants have the burden of showing that a complaint that was investigated does not satisfy the prison policy).

particular kinds of complaints.[877] The Second Circuit has taken this view in *Macias v. Zenk*,[878] 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.[879] *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."[880]

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.[881] 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.[882]

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,[883] or its widely followed decision in *Hemphill v. New York*,[884] 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

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[877] In *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 *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; *compare* 2006 WL 1876632, *2. However, the court also questioned whether *Woodford* was applicable, since Mr. Rainge-El, unlike the *Woodford* plaintiff, did not "entirely ignore" the prison's administrative system. 2006 WL 1980287, *1.

[878] 495 F.3d 37 (2d Cir. 2007).

[879] *See* Braham v. Clancy, 425 F.3d 177, 183 (2d Cir. 2005) (quoting Johnson v. Testman, 380 F.3d 691, 697 (2d Cir. 2004)).

[880] Macias v. Zenk, 495 F.3d at 43-44.

[881] *See* nn. 726-727, above.

[882] *But see* Roth v. Larson, 2008 WL 4527831, *18 (D.Minn., Sept. 30, 2008) (the fact that prison officials respond to informal complaints does not waive the defense that the prisoner failed to use the grievance system or other designated remedy).

[883] *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. 685 *et seq.*, 867, above.

[884] 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).

> 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 his complaints, thereby neutralizing threatened retaliatory conduct from prison employees.[885]

The *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."[886] 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."[887]

In adopting its procedural default rule requiring "proper exhaustion," *i.e.*, exhaustion compliant with the agency's "critical procedural rules,"[888] 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 *Woodford*.[889]

4. The New York State "Expedited Procedure"

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

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[885] *Hemphill*, *id.* at 688. The effect of threats and retaliation on exhaustion obligations is discussed further at nn. 960-970895-905, below.

[886] *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.*

[887] *Hemphill, id.* at 690 n.8.

[888] Woodford v. Ngo, 548 U.S. 81, 90 (2006).

[889] *See* nn. 667-672624-628, above.

the highest level of the grievance system, the Central Office Review Committee.[890] 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.[891] 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.[892]

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.[893] District court decisions rejected that view.[894] 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.[895] In my view, poorly

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[890] This discussion is summarized from *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.

[891] 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 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.

The obligation to appeal may also be terminated by transfer, since in this grievance system, "departmental" grievances may be appealed after transfer, but by negative implication, "institutional" grievances may not. Andrews v. Cruz, 2010 WL 1141182, *6 (S.D.N.Y., Mar. 24, 2010); Land v. Kaufman, 2009 WL 1106780, *3-4 (S.D.N.Y., Apr. 23, 2009).

[892] *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).

[893] 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).

[894] Morris v. Eversley, 205 F.Supp.2d at 240-41; Perez v. Blot, 195 F.Supp.2d 539, 544-46 (S.D.N.Y. 2002); Gadson v. Goord, 2002 WL 982393, *3 (N.D.N.Y., May 10, 2002).

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).

[895] Houze v. Segarra, 217 F.Supp.2d at 395-96; McNair v. Sgt. Jones, 2002 WL 31082948, *7 n.3 (S.D.N.Y., Sept. 18, 2002); Byas v. State of New York, 2002 WL 1586963, *2 (S.D.N.Y., July 17, 2002). *Contra*, Rivera v. Goord, 2003 WL 1700518, *12 (S.D.N.Y., Mar. 28, 2003) ("Although Rivera did not comply with the technical

educated prisoners should not be penalized for not understanding the term of art "immediate 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.[896]

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."[897] 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.[898] 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*,[899] 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"

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requirements of the expedited procedure [by writing the Superintendent], this failure does not automatically amount to a failure to exhaust.")

Some decisions simply assert that letters to the Superintendent do not exhaust, without discussing the harassment grievance procedure. *See, e.g.*, Harris v. Totten, 244 F.Supp.2d 229, 233 (S.D.N.Y. 2003).

[896] *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. 726-727, 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).

[897] *Hemphill*, 380 F.3d at 689.

[898] *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.

[899] 255 F.3d 40 (2d Cir. 2001)

exhausted, since the relevant grievance policy says that the formal process was intended to supplement, not replace, informal methods.[900] In effect, the court held, informal resolution had been adopted as part of the grievance system. Under this holding a prisoner must succeed in the informal process in order to have exhausted through it.[901]

The *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.[902] In fact, the Second Circuit appears to have abandoned its informal exhaustion holding. In *Braham v. Clancy*,[903] 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.[904]

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[900] *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 intended to supplement, not replace, existing formal or informal channels of problem resolution')."). In *Bivens v. Lisath*, 2007 WL 2891416, *3 (S.D.Ohio, Sept. 28, 2007), the court cited the Ohio grievance procedure's instruction to "Talk to Or Kite Staff" and then, if the issue is resolved, "STOP" rather than file a grievance, in holding it would would be reasonable for a prisoner to believe that he need not resort to the grievance process if his complaint is resolved without it.

[901] *See* Thomas v. Cassleberry, 315 F.Supp.2d 301, 304 (W.D.N.Y. 2004) (holding a complaint to the Inspector General exhausts informally only if the resolution is favorable); Curry v. Fischer, 2004 WL 766433, *6 (S.D.N.Y., Apr. 12, 2004), *dismissed on other grounds*, 2004 WL 2368013 (S.D.N.Y., Oct. 22, 2004); Rivera v. Goord, 2003 WL 1700518, *11 (S.D.N.Y., Mar. 28, 2003) (holding that a prisoner who initiated an investigation of his claim, but did not show that he obtained a favorable resolution informally or that he sought administrative review of an unfavorable resolution, had not exhausted informally). *But see* Gibson v. Brooks, 335 F.Supp.2d 325, 333 (D.Conn. 2004) (holding that a prisoner who confronted one of the defendants and received an apology had informally exhausted). *Contra*, McCray v. Orange County Jail, 2007 WL 4180759, *1-2 (M.D.N.C., Nov. 20, 2007) (holding prisoner who received an apology but didn't appeal failed to exhaust; if he wasn't satisfied, he should have finished the process).

If grievance rules provide that informal exhaustion is an acceptable alternative means of dispute resolution regardless of outcome, it will satisfy the PLRA. Carr v. Hazelwood, 2008 WL 4556607, *5 (W.D.Va., Oct. 8, 2008), *report and recommendation adopted*, 2008 WL 4831710 (W.D.Va., Nov. 3, 2008).

[902] *See* § IV.F.3, above.

[903] 425 F.3d 177 (2d Cir. 2005).

[904] *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," *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.

Braham can be read as holding that informal steps can suffice to exhaust as long as they put prison officials on notice of the problem. However, the Second Circuit has subsequently held that in this respect Braham does not survive the "proper exhaustion" holding of *Woodford v. Ngo*, 548 U.S. 81 (2006): "after Woodford, notice alone is insufficient" without compliance with "critical procedural rules." Macias v. Zenk, 495 F.3d 37, 43-44 (2d Cir. 2007). The plaintiff in *Macias* made no claim that the rules were so confusing that he reasonably believed that he had satisfied the exhaustion requirement by filing tort claims and complaining informally, id., so the court had no occasion to decide whether such a claim would satisfy the exhaustion requirement.

Later, in *Ruggiero v. County of Orange*,[905] 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."[906] 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."[907]

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.[908] 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.[909] 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.[910] 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.[911]

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[905] 467 F.3d 170, 177 (2d Cir. 2006)

[906] *Ruggiero*, 467 F.3d at 177. For further discussion of *Braham* and *Ruggiero*, *see* nn. 482-484, above.

[907] *Ruggiero*, 467 F.3d at 177 (quoting *Braham*, 425 F.3d at 183).

[908] Williams v. Georgia Dept. of Corrections, 2012 WL 2839454, *3 (S.D.Ga., May 2, 2012) (where grievance policy encouraged *resolving* grievances at the informal level, prisoners need not pursue a formal grievance to exhaust), *report and recommendation adopted*, 2012 WL 2839402 (S.D.Ga., July 10, 2012); Aziz v. Pittsylvania County Jail, 2012 WL 263393, *5 (W.D.Va., Jan. 30, 2012) ("The policy does not preclude using informal methods of grievance resolution and does not mandate written grievances as the sole method of exhaustion."); Davis v. D.C. Dept. of Corrections, 623 F.Supp.2d 77, 80-81 (D.D.C. 2009) (where handbook said that prisoners should complain about sexual abuse by telling any staff member or calling a hotline, with no further action by the prisoner required, those actions would exhaust).

[909] Houseknecht v. Doe, 653 F.Supp.2d 547, 560 (E.D.Pa. 2009).

[910] Byrum v. Georgia Dept. of Corrections, 2011 WL 4083893, *5 n.3 (S.D.Ga., Sept. 13, 2011) (where grievance procedure requires completion of an informal stage, and complaint is resolved at it, prisoner has exhausted), *report and recommendation adopted*, 2011 WL 5239111 (S.D.Ga., Nov. 1, 2011); Agnes v. Joseph, 2011 WL 4352843, *4 (E.D.Cal., Sept. 16, 2011) (prisoner who asked to see a doctor, and was allowed to, by informal grievance had exhausted; court notes informal section of grievance form does not refer to appeal), *report and recommendation adopted*, 2011 WL 5024443, *1 (E.D.Cal., Oct. 20, 2011); Barrett v. Maricopa County Sheriff's 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); Stevens v. Goord, 2003 WL 21396665, *4 (S.D.N.Y., June 16, 2003) (prisoner who got medical treatment by having his family contact the prison exhausted), *adhered to on reargument*, 2003 WL 22052978 (S.D.N.Y., Sept. 3, 2003); 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 also* Branch v. Brown, 2003 WL 21730709, *12 (S.D.N.Y., July 25, 2003) (formal grievance resolved informally appeared to exhaust), *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) (similar to *Branch*).

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 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

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."[912] 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."[913] No particular structure or degree of formality is required of a grievance system as long as it is constituted to act on individuals' complaints[914]—though there is an extreme of informality that courts will not

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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.

[911] *See* § IV.E.1, above.

[912] 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.'")).

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 uncounselled 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).

[913] 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, underttaken 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).

[914] *See* nn. 814-818, above.

credit.[915] Remedies may be deemed unavailable if there is no "clear route" for challenging the conduct in question.[916]

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.[917] 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.[918]

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.[919] It is common for some issues not to be "grievable" in a particular grievance system because the system explicitly excludes them from coverage,[920] or because the informal practices of staff have the same

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[915] 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.

[916] 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. 573-576, 685-692, 867-869, above, and 991, 995, below, concerning the lack of clarity in prison remedies.

[917] Abney v. McGinnis, 380 F.3d 663, 667 (2d Cir. 2004).

[918] *See* nn. 188, 238-240, 465, 800, 886-887, above, and § IV.G.3, and n. 1071, below.

[919] 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.Ill., 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.

[920] *See* Owens v. Keeling, 461 F.3d 763, 769-70 (6th Cir. 2006) (stating "a prisoner is not required to pursue a remedy where the prison system has an across-the-board policy declining to utilize that remedy for the type of claim raised by the prisoner"; noting classification matters excluded from Tennessee grievance system); Figel v. Bochard, 89 Fed.Appx. 970, 971, 2004 WL 326231, *1 (6th Cir. 2004) (unpublished) (noting that Michigan system makes non-grievable issues that "involve a significant number of prisoners"); Evans v. Heidorn, 2013 WL 355822, *3 (E.D.Wis., Jan. 29, 2013) (noting "Policies, Rules, Regulations, and Procedures of the Sauk County Jail ARE NOT subject to review as part of the inmate grievance process."); Crihalmean v. Ryan, 2012 WL 5269312, *3-4 (D.Ariz., Oct. 24, 2012) (noting grievance policy made "[a]ctions of the ... State Legislature" non-grievable, though dismissing where plaintiff's claim involved administrative actions pursuant to a grant of discretion by the legislature); McAllister v. Garrett, 2012 WL 4471531, *5 (S.D.N.Y., Sept. 25, 2012) (noting that Westchester County jail policy makes disciplinary and administrative segregation decisions non-grievable); Bruce v. Correctional Medical Services, Inc., 2012 WL 4372378, *3 (E.D.Tenn., Sept. 24, 2012) (noting that Tennessee prison grievance system excludes medical diagnoses); Standley v. Ryan, 2012 WL 3288728, *3 (D.Ariz., Aug. 13, 2012) (holding gang validation appeal procedure which allowed appeals only of the specific reasons for validation was not an available remedy for due process concerns); Oliver v. Browe, 2012 WL 4459939, *3-4 (W.D.Va., July 30, 2012)

effect.[921] For example, the New York City jail grievance directive effective until September 2012 listed 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;

(noting that medical care complaints are non-grievable under jail grievance policy), *order issued*, 2012 WL 4459941 (W.D.Va., July 30, 2012); Oliver v. Harbough, 2011 WL 6412044, *4 (D.Md., Dec. 19, 2011) (rejecting non-exhaustion defense where matters under investigation by Internal Investigation Unit were no longer subject to grievance system); Holland v. Bramble, 775 F.Supp.2d 748, 752-53 (D.Del. 2011) (holding a system that heard "inmate complaints regarding policies and conditions . . . within DOC jurisdiction" which do not "have their own formal appeal mechanisms" did not allow grievances about incidents resulting in criminal charges prosecuted outside the prison); Smith v. Warden, 2011 WL 886211, *2 (D.Md., Mar. 10, 2011) (stating that if grievance process did not address claims of withholding of mail, mail withholding claim could not be barred for non-exhaustion); *see Appendix A for additional authority on this point. But see* Hanks v. Prachar, 2009 WL 702177, *7-8 (D.Minn., Mar. 13, 2009) (stating that non-grievability does not excuse exhaustion since the procedure is available).

Rules concerning non-grievable issues may be applied very narrowly. *See* Jones v. Schofield, 2010 WL 786585, *4 (M.D.Ga., Mar. 4, 2010) (acknowledging the sexual assaults and harassment were not grievable, but dismissing claim of inadequate medical care after rapes because medical care was grievable).

[921] *See* Kelley v. DeMasi, 2008 WL 4298475, *4 (E.D.Mich., Sept. 18, 2008) (where grievance response said that medical appointments could not be scheduled without the medical provider's approval, it was questionable whether the grievance process was available); Wigfall v. Duval, 2006 WL 2381285, *8 (D.Mass., Aug. 15, 2006) (citing evidence that use of force claims were not treated as grievances); Scott v. Gardner, 287 F.Supp.2d 477, 491 (S.D.N.Y. 2003) (holding that allegations that grievance staff refused to process and file grievances about occurrences at other prisons, claiming they were not grievable, sufficiently alleged lack of an available remedy), *on reconsideration*, 344 F.Supp.2d 421 (S.D.N.Y. 2004) *and* 2005 WL 984117 (S.D.N.Y., Apr. 28, 2005); Casanova v. Dubois, 2002 WL 1613715, *6 (D.Mass., July 22, 2002) (finding that, contrary to written policy, practice was "to treat complaints of alleged civil rights abuses by staff as 'not grievable'"), *remanded on other grounds*, 304 F.3d 75 (1st Cir. 2002); 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); *see* Marr v. Fields, 2008 WL 828788, *6 (W.D.Mich., Mar. 27, 2008) (evidence that hearing officers interpreted grievance policy broadly to exclude all grievances with any relationship to a disciplinary charges could excuse failure to exhaust); 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 also* Kendall v. Kittles, 2004 WL 1752818, *2 (S.D.N.Y., Aug. 4, 2004) (noting that Grievance Coordinator's affidavit said that plaintiff needed a physician's authorization to grieve medical concerns; no such requirement appears in the New York City grievance policy, annexed as Appendix C, or in its successors, Appendices G and H).

In *Davis v. Frazier*, 1999 WL 395414, *4 (S.D.N.Y., June 15, 1999), the court noted plaintiff's allegation that New York City prisoners are told at orientation that "a grievance cannot be brought against Officers or Staff" (an exception that does not appear in the written policy, quoted in the text below). It held that this allegation supported an estoppel defense to a claim of failure to exhaust). I have seen documents from the City grievance program itself rejecting claims as non-grievable because the grievance committee "does not investigate complaints against staff." *But see* Berry v. City of New York, 2002 WL 31045943, *8 (S.D.N.Y., June 11, 2002) (holding that despite "no grievance against Officers or Staff" announcement, prisoner's subsequent filing of several grievances defeated estoppel claim).

4. grievances 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).[922]

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.[923] Several other courts have dismissed New York City cases while erroneously citing the New York State prison grievance procedure.[924]

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,[925] 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.[926] In a third case, decided by the same judge on the same

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[922] Appendix H, New York City Dep't of Correction Directive 3376, Inmate Grievance and Request Program, § IV.B (September 10, 2012)
(http://www.nyc.gov/html/doc/downloads/pdf/Directive_3376_Inmate_Grievance_Request_Program.pdf). The new directive substitutes "not subject to IGRC process" for the term "non-grievable."

This list is modified from its predecessor, which made non-grievable "matters under investigation by the Inspector General, . . . [or] pertaining to matters in litigation ." Appendix C, New York City Dep't of Correction Directive 3375R, Inmate Grievance Resolution Program at § II.B (March 4, 1985); Appendix G, New York City Dep't of Correction Directive 3375R-A, Inmate Grievance Resolution Program at § II.C. (March 13, 2008). The reference to complaints which do not directly affect the inmate was removed, but it remains clear in the current directive that such a direct effect is a necessary element of a grievance. Appendix H, Directive 3376, § II.A. *See* Rizzuto v. City of New York, 2003 WL 1212758, *4 (S.D.N.Y., Mar. 17, 2003) (noting that claims of assault, verbal harassment, or matters under Inspector General investigation are non-grievable); Handberry v. Thompson, 2003 WL 194205, *8-10 (S.D.N.Y., Jan. 28, 2003) (holding issues concerning education in jail non-grievable based on defendants' prior statements that they were non-grievable because not under the sole control of the Department of Correction), *aff'd in part, vacated in part, and remanded on other grounds*, 446 F.3d 335, 342 (2d Cir. 2006) (noting failure to reach the issue on appeal). The omission of matters under investigation by the Inspector General moots some prior case law. *See* Berry v. Kerik, 237 F.Supp.2d 450, 451 (S.D.N.Y. 2002) (stating that a matter under investigation by the Inspector General had to be exhausted notwithstanding the policy); Jones v. Jones, 2002 WL 31548721, *1 (S.D.N.Y., Nov. 21, 2002) (dismissing for non-exhaustion on the ground that there was no evidence the matter was being investigated by the Inspector General, despite the plaintiff's conversation with an investigator who said he would look into it).

[923] *See* Mojias v. Johnson, 351 F.3d 606, 608-10 (2d Cir. 2003) (reversing dismissal of assault claim for non-exhaustion in a system that does not hear assault claims); *see also* Timmons v. Pereiro, 88 Fed.Appx. 447, 2004 WL 322702, *1 (2d Cir. 2004) (unpublished) (same).

[924] *See* Goldenberg v. St. Barnabas Hosp., 2005 WL 426701, *3 n.5 (S.D.N.Y., Feb. 23, 2005); Kearsey v. Williams, 2002 WL 1268014 (S.D.N.Y., June 6, 2002); 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). Another decision makes the same error in a case arising at another county jail. Ruggiero v. County of Orange, 386 F.Supp.2d 434, 436 (S.D.N.Y. 2005), *aff'd*, 467 F.3d 170 (2d Cir. 2006). *Cf.* Musto v. Trinity Food Services, Inc., 2009 WL 426014, *4 (M.D.Fla., Feb. 20, 2009) (rejecting argument that prisoner challenging jail conditions must exhaust state prison grievance system set out in state regulations).

[925] Timmons v. Pereiro, 88 Fed.Appx. 447, 448, 2004 WL 322702, *2 (2d Cir. 2004) (unpublished).

[926] Oates v. City of New York, 2004 WL 1752832, *3 (S.D.N.Y., Aug. 4, 2004) (noting City's inconsistent positions). In *Leacock v. New York City Health Hosp. Corp.*, 2005 WL 1027152 (S.D.N.Y. May 4, 2005), *adopted*,

day, the jail Grievance Coordinator submitted an affidavit stating that he told the plaintiff that to grieve medical concerns "he would need written physician authorization for each request," a requirement that does not appear in the grievance policy.[927]

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."[928] Courts should require substantiation that an administrative procedure on its face affords relief for a particular type of complaint before dismissing a prisoner's claim for non-exhaustion.[929]

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.[930] 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*.[931] 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.[932]

2005 WL 1639329 (S.D.N.Y., July 12, 2005), the City initially sought dismissal for non-exhaustion of the grievance process in a suit against medical staff, then acknowledged (citing *Timmons*) that that remedy was inapplicable to such claims. *See also* Fernandez v. New York City Dept. of Correction, 2010 WL 1222017, *6 (S.D.N.Y., Mar. 29, 2010) (dictum) (noting open question whether a medical complaint arising from a use of force is grievable). *But see* Prince v. Latunji, 746 F.Supp.2d 491, 494 (S.D.N.Y., Sept. 27, 2010) (granting defendants' motion to dismiss without noting question of availability of remedy against medical staff).

[927] 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).

[928] 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.Ill., 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.'")

[929] *See* Westefer v. Snyder, 422 F.3d 570, 580 (7th Cir. 2005) (holding prison officials had not established an available remedy where nothing "clearly identifie[d]" how to challenge certain decisions).

[930] *See* § IV.F.2, n. 859, 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).

[931] *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); Nooner 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 grieve 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

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.[933] Courts have acknowledged other medical reasons making administrative remedies unavailable,[934] though in some cases they have not credited purported medical excuses.[935] A number of decisions have held, as *Days* implies, that prisoners who could not file

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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 question whether a remedy was actually available on the ground that plaintiffs had at least to start the grievance process to determine whether any remedies were available.

[932] *See* n. 993, below.

[933] 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").

[934] *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); 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); 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); *see Appendix A for additional authority on this point.*.

[935] *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); 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), *appeal dismissed*, No. 12-2194 (3d Cir., July 17, 2012); 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); Wright v. Langford, 2012 WL 1074508, *2 (M.D.Ga., Mar. 29, 2012) (holding allegation that hand 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*

grievances when they would be timely were obliged to file them untimely, notwithstanding the governing "proper exhaustion" rule.[936] 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,[937] impaired literacy or lack of education,[938] language barrier,[939]

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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); *see Appendix A for additional authority on this point.*

[936] *See* cases cited in nn. 777-779, above.

[937] 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 sufficient notice they should have assisted him in filing a grievance; grievance system made no provision for outside persons to use it); 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).

[938] 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) (see previous note); *see* Womack v. Smith, 2011 WL 819558, *9 (M.D.Pa., Mar. 2, 2011) (illiteracy in combination with other factors made the remedy unavailable; illiteracy by itself would not excuse non-exhaustion where prisoner did not ask for assistance as provided in grievance policy). In the unreported decision in *Davis v. Corrections Corp. of America*, 131 Fed.Appx. 127, 128-29, 2005 WL 880892, *1 (10th Cir., Apr. 18, 2005) (unpublished), the court rejected the argument that the plaintiff's educational deficiencies (he said he was a "slow learner and thinker" still working to obtain a G.E.D.) should excuse his failure to exhaust, noting that his papers "did not describe insurmountable barriers to his filing of grievances and did not show that prison officials had effectively foreclosed his efforts." *Id.*, *1; *see also* Ramos v. Smith, 187 Fed.Appx. 152, 154 (3d Cir. 2006) (unpublished) (rejecting claim of illiteracy, since federal regulations require assistance to illiterate prisoners, and plaintiff did not allege that he asked for such assistance); Georgacarakos v. Watts, 147 Fed.Appx. 12, 14-15, 2005 WL 1984451, *2-3 (10th Cir. 2005) (unpublished) (ignoring litigant's plea to appoint counsel if his exhaustion presentation was inadequate, in light of his lack of "means and sophistication"); Levan v. Thomas, 2011 WL 2669288, *2 (D.Ariz., July 7, 2011) (rejecting claim of illiteracy, since grievance policy provided for assistance to illiterate persons, and defendants said grievance staff would help individuals as needed); Womack v. Smith, 2008 WL 822114, *8 (M.D.Pa., Mar. 26, 2008) (similar to *Ramos v. Smith*), *reversed and remanded on other grounds*, 2009 WL 347469 (3d Cir., Feb. 12, 2009) (unpublished). *Cf.* Cook v. LaPonsie, 2008 WL 4425589, *5 (W.D.Mich., Sept. 26, 2008) (excusing grievance's mis-description of problem where illiterate plaintiff had had to describe it to another prisoner, who made an error).

or youth.[940] The 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.[941] Others have rejected claims that mental disabilities prevented

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[939] 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* Bojorquez v. Fitzsimmons, 2009 WL 790950, *4-5 (C.D.Ill., Mar. 23, 2009); Abel v. Pierson, 2008 WL 509466, *4 (S.D.Ill., Feb. 13, 2008); Ramos v. Rosevthal, 2007 WL 1464436, *1 n.1 (D.Neb., May 17, 2007); Gonzalez v. Lantz, 2005 WL 1711968, *3 (D.Conn., July 20, 2005). *But see* Mendez v. Sullivan, 2012 WL 760724, *4-5 (M.D.Pa., Mar. 7, 2012) (granting summary judgment to defendants based on evidence of bilingual handbook, availability of interpreters and of counselors to assist Spanish-speaking prisoners), *aff'd*, 488 Fed.Appx. 566, 568 (3rd Cir. 2012); Aleman v. Dart, 2012 WL 488068, *5-6 (N.D.Ill., Feb. 14, 2012) (declining to excuse Spanish-speaking prisoner's non-exhaustion, given evidence of his failure to seek help from prison staff, his ability to get help from other prisoners, his filing of other grievances and of adequate legal papers given that help, and the fact that the grievance policy was made known in Spanish. "A prisoner's lack of familiarity with English may excuse a failure to exhaust administrative remedies where the prisoner is given insufficient assistance by prison officials to enable the prisoner to satisfy the prison grievance process."); *see Appendix A for additional authority on this point*; *see also* Lang Vo Tran v. Illinois Dept. of Corrections, 2011 WL 816630, *8 (S.D.Ill., Mar. 1, 2011) (holding lack of competence in English does not excuse other failures to exhaust in light of provisions for staff assistance, accessibility for persons who don't speak English, and explanation of procedures in non-English languages).

[940] 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. Pazera, 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").

[941] *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); 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); *see Appendix A for additional authority on this point*; *see also* Macahilas v. Taylor, 2008 WL 220364,

exhaustion,[942] though often on the ground that the plaintiff did not sufficiently plead or provide evidentiary support for the claim[943]—a rather *Catch-22*ish 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 CCA 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.[944] 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

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*4 (E.D.Cal., Jan. 25, 2008) (denying summary judgment to defendants based on alleged psychological effects of a serious physical illness), *report and recommendation adopted*, 2008 WL 506109 (E.D.Cal., Feb. 22, 2008). In *Johnson-Ester v. Elyea*, 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.

[942] 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); 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 initating three civil rights actions during the same time period), *review denied*, 2008 WL 2003757 (D.Ariz., May 8, 2008); *see Appendix A for additional authority on this point.*

[943] *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 affirmance 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).

[944] Braswell v. Corrections Corp. of America, 419 Fed.Appx. 622, 625 (6th Cir. 2011) (unpublished).

cell.[945] 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 unavailably 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 "completely unable to file a grievance," and if "this is evidenced to the Court's satisfaction."[946] 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.[947]

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.[948] However, transfer or absence will not automatically excuse non-exhaustion;

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[945] *Braswell*, 419 Fed.Appx. at 626.

[946] 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.

[947] 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*.

[948] 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); 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).

In *Johnson v. Ohio Dept. of Rehabilitation and Corrections*, 2008 WL 4560757, *2 (S.D.Ohio, Oct. 9, 2008), the Rastafarian plaintiff, in jail, sought an injunction against cutting his hair if he were sentenced to prison;

courts have held exhaustion required if the grievance system makes provision for grievances to be filed and processed under such circumstances, or if the prisoner had the opportunity to file before transfer.[949] Defendants have the burden of proof on this point as on other issues concerning exhaustion.[950] This determination can be difficult to make in some systems.[951] In

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the court declined to dismiss for non-exhaustion since the plaintiff didn't yet have access to the state prison grievance procedure.

[949] 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); Daniels v. Caldwell, 2013 WL 85165, *3 (E.D.Va., Jan. 7, 2013) ("[W]ithout 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); 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); 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), *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); 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); 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 thee 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), *aff'd*, 636 F.3d 218 (6th Cir. 2011); *see Appendix A for additional authority on this point*.

In *Brownell v. Krom*, 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.

[950] 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 after transfer); Ortiz v. Forbes, 2012 WL 5389708, *1-3 (N.D.Ill., Oct. 30, 2012) (declining to dismiss for non-exhaustion where defendants did not show jail grievance system was available to a prisoner transferred to state prison); Carter v. Sims, 2012 WL 2863424, *7 (N.D.Ill., July 9, 2012) (holding defendants failed to show that jail grievance system remained available for appeal after prisoner's transfer to state prison), *appeal dismissed*, No. 12-2955 (7th Cir., Oct. 9, 2012); Ball v. Bower, 2012 WL 1414827, *1, 3-4 (M.D.Pa., Mar. 22, 2012) (holding defendants failed to show that their grievance system was made known or available to the plaintiff during the several hours she was at the jail), *report and recommendation adopted*, 2012 WL 1414771 (M.D.Pa., Apr. 24, 2012); Diaz v. Musker, 2012 WL 85234, *5 (E.D.Pa., Jan. 10, 2012) ("Defendants have not shown that Plaintiff had the ability to appeal the decision after his transfer . . .; Plaintiff alleges he did not."), *order entered*, 2012 WL 85763 (E.D.Pa., Jan. 10, 2012), *aff'd*, --- Fed.Appx. ----, 2012 WL 5352483 (3d Cir., Oct. 31, 2012); Holston v. DeBranca, 2011 WL 666880, *3-5 (E.D.Cal., Feb. 11, 2011), *report and recommendation adopted*, 2011 WL 884864 (E.D.Cal., Mar. 10, 2011); Key v. Fischer, 2008 WL 2653840, *6 (S.D.N.Y., July 7, 2008) (declining to dismiss where defendants provided no information on whether the state grievance system was available to a prisoner transferred to federal facility); Gabino v. Bohlman, 2007 WL 906156, *3 (E.D.Wis., Mar. 23, 2007). *Contra*, Taylor v. Suchil, 2012 WL 4867563, *5 (C.D.Cal., May 15, 2012) (stating "plaintiff has made no showing that he could not have filed an appeal by mail"), *report and recommendation adopted*, 2012 WL 4867551 (C.D.Cal., Oct. 12, 2012); Saraidaris v. Sealy, 2012 WL 405172, *2 (E.D.N.C., Feb. 8, 2012) (granting motion to dismiss where plaintiff did not provide factual support for claim transfer interfered with exhaustion).

some cases courts have simply assumed that the grievance system was available to the absent prisoner without inquiring whether that was actually the case,[952] rather than "establish[ing its] availability . . . from a legally sufficient source."[953] Thus, New York City has represented to the federal courts that its grievance system cannot be used by persons out of City custody[954] (a point which has now been made explicit in its policy[955]), but in at least one case a federal court has simply declared without support that the prisoner should have exhausted by mail.[956] One recent appellate decision states that unless a grievance policy clearly precludes its use by a prisoner no longer in the relevant prison or system, the prisoner is obliged at least to try to follow the policy.[957] 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 another 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

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[951] Land v. Kaufman, 2009 WL 1106780, *3-4 (S.D.N.Y., Apr. 23, 2009) (noting that under New York State rules, a "departmental" grievance can be appealed after transfer but an "institutional" grievance cannot, so plaintiff exhausted all remedies actually available); *accord*, Andrews v. Cruz, 2010 WL 1141182, *6 (S.D.N.Y., Mar. 24, 2010).

[952] *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* Mobley 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 would have been available for the earlier incident) (dictum).

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

[954] Burns v. Moore, 2002 WL 91607, *6 (S.D.N.Y., Jan. 24, 2002).

[955] Exhibit H, New York City Dep't of Correction Directive 3376 at § IV.I.c.ii (September 10, 2012) ("If the inmate has been discharged from Department custody, the inmate will no longer have access to the IGRP process.").

[956] Thomas v. Henry, 2002 WL 922388, *2 (S.D.N.Y., May 7, 2002). This decision appears to have been overruled by a later decision, which stated: "As long as [the prisoner] was *within the custody of the agency against which he had grievances, the NYCDOC*, he was required to use available grievance procedures." Berry v. Kerik, 366 F.3d 85, 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.

[957] 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.").

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."[958] 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.[959] For example, there is a recurrent pattern in American prisons of threats and retaliation against prisoners who file grievances, litigation, and other complaints.[960] The Second Circuit has held

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[958] Long v. Lafko, 254 F.Supp.2d 444, 448 (S.D.N.Y. 2003).

[959] 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 'utiliz[ing]' 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).

[960] *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. Stalder, 342 F.Supp.2d 555, 564-67 (M.D.La. 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.Or. 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. Cleary, 27 F.Supp.2d 395, 397-

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.[961] Numerous other courts have adopted that holding or a similar formulation.[962] Two circuits have qualified their holdings by requiring the plaintiff also to show that the threat or intimidation actually did deter the plaintiff from pursuing administrative remedies.[963] If a plaintiff establishes an intimidation defense to non-exhaustion, the existence of an emergency grievance procedure does not refute it.[964] Some district courts have entirely rejected the view that threats or intimidation can excuse non-exhaustion.[965] Others have rejected such arguments

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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).

[961] Hemphill v. New York, 380 F.3d 680, 688 (2d Cir. 2004); *accord*, 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); Mimms v. Carr, 2011 WL 2360059, *4-5 (E.D.N.Y., June 9, 2011) (allegations of threats and retaliatory discipline and other actions made remedy unavailable); Morrison v. Hartman, 2010 WL 811319, *2 n.1, 3 (W.D.N.Y., Mar. 3, 2010) (alleged threats made remedy unavailable and estopped the defendants); Mandell v. Goord, 2009 WL 3123029, *10 (N.D.N.Y., Sept. 29, 2009); Davis v. Rhoomes, 2009 WL 415628, *5 (S.D.N.Y., Feb. 12, 2009); Headley v. Fisher, 2008 WL 1990771, *13 (S.D.N.Y., May 7, 2008) (staff conversation reasonably perceived as a threat of retaliation constituted special circumstances excusing exhaustion); Lunney v. Brureton, 2007 WL 1544629, *9 (S.D.N.Y., May 29, 2007), *objections overruled,* 2007 WL 2050301 (S.D.N.Y., July 18, 2007); Snyder v. Goord, 2007 WL 957530, *9-10 (N.D.N.Y., Mar. 29, 2007); Thomas v. Cassleberry, 2007 WL 1231485, *2 (W.D.N.Y., Apr. 24, 2007); Doe v. Barrett, 2006 WL 3741825, *5-6 (D.Conn., Dec. 19, 2006); Larry v. Byno, 2006 WL 1313344, *4 (N.D.N.Y., May 11, 2006); Orraca v. McCreery, 2006 WL 1133254, *5 (N.D.N.Y., Apr. 25, 2006); McCullough v. Burroughs, 2005 WL 3164248, *4 (E.D.N.Y., Nov. 29, 2005) (applying *Hemphill*; holding that a prior instance of assault for filing a grievance could make the grievance process unavailable for purposes of the current case).

[962] 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 available"; following *Hemphill* and *Kaba*); Kaba v. Stepp, 458 F.3d 678, 684-86 (7th Cir. 2006) (adopting *Hemphill* analysis); Breer v. Maranville, 2012 WL 6597707, *2 (D.Vt., Nov. 27, 2012) (holding allegation that plaintiff "was confronted [and] told not to complain" barred dismissal for non-exhaustion), *report and recommendation adopted*, 2012 WL 6597700 (D.Vt., Dec. 18, 2012); Sauder v. Green, 2011 WL 3608646, *5 (N.D.Fla., July 25, 2011) (holding threats of retaliation, and their repetition after transfer, sufficient alleged unavailability of remedy), *report and recommendation adopted*, 2011 WL 3607667 (N.D.Fla., Aug. 16, 2011); *see Appendix A for additional authority on this point*.

[963] Tuckel v. Grover, 660 F.3d at 1254; Turner v. Burnside, 541 F.3d at 1085. "Once a defendant proves that a plaintiff failed to exhaust, . . . the onus falls on the plaintiff to show that remedies were unavailable to him as a result of intimidation by prison officials." *Tuckel*, *id.* *See* Rouse v. Baca, 2012 WL 4498866, *7 (D.N.M., Sept. 25, 2012) (holding plaintiff who "refused to be cowed" was not excused from exhaustion by alleged threats); Toler v. Halley, 2012 WL 555740, *4-5 (N.D.Fla., Jan. 12, 2012) (dismissing under *Turner* where plaintiff did not allege that threats prevented him from pursuing a grievance), *report and recommendation adopted*, 2012 WL 555707 (N.D.Fla., Feb. 21, 2012).

[964] *Tuckel*, 660 F.3d at 1255; *Turner*, 541 F.3d at 1083–84.

[965] Lamon v. Tilton, 2011 WL 532315, *3 (E.D.Cal., Feb. 14, 2011) (stating chilling of First Amendment rights does not excuse non-exhaustion); Escobar v. Brown, 2010 WL 5230877, *5-6 (D.Colo., Aug. 10, 2010) (holding death threats without physical harm do not excuse non-exhaustion), *report and recommendation adopted*, 2010 WL 5230874 (D.Colo., Dec. 16, 2010); Snow v. Brown, 2009 WL 87613, *3-4 (S.D.Ga., Jan. 6, 2009) (claiming *Porter v. Nussle* rejected fear of retaliation as a reason for non-exhaustion); Sasser v. Donald, 2008 WL 4809171, *4

on the narrower ground that the plaintiff's factual allegations are insufficient to support the claim,[966] or that the plaintiff's filing of other complaints is inconsistent with it.[967] However,

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(S.D.Ga., Nov. 4, 2008) (same as *Snow*); Boone v. Fighter, 2008 WL 880208, *2 (E.D.Mich., Mar. 31, 2008) (fear of retaliation did not excuse non-exhaustion because the grievance policy addressed retaliation); Campbell v. Oklahoma County Detention Center, 2008 WL 490619, *5 (W.D.Okla., Feb. 21, 2008) ("it is highly questionable whether threats of retaliation could in any circumstances excuse the failure to exhaust administrative remedies") (citation omitted); Glick v. Montana Dept. of Corrections, 2007 WL 2359776, *2 n.3 (D.Mont., Aug. 14, 2007) (holding fear of retaliation cannot excuse non-exhaustion since retaliation is illegal); Poole v. Rich, 2007 WL 2238831, *3 (S.D.Ga., Aug. 1, 2007) (holding threats of assault do not excuse exhaustion), *aff'd*, 312 Fed.Appx. 165 (11th Cir. 2008), *cert. denied*, 555 U.S. 854 (2008); *see* Solomon v. Michigan Dept. of Corrections, 478 Fed.Appx. 318, 321 (6th Cir. 2012) (unpublished) (seeming rejecting the notion that threats excuse exhaustion); *see also Appendix A for additional authority on this point*. Decisions to this effect from within the Second, Fifth, Seventh, Tenth, and Eleventh Circuits are generally overruled by contrary circuit authority. *See* Hammett v. Cofield, 681 F.3d 945, 948 (8th Cir. 2012) (holding retaliation and harassment did not excuse failure to exhaust retaliation and harassment where such conduct was forbidden by prison rules and there was a special grievance procedure for such complaints).

[966] In one recent and 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 to the Inspector General. The court noted he did not say he was threatened with bodily harm if he filed a grievance about *this* assault, 2013 WL 276679, *6, and dismissed for non-exhaustion.

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); 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").

[967] 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); 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); Valentine v. Lindsay, 2011 WL 3648261, *7 (E.D.N.Y., Aug. 17, 2011) (holding claim of fear of retaliation did not excuse failure to complete the last step where the plaintiff had completed the preceding three steps); Guarneri v. West, 782 F.Supp.2d 51, 60 (W.D.N.Y. 2011) (claim that retaliation inhibited plaintiff's exhaustion is inconsistent with subsequent filing of numerous grievances); Champ v. Lafayette, 2011 WL 565648, *3 (M.D.Fla., Feb. 8, 2011) (noting plaintiff filed other grievances); *see Appendix A for additional authority on this point*. *But see* Kaba v. Stepp, 458 F.3d 678, 685-86 (7th

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 federal courts."[968] 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.[969] 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."[970]

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[971]—though some courts have rejected vague and generalized claims of non-

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Cir. 2006) (filing of some grievances about other subjects did not prove that plaintiff was not intimidated from filing particular grievances against particular staff members); *accord*, 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).

[968] *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).

[969] *See* Ortiz v. Skinner, 2004 WL 2091994, *5 (W.D.N.Y., Sept. 16, 2004) (holding that allegations of threats designed to deter grievances might constitute "special circumstances" justifying letters to Superintendent rather than formal grievances). *But see* McGregor v. Jarvis, 2010 WL 3724133, *4 (N.D.N.Y., Aug. 20, 2010) (accepting that plaintiff's "apprehension" about sexual activity with a staff member might justify complaining by letter to the warden, but finding he failed to exhaust because his letter was not specific enough), *report and recommendation adopted*, 2010 WL 3724131 (N.D.N.Y., Sept. 16, 2010).

[970] 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).

[971] Frost v. McCaughtry, 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); 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 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").

functioning grievance systems.[972] 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,[973] as may the absence of copying facilities where the rules require multiple copies of documents,[974] deprivation of writing materials or documentation to prisoners in a segregation unit or elsewhere,[975] or other situations that make prisoners unable to comply with grievance rules.[976] Sometimes prisoners in a particular status or situation are simply excluded

[972] 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.")

[973] Bey v. Caruso, 2007 WL 2875196, *1 (E.D.Mich., Sept. 28, 2007) (noting that denial of "postal loan" was based on plaintiff's using his religious name suffix on the relevant form, contrary to the policy he was trying to challenge; "the procedural question of exhaustion is inextricably intertwined with the merits of this case"); Cordova v. Frank, 2007 WL 2188587, *6 (W.D.Wis., July 26, 2007); Kaufman v. Schneiter, 474 F.Supp.2d 1014, 1032 (W.D.Wis. 2007) (dictum); *see* Williams v. Pollard, 2009 WL 3055334, *10 (E.D.Wis., Sept. 21, 2009) (remedies were unavailable to a prisoner who could not obtain envelope for an appeal that had to be mailed). Amazingly, one court has held that refusal to mail a grievance appeal would not justify failure to complete the administrative process. Carter v. Rojas, 2009 WL 256110, *4 (E.D.Cal., Feb. 4, 2009), *report and recommendation adopted*, 2009 WL 813465 (E.D.Cal., Mar. 27, 2009).

[974] DeMartino v. Zenk, 2009 WL 2611308, *7-8 (E.D.N.Y., Aug. 25, 2009) (absence 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").

[975] Luciano v. Lindberg, 2012 WL 1642466, *17 (M.D.Pa., May 10, 2012) (holding allegation of deprivation of writing materials for a month and refusal of late grievance raised a factual issue barring summary judgment); Campbell v. Cowen, 2012 WL 1636996, *4-5 (N.D.Ind., May 9, 2012) (holding allegation that plaintiff was deprived of writing materials and kept under conditions of total darkness raised a factual issue barring summary judgment on non-exhaustion); Marella v. Terhune, 2011 WL 4074865, *9-10 (S.D.Cal., Aug. 16, 2011) (holding sworn allegation of deprivation of writing materials and forms in hospital and infirmary precluded dismissal for non-exhaustion), *report and recommendation adopted*, 2011 WL 4074750 (S.D.Cal., Sept. 13, 2011); Fawley v. Johnson, 2011 WL 3240537, *9 (W.D.Va., July 28, 2011) (holding allegation that prison staff confiscated all of prisoner's pens so he could not write a grievance barred summary judgment for non-exhaustion); Weighall v. Pea, 2009 WL 2048107, *7 (W.D.Wash., May 6, 2009); Sandlin v. Poole, 575 F.Supp.2d 484, 488 (W.D.N.Y. 2008); Walker v. Karelas, 2008 WL 4851936, *3 (E.D.Cal., Nov. 7, 2008), *report and recommendation adopted*, 2008 WL 5397493 (E.D.Cal., Dec. 22, 2008); Woods v. Carey, 2007 WL 2688819, *1-2 (E.D.Cal., Sept. 13, 2007) (vacating recommendation for exhaustion dismissal pending inquiry into plaintiff's access to his legal property, which he said impeded his timely appeal); Mellender v. Dane County, 2006 WL 3113212, *3 (W.D. Wis. Oct. 27, 2006) (holding that remedies were not shown to be available where the prisoner asked repeatedly without success for a pencil and his glasses during his stay in jail, which "alone might be sufficient reason" to refuse dismissal for non-exhaustion).

[976] *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 WL 4383225 (W.D.Okla., Sept. 20, 2011); Randolph v. Kelly, 2010 WL 883747, *5 (E.D.Va., Mar. 9, 2010) (remedy was unavailable where appeal was declared untimely because prison mail took 10 days to deliver an appeal with a five-day deadline); Holsombach v. Norris, 2009 WL 424166, *68 (E.D.Ark., Feb. 18, 2009) (where appeals had to be sought on the original grievance form, and officials did not return the original form to plaintiff, summary judgment for defendants denied); 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); *see* n. 454, above (citing cases holding that prisoners who did not get a grievance decision had exhausted available remedies in systems where a decision was required in order to appeal); *see also Appendix A for additional authority on this point*. *But see* Hill v. Haynes, 2012 WL 3839422, *28 (N.D.W.Va., Sept. 5, 2012) (holding that prisoner who was prevented from filing grievances at prison should have filed appeal forms even though they would have been rejected because the plaintiff could not satisfy the requirement of attaching the prison grievances to appeals),

from using the grievance system.[977] 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,[978] though the majority of decisions involving such rules uphold claims of non-exhaustion.[979] A system of "modified grievance access," which requires prior permission to file a grievance, makes the remedy unavailable if permission is not granted.[980]

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report and recommendation adopted, 2012 WL 5467750 (N.D.W.Va., Nov. 9, 2012). *Cf.* Alamiin v. Miller, 2010 WL 3603150, *5 (W.D.Okla., June 28, 2010) (upholding a $2.00 "co-pay" for grievance appeals, which is deferred for indigents, and not collected if relief is granted), *report and recommendation adopted*, 2010 WL 3604660 (W.D.Okla., Sept. 9, 2010).

[977] Zuege 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).

[978] Rules limiting prisoners to a certain number of grievances may make the remedy unavailable for prisoners who are over the limit. Springer v. Brown, 2012 WL 5397224, *3 (W.D.Va., Nov. 2, 2012) (holding claim that grievances were untimely because plaintiff was limited to one grievance a week and his grievances relevant to this case were therefore filed late barred summary judgment for non-exhaustion); Lerajjareanra-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), a*ffirmed in part, reversed in part*, --- Fed.Appx. ----, 2013 WL 238862 (10th Cir., Jan. 23, 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 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 to exhaust); *see* Pelzer v. SCDC, 2012 WL 761703, *3 (D.S.C., Feb. 15, 2012) (upholding a limit of three grievances a month, but rejecting non-exhaustion defense where defendants failed to consolidate two similar grievances to make room for another one, as had been done in the past), *report and recommendation adopted*, 2012 WL 761691 (D.S.C., Mar. 8, 2012).

[979] Escobar v. Mora, ___ Fed.Appx. ___, 2012 WL 3893126, *2 (10th Cir. 2012) (unpublished) (rejecting argument that limit of one grievance a month prevented plaintiff from exhausting where he did not explain how it affected the particular grievance at issue); 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

Remedies may also be made unavailable by actions by supervisors or grievance staff with respect to particular grievances or grievants,[981] by purposeful misconduct,[982] or by neglect or

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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); Wilson v. Boise, 252 F.3d 1356, 2001 WL 422621, at *4 (5th Cir. 2001) (unpublished) (upholding "backlogging" system under which only one grievance would be processed at a time); Ball v. Struthers, 2012 WL 2946785, *4 (M.D.Pa., July 19, 2012) (holding temporary restriction to one grievance a week did not make remedy unavailable where plaintiff had time to file after restriction expired); White v. Epps, 2012 WL 2603657, *2 (S.D.Miss., July 5, 2012) (holding backlogging system did not excuse plaintiff's non-exhaustion); Sias v. LeBlanc, 2012 WL 275056, *2 (M.D.La., Jan. 13, 2012) (finding non-exhaustion under backlogging system), *report and recommendation adopted*, 2012 WL 292531 (M.D.La., Jan. 31, 2012), *appeal dismissed* No. 12-30200 (5th Cir., May 8, 2012); *see also* Riley v. Crawford, 2007 WL 4468701, *3 (W.D.Mo., Dec. 17, 2007) (expressing concern that "one grievance a week" policy could deny access for legitimate complaints, but holding that it did not make remedies unavailable for problems that occurred over a period of months). *See Appendix A for additional authority on this point*.

[980] Walker v. Mich. Dep't of Corr., 128 F. Appx. 441, 446 (6th Cir. 2005); Reeves v. Correctional Medical Services, 2009 WL 3876292, *1-2 (E.D.Mich., Nov. 17, 2009) (plaintiff exhausted by asking for a form and being denied); Marr v. Jones, 2009 WL 160787, *5-8 (W.D.Mich., Jan. 22, 2009) (defendants failed to identify any available remedy where prisoner on modified grievance status was denied grievance forms); McMurry v. Caruso, 2008 WL 5422853, *5-6 (W.D.Mich., Dec. 30, 2008) (evidence that plaintiff on modified access asked for grievance forms and did not receive them barred summary judgment); Bagetta v. Caruso, 2008 WL 723546, *4-5 (W.D.Mich., Mar. 12, 2008); Dawson v. Norwood, 2007 WL 3302102, *9 (W.D.Mich., Nov. 6, 2007) ("If a prisoner has been placed on modified access to the grievance procedure and attempts to file a grievance which is deemed to be non-meritorious, he has exhausted his 'available' administrative remedies as required by § 1997e(a).") (citation omitted); Hahn v. Tarnow, 2006 WL 1705128, *2 n.4 (W.D.Mich., June 16, 2006) (holding that a plaintiff on "modified grievance restriction" who was denied grievance forms did not have an available remedy). A rule requiring prisoners on modified grievance status to submit a notarized affidavit with a grievance may make the remedy unavailable if the prisoner cannot get access to a notary. Thomas v. Guffy, 2008 WL 2884368, *2-3 (W.D.Okla., July 25, 2008). *But see* Henry v. Caruso, 2009 WL 2584739, *4 (W.D.Mich., Aug. 19, 2009) (holding that a prisoner whose request for a grievance form was denied had exhausted only as to those persons named in the request form).

[981] 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); Travis v. Morgridge, 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"); Sanders v. Davis, 2012 WL 5830423, *4-5 (S.D.Ill., Oct. 15, 2012) (holding remedies unavailable where officials refused to sign off and to process plaintiff's grievance), *report and recommendation adopted*, 2012 WL 5830401 (S.D.Ill., Nov. 16, 2012); Martin v. Rednour, 2012 WL 3705102, *5 (S.D.Ill., Aug. 6, 2012) (holding remedies unavailable where grievance staff refused to accept grievances returned from central grievance body with instructions to file at the prison), *report and recommendation adopted*, 2012 WL 3705093 (S.D.Ill., Aug. 27, 2012); Penton v. Dickinson, 2012 WL 2620528, *8-10 (E.D.Cal., July 5, 2012) (holding remedies unavailable where grievance staff demanded plaintiff attach meterials he did not have), *report and recommendation adopted*, 2012 WL 4050075 (E.D.Cal., Sept. 13, 2012); Carroll v. Read, 2012 WL 1229335, *6 (C.D.Cal., Apr. 12, 2012) (holding that where authorities declined to process grievance, instead charging the plaintiff with conduct violations for filing it, the remedy was unavailable); Thurmond v. Cool, 2012 WL 601251, *7 (D.Nev., Jan. 9, 2012) ("Plaintiff exhausted all available remedies by supplying prison officials with his property inventory sheet, addressing his property issue with his caseworker, and filing numerous grievances, which thoroughly explained his simple request. In response, prison officials requested additional unnecessary

accident,[983] or events that are merely unexplained,[984] though courts are unlikely to credit vague or conclusory claims of obstruction.[985] Numerous decisions hold that the failure or refusal to

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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); *see Appendix A for additional authority on this point*; *see* n. 460, 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.

[982] 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), *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), *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); *see Appendix A for additional authority on this point*.

[983] 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); 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), *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 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.

[984] 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"); 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. 460, above, concerning this type of problem.

[985] *See, e.g.*, Bowlin v. Van Hoesen, 2011 WL 1532088, *6 (W.D.Okla. Mar 28, 2011) (noting plaintiff "does not state the dates on which he attempted to submit grievances, the subject of the grievances that were not responded to, or the name of the jail officials who allegedly thwarted his efforts"), *report and recommendation adopted*, 2011 WL 1526893 (W.D.Okla., Apr. 22, 2011); Stewart v. Ryan, 2011 WL 1526932, *4 (D.Ariz., Apr. 21, 2011) (rejecting allegation of "pervasive" misconduct where plaintiff made "no attempt to explain his attempts at exhaustion . . . or

provide necessary forms makes the remedy unavailable or otherwise excuses failure to exhaust,[986] though obviously not in systems where forms are not required by the rules.[987] (One court has found it necessary to order prison staff to make forms available to all prisoners as regulations require.[988]) Some courts reject claims of denial of forms out of hand if they are not

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how he was prevented from exhausting"), *reconsideration denied*, 2011 WL 2078648 (D.Ariz., May 25, 2011), *motion for relief from judgment denied*, 2011 WL 2679596 (D.Ariz., July 8, 2011); Stine v. Wiley, 2007 WL 121822, *1-2 (D.Colo., Jan. 10, 2007); Djukic v. Arpaio, 2006 WL 2850060, *3 (D.Ariz., Sept. 26, 2006).

[986] Stine v. U.S. Federal Bureau of Prisons, 2013 WL 238862, *1-2 (10th Cir., Jan. 23, 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); Thornton v. Chandler, 2013 WL 244061, *5 (D.Del., Jan. 22, 2013); Manon v. Albany County, 2012 WL 6202987, *5 (N.D.N.Y., Oct. 9, 2012), *report and recommendation adopted*, 2012 WL 6202984 (N.D.N.Y., Dec. 12, 2012); Vazquez v. Curcione, 2012 WL 6569367, *3 (W.D.N.Y., Dec. 17, 2012); Flores v. Wall, 2012 WL 4471101, *4-5 (D.R.I., Aug. 31, 2012) (holding allegation that "specific claim" that identified officers who refused plaintiff grievance forms raised a material factual issue of availability), *report and recommendation adopted*, 2012 WL 4470998 (D.R.I., Sept. 25, 2012); Swisher v. Porter County Sheriff's Dept., 2012 WL 3776363, *3 (N.D.Ind., Aug. 29, 2012) (denying summary judgment to defendant where plaintiff "states under penalty of perjury that he attempted to grieve the incidents he presents in his complaint but that jail officials would not provide him with a grievance form"; this is not conclusory), *reconsideration denied*, 2013 WL 550507 (N.D.Ind., Feb. 11, 2013); Franklin v. Mosley, 2012 WL 3535772, *2 (E.D.Mo., Aug. 14, 2012) (denying summary judgment based on claim of denial of forms); 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); Hankins v. Pennsylvania, 2011 WL 6739289, *12 (W.D.Pa., Nov. 30, 2011) (refusing to dismiss for non-exhaustion where plaintiff documented his efforts to obtain grievance forms), *report and recommendation adopted in part, rejected in part on other grounds*, 2011 WL 6739288 (W.D.Pa., Dec. 22, 2011); Marella v. Terhune, 2011 WL 4074865, *9-10 (S.D.Cal., Aug. 16, 2011); Williams v. Calton, 2011 WL 1598775, *3 (W.D.Va., Apr. 27, 2011); *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); 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). *But see* 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); Mackey v. Kemp, 2009 WL 2900036, *3 (S.D.Ga., July 27, 2009) (plaintiff 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).

[987] 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).

[988] *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

supported by considerable factual detail or evidence of effort to obtain the forms,[989] or if the prisoner filed other grievances around the same time.[990]

A remedy may be deemed unavailable if prisoners are misinformed by prison personnel about its operation or availability[991]—though many such claims have been rejected.[992] A number

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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").

[989] *See, e.g.*, Watson v. Hughes, 439 Fed.Appx. 300, 302 (5th Cir. 2011) (unpublished) (holding allegation plaintiff was told grievance forms were unavailable did not excuse non-exhaustion where he did not so allege for the remaining 14 days of the period for submitting a grievance); Johnson v. City of New York, 2011 WL 1044852, *11 (S.D.N.Y., Mar. 18, 2011) (rejecting assertion that housing unit was out of forms where prisoner conceded he made no further effort to obtain them); Rang v. Chapman, 2011 WL 837745, *6-7 (M.D.Pa., Jan. 19, 2011) (rejecting conclusory claim of inability to get forms given evidence of multiple ways they could be obtained), *report and recommendation adopted*, 2011 WL 835773 (M.D.Pa., Mar. 3, 2011); Williams v. Lafler, 2011 WL 692165, *4 (E.D.Mich., Jan. 31, 2011) (dismissing where plaintiff did not even state he was denied a form), *report and recommendation adopted*, 2011 WL 692685 (E.D.Mich., Feb. 18, 2011); 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"; conclusory statements were inadequate); *see Appendix A for additional authority on this point. But see* Fitzpatrick v. Georgia Dept. of Corrections, 2012 WL 5207474, *4 (S.D.Ga., Sept. 12, 2012) ("It is of no moment that Plaintiff Mosley cannot determine who denied his request for an appeal. The facts before the Court are that he asked for an appeal form and was not provided with one."), *report and recommendation adopted as modified*, 2012 WL 5207472 (S.D.Ga., Oct. 22, 2012); Thompson v. Sadowski, 2011 WL 7640125, *9 (N.D.N.Y., Aug. 16, 2011) (rejecting argument that prisoner failed to name the person whom he asked for a grievance form); Kyle v. Feather, 2011 WL 1102735, *2 (W.D.Wis., Mar. 23, 2011) (rejecting argument that prisoner should have been required to ask other staff members for a grievance form; "Any other rule would create an improper incentive for officials to make the grievance process as complicated and difficult as possible, so long as they left a route open for those prisoners savvy enough to find it.").

One court 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, but that decision is of dubious authority. Jones v. Smith, 266 F.3d 399 (6th Cir. 2001), *called into doubt by* Peterson v. Cooper, 463 Fed.Appx. 528 (6th Cir. 2012). **BUT OTHERS SUPPORT THIS—SEE LEE V. WILLEY NOTE 986**

[990] *See, e.g.*, Williams v. King County Jail, 2011 WL 4706893, *4 (W.D.Wash., Sept. 7, 2011), *report and recommendation adopted*, 2011 WL 4706198 (W.D.Wash., Oct. 4, 2011); Taylor v. Thames, 2010 WL 3614189, *4-5 (N.D.N.Y., July 22, 2010), *report and recommendation adopted*, 2010 WL 3614191 (N.D.N.Y., Sept. 8, 2010); Guel v. Larkin, 2008 WL 1994942, *5-6 (W.D.Ark., May 6, 2008).

[991] Pavey v. Conley, 663 F.3d 899, 906 (7th Cir. 2011) ("An administrative remedy is not 'available,' and therefore need not be exhausted, if prison officials erroneously inform an inmate that the remedy does not exist or inaccurately describe the steps he needs to take to pursue it."); Pavey v. Conley, 170 Fed.Appx. 4, 8-9, 2006 WL 509447, *4-5 (7th Cir., Mar. 3, 2006) (unpublished) (stating that "inmates may rely on the assurances of prison officials when they are led to believe that satisfactory steps have been taken to exhaust administrative remedies. . . . [P]rison officials will be bound by their oral representations to inmates concerning compliance with the grievance process"; plaintiff, who could not write, could reasonably rely on assurances that his oral complaint would be investigated); 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); Coley v. Gallagher, 2013 WL 210724, *3 (D.Md., Jan. 17, 2013) (declining to dismiss for non-exhaustion where prisoner was told categorically that his complaint could not be resolved through the grievance system); Jones v. Corrections Corp. of America, 2013 WL 56119, *8-9 (D.Ariz., Jan. 3, 2013) (similar to *Brown v. Croak*); Hanson v. Sinavsky, 2012 WL 5388143, *4 (C.D.Cal., Oct. 11, 2012) (holding plaintiff's averment that he followed officials' advice to file a tort claim rather than a grievance barred granting of motion to dismiss), *report and recommendation adopted*, 2012 WL 5388800 (C.D.Cal., Oct. 30, 2012); Williams v. Suffolk County, 2012 WL

of decisions have refused to dismiss for non-exhaustion where prisoners had relied on prison personnel's representations that an issue was non-grievable[993] or a decision was non-

6727160, *5-6 (E.D.N.Y., Dec. 28, 2012) (holding claim that grievance staff told plaintiff that the process could not help him and he should file an Internal Affairs complaint sufficiently alleged that the remedy was not available); Pike v. Smith, 2012 WL 4138726, *9 (D.Idaho, Sept. 17, 2012) (weighing misleading staff advice in declining to dismiss for non-exhaustion); Ashlock v. Myers, 2012 WL 4017799, *2 (N.D.Ind., Sept. 12, 2012) (holding if prison staff told plaintiff he needed to file a tort claim rather than a grievance, the grievance remedy could be unavailable); Gaspard v. Castillo, 2011 WL 149366, *4-5 (E.D.Cal., Jan. 18, 2011) (holding untimely grievance was excused where plaintiff complained, was told a written complaint was not required and that he should await the results of the investigation); Riggs v. Valdez, 2010 WL 4117085, *9-10 (D.Idaho, Oct. 18, 2010) (holding grievance system was unavailable for complaints that were the subject of disciplinary proceedings where those who tried to grieve them were rebuffed), *on reconsideration in part*, 2010 WL 5391313 (D.Idaho, Dec. 22, 2010); *see Appendix A for additional authority on this point; see also* cases cited in n. 868, above; Jackson v. Ivens, 2007 WL 2261552, *4 (3d Cir. 2007) (refusing to enforce a procedural rule not stated in grievance policy; "We will not condition exhaustion on unwritten or 'implied' requirements.") (citing Spruill v. Gillis, 372 F.3d 218, 234 (3d Cir. 2004)).

[992] *See* Stine v. U.S. Federal Bureau of Prisons, 2013 WL 238862, *4 (10th Cir., Jan. 23, 2013) (holding official's statement "we'll 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 (D.C.Cir. 2001) (holding that a plaintiff who complained to three prison officials and was told by the warden to "file it in the court" had not exhausted); Yousef v. Reno, 254 F.3d 1214, 1221-22 (10th Cir. 2001) (holding that plaintiff who was confused by prison officials' erroneous representations about the powers of the grievance system was still required to exhaust); Chelette v. Harris, 229 F.3d 684, 688 (8th Cir. 2000) (holding that a plaintiff who complained to the warden and was told the warden would take care of his problem, but the warden didn't, was not excused from exhausting the grievance system), *cert. denied*, 531 U.S. 1156 (2001); 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); Boclair 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); *see Appendix A for additional authority on this point; see also* Didiano v. Balicki, 488 Fed.Appx. 634, 639-40 (3d Cir. 2012) (holding misinformation by "prison paralegal" did not excuse failure to exhaust because paralegal was not a prison official).

[993] 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); 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 afoul of the regulations for the inmate grievance process."); Zlotorzynski 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

appealable.[994] 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.[995] However,

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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.La., 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); *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 "disingenous" 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) (dismissing claim of a prisoner who said staff told him his rape complaint was not grievable, since futility is not an excuse).

[994] *See* n. 463, above.

[995] Brown v. Drew, 452 Fed.Appx. 906, 908 (11th Cir. 2012) (unpublished) (noting in case where grievance response arrived too late to appeal, "nothing in the record establishes that Brown was aware or could readily become aware of his right to request an extension of time to resubmit his appeal"); Illes v. Deparlos, 447 Fed.Appx. 391, 393-94 (3d Cir. 2011) (unpublished) (vacating dismissal for non-exhaustion where plaintiff had no access to information about grievance system and staff told him there were no grievance procedures; declining to charge plaintiff with knowledge of procedures based on previous period of incarceration several years previously); Williams v. Marshall, 319 Fed.Appx. 764, 768 (11th Cir., Nov. 4, 2008) (vacating dismissal for non-exhaustion where grievance rules mostly appeared in a policy not available to prisoners and where no instructions appear on the grievance forms concerning time limits or how to appeal); Jackson v. Ivens, 244 Fed.Appx. 508, 514 (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)); Goebert v. Lee County, 510 F.3d 1312, 1322-23 (11th Cir. 2007) (holding that an appeal procedure not described in the inmate handbook, but only in the operating procedures the inmates did not have access to, was not an available remedy); Westefer v. Snyder, 422 F.3d 570, 580 (7th Cir. 2005) (holding that defendants did not show remedies were available where there was no "clear route" for challenging certain decisions); 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

prisoners' ignorance of the remedy does not excuse them from using it if it has been made known, *e.g.*, in an inmate orientation handbook.[996] (If the administrative remedy is made known,

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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 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.Ill., 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); *see* cases cited in n.307, above; *see Appendix A for additional authority on this point; see also* Giano v. Goord, 380 F.3d 670, 678-79 (2d Cir. 2004) (holding that a reasonable misunderstanding of procedural rules constitute special circumstances excusing failure to exhaust). *But see* Jones Bey v. Johnson, 407 F.3d 801, 809 n.9 (6th Cir. 2005) ("Although exhaustion is mandatory . . . prison officials do not have to affirmatively provide information on how to proceed with individual claims."), *cert. granted, judgment vacated*, 549 U.S. 1190 (2007); Burgess v. Igboekwe, 2012 WL 6054009, *3, 6 (E.D.N.C., Dec. 5, 2012) (plaintiff's belief that as a "safekeeper" in the jail, he was not subject to the grievance system did not excuse non-exhaustion; officials were not obliged to explain system to prisoners individually, prisoners must take some action to find out about the grievance system); Johnson v. District of Columbia, 869 F.Supp.2d 34, 41 (D.D.C. 2012) (plaintiff's subjective ignorance of the grievance process did not matter where he did not allege that prison staff affirmatively obstructed him).

In *Davis v. Milwaukee County*, 225 F.Supp.2d 967, 975-76 (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 failing to make available materials concerning the grievance procedure.

[996] 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 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); 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 *Goebert v. Lee*), *report and recommendation adopted*, 2012 WL 5500574 (S.D.Ga., Nov. 13, 2012); Thrower v. U.S., 2012 WL 3679702, *6 (M.D.Pa., Aug. 24, 2012); Morgan v. City of Henderson Detention Center, 2012 WL 2884889, *5 (D.Nev., July 13, 2012) (rejecting claim of ignorance of appeal procedures where they were set out in a policy identified on the grievance disposition; court characterizes rule as "administrative remedies are unavailable to inmates if they cannot discover those remedies through reasonable effort"); Martin v. Corrections Corp. of America, 2012 WL 715551, *4 (D.Ariz., Mar. 6, 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), *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 *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.

prison officials are not obliged to educate prisoners about the exhaustion requirement itself.[997]) Courts may also discount prisoners' claims of ignorance or misunderstanding of remedies where the prisoners have a record of using them.[998] In some instances, a remedy may be made unavailable by officials' nondisclosure of information necessary for the prisoner to know to make a complaint.[999]

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."[1000] A recent Ninth Circuit decision 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 *unknowable*,"[1001] though later in the opinion the court uses the phrase "reasonable, good-faith efforts to discover the appropriate procedure" to describe the prisoner's burden.[1002] 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.[1003] 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 the same 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.[1004] 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,[1005] 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,

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[997] Clark v. Forsythe, 2010 WL 1753130, *4 (W.D.Okla., Mar. 11, 2010)*, 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).

[998] Scott v. Correctional Medical Services, 2010 WL 3724126, *5-6 (D.N.J., Sept. 13, 2010); Francisco v. Reese, 2009 WL 77458, *4 (S.D.Miss., Jan. 9, 2009); Akright v. Graves, 2006 WL 2947323, *6 (E.D.Wis., Oct. 16, 2006).

[999] In *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 confidential and would not have been disclosed to the plaintiff.

[1000] Morgan v. City of Henderson Detention Center, 2012 WL 2884889, *6 (D.Nev., July 13, 2012); *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").

[1001] Albino v. Baca, 697 F.3d 1023, 1026 (9th Cir. 2012) (emphasis supplied).

[1002] *Albino*, 697 F.3d at 1035; *see id.*, 1037 ("unknowable with reasonable effort").

[1003] Goebert v. Lee Cnty., 510 F.3d 1312, 1322 (11th Cir. 2007) (quoted in *Albino*, 697 F.3d at 1026, 1036.

[1004] *See* Brown v. Drew, 452 Fed.Appx. 906, 908 (11th Cir. 2012) (unpublished) (emphasis supplied).

[1005] *Albino*, 697 F.3d at 1041 (dissenting opinion).

were "noticeable to or identifiable by the inmates."[1006] In any case, the approach of the Ninth Circuit majority 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.[1007] 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.[1008]

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.[1009]

There is an open question whether a remedy that is too slow to prevent irreparable harm is "available" for PLRA purposes.[1010]

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.[1011] 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.[1012] This

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[1006] *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.").

[1007] Washington v. Proffit, 2005 WL 1176587, *3 (W.D.Va., May 17, 2005), *report and recommendation adopted*, 2005 WL 1429312 (W.D.Va., June 17, 2005); *accord*, Veloz v. State of N.Y., 339 F.Supp.2d 505, 516 (S.D.N.Y 2004) ("An inmate seeking to be relieved from technically exhausting his administrative remedies must allege facts showing that he made reasonable attempts to exhaust his remedies."), *aff'd*, 178 Fed.Appx. 39 (2d Cir., Apr. 24, 2006).

[1008] *See* Turner v. Burnside, 541 F.3d 1077, 1085 (11th Cir. 2008); Hemphill v. New York, 380 F.3d 680, 688 (2d Cir. 2004).

[1009] *See* nn. 777-779, above.

[1010] *See* § IV.H, below.

[1011] 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). 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) (treating claim of retaliation for a grievance as equivalent to one involving a lawsuit because exhaustion is required before litigation).

[1012] *See, e.g.*, Paolone v. Altiere, 2012 WL 5463871, *3 (N.D.Ohio, Nov. 8, 2012); Thomas v. Hernandez, 2012 WL 4496826, *4 (S.D.Cal., Sept. 28, 2012) ("Thomas hasn't been shut out of court. He's here, presenting his § 1983 claim . . . . [and] argu[ing] that his failure to exhaust should be excused. . . ."); Horning v. Laousor, 2011 WL 5175352, *3 (C.D.Cal., Nov. 1, 2011) ("The remedy when prison officials improperly impede a prisoner's ability to file an administrative grievance is for the court to exempt the prisoner from the PLRA's exhaustion requirement."); Rideaux v. Tribley, 2011 WL 4374616, *10 n.5 (W.D.Mich., Sept. 19, 2011); Brown v. Blackwell, 2011 WL 63595, *2 (S.D.Ohio, Jan. 6, 2011) (declining to enjoin allegedly non-functioning grievance system); Garcia v. Lunes, 2010 WL 1267128, *7 (E.D.Cal., Mar. 30, 2010), *aff'd*, 441 Fed.Appx. 485 (9th Cir. 2011) (unpublished); Wappler v. Kleinsmith, 2010 WL 707339, *5 (W.D.Mich., Feb. 22, 2010); Peterson v. Cooper, 2009 WL 2448141, *4

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 unlikely to be able to discredit official claims that they failed to exhaust.[1013]

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,[1014] or misleading of prisoners about the availability or requirements of remedies.[1015] Some

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(W.D.Mich., Aug. 10, 2009); Wilkins v. Illinois Dept. of Corrections, 2009 WL 1904414, *9 (S.D.Ill., July 1, 2009), *on reconsideration on other grounds*, 2009 WL 4894588 (S.D.Ill., Dec. 11, 2009); *see Appendix A for additional authority on this point*. Consistently with this view, other courts have held that an allegation of interference with the grievance process does not give rise to a cognizable access to courts claim until and unless the plaintiff suffers actual injury from dismissal for non-exhaustion. Green v. Swhittach, 2007 WL 2947596, *2 (E.D.Cal., Oct. 9, 2007), *report and recommendation adopted,* 2007 WL 4591926 (E.D.Cal., Dec. 28, 2007); Trevino v. Whitten, 2005 WL 2655741, *3 (E.D.Cal., Oct. 17, 2005), *report and recommendation adopted*, 2005 WL 3284167 (E.D.Cal., Nov. 29, 2005). One recent decision withheld injunctive relief on similar grounds after a showing that the grievance system had been practically unavailable to multiple plaintiffs. Kress v. CCA of Tennessee, LLC, 2010 WL 4751584, *4 (S.D.Ind., Nov. 16, 2010).

[1013] 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 plaintiff's grievances).

[1014] 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); Ziemba 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, *4 (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); Triplett 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 1313344, *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.

The Seventh Circuit has explicitly avoided deciding whether estoppel applies in this context. Kaba v. Stepp, 458 F.3d 678, 687 (7th Cir. 2006). The Third and Tenth Circuits have not reached the issue. *See* Abdulhaseeb v. Calbone, 2008 WL 904661, *15 (W.D.Okla., Apr. 2, 2008)*;* Clemens v. SCI-Albion, 2006 WL 3759740, *6 (W.D.Pa., Dec. 19, 2006).

[1015] *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

courts, however, have said that claims of estoppel are limited to cases of affirmative misrepresentation or misconduct by officials.[1016] The Second Circuit has suggested that it is better to consider unavailability first,[1017] 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 . . . estop[] *the State* from asserting the exhaustion defense."[1018] 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."[1019] Some courts have treated estoppel as a personal defense and have declined to apply it where the persons responsible for the estopping conduct were not the named defendants.[1020] 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.[1021] This result

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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).

[1016] 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.Okla., Apr. 2, 2008) (holding plaintiff would have to "demonstrate misrepresentation, reasonable reliance on the misrepresentation, and detriment").

[1017] Abney v. McGinnis, 380 F.3d 663, 667 (2d Cir. 2004).

[1018] 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).

[1019] Hemphill v. New York, 380 F.3d 680, 689 (2d Cir. 2004).

[1020] Dillon v. Rogers, 596 F.3d 260, 270 (5th Cir. 2010) (quoting *Hemphill*); Fields v. Downstate Correctional Facility, 2012 WL 6709192, *6 (S.D.N.Y., Dec. 21, 2012) (holding defendant cannot be estopped from arguing non-exhaustion unless he personally impeded exhaustion); Murray v. Palmer, 2010 WL 1235591, *5 (N.D.N.Y., Mar. 31, 2010) ("Generally, a defendant in an action may not be estopped from asserting the affirmative defense of failure to exhaust administrative remedies based on the actions (or inactions) of other individuals.") (footnote omitted); Collins v. Goord, 438 F.Supp.2d 399, 415 n.16 (S.D.N.Y. 2006); Gill v. Frawley, 2006 WL 1742738, *12 (N.D.N.Y., June 22, 2006); McCullough v. Burroughs, 2005 WL 3164248, *4 (E.D.N.Y., Nov. 29, 2005); Barad v. Comstock, 2005 WL 1579794, *7 (W.D.N.Y., June 30, 2005) (all declining to apply estoppel where persons responsible for estopping conduct were not the named defendants); *see* Snyder v. Whittier, 2009 WL 691940, *9 (N.D.N.Y., Mar. 12, 2009) (intimidation by one defendant did not excuse non-exhaustion against another defendant not involved in the conduct).

[1021] *See* Brunson v. Jonathan, 727 F.Supp.2d 195, 198-99 (W.D.N.Y. 2010); Cousin v. Dodrill, 2010 WL 986411, *7 (N.D.N.Y., Feb. 25, 2010) (finding a material issue as to estoppel based on claim that prison personnel delayed mailing pliantiff's grievance appeal), *report and recommendation adopted*, 2010 WL 986405 (N.D.N.Y., Mar. 17, 2010); DeMartino v. Zenk, 2009 WL 2611308, *7-8 (E.D.N.Y., Aug. 25, 2009) (finding a material issue as to estoppel based on lack of access to a copy machine required to comply with grievance procedure; grievance concerned medical care), *reconsideration denied*, 2009 WL 4626647 (E.D.N.Y., Dec. 7, 2009); Snyder v. Goord, 2007 WL 957530, *10 (N.D.N.Y., Mar. 29, 2007) (holding misleading advice from grievance supervisor could estop named defendant); Messa v. LeClaire, 2007 WL 2292975, *4 (N.D.N.Y., Feb. 26, 2007) (holding threats by unidentified prison staff could estop the named defendants), *report and recommendation adopted*, 2007 WL 2288106 (N.D.N.Y., Aug. 6, 2007); Gay v. Correctional Medical Services, 2007 WL 495241, *3 (D.Vt., Feb. 9, 2007) (holding officer's admission that she received and signed the plaintiff's grievance but then returned it to him rather than forwarding it as required may estop the defendants); Brown v. Koenigsmann, 2005 WL 1925649, *2 (S.D.N.Y., Aug. 10, 2005) ("Nothing in *Ziemba*, however, requires that the action or inaction which is the basis for

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,[1022] 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,[1023] consistently with the general principle that exhaustion must precede filing.[1024] Courts have rejected requests for temporary restraining orders and preliminary injunctions based on non-exhaustion, sometimes stating that non-exhaustion means there is little likelihood of

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the estoppel be that of the particular defendant in the prisoner's case."); Rivera v. Pataki, 2005 WL 407710, *11 (S.D.N.Y., Feb. 7, 2005) (holding that rejection of grievances as untimely after the court had dismissed on condition that exhaustion would be allowed estopped the defendants from claiming non-exhaustion); 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); *see also* Shaheed-Muhammad v. Dipaolo, 393 F.Supp.2d 80, 97 (D.Mass. 2005) (noting defendants' failure to answer the plaintiff's grievances; 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.").

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. That will probably be the case in most cases where estoppel is raised. *See, e.g.*, Rivera v. Pataki, 2005 WL 407710, *11-13; Warren v. Purcell, 2004 WL 1970642, *6.

[1022] "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. Shackleton*, 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.

[1023] Williams v. Bal, 2012 WL 2065051, *2 (E.D.Cal., June 7, 2012) (holding there is no imminent danger exception to the exhaustion requirement); Bolton v. Smith, 2012 WL 1400061, *6-7 (C.D.Cal., Mar. 1, 2012), *report and recommendation adopted*, 2012 WL 1399961 (C.D.Cal., Apr. 16, 2012); Riffey v. Lappin, 2010 WL 3782220, *4 (D.S.C., July 27, 2010) ("Under the PLRA, there is no urgent medical need exception for the exhaustion requirement."), *report and recommendation adopted*, 2010 WL 3782164 (D.S.C., Sept. 21, 2010); Nickens v. District of Columbia, 694 F.Supp.2d 10, 15 (D.D.C. 2010) (noting that the PLRA eliminated the rule that remedies must be "plain, speedy, and effective" to require exhaustion); Michalski v. Krebs, 2010 WL 1032647, *1 (S.D.Ill., Mar. 17, 2010); Horacek v. Caruso, 2009 WL 125398, *3 (W.D.Mich., Jan. 15, 2009); *see Appendix A for additional authority on this point; see also* Hammond v. SCI Albion/DOC, 2012 WL 5451564, *2 (W.D.Pa., Nov. 7, 2012) (similar to *Lake v. Johnson*, *infra*); Lake v. Johnson, 2008 WL 2641323, *2 (W.D.Va., July 1, 2008) (prisoner who has not exhausted does not show a likelihood of success as required for an injunction); Washington v. Randall-Owens, 2007 WL 1544425, *2 (E.D.Mich., May 25, 2007) (citing lack of exhaustion *and* lack of showing of irreparable harm in denying preliminary injunction); Jones v. Sandy, 2006 WL 355136, *10 & n.3 (E.D. Cal. Feb. 14, 2006) (stating there is no emergency exception to exhaustion, but the court might reconsider that conclusion if it learned there was no emergency grievance procedure), *report and recommendation adopted*, 2006 WL 708346 (E.D. Cal. Mar. 20, 2006).

[1024] *See* § IV. E, above.

success on the merits.[1025] There are a few decisions that have allowed cases to go forward without exhaustion to avoid irreparable harm, but they mostly do not provide much legal justification for disregarding the exhaustion requirement.[1026] The Second Circuit once said the question was open whether there was an irreparable harm exception to PLRA exhaustion,[1027] but apparently no lower court has granted relief based on that statement, and courts have questioned whether it is consistent with Supreme Court decisions.[1028] 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.[1029]

The strongest basis for requesting court intervention without waiting for exhaustion is a decision stating 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.[1030] No one seems actually to have obtained relief on that basis yet (though one court threatened to

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[1025] *See, e.g.*, Breeland v. Fisher, 2012 WL 4105090, *6 (M.D.Pa., July 25, 2012) (holding failure to exhaust precluded consideration of injunctive relief), *report and recommendation adopted*, 2012 WL 4104561 (M.D.Pa., Sept. 18, 2012); Wenzel v. IDOC, 2012 WL 3062779, *3 (S.D.Ill., June 7, 2012) (holding plaintiff's desire to seek an emergency TRO did not excuse non-exhaustion), *report and recommendation adopted*, 2012 WL 3062775 (S.D.Ill., July 27, 2012); Geiger v. Benov, 2011 WL 5884273, *3 (E.D.Cal., Nov. 23, 2011); Victor v. Varano, 2011 WL 5026216, *9 (M.D.Pa., Sept. 12, 2011), *report and recommendation adopted*, 2011 WL 5036016 (M.D.Pa., Oct. 21, 2011); Christian v. Bureau of Prisons, 2011 WL 3903173, *2 (C.D.Cal., Sept. 2, 2011); Anderson v. Prisoner Health Services, 2011 WL 2143514, *2 (E.D.Mich., May 31, 2011); Alba v. Randle, 2011 WL 1113866, *1-2 (S.D.Miss., Mar. 28, 2011) (denying TRO for non-exhaustion).

[1026] *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).

[1027] *See* Marvin v. Goord, 255 F.3d 40, 43 (2d Cir. 2001).

[1028] *See* Rivera v. Pataki, 2003 WL 21511939, *6 (S.D.N.Y. July 1, 2003).

[1029] 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. 233-236, above.

[1030] 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.

grant it and jail officials hastily addressed the problem[1031]), but the argument may have been strengthened by the Supreme Court's holding that courts should not deviate from the usual practices of litigation unless the PLRA explicitly says so.[1032]

One recent decision 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."[1033] 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.[1034] 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.[1035]

The *Fletcher* decision addresses "imminent danger of serious physical injury," the exception to the "three strikes" provision of the PLRA,[1036] 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.[1037]

Other decisions have held that an allegation of imminent danger of serious physical harm asserted for purposes of avoiding the three strikes provision[1038] does not except the prisoner from the exhaustion requirement.[1039] These decisions should be reevaluated in light of the holding in *Fletcher*.

[1031] Tvelia v. Dep't of Corr., 2004 WL 298100, *2 (D.N.H. Feb. 13, 2004). *But see* Blain v. Bassett, 2007 WL 4190937, *2 (W.D.Va., Nov. 21, 2007) (refusing to direct delay of new prison rule pending plaintiff's completion of exhaustion, dismissing action; *Jackson* not cited); McCauley v. Bassett, 2007 WL 4125375, *2 (W.D.Va., Nov. 20, 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).

[1032] Jones v. Bock, 549 U.S. 199, 212-16 (2007). The Court specifically referred to the usual practice under the Federal Rules of Civil Procedure. Injunctions, including preliminary injunctions, are addressed in Rule 65.

[1033] 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.*

[1034] Fletcher v. Menard Correctional Center, 623 F.3d at 1174; *accord*, Smith v. Moon, 2012 WL 5425260, *2-3 (E.D.Cal., Nov. 6, 2012); Blankenship v. Owens, 2011 WL 610967, *6 n.5 (N.D.Ga., Feb. 15, 2011); Nowell v. Hickey, 2011 WL 381943, *3 (E.D.Ky., Feb. 1, 2011).

[1035] 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).

[1036] 28 U.S.C. § 1915(g); *see* § VIII.D, below.

[1037] *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.

[1038] 28 U.S.C. § 1915(g); *see* § VIII, below.

[1039] McAlphin v. Toney, 375 F.3d 753, 755 (8th Cir. 2004); Severson v. Igbinosa, 2011 WL 870895, *3 (E.D.Cal., Feb. 18, 2011); Jensen v. Knowles, 2008 WL 5156694, *4 (E.D.Cal., Dec. 9, 2008); Morgan v. Baker, 2008 WL 2568817, *2 (D.Conn., June 24, 2008), *motion for relief from judgment granted on other grounds*, 2008 WL 4831414 (D.Conn., Nov. 5, 2008); Clayborne v. Epps, 2008 WL 4056293, *1 (S.D.Miss., Aug. 25, 2008).

I. Statutes of Limitations

Decisions to date mostly hold that the statute of limitations is tolled during administrative exhaustion.[1040] However, it is not certain whether that conclusion holds independently of state tolling rules. The first appellate decision on the point, and a number of others since, have relied explicitly on state tolling law,[1041] and a few have held that the period is *not* tolled under a particular state's law.[1042] Other decisions have been unclear or equivocal on the basis for tolling during exhaustion.[1043] A few decisions have stated directly, or strongly implied, that the PLRA

[1040] 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. 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. Rhodes*, 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. Rozum*, 2009 WL 1833601, *2 (W.D.Pa., June 25, 2009), asserted that exhaustion does not toll the limitations period while ignoring all contrary authority.

[1041] Harris v. Hegmann, 198 F.3d 153, 157-58 (5th Cir. 1999); *accord*, Braxton v. Zavaras, 614 F.3d 1156, 1160 (10th Cir. 2010); Roberts v. Barreras, 484 F.3d 1236, 1240 (10th Cir. 2007); Leal v. Georgia Dep't of Corrections, 254 F.3d 1276, 1280 (11th Cir. 2001) (assuming that state law provides the tolling rule); Saucillo v. Samuels, 2013 WL 360258, *2 (D.S.C., Jan. 30, 2013); Kelly v. White, 2011 WL 939015, *2 (D.S.C., Mar. 16, 2011) (applying state limitations and tolling law); Dozier v. Neven, 2010 WL 3910060, *2-3 (D.Nev., Sept. 30, 2010) (following *Wisenbaker v. Farwell*, *infra*); Peoples v. Rogers, 2010 WL 424201, *2 (D.S.C., Feb. 1, 2010); Peoples v. South Carolina Dept. of Corrections, 2008 WL 4442583, *5-6 (D.S.C., Sept. 25, 2008); Hall v. Corrections Corp. of America, 2007 WL 2688880, *1 (D.Kan., Sept. 13, 2007) (stating Kansas tolling law governed even in a *Bivens* action), *subsequent determination*, 2008 WL 53666 (D.Kan., Jan. 3, 2008); Wisenbaker v. Farwell, 341 F.Supp.2d 1160, 1164-65 (D.Nev., Sept. 29, 2004) (applying "best judgment" about application of state equitable tolling law); Howard v. Mendez, 304 F.Supp.2d 632, 636 (M.D.Pa. 2004) (applying state tolling rules to a case involving a federal prisoner); McCoy v. Goord, 255 F.Supp.2d 233, 253 (S.D.N.Y. 2003) (noting in dictum that time spent exhausting appears to be tolled under New York law); Roberts v. Saunders, 2003 WL 23678921, *1 (W.D.Va., Jan. 10, 2003); *see generally* Board of Regents v. Tomanio, 446 U.S. 478, 483-86 (1980) (holding that state tolling rules are applicable in § 1983 actions).

[1042] Adams v. Wiley, 2010 WL 551394, *2 (D.Colo., Feb. 10, 2010) (similar to *Braxton*), *aff'd*, 398 Fed.Appx. 372 (10th Cir. 2010); Braxton v. Zavaras, 2009 WL 5743217, *4-5 (D.Colo., Dec. 11, 2009) (no tolling where plaintiffs did not allege legal disability or mental incompetence; denying equitable tolling as well where plaintiff still had substantial time under the limitations period when he finished exhausting), *report and recommendation adopted*, 2010 WL 420035 (D.Colo., Feb. 1, 2010), *aff'd*, 614 F.3d 1156 (10th Cir. 2010); Smith v. Wilson, 2009 WL 3444662, *3-4 (N.D.Ind., Oct. 22, 2009) (where state law limited statutory tolling to persons less than eighteen years of age, mentally incompetent, or out of the United States, plaintiff was not entitled to tolling while he exhausted administrative remedies).

[1043] *See* Gonzalez v. Hasty, 651 F.3d 318, 322 (2d Cir. 2011); Brown v. Valoff, 422 F.3d 926, 943 (9th Cir. 2005) (citing cases relying on state law, but not referring directly to state law); Johnson v. Rivera, 272 F.3d 519, 521 (7th Cir. 2001); Brown v. Morgan, 209 F.3d 595, 596 (6th Cir. 2000) (not referring to state law, but relying on *Harris v. Hegmann*, which did); Petrucelli v. Hasty, 605 F.Supp.2d 410, 418-19 (E.D.N.Y. 2009), *reconsideration denied*, 2010 WL 455002 (E.D.N.Y., Feb. 2, 2010); Ozoroski v. Maue, 2009 WL 414272, *7 (M.D.Pa., Feb. 18, 2009); Cuco v. Federal Medical Center-Lexington, 2006 WL 1635668, *25 (E.D.Ky., June 9, 2006) (stating that the exhaustion requirement tolls the limitations period but does not delay the accrual of the claim); Pratt v. New

itself requires tolling during exhaustion.[1044] (At least one decision takes a different approach, holding that the PLRA implies as a matter of federal law that the claim does not *accrue* for limitations purposes until exhaustion is completed.[1045] Holdings that exhaustion tolls the limitations period mean that a prisoner case can generally not be found time-barred on the face of the complaint unless the complaint specifies the amount of time taken up in exhaustion.[1046]

The limitations period is not further tolled during exhaustion of state judicial remedies, since the statute does not require judicial exhaustion.[1047] Nor is it automatically tolled during the pendency of a suit dismissed for failure to exhaust,[1048] though as noted below, equitable tolling may be appropriate in some such cases.

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.[1049] 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 not reinstated for issues from previous periods of incarceration[1050]—an assumption that courts have rejected in

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Hampshire Dept. of Corrections, 2006 WL 995121, *6 (D.N.H., Mar. 31, 2006); Charlton v. Touma, 2006 WL 782829, *2 (E.D.Ky., Mar. 28, 2006) ("Because prisoners cannot bring suit in federal court until they have exhausted their administrative remedies, the running of the applicable statute of limitations is tolled" during exhaustion); Brown v. Olivencia-Font, 2006 WL 212188, *3 (D.S.C., Jan. 27, 2006) ("Filing a mandatory administrative grievance typically tolls the statute of limitations for a § 1983 action").

[1044] Miscovitch v. Judge, 2012 WL 1521071, *2 (E.D.Pa., Apr. 30, 2012); Sheridan v. Reinke, 2012 WL 1067079, *4 (D.Idaho, Mar. 28, 2012) (holding statute of limitations is tolled during exhaustion under PLRA "[r]egardless of state law"); Brandon v. Bergh, 2009 WL 4646954, *3 (W.D.Mich., Dec. 8, 2009); Bourguignon v. Armstrong, 2007 WL 2495230, *2-4 (D.Conn., Aug. 28, 2007) and cases cited; Wright v. O'Hara, 2004 WL 1793018, *6 (E.D.Pa., Aug. 11, 2004). The *Brandon* decision states:

> [§ 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."). *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).

[1045] 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.

[1046] Thomas v. Palakovich, 2012 WL 1079441, *4 (M.D.Pa., Mar. 30, 2012), *order entered*, 2012 WL 1078250 (M.D.Pa., Mar. 30, 2012) .

[1047] Freeman v. Haselden, 2012 WL 3962748, *3 (D.S.C., Feb. 24, 2012), *report and recommendation adopted*, 2012 WL 3981137 (D.S.C., Sept. 11, 2012); Bloom v. Medill, 2007 WL 4206604, *2 (D.Kan., Nov. 26, 2007).

[1048] Worrell v. Bruce, 296 Fed.Appx. 665, 667 n.2, 2008 WL 4596335, *1 n.2 (10th Cir., Oct. 15, 2008); Crump v. Darling, 2007 WL 851750, *13-14 (W.D.Mich., Mar. 21, 2007).

[1049] Gonzalez v. Hasty, 651 F.3d 318, 323-24 (2d Cir. 2011); *accord*, Winston v. Kelly, 2012 WL 3149122, *3 (E.D.Ark., Aug. 1, 2012); Gutierrez v. Williams, 2011 WL 2559788, *4 (D.Or., June 29, 2011).

[1050] Pettiford v. Sheahan, 2002 WL 1433503, *2 and n.3 (N.D.Ill., July 2, 2002).

other contexts.[1051] Another decision holds that a person who seeks to exhaust administrative remedies while a prisoner retains the benefit of the resulting tolling even if she does not bring suit until after release.[1052] 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.[1053] Others have held 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.[1054] 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.[1055] 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.[1056]

The limitations period is not tolled by an administrative proceeding that could not have remedied the problem of which the prisoner complains,[1057] or one that was not proper under the grievance rules.[1058] Exhaustion does not toll (or revive) the limitations period if the period has already expired when the prisoner commences exhaustion.[1059] Similarly, one court has held that an untimely attempt to exhaust does not toll the limitations period.[1060] Courts have disagreed

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[1051] *See* n. 39, above.

[1052] Robinson v. PTS of America, LLC, 2006 WL 1083397, *4 (M.D.Tenn., Apr. 24, 2006).

[1053] Iacovone v. Wilkinson, 2006 WL 689102, *3 (S.D.Ohio, Mar. 14, 2006).

[1054] Vandiver v. Correctional Medical Services, Inc., 2012 WL 3923905, *1-2 (W.D.Mich., Sept. 7, 2012) (citing cases); Cleveland v. County of Cook, 2009 WL 3156742, *4 (N.D.Ill., Sept. 25, 2009); Juresic v. Cook County Medical Services Director, 2002 WL 1424564 (N.D.Ill., June 28, 2002). The *Juresic* court's expressed concern was to protect prison staff from stale claims. One would think that the concern of the PLRA to protect prison administrations and federal courts from federal litigation until prison administrations have addressed the prisoner's problem would be better served by the holding in *Iacovone*. Hatch v. Briley, 230 Fed.Appx. 598, 599, 2007 WL 1175650 (7th Cir., Apr. 19, 2007) (unpublished) (holding limitations period tolled only for period when grievance is actually pending, not for the time between the occurrence and the filing of the grievance).

[1055] 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. 418, 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.

[1056] Ross v. Busby, 2006 WL 2382014, *7 (E.D.Cal., Aug. 17, 2006).

[1057] 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 pendency 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).

[1058] Brown v. Mason, 2009 WL 113847, *5 (W.D.Wash., Jan. 13, 2009) (an additional administrative appeal taken after plaintiff's remedies were already exhausted did not toll the limitations period).

[1059] Murphy v. Cambra, 2007 WL 1176197, *7 (E.D.Cal., Apr. 20, 2007), *report and recommendation adopted,* 2007 WL 2206937 (E.D.Cal., July 30, 2007); *see* Brown v. Voorhies, 2012 WL 1081796, *4 (S.D.Ohio, Mar. 30, 2012) (evidence of attempts to exhaust after the event at issue and within the limitations period barred summary judgment on limitations grounds).

[1060] 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).

whether tolling for exhaustion runs consecutively or concurrently with other tolling provisions that may apply.[1061]

In cases that are dismissed for non-exhaustion, the claim will often be presumptively time-barred because the delay in litigating exhaustion means that any renewed grievance would be grossly untimely.[1062] 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.[1063]

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.[1064] That is the case in New 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,[1065] and state law may further toll that six-month period during the pendency of administrative proceedings.[1066] However, not all state statutes of this type will benefit prisoners whose cases have been dismissed for non-exhaustion.[1067]

[1061] *Compare* Jewell v. Francis, 2011 WL 455845, *2 (S.D.Cal., Feb. 3, 2011) (exhaustion-related tolling is added to two-year statutory tolling for imprisonment); Elmore v. Arong, 2010 WL 366628, *2 (E.D.Cal., Jan. 26, 2010) (same), *report and recommendation adopted,* 2010 WL 1027533 (E.D.Cal., Mar 18, 2010) *with* Lopez v. Schwarzenegger, 2012 WL 78377, *5 (E.D.Cal., Jan. 10, 2012) (citing *Gutierrez*), *report and recommendation adopted*, 2012 WL 671680 (E.D.Cal., Feb. 29, 2012); Gutierrez v. Butler, 2008 WL 436948, *3 (E.D.Cal., Feb. 14, 2008) (tolling runs concurrently), *report and recommendation adopted*, 2008 WL 795006 (E.D.Cal., Mar. 25, 2008).

[1062] *See, e.g.,* Long v. Simmons, 77 F.3d 878, 880 (5th Cir. 1996) (noting that dismissal without prejudice after the limitations period operates as dismissal with prejudice).

[1063] The most significant of the latter 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.

[1064] *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 from the application of equitable tolling. McCoy v. Goord, 255 F.Supp.2d at 253; *see* nn. 185, 803-807, above, and 1068-1071, below, concerning equitable tolling.

[1065] 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.

This statute also requires that service be completed within the six-month period, which may limit its utility for *pro se* prisoner litigants given their difficulties in arranging for service. However, courts have held that even if the plaintiff relies on § 205(a), the service requirement need not be met, since state law governing the method or timing of service of process is not borrowed along with the statute of limitations for federal claims. Allaway v. McGinnis, 362 F.Supp.2d 390, 395 (W.D.N.Y. 2005); Gashi v. County of Westchester, 2005 WL 195517, *9 (S.D.N.Y., Jan. 27, 2005).

[1066] 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."

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.[1068] 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,[1069] but other decisions have held or suggested that equitable tolling may be applicable more generally.[1070] 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 if administrative remedies have become unavailable.[1071] It would 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.[1072] 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.[1073] 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.[1074]

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).

[1067] 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).

[1068] 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. 185, 803-807, above, concerning equitable tolling.

[1069] *See* Booth v. Churner, 532 U.S. 731 (2001).

[1070] *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). Concerning the applicability of equitable tolling to grievance deadlines, see § IV.E.8, nn. 803-807, above.

[1071] 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).

[1072] *See* Neal v. Goord, 267 F.3d 116, 122 (2d Cir. 2001); *see* nn. 233-236, above.

[1073] *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).

[1074] *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.

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."[1075] 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[1076] as well as cases where the plaintiff made an error of law.[1077] The fact that a case has not yet been heard on the merits weighs heavily in favor of granting such relief.[1078] 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.[1079]

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.

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.")

[1075] Rule 60(b)(1),(5),(6), Fed.R.Civ.P.

[1076] *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.")

[1077] *See* Scott v. U.S. Environmental Protection Agency, 185 F.R.D. 202, 204-06 (E.D.Pa. 1999) (relieving plaintiff from voluntary dismissal based on erroneous belief that she could pursue her Federal Tort Claims Act claim with other claims in state court; citing excusable neglect provision of rule), *reconsideration denied*, 1999 WL 358918 (E.D.Pa., June 2, 1999); Balik v. Apfel, 37 F.Supp.2d 1009, 1010 (S.D.Ohio 1999) (granting relief under excusable neglect and "catchall" provisions to re-enter judgment so mentally impaired plaintiff could appeal timely), *aff'd*, 210 F.3d 371 (6th Cir. 2000) (unpublished).

[1078] *See* Bridgeway Corp. v. Citibank, N.A., 132 F.Supp.2d at 301; Scott v. U.S. Environmental Protection Agency, 185 F.R.D. at 206.

[1079] *See* n.241, above.

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.[1080]

A claim that is otherwise timely is not time-barred because exhaustion occurred outside the limitations period.[1081]

J. Retroactivity[1082]

The PLRA exhaustion requirement does not apply to actions or appeals filed before its enactment.[1083] It does apply to suits filed after enactment even if the events complained about occurred before enactment.[1084] 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.[1085] 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 additional plaintiffs join in challenging them; conditions not raised before the PLRA cannot be raised in the same action without exhaustion.[1086] A post-PLRA motion to enforce a judgment in a case filed before enactment of the PLRA is not subject to the exhaustion requirement.[1087]

K. Exhaustion and Class Actions

In class actions,[1088] most decisions to date state that the PLRA requires only the named plaintiffs (and often a single named plaintiff) to exhaust.[1089] New named plaintiffs added by

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[1080] *See* § IV.E.8, above.

[1081] Harrison v. Stalder, 2006 WL 3524315, *4 (E.D.La., Dec. 5, 2006); *accord*, Raheem v. Miller, 2010 WL 2595112, *3 (W.D.Okla., May 14, 2010)*, report and recommendation adopted,* 2010 WL 2595082 (W.D.Okla., June 23, 2010).

[1082] Consequences of the retroactive application of Supreme Court decisions interpreting the PLRA are addressed in n. 807, above.

[1083] Scott v. Coughlin, 344 F.3d 282, 290 (2d Cir. 2003); Salahuddin v. Mead, 174 F.3d 271, 274 (2d Cir. 1999); Tyree v. Weld, 2010 WL 145882, *9 n.11 (D.Mass., Jan. 11, 2010); *see* Caruso v. Zenon, 2005 WL 5957978, *7-8 (D.Colo., July 25, 2005) (holding that filing of amended complaint in pre-PLRA case does not require exhaustion where it merely clarifies already filed allegations).

[1084] White v. McGinnis, 131 F.3d 593, 595 (6th Cir. 1997); Garrett v. Hawk, 127 F.3d 1263, 1266 (10th Cir. 1998); Polite v. Barbarin, 1998 WL 146687, *2 (S.D.N.Y., Mar. 25, 1998).

[1085] Wyatt v. Leonard, 193 F.3d 876, 879 (6th Cir. 1999) (citing Bibbs v. Zummer, 173 F.3d 428, 1999 WL 68573 (6th Cir., Jan. 21, 1999) (unpublished) (holding that the opposite result would have an impermissible retroactive effect)); Hitchcock v. Nelson, 1997 WL 433668, *2 (N.D.Ill., July 28, 1997) (same).

[1086] Shariff v. Coombe, 655 F.Supp.2d 274, 284 (S.D.N.Y. 2009).

[1087] Clarkson v. Coughlin, 2006 WL 587345, *3 (S.D.N.Y., Mar. 10, 2006).

[1088] 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).

[1089] *See* Chandler v. Crosby, 379 F.3d 1278, 1287 (11th Cir. 2004) (holding exhaustion by one class member is sufficient); Gates v. Cook, 376 F.3d 323, 329 (5th Cir. 2004) (same); Jackson v. District of Columbia, 254 F.3d 262, 268-69 (D.C.Cir. 2001) (quoting Foster v. Gueory, 655 F.2d 1319, 1321-22 (D.C.Cir. 1981) (stating that exhaustion by a single class member is sufficient)); Phipps v. Sheriff of Cook County, 681 F.Supp.2d 899, 908 (N.D.Ill. 2009) (exhaustion by a single class member will exhaust for the class); Young v. County of Cook, 2009 WL 2231782, *4

amended complaint need not have exhausted before the filing of the original complaint as long as they have exhausted before seeking joinder.[1090] Other courts have simply certified classes without inquiring into exhaustion by anyone but the named plaintiffs, without commenting on the theoretical issue.[1091]

These decisions are consistent with the general practice in class actions,[1092] which the PLRA does not purport to displace.[1093] There may be exceptions to the general practice for exhaustion requirements that are jurisdictional, as the PLRA's is not,[1094] or are found in statutory

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(N.D.Ill., July 27, 2009) (only one class member need have exhausted for class certification); Meisberger v. Donahue, 245 F.R.D. 627, 629-30 (S.D.Ind. 2007) (holding that named plaintiffs must exhaust but absent class members need not); Orafan v. Goord, 2003 WL 21972735, *5 n.7 (N.D.N.Y., Aug. 11, 2003) (stating in dictum that a single class member can exhaust for the class); Lewis v. Washington, 265 F.Supp.2d 939, 942 (N.D.Ill. 2003) (holding that exhaustion by one class member is sufficient); Rahim v. Sheahan, 2001 WL 1263493, *7-8 (N.D.Ill., Oct. 19, 2001) (holding that defendants' waiver of exhaustion with respect to named plaintiffs extended to absent class members); Jones'El v. Berge, 172 F.Supp.2d 1128, 1131-33 (W.D.Wis. 2001) (rejecting the argument that all class members must exhaust); *see* Hattie v. Hallock, 8 F.Supp.2d 685, 689 (N.D.Ohio), *amended*, 16 F.Supp.2d 834 (N.D.Ohio 1998) (acknowledging in dicta that "vicarious exhaustion" is available in class actions under Rule 23(b)(2)); *see* Glenn v. Hayman, 2007 WL 894213, *5 (D.N.J., Mar. 21, 2007) (holding that class certification should be determined after proceedings to test the named plaintiffs' exhaustion). *But see* Ellis v. Cambra, 2005 WL 2105039, *3 (E.D.Cal., Aug. 30, 2005) (holding the plaintiff did not exhaust by virtue of having joined in a putative class action with another prisoner who had exhausted), *report and recommendation adopted*, 2006 WL 547921 (E.D.Cal., Mar. 3, 2006). The above-cited cases mostly cite Title VII exhaustion doctrine as a useful guide under the PLRA. The Supreme Court, however, has rejected the analogy to Title VII and related statutes, though in a very different context. *See* Woodford v. Ngo, 548 U.S. 81, 98-99 (2006).

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 v. Clay, 2012 WL 642258, *5 (S.D.Tex., Feb. 27, 2012) (asserting without explanation that any "new" class members would have to exhaust).

One court has suggested that named plaintiffs need not have exhausted if they have been released, but that at least one class member must have exhausted. Jones v. Swanson Services Corp., 2009 WL 2151300, *2 (M.D.Tenn., July 13, 2009).

[1090] Mathis v. GEO Group, Inc., 2011 WL 2899135, *5 (E.D.N.C., July 18, 2011), *report and recommendation adopted in pertinent part and stay granted*, 2012 WL 43586, *3 (E.D.N.C., Jan. 9, 2012).

[1091] *See, e.g.,* Aiello v. Litscher, 104 F.Supp.2d 1068, 1073 (W.D.Wis. 2000); Edwards v. Alabama Dept. of Corrections, 81 F.Supp.2d 1242 (M.D.Ala. 2000); Gomez v. Spalding, No. Civ 91-0299-S-LMB, Order at 2 (D.Idaho, Feb. 5, 1998); Clark v. California, 1998 WL 242688, *3 (N.D.Cal., May 11, 1998). *Cf.* Hattie v. Hallock, 8 F.Supp.2d 685, 689 (N.D.Ohio 1998) (stating that prisoners must personally exhaust and that there is no "vicarious" exhaustion *except* in class actions), *judgment amended*, 16 F.Supp.2d 834 (N.D.Ohio 1998).

[1092] 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).

[1093] *Cf.* Anderson v. Garner, 22 F.Supp.2d 1379, 1383 (N.D.Ga. 1997) (stating that the PLRA does not "in any way affect[]" the consideration of class certification, leaving courts to apply "existing law governing class certification"); *accord*, Shook v. El Paso County, 386 F.3d 963, 969-71 (10th Cir. 2004), *cert. denied*, 544 U.S. 978 (2005).

[1094] *See* § IV.A, n. 184, above.

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 inapplicable under the PLRA, since judicial review of prisoners' civil rights complaints is *de novo* and not restricted to an administrative record or determination.[1095]

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. 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.[1096]

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 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.[1097]

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.[1098]

One decision pointed out that prior authority involves Rule 23(b)(2) class actions, and declined 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.[1099] 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.[1100] 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

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[1095] Jones'El v. Berge, 172 F.Supp.2d at 1132.

[1096] Amador v. Andrews, 655 F.3d 89, 101 (2d Cir. 2011) (holding plaintiffs' claims "inherently transitory").

[1097] *See* nn. 717-718, above, for discussion of cases raising similar issues.

[1098] Amador v. Superintendents of Dept. of Correctional Services, 2005 WL 2234050, *8-9 (S.D.N.Y., Sept. 13, 2005). *Cf.* Williams v. City of Philadelphia, 2010 WL 3986104, *14-15 (E.D.Pa., Oct. 8, 2010) (certifying class 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").

[1099] Sanchez v. Becher, 2003 WL 1563941, *4 (S.D.Ind., Jan. 31, 2003).

[1100] *Sanchez, id.*, *3-4.

class members were required to exhaust.[1101] In another 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.[1102] 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.[1103] 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.

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."[1104] That holding remains applicable when plaintiffs in a class action seek preliminary relief benefiting individual unnamed class members.[1105] The PLRA does not disturb pre-existing principles of notice pleading and liberal construction, especially of *pro se* pleadings,[1106] and those principles are equally applicable in class actions.[1107]

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 *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.[1108] Similarly, the Second Circuit and others have held that the grievant need not

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[1101] 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 plaintifs' standing to seek injunctive relief.

[1102] Turner v. Grant County Detention Center, 2008 WL 821895, *5-6 (E.D.Ky., Mar. 26, 2008). The court denied 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).

[1103] In re Nassau County Strip Search Cases, 2010 WL 3781563, *8-9 (E.D.N.Y., Sept. 22, 2010); Kelsey v. County of Schoharie, 2007 WL 603406, *11 (N.D.N.Y., 2007), *rev'd and remanded on other grounds*, 567 F.3d 54 (2d Cir. 2009).

[1104] Jones'El v. Berge, 172 F.Supp.2d at 1132.

[1105] *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), *amendment denied*, 2003 WL 23142268 (W.D.Wis., Apr. 17, 2003); Piscitello v. Berge, 2002 WL 32345410, *2 (W.D.Wis., Nov. 4, 2002), *aff'd*, 94 Fed.Appx. 350, 2004 WL 635263 (7th Cir. 2004).

[1106] *See* n. 1512, below.

[1107] *See* Lewis v. Washington, 197 F.R.D. 611, 614 (N.D.Ill. 2000) (construing grievances about placement in "unapproved PC" status as encompassing complaints about conditions in that unit).

[1108] *See* §§ IV.G, IV.G.1, above.

"demand particular relief."[1109] 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.[1110]

The leading case on this point does not go quite that far. However, it said, in a case involving an alleged pattern of failure to protect from sexual assault, that prisoners exhausted as long as they generally alleged a failure to protect, as well as what happened to them, with no requirement that they spell out issues of training, supervision, staff discipline, etc., that might form the basis of liability and of remedy. "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."[1111]

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[1112]—especially since they may not even be allowed access to significant personnel- or security-related policies.[1113] It makes no

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[1109] Johnson v. Testman, 380 F.3d 691, 697 (2d Cir. 2004) (quoting Strong v. David, 297 F.3d 646, 650 (7th Cir. 2002)); *see* § IV.E.5, above.

[1110] 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.

[1111] Amador v. Andrews, 655 F.3d 89, 104 (2d Cir. 2011); *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. 534-535501-502, above, and surrounding text for further discussion of *Amador* and related supervisory liability issues.

The court took a slightly different approach in *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 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.

[1112] 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.

Riggs v. Valdez, 2010 WL 4117085, *13 (D.Idaho, Oct. 18, 2010), *on reconsideration in part*, 2010 WL 5391313 (D.Idaho, Dec. 22, 2010).

[1113] 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

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,[1114] to the underlying conduct that was grieved.[1115]

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.[1116] 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,[1117] 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.[1118]

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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.

[1114] *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).

[1115] *See* Lewis v. Washington, 197 F.R.D. 611, 614 (N.D.Ill. 2000) (applying principle of liberal construction of *pro se* pleadings to plaintiffs' grievances, holding that grievances about placement in "unapproved PC" status encompassed complaints about allegedly unconstitutional conditions in that status).

[1116] *See* Schnellbaecher v. Baskin Clothing Co., 887 F.2d 124, 128 (7th Cir. 1989); Miller v. Baltimore Gas & Elec. Co., 202 F.R.D. 195, 206 (D.Md. 2001).

Claims against federal agencies are an exception to this principle because of the explicit requirements of current federal regulations, which prescribe that class claims against federal entities must be pled in the administrative charge essentially as they would be pled in court, Gulley v. Orr, 905 F.2d 1383, 1385 (10th Cir. 1990); the "like or related to" standard is not applicable. Wade v. Secretary of the Army, 796 F.2d 1369, 1373 (11th Cir. 1986).

[1117] *See* §IV.E.8, n. 761, above.

[1118] For example, the Michigan grievance system formerly made issues non-grievable if they "involve a significant number of prisoners." Figel v. Bochard, 89 Fed.Appx. 970, 971, 2004 WL 326231, *1 (6th Cir. 2004) (unpublished); *see* Hernandez v. Caruso, 2005 WL 2077474, *3 (W.D.Mich., Aug. 26, 2005) (noting later elimination of that provision). The New York State grievance regulations, though less extreme, provide:

> *(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.
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> * * *

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,[1119] even if class certification was not sought until after enactment.[1120] Nor is exhaustion required before moving to enforce an existing class action judgment.[1121]

When prison officials move to terminate a judgment under the PLRA,[1122] 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 administrative remedies prior to defending a 3626(b) motion would produce an absurd result that is not contemplated by the statute."[1123]

V. Mental or Emotional Injury

The PLRA says that "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."[1124] There is a similar provision amending the Federal Tort Claims Act (FTCA),[1125] which has generally been interpreted similarly to § 1997e(e),[1126] 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.[1127] Further, the FTCA generally is a limited waiver of sovereign immunity, and federal courts

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> *(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.

[1119] Gomez v. Spalding, No. Civ 91-0299-S-LMB, Order at 2-3; Clark v. California, 1998 WL 242688, *3.

[1120] Jones v. Goord, 2000 WL 290290, *3 (S.D.N.Y., Mar. 20, 2000).

[1121] Clarkson v. Coughlin, 2006 WL 587345, *3 (S.D.N.Y., Mar. 10, 2006); *accord*, Arce v. O'Connell, 427 F.Supp.2d 435, 440-41 (S.D.N.Y. 2006).

[1122] *See* 18 U.S.C. § 3626(b); § III.B, above.

[1123] Green v. Peters, 2000 WL 1230246, *5 (N.D.Ill., Aug. 24, 2000); *accord*, Clark v. California, 739 F.Supp.2d 1168, 1232 (N.D.Cal. 2010).

[1124] 42 U.S.C. § 1997e(e).

[1125] 28 U.S.C. § 1346(b)(2).

[1126] *See, e.g.*, Ellerbe v. U.S., 2011 WL 4361617, *5 n.2 (N.D.Ohio, Sept. 19, 2011) (noting similarity to § 1997e(e)); Michtavi v. U.S., 2009 WL 578535, *5 (M.D.Pa., Mar. 4, 2009) (applying § 1346(b)(2) to claim about medication effects), *aff'd*, 2009 WL 2989915 (3d Cir., Sept. 21, 2009); Smith v. U.S., 2007 WL 2155651, *4 (D.Kan., July 26, 2007) (applying § 1346(b)(2) to claim of asbestos exposure), *reconsideration denied*, 2007 WL 4570888 (D.Kan., Dec. 27, 2007), *motion to amend denied*, 2008 WL 1735190 (D.Kan., Apr. 10, 2008); Taylor v. U.S., 2006 WL 2350165, *3 (W.D.Va., Aug. 11, 2006) (holding both § 1997e(e) and § 1346(b)(2) applicable to FTCA claim based on property loss); Mitchell v. U.S., 2005 WL 3445607, *4 (S.D.Tex., Dec. 15, 2005) (applying statute to claim of emotional injury from withdrawal of funds from account).

[1127] 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). 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. **STATUTORY CONSTRUCTION CITE?**

lack jurisdiction over claims that do not fall within it, so it appears that where recovery is sought for mental or emotonal injury, physical injury is a pleading requirement, which I argue below is not the case under § 1997e(e).[1128]

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.[1129]

The substantive scope of § 1997e(e), "injury suffered while in custody," is broader than the "prison conditions" language of the PLRA exhaustion requirement.[1130]

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.[1131] Dismissal under § 1997e(e) should be without prejudice to refiling once the prisoner is no longer incarcerated.[1132] In a class action, the provision is applicable only to the named plaintiffs, not unnamed class members.[1133]

One circuit has held that the statute applies to a claim that arose before, and was unrelated to, the plaintiff's present incarceration.[1134] The same 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.[1135]

[1128] Antonelli v. Crow, 2012 WL 4215024, *3 (E.D.Ky., Sept. 19, 2012). *Compare* **CROSS REF DISCUSSION OF PLEADING REQUIREMENT**

[1129] 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 consistent with the phrase "showing of prior physical injury," but not with 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. . . ." rather than "no damages shall be recovered. . . ."

[1130] *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).

[1131] *See* § II, n. 28, above. A few courts have held that § 1997e(e) applies to released prisoners notwithstanding its language, but most have rejected that view.

[1132] Douglas v. Yates, 535 F.3d 1316, 1320-21 (11th Cir. 2008) (citing Harris v. Garner, 216 F.3d 970, 985 (11th Cir. 2000) (en banc)).

[1133] In re Nassau County Strip Search Cases, 2010 WL 3781563, *8-9 (E.D.N.Y., Sept. 22, 2010); Schilling v. Transcor America, LLC, 2010 WL 583972, *6 (N.D.Cal., Feb. 16, 2010); Kelsey v. County of Schoharie, 2007 WL 603406, *11 (N.D.N.Y., Feb. 21, 2007) , *rev'd and remanded on other grounds*, 567 F.3d 54 (2d Cir. 2009). *But see* Turner v. Grant County Detention Center, 2008 WL 821895, *20 n.13 (E.D.Ky., Mar. 26, 2008) (denying class certification, citing § 1997e(e) and stating that if some class members had no physical injury, that fact weighs against commonality of claims).

[1134] 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.

[1135] Mitchell v. Brown & Williamson Tobacco Corp., 294 F.3d 1309, 1315 (11th Cir. 2002).

However, the statute says that "no Federal civil action *may be brought*"[1136] for mental or emotional injury without physical injury. In determining whether the statute is retroactive, courts have held that the phrase "may be brought" ties the statute's applicability to the time when the case is filed. If that is the case, a suit filed in state court is not a "Federal civil action"[1137] 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.[1138] Conversely, under this reasoning, state law claims filed in federal courts under their supplemental jurisdiction should be subject to § 1997e(e), and some (but not all) courts have so held.[1139]

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."[1140] 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."[1141] The availability of injunctive and declaratory relief is not affected.[1142] Most courts have held that the statute limits only

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[1136] 42 U.S.C. § 1997e(e) (emphasis supplied).

[1137] *See* 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, which ties the statute's applicability to the plaintiff's status as a prisoner at the time the action is brought. *See* nn. 25-42, above.

[1138] The term "federal civil action" is not defined in the statute. However, it appears to mean a civil action filed in federal court, not a civil action brought under federal law in any court. In the PLRA exhaustion requirement, Congress referred to actions brought "under section 1983 of this title, or any other Federal law." 42 U.S.C. § 1997e(a). Having used that explicit term in one part of the statute, it is not plausible that Congress would use a different and much vaguer term to convey the same idea in a different part of the PLRA. *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' ").

[1139] *See* Jacobs v. Pennsylvania Dept. of Correctons, 2011 WL 2295095, *23 (W.D.Pa., June 7, 2011) (holding federal civil action means "an action in which civil claims over which the federal court has jurisdiction are brought, i.e., all claims over which the court has original jurisdiction under 28 U.S.C. § 1331, and supplemental jurisdiction under 28 U.S.C. § 1367"); Schonarth v. Robinson, 2008 WL 510193, *4-5 (D.N.H., Feb. 22, 2008) ("I agree with the line of cases which conclude that § 1997e(e) applies to all actions that are brought in federal court which seek damages for mental or emotional injury, regardless of whether the underlying cause of action is based on federal or state law."); Hines v. Oklahoma, 2007 WL 3046458, *6 (W.D.Okla., Oct. 17, 2007). *But see* Mercado v. McCarthy, 2009 WL 799465, *2 (D.Mass., Mar. 25, 2009) (expressing doubt as to provision's application to state law claims); Bromell v. Idaho Dep't of Corrections, 2006 WL 3197157, *5 (D.Idaho, Oct. 31, 2006) (holding provision inapplicable to supplemental state claim).

[1140] Thompson v. Carter, 284 F.3d 411, 417 (2d Cir. 2002).

[1141] *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)).

[1142] *Thompson,* 284 F.3d at 418.

compensatory damages, allowing recovery of nominal and punitive damages,[1143] though some courts have held that punitive damages are barred as well.[1144] 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 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,[1145] or have even held that the complaint does not state a claim for that reason.[1146]

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,[1147] or by resort to the statute's heading, "Limitation on Recovery,"[1148] despite the Supreme Court's warning against

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[1143] 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 wrongdoers 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 247, 252 (3d Cir. 2000); Jones v. Price, 696 F.Supp.2d 618, 624-25 (N.D.W.Va. 2010) (adopting majority rule in absence of Fourth Circuit decision); Porter v. Caruso, 2008 WL 3978972, *8- 9 (W.D.Mich., Aug. 22, 2008); Green v. Padula, 2007 WL 4124830, *3 (D.S.C., Sept. 25, 2007), *report and recommendation rejected in part on other grounds,* 2007 WL 4124663 (D.S.C., Nov. 19, 2007); Williams v. Sharrett, 2007 WL 2406960, *4 (W.D.Mich., Aug. 20, 2007); Donovan v. Magnusson, 2005 WL 757585, *16 (D.Me., Mar. 11, 2005); *see* Nix v. Carter, 2013 WL 432566, *1-2 (M.D.Ga., Feb. 1, 2013) (holding nominal damages remain available even where circuit law prohibits punitive damages).

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* Haynes 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).

[1144] *See* Al-Amin v. Smith, 637 F.3d 1192, 1199 (11th Cir. 2011); Smith v. Allen, 502 F.3d 1255, 1271-72 (11th Cir. 2007); Davis v. District of Columbia, 158 F.3d 1342, 1348 (D.C. Cir. 1998); Holley v. Johnson, 2010 WL 988483, *14 (W.D.Va., Mar. 16, 2010) (noting absence of Fourth Circuit decision on the question), *report and recommendation adopted in part, rejected in part,* 2010 WL 2640328 (W.D.Va., June 30, 2010); Colston v. Matthews, 2009 WL 1788413, *6 (W.D.Mich., Feb. 17, 2009), *report and recommendation adopted as modified*, 2009 WL 1788415 (W.D.Mich., June 19, 2009); Page v. Kirby, 314 F.Supp.2d 619, 622 (N.D.W.Va. 2004).

[1145] *See, e.g.,* Doolittle v. Holmes, 2010 WL 22552, *6 (M.D.La., Jan. 4, 2010); Brown v. Napoli, 687 F.Supp.2d 295, 299 (W.D.N.Y. 2009); Apodaca v. Simpson County Jail, 2009 WL 2591659, *2-3 (W.D.Ky., Aug. 21, 2009); Grindstaff v. Tennessee Dept. of Correction, 2009 WL 2461772, *1 (M.D.Tenn., Aug. 12, 2009); Quinones-Pagan v. Administracion de Correccion, 2009 WL 2058668, *5 (D.P.R., July 10, 2009) (ordering plaintiff to show cause why his case should not be dismissed for failure to allege compensable damages); Wilson v. Longino, 2009 WL 1076684, *4 (W.D.La., Apr. 21, 2009).

[1146] *See, e.g.*, Schell v. Jones, 2012 WL 4381608, *2 (W.D.Okla., Sept. 7, 2012) (holding assault allegation did not state a claim because of § 1997e(e)), *report and recommendation adopted*, 2012 WL 4378134 (W.D.Okla., Sept. 25, 2012); Cadarette v. Curtin, 2012 WL 1981726, *4 (W.D.Mich., June 1, 2012) (holding claim of unsanitary conditions did not state a claim because of § 1997e(e)); Zain v. Osborne, 2012 WL 435582, *7-8 (W.D.Ky., Feb. 9, 2012) (holding defective plumbing claim did not state a claim because of § 1997e(e)); Brewster v. Nassau County, 349 F.Supp.2d 540, 552-53 (E.D.N.Y. 2004) (stating that an officer's spreading rumors likely to cause a prisoner to be harmed by other prisoners did not state a cause of action because of § 1997e(e)); *see* Foster v. Gentry, 2010 WL 2926173, *2 (D.Nev., July 19, 2010) (conflating § 1997e(e) with Eighth Amendment standard).

[1147] Thompson v. Carter*,* 284 F.3d at 418.

[1148] *Thompson,* 284 F.3d at 418.

relying on a statute's title to limit its plain meaning.[1149] A more plausible concern is that the statute, read as a bar on actions and not on damages, would be an unconstitutional limitation on judicial enforcement of constitutional rights if it did not allow for injunctive relief and contempt sanctions.[1150] Other courts have reached the same conclusion about the statute's reach without alluding to this constitutional problem.[1151]

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.[1152]

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.[1153] On that view, the defense would be waived by failure to plead it.[1154] 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 for failure to allege it.[1155] In fact, some district courts within the Eleventh Circuit appear to be

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[1149] Pennsylvania Dep't of Corr. v. Yeskey, 524 U.S. 206, 212 (1998). Indeed, *Thompson* cited *Yeskey* for the proposition that the title "can shed light on otherwise ambiguous language." 284 F.3d at 418.

[1150] Zehner v. Trigg, 133 F.3d 459, 461-63 (7th Cir. 1997).

[1151] *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").

[1152] *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).

[1153] Douglas v. Yates, 535 F.3d 1316, 1320-21 (11th Cir. 2008); *see* Mobley v. Gresco, 2011 WL 3163159, *2 (N.D.Fla., July 1, 2011) (acknowledging *Douglas*, but holding complaint that alleged only "pain and suffering" and "mental and emotional stress" could be dismissed), *report and recommendation adopted*, 2011 WL 3162858 (N.D.Fla., July 26, 2011). *Contra*, In re Nassau County Strip Search Cases, 2010 WL 3781563, *2 (E.D.N.Y., Sept. 22, 2010) (holding provision is a limitation on remedies, not an affirmative defense, and need not be pled).

[1154] Ford v. Bender, 2012 WL 262532, *12-13 (D.Mass., Jan. 27, 2012), *motion to amend denied*, 2012 WL 1378651 (D.Mass., Apr. 19, 2012).

[1155] *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."); Hampton v. Blanco, 2008 WL 4933737, *1 (5th Cir., Nov. 19, 2008) (plaintiff failed to allege that he ate unsafe food and thus cannot show physical harm); Lackey v. East Cent. Regional Hosp. (Treatment Team), 2013 WL 395120, *2 (S.D.Ga., Jan. 4, 2013) ("Plaintiff has failed to allege facts sufficient to satisfy the

unaware of the holding that it is an affirmative defense.[1156] 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.[1157] 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.

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.[1158] As such, it is an issue for the trier of fact, as several decisions have held or

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mandates set forth in § 1997e(e)"); Brown v. King, 2012 WL 5304084, *3 (S.D.Miss., Oct. 25, 2012) (dismissing where plaintiff failed to allege injury from conditions); Pittman-Bey v. Clay, 2012 WL 4513840, *8 (S.D.Tex., Sept. 19, 2012) ("Plaintiff has not alleged that he suffered more than a de minimis injury that would entitle him to recover compensatory damages for his emotional injuries.") (footnote omitted); Logan v. Honeycutt, 2012 WL 3903501, *3 (M.D.La., July 24, 2012) (holding failure to allege physical injury barred claim for compensatory damages), *report and recommendation adopted*, 2012 WL 3903452 (M.D.La., Sept. 7, 2012); Burke v. Enenoh, 2012 WL 2995489, *1 (E.D.Cal., July 23, 2012) (citing failure to allege physical injury as precluding any claim for mental or emotional injury); Davis v. Cain, 2012 WL 1965686, *3 n.3 (M.D.La., Apr. 11, 2012), *report and recommendation adopted*, 2012 WL 1964057 (M.D.La. May 30, 2012), *appeal dismissed*, -- Fed.Appx. ----, 2012 WL 5897596 (5th Cir., Nov. 26, 2012); Swogger v. Yonak, 2012 WL 1883975, *2 (S.D.Ohio, May 22, 2012), *report and recommendation adopted*, 2012 WL 2273368 (S.D.Ohio, June 18, 2012); Chavira v. Ruth, 2012 WL 1328636, *4 (E.D.Cal., Apr. 17, 2012) ("If Plaintiff chooses to amend and brings a claim for mental or emotional injury he should include sufficient facts complying with the physical injury requirement."); *see Appendix A for additional authority on this point*; *see also* Doolittle v. Holmes, 306 Fed.Appx. 133, 134 (5th Cir. 2009) (unpublished) (allegation of muscle atrophy from lack of exercise sufficiently pled physical injury); Oliver v. Wolfenbarger, 2008 WL 4387210, *10 (E.D.Mich., Sept. 24, 2008) (holding on motion to dismiss "there are no allegations that plaintiff suffered any physical injuries. Consequently, plaintiff cannot recover for any mental or emotional injuries. . . ."); Ocegueda v. Francis, 2008 WL 4379565, *3 (N.D.W.Va., Sept. 23, 2008) ("As plead [sic], the plaintiff's alleged injuries are only mental or emotional.")

[1156] Brown v. Henry, 2009 WL 4510124, *1 (N.D.Fla., Nov. 30, 2009) ("If there is no physical injury alleged, then mental or emotional monetary damages, as well as punitive damages, cannot be recovered. . . ."); Mala v. Pastrana, 2009 WL 3055214, *1-2 (S.D.Fla., July 7, 2009) ("under 42 U.S.C. § 1997e(e), in order to assert a claim for which relief could be granted for a claim of an unconstitutional condition of confinement, there must be an allegation of a specific physical injury"); Rix v. Manatee County Sheriff's Office, 2009 WL 1449085, *1 (M.D.Fla., May 21, 2009) (dismissed because the plaintiff "fails to allege" injury); Schott v. Ierubino, 2009 WL 790121, *3 (S.D.Fla., Jan. 12, 2009) (damages claim barred because plaintiff "fails to allege" physical injury), *report and recommendation adopted in part*, 2009 WL 790117 (S.D.Fla., Mar. 25, 2009); Burrows v. McNesby, 2008 WL 4648962, *4 (N.D.Fla., Oct. 20, 2008) ("§ 1997e(e) bars [plaintiff] from recovering compensatory damages for such an injury because he did not allege any physical injury," so his complaint may be subject to dismissal).

It is telling that one of the first applications of *Douglas v. Yates* begins by acknowledging that case's holding but by the end of its analysis has inverted it, stating in substance that failure to allege physical injury *means* that its absence is apparent on the face of the complaint. Johnson v. Crawson, 2008 WL 4382810, *3 (N.D.Fla., Sept. 25, 2008) ("the incarcerated plaintiff's damages claim is subject to dismissal without prejudice unless he alleges physical injury"); *accord*, Clark v. Florida, 2012 WL 4513056, *3 (M.D.Fla., Oct. 2, 2012); Thompson v. Butler, 2010 WL 5112902, *3 (N.D.Fla., Nov. 16, 2010), *report and recommendation adopted*, 2010 WL 5101212 (N.D.Fla., Dec. 8, 2010). Worse, one panel of the Eleventh Circuit has *cited Douglas* for the general standard of review for dismissals, and then affirmed a dismissal in part because of failure to *allege* physical injury. Tsosie v. Garrett, 2010 WL 4823475, *1-2 (11th Cir., Nov. 29, 2010) (unpublished), *cert. denied*, 132 S.Ct. 466 (2011).

[1157] Douglas v. Yates, 535 F.3d at 1321.

[1158] *See* Malik v. City of New York, 2012 WL 3345317, *16 (S.D.N.Y., Aug. 15, 2012), *report and recommendation adopted*, 2012 WL 4475156 (S.D.N.Y., Sept. 28, 2012); Habeebullah v. Crawford, 2011 WL 2458060, *5 (W.D.Mo., June 17, 2011) (stating "there is no requirement that Plaintiff plead a physical injury"); In re Nassau

suggested.[1159] (On that view, failure to object and preserve the applicability of the physical injury requirement at the jury instruction stage waives the argument.[1160])

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 *Jones v. Bock*.[1161] 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 *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 interpretation.

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.[1162]

County Strip Search Cases, 2010 WL 3781563, *2 (E.D.N.Y., Sept. 22, 2010) ("As § 1997e(e) is a limitation on recovery and not an affirmative defense to liability, it need not be pled.").

[1159] 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); 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 *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 shampoo are sufficient to enable him to recover damages for his mental pain and suffering under § 1997e(e)."); 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 (W.D.Ark., Aug. 6, 2010) (declining to decide on summary judgment whether pain from aggravated back injury satisfied § 1997e(e)), *report and recommendation adopted*, 2010 WL 3829453 (W.D.Ark., Sept. 24, 2010); 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); 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.").

[1160] Kerwin v. McConell, 2008 WL 4525369, *4-5 (W.D.Pa., Sept. 30, 2008). *Compare* Jacobs v. Pennsylvania Dept. of Correctons, 2011 WL 2295095, *22 (W.D.Pa., June 7, 2011) (striking compensatory award; defendants who raised § 1997e(e) at the charge conference and in a Rule 50(b) motion did not waive their challenge to a jury verdict on that ground).

[1161] *Douglas*, 535 F.3d at 1320-21 (*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.")).

[1162] Cuevas v. Bryon Kolath, 2011 WL 3159098, *6 (D.Colo., May 17, 2011), *report and recommendation adopted in part, overruled on other grounds*, 2011 WL 3159096 (D.Colo., July 26, 2011).

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."[1163] Some courts accordingly have recognized a variety of constitutional injuries that are neither physical nor mental or emotional, and therefore are not affected by the statute,[1164] such as property loss,[1165] denial of First Amendment rights,[1166] loss of or exclusion from prison programs,[1167] freedom from racial discrimination,[1168] denial of access to courts,[1169] and freedom from arrest and incarceration without probable cause.[1170] At least one court has held that injury to reputation is not mental or emotional in nature.[1171]

[1163] 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* Wright v. Shoe, 2012 WL 1899432, *2 (M.D.Ga., May 1, 2012) (holding claim of failure adequately to treat mental illness was barred by § 1997e(e)), *report and recommendation adopted*, 2012 WL 1899425 (M.D.Ga., May 24, 2012); 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); Chatham v. Adcock, 2007 WL 2904117, *16 (N.D.Ga., Sept. 28, 2007) (applying statute to denial of Xanax resulting in anxiety, nightmares, and hallucinations), *aff'd*, 334 Fed.Appx. 281 (11th Cir. 2009); Webber v. Federal Bureau of Prisons, 2005 WL 176122, *7 (N.D.Tex., Jan. 27, 2005) (applying statute to claim of inadequate psychiatric care).

[1164] *See* 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 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.

[1165] Thompson v. Carter, 284 F.3d at 418; Robinson v. Page, 170 F.3d 747, 748 (7th Cir. 1999); *see* Ruiz v. Adamson, 2012 WL 832986, *8 (N.D.Ill., Mar. 8, 2012) (money spent at commissary to provide religiously appropriate food that prison failed to provide); Suggs v. Caballero, 2009 WL 368208, *6 (E.D.Mich., Feb. 11, 2009) (loss of skilled job assignment after transfer). *But see* Allen v. Reynolds, 475 Fed.Appx. 280, 283 (10th Cir. 2012) (unpublished) (holding plaintiff who sought damages of $50,000 for seizure of family photos and grandfather's obituary was seeking emotional damages); Johnson v. Pallito, 2012 WL 6093804, *4 (D.Vt., Nov. 26, 2012) (holding compensatory damages barred for injuries including property loss), *report and recommendation adopted*, 2012 WL 6093801 (D.Vt., Dec. 7, 2012); Patterson v. Stovall, 2005 WL 2589182, *2 (E.D.Ky., Oct. 13, 2005) (holding prisoner cannot recover damages for emotional injury caused by property loss absent physical injury); *accord*, Hoskins v. Craig, 2011 WL 5547460, *3 (S.D.Ill., Nov. 15, 2011).

[1166] *See* n. 1179, below.

[1167] *See* Suggs v. Caballero, 2009 WL 368208, *6 (E.D.Mich., Feb. 11, 2009) (loss of skilled job assignment after transfer); Parker v. Michigan Dept. of Corrections, 2001 WL 1736637, *2 (W.D.Mich., Nov. 9, 2001) (exclusion from an alcohol treatment program in violation of the disability statutes).

[1168] Mason v. Schriro, 45 F.Supp.2d 709, 716-20 (W.D.Mo. 1999).

[1169] 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).

[1170] 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).

[1171] Jacobs v. Pennsylvania Dept. of Correctons, 2011 WL 2295095, *24 (W.D.Pa., June 7, 2011).

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.[1172] (Admittedly, the failure of litigants even to frame the issue properly has no doubt contributed to this failure.[1173]) 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] 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."[1174]

[1172] 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 *le mot juste*.

[1173] *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 *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.

[1174] Charles v. Nance, 2006 WL 1752486, *1 (5th Cir., June 21, 2006) (unpublished); *accord*, *e.g.*, Al-Amin v. Smith, 637 F.3d 1192, 1195 (11th Cir. 2011) ("This case concerns the narrow question of whether, in the absence of physical injury, a prisoner is precluded from seeking punitive damages" by the PLRA; court ignores the mental or emotional injury language of § 1997e(e)); Johnson v. Pallito, 2012 WL 6093804, *4 (D.Vt., Nov. 26, 2012) (quoting statute, then stating: "In other words, the PLRA imposes a limitation on the recovery of damages that are unrelated to any physical injury. . . ."), *report and recommendation adopted*, 2012 WL 6093801 (D.Vt., Dec. 7, 2012); Green v. Division of Corrections, 2012 WL 4757923, *2 n.3 (D.Md., Oct. 4, 2012) ("In the absence of showing physical injury, any claim for damages may not proceed."); Courtney v. Murphy, 2012 WL 3966336, *1 (E.D.Mich., Sept. 11, 2012) ("In fact, recovery of monetary damages for deliberate indifference is statutorily barred absent a showing of physical injury. *See* 42 U.S.C. § 1997e(e)."); Brewer v. Tesinsky, 2012 WL 3029691, *8 (C.D.Cal., March 14, 2012) ("A person confined to a jail or prison cannot seek compensatory damages under federal law without a showing of physical injury."), *report and recommendation adopted*, 2012 WL 3039214 (C.D.Cal., July 24, 2012); Perkins v. Moreci, 2012 WL 2930766, *6 (N.D.Ill., July 18, 2012) ("An inmate generally cannot recover compensatory damages without physical injury."); Smith v. Conner, 2012 WL 2512009, *1 (M.D.Fla., June 29, 2012) ("A prisoner, therefore, may not proceed in a civil rights action for compensatory or punitive damages unless he alleges some physical injury that is more than *de minimis*."); Mobley v. Santa Rosa County Sheriff's Office Mail Personnel and Admin., 2012 WL 967597, *2 (N.D.Fla., Feb. 17, 2012) (stating that damages for deprivation of law books were either for mental/emotional distress or for the constitutional violation itself; "The complaint identifies no physical injury arising from defendants' conduct. . . ."), *report and recommendation adopted*, 2012 WL 967566 (N.D.Fla., Mar. 22, 2012); Greene v. D.O.C., 2012 WL 694031, *3 (S.D.N.Y., Mar. 5, 2012) ("The PLRA requires that a claim under Section 1983 requires [sic] an allegation of physical harm."); *see Appendix A for additional authority on this point; see also* Allen v. Thomas, 2005 WL 2076033, *12 (S.D.Tex., Aug. 26, 2005) (citing lack of physical injury in a case alleging confiscation of property). In other cases, courts seem to use § 1997e(e) as a handy means of disposing of cases whose allegations they consider insubstantial. *See, e.g.*, Taylor v. Howards, 2001 WL 34368927 (N.D.Tex., Jan. 29, 2001), *appeal dismissed*, 268 F.3d 1063 (5th Cir.) (unpublished), *cert. denied*, 534 U.S. 1061 (2001).

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)

A leading example of this conceptual confusion is *Allah v. Al-Hafeez*,[1175] cited with apparent approval in *Thompson v. Carter*,[1176] 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.[1177] 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.[1178] While there are also a 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,[1179] most of

[1175] 226 F.3d 247 (3d Cir. 2000).

[1176] 284 F.3d at 417.

[1177] *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.").

[1178] 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 5138674, *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). . . ."), *report and recommendation adopted in part, rejected in part*, 2012 WL 6059363 (N.D.Fla., Dec. 6, 2012); Warner v. Patterson, 2012 WL 4056709, *2 (D.Utah, Sept. 14, 2012) (holding "spiritual injury" from religious rights deprivation was indistinguishable from mental or emotional injury; barring compensatory damages); Ciempa v. Jones, 745 F.Supp.2d 1171, 1201 (N.D.Okla., Aug. 23, 2010) (barring damages for denial of Halal food); Neal v. Byrne, 2009 WL 3254908, *7 (W.D.N.Y., Oct. 7, 2009) (applying § 1997e(e) to various religious deprivations); Mann v. Wilkinson, 2009 WL 1441721, *2 (S.D. Ohio, May 20, 2009) (holding damages barred for confiscation of religious materials); Johnson v. MDOC, 2009 WL 224907, *3 (N.D.Miss., Jan. 28, 2009) (recommending nominal damages of $100 for improper discipline); Gillard v. Kuykendall, 2009 WL 981899, *3 (W.D.Ark., Apr. 13, 2009) (awarding nominal damages of $1.00 *per day* for punishment of prisoner for refusing to clean his cell on his Sabbath); Lopeztegui v. Wendt, 2008 WL 1869097, *2 (N.D.W.Va., Apr. 24, 2008) (applying § 1997e(e) to claim of mishandled mail); Hendrickson v. Caruso, 2008 WL 623788, *10 n.7 (W.D.Mich., Mar. 4, 2008) (applying § 1997e(e) to deprivation of Satanist texts); *see Appendix A for additional authority on this point*.

[1179] *See* 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) ("[T]he 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. Therefore, § 1997e(e) does not apply to First Amendment [c]laims regardless of the form of relief sought."); King v. Lienemann, 2011 WL 833977, *2 (S.D.Ill., Mar. 4, 2011) (holding plaintiff cannot seek mental/emotional distress damages for being stripped publicly, but he "appears to allege an injury to an unspecified constitutional right, and therefore [he] may seek damages for the claimed constitutional deprivation"); 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, based on "violation of the plaintiff's First Amendment rights and the chilling impact [these] actions had on the plaintiff's ability to send and receive personal letters"); *see Appendix A for additional authority on this point*; *see also* see Stavenjord v. Corrections Corp. of America, 2010 WL 960413, *9 (D.Ariz., Mar. 15, 2010) (applying holding to violation of Religious Land Use and Institutionalized Persons Act). *Contra*, Thompson v. Caruso, 2008 WL 559655, *1 (W.D.Mich., Feb. 27, 2008) (reconsidering prior adherence to view that § 1997e(e) is inapplicable to First Amendment claims); Meade v. Plummer, 344 F.Supp.2d 569, 573

them have not done much to explain why.[1180] Several decisions have said that construing § 1997e(e) to bar compensatory awards for First Amendment violations would be constitutionally questionable, or outright unconstitutional.[1181]

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[1182] and racial discrimination[1183] among many others.[1184]

(E.D.Mich. 2004) (denying that First Amendment claims have compensable value absent physical or emotional injury). Even if there is a special rule for First Amendment cases, if the plaintiff pleads mental or emotional injury as the only compensable injury, § 1997e(e) would bar recovery. Swackhammer v. Goodspeed, 2009 WL 189854, *3 (W.D.Mich., Jan. 26, 2009) (compensatory damages barred for First Amendment claims).

In *Shaheed-Muhammad v. Dipaolo*, 393 F.Supp.2d 80 (D.Mass. 2005), a First Amendment case, the court stated more generally that "the violation of a constitutional right is an independent injury that is immediately cognizable and outside the purview of § 1997e(e)," and that "[a]long with the Seventh and Ninth Circuits, I continue to believe that § 1997e(e) is inapplicable to suits alleging constitutional injuries." 393 F.Supp.2d at 108.

[1180] An exception is *Malik v. City of New York*, 2012 WL 3345317, *16-17 (S.D.N.Y., Aug. 15, 2012), *report and recommendation adopted*, 2012 WL 4475156 (S.D.N.Y., Sept. 28, 2012), which states: "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. . . . 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.").

[1181] One court, after accepting the Ninth Circuit's holding in *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." *Shaheed-Muhammad v. Dipaolo*, 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." *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." *Turner v. Safley*, 482 U.S. 78, 84 (1987).

Percial v. Rowley, 2005 WL 2572034, *2 (W.D.Mich., Oct. 12, 2005); *see* Siggers-El v. Barlow, 433 F.Supp.2d 811, 816 (E.D.Mich. 2006) (stating that "§ 1997e(e) is unconstitutional to the extent that it precludes First Amendment claims" such as the retaliation claim at issue," but interpreting statute to allow damages for First Amendment mental/emotional injuries); *accord*, Gordon v. Collins, 2010 WL 5464256, *3 (E.D.Mich., Nov. 5, 2010), *report and recommendation adopted*, 2010 WL 5464750 (E.D.Mich., Dec. 29, 2010); Suggs v. Caballero, 2009 WL 368208, *6 (E.D.Mich., Feb. 11, 2009).

[1182] Brown v. Sudduth, 255 Fed.Appx. 803, 808, 2007 WL 3283777 (5th Cir. 2007) (unpublished) (applying § 1997e(e) to claim of false arrest; plaintiff "sought compensatory damages for the sole alleged injury of liberty deprivation. Having not alleged a physical injury, the district court correctly concluded that Brown's claim for compensatory damages must fail."); Wilson v. Phoenix House, 2011 WL 3273179, *3 (S.D.N.Y., Aug. 1, 2011) (holding alleged unlawful confinement was not a physical injury and could not be compensated under § 1997e(e)); Miller v. Corbin, 2010 WL 1658952, *2 (S.D.Ga., Mar. 19, 2010) (alleged unlawful arrest and detention without

Demonstrating the same sort of confusion, some courts have held that complaints of placement in segregation or even of exposure to unconstitutional prison living conditions–those that deny the "minimal civilized measure of life's necessities"[1185]–are barred by § 1997e(e) absent allegations of physical injury.[1186] Such holdings appear inconsistent with Eighth

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court appearance or bail hearing; plaintiff cited "impairment of reputation and personal humiliation"), *report and recommendation adopted*, 2010 WL 1658896 (S.D.Ga., Apr. 21, 2010); Pratola v. Barge, 2010 WL 774173, *1-3 (D.N.J., Mar. 4, 2010) (failure to take arrestee before a judge), *reconsideration denied*, 2010 WL 5186133 (D.N.J., Dec. 14, 2010); Carter v. Bone, 2010 WL 558598, *6-7 (D.S.C., Feb. 10, 2010) (wrongful arrests and detention); Jackson v. Martin, 2009 WL 4728160, *5 (N.D.Fla., Dec. 2, 2009) (malicious prosecution and unjust confinement); Scott v. Denzer, 2008 WL 694717, *8 (W.D.Ark., Mar. 12, 2008) (claim of wrongful detention before delayed initial court appearance); Brumett v. Santa Rosa County, 2007 WL 4287558, *2 (N.D.Fla., Dec. 4, 2007) (claim of six months' illegal detention); Layne v. McDonough, 2007 WL 2254959, *4 (N.D.Fla., Aug. 6, 2007) (claim of 25 days' wrongful incarceration); Watts v. Smith, 2007 WL 2257601, *3-4 (N.D.Fla., Aug. 6, 2007) (false arrest), *subsequent determination*, 2007 WL 2462012, *2-3 (N.D.Fla., Aug. 28, 2007); Scott v. Belin, 2007 WL 2390383, *4 (W.D.Ark., Aug. 2, 2007) (detention for 76 days without being brought before a court), *report and recommendation adopted*, 2007 WL 2416408 (W.D.Ark., Aug. 20, 2007); Campbell v. Johnson, 2006 WL 3408177, *1 (N.D.Fla., Nov. 27, 2006) (refusal to accept paperwork and collateral for release on bond).

[1183] Reynolds v. Barrett, 741 F.Supp.2d 416, 446 (W.D.N.Y., Oct. 4, 2010); Johnson v. McByrde, 2010 WL 3059248, *2 (W.D.Mich., Aug. 4, 2010) (holding both compensatory and punitive damages barred); Jones v. Pancake, 2007 WL 2407271, *3 (W.D.Ky., Aug. 20, 2007).

[1184] Simpson v. Chester County Prison, 2010 WL 3323119, *6 (E.D.Pa., Aug. 19, 2010) (medical examinations conducted in public); Marshall v. Graham, 2009 WL 151693, *3 (W.D.Ky., Jan. 21, 2009) (rough and humiliating searches); Jordan v. Corrections Corp. of America, 2008 WL 687329, *2 (M.D.Ga., Mar. 11, 2008) (confiscation of mail); Jones v. Corley, 2008 WL 616114, *2-3 (N.D.Fla., Mar. 3, 2008) (*Miranda* violation and forced consent to search); Lattanzio v. Holt, 2008 WL 553703, *2 (M.D.Pa., Feb. 27, 2008) (interference with visiting); Johnson v. Georgia, 2007 WL 2684985, *2-3 (M.D.Ga., Sept. 7, 2007) (violation of attorney-client privilege); Johnson v. Burkette, 2007 WL 2406988, *3 (N.D.Fla., Aug. 21, 2007) (claim that defendants' actions destroyed plaintiff's marriage and left him homeless on release); Charest v. Montgomery, 2007 WL 2069927, *6 n.6 (S.D.Ala., July 17, 2007) (strip search in presence of an opposite sex prisoner); Robinson v. Department of Corrections, 2007 WL 2107172, *5 (N.D.Fla., July 13, 2007) (stopping of mail and delaying filing of lawsuits as well as deprivation of religious materials), *report and recommendation adopted*, 2007 WL 3010790 (N.D.Fla., Oct. 12, 2007); Ivy v. New Albany City Police Dept., 2006 WL 3103138 (N.D.Miss., Oct. 31, 2006) (being held naked in an isolation cell); Caudell v. Rose, 2005 WL 1278543, *3 (W.D.Va., May 27, 2005) (seizure of legal papers), *report and recommendation adopted*, 378 F.Supp.2d 725 (W.D.Va. 2005); Ashann Ra v. Com. of Va., 112 F.Supp.2d 559, 566 (E.D.Va. 2000) (holding that a complaint that a prisoner was routinely viewed in the nude by opposite-sex staff stated a constitutional claim sufficiently clearly established to defeat qualified immunity, but was not actionable because of the mental/emotional injury provision).

[1185] Rhodes v. Chapman, 452 U.S. 337, 347 (1981).

[1186] *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* Watson v. Curley, 2012 WL 6019498, *4 (W.D.Mich., Dec. 3, 2012) (confinement for 16 days in a cold cell); Green v. Division of Corrections, 2012 WL 4757923, *2 & n.3 (D.Md., Oct. 4, 2012) (confinement naked in cell for 20 hours); Davis v. Gusman, 2012 WL 3150047, *1-2 (E.D.La., August 2, 2012) (litany of conditions complaints), *appeal dismissed*, No. 12-30932 (5th Cir., Dec. 3, 2012); Higgs v. Easterling, 2012 WL 692610, *13 (W.D.Ky., Mar. 2, 2012) (confinement under unwholesome living conditions); Cincoski v. Richard, 2012 WL 810575, *4 (E.D.Ark., Feb. 21, 2012) (placement on "suicide watch" with a camera in his cell, denial of medications, shoes, clothes, underwear and a blanket, and subjection to freezing temperatures), *report and recommendation adopted*, 2012 WL 810445 (E.D.Ark., Mar. 12, 2012), *reconsideration denied*, 2012 WL 1080749 (E.D.Ark., Mar. 30, 2012); Torres v. Logan, 2011 WL 3894386, *3 (S.D.N.Y., June 13, 2011) (confinement in punitive segregation); Brown v. Chatman, 2010 WL 3717283, *4 (M.D.Ga., Sept. 10, 2010) (exposure to environmental tobacco smoke); Wells v. Quarterman, 2010 WL 3447490, *1-2 (S.D.Tex., Aug. 30,

Amendment doctrine set forth 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.[1187] It is questionable whether a claim alleging conditions that are *objectively* intolerable is an "action for mental or emotional injury," even if such injury (not surprisingly) results from them.[1188] (There is a striking departure from 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.[1189] It is discussed in the next section.)

2010) (failure to accommodate blind prisoner's disability); *see Appendix A for additional authority on this point*. In *Williams v. Norris*, 2010 WL 2487479, *1 (E.D.Ark., June 14, 2010), the court found that 13 years in administrative segregation did not inflict physical injury on the plaintiff, but awarded nominal damages of $1.00 *a day*, totalling $4,846.00. *Accord*, Keating v. Helder, 2011 WL 3703415, *16 (W.D.Ark., Apr. 11, 2011), *report and recommendation adopted*, 2011 WL 3703264 (W.D.Ark., Aug. 23, 2011). *See also* Cline v. Broward County Sheriff's Office, 2007 WL 2453558, *9 (S.D.Fla., Aug. 23, 2007) (dismissing damage claims that food is prepared and served by prisoners who have not been medically screened). *Cf.* Jackson v. Carey, 353 F.3d 750, 758 (9th Cir. 2003) (holding that an allegation of placement in segregation without due process might be saved from the mental/emotional injury bar by allegations of inadequate medical care in the segregation unit).

Subjection to inhumane conditions or prolonged isolated confinement may, of course, result in physical injury. *See* Huff v. Pundt, 2012 WL 2994438, *2-3 (S.D.Tex., July 20, 2012) (holding evidence of eye infection associated with unsanitary conditions barred summary judgment); Peterson v. Morin, 2012 WL 1694775, *2-3 (S.D.Tex., May 15, 2012) (holding claim of ringworm or fungal infection from unsanitary showers satisfied physical injury requirement); Wagner v. Hartley, 2012 WL 1079185, *7 (D.Colo., Mar. 30, 2012) (holding allegations of "muscle atrophy, joint pains and aches, and repeated and severe migraine and/or other headaches due to the lack of exercise, lack of fresh outdoor air, and the mental and emotional stress from isolation and his fear that the arbitrary and capricious retaliation would continue" sufficiently alleged physical injury); Ford v. Bender, 2012 WL 262532, *15 (D.Mass., Jan. 27, 2012) (holding episodes of uncontrolled diabetes resulting from limited medical attention and cuts and infections caused by being shackled whenever the plaintiff left his segregation cell constituted physical injury under § 1997e(e)), *motion to amend denied*, 2012 WL 1378651 (D.Mass., Apr. 19, 2012); Fogle v. Pierson, 2008 WL 821803, *9 (D.Colo., Mar. 26, 2008) (evidence of muscle loss, vitamin D deficiency, migraine headaches, and knee and back problems from lack of outdoor exercise during three years of segregation supported claim of physical injury in connection with due process challenge to placement in segregation and arguably claim of denial of access to courts which prolonged his stay in segregation); Compton v. Robinson, 2008 WL 616053, *4 (W.D.Ark., Mar. 3, 2008) (declining to apply § 1997e(e) to plaintiff who was segregated and alleged scar on ankle from shackles, a cold resulting from cold temperatures, dehydration for nine days, and being left chained to a stool to urinate and defecate on himself).

[1187] 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., Feb. 6, 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.")

[1188] 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 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).

[1189] Braswell v. Corrections Corp. of America, 419 Fed.Appx. 622, 626-27 (6th Cir. 2011) (unpublished).

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),"[1190] 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,[1191] though others have rejected that proposition.[1192]

[1190] Shaheed-Muhammad v. Dipaolo, 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); 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, *16-17 (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')").

[1191] Aldridge v. 4 John Does, 2005 WL 2428761, *3 (W.D.Ky., Sept. 30, 2005) (ruling in case involving medical deprivations, protracted segregation, and denial of access to courts); *accord*, Mitchell v. Horn, 318 F.3d 523, 534 (3d Cir. 2003) (stating that requests for damages for loss of "status, custody level and any chance at commutation" resulting from a disciplinary hearing were "unrelated to mental injury" and "not affected by § 1997e(e)'s requirements."); Ford v. Bender, 2012 WL 262532, *14 (D.Mass., Jan. 27, 2012), *motion to amend denied*, 2012 WL 1378651 (D.Mass., Apr. 19, 2012); Turner v. Salinas, 2011 WL 4905722, *4 (E.D.Cal., Oct. 14, 2011) ("The fact that [plaintiff] never suffered any physical injury as a result of [defendant's] alleged acts may make his Eighth Amendment claim of very little financial value but does not make the claim non-existent."); Patch v. Arpaio, 2009 WL 211090, *3 (D.Ariz., Jan. 29, 2009) ("Plaintiff did not bring a claim for mental or emotional injury; he brought a claim for the violation of his Fourteenth and Eighth Amendment rights. . . ."); Nelson v. CA Dept of Corrections, 2004 WL 569529, *7 (N.D.Cal., Mar. 18, 2004), *aff'd*, 131 Fed.Appx. 549 (9th Cir. 2005) (distinguishing claim for emotional injury in case about inadequate clothing for outdoor exercise in cold weather from Eighth Amendment violation, stating plaintiff could recover damages for the latter without regard for physical injury); *see Appendix A for additional authority on this point*.

[1192] 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*, 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); *see also* 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

That approach is consistent with the general background of tort law, the basis of the law of damages under 42 U.S.C. § 1983,[1193] 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.[1194] 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.[1195] 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.[1196] 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.[1197] The Second Circuit has acknowledged this distinction in a 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."[1198]

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indefinite damage allegedly arising from a violation of his constitutional rights."), *cert. denied*, 544 U.S. 1061 (2005).

[1193] Smith v. Wade, 461 U.S. 30, 34 (1983); Carey v. Piphus, 435 U.S. 247, 257-58 (1978).

[1194] The following discussion is based on research by Prof. Margo Schlanger of Washington University Law School.

[1195] Arthur G. Sedgwick & Joseph H. Beale, Jr., 1 *Sedgwick's Treatise on Damages* 50-51 (8th ed. 1891).

[1196] *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 . . . .").

[1197] *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 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).

[1198] 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.

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.[1199] 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 absence of record proof.[1200] 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.[1201]

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.[1202] 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."[1203] Courts have recognized similar concerns underlying § 1997e(e).[1204] At common law, and in cases

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[1199] Finally, one district court has connected these dots. 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. 1179, 1188-1191, some other federal courts applying § 1997e(e) have also reached essentially this conclusion, though they have not grounded it in tort principles.

[1200] Soto v. Lord, 693 F.Supp. 8, 22-23 (S.D.N.Y. 1988). *But see* 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).

[1201] Burke v. Enenoh, 2012 WL 2358595, *4 (E.D.Cal., June 20, 2012) (holding damages barred for claim of deprivation of mood-stabilizing medication), *report and recommendation adopted*, 2012 WL 2995489 (E.D.Cal., July 23, 2012); Reeder v. Hogan, 2011 WL 1484118, *11-12 (N.D.N.Y., Mar. 1, 2011), *report and recommendation adopted*, 2011 WL 1302915 (N.D.N.Y., Mar. 31, 2011); Liverman v. Gubernik, 2008 WL 5427904, *3 (E.D.Pa., Dec. 30, 2008); Grisby v. Cobb County Adult Detention Center, 2008 WL 4919511, *2 n.3 (N.D.Ga., Nov. 13, 2008) (deprivation of PTSD medication); Edmond v. Waller, 2006 WL 2975465, *3 (S.D.Miss., Oct. 17, 2006); Hunnicutt v. Armstrong, 305 F.Supp.2d 175, 186 (D.Conn. 2004).

[1202] *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.").

[1203] Francis H. Bohlen, Right to Recover for Injury Resulting from Negligence Without Impact, 50 Am. L. Reg. 141, 142, 143, 146 (1902).

[1204] *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

where the PLRA's physical injury provision applies, the physical injury "in essence, vouch[es] for the asserted emotional injury."[1205] 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.[1206]

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 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."[1207] 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,"[1208] 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,[1209] or the loss of freedom and quality of life resulting from placement in particularly restrictive or

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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).

[1205] Dawes v. Walker, 239 F.3d at 495 (Walker, J., special statement).

[1206] This approach is illustrated by the decision in *Soto v. Lord*, discussed in n. 1200, 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).

[1207] 284 F.3d at 419.

[1208] 284 F.3d at 417 (emphasis supplied).

[1209] 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.

inhumane prison conditions. Subsequent case law, in the Second Circuit or elsewhere, has not advanced the state of judicial understanding on this point.[1210]

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:
>
> 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,[1211] and the Supreme Court

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[12101210] *But see* n.1199, above, concerning the single district court case that has 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.

[1211] 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

has cautioned that damage awards cannot be based on the "abstract 'importance' of a constitutional right."[1212] 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,[1213] and § 1997e(e) should not be read to forbid such a result in prisoner cases.

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 § 1997e(e).[1214] However, there is a square disagreement among courts as to where the *de minimis* threshold is to be found.[1215] One appeals court has said that injury need not be observable, diagnosable, or requiring treatment by a medical care professional to meet the § 1997e(e) standard.[1216] But a much-cited district court decision holds that under § 1997e(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

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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).

[1212] Memphis Community Sch. Dist. v. Stachura, 477 U.S. 299, 312-13 (1986).

[1213] *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 "presumed damages" even without proof of injury, though damages cannot be recovered based on the abstract value or importance of the right).

[1214] Liner v. Goord, 196 F.3d 132, 135 (2d Cir. 1999); *accord*, Mitchell v. Horn, 318 F.3d 523, 535-36 (3d Cir. 2003); Oliver v. Keller, 289 F.3d 623, 626-27 (9th Cir. 2002); Harris v. Garner, 190 F.3d 1279, 1286 (11th Cir. 1999), *vacated in part and reinstated in part on reh'g*, 216 F.3d 970 (11th Cir. 2000) (en banc); Siglar v. Hightower, 112 F.3d 191, 193 (5th Cir. 1997).

[1215] 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 § 1997e(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 § 1997e(e)), *report and recommendation approved*, 2012 WL 3230416 (M.D.La., Aug. 6, 2012).

[1216] Oliver v. Keller, 289 F.3d 623, 628 (9th Cir. 2002); *accord*, Armer v. Marshall, 2011 WL 2580359, *7 (W.D.Ky., June 28, 2011) (holding allegation of injury need not be corroborated by other evidence than plaintiff's testimony); Mansoori v. Shaw, 2002 WL 1400300, *4 (N.D.Ill., June 28, 2002) (stating that injury need not be shown by objective evidence). Another court has rejected an effort to read "long-term" into the physical injury requirement. Glenn v. Copeland, 2006 WL 1662921, *4 (N.D.Fla., June 9, 2006) ("Presumably . . . any physical injury, even if short-term, is sufficient" to meet the statutory threshold.). *But see* Brown v. Simmons, 2007 WL 654920, *6 (S.D.Tex., Feb. 23, 2007) (holding burns on face that "healed well" and "had no lasting effect" did not satisfy the statute).

> 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 complains. Injuries treatable at home and with over-the-counter drugs, heating pads, rest, etc., do not fall within the parameters of 1997e(e).[1217]

Not surprisingly, a number of courts have dismissed identifiable traumatic injuries as *de minimis*.[1218] Others have held that relatively superficial traumatic injuries are actionable under § 1997e(e).[1219] Self-inflicted injuries may also satisfy § 1997e(e).[1220]

[1217] Luong v. Hatt, 979 F.Supp. 481, 485-86 (N.D.Tex. 1997). *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,* 129 S.Ct. 597 (2008); *accord*, Monclova-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).

[1218] *See, e.g*., Shain v. Grayson County, Ky., 2011 WL 5122667, *4 (W.D.Ky., Oct. 28, 2011) (holding red and swollen hands from handcuffs and black box *de minimis*); Jones v. Cowens, 2010 WL 3239286, *2-3 (D.Colo., Aug. 12, 2010) (holding "deep red grooves" from handcuffs *de minimis*); Hodge v. Williams, 2009 WL 111565, *3 (N.D.Tex., Jan. 16, 2009) (cuts on hands, inside lip, and sore neck were *de minimis*), *aff'd*, 343 Fed.Appx. 979 (5th Cir. 2009); Silguero v. Acheson, 2009 WL 56341, *2 (N.D.Tex., Jan. 9, 2009) (allegation that foot was swollen, cut, and bruised for at least a week were *de minimis*); Carr v. Horton, 2008 WL 4391156, *1 (N.D.Tex., Sept. 29, 2008) (plaintiff alleged lacerations of fingers, permanent scarring, and "immediate loss" of two fingernails; court cited nurse's observation of small superficial lacerations and declared it *de minimis*); Griggs v. Horton, 2008 WL 833091, *1 (N.D.Tex., Mar. 28, 2008) (wrist abrasion, tenderness to rib cage were *de minimis*); Diggs v. Emfinger, 2008 WL 544293, *4 (W.D.La., Jan. 10, 2008) (allegation of an "open wound" causing "severe pain" did not exceed the *de minimis* threshold), *report and recommendation rejected on other grounds*, 2008 WL 516378 (W.D.La., Feb. 25, 2008); Lyons v. Leonhardt, 2007 WL 2875134, *11 (D.Nev., Sept. 27, 2007) (holding loss of circulation in hands, brief pain in shoulder, and three-day pain in pelvis from use of force was *de minimis*); Brown v. Simmons, 2007 WL 654920, *6 (S.D.Tex., Feb. 23, 2007) (holding facial burns that "healed well" and "had no lasting effect" did not satisfy statutory threshold); *see Appendix A for additional authority on this point*.

[1219] *See, e.g.*, Williams v. Smith, 2012 WL 5987554, *6 (W.D.Ark., Oct. 31, 2012) (holding pepper spraying and push into cell wall actionable for compensatory damages, awarding $1.00 and $500 respectively), *report and recommendation adopted*, 2012 WL 5987575 (W.D.Ark., Nov. 29, 2012); D'Attore v. New York City Dept. of Correction, 2012 WL 4493977, *2, 15 (S.D.N.Y., Sept. 27, 2012) (holding plaintiff's testimony about severe pain resulting from being punched and shoved barred summary judgment under § 1997e(e) in a case where a jail doctor found no apparent injury and prescribed Tylenol), *report and recommendation adopted*, 2012 WL 5951317 (S.D.N.Y. Nov 28, 2012); Pettigrew v. Zavares, 2012 WL 1079445, *9 (D.Colo., Jan. 23, 2012) (allegation of cut ankles from shackles satisfied § 1997e(e)), *report and recommendation adopted*, 2012 WL 1079342 (D.Colo., Mar. 30, 2012), *order amended and superseded on other grounds*, 2012 WL 1090181 (D.Colo., Apr. 2, 2012); Hart v. Bell, 2011 WL 1584601, *5-6 (M.D.Tenn., Apr. 27, 2011) (allegation of "visible and documented" injuries to wrists, and that injuries were significant enough that x-rays of wrists and jaw were ordered, satisfied § 1997e(e)), *report and recommendation adopted*, 2011 WL 2078084 (M.D.Tenn., May 26, 2011); Easley v. Haywood, 2011 WL 799795, *3 (S.D.Ohio, Mar. 2, 2011) (rejecting claim that "two small cuts do not make out a federal case" where officer's affidavit indicated plaintiff hit the cement floor at least twice, and medical records indicated he continued to complain of pain in back, rib cage, and shoulder for a month), *report and recommendation adopted*, 2011 WL 799795 (S.D.Ohio, Mar. 2, 2011); Myers v. TransCor America, LLC, 2010 WL 3619831, *10, *19 (M.D.Tenn., Sept. 9, 2010) (swelling, bruising, numbness, bruising, scarring, and cuts from protracted restraint during transportation were more than *de minimis*), *report and recommendation adopted*, 2010 WL 3824083 (M.D.Tenn., Sept. 30, 2010); *see Appendix A for additional authority on this point.*

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?[1221] 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,[1222] and at least one court has reached the opposite conclusion.[1223] There are many similar scenarios. Some, but not all, courts have found the requirement satisfied by:

[1220] 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. 1484, below. *Contra*, Alajemba v. Rutherfod 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).

[1221] 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).

[1222] *See* Kahle v. Leonard, 563 F.3d 736, 741-42 (8th Cir. 2009) (noting district court's finding of "sufficient showing of physical injury" in sexual abuse case, approving jury instruction to assess nature and extent of injury if jury found liability); Liner v. Goord, 196 F.3d 132, 135 (2d Cir. 1999) (holding "alleged sexual assaults," also described as "intrusive body searches," "qualify as physical injuries as a matter of common sense" and "would constitute more than *de minimis* injury"); Solliday v. Spence, 2009 WL 559526, *11-12 & n. 16 (N.D.Fla., Mar. 2, 2009) (sexual assault was not barred because it was "repugnant to the conscience of mankind"; citing *Liner*); Duncan v. Magelessen, 2008 WL 2783487, *2 (D.Colo., July 15, 2008) ("unwanted sexual contact, alone, is a physical injury for which there may be compensation"); Knight v. Simpson, 2008 WL 1968770, *3 n.6 (M.D.Pa., Apr. 3, 2008) (stating sexual assault plaintiff alleged physical injury; no explanation), *report and recommendation adopted in pertinent part*, 2008 WL 1968762 (M.D.Pa., May 2, 2008); Boxer X v. Harris, 2007 WL 1731436, *2 (S.D.Ga., June 4, 2007) (declining to dismiss claim that officer required prisoner to masturbate for her, citing his argument that "masturbation can be painful when performed unwillingly"), *referred*, 2007 WL 1812631, *2 (S.D.Ga., June 18, 2007); Kemner v. Hemphill, 199 F.Supp.2d 1264, 1270 (N.D.Fla. 2002) (holding that sexual assault, "even if considered to be *de minimis* from a purely physical perspective, is plainly 'repugnant to the conscience of mankind.' Surely Congress intended the concept of 'physical injury' in § 1997e(e) to cover such a repugnant use of physical force."); Nunn v. Michigan Dept. of Corrections, 1997 WL 33559323, *4 (E.D.Mich. 1997); *see also* Pearson v. Pasha, 2011 WL 3841807, *5 (D.Mont., June 2, 2011) (holding allegation that guard painfully squeezed genitals was "repugnant to the conscience of mankind" and not de minimis), *report and recommendation adopted*, 2011 WL 3841969 (D.Mont., Aug. 30, 2011); Connors v. Northern State Prison, 2009 WL 1562240, *4 n.2 (D.N.J., May 28, 2009) (stating rectal examination performed harshly and with "discriminatory remarks" could be sufficiently "repugnant to the conscience of mankind" to satisfy the statute); Ogden v. Chesney, 2003 WL 22225763 (E.D.Pa., Sept. 17, 2003) (holding plaintiff's allegation that "prison officials allowed a drug dog to sniff and lick his genitals during a strip search" was sufficient to withstand summary judgment).

[1223] Hancock v. Payne, 2006 WL 21751, *1, 3 (S.D.Miss., Jan. 4, 2006) (holding prisoners who alleged they were "sexually battered . . . by sodomy" did not satisfy § 1997e(e)).

Numerous decisions hold that allegations of sexual harassment short of actual penetrative or oral sex do not satisfy § 1997e(e). *See* Solomon v. Michigan Dept. of Corrections, 2011 WL 4479407, *1 (W.D.Mich., Sept. 27, 2011) (staff member's grabbing plaintiff's penis, and pressing his erection against plaintiff's buttocks, were not physical injury); Etters v. Bennett, 2011 WL 976472, *6 (E.D.N.C., Mar. 16, 2011) (allegations of sexual abuse short of rape did not satisfy § 1997e(e)), *appeal dismissed*, 444 Fed.Appx. 686 (4th Cir. 2011) (unpublished); Thomas v. Komjathy, 2010 WL 5855979, *2 (W.D.Mich., Nov. 4, 2010) (allegation that nurse "grabbed" plaintiff's

- loss of consciousness;[1224]
- physiological disturbances resulting from medication withdrawal, overdose, or error;[1225]
- the consequences of illness or failure to treat illness or injury, both immediate[1226] and longer-term or prospective;[1227]

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penis did not satisfy § 1997e(e)), *report and recommendation adopted*, 2011 WL 689982 (W.D.Mich., Feb. 16, 2011); Morgan v. Downing, 2010 WL 5211483, *2 (E.D.N.C., Dec. 16, 2010) ("poking at" penis during search did not satisfy § 1997e(e)); McGregor v. Jarvis, 2010 WL 3724133, *4 (N.D.N.Y., Aug. 20, 2010) (non-forcible sexual activity did not satisfy § 1997e(e)), *report and recommendation adopted*, 2010 WL 3724131 (N.D.N.Y., Sept. 16, 2010); *see Appendix A for additional authority on this point; see also* Carrington v. Easley, 2011 WL 2119421, *1, 3 (E.D.N.C., Feb. 8, 2011) (holding allegation that staff member took prisoner into a closet for an alleged strip search and attempted to perform oral sex on him, and was pushed away by the prisoner, constituted a physical injury under § 1997e(e), but that without a further showing of physical injury he was limited to nominal and punitive damages), *report and recommendation adopted as modified*, 2011 WL 2132850 (E.D.N.C., May 25, 2011) (awarding $5,000 in punitive damages). Non-physical sexual harassment is, of course, not physical injury. Cox v. Prather, 2012 WL 5472023, *4 (W.D.Ky., Nov. 9, 2012); Noland v. McCoy, 2012 WL 3027541, *3 (E.D.Ky., July 23, 2012) (sexual gesture and threats); Black v. Talbott, 2011 WL 1435202, *5 (W.D.Mich., Apr. 14, 2011); Murray v. Mancuso, 2010 WL 677789, *5 (W.D.La., Feb. 24, 2010); Gillespie v. Smith, 2007 WL 2002724, *1, 4 (N.D.Iowa, July 3, 2007); Maxton v. Quick, 2007 WL 1486142, *3 (D.S.C., May 18, 2007).

[1224] 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).

[1225] Campbell v. Gause, 2011 WL 825016, *7 (E.D.Mich., Feb. 1, 2011) (holding allegations that "'psychological and mental anguish'" depression, and anxiety attacks were brought about by the physical symptoms of chest pains, spiked blood pressure, broncospasms, migraine headaches, and dizziness resulting from Defendants' confiscation of his prescriptions" sufficed at the pleading stage), *report and recommendation adopted*, 2011 WL 837737 (E.D.Mich., Mar. 4, 2011); May v. Jones, 2009 WL 4793031, *1 (M.D.Pa., Dec. 7, 2009) (citing deprivation of medication for migraine headaches resulting in "pain, vomiting, loss of appetite, light sensitivity and an inability to sleep"); Shelley v. Hepp, 2009 WL 483161, *2-3 (W.D.Wis., Feb. 25, 2009) (citing allegation that discontinuation of psychotropic medications resulted in severe headaches and "physiological changes"); Scarver v. Litscher, 371 F.Supp.2d 986, 997-98 (W.D.Wis. 2005) (citing self-inflicted overdose of Thorazine as well as 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); Ziemba v. Armstrong, 2004 WL 78063, *3 (D.Conn., Jan. 14, 2004) (holding that allegation of withdrawal, panic attacks, pain similar to a heart attack, difficulty breathing and profuse sweating, resulting from withdrawal of psychiatric medication, met the physical injury requirement); Wolfe v. Horn, 2001 WL 76332, *10 (E.D.Pa., Jan. 29, 2001) (holding physical consequences of withdrawal of hormone treatment to a pre-operative transsexual met physical injury requirement). *But see* Johnson v. Rawers, 2008 WL 752586, *5 (E.D.Cal., Mar. 19, 2008) (claim that medications were administered in a crushed form, causing plaintiff to feel depressed, anxious, nauseous, and paranoid, did not satisfy the statute), *report and recommendation adopted*, 2008 WL 2219307 (E.D.Cal., May 27, 2008); Robinson v. Johnson, 2008 WL 394977, *5 (E.D.Ark., Feb. 12, 2008) (allegation that plaintiff was forced to have an unnecessary PPD, which made his arm hurt, and take a second course of INH treatment, did not constitute injury); *see Appendix A for additional authority on this point*.

[1226] *See* Perez v. U.S., 330 Fed.Appx. 388, 389-90 (3d Cir. 2009) (unpublished) (holding claim of untreated asthma attack resulting in "dizziness, headaches, weakness, back pain, and nausea," which required steroids, prescription medication, and other medical treatment to recover, presented a material issue of fact under the *de minimis* standard); Munn v. Toney, 433 F.3d 1087, 1089 (8th Cir. 2006) (holding claim of headaches, cramps, nosebleeds, and dizziness resulting from deprivation of blood pressure medication "does not fail . . . for lack of physical injury"); McConnell v. Cirbo, 2012 WL 3590762, *11 (D.Colo., Apr. 24, 2012) (holding complaint of dizziness resulting from injuries sustained in a fall goes "beyond mere physical pain" and satisfies § 1997e(e)), *report and*

- denial of adequate food;[1228]

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recommendation adopted, 2012 WL 3590760 (D.Colo., Aug. 20, 2012); Morris v. Levi, 2011 WL 1936778, *8 (E.D.Pa., Apr. 21, 2011) (holding allegations of repeated "dizziness, sharp chest pains, increased heart rate, and blacking out," which plaintiff's expert associated with plaintiff's hypertophic cardiomyopathy, satisfied § 1997e(e)), *report and recommendation adopted*, 2011 WL 1938149 (E.D.Pa., May 20, 2011); Hayes v. Byrd, 2011 WL 1575277, *6 (E.D.Ark., Feb. 25, 2011) (holding prisoner who had "considerable pain over a period of several months, had bleeding and swollen gums, and ultimately had at least two teeth extracted" as a result of denial of dental care met the physical injury requirement), *report and recommendation adopted in pertinent part, rejected in part on other grounds*, 2011 WL 1561062 (E.D.Ark., Apr. 26, 2011); *see Appendix A for additional authority*. *But see* Owens v. U.S., 2012 WL 6057126, *2, 6 (E.D.N.C., Dec. 6, 2012) (holding dizziness, weakness, and loss of consciousness following deprivation of blood pressure medication *de minimis*; distinguishing *Perez v. U.S.* based on transitoriness of symptoms); Broadnax v. Escambia County Main Jail, 2012 WL 5457221, *2 (N.D.Fla., Oct. 9, 2012) (holding allegation of staph infection "without more" does not show more than *de minimis* injury), *report and recommendation adopted*, 2012 WL 5457211 (N.D.Fla. Nov. 8, 2012); Tuft v. Chaney, 2007 WL 3378347, *3 (S.D.Tex., Nov. 9, 2007) (holding complaints of "generalized 'fatigue' and 'stress'" resulting from MRSA and Hepatitis C were not physical injuries); Williams v. Caruso, 2007 WL 2710109, *7-8 (E.D.Mich., Sept. 13, 2007) (holding pain and suffering resulting from failure to provide a diet necessitated by kidney disease was not compensable); Mitchell v. Valdez, 2007 WL 1228061, *2 (N.D.Tex., Apr. 25, 2007) (holding chronic headaches causing extreme pain do not meet physical injury requirement); Giddings v. Valdez, 2007 WL 1201577, *3 (N.D.Tex., Apr. 24, 2007) (holding pain from two months' lack of treatment for a degenerative joint disease did not satisfy the physical injury requirement); Olivas v. Corrections Corp. of America, 408 F.Supp.2d 251, 254, 259 (N.D.Tex. 2006) (resulting from delay in treatment of broken teeth with exposed nerve, resulting in pain reported as 10 on a scale of 1 to 10, did not meet physical injury requirement).

[1227] Young v. Beard, 2007 WL 1549453, *4 (W.D.Pa., May 22, 2007) (holding allegation that plaintiff sought damages for present and future injury from denial of cholesterol medication, and of testing of blood pressure, diabetes, and cholesterol more often than every six months, sufficed at the pleading stage), *vacated on other grounds*, 2007 WL 2012604 (W.D.Pa., July 3, 2007); Mejia v. Goord, 2005 WL 2179422, *5 (N.D.N.Y., Aug. 16, 2005) (denying summary judgment where prisoner was denied a low fat diet for potentially debilitating coronary condition); Perkins v. Kansas Dept. of Corrections, 2004 WL 825299, *4 n.2 (D.Kan., Mar. 29, 2004) (holding allegation of progression of HIV infection met physical injury standard). *But see* Cotter v. Dallas County Sheriff, 2006 WL 1652714, *3-4 (N.D.Tex., June 15, 2006) (holding staphylococcus exposure and a "dormant" staph infection were *de minimis*).

[1228] Little v. Jones, 2012 WL 1068877, *7 (E.D.Okla., Mar. 29, 2012) (allegations of weight loss resulting from failure to provide sufficient food consistent with plaintiff's religious beliefs barred summary judgment on compensatory damages); Ward v. ARAMARK Corrections Food Service, 2011 WL 1542108, *3-4 (W.D.Ky., Apr. 22, 2011) (allegation of weight loss, reflux, constant hunger and intestinal problems satisfied physical injury requirement at pleading stage); Shirley v. Sternal, 2010 WL 6020684, 10 (S.D.Fla., Aug. 30, 2010) (allegation of vegan diet that was not nutritionally adequate and failed to address his food allergy, and resulted in 40-pound weight loss over six months plus symptoms including headache, light-headedness, swollen legs, constipation, upset stomach, nausea, and depression, was not *de minimis*), *report and recommendation adopted*, 2011 WL 855273 (S.D.Fla., Mar. 9, 2011); Shepard v. Alvarez, 2009 WL 1872016, *8-9 (S.D.Fla., May 21, 2009) (evidence of 40-pound weight loss from inadequate food raised material factual issue as to physical injury); Williams v. Humphreys, 2005 WL 4905109, *7 (S.D.Ga., Sept. 13, 2005) (holding allegation of 12 pounds weight loss, abdominal pain, and nausea resulting from denial of pork substitute at meals sufficiently alleged physical injury); *see* Patch v. Arpaio, 2010 WL 432354, *10 (D.Ariz., Feb. 2, 2010) (allegation of weight loss from inedible food could not be dismissed as not a physical injury without medical evidence). *But see* Davis v. District of Columbia, 158 F.3d 1342, 1394 (D.C.Cir. 1998) (holding weight loss resulting from disclosure of HIV-positive status did not meet the physical injury standard); Pittman-Bey v. Clay, 2012 WL 4513840, *8 (S.D.Tex., Sept. 19, 2012) (holding allegation of being "weak, tired, and dizzy" and unable to sleep from missing evening meals during Ramadan was *de minimis*); Price v. Jones, 2012 WL 1854299, *4 (S.D.Ohio, May 21, 2012) (holding claim of being "stressed out and depressed from being hungry" did not meet physical injury standard), *report and recommendation adopted*, 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

- food contamination or poisoning;[1229]
- muscle atrophy from denial of exercise;[1230]
- exposure to harmful substances;[1231]

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speculative, and would be de minimis even if connection were shown); *see Appendix A for additional authority on this point.*

[1229] 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, gastroduodenitis, and gastroenteritis," and that he was confined to bed "for not-less-than three (3) days" satisfied Federal Tort Claims Act physical injury requirement); Bond v. Rhodes, 2006 WL 1617892, *3 (W.D.Pa., June 8, 2006) (holding allegation of serious diarrhea resulting from food tampering satisfied the requirement at the pleading stage); Young v. Medden, 2006 WL 456274, *20 (E.D.Pa., Feb. 23, 2006) (holding allegation that prison staff put substances in prisoner's food that made him urinate constantly "arguably demonstrate more than *de minimis* physical injury"); Gil v. U.S., 2006 WL 385088, *3 (M.D.Fla., Feb. 17, 2006) (awarding "intangible damages for pain and suffering, inconvenience, and loss of capacity for enjoyment of life" to prisoner who suffered food poisoning from tainted food). *But see* Ward v. ARAMARK Corrections Food Service, 2012 WL 1833312, *4 (W.D.Ky., May 18, 2012) (holding evidence of weight loss, which was not substantial or sustained; gastric reflux, treated with OTC medications; and stomach discomfort and gurgling were *de minimis*); Zerby v. McNeil, 2010 WL 5019232, *2 (N.D.Fla., Nov. 2, 2010) (holding stomach pains and diarrhea from rotten and contaminated food was *de minimis*), *report and recommendation adopted*, 2010 WL 5014355 (N.D.Fla., Dec. 3, 2010); Mayes v. Travis State Jail, 2007 WL 1888828, *4-5 (W.D.Tex., June 29, 2007) (holding diarrhea allegedly caused by spoiled food was *de minimis*); Watkins v. Trinity Service Group Inc., 2006 WL 3408176, *4 (M.D.Fla., Nov. 27, 2006) (holding diarrhea, vomiting, cramps, nausea, and headaches from food poisoning were *de minimis*; noting a free person would not have to visit an emergency room or go to a doctor because of them); Cotter v. Dallas County Sheriff, 2006 WL 1652714, *3-4 (N.D.Tex., June 15, 2006) (holding two incidents of vomiting and diarrhea were *de minimis*).

[1230] Doolittle v. Holmes, 306 Fed.Appx. 133, 134 (5th Cir. 2009) (unpublished) (allegation of muscle atrophy sufficiently pled physical injury); Anderson v. Colorado, Dept. of Corrections, 848 F.Supp.2d 1291, 1298 (D.Colo., Mar. 26, 2012 (allegation of muscle weakness from lack of exercise sufficed at summary judgment stage); Williams v. Goord, 2000 WL 1051874, *8 n.4 (S.D.N.Y., July 28, 2000) (allegation of 28-day denial of exercise sufficiently alleged physical injury). *But see* Murray v. Raney, 2012 WL 5985543, *5 (D.Idaho, Nov. 29, 2012) (holding allegation of protracted denial of outdoor exercise should be dismissed under § 1997e(e) in the absence of allegation of resulting physical injury).

[1231] Williams v. Smith, 2012 WL 5987554, *5 (W.D.Ark., Oct. 31, 2012) (holding allegation of pepper spraying not barred, though awarding only $1.00 damages), *report and recommendation adopted*, 2012 WL 5987575 (W.D.Ark., Nov. 29, 2012); Caldwell v. Herrington, 2012 WL 1070120, *2 (E.D.Tex., Jan. 31, 2012) (declining to bar compensatory damages where plaintiff alleged he suffered blurred vision and partial blindness after use of chemical agents), *report and recommendation adopted*, 2012 WL 1068527 (E.D.Tex., Mar. 28, 2012); Sauder v. Green, 2011 WL 3608646, *6 (N.D.Fla., July 25, 2011) (holding allegation that plaintiff could not breathe and was disoriented after pepper spraying and suffered peeling skin as a result satisfied § 1997e(e) at pleading stage), *report and recommendation adopted*, 2011 WL 3607667 (N.D.Fla., Aug. 16, 2011); Hawthorne v. Cain, 2011 WL 2973690, *6 (M.D.La., June 8, 2011) (holding allegation of foot ailment, vomiting, and breathing problems resulting from exposure to human waste satisfied § 1997e(e)), *report and recommendation adopted*, 2011 WL 2941308 (M.D.La., July 21, 2011); Randle v. Alford, 2011 WL 817203, *2 (E.D.Tex., Jan. 24, 2011) (holding allegation of rashes caused by unsanitary conditions satisfied the statute at the pleading stage), *report and recommendation adopted*, 2011 WL 810343 (E.D.Tex., Mar. 2, 2011); Sanchez v. Goings, 2010 WL 3701385, *1 (E.D.Tex., Aug. 3, 2010) (holding plaintiff who alleged headaches, chest pain, and a sore throat from exposure to carbon monoxide in the aftermath of Hurricane Ike was not barred from compensatory recovery), *report and recommendation adopted*, 2010 WL 3701382 (E.D.Tex., Sept. 15, 2010); Enigwe v. Zenk, 2006 WL 2654985, *5 (E.D.N.Y., Sept. 15, 2006) (declining to dismiss emotional injury claims in light of allegation of exposure to environmental tobacco smoke resulting in dizziness, uncontrollable coughing, lack of appetite, runny eyes and high blood pressure); Caldwell v. District of Columbia, 201 F.Supp.2d 27, 34 (D.D.C. 2001) (holding that evidence of heat exhaustion, skin rash, and bronchial irritation from smoke inhalation met the PLRA standard; injury need not be serious or lasting). *But see* Robinson v. Tifft, 2012 WL 2675467, *2 (N.D.Fla., June 1, 2012) (holding allegations that "chemical agents caused

- infliction of pain or illness through extreme conditions of confinement[1232] or physical abuse;[1233]

'involuntary closing and burning sensation, which blinded the Plaintiff temporarily' . . . do not reasonably support an inference that plaintiff suffered more than *de minimis* physical injury"), *report and recommendation adopted*, 2012 WL 2675469 (N.D.Fla., July 6, 2012); Glover v. Haynes, 2012 WL 1202175, *8 (S.D.Ga., Mar. 21, 2012) (dismissing claim based on respiratory illnesses resulting from mold exposure on the ground that they were "of temporary duration and treatable"), *report and recommendation adopted*, 2012 WL 1202170 (S.D.Ga., Apr. 10, 2012); Smith v. Leonard, 2008 WL 1912804, *6 n.7 (S.D.Tex., Apr. 28, 2008) (holding headaches, sinus problems, trouble breathing, blurred vision, irritated eyes, and fatigue resulting from exposure to toxic mold were *de minimis*); Thompson v. Joyner, 2007 WL 4963007, *5 (E.D.N.C., May 29, 2007) (pepper spraying was *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. 1125, 1248, above, concerning asbestos exposure.

[1232] Ellis v. LeBlanc, 2012 WL 4483810, *3 (M.D.La., Sept. 10, 2012) (holding allegation that plaintiff was sent to work in agricultural fields and collapsed, suffering from chest pain, nausea, dizziness and profuse sweating, and was later treated for dehydration, high blood pressure and high blood sugar, satisfied § 1997e(e)), *report and recommendation approved*, 2012 WL 4482572 (M.D.La., Sept. 28, 2012); Skandha v. Savoie, 811 F.Supp.2d 535, 539 (D.Mass., Aug. 18, 2011) (holding allegation that extreme cold in cell aggravated effects of arthritis and spinal fusion surgery satisfied § 1997e(e) at the pleading stage); Denson v. Maifeld, 2011 WL 2714095, *3-4 (D.Colo., July 13, 2011) (holding blood clots and circulatory problems resulting from segregated confinement are physical injuries); Kershner v. Livingston, 2010 WL 3701379, *1 (E.D.Tex., Aug. 13, 2010) (holding nausea resulting from unsanitary conditions is a physical injury, though it might prove to be *de minimis*), *report and recommendation adopted*, 2010 WL 3701370 (E.D.Tex., Sept. 15, 2010); Torrealba v. Hogsten, 2009 WL 3242293, *1 (M.D.Pa., Oct. 8, 2009) (holding that "panic attacks, insomnia, loss of memory and concentration, severe anxiety, and bleeding and receding of the gums" associated with two years' segregated confinement sufficiently alleged physical injury); Rinehart v. Alford, 2003 WL 23473098, *2 (N.D.Tex., Mar. 3, 2003) (holding that severe headaches and back pain, attributed by the jail nurse to bright 24-hour illumination and sleeping on a narrow bench, sufficiently alleged physical injury); Perez G. v. Lambert, 2001 WL 34736218, *3 (D.Or., Sept. 7, 2001) (holding that allegation of cramps, vomiting, constipation, compacted bowels and anal bleeding, resulting from confinement in conditions so filthy the plaintiff could not eat and his subsequent denial of bathroom breaks while in restraints, met the physical injury standard). *But see* Watson v. Curley, 2012 WL 6019498, *4 (W.D.Mich., Dec. 3, 2012) (holding complaint of being held in a cold cell for 16 days did not allege physical injury); Beasley v. LeBlanc, 2012 WL 5994299, *2 (W.D.La., May 23, 2012) (holding allegation of athlete's foot contracted from unsanitary shower was *de minimis*), *report and recommendation adopted*, 2012 WL 5994292 (W.D.La., Nov. 30, 2012).

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).

[1233] 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

- sustained deprivation of a hearing aid to a hearing-impaired prisoner.[1234]
- stillbirth or miscarriage.[1235]

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.[1236] There are also decisions in which the alleged infliction of severe physical pain is held not to satisfy the statute. Indeed, some courts say so explicitly,[1237] raising the prospect that torture may not be compensable as long as it is inflicted with sufficient care to leave no marks.[1238] In some cases, courts have resolved factual issues on motion in declaring that injuries do not meet the statutory requirement.[1239]

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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. 1237, a number of decisions have squarely held that pain by itself is not actionable under § 1997e(e).

[1234] Hicks v. Anderson, 2012 WL 1415338, *14 (D.Colo., Jan. 23, 2012) ("The adjective 'physical' means 'of or relating to the body.'" (quoting Merriam–Webster's Collegiate Dictionary 935 (11th ed. 2007))), *report and recommendation adopted*, 2012 WL 1414935 (D.Colo., Apr. 24, 2012) .

[1235] 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.

[1236] In addition to those cases already cited, *see, e.g.*, Hall v. Plumber Official, 2011 WL 1979721, *14 (S.D.Fla., Apr. 26, 2011) (stating "dehydration, severe diarrhea, gastroesophogeal reflux disease, chest pain, abdominal pain, bleeding gums, plaque build up, depression, constant severe and unnecessary pain" were not "significant" enough to satisfy § 1997e(e)), *report and recommendation adopted*, 2011 WL 1979714 (S.D.Fla., May 20, 2011), *aff'd*, 446 Fed.Appx. 184 (11th Cir. 2011); Taylor v. Duplechain, 2009 WL 1490836, *2 (W.D.La., May 26, 2009) (stating chest pain and high blood pressure are merely "symptoms" and not physical injury); Darvie v. Countryman, 2008 WL 2725071, *7 (N.D.N.Y., July 10, 2008) (characterizing "anxiety, depression, stress, nausea, hyperventilation, headaches, insomnia, dizziness, appetite loss, weight loss, etc.," as "essentially emotional in nature"), *report and recommendation adopted*, 2008 WL 3286250 (N.D.N.Y., Aug. 7, 2008); Myers v. Valdez, 2005 WL 3147869, *2 (N.D.Tex., Nov. 17, 2005) (holding "pain, numbness in extremities, loss of mobility, lack of sleep, extreme tension in neck and back, extreme rash [and] discomfort" to be *de minimis*); Abney v. Valdez, 2005 WL 3147863, *2 (N.D.Tex., Oct. 27, 2005) (holding more frequent urination, near-daily migraine headaches, and itchiness and watery eyes did not meet the physical injury requirement); Vega v. Hill, 2005 WL 3147862, *3 (N.D.Tex., Oct. 14, 2005) (holding "bad headaches, sleeplessness, dizziness," and "feel[ing] like a 'zombie'" to be *de minimis*); Mitchell v. Horn, 2005 WL 1060658, *1 (E.D.Pa., May 5, 2005) (dismissing complaint of "severe stomach aches, severe headaches, severe dehydration, loss of weight, severe itching, due to the inability to take his prescribed medication, nausea, physical weakness and blurred vision," stating that such "transitory" injuries were not contemplated by the PLRA); *see also* Tate v. Lincoln County, Tenn., 2010 WL 3239281, *2 (E.D.Tenn., Aug. 16, 2010) (holding fatigue from lack of sleep is *de minimis*).

[1237] Jones v. Cowens, 2010 WL 3239286, *2 (D.Colo., Aug. 12, 2010) ("Physical pain, standing alone, however, is deemed to be a *de minimis* injury. . . ."); Marino v. Commissioner, Maine Dept. of Corrections, 2009 WL 1150104, *2 (D.Me., Apr. 28, 2009) (statute "requires physical injury and not physical pain"), *report and recommendation adopted*, 2009 WL 1395164 (D.Me., May 18, 2009); Calderon v. Foster, 2007 WL 1010383, *8 (S.D.W.Va., Mar. 30, 2007) (pain, standing alone, is *de minimis*), *aff'd*, 264 Fed.Appx. 286 (4th Cir. 2008) (unpublished); Ladd v. Dietz, 2007 WL 160762, *1 (D.Neb., Jan. 17, 2007) (holding pain resulting from placing ear medication in plaintiff's eye was "not enough" to constitute physical injury); Clifton v. Eubank, 418 F.Supp.2d 1243, 1246 (D.Colo., 2006); Olivas v. Corrections Corp. of America, 408 F.Supp.2d 251, 254, 259 (N.D.Tex. 2006) (dismissing as *de minimis* pain reported as 10 on a scale of 1 to 10, resulting from delay in treatment of broken teeth with exposed nerve).

[1238] 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

One recent appellate decision, unfortunately unpublished, represents a startling departure from prior approaches. In *Braswell v. Corrections Corp. of America*,[1240] 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 disgustingly 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.[1241]

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

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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, 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.

[1239] *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).

[1240] Braswell v. Corrections Corp. of America, 419 Fed.Appx. 622 (6th Cir. 2011) (unpublished).

[1241] *Braswell*, 419 Fed.Appx. at 626-27.

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).[1242] 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.[1243] That term is not defined in the statute. However, several other federal criminal statutes define that term 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."[1244] Several circuits have adopted that definition for purposes of § 242[1245] as well, and there is no apparent reason why it should not be applied under § 1997e(a) as well.[1246] 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

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[1242] Waters v. Andrews, 2000 WL 1611126, *7 (W.D.N.Y., Oct. 16, 2000). *But see* Alexander v. Tippah County, Miss., 351 F.3d 626, 631 (5th Cir. 2003) (holding that prisoner who vomited as a result of exposure to noxious odors in a filthy holding cell full of raw sewage suffered only a *de minimis* injury, if any), *cert. denied*, 541 U.S. 1012 (2004); Hooks v. Chapman, 2012 WL 6674494, *3 (D.S.C., Nov. 30, 2012) (being forced to urinate on oneself and to remain in a soiled jumpsuit for several hours did not satisfy § 1997e(e)), *report and recommendation adopted*, 2012 WL 6674491, *2 (D.S.C., Dec. 21, 2012); Ellerbe v. U.S., 2011 WL 4361617, *1-2, 5 (N.D.Ohio, Sept. 19, 2011) (being forced to defecate on oneself is *de minimis* under similar physical injury provision of 28 U.S.C. § 1346(b)(2)); Garrett v. Winn Correctional Center, 2010 WL 790540, *2 (W.D.La., Mar. 2, 2010) (§ 1997e(e) applied to claim of urinating on self); Grindstaff v. Tennessee Dept. of Correction, 2009 WL 2461772, *1 (M.D.Tenn., Aug. 12, 2009) (urinating on oneself is not physical injury); Robinson v. Lavalais, 2008 WL 4297057, *2 (M.D.La., Sept. 16, 2008) (holding that being forced to urinate on oneself and to remain in the soiled clothing for several hours was not physical injury), *aff'd*, 331 Fed.Appx. 282 (5th Cir. 2009), *cert. denied*, 130 S.Ct. 558 (2009); Brooks v. Delta Correctional Facility, 2007 WL 2219303, *1 (N.D.Miss., July 30, 2007) (holding being forced to defecate in clothing and sleep in feces was *de minimis*); Parter v. Valone, 2006 WL 3086900, *2-3 (E.D.Mich., Oct. 30, 2006) (holding a prisoner who was denied the use of a bathroom and urinated on himself suffered only mental or emotional injury); Jarrell v. Seal, 2004 WL 241712 (E.D.La., Feb. 10, 2004) (holding that a prisoner who alleged he soiled himself after not being allowed to use a toilet was complaining of humiliation and had suffered no physical injury), *aff'd*, 110 Fed.Appx. 455 (5th Cir. 2004). *Cf.* Glaspy v. Malicoat, 134 F.Supp.2d 890, 894-95 (W.D.Mich. 2001) (treating denial of toilet access to a non-prisoner, with predictable results, as a deprivation of liberty). Several courts have held that having urine or feces thrown on one, or being spat on, is no more than a mental or emotional injury. Allen v. Louisville Metro Dept. of Corrections, 2007 WL 3124696, *7-8 (W.D.Ky., Oct. 24, 2007); Williams v. Sharrett, 2007 WL 2406960, *3-4 (W.D.Mich., Aug. 20, 2007); Jennings v. Weberg, 2007 WL 80875, *1 (W.D.Mich., Jan. 8, 2007) (HIV-positive prisoner was doing the spitting and throwing feces).

[1243] 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").

[1244] 18 U.S.C. §§ 831(f)(5); *accord*, 18 U.S.C. § 1365(h)(4); 18 U.S.C. § 1515(a)(5); 18 U.S.C. § 1864(d)(2).

[1245] *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*.

[1246] "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.

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,[1247] a result that seems unsupported by the statutory language, which directly implies that mental or emotional injury with physical injury should be actionable. Decisions are split on the question whether the risk of future injury meets the § 1997e(e) standard.[1248]

[1247] Davis v. District of Columbia, 158 F.3d 1342, 1349 (D.C.Cir. 1998); Bustos v. U.S., 2010 WL 4256182, *4 (D.Colo., Oct. 21, 2010) (stating that "courts are willing to make more inclusive the definition of 'physical injury' when the prisoner alleges that he failed to receive adequate medical treatment or was exposed to adverse physical or environmental conditions and thereafter suffered mental or emotional harm. However, the case law appears clear that when the alleged physical injury is associated with and arises from the distress of living in fear of one's well being, which is the case here, the PLRA bars recovery."), *report and recommendation adopted*, 2010 WL 5157325 (D.Colo., Dec. 14, 2010); Sanchez v. U.S., 2010 WL 3199878, *3 (S.D.Fla., Aug. 6, 2010) (citing "loss of appetite, loss of sleep, gastrointestinal distress and emotional and physical distress" after eating non-kosher food), *report and recommendation adopted*, 2010 WL 3466932 (S.D.Fla., Sept. 2, 2010); Klein v. Kimoto, 2009 WL 3045858, *14 (D.Nev., Aug. 6, 2009) (citing "sleeplessness, physical pain, depression, anxiety [and] panic attacks" as a result of disputed incident); Hughes v. Colorado Dept. of Corrections, 594 F.Supp.2d 1226, 1238-39 (D.Colo. 2009); Dean v. Phillips, 2008 WL 5056679, *7 (N.D.N.Y., Nov. 24, 2008); Darvie v. Countryman, 2008 WL 2725071, *7 n.12 (N.D.N.Y., July 10, 2008) (characterizing "anxiety, depression, stress, nausea, hyperventilation, headaches, insomnia, dizziness, appetite loss, weight loss, etc.," as "essentially emotional in nature"), *report and recommendation adopted*, 2008 WL 3286250 (N.D.N.Y., Aug. 7, 2008); McCloud v. Tureglio, 2008 WL 1772305, *9 (N.D.N.Y., Apr. 15, 2008); Martin v. Vermont Dept. of Corrections, 2005 WL 1278119 (D.Vt., May 25, 2005) (stating that "physical manifestations of stress are insufficient to establish physical injury under the PLRA"), *report and recommendation adopted*, 2005 WL 2001749 (D.Vt., Aug. 19, 2005); Minifield v. Butikofer, 298 F.Supp.2d 900, 905 (N.D.Cal. 2004) ("Physical symptoms that are not sufficiently distinct from a plaintiff's allegations of emotional distress do not qualify as a prior showing of physical injury."); Todd v. Graves, 217 F.Supp.2d 958, 960 (S.D.Iowa 2002) (holding that allegations of stress-related aggravation of hypertension, dizziness, insomnia and loss of appetite were not actionable); Cannon v. Burkybile, 2002 WL 448988, *4 (N.D.Ill., Mar. 22, 2002); McGrath v. Johnson, 67 F.Supp.2d 499, 508 (E.D.Pa. 1999). *But see* Montemayor v. Federal Bureau of Prisons, 2005 WL 3274508, *5 (D.D.C., Aug. 25, 2005) (holding that a heart attack resulting from physical and emotional stress caused by treatment in prison would meet the physical injury requirement); Perkins v. Arkansas Dept. of Corrections, 165 F.3d 803, 807-08 (8th Cir. 1999) (remanding question whether an allegation of mental anguish so severe that it caused physical deterioration and would shorten plaintiff's life was sufficient under § 1997e(e)); Gilmore v. Bloom, 2008 WL 5272576, *10 (S.D.W.Va., Dec. 17, 2008) (allegation that plaintiff suffered stomach and lower intestinal problems, headaches, cold sweats, rashes, nightmares, vomiting, and teeth grinding stated a claim under physical injury requirement).

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).

[1248] *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); 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.Ill., 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 entitling the plaintiff to nominal damages

Courts have disagreed over how closely physical injury must be connected to the defendants' actions inflicting mental or emotional injury for the latter to be actionable.[1249] However, the statute does not require that the plaintiff show that the physical injury itself violated his or her legal rights,[1250] or indeed that it was caused or inflicted by the defendants if there is some other basis for liability for the defendants.[1251]

VI. Attorneys' Fees

In actions brought by prisoners,[1252] the PLRA restricts fees awarded pursuant to 42 U.S.C. § 1988 to 150% of the rates "established" under the Criminal Justice Act.[1253] The

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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.").

[1249] *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 243535 (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); *see also* Toliver v. City of New York, 2012 WL 914948, *5 (S.D.N.Y., Mar. 19, 2012) (holding court would only consider injury resulting from the claim in the complaint and not earlier injuries inflicted by the same defendants).

[1250] 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.)

[1251] May v. Williams, 2012 WL 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).

[1252] See § II, nn. 7-47, 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), *rev'g* Robbins v. Chronister, 2002 WL 356331 (D.Kan., Mar. 31, 2002), and more recently *Morris* itself was overruled. Perez v. Westchester County Dep't of Corrections, 587 F.3d 143, 154-55

attorneys' fees restrictions are not limited to cases involving prison conditions.[1254] They apply to cases about juvenile institutions.[1255]

Courts have disagreed whether the "established" CJA rate means the rate actually paid (*i.e.*, as limited by available funding) under the CJA or the rate authorized by the Judicial Conference based on inflation.[1256] One court has held that the PLRA rate may be enhanced for excellent results.[1257]

The PLRA restrictions do not apply to fees sought on any basis other than 42 U.S.C. § 1988.[1258] 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.[1259] Courts have also taken varying approaches in cases where different claims are governed by different fee statutes.[1260]

(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).

[1253] 42 U.S.C. § 1997e(d)(3); 18 U.S.C. § 3006A; *see* Perez v. Cate, 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).

[1254] 42 U.S.C. § 1997e(d)(1); *see* Jackson v. State Bd. of Pardons and Paroles, 331 F.3d 790, 794-95 (11th Cir.) (applying PLRA restrictions to prisoner who won a challenge to a new policy concerning parole eligibility hearings), *cert. denied*, 540 U.S. 880 (2003). *Contra*, Hall v. Galie, 2009 WL 722278, *3-7 (E.D.Pa., Mar. 17, 2009) (declining to apply PLRA restrictions to pre-incarceration civil rights violations).

[1255] Christina A. ex rel. Jennifer A. v. Bloomberg, 315 F.3d 990, 994 (8th Cir. 2003).

[1256] The difference is described in *Johnson v. Daley*, 339 F.3d 582, 584 & n.‡ (7th Cir. 2003) (en banc), *cert. denied*, 541 U.S. 935 (2004). The weight of authority holds that the rate adjusted by the Judicial Conference governs. *See* Hadix v. Johnson, 398 F.3d 863 (6th Cir. 2005); Webb v. Ada County, 285 F.3d 829, 838-39 (9th Cir.), *cert. denied*, 537 U.S. 948 (2002); Laube v. Allen, 506 F.Supp.2d 969, 987 (M.D.Ala., Aug. 31, 2007); Batchelder v. Geary, 2007 WL 2427989, *5-6 (N.D.Cal., Aug. 22, 2007). *Contra*, Hernandez v. Kalinowski, 146 F.3d 196, 201 (3d Cir. 1998).

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). The figure elicited from that agency for FY 2010 is $139 an hour. A request to AOC from a number of prisoner advocates to make the information more readily accessible elicited a noncommittal response. Letter, AOC Assistant Director Theodore J. Lidz to Gabriel B. Eber, Staff Counsel, ACLU National Prison Project (June 16, 2010). *See* Graves v. Arpaio, 633 F.Supp.2d 834, 854-55 (D.Ariz. 2009) (finding rates for 2009), *aff'd on other grounds*, 623 F.3d 1043 (9th Cir. 2010).

[1257] Skinner v. Uphoff, 324 F.Supp.2d 1278, 1287 (D.Wyo. 2004).

[1258] *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); 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).

[1259] *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).

[1260] *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

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.[1261] This apparently includes all hours spent in the course of litigation where an actual violation is shown as long as they are reasonable.[1262] 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,[1263] 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."[1264] 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.[1265] 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 challenged practice was unlawful.[1266] Fees are probably not recoverable in cases that are favorably resolved but do not result in an enforceable judgment for the plaintiff.[1267]

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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 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).

[1261] 42 U.S.C. § 1997e(d)(1)(A).

[1262] Riley v. Kurtz, 361 F.3d 906, 916 (6th Cir.) (holding fees for defending a judgment are compensable as part of "proving or making certain an actual violation of the prisoner's rights"), *cert. denied*, 543 U.S. 892 (2004); Jackson v. State Bd. of Pardons and Paroles, 331 F.3d 790, 798-99 (11th Cir.) (holding "fees on fees" available in case governed by PLRA), *cert. denied*, 540 U.S. 880 (2003); Volk v. Gonzalez, 262 F.3d 528, 536 (5th Cir. 2001) (holding "fees on fees" available under PLRA); Hernandez v. Kalinowski, 146 F.3d 196, 199-201 (3d Cir. 1998) (same); Batchelder v. Geary, 2007 WL 2427989, *3-4 (N.D.Cal., Aug. 22, 2007) (holding fees incurred in defending a judgment are compensable); Siggers-El v. Barlow, 433 F.Supp.2d 811, 821-22 (E.D.Mich. 2006) (holding time spent on post-judgment motions compensable); Sallier v. Scott, 151 F.Supp.2d 836 (E.D.Mich. 2001) (holding time spent on postjudgment motions compensable); Morrison v. Davis, 88 F.Supp.2d 799, 810 (S.D.Ohio 2000) (including all in-court and out-of-court time), *amended in part on other grounds*, 195 F.Supp.2d 1019 (S.D.Ohio 2001).

[1263] *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.").

[1264] 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.

[1265] 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.

[1266] 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

Fees awarded under this provision must be "proportionately related to the court ordered relief for the violation."[1268]

Alternatively, fees may be awarded if they are "directly and reasonably incurred in enforcing the relief ordered for the violation."[1269] One recent decision held that protecting class

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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.

[1267] *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 disclaimed 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.3d755, 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).

[1268] 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).

[1269] 42 U.S.C. § 1997e(d)(1)(B)(ii); *see* 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 and reasonably incurred" in enforcement need not also show fees were proportionate to relief); Balla v. Idaho Bd. of Correction, 2007 WL 4531304, *6 (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).

representatives from retaliation is compensable under this provision because retaliation against them "directly impedes their ability to assist counsel in monitoring the injunctive relief."[1270]

Up to 25% of money judgments must be used to satisfy attorneys' fees claims.[1271] 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).[1272] Defendants cannot be made to pay fees greater than 150% of a money judgment,[1273] even if their actions after the judgment cause the fees to increase.[1274] When the plaintiff obtains injunctive relief as well as damages, the 150% limit is either inapplicable or applicable only to those hours expended

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[1270] Balla v. Idaho State Bd. of Correction, 2013 WL 501646, *5 (D.Idaho, Feb. 8, 2013).

[1271] 42 U.S.C. § 1997e(d)(2).

[1272] 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).

[1273] 42 U.S.C. § 1997e(d)(2); *see* Keup v. Hopkins, 596 F.3d 899, 905 (8th Cir. 2010) (holding fees limited to $1.50 where plaintiff recovered only $1.00 in nominal damages); Pearson v. Welborn, 471 F.3d 732, 742-43 (7th Cir. 2006) (same); Boivin v. Black, 225 F.3d 36 (1st Cir. 2000) (same). *But see* Torres v. Walker, 356 F.3d 238, 243 (2d Cir. 2004) (holding that the 150% cap does not apply to a case resolved by a "so ordered" stipulation, since there is no "monetary judgment"); *accord*, Romaine v. Rawson, 2004 WL 1013316, *3 (N.D.N.Y., May 6, 2004).

[1274] 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), *cert. denied*, 543 U.S. 892 (2004). Some courts have also held that expenses in excess of statutory costs must also be included under the 150% ceiling. Berberena v. Pesquino, 2008 WL 68671, *1 (S.D.Ill., Jan. 7, 2008). *Contra*, Nelson v. Turnesky, 2010 WL 3655565, *3 (E.D.Ark., Sept. 13, 2010) (awarding costs in addition to fees at the 150% limit).

solely for the purpose of obtaining damages.[1275] One decision holds the 150% limit applicable to a case in which the prisoner's claim concerned events that antedated his incarceration.[1276]

Courts have rejected arguments that the attorneys' fees restrictions deny equal protection.[1277]

VII. Filing Fees and Costs

Prisoners proceeding *in forma pauperis* in civil actions or appeals are now required to pay filing fees in installments according to a statutory formula.[1278]

Once a prisoner files a complaint or notice of appeal, the court generally lacks authority to forgive or refund the fee,[1279] though there are some variations in local practice that have that

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[1275] In *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 "proportionately 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. *Accord***,** Goodman v. Walker, 2007 WL 2907991, *1 (S.D.Ill., Oct. 1, 2007) and cases cited. *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), *cert. denied*, 535 U.S. 1095 (2002); *accord*, Boivin v. Black, 225 F.3d 36, 41 n.4 (1st Cir. 2000); Carbonell v. Acrish, 154 F.Supp.2d 552, 566 (S.D.N.Y. 2001). *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).

[1276] Robbins v. Chronister, 435 F.3d 1238, 1241-44 (10th Cir. 2006) (en banc).

[1277] Johnson v. Daley, 339 F.3d 582 (7th Cir. 2003) (en banc), *cert. denied*, 541 U.S. 935 (2004); Jackson v. State Bd. of Pardons and Paroles, 331 F.3d 790, 796-98 (11th Cir.), *cert. denied*, 540 U.S. 880 (2003); Foulk v. Charrier, 262 F.3d 687, 704 (8th Cir. 2001) (upholding cap of 150% of damages); Walker v. Bain, 257 F.3d 660 (6th Cir. 2001) (same as *Foulk*), *cert. denied*, 535 U.S. 1095 (2002); Hadix v. Johnson, 230 F.3d 840 (6th Cir. 2000) (upholding limit on hourly rates); Boivin v. Black, 225 F.3d 36 (1st Cir. 2000) (same as *Foulk*); Carbonell v. Acrish, 154 F.Supp.2d 552, 562-64 (S.D.N.Y. 2001) (upholding 150% limit).

[1278] 28 U.S.C. § 1915(b)(1-2); *see* 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).

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. *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 the PLRA provides an appropriate means to exercise this authority over a civilly committed patient. Taft v. Sassman, 2012 WL 384836, *1-2 & n.2 (N.D.Iowa, Feb. 6, 2012).

[1279] 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, 130 S.Ct. 631 (2009); 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"); 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

effect in some cases.[1280] The filing fees provision has been upheld as constitutional; courts have 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.[1281]

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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.

[1280] In some cases, courts have dismissed at initial screening, or allowed voluntary withdrawal, without assessing filing fees. *See, e.g.*, Bradley v. Mergucz, 2012 WL 4742481, *2 (D.N.J., Oct. 2, 2012) (directing clerk to administratively terminate without assessing a fee, stating plaintiff may reopen by satisfying fee requirement and submitting amended complaint); Jones v. California Medical Facility Custody Staff, 2012 WL 5187994, *4 (E.D.Cal., Oct. 17, 2012) (declining to impose fee where non-exhaustion was facially apparent, stating fee would be charged if plaintiff persisted and sought *in forma pauperis* status), *report and recommendation vacated on other grounds*, 2012 WL 5868772 (E.D.Cal. Nov 19, 2012); Wade v. Swiekatowski, 2010 WL 152073, *2 (E.D.Wis., Jan. 15, 2010) (allowing plaintiff opportunity to dismiss voluntarily without fee or "strike"); Berry v. Savannah Chatham Metropolitan Police Dept., 2009 WL 1438194, *1 (S.D.Ga., May 8, 2009) (plaintiff allowed to dismiss voluntarily after magistrate judge's report without filing fee or strike); Akers v. Poisson, 2009 WL 799474, *1 (D.Me., Mar. 24, 2009) (noting court advised plaintiff his claim would likely not survive screening and that he could voluntarily terminate without incurring a filing fee and "strike"), *aff'd*, 2009 WL 1375167 (D.Me., May 15, 2009); Ramziddin v. Speziale, 2007 WL 4232987, *1-2 (D.N.J., Nov. 29, 2007) (ordering case filed without IFP application administratively terminated without fee, subject to reopening if plaintiff submits IFP application); James v. Crawford, 2007 WL 4289860, *2 (W.D.Mo., Nov. 28, 2007) (warning that fee will be collected if plaintiff files further pleadings in the case); Dugan v. Lingle, 2007 WL 1795554, *2-3 (D.Haw., June 19, 2007) (dismissing without fee where plaintiff had said he would dismiss voluntarily if court did not appoint counsel; "this is an extraordinary, non-binding and non-precedential result, available only at the discretion of the court"); Newson v. Frank, 2006 WL 2871723, *1-2 (E.D.Wis., Oct. 6, 2006) (allowing plaintiff opportunity to dismiss voluntarily without fee or "strike"); *see also* Hammer v. Central Classification Services, 2010 WL 5139360, *1 (W.D.Va., Dec. 13, 2010) (dismissing for non-exhaustion, noting filing fee has not yet been charged); O'Bryant v. Wilson, 2010 WL 940352, *2 (N.D.Fla., Mar. 12, 2010) (where plaintiff was denied IFP status and court held dismissal was required, but plaintiff had paid the entire fee in the interim, "fairness dictates that Plaintiff's filing fee be returned to him."); Cherry v. Boughton, 2008 WL 2600884, *2 (W.D.Wis., Jan. 31, 2008) (allowing plaintiff to withdraw without paying fee because he did not know when filing he was ineligible for *in forma pauperis* treatment and he sought to withdraw the complaint before the court ruled on the question). One court has told the parties that if the case settled within 90 days, no filing fee would be required, a bizarre and completely unauthorized holding. *See* Stuard v. Carlin, 2010 WL 4791739, *3 (D.Idaho, Nov. 16, 2010). A subsequent case in the same district refers to a "pre-answer mediation option" in which a prisoner who is willing to settle for the amount of the filing fee or less, and/or

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."[1282] 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."[1283] Two circuits have held that each prisoner in multiple-plaintiff litigation must pay a full filing fee,[1284] and one has gone further by

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change or clarification in policy, may not be required to pay the fee. Adams v. CCA, 2011 WL 2909877, *7 (D.Idaho, July 18, 2011).

By contrast, at least one district court has a rule requiring partial payment of the fee before a case will be screened. *See* Rindahl v. Daugaard, 2011 WL 4625984, 4 n.7 (D.S.D., Sept. 30, 2011) (noting Western District of Wisconsin system requiring partial payment before case will be screened).

[1281] Nicholas v. Tucker, 114 F.3d 17, 21 (2d Cir. 1997), *cert. denied*, 523 U.S. 1126 (1998); *see* Taylor v. Delatoor, 281 F.3d 844, 850 (9th Cir. 2002) (holding that dismissal was improper where the plaintiff failed to pay the initial filing fee because he didn't have the money); *accord*, Menefee v. Werholtz, 368 Fed.Appx. 879, 884 (10th Cir. 2010). *But see* Wewerka v. Roper, 2011 WL 4532071 (8th Cir., Oct. 3, 2011) (affirming dismissal for seven-month failure to pay assessed initial partial fee where plaintiff did not notify the district court or appeals court of any reason he couldn't pay).

However, one circuit has held that prisoners who have failed to pay fees for *prior* litigation "for any reason other than destitution" should be treated as if they had "three strikes" under 28 U.S.C. § 1915(g) and denied *in forma pauperis* status until they have paid. Thurman v. Gramley, 97 F.3d 185, 188 (7th Cir. 1996); *see* Campbell v. Clarke, 2006 WL 6021179, *1 (W.D.Wis., Apr. 19, 2006); *see also* Dudley v. Pratt, 2007 WL 4290500, *2-3 (E.D.Tex., Dec. 4, 2007) (dismissing without prejudice where plaintiff failed to pay the $4.01 initial fee, saying he could not afford it since he only received $20.00 a month).

[1282] Talley-Bey v. Knebl, 168 F.3d 884, 887 (6th Cir. 1999); In re Prison Litigation Reform Act, 105 F.3d 1131, 1137-38 (6th Cir. 1997); *see* Miller v. County of Nassau, 2012 WL 4741592, *11 (E.D.N.Y., Oct, 3, 2012) (directing plaintiff to pay his *pro rata* share of the fee); Fox v. Koskinen, 2009 WL 2507405, *1 (W.D.Mich., Aug. 14, 2009); Coleman v. Granholm, 2007 WL 1011662, *2 (E.D.Mich., Mar. 29, 2007); Hernandez v. Caruso, 2005 WL 1610686, *1 (W.D.Mich., July 5, 2005); Mitchell v. Michigan Dept. of Corrections, 2005 WL 1295614, *1 (W.D.Mich., May 31, 2005) (all applying *In re PLRA* holding). *But see* Jones v. Fletcher, 2005 WL 1175960, *6 (E.D.Ky., May 5, 2005) (declining to follow *In re PLRA*, holding that each plaintiff must pay a separate filing fee).

[1283] 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.

[1284] Hagan v. Rogers, 570 F.3d 146, 154-56 (3d Cir. 2009); Boriboune v. Berge, 391 F.3d 852, 855-56 (7th Cir. 2004); *see* Suarez v. A1, 2006 WL 3694598, *4 (D.N.J., Dec. 13, 2006) (acknowledging the difficulties of joint litigation, but holding that different plaintiffs who sought the same remedy could proceed jointly though they each had to pay a filing fee); *see also* Picozzi v. Connor, 2012 WL 2839820, *3 (D.N.J., July 9, 2012) (allowing joint litigation, but "the Court finds it warranted to allow each Plaintiff an opportunity to make an informed personal decision as to whether (and how) each Plaintiff wishes to raise his claims"); Glenn v. Hayman, 2007 WL 894213, *6 (D.N.J., Mar. 21, 2007) (holding consideration of class certification should be deferred until the court satisfies itself that all named plaintiffs actually wish to proceed rather than being "peer-pressured or bullied" by other prisoners, and all named plaintiffs have had a fair opportunity to articulate the wrongs done to them personally). *But see* Hagwood v. Warden, 2009 WL 427396, *2-3 (D.N.J., Feb. 19, 2009) ("Prisoners are not in the same situation as

holding that prisoners cannot file jointly at all, but must each file a separate complaint.[1285] This extraordinary holding that the PLRA overturns the joinder rules of Fed.R.Civ.P. 20 is unsupported by statutory language or history[1286] 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.[1287] The latter point is supported by the Supreme Court's recent holding that courts should not deviate from the usual procedural practices except to the extent that the PLRA actually says to do so.[1288] 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,"[1289] not multiple fees, and nothing in the PLRA purports to address multi-plaintiff litigation.[1290] Further, interpreting the PLRA's amendments to the IFP statutes in this manner would lead to the

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non-prisoner joint plaintiffs; prisoners' circumstances make joint litigation exceptionally difficult." These cases require individualized consideration; court disapproves joinder); *accord*, Bonner v. Lester, 2009 WL 3837369, *4 (W.D.Okla., Nov. 16, 2009) (denying joinder, citing need for individual screening and the fact that with two plaintiffs incarcerated and one released, it would be difficult to arrange signing papers).

[1285] Hubbard v. Haley, 262 F.3d 1194, 1197 (11th Cir. 2001), *cert. denied*, 534 U.S. 1136 (2002); *accord*, Johnson-Bey v. Steele, 2011 WL 720441, *1 (E.D.Mo., Feb. 22, 2011) (citing risk that prisoners would circumvent three strikes provision by joining with other prisoners so that fewer than all claims would be dismissed); Class Action ex rel. All Prisoners at T.R.C.I. v. Ozmint, 2010 WL 3812531, *2 (D.S.C., Aug. 16, 2010), *report and recommendation adopted*, 2010 WL 3766873 (D.S.C., Sept. 22, 2010); Benford v. Madison County Bd. of Sup'rs, 2010 WL 235022, *1 (S.D.Miss., Jan. 15, 2010); Kron v. Cook, 2008 WL 194367, *1 (S.D.Tex., Jan. 23, 2008); Worthen v. Oklahoma Dept. of Corrections, 2007 WL 4563665, *3 (W.D.Okla., Dec. 7, 2007) (citing individualized issues concerning administrative exhaustion), *report and recommendation adopted in part*, 2007 WL 4563644 (W.D.Okla., Dec. 20, 2007); Lilly v. Ozmint, 2007 WL 2022190, *1 (D.S.C., July 11, 2007); Osterloth v. Hopwood, 2006 WL 3337505, *2-5 (D.Mont., Nov. 15, 2006); Amir Sharif v. Dallas County, 2006 WL 2860552, *3-4 (N.D.Tex., Oct. 5, 2006); Ray v. Evercom Systems, Inc., 2006 WL 2475264, *5-6 (D.S.C., Aug. 25, 2006) (extending holding to a fee-paid case), *appeal dismissed on other grounds*, 234 Fed.Appx. 248 (5th Cir. 2007); Swenson v. MacDonald, 2006 WL 240233, *3-4 (D.Mont., Jan. 30, 2006); Clay v. Rice, 2001 WL 1380526 (N.D.Ill., Nov. 5, 2001); *see* Cranford v. Stringer, 2006 WL 2404570, *1-2 (S.D.Miss., Aug. 15, 2006) (noting that multi-plaintiff suits render the PLRA filing fee and three strikes provisions "inefficient," severing claims, but not explicitly holding joinder impermissible).

[1286] *See* Burke v. Helman, 208 F.R.D. 246, 247 (C.D.Ill. 2002) (rejecting *Hubbard* holding).

[1287] *Hagan*, 570 F.3d at 154-55; *Boriboune*, 391 F.3d at 854-55.

[1288] Jones v. Bock, 549 U.S. 199, 212-16 (2007).

[1289] 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.

[1290] *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.
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> > 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).

perverse result that prisoners who can pay the 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.[1291]

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.[1292]

Prisoners are required to provide certified statements of their prison accounts.[1293] A complaint should not be dismissed for prison officials' failure to provide the necessary information,[1294] or without determining whether the prisoner has done what he or she can to

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[1291] McGeachy v. Aviles, 2011 WL 1885938, *2-3 (D.N.J., May 18, 2011).

[1292] *See* George v. Smith, 507 F.3d 605, 607-08 (7th Cir. 2007); Simmons v. Akanno, 2010 WL 5186690, *2 (E.D.Cal., Dec. 8, 2010), *certificate of appealability denied*, 2011 WL 1566583 (E.D.Cal., Apr. 22, 2011); Valdez v. Dretke, 2007 WL 2177007, *8-9 (S.D.Tex., July 26, 2007); *see also* Harris v. Gerth, 2008 WL 5424134, *4-5, 12 (E.D.Mich., Dec. 30, 2008) (dismissing all but one plaintiff's claims in multiple-plaintiff, multiple-claim case); Vasquez v. Schueler, 2007 WL 5431016, *2 (W.D.Wis., Nov. 29, 2007) (applying *George v. Smith*, requiring six claims to be pursued in four separate suits); Pope v. Miller, 2007 WL 2427978, *4-5 (W.D.Okla., Aug. 21, 2007) (holding claims of two plaintiffs misjoined under Federal Rules where they involved distinct factual issues as to exhaustion and merits). *But see* McDonald v. Wexford Health Sources, 2010 WL 3034529, *6 (N.D.Ill., July 30, 2010) (allowing joinder of multiple medical complaints which plaintiff alleged are all related to a cost-cutting policy of the health provider); Johnson v. Pollard, 2008 WL 5114283, *3 (E.D.Wis., Dec. 2, 2008) (allowing joinder of different claims against different defendants where plaintiff alleged "a pattern of conduct that occurred within the segregation unit . . . during a specified period of time" and therefore constituted a single "transaction or occurrence" for joinder purposes). In *McCoy v. Bazzle*, 2008 WL 4280386, *5 (D.S.C., Sept. 15, 2008), the plaintiff complained of dental neglect in one prison, and was denied amendment of his complaint to add continuing dental neglect after 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.

[1293] Spaight v. Makowki, 252 F.3d 78 (2d Cir. 2001) (holding that account information should be produced for the six months preceding the notice of appeal, not the *in forma pauperis* motion); Morales v. Lanigan, 2012 WL 1600441, *3 (D.N.J., May 7, 2012) (rejecting account statements not close enough to date of filing of complaint); Knowlin v. Raemisch, 2009 WL 1259026, *2 (W.D.Wis., May 5, 2009) (holding that account information for June-December 2008 did not satisfy statute where plaintiff sought to appeal well into 2009); Redmond v. Rodriguez, 2007 WL 2382156, *1 (E.D.Cal., Aug. 17, 2007) (holding three months of account information did not satisfy the statute). *But see* Galeas v. Previtire, 2012 WL 5985667, *1 (W.D.N.C., Nov. 28, 2012) (granting IFP without account information because plaintiff has proceeded IFP in prior actions); Baker v. Sedgwick County Jail, 2012 WL 5332360, *1 (D.Kan., Oct. 24, 2012) (relying on "sparse" records filed in another action).

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).

[1294] 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 an account statement 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).

follow the procedures and make required payments.[1295] Refusal by prison officials to provide the required information would violate the right of access to courts.[1296] Prisoners generally may not be prohibited from bringing an action because they owe fees on a prior action.[1297] 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[1298] can be denied IFP status or barred from filing.[1299] 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.[1300] If the court remits too much in collecting a filing fee, the remedy is to abate the collection temporarily.[1301]

Assessed costs must be paid in full in the same manner as filing fees.[1302] However, courts retain their pre-PLRA discretion to assess or refrain from assessing costs against indigent prisoners.[1303]

[1295] Hatchett v. Nettles, 201 F.3d 651 (5th Cir. 2000); *accord*, 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. Meadors, 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* 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. Garoutte, 2007 WL 2697445, *12-13 (D.Colo., Sept. 11, 2007) (dismissing for repeated failures to make required payments).

[1296] Adnan v. Santa Clara County Dept. of Corrections, 2002 WL 32058464, *12 (N.D.Cal., Aug. 15, 2002).

[1297] Walp v. Scott, 115 F.3d 308 (5th Cir. 1997).

[1298] 28 U.S.C. § 1915(g); see next section for further discussion.

[1299] 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).

[1300] Whitfield v. Scully, 241 F.3d 264, 275-78 (2d Cir. 2001); *see* Torres v. O'Quinn, 612 F.3d 237, 242 (4th Cir. 2010) (also holding only one fee to be paid at a time, not addressing costs). *Contra*, Christensen v. Big Horn County Board of County Commissioners, 374 Fed.Appx. 821, 829-32 (10th Cir. 2010) (unpublished); Atchison v. Collins, 288 F.3d 177, 180-81 (5th Cir. 2002); Markovick v. Werholtz, 2011 WL 751155, *1 (D.Kan., Feb. 24, 2011) (following *Christensen*); Lyon v. Kentucky State Penitentiary, 2005 WL 2044955, *1 (W.D.Ky., Aug. 23, 2005). *See also* Davis v. Middlesex Superior Court, 2011 WL 1344155, *2 & n.3 (D.Mass., Apr. 7, 2011) (stating that consistently with this court's practice, fee should be collected only after any prior fee obligations are completed); Bey v. William, 2010 WL 1759573, *3 (D.Md., Apr. 29, 2010) (stating the PLRA does not say how monthly payments are to be computed for prisoners who owe multiple fees; expressing approval of Maryland policy which only deducts one 20% payment from monthly income, rather than rendering the prisoner "utterly destitute").

[1301] Biggs v. Hunt, 2012 WL 3613073, *4 (E.D.N.C., Aug. 21, 2012).

[1302] 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.

[1303] 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*

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.[1304]

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,[1305] though some have held that they must pay any fees that were already due before their release.[1306]

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.[1307] Apart from that imminent danger exception, the statutory language is

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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.

[1304] *See* n. 244.

[1305] DeBlasio v. Eggleston, 315 F.3d 396, 399 (4th Cir. 2003) (citing cases); McGann v. Comm'r, Soc. Sec. Admin., 96 F.3d 28, 29-30 (2d Cir. 1996); McGore v. Wrigglesworth, 114 F.3d 601, 612-13 (6th Cir. 1997); *see* Duran v. Crandell, 2012 WL 2065540, *1-3 (D.Colo., June 8, 2012) (directing filing of new IFP application, noting released plaintiff did not have a prison account; reviewing relevant case law); Robinson v. Caspari, 2007 WL 187808, *1 (E.D.Mo., Jan. 22, 2007) (directing released plaintiff to submit a new *in forma pauperis* application). *But see* Gay v. Texas Department of Corrections State Jail Div., 117 F.3d 240, 242 (5th Cir. 1997) (holding filing fee must be assessed, not explaining how it is to be collected from a person who no longer has a prison account); Murphy v. Maricopa County Sheriff's Office, 2005 WL 3273573, *1 (D.Ariz., Dec. 1, 2005) (holding a released prisoner must pay the entire filing fee within 30 days or show cause why he cannot); *see also* Dillard v. City of St. Paul, 2010 WL 396777, *1 (D.Minn., Jan. 27, 2010) (holding unpaid balance upon release will become due if the plaintiff ever returns to prison); *accord*, Jones v. Redding, 2011 WL 2981446, *1 (D.Minn., July 22, 2011); Wolf v. Rios, 2008 WL 4745667, *5 n.6 (D.Minn., Oct. 29, 2008).

[1306] Robbins v. Switzer, 104 F.3d 895, 899 (7th Cir. 1997) (holding that a released prisoner must pay any part of the filing fee that he or she could have paid before release); *accord*, In Re Smith, 114 F.3d 1247, 1251-52 (D.C.Cir. 1997); Hobbs v. El Paso County, 2008 WL 2787246, *3-4 (D.Colo., July 16, 2008). *But see* Gooden v. Washington, 2011 WL 2457900, *5 (M.D.Ga., May 9, 2011) (holding prisoner must continue to pay entire filing fee after release, and authorizing collection "by any means permitted by law" if he does not), *report and recommendation adopted in part, rejected in part on other grounds*, 2011 WL 2435374 (M.D.Ga., June 16, 2011).

[1307] 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).

One court has 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). The court does 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 evade the statute's terms by adding new claims that could be brought separately to an already filed complaint. 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.[1308] That means a prisoner who can't pay the whole fee up front is out of court[1309]–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.[1310] One federal circuit has held that a prisoner with three strikes who seeks IFP status anyway can be barred from any future filings in federal court.[1311]

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not subject to § 1915(g)) to add a § 1983 claim and thereby avoid the statute. McGore v. Michigan Parole Bd., 2012 WL 1067235, *3 (W.D.Mich., Mar. 28, 2012).

[1308] In exceedingly rare circumstances, courts have declined to impose a strike for a case within the statutory bounds. *See* 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.).

[1309] 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.

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).

[1310] *See* Ammons v. Gerlinger, 547 F.3d 724, 725-26 (7th Cir. 2008); In re Alea, 286 F.3d 378, 381-82 (6th Cir. 2002); Cohen v. Growse, 2011 WL 947085, *6 (E.D.Ky., Mar. 14, 2011); Schultz v. Wallace, 2006 WL 6000792, *2 (W.D.Wis., Feb. 28, 2006); McSwain v. Wallintin, 2003 WL 23138750 (W.D.Wis., Apr. 4, 2003) (holding that the order to that effect can be appealed without prepaying the appellate filing fee); *see also* Tibbs v. Cockrell, 85 Fed.Appx. 385, 2004 WL 57382 (5th Cir., Jan. 13, 2004) (unpublished) (holding appeal of prisoner with three strikes frivolous on merits; he moved for IFP status in the appeals court, was granted it despite having three strikes, and then the court examined the merits).

[1311] 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).

At least one district court has held that this Seventh Circuit rule even bars prisoners with three strikes from filing *in forma pauperis* when they satisfy the imminent danger of serious physical injury exception to § 1915(g). Pozo v. Herwig, 2008 WL 4836411, *1 (E.D.Wis., Nov. 6, 2008), *reconsideration denied*, 2008 WL 5046453 (E.D.Wis., Nov. 25, 2008). However, the only appeals court to rule on the question has held otherwise. Miller v. Donald, 541 F.3d 1091, 1099 (11th Cir. 2008) (prisoner subject to three strikes provision who has not paid filing

Some courts have held that exclusion from IFP status means that the court cannot appoint counsel.[1312] In my view, that 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."[1313] 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."[1314] Inability to pay a $350 filing fee 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.[1315]

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.[1316]

The statutory language indicates that § 1915(g) does not provide for dismissal, but only for exclusion from *in forma pauperis* status, so most courts have held that a litigant found to have three strikes must be allowed an opportunity to pay the filing fee.[1317] Two circuits have

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fees owed cannot be barred from filing under "imminent danger of serious physical injury" exception to three strikes statute).

[1312] *See* Mills v. Fischer, 645 F.3d 176, 177-78 (2d Cir. 2011); Brightwell v. Lehman, 637 F.3d 187, 192 (3d Cir. 2011) ("Because Brightwell was barred from proceeding under § 1915, he was not entitled to any of the benefits that accrue to one who proceeds *in forma pauperis*."); Gay v. Chandra, 2010 WL 4717647, *2 (S.D.Ill., Nov. 15, 2010) (stating that "a plaintiff seeking appointment of counsel must have already been granted leave to proceed *in forma pauperis*"); Hairston v. Blackburn, 2010 WL 145793, *10 (S.D.Ill., Jan. 12, 2010); Crooker v. U.S., 2009 WL 6717363, *4 (D.Mass., May 7, 2009); Ammons v. Gerlinger, 2007 WL 5595899, *1 (W.D.Wis., May 1, 2007).

The Third Circuit has mitigated the harshness of the *Brightwell* rule in at least one IFP case by appointing "amicus counsel" to argue specified points on the prisoner litigant's behalf. Byrd v. Shannon, No. 11-1744 (Order, Jan. 12, 2012).

[1313] 28 U.S.C. § 1915(e)(1) (emphasis supplied).

[1314] 28 U.S.C. § 1915(a)(1).

[1315] *Cf.* Weir v. Potter, 214 F.Supp.2d 53, 55 (D.Mass. 2002) (holding a person not indigent enough to proceed *in forma pauperis* may be eligible for appointment of counsel).

[1316] Washington v. Early, 2009 WL 959796, *2 (E.D.Cal., Apr. 7, 2009). *But see* Hairston v. Blackburn, 2010 WL 145793, *9-10 (S.D.Ill., Jan. 12, 2010) (plaintiff failed to show why he could not serve process himself under the Federal Rules).

[1317] *See, e.g.*, Dubuc v. Johnson, 314 F.3d 1205, 1207 (10th Cir. 2003) ("We VACATE the district court's grant of Plaintiff's motion to proceed *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, 29–30 (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); Davis v. Upton, 2012 WL 1194308, *2 (W.D.Okla., Apr. 10, 2012) (allowing 17 days to pay the fee); Herman v. Ferriter, 2012 WL 1081076, *1 (D.Mont., Mar. 28, 2012) (allowing 32 days to pay the fee), *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), *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.*

held otherwise.[1318] 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.[1319] However, that fact does not moot an appeal of the denial of IFP status if the plaintiff is released during its pendency.[1320]

This statute bars many litigants with substantial claims from litigating them.[1321] 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.[1322] Further, the inclusion in the statutory criteria of failure to state a claim allows prisoners to be charged strikes for raising

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[1318] 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 Commissary Services, 2010 WL 1278171, *1 (W.D.Va., Mar. 31, 2010). In *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, *Miller v. Keating*, 2011 WL 285080, *1 (E.D.Cal., Jan. 25, 2011) and *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), *Tierney v. Kupers*, 128 F.3d 1310, 1311 (9th Cir. 1998), and another which dismissed an appeal without providing 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 *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. *Miller*, 2011 WL 285080, *1 (emphasis supplied); *accord*, *Dean*, 2010 WL 3943525, *2. From the Fifth Circuit, they cited *Adepegba 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 *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 *Miller* and *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 WL 1327711, *4 (E.D.Cal., Apr. 5, 2011) (adopting part of same argument); Saif'ullah v. Sisto, 2011 WL 1235197, *2 (E.D.Cal., Mar. 31, 2011) (same, citing additional cases).

[1319] Harris v. City of New York, 607 F.3d at 24; Vogel v. Roy, 2012 WL 2045963, *1 n.1 (D.Minn., June 6, 2012) (noting nothing would impede three-strike plaintiff's re-filing after release where dismissal was without prejudice); Woodall v. Schwarzenegger, 2011 WL 864372, *1 (S.D.Cal., Mar. 9, 2011) (assessing IFP application according to usual civilian standards where plaintiff was barred by three strikes but re-filed after release); Johnson v. Delgado, 2010 WL 2367389, *6 (S.D.Ill., June 11, 2010).

[1320] 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)).

[1321] *See, e.g.*, Bowler v. Ray, 2007 WL 1725354, *1 (W.D.Va., June 13, 2007) (applying § 1997e(e) to prisoner's challenge to seven-year retention in segregation).

[1322] 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.").

claims that are legitimately debatable and about which courts are divided.[1323] 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.[1324] 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).[1325]

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."[1326] 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 access to courts, and the denial of IFP status is merely the restriction of a privilege.[1327] 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 PLRA"[1328]—despite its willingness to depart from the policy judgment of Congress in the PLRA as to when to exclude prisoners from IFP status.

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,[1329] has been invoked in federal court prison litigation on a number of occasions.[1330] 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,[1331] or are otherwise inappropriate for invocation by federal courts.[1332]

[1323] 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).

[1324] Sloan v. Lesza, 181 F.3d 857, 859 (7th Cir. 1999).

[1325] Miller v. Donald, 541 F.3d 1091, 1099 (11th Cir. 2008).

[1326] Butler v. Department of Justice, 492 F.3d 440, 446 (D.C.Cir. 2007).

[1327] *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.*

[1328] 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").

[1329] Cal.C.C.P. § 391.1 (Title 3A, part 2, of the California Code of Civil Procedure).

[1330] *See, e.g.*, Tyler v. Knowles, 2012 WL 5523405, *1, 8 (E.D.Cal., Nov. 13, 2012) (declaring plaintiff a vexatious litigant, enjoining filings, requiring $850 security to continue this action); Hollis v. Gorby, 2011 WL 2924322, *3-4 (E.D.Cal., July 15, 2011) (declining to declare plaintiff a vexatious litigant), *reconsideration denied*, 2011 WL 4634157 (E.D.Cal., Oct. 4, 2011). At least one district court has adopted this provision as a discretionary local rule. *See* Stephen v. Zhang, 2011 WL 2516244, *2 (E.D.Cal., June 21, 2011) (citing Local Rule 151(b)), *report and recommendation adopted*, 2011 WL 3500724 (E.D.Cal., Aug. 8, 2011).

[1331] Stephen v. Zhang, 2011 WL 2516244, *2.

[1332] Brock v. Skolnik, 2012 WL 683909, *6 (D.Nev., Jan. 25, 2012) (declining to apply state statute sanctioning prisoners with loss of good time in light of § 1915(g) and other options open to federal court, as well as the state statute's lack of authorization of judicial action), *report and recommendation adopted*, 2012 WL 724711 (D.Nev., Mar. 2, 2012), *appeal dismissed*, No. 12-15575 (9th Cir., June 12, 2012).

1. Strikes Defined

"Strikes" comprise only actions dismissed for the reasons stated in the statute: frivolousness, maliciousness, or failure to state a claim.[1333] (An affirmative defense that is apparent on the face of the complaint means that the complaint fails to state a claim and is a strike.[1334]) Cases that were not dismissed on the statutory grounds are not strikes even if they could or should have been dismissed on those grounds.[1335] Conversely, a dismissal that invokes the correct statutory grounds and standard is a strike even if it cites other reasons for dismissal in addition.[1336] Dismissals made on the specified grounds are strikes regardless of the statutory

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[1333] 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); 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 relief" is not a strike because it "did not affirmatively find the complaint was either frivolous or failed to state a claim"); Thomas v. Felker, 2012 WL 2116406, *4 (E.D.Cal., June 11, 2012) (affirmance of denial of injunctive motion as premature because the complaint had not been served was not a strike); Martinez v. U.S., 812 F.Supp.2d 1052, 1057 (C.D.Cal. 2010) (dismissal of duplicative claim not found to be malicious was not a strike); Drollinger v. Carlson, 2009 WL 348082, *1 (D.Or., Feb. 9, 2009) (dismissal for failure to authorize payment of the filing fee is not a strike); Morefield v. Brewton, 2008 WL 5209984, *2 (S.D.Ga., Dec. 11, 2008) (dismissal as duplicative of another case is not a strike absent a finding the case was frivolous, malicious, or failed to state a claim); Fortson v. Kern, 2005 WL 3465843, *2 (E.D.Mich., Dec. 19, 2005) (holding dismissal for failure to pay initial filing fee is not a strike); Maree-Bey v. Williams, 2005 WL 3276276, *2 (D.D.C., Aug. 1, 2005) (holding dismissal under Fed.R.Civ.P. 8 is not a strike). In *Anderson v. Soukup*, 2008 WL 623491, *1 (W.D.Wash., Mar. 4, 2008), the magistrate judge said the plaintiff appeared to have stated two possibly meritorious claims and gave him leave to file an amended complaint; he did not do so. The district court rejected the recommendation to dismiss the case for failure to state a claim and to charge a strike because of the potentially meritorious claims. *But see* Westefer v. Snyder, 2011 WL 766188, *4 (S.D.Ill., Feb. 25, 2011) (holding frivolous attempt to intervene in a class action was a strike); Baxter v. Samples, 2010 WL 2836393, *1 (D.D.C., July 19, 2010) (holding dismissal for *res judicata* is failure to state a claim, and therefore a strike); Burgess v. Conway, 631 F.Supp.2d 280, 281-82 (W.D.N.Y. 2009) (holding dismissal of claim because it could have been pursued in prior actions which were ended by stipulation of dismissal was a strike; stating defect was "fatal" and not remediable, but not connecting it to statutory categories).

Arguably, a dismissal that is not by nature a strike may be a strike if the prisoner's claim or some other aspect of the case is so egregious as to be frivolous. *See* Partee v. Connolly, 2009 WL 1788375, *3 (S.D.N.Y., June 23, 2009) (appeal filed two years late was frivolous).

[1334] This is true of dismissals for non-exhaustion. *See* nn. 1397-1398 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).

[1335] 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"); *accord*, Everett v. Whaley, 2013 WL 142049, *1 (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").

[1336] Smith v. Veterans Admin., 636 F.3d 1306, 1312-13 (10th Cir. 2011), *cert. denied*, 132 S.Ct. 381 (2011).

authority under which they are granted or the procedural posture of the case.[1337] Dismissals that fit the statutory criteria are strikes regardless of age[1338] and even if they occurred before enactment of § 1915(g),[1339] or in cases that were not brought *in forma pauperis*.[1340]

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,[1341] thereby hastening prisoners' exclusion from the benefits of *in forma pauperis* status. In the following elaboration of three strikes law, most of the footnotes will end with a *But see* or *Contra* section, citing cases that reflect this tendency.

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 *in forma pauperis* proceedings,[1342] and most district courts that have considered § 1915(g)'s language in context

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[1337] *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).

[1338] Thomas v. Yates, 2012 WL 2520924, *2 (E.D.Cal., June 27, 2012) (holding 22-year-old dismissal is a strike; "The passage of time, the discharge or deactivation of Plaintiff's prior prison identification number, and Plaintiff's discharge from prison after filing suit are irrelevant."); Simpson v. Prison Health Services, Inc., 2009 WL 4950487, *2 (W.D.Mich., Dec. 14, 2009) (citing strikes spanning a period of 20 years), *reconsideration denied*, 2010 WL 431371 (W.D.Mich., Jan. 25, 2010).

[1339] 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) (citing cases).

[1340] Burghart v. Corrections Corp. of America, 350 Fed.Appx. 278, 279 (10th Cir. 2009); Hyland v. Clinton, 3 Fed.Appx. 478, 479 (6th Cir. 2001); Duvall v. Miller, 122 F.3d 489, 490 (7th Cir. 1997). *Contra*, 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).

[1341] *See, e.g.*, 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) 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); 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); 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 reincarcaration), *report and recommendation adopted*, 2011 WL 5881778 (N.D.N.Y., Nov. 23, 2011).

[1342] *Compare* 28 U.S.C. § 1915(e)(1)(B) (providing for dismissal of an *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

have drawn the obvious conclusion that Congress did not intend such dismissal automatically to constitute strikes.[1343] However, suing an immune defendant can certainly be found to be frivolous at least in some cases, and the Second Circuit, the only circuit to decide the question, has held that such dismissals are *per se* frivolous.[1344] This holding is questionable, since it erases the distinction between § 1915's omission of immunity dismissals and other PLRA provisions' inclusion of them.[1345] At a minimum, a case-by-case analysis of whether the particular claim was frivolous under the circumstances would seem to be required.[1346] The Second Circuit has acknowledged this point in connection with prosecutorial immunity.[1347]

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government defendants on same grounds); 42 U.S.C. § 1997e(c) (providing for dismissal of prisoner challenges to prison conditions on same grounds).

[1343] 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), *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. *See, e.g.*, Barnes v. Seymour, 2009 WL 6547636, *2 (D.S.C., Nov. 10, 2009), *report and recommendation adopted,* 2010 WL 2293237 (D.S.C., June 4, 2010), *aff'd in part, vacated in part on other groundt, 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. Hafed v. Federal Bureau of Prisons, 635 F.3d 1172, 1178 (10th Cir. 2011).

[1344] Mills v. Fischer, 645 F.3d 176, 177 (2d Cir. 2011) ("The IFP statute does not explicitly categorize as frivolous a claim dismissed by reason of judicial immunity, but we will: Any claim dismissed on the ground of absolute judicial immunity is 'frivolous' for purposes of 28 U.S.C. § 1915(g)."); *accord*, Palmer v. Salazar, 2010 WL 520516, *2 (N.D.Cal., Feb. 6, 2010).

[1345] Similarly, the decision in *Simpson v. 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 officers entitled to absolute immunity, appears to gloss over the statutory distinction between strikes and immunity dismissals.

[1346] Hafed v. Federal Bureau of Prisons, 635 F.3d 1172, 1178 (10th Cir. 2011) (holding that if the defendant's immunity is apparent on the face of the complaint, the complaint fails to state a claim or is frivolous).

[1347] 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 our 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).

Dismissals for lack of prosecution,[1348] lack of jurisdiction,[1349] improper venue,[1350] or expiration of the statute of limitations are not generally strikes.[1351] If a case is dismissed for lack

[1348] Paul v. Marberry, 658 F.3d 702, 706 (7th Cir. 2011) (holding "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"); Butler v. Department of Justice, 492 F.3d 440, 443-45 (D.C.Cir. 2007) (holding dismissal for lack of prosecution is not a strike); Woods v. Ayers, 2013 WL 489620, *1-2 (N.D.Cal., Feb. 7, 2013) (holding dismissal of appeal for lack of prosecution is not a strike unless the case's underlying merits are frivolous, malicious, or fail to state a claim); Jacobs v. Bayha, 2009 WL 1790506, *1 (W.D.Pa., June 23, 2009); Morefield v. Brewton, 2008 WL 5209984, *2 (S.D.Ga., Dec. 11, 2008) (dismissal for lack of prosecution after failing to pay the appellate filing fee was not a strike); Harden v. Harden, 2007 WL 2257327, *1 (D.Neb., Aug. 3, 2007) (dismissals for lack of jurisdiction or failure to prosecute are not strikes); Green v. Dewitt, 2006 WL 1074983, *1 (D.S.C., Apr. 20, 2006) (declining to treat dismissal for failure to prosecute as a strike). A decision holding that "[a] history of failure to prosecute is akin to the filing of a frivolous claim" and is a strike, Gill v. Pidlypchak, 2006 WL 3751340, *4 n.7 (N.D.N.Y., Dec. 19, 2006), appears to be wrong, since the statute does not refer to claims that are "akin" to frivolous claims. *But see* Hargrove v. Johnson, 2012 WL 3987585, *2 (M.D.Ga., Aug. 15, 2012) (counting dismissal for lack of prosecution as strikes), *report and recommendation adopted*, 2012 WL 3987632 (M.D.Ga., Sept. 11, 2012); Rose v. Johnson, 2011 WL 5023532, *5 (D.Mont., Oct. 19, 2011) (counting failure to prosecute as a strike); Guarneri v. Wood, 2011 WL 4592209, *10 (N.D.N.Y., Sept. 2, 2011) (holding a dismissal for failure to prosecute, following multiple requests to the court and failure to comply with court orders to inform the court of plaintiff's whereabouts, was a strike because it was "closer to Congress' intended policy behind the three-strike provision to prevent 'the tide of egregiously meritless lawsuits'") (citation omitted), *report and recommendation adopted*, 2011 WL 4594149 (N.D.N.Y., Sept. 30, 2011); Morefield v. Ajibade, 2010 WL 5689539, *1 n.4 (S.D.Ga., Oct. 5, 2010) (holding failure to prosecute a strike), *report and recommendation adopted*, 2011 WL 346997 (S.D.Ga., Jan. 31, 2011); Rainey v. Bureau of Prisons, 2008 WL 4960229, *2 (W.D.La., Nov. 20, 2008) (holding dismissal for non-prosecution a strike because plaintiff failed to obey an order to pay the filing fee and delayed with "frivolous excuses").

[1349] 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 jurisdiction does not warrant a strike under 28 U.S.C. § 1915(g), at least when the assertion of jurisdiction is not itself found to be frivolous."); Thompson v. Drug Enforcement Admin., 492 F.3d 428, 437 (D.C.Cir. 2007); Tafari v. Hues, 473 F.3d 440 (2d Cir. 2007); Andrews v. King, 398 F.3d 1113, 1120-21 (9th Cir. 2005); Sidney v. Fischer, 2011 WL 4478679, *3 (N.D.N.Y., Aug. 8, 2011) (following *Thompson v. DEA*), *report and recommendation adopted*, 2011 WL 4478556 (N.D.N.Y., Sept. 26, 2011); Gould v. Owens, 2011 WL 3347907, *4 (M.D.Ga., July 6, 2011) (holding dismissal for lack of jurisdiction can be a strike if examination of the opinion shows a finding of failure to state a claim), *report and recommendation adopted*, 2011 WL 3328653 (M.D.Ga., Aug. 3, 2011); Ortiz v. Cox, 759 F.Supp.2d 1258, 1261 (D.Nev. 2011); Lewis v. Norton, 2009 WL 1041815, *3 n.3 (E.D.Wis., Apr. 17, 2009), *aff'd*, 355 Fed.Appx. 69 (7th Cir. 2009); Daniels v. Woodford, 2008 WL 2079010, *6, 8 (C.D.Cal., May 13, 2008); Ray v. Seventh Ave. Co., 2007 WL 5303981, *1 (W.D.Wis., July 11, 2007); Fitts v. Burt, 2008 WL 842705, *5 (E.D.Mich., Jan. 24, 2008), *report and recommendation adopted*, 2008 WL 878522 (E.D.Mich., Mar. 28, 2008), *reconsideration denied*, 2008 WL 2357739 (E.D.Mich., June 10, 2008); Harden v. Harden, 2007 WL 2257327, *1 (D.Neb., Aug. 3, 2007). *Contra*, Cohen v. Corrections Corp. of America, 439 Fed.Appx. 489, 491 (6th Cir. 2011) (unpublished) (dismissal for lack of jurisdiction can be a strike where the invocation of federal jurisdiction was frivolous, *i.e.*, there was no possible basis for asserting it); Hargrove v. Johnson, 2012 WL 3987585, *2 (M.D.Ga., Aug. 15, 2012) (holding jurisdictional dismissals for failure to identify an order appealed from and attempt to appeal a non-appealable order to be strikes), *report and recommendation adopted*, 2012 WL 3987632 (M.D.Ga., Sept. 11, 2012); 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), *report and recommendation adopted*, 2011 WL 2881249 (W.D.Mich., July 18, 2011); Mayo v. Norris, 2009 WL 4730687, *2 (E.D.Ark., Dec. 4, 2009) (declaring strike in case dismissed for lack of standing; court does not explain how this jurisdictional dismissal fits § 1915(g)); Crane v. Hatton, 2009 WL 3112077, *2 (N.D.Cal., Sept. 23, 2009) (asserting lack of jurisdiction is failure to state a claim, no explanation).

[1350] Moten v. Adams, 2012 WL 2529204, *2 (E.D.Cal., June 29, 2012); Jennings v. Federal Bureau of Prisons, 2011 WL 6934764, *3 (E.D.N.Y., Nov. 17, 2011), *report and recommendation adopted*, 2011 WL 6936354 (E.D.N.Y., Dec. 30, 2011).

of jurisdiction, statements in the court's opinion indicating that grounds might exist for a § 1915(g) dismissal do not convert the dismissal into a strike.[1352] Some courts have held that if the substantive reason underlying the disposition is one of the statutory grounds, the case is a strike even if the dismissal is technically framed in some other terms.[1353] Under that view, denial of *in forma pauperis* status at initial screening on the grounds specified in the statute is a strike even if the district court does not used the word "dismissed."[1354] 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.[1355] 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."[1356]

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.[1357] That is a

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[1351] 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).

[1352] Moore v. Maricopa County Sheriff's Office, 657 F.3d 890, 895 (9th Cir. 2011).

[1353] 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); Thomas v. Yates, 2012 WL 2520924, *2-3 (E.D.Cal., June 27, 2012) (similar to *Thompson*); Thomas v. Felker, 2012 WL 2116406, *3 (E.D.Cal., June 11, 2012) (similar to *Hafed*).

[1354] O'Neal v. Price, 531 F.3d 1146, 1152-53 (9th Cir. 2008).

[1355] *See* Johnson v. Truedo, 2012 WL 3054114, *4 (N.D.N.Y., June 15, 2012) (dismissal for failure to file an amended complaint, absent a finding of frivolousness or failure to state a claim, is not a strike), *report and recommendation adopted*, 2012 WL 3062293 (N.D.N.Y., July 26, 2012); Palmer v. Woodford, 2011 WL 3439286, *2 (E.D.Cal., Aug. 5, 2011) (voluntary dismissal following dismissal with leave to amend was not a strike); Toliver v. Perri, 2011 WL 43461, *1 (S.D.N.Y., Jan. 6, 2011) (dismissal for failure to submit an amended complaint as ordered, after finding that initial complaint did not state a claim, was not a strike); Miller v. California State Prison, 2009 WL 1211068, *2 (E.D.Cal., May 1, 2009) (same), *report and recommendation adopted*, 2009 WL 1953173 (E.D.Cal., July 7, 2009); Keeton v. Cox, 2009 WL 650413, *1, 6 (E.D.Cal., Mar. 12, 2009) (same), *report and recommendation adopted*, 2009 WL 902094 (E.D.Cal., Apr. 1, 2009).

[1356] Tafari v. Hues, 473 F.3d 440, 443 (2d Cir. 2007).

[1357] *See* Rivera v. Allin, 144 F.3d 719, 731 (11th Cir. 1998) (dismissal for abuse of judicial process is a strike even if it does not expressly say the case is frivolous or malicious; plaintiff failed to disclose all his prior litigation history), *cert. denied*, 524 U.S. 978 (2008); *accord*, Pinson v. Grimes, 391 Fed.Appx. 797, 799 (11th Cir. 2010) (following *Rivera*), *cert. denied*, 131 S.Ct. 527 (2010); Henderson v. Morales, 2012 WL 5473057, *2 n.7 (S.D.Ga., Oct. 10, 2012) ("Dismissals for providing false filing-history information and failing to comply with court orders both fall under the category of 'abuse of the judicial process,' which the Eleventh Circuit has held to be a 'strike-worthy' form of dismissal under § 1915(g)."), *report and recommendation adopted*, 2012 WL 5473768 (S.D.Ga., Nov. 9, 2012); McKee v. McKenna, 2012 WL 4127732, *7 (W.D.Wash., Aug. 10, 2012) ("Courts have read related situations into § 1915(g) 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."), *report and recommendation adopted*, 2012 WL 4117625 (W.D.Wash., Sept. 18, 2012); Henderson v. Wright, 2012 WL 399125, *1 & n.2 (S.D.Ga., Jan. 10, 2012) (dismissals for misrepresenting prior litigation history are strikes), *report and recommendation adopted*, 2012 WL 399087 (S.D.Ga., Feb. 7, 2012); Cobb v. Coursey, 2010 WL 2044484, *1 n.2 (S.D.Ga., Apr. 28, 2010) (dismissal for failure to obey a court order is a strike), *report and recommendation adopted*, 2010 WL 2044483 (S.D.Ga., May 21, 2010); Hoffman v. Florida, 2010 WL 330312, *3 (S.D.Fla., Jan. 19, 2010) (dismissals for abuse of the judicial process are strikes, including lying under penalty of perjury, refusing to comply with court orders, and repeated assertion of previously raised claims); Wilson v. James, 2009 WL 763563, *3 (S.D.Ala., Mar. 18, 2009) (declaring a strike for misrepresentation of prior litigation history); Bure v. Miami-Dade Police Dept., 2008 WL 2374149, *2-3 (S.D.Fla., June 6, 2008) (same as *Hoffman*). *Cf.* Cooks v. Ellis, 2008 WL 686134, *1 & n.1 (N.D.Fla., Mar. 11, 2008)

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.[1358] Also, as noted above, courts have held that there must be an explicit determination that a case satisfies the criteria of § 1915(g) for it to be deemed a strike.[1359]

A duplicative complaint is not a strike unless it is deemed malicious by the court.[1360] 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.[1361] Other circuits have rejected this conclusion.[1362] One court has held that dismissal at initial screening is a strike, but dismissal resulting from a

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(holding dismissal for failure to disclose prior litigation was "tantamount" to dismissal as malicious; but cases *were* dismissed as malicious), *report and recommendation adopted*, 2008 WL 1723689 (N.D.Fla., Apr. 10, 2008).

One recent decision, *Evans v. Mahoney*, 2010 WL 5805663, *13 (D.Mont., Dec. 22, 2010), *report and recommendation adopted as modified*, 2011 WL 550084 (D.Mont., Feb. 9, 2011), cites a standing order of the 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, which includes the three strikes provision.

[1358] *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).

[1359] *See* cases cited in n. 1335, above.

[1360] Buchanan v. Clark, 2012 WL 6726535, *2 (E.D.Cal., Dec. 27, 2012), *report and recommendation adopted*, 2013 WL 594309 (E.D.Cal., Feb. 14, 2013); Turner v. Cates, 2012 WL 5014537, *1 n.1 (E.D.Cal., Oct. 17, 2012) (stating "it is not at all clear that a complaint dismissed simply as duplicative qualifies as a strike under § 1915(g)."); Thomas v. Felker, 2012 WL 2116406, *4 (E.D.Cal., June 11, 2012) (holding duplicative appeal not dismissed as malicious was not a strike); Foster v. Statti, 2011 WL 4543212, *2 (E.D.Cal., Sept. 28, 2011) (holding some of plaintiff's litigation not to be strikes, though it is repetitive; "[w]hile it appears that plaintiff may be abusing the system, § 1915(g) is clear in what constitutes a strike. . . ."), *report and recommendation adopted*, 2011 WL 6756975 (E.D.Cal., Dec. 9, 2011); Martinez v. U.S., 812 F.Supp.2d 1052, 1057 (C.D.Cal. 2010). *Contra*, Horob v. Wright, 2012 WL 5292877, *2 (D.Mont., Oct. 25, 2012); *see* Gordon v. Huncke, 2012 WL 706064, *2 (W.D.N.C., Mar. 5, 2012) (declaring duplicative filing to be frivolous, malicious, and a strike); Curry v. Young, 2011 WL 5403353, *3 (D.S.C., Aug. 23, 2011) (declaring duplicative filing to be frivolous and a strike), *report and recommendation adopted*, 2011 WL 5403299 (D.S.C., Nov. 8, 2011). At least one court seems to have held that duplicative complaints are inherently malicious. *See* Coleman v. Tanner, 2012 WL 3138173, *4 (E.D.La., July 13, 2012) ("Duplicative and repetitive lawsuits are malicious for purposes of 28 U.S.C. § 1915(e)(2)(B)(i) and must be dismissed for that reason."), *report and recommendation adopted*, 2012 WL 3138115 (E.D.La., Aug. 1, 2012).

[1361] 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

[1362] Orr v. Clements, 688 F.3d 463, 465 (8th Cir. 2012); Paul v. Marberry, 658 F.3d 702, 704 (7th Cir. 2011); O'Neal v. Price, 531 F.3d 1146, 1154-55 (9th Cir. 2008) (following *Day v. Maynard*, holding distinction between dismissals with and without prejudice is irrelevant to § 1915(g)); *accord*, Gould v. Owens, 2011 WL 3347907, *4 (M.D.Ga., July 6, 2011), *report and recommendation adopted*, 2011 WL 3328653 (M.D.Ga., Aug. 3, 2011); Nunn v. Thompson, 2010 WL 3829643, *1 (M.D.Ala., Sept. 29, 2010); Johnson v. Delgado, 2010 WL 2367389, *4-5 (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).

defendant's Rule 12(b)(6) motion is not; this holding is not supported by the statutory language.[1363] 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."[1364] Cases need not be about prison conditions for their dismissal to constitute a strike.[1365] An action consisting only of a preliminary injunction motion, with no complaint ever filed, is a strike if dismissed on the statutory grounds.[1366]

If the basis of a dismissal cannot be determined, the dismissal cannot be counted as a strike.[1367] Dismissals in state court are not strikes.[1368] Voluntary dismissal is not a strike.[1369]

[1363] 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 *sua 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). *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); Kitchen v. Peguese, 2005 WL 4827386, *5 (D.Md., November 23, 2005).

[1364] Vaughn v. Indiana Dept. of Corr., 2012 WL 5419130, *1 (7th Cir., Nov. 7, 2012) (unpublished) (holding cases where the district court certified that the plaintiff's appeals had not been taken in good faith are not strikes "because [the orders] did not dismiss the actions in their entirety"); Cohen v. Corrections Corp. of America, 2009 WL 3259124, *3 (N.D.Ohio, July 7, 2009) (noting that several such cases of plaintiff's are grants of summary judgment, which suggests that those complaints did state a claim and could not be disposed of on a motion to dismiss), *report and recommendation adopted in part*, 2009 WL 3259079 (N.D.Ohio, Oct. 7, 2009); Daniels v. Woodford, 2008 WL 2079010, *6, 8 (C.D.Cal., May 13, 2008) (holding determination that an appeal would not be taken in good faith is not a strike). Courts have held that a finding that an appeal would not be taken in good faith can "clarify" that a dismissal is frivolous. Sidney v. Fischer, 2011 WL 4478679, *2 (N.D.N.Y., Aug. 8, 2011), *report and recommendation adopted*, 2011 WL 4478556 (N.D.N.Y., Sept. 26, 2011)

[1365] Young-Bey v. Robinson, 2009 WL 3255698, *1 (D.D.C., Oct. 9, 2009).

[1366] Kotewa v. Corrections Corp. of America, 2010 WL 5156031, *2 (M.D.Tenn., Dec. 14, 2010). One court has held the denial of a preliminary injunction motion to be a strike even though the case was not dismissed. Cohen v. Growse, 2011 WL 947085, *2 (E.D.Ky., Mar. 14, 2011). That is clearly contrary to the language of § 1915(g), which refers to "action[s]" that are "dismissed."

[1367] Andrews v. King, 398 F.3d 1113, 1120 (9th Cir. 2005); Bontemps v. Sotak, 2013 WL 178210, *2 (E.D.Cal., Jan. 16, 2013); Deen-Mitchell v. Lappin, 2010 WL 2382568, *1 (D.D.C., June 8, 2010); Duckett v. District of Columbia, 2005 WL 3276284, *1 (D.D.C., July 29, 2005); Shaw v. Dodson, 2005 WL 2406154, *2 (S.D.Ga., Sept. 29, 2005); Freeman v. Lee, 30 F.Supp.2d 52, 54 (D.D.C. 1998).

[1368] Wheeler v. Ulisny, 482 Fed.Appx. 665, 668 (3d Cir. 2012) (unpublished); Ortiz v. Kelly, 2010 WL 3748436, *1 (D.Nev., Sept. 20, 2010); Elliott v. Beard, 2006 WL 4404771, *3 (W.D.Pa., Sept. 27, 2006) (holding state courts are not "courts of the United States" as the statute prescribes); Miller v. John Doe, 2005 WL 1308408, *1 (E.D.Wis., May 31, 2005); Freeman v. Lee, 30 F.Supp.2d 52, 54 (D.D.C. 1998). *Cf.* Johnson v. U.S., 82 Fed.Cl. 150, 153 n.4 (Fed.Cl. 2008) (Court of Federal Claims is a "court of the United States" for purposes of § 1915(g), though not for other purposes).

[1369] Tolbert v. Stevenson, 635 F.3d 646, 654 (4th Cir. 2011); Ball v. Famiglio, 2012 WL 727841, *1 n.1 (M.D.Pa., Mar. 6, 2012) ("Plaintiff may avoid [a strike] by moving for voluntary dismissal of any pending claim she fears is in danger of dismissal on the grounds that is frivolous, malicious, or fails to state a claim." (citing *Tolbert*)); Calderon v. Dickhaut, 2011 WL 3652766, *2 n.3 (D.Mass., Aug. 17, 2011); Bey v. Sullivan, 2011 WL 2413997, *3 n.5 (D.Mass., June 9, 2011); Rahmings v. Ellis, 2011 WL 971695, *2 (N.D.Fla., Mar. 16, 2011) (warning plaintiff to avoid strike by taking a voluntary dismissal); Hollis v. Downing, 2010 WL 5115196, *3 (E.D.Cal., Dec. 9, 2010), *report and recommendation adopted*, 2011 WL 590756 (E.D.Cal., Feb. 10, 2011); Daniels v. Woodford, 2008 WL 2079010, *5 (C.D.Cal., May 13, 2008); Voyles v. State of Alaska, 2005 WL 1172430, *3 n.39 (D.Alaska, May 11, 2005); *see* Muhammad v. Sisto, 2011 WL 2447975, *2 (E.D.Cal., June 20, 2011) (rejecting defendants' request to rule on their motion to revoke IFP for three strikes, despite request for voluntary dismissal, and to declare plaintiff a vexatious litigant; "While CDCR may wish to seek preclusive sanctions against plaintiff, it should do so in an action

The denial of a temporary restraining order is not a strike.[1370] Cases that were not filed while the plaintiff was a prisoner are not strikes.[1371] However, cases need not address prison conditions to be strikes.[1372] Cases dismissed because the court disallowed multiple plaintiffs' proceeding jointly are not strikes.[1373]

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in which plaintiff remains an active participant."). However, some courts have held that a prisoner who receives a magistrate judge's recommendation for dismissal cannot avoid a strike by dismissing voluntarily. *See* Kirby v. Outlaw, 2011 WL 4704202, *1 (E.D.Ark., Oct. 6, 2011) (plaintiff "may not litigate with zeal and then avoid the reach of the Act"); Williams v. Johnson State Prison, 2011 WL 2680770, *1 (S.D.Ga., July 8, 2011); Ashley v. Colohan, 2010 WL 322741, *1 (S.D.Ga., Jan. 27, 2010) (noting prisoner had declined earlier opportunity to dismiss); Grindling v. Hawaii, 2009 WL 4857399, *1-2 (D.Hawai'i, Dec. 16, 2009) (holding that the later-enacted PLRA trumps Rule 41(a), Fed.R.Civ.P.); Latson v. Johnson, 2009 WL 2824874, *2 (W.D.La., Sept. 2, 2009) ("the PLRA does not permit this type of gamesmanship"); Stone v. Smith, 2009 WL 368620, *1 (S.D.Ga., Feb. 13, 2009) (noting prisoner had declined earlier opportunity to dismiss); Wilson v. Freesemann, 2007 WL 2083827, *1 (S.D.Ga., July 13, 2007) (same); Johnson v. Edlow, 37 F. Supp. 2d 775, 776–78 (E.D. Va. 1999) (citing prior pattern of seeking voluntary dismissal after court and defendants have expended substantial resources on the case; dismissing as malicious); *see* Blaisdell v. Hawaii Dept. of Public Safety, 2012 WL 5996797, *3 (D.Haw., Nov. 30, 2012) (declining to allow voluntary dismissal where complaint had already been dismissed for failure to state a claim); *see also* Bloodworth v. Timmerman-Cooper, 2011 WL 1740031, *4 (S.D.Ohio, May 5, 2011) (agreeing generally that a strike cannot be avoided through voluntary dismissal after a magistrate judge's recommendation, but declining to reopen voluntary dismissal where dismissal had been sought because plaintiff was in segregation and unable to litigate); White v. Jones, 2010 WL 2162634, *2 (S.D.Ill., May 26, 2010) (voluntary dismissal after several claims had previously been dismissed on the merits was a strike). *But see* Palmer v. Salazar, 2010 WL 520516, *2 (N.D.Cal., Feb. 6, 2010) (voluntary dismissal, after dismissal without prejudice for failure to state a claim, in lieu of filing an amended complaint is not a strike); Williams v. Grannis, 2008 WL 4078664, *3-4 (E.D.Cal., Aug. 29, 2008) (same).

[1370] Ortiz v. Kelly, 2010 WL 3748436, *2 (D.Nev., Sept. 20, 2010).

[1371] Nali v. Caruso, 2008 WL 718155, *2 (E.D.Mich., Mar. 14, 2008).

[1372] DeBrew v. Atwood, 2010 WL 5055821, *2 (D.D.C., Dec. 6, 2010), *stay lifted*, 2011 WL 285874 (D.D.C., Jan. 28, 2011).

[1373] Bryant v. Wade, 2011 WL 1123400, *3 (M.D.Ga., Mar. 2, 2011), *report and recommendation adopted*, 2011 WL 1193208 (M.D.Ga., Mar. 30, 2011).

Most courts have held that a grant of summary judgment is not a strike.[1374] 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)."[1375] That is, "if a summary judgment order *states on its face* that the district court considered the statutory criteria for a strike to have been met, then the summary judgment dismissal should count as a strike."[1376] 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, *e.g.*, that they

> should "be considered [ ] 'strike[s]' for purposes of the 'three strikes' rule set forth in 28 U.S.C. § 1915(g)" because they are " 'frivolous, malicious, or fail [ ] to state a claim upon which relief may be granted[,]' . . . .[1377]

[1374] Cincoski v. Richard, 418 Fed.Appx. 571, 572 (8th Cir. 2011) (unpublished); Richardson v. Ray, 402 Fed.Appx. 775, 776 (4th Cir. 2010) (unpublished); Armenta v. Chatman, 371 Fed.Appx. 452, 454 n.3 (5th Cir. 2010) (unpublished), *cert. denied*, 131 S.Ct. 114 (2010); Thompson v. Drug Enforcement Admin., 492 F.3d 428, 438 (D.C.Cir. 2007); Stallings v. Kempker, 109 Fed.Appx. 832, 2004 WL 2165363, *1 (8th Cir. 2004) (unpublished); Sidney v. Fischer, 2011 WL 4478679, *3 (N.D.N.Y., Aug. 8, 2011), *report and recommendation adopted*, 2011 WL 4478556 (N.D.N.Y., Sept. 26, 2011); Martinez v. U.S., 812 F.Supp.2d 1052, 1057 (C.D.Cal. 2010); Ortiz v. Cox, 759 F.Supp.2d 1258, 1261-62 (D.Nev., 2011); Page v. Reynolds, 2008 WL 4427324, *1 n.* (D.S.C., Sept. 29, 2008) (citing Pressley v. Rutledge, 82 Fed.Appx. 857, 858, 2003 WL 22999339, *1 (4th Cir. 2003)); Daniels v. Woodford, 2008 WL 2079010, *6 (C.D.Cal., May 13, 2008); Chavis v. Curlee, 2008 WL 508694, *4 (N.D.N.Y., Feb. 21, 2008); Ramsey v. Goord, 2007 WL 1199573, *2 (W.D.N.Y., Apr. 19, 2007); Chappell v. Pliler, 2006 WL 3780914, *3 (E.D.Cal., Dec. 21, 2006) ("The granting of summary judgment on some claims precludes a determination that the case was dismissed for failure to state a claim on which relief could be granted."); Weber v. Gathers, 2006 WL 2796374, *3 (D.S.C., Sept. 26, 2006) (stating "an action proceeding to the summary judgment stage can rarely be characterized as 'frivolous, malicious, or fail[ing] to state a claim upon which relief may be granted" for purposes of 28 U.S.C. § 1915(g)'") (citation omitted); Johnson v. Sheahan, 2005 WL 2739183, *4 (N.D.Ill., Oct. 24, 2005); Barela v. Variz, 36 F.Supp.2d at 1259; Walker v. Kirschner, 1997 WL 698190, *2 (S.D.N.Y., Nov. 7, 1997). *Contra*, Cohen v. Growse, 2011 WL 947085, *2 (E.D.Ky., Mar. 14, 2011) (counting summary judgment dismissal as a strike); Dunkin v. Zulpo, 2010 WL 4921595, *1 (E.D.Ark., Nov. 29, 2010) (declaring summary judgment dismissal a strike); Krivec v. Roscoe, 2010 WL 3925989, *8-9 (D.Mont., Sept. 2, 2010) (holding summary judgment a strike where plaintiff's claims "when provided with the undisputed facts are frivolous"), *report and recommendation adopted*, 2010 WL 3909442 (D.Mont., Sept. 29, 2010); Blakely v. South Carolina, 2009 WL 4920371, *1 (D.S.C., Dec. 11, 2009) (assuming summary judgment dismissals are strikes); Appellate affirmance of a grant of summary judgment is not a strike. Armenta v. Chatman, 371 Fed.Appx. at 454 n.3.

[1375] Blakely v. Wards, 701 F.3d 995, 996 (4th Cir. 2012); *accord*, Davis v. Kakani, 2007 WL 2221402, *2 (E.D.Mich., July 31, 2007) (holding summary judgment can be a strike if the decision says no claim was stated).

[1376] *Blakely*, 701 F.3d at 1001 (emphasis supplied). Under this holding, district courts need not "'parse summary judgment orders and their supporting documents' to determine if the orders constituted strikes." *Id.*, 701 F.3d at 999 (quoting Tolbert, 635 F.3d 646, 653 n.7 (4th Cir. 2011)). **CHECK** The *Blakely* court distinguished 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*, 701 F.3d at 996-98.

[1377] *Blakely*, 701 F.3d at 999 (record citation omitted). The court cites as an example of a frivolous case dismissed on summary judgment a disability case in which the plaintiff was found not to be disabled, and stated: "Making an ADA claim without being disabled surely supports a frivolity determination and certainly supported the district

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 *in forma pauperis* status in the future.

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."[1378] Mere affirmance of the district court's dismissal is not a strike,[1379] nor is dismissal of the appeal on grounds not specified in the statute.[1380] Two strikes are charged if the district court dismissal is a strike and the appeals court also dismisses on the statutory grounds.[1381]

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court's decision that that dismissal counted as a strike." *Blakely*, 701 F.3d at 1000 n.2. On the contrary, determining what is a disability can be a highly technical determination, and making an ADA claim without being disabled may represent at most the blunder of a *pro se* litigant in understanding a statutory term.

[1378] 28 U.S.C. § 1915(g); *see* Andrews v. King, 398 F.3d 1113, 1120-21 (9th Cir. 2005) (holding that an appeal dismissed for lack of jurisdiction is not a strike); Newlin v. Helman, 123 F.3d 429, 433 (7th Cir. 1997), *cert. denied*, 522 U.S. 1054 (1998), *overruled in part on other grounds*, Walker v. O'Brien, 216 F.3d 626 (7th Cir. 2000), *cert. denied*, 531 U.S. 1029 (2000).

[1379] 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. Natrona County Detention Center, 175 F.3d 775, 780 (10th Cir. 1999); Patton v. Jefferson Correctional Center, 136 F.3d 458, 464 (5th Cir. 1998); 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); Whiteside v. Collins, 2011 WL 6934500, *2 (S.D.Ohio, Aug. 23, 2011), *report and recommendation adopted*, 2011 WL 6934495 (S.D.Ohio, Dec. 30, 2011); Soto v. Birkett, 2007 WL 3121606, *1-2 (E.D.Mich., Oct. 23, 2007); Barela v. Variz, 36 F. Supp. 2d 1254, 1258 (S.D. Cal. 1999) ("Insofar as an affirmance is not concerned with the merits of the appeal but is rather a finding of no error at the district court level, it should not count as a strike."); Freeman v. Lee, 30 F. Supp. 2d 52, 54 & n.3 (D.D.C. 1998) (holding that a circuit court's affirmation of a § 1915(g) dismissal does not count as second strike); *see also* Henderson v. Norris, 129 F.3d 481, 485 n.4 (8th Cir. 1997) (recognizing that appeals of claims found to be frivolous are not automatically also frivolous).

[1380] 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 affirmance 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).

[1381] Chavis v. Chappius, 618 F.3d 162, 168-69 (2d Cir. 2010) (citing cases); Ball v. Hummel, 2012 WL 3614045, *1 (M.D.Pa., Aug. 21, 2012).

Most courts have held that partial dismissal on the enumerated grounds is not a strike.[1382] One federal circuit held to the contrary, with little basis in my view.[1383] The result of this rule 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)

[1382] *See* 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); Jackson v. Fromm, 2012 WL 6853512, *2-3 (N.D.Fla., Dec. 27, 2012); 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 cannot possibly trigger 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). *Contra*, Williams v. Williams, 2012 WL 5289869, * ___ (N.D.Tex., Oct. 26, 2012); Bridgeforth v. U.S. Navy Recruitment Office, 2011 WL 5881780, *3 n.3 (N.D.N.Y., May 18, 2011), *report and recommendation adopted*, 2011 WL 5881778 (N.D.N.Y., Nov. 23, 2011) ; Wilson v. City of Meridian Police Dept., 2011 WL 3510942, *2 n.4 (S.D.Miss., May 24, 2011), *report and recommendation adopted*, 2011 WL 3510933 (S.D.Miss., Aug. 10, 2011); Eaker v. Burns, 2011 WL 304701, *1 (W.D.N.C., Jan. 28, 2011) (overruled by *Tolbert v. Stevenson*, *supra*); Davis v. Kakani, 2007 WL 2221402, *3 (E.D.Mich., July 31, 2007); Eady v. Lappin, 2007 WL 1531879, *2-3 (N.D.N.Y., May 22, 2007) (noting that only one strike can be assessed per case if there are separate dismissals of multiple claims); *see also* Rogers v. City of West Columbia, 2007 WL 2332465, *3 (D.S.C., Aug. 13, 2007) (treating dismissal of one of several defendants on immunity grounds as a strike).

One court has bootstrapped a partial dismissal on the enumerated grounds into a strike where several claims were found not to state a claim and the plaintiff was given leave to amend. The plaintiff did not amend and the case was later dismissed, and the later court held that since these events were set in motion because several claims failed to state a claim, the case was a strike. Palmer v. Woodford, 2010 WL 1135887, *3 (E.D.Cal., Mar. 22, 2010), *vacated on reconsideration on other grounds*, 2011 WL 3439286 (E.D.Cal., Aug. 5, 2011). This reasoning does not satisfy the statute's requirement that the *action* be dismissed as frivolous, malicious, or failing to state a claim. The same is true of *Johnson v. Delgado*, 2010 WL 2367389, *5 (S.D.Ill., June 11, 2010), which characterized as a strike a case where several claims were dismissed for not stating a claim, but other claims were settled, with no stipulation of dismissal for the case as a whole.

[1383] 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 receiving three strikes. George v. Smith, 507 F.3d 605, 607-08 (7th Cir. 2007).

grounds.[1384] 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)."[1385]

Two circuits have held that strikes should be assessed for partial dismissals under limited circumstances: "if a complaint is dismissed in part for failure 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."[1386] 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.[1387]

[1384] *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).

[1385] 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.

[1386] Pointer v. Wilkinson, 502 F.3d 369, 376 (6th Cir. 2007); *accord*, Thomas v. Parker, 672 F.3d 1184 (10th Cir. 2012). *Contra*, Turley v. Gaetz, 625 F.3d at 1009; Afeworki v. Hubert, 2008 WL 3243950, *1 (W.D.Wash., Aug. 5, 2008).

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* 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"); 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.")

[1387] Ellis v. Tilton, 2009 WL 89196, *2 (E.D.Cal., Jan. 12, 2009); Mendoza v. Mendoza-Powers, 2008 WL 4642926, *2 (E.D.Cal., Oct. 20, 2008). Another district court has recently held the same (but without the requirement of a warning). *See* West v. Hallet, 2011 WL 3273565, *1 (E.D.Wis., July 29, 2011). *West* cited *George v. Smith*, 507 F.3d 605, 607-08 (7th Cir. 2007) for that proposition. *George* did not so hold, and the cited portion of *George* has been overruled in any case. *See* n. 1385, above.

A dismissal in a habeas corpus action is not a strike.[1388] 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" actions), count as strikes,[1389] though decisions are not unanimous.[1390] Dismissal of a mandamus petition can be a strike if the mandamus claim is analogous to prison conditions claims under § 1983.[1391] 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,

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[1388] 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."

At least one court has disagreed with this result, observing that the fact that § 1915(g) doesn't bar habeas corpus actions does not necessarily mean that habeas dismissals cannot be counted as strikes for purposes of future civil actions. The court points out the contrast in § 1915(g) between the bar on bringing "a civil action or appeal" by litigants with three strikes, and the description of a strike as "an action or appeal," and suggests that the omission of "civil" from the latter phrase means that habeas dismissals should be counted. Jones v. Smith, 2011 WL 7073689, *5-7 (N.D.N.Y., Dec. 6, 2011), *report and recommendation adopted*, 2012 WL 177971 (N.D.N.Y., Jan. 23, 2012).

[1389] *See* In re Jones, 652 F.3d 36, 38-39 (D.C.Cir. 2011) (per curiam) (holding *Heck*-barred claim fails to state a claim and is therefore a strike); Smith v. Veterans Admin., 636 F.3d 1306, 1312 (10th Cir. 2011) (citing Davis v. Kan. Dep't of Corr., 507 F.3d 1246, 1248, 1249 (10th Cir. 2007)), *cert. denied*, 132 S.Ct. 381 (2011); Ridge v. Larson, 2012 WL 4328341, *5 (D.Mont., Aug. 6, 2012); Berner v. Hill, 2012 WL 726830, *2 (W.D.Mich., Mar. 6, 2012); Ransom v. Martinez, 2011 WL 867069, *1 (E.D.Cal., Mar. 10, 2011) ("A dismissal pursuant to *Heck* is a dismissal because Plaintiff's claims are not cognizable, which is a dismissal for 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."), *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); *see also* Hamilton v. Lyons, 74 F.3d 99, 103 (5th Cir. 1996) (holding *Heck*-barred claim frivolous).

At least one court has implied that a dismissal under the abstention doctrine of *Younger v. Harris* is a strike. Liner v. Fischer, 2012 WL 2847910, *3 (S.D.N.Y., July 11, 2012) (citing multiple bases for dismissal, including *Younger*, in finding a strike), *report and recommendation adopted*, 2012 WL 4849130 (S.D.N.Y., Oct. 12, 2012).

[1390] *See* McCotter v. Repischak, 2012 WL 2160821, *3 (E.D.Wis., June 13, 2012) (holding "because the plaintiff may pursue a separate petition for a writ of habeas corpus, . . . the plaintiff will not incur a strike under 28 U.S.C. § 1915(g)"); Howard v. Nelson, 2007 WL 5595944, *3 (W.D.Wis., June 20, 2007) ("Because failure to choose the correct procedural vehicle for raising a claim is not one of the enumerated grounds, a strike will not be recorded against petitioner under § 1915(g)."); Whitfield v. Lawrence Correctional Center, 2008 WL 3874718, *3-4 (S.D.Ill., Aug. 18, 2008), *reconsideration denied*, 2008 WL 4185937 (S.D.Ill., Sept. 8, 2008); Rogers v. Wisconsin Dept. of Corrections, 2005 WL 300291, *3 (W.D.Wis., Feb. 3, 2005) (holding that dismissal of a § 1983 action that should have been filed as a habeas petition is not a strike because "dismissal . . . for failure to use the proper avenue for relief" is not a ground listed in the statute.). *See* Patton v. Jefferson Corr. Ctr., 136 F.3d 458, 464 (5th Cir. 1998) (holding that § 1983 actions that should have been filed as habeas petitions but would have been frivolous as such were strikes).

[1391] 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. *See* n. 55, above.

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.[1392]

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.[1393] 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,[1394] but courts are now reluctant to do for several PLRA-related reasons, including the concern that prisoners not end up being charged a strike without the chance to think it over before proceeding.[1395] A motion filed in an already filed case is not a strike.[1396]

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.[1397] That means dismissal for non-exhaustion should generally not be a strike.[1398] Some courts have held that a dismissal

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[1392] 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); *see* McLean v. U.S., 566 F.3d 391, 396-99 (4th Cir. 2009).

[1393] 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. *See* 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).

[1394] *See* Carson v. Johnson, 112 F.3d 818, 819 (5th Cir. 1997) (construing habeas corpus petition as a § 1983 case).

[1395] Pischke v. Litscher, 178 F.3d 497, 500 (7th Cir. 1999) (dismissing habeas corpus actions and indicating plaintiffs may refile complaints as civil rights claims), *cert. denied*, 528 U.S. 954 (1999); *accord*, Robinson v. Sherrod, 631 F.3d 839, 841 (7th Cir. 2011), *cert. denied*, 132 S.Ct. 397 (2011); Lugo v. Gill, 2012 WL 5499864, * __ (E.D.Cal., Nov. 13, 2012); Thomas v. Valenzuela, 2012 WL 2428215, *1 (C.D.Cal., June 26, 2012); Armstrong v. Thomas, 2012 WL 1118637, *3-4 (C.D.Cal., Mar. 1, 2012), *report and recommendation adopted*, 2012 WL 1118630 (C.D.Cal., Apr. 2, 2012); Herrera v. Sanders, 2012 WL 424378, *2 (C.D.Cal., Feb. 8, 2012), *appeal dismissed*, No. 12-55372 (9th Cir., June 21, 2012); Cheatom v. Grounds, 2011 WL 3555775, *1 (N.D.Cal., Aug. 11, 2011); Raia v. Aviles, 2011 WL 2710275, *2 n.3 (D.N.J., July 6, 2011); Brock v. White, 2011 WL 1565188, *4 (E.D.Mich., Apr. 25, 2011); Flores v. Jacquez, 2010 WL 3294122, *2 (N.D.Cal., Aug. 17, 2010); Williams v. Zuercher, 2010 WL 420066, *4 (E.D.Ky., Feb. 1, 2010); Brown v. Woodring, 2009 WL 4040067, *3 (C.D.Cal., Nov. 17, 2009) (citing PLRA filing fee and initial screening requirements, three strikes provision, and fact that plaintiff did not seem to have exhausted administrative remedies as reasons not to convert habeas to § 1983 action); Underwood v. Schultz, 2009 WL 2982633, *3 n.2 (D.N.J., Sept. 8, 2009); Isreal v. Hedgpeth, 2009 WL 2612374, *1 (N.D.Cal., Aug. 24, 2009); Toolasprashad v. Grondolsky, 570 F.Supp.2d 610, 630 n. 28 (D.N.J.2008). *But see* Alpine v. Thaler, 2012 WL 3756607, *2 (S.D.Tex., Aug. 28, 2012) (where three-strike plaintiff admitted he filed habeas petition to avoid the filing fee, treating petition as a § 1983 action, dismissing as frivolous, and charging the filing fee as a sanction).

[1396] Belton v. U.S., 2008 WL 2273272, *10 (E.D.Wis., June 2, 2008) (motion under Rule 60(b) is not a strike; statute "does not apply to motions, only 'actions' or 'appeals'").

[1397] 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).

[1398] 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. Melindez, 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.

for non-exhaustion is a strike because it seeks "relief to which [the plaintiff] is not entitled" and is therefore is frivolous.[1399] I think that is 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.[1400] 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."[1401]

Whitman, 2009 WL 857604, *12-13 (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).

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 *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). Nonetheless, some decisions continue to assert that non-exhaustion dismissals are strikes, often in unexamined reliance on *Rivera*. *See, e.g.*, Medrano v. Thaler, 2012 WL 3308113, *7 (E.D.Tex., Aug. 10, 2012) ("Dismissal for failure to exhaust before filing a lawsuit is in effect a dismissal for failure to state a claim upon which relief may be granted."); D'Angelo v. Schofield, 2012 WL 1300819, *2 (M.D.Ga., Apr. 16, 2012) (citing *Rivera*); Gould v. Hembrick, 2011 WL 1671814, *3 (M.D.Ga., Mar. 29, 2011) (dictum), *report and recommendation adopted*, 2011 WL 1670929 (M.D.Ga., May 3, 2011); Hogan v. Georgia State Prison, 2011 WL 841182, *1 (S.D.Ga., Feb. 16, 2011), *report and recommendation adopted*, 2011 WL 841173 (S.D.Ga., Mar. 8, 2011); Moss v. Bottom, 2010 WL 3455879, *1 (M.D.Ga., Aug. 26, 2010); Garland v. Broward County Courthouse, 2009 WL 3497078, *2 (S.D.Fla., Oct. 27, 2009); Crane v. Hatton, 2009 WL 3112077, *2 (N.D.Cal., Sept. 23, 2009); Martin v. Hall, 2009 WL 2606081, *2 (M.D.Ga., Aug. 20, 2009); Rivera v. McNeil, 2009 WL 1154118, *3 (S.D.Fla., Apr. 24, 2009).

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).

[1399] *See, e.g.*, Wallmark v. Johnson, 2003 WL 21488141, *1 (N.D. Tex., Apr. 28, 2003). Similarly, some courts have held that a case dismissed under the *Rooker-Feldman* doctrine was properly dismissed for lack of subject matter jurisdiction and was frivolous, and therefore a strike. Greer v. Household Finance Corp., 2010 WL 2680677, *2 (W.D.Mich., June 3, 2010) (citing cases), *report and recommendation adopted*, 2010 WL 2680710 (W.D.Mich., July 6, 2010).**CONSIDER WHETHER MORE MATERIAL IN THESE NOTES SHOULD GO IN THE TEXT**

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 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.

[1400] 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).

[1401] Tafari v. Hues, 473 F.3d 440, 443 (2d Cir. 2007).

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.[1402]

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.[1403] The usual rule that the basis for dismissals will not be re-examined in later litigation about strikes[1404] presumably should not apply when the legal basis of the dismissal has been completely undermined. However, one recent decision has treated 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 counted as strikes.[1405] This application of retroactivity doctrine, while perhaps technically correct in its own terms, seems misplaced since it yields a result that is contrary to the plain terms of the statute as authoritatively interpreted by the Supreme Court.

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[1406]—a result with little evident basis in statutory language or logic.[1407] In a class action, only the named plaintiffs are subject to the three strikes provision.[1408]

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*.

[1402] Presumably the converse is also true. *See* 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 grieve 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).

[1403] 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* (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).

[1404] *See* n. 1420, below.

[1405] Strope v. Cummings, 653 F.3d 1271, 1274-75 (10th Cir. 2011).

[1406] 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 a Seventh Circuit opinion remanding the case, and expresses hope that the court of appeals will clarify the matter. *See* 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).

[1407] *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

Where a prisoner files multiple cases which are consolidated and dismissed together, each case is counted as a separate strike.[1409]

The Second Circuit has held persuasively 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*.[1410] However, the practice is widespread of declaring a strike when an action or an appeal is dismissed,[1411] even in the circuits that have held to the contrary.[1412]

Most circuits have held that a dismissal should not count against a petitioner until he has exhausted or waived his appeals.[1413] Otherwise, a prisoner who received a third strike in the

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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.

[1408] Meisberger v. Donahue, 245 F.R.D. 627, 630 (S.D.Ind. 2007).

[1409] Palmer v. New York State Dep't of Correctional Services, 342 Fed. Appx. 654, 655-56 (2d Cir. 2009) (unpublished); Southerland v. Patterson, 2012 WL 208105, *1 n.1 (S.D.N.Y., Jan. 23, 2012); Walton v. Alston, 2011 WL 873245, *2-3 (S.D.N.Y., Feb. 15, 2011), *report and recommendation adopted*, 2011 WL 891205 (S.D.N.Y., Mar. 11, 2011), *adhered to*, 2011 WL 1045933 (S.D.N.Y., Mar. 21, 2011). *Walton* acknowledged that "[t]here is little doubt that this rule penalizes *pro se* litigants for their ignorance of the Federal Rules of Civil Procedure." 2011 WL 873245, *3.

[1410] Deleon v. Doe, 361 F.3d 93, 95 (2d Cir. 2004); *accord*, 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); 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 Lucien has an action before 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).

[1411] *See, e.g.*, Williams v. Dretke, 306 Fed.Appx. 164, 167 (5th Cir. 2009); Hill v. Cockrell, 71 Fed.Appx. 390, 2003 WL 21976270 (5th Cir. 2003) (declaring two strikes); Rainey v. Bruce, 74 Fed.Appx. 8, 2003 WL 21907609 (10th Cir. 2003) (declaring two strikes); Downey v. Johnson, 2009 WL 150667, *2 (E.D.Va., Jan. 21, 2009), *aff'd*, 326 Fed.Appx. 131 (4th Cir. 2009); Criddell v. Belcher, 2009 WL 188481, *2 (C.D.Ill., Jan. 27, 2009) ("The clerk of the court is directed to record the plaintiff's strike in the three-strike log. . . ."); Wilson v. Smart, 2009 WL 117612, *2 (W.D.Mich., Jan. 9, 2009); D'Angelo v. Kiles, 2009 WL 86697, *2 (S.D.Ga., Jan. 13, 2009); Sharp v. Geo Group, Inc., 2009 WL 89640, *2 (W.D.Okla., Jan. 13, 2009).

[1412] Ring v. Knecht, 130 Fed.Appx. 51, 52 (7th Cir. 2005) (declaring dismissal and appellate affirmance to be two strikes and the plaintiff to have "struck out"), *cert. denied*, 546 U.S. 1184 (2006); Paulson v. Snohomish County, 2010 WL 5129835, *1 (W.D.Wash., Dec. 10, 2010) (declaring dismissal a strike at defendants' request); White v. Benton, 2010 WL 3515555, *2 (S.D.Ill., Aug. 31, 2010); Smith v. Milwaukee Secure Detention Facility, 2010 WL 684997, *3 (E.D.Wis., Feb. 22, 2010), *reconsideration denied*, 2010 WL 960012 (E.D.Wis., Mar. 12, 2010); Wilson v. Perkinson, 2009 WL 161192, *3 (E.D.Cal., Jan. 22, 2009) (directing clerk to enter strike in the docket); Little v. Behner, 2008 WL 5459780, *3 (W.D.Wash., Dec. 8, 2008); Lawrence v. Mahoney, 2008 WL 5416381, *2 (D.Mont., June 11, 2008); Porter v. Gummerson, 2007 WL 446026, *4-5 (N.D.N.Y., Feb. 8, 2007) (granting motion to deem this case a strike).

[1413] Henslee v. Keller, 681 F.3d 538, 541 (4th Cir. 2012) (citing cases); Jordan v. Cicchi, 428 Fed.Appx. 195, 198 n.2 (3d Cir. 2011) (unpublished); Campbell v. Davenport Police Dept., 471 F.3d 952, 953 (8th Cir. 2006); Thompson v. Drug Enforcement Admin., 492 F.3d 428, 440 (D.C.Cir. 2007); Jennings v. Natrona County Detention Center, 175 F.3d at 780 n. 3; Adepegba v. Hammons, 103 F.3d 383, 387 (5th Cir. 1996). More specifically, courts

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.[1414] 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.[1415] This hyper-technical rule, while satisfying the court's concern with formal compliance with the statute, will create a technical trap for uncounselled and unsophisticated litigants while serving no actual useful purpose for the judicial system. If a finding of frivolousness is reversed on appeal, the strike is eliminated.[1416]

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have said that "a strike counts against a prisoner from the date of the Supreme Court's denial or dismissal of a petition for writ of certiorari, if the prisoner filed one, or from the date when the time to file a petition for writ of certiorari expired, if he did not. And if the prisoner did not file a direct appeal in a circuit court, a district court's dismissal counts as a strike from the date when his time to file a direct appeal expired." Hafed v. Federal Bureau of Prisons, 635 F.3d 1172, 1175 (10th Cir. 2011); *accord*, Silva v. Di Vittorio, 658 F.3d 1090, 1098-1100 (9th Cir. 2011); Henry v. Davis, 2011 WL 2436916, *1-2 (S.D.N.Y., June 6, 2011). *Contra*, Harris v. Croft, 2012 WL 2884800, *1 (S.D.Ohio, July 13, 2012) (holding case still pending on appeal is a strike); Simpson v. Prison Health Services, Inc., 2010 WL 425157, *4 (W.D.Mich., Jan. 27, 2010) (dictum); Simpson v. Pramstaller, 2010 WL 204146, *3-4 (W.D.Mich., Jan. 15, 2010) (dictum).

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); K'napp v. Arlitz, 2011 WL 4983628, *2 (E.D.Cal., Oct. 19, 2011); *see also* Kellat v. Jackson, 2013 WL 461044, *1 (S.D.Ga., 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).

[1414] 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, 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, *___ (D.C.Cir., Nov. 21, 2008).

[1415] 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).

[1416] *Jennings*, 175 F.3d at 780; *Adepegba*, 103 F.3d at 387.

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 *sua sponte* by the court.[1417] Once a *prima facie* case has been made that the prisoner has three strikes, the burden shifts to the prisoner to show otherwise.[1418] 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).[1419] Plaintiffs may not revisit the correctness of prior dismissals for purposes of § 1915(g).[1420] 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.[1421] 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*.[1422] Similarly, many

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[1417] 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).

[1418] 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 connectiion 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).

[1419] 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).

[1420] Casey v. Scott, 2012 WL 5328306, *1 (11th Cir., Oct. 30, 2012) (unpublished) ("Plaintiffs are bound by the judgments in their prior cases, and may not dispute their merits in order to challenge a 'three-strikes' determination."); D'Angelo v. Schofield, 2012 WL 1300819, *2 (M.D.Ga., Apr. 16, 2012) ("Plaintiff should have addressed any alleged 'errors' in these cases by appealing the cases themselves."); Childress v. Ray, 2011 WL 3568672, *2 (E.D.Mich., Aug. 15, 2011); Price v. Cunningham, 2011 WL 864677, *3 (E.D.Cal., Mar. 10, 2011) (counting case dismissed as *Heck*-barred as a strike even though the dismissal was probably erroneous), *report and recommendation adopted*, 2011 WL 2110761 (E.D.Cal., May 25, 2011); Granillo v. Corrections Corp. of America, 2010 WL 1250734, *2 (D.Ariz., Mar. 24, 2010), *reconsideration denied*, 2010 WL 4054132 (D.Ariz., Oct. 15, 2010); Brown v. Gallegos, 2008 WL 782533, *1 (N.D.Cal., Mar. 24, 2008); Hawthorne v. Caruso, 2007 WL 2710106, *2 (E.D.Mich., Sept. 13, 2007); Oluwa v. Bliesner, 2007 WL 2457510, *1 (N.D.Cal., Aug. 27, 2007); *see* Scarver v. Litscher, 2008 WL 4962676, *1 (W.D.Wis., Nov. 19, 2008) (where plaintiff argued that eight-year-old strike should be removed because the claims were subsequently recognized in other litigation as possibly meritorious, court held that Rule 60(b) motion must be brought in a "reasonable time" and eight years was not that).

[1421] *See* n. 1410, above.

[1422] *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. 1420, above.

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*.[1423]

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.[1424] 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.[1425] 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.[1426]

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.[1427] 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.[1428] 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

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[1423] *See* nn. 1383-1385, above; *see also* Whitfield v. Walker, 438 Fed.Appx. 501, 502 (7th Cir. 2011) (unpublished) (noting court recalled mandate and reinstated appeal in case where it had denied IFP status under now-overruled law); Rowe v. Morton, 2011 WL 1740169, *1 (N.D.Ind., May 4, 2011) (noting that two of plaintiff's strikes were "*George* strikes," no longer valid under *Turley*).

[1424] Nicholas v. American Detective Agency, 254 Fed.Appx. 116, 117 (3d Cir. 2007) (unpublished); Mills v. White, 2006 WL 1458312, *1 (8th Cir., May 30, 2006) (unpublished); Brown v. Timmerman-Cooper, 2011 WL 1429078, *1-3 (S.D.Ohio, Apr. 14, 2011), *report and recommendation adopted*, 2011 WL 1740706 (S.D.Ohio, May 4, 2011); Wilson v. Director of Div. of Adult Institutions, 2009 WL 311150, *3 (E.D.Cal., Feb. 9, 2009); Cruz v. Marcial, 2002 WL 655520 (D.Conn., Apr. 18, 2002). *Contra*, McGrew v. Barr, 2011 WL 1107195, *2-3 (M.D.La., Mar. 22, 2011) (citing goals of the statute but not addressing its actual language); Nichols v. Rich, 2004 WL 743938, *2 (N.D.Tex., Apr. 7, 2004) (same), *report and recommendation adopted*, 2004 WL 1119689 (N.D.Tex., May 18, 2004).

[1425] 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. 6, 433 above.

[1426] 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).

[1427] *See, e.g.*, Whiteside v. Collins, 2011 WL 6934500, *1 (S.D.Ohio, Aug. 23, 2011), *report and recommendation adopted*, 2011 WL 6934495 (S.D.Ohio, Dec. 30, 2011); Guarneri v. Wood, 2011 WL 4592209, *8 (N.D.N.Y., Sept. 2, 2011) ("When a court becomes aware of three prior strikes only after granting IFP status, it is appropriate to revoke that status and bar the complaint under § 1915(g)." (citing McFadden v. Parpan, 16 F.Supp.2d 246, 247 (E.D.N.Y.1998))), *report and recommendation adopted*, 2011 WL 4594149 (N.D.N.Y., Sept. 30, 2011); Ransom v. Martinez, 2011 WL 573823 (E.D.Cal., Feb. 11, 2011), *reconsideration denied*, 2011 WL 4762122 (E.D.Cal., Sept. 29, 2011); Walton v. Alston, 2011 WL 873245, *1 (S.D.N.Y., Feb. 15, 2011), *report and recommendation adopted*, 2011 WL 891205 (S.D.N.Y., Mar. 11, 2011), *adhered to*, 2011 WL 1045933 (S.D.N.Y., Mar. 21, 2011); Pellegrino v. Weber, 2010 WL 5249832, *4 (D.S.D., Sept. 27, 2010), *report and recommendation adopted*, 2010 WL 5248739 (D.S.D., Dec. 16, 2010).

[1428] Conseillant v. Worle, 2013 WL 164242, *6-7 (W.D.N.Y., Jan. 15, 2013) (dismissing claims with prejudice because of nondisclosure).

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.[1429]

On appeal, the determination whether a prior decision is a strike is made *de novo*.[1430] 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."[1431] However, another has held, rather self-defeatingly, that federal law does *not* require district courts to specify the dispositions on which its three-strikes finding rests, while noting that the failure to do so may remand for further proceedings if the plaintiff disputes the existence of three strikes.[1432]

Ordinarily, the denial of *in forma pauperis* status is immediately appealable under the collateral order doctrine.[1433] 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.[1434]

3. Actions Removed from State Courts

Removal from state to federal court[1435] 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 that situation.[1436] 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."[1437]

[1429] Wright v. Kupczyk, 2011 WL 167258, *2 (N.D.Ill., Jan. 18, 2011). In fact, the 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.

[1430] Taylor v. First Medical Management, 2012 WL 6554645, *2 n.3 (6th Cir., December 14, 2012) (citing cases). **BREAK SOME OF THESE CASES OUT**

[1431] 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).

[1432] Gibson v. City Municipality of New York, 692 F.3d 198, 200 n.2 (2d Cir. 2012).

[1433] Roberts v. U.S. Dist. Court, 339 U.S. 844, 845 (1950); Andrews v. Cervantes, 493 F.3d 1047, 1052 (9th Cir. 2007).

[1434] Burnett v. Miller, 2013 WL 151195, *1 (10th Cir., Jan. 15, 2013) (unpublished).

[1435] 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.

[1436] *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). *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).

[1437] Hollis v. Downing, 2010 WL 5115196, *3 (E.D.Cal., Dec. 9, 2010), *report and recommendation adopted*, 2011 WL 590756 (E.D.Cal., Feb. 10, 2011). A state court is not a "court of the United States." *See* cases cited in n. 1368, 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 *under this section*," *i.e.*, litigants who invoked the federal *in forma pauperis* provisions when the case was "brought."[1438] A case brought in state court is not subject to those provisions, but rather to the state court's rules, which may or may not parallel federal rules.[1439] When an action is removed, it is the defendants, not the plaintiff, who are responsible for paying the filing fee.[1440]

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.[1441] This view seems

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[1438] 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 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).

Carrea v. California, 2010 WL 3984832, *8 (C.D.Cal., Aug. 25, 2010), *report and recommendation adopted*, 2010 WL 3985820 (C.D.Cal., Oct. 5, 2010), *order vacated* (Dec. 13, 2010).

[1439] *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).

[1440] 28 U.S.C. § 1914(a) ("The clerk of each district court shall require the parties instituting any civil action, suit or proceeding in such court, whether by original process, removal or otherwise, to pay a filing fee of $350. . . ."); *see* Ransom v. Aguirre, 2013 WL 398903, *1 n.1 (E.D.Cal., Jan. 31, 2013) (holding three-striker's status is not relevant where defendants removed and paid the fee); Jones v. Ozmit, 2012 WL 602643, *1 n.1 (D.S.C., Jan. 31, 2012) (noting defendants paid three-striker's filing fee in removed case), *report and recommendation adopted*, 2012 WL 602639 (D.S.C., Feb. 23, 2012), *appeal dismissed*, No. 12-6429 (4th Cir., Apr. 16, 2012); Hairston v. Blackburn, 2010 WL 145793, *1 (S.D.Ill., Jan. 12, 2010). *But see* Crooker v. U.S., 2011 WL 1375613, *2 n.7 (D.Mass., Apr. 12, 2011) (citing earlier order requiring plaintiff to pay filing fee in removed action; characterizing this as a sanction). *Cf.* Carrea v. Iserman, 2011 WL 1233111, *2 (E.D.Cal., Mar. 31, 2011) (court purports to revoke IFP status in removed case, acknowledging doing so will have little immediate effect since defendant paid the fee), *reconsideration denied*, 2011 WL 4527407 (E.D.Cal., Sept. 27, 2011).

[1441] Crooker v. Burns, 544 F.Supp.2d 59, 62 (D.Mass., Apr. 10, 2008) (citing prior unpublished opinion). This litigant has been directed in some cases to show good cause why he should not be required to pay the removal fee (a requirement not authorized in the relevant statutes), or to show cause why his statements should not be regarded "as probative evidence of Crooker's lack of a bona fide intent to prosecute his eight civil actions at the time he filed those actions in the state courts, and as evidence of a manipulative attempt to circumvent" the three strikes provision warranting "severe sanctions." Crooker v. Burns, 2010 WL 3781877, *4-5 (D.Mass., Sept. 21, 2010). Most recently, the court has simply applied § 1915(g) to one of his removed cases, dismissing subject to reinstatment upon paying the filing fee—notwithstanding the statutory requirement that the removing *defendant* pay the fee. Crooker v. Global Tel Link, 2012 WL 651644, *2 (D.R.I., Jan. 6, 2012), *report and recommendation adopted*, Crooker v. Global Tel Link, 2012 WL 651641 (D.R.I., Feb. 28, 2012), *appeal dismissed*, No. 12-1318 (1st Cir., June 14, 2012); *accord*, Riggins v. Corizon Medical Services, 2012 WL 5471248, *2 (S.D.Ala., Oct. 19, 2012) (stating "not to apply the 'three-strikes' rule to Plaintiff's removed state court action would allow Plaintiff to accomplish an

unwarranted. Indeed, one federal appeals court has explicitly 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).[1442] 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.[1443]

Some courts have held that the 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 right of court access and to appeal, but depriving the defendants of their statutory right to remove.[1444] 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.[1445] (These decisions do not resolve whether the district court can simply dismiss the properly removed case or must entertain it.[1446]) Some courts have held that it is appropriate to

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end-run around the 'three-strikes' rule by filing in state court and hoping, perhaps, for removal of his action to this Court"), *report and recommendation adopted*, 2012 WL 5470892 (S.D.Ala., Nov. 9, 2012). *Cf.* Willis v. Brown, 2012 WL 6016834, *1 (S.D.Ga., Dec. 3, 2012) (acknowledging that removed case cannot be dismissed based on three strikes provision, but dismissing because the plaintiff misrepresented his prior litigation to the *state* court), *report and recommendation adopted*, 2012 WL 6553919 (S.D.Ga., Dec. 14, 2012).

[1442] Abdul-Akbar v. McKelvie, 239 F.3d 307, 314-15 (3d Cir. 2001). The court is correct in at least some cases about state IFP rules. *See* Crooker v. U.S., 2009 WL 6366792, *4-5 (W.D.Pa., Nov. 20, 2009) (noting lack of three strikes rule in Pennsylvania law); Lakes v. State, 333 S.C. 382, 387, 510 S.E.2d 228, 231 (S.C. Ct. App. 1998) (holding prisoner could proceed IFP, since South Carolina has no analogy to PLRA's three strikes provision).

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.

[1443] Jones v. Bock, 549 U.S. 199, 212-16, 220-24 (2007); *see* Miller v. Donald, 541 F.3d 1091, 1099 (11th Cir. 2008) (applying *Jones* prohibition on judicial supplementation of PLRA to three strikes provision).

[1444] Bartelli v. Pa Dept. of Corrections, 2011 WL 470370, *3 (W.D.Pa., Jan. 19, 2011), *report and recommendation adopted*, 2011 WL 474339 (W.D.Pa., Feb. 4, 2011); Bartelli v. Beard, 2008 WL 4363645, *2 (M.D.Pa., Sept. 24, 2008).

[1445] Lloyd v. Benton, 686 F.3d 1225, 1227-28 (11th Cir. 2012); Lisenby v. Lear, 674 F.3d 259, 262-63 (4th Cir. 2012); *accord*, Pickett v. Hardy, 2010 WL 4103712, *2-3 (C.D.Ill., Oct. 18, 2010) (denying motion to reconsider removal to federal court); Lanier v. Holiday, 2005 WL 1513106, *2-3 (W.D.Tenn. June 16, 2005) (acknowledging defendants' "absolute" right to remove a § 1983 case; screening removed complaint under 28 U.S.C. § 1915A).

[1446] 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*).

require a litigant with three strikes to put up security for costs,[1447] but at least one recent appellate decision has rejected that proposition.[1448]

4. The Imminent Danger Exception

A prisoner who is in "imminent danger of serious physical injury" may proceed *in forma pauperis* notwithstanding the three strikes provision.[1449] "Imminent danger" has been said to exist "[w]hen a threat or prison condition is real and proximate."[1450] The danger must exist at the time the complaint is filed.[1451] Past danger does not constitute imminent danger unless there is reason to believe it will recur imminently.[1452] Allegations of recent or ongoing physical abuse

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[1447] Carrea v. Iserman, 2011 WL 1233111, *2, 6 (E.D.Cal., Mar. 31, 2011) (determining plaintiff is a vexatious litigant under state law, requiring a $2500 bond within 20 days on pain of dismissal), *reconsideration denied*, 2011 WL 4527407 (E.D.Cal., Sept. 27, 2011); Gay v. Chandra, 2011 WL 884127, *1-3 (S.D.Ill., Mar. 11, 2011) (acknowledging lack of statutory authorization, claiming inherent power to impose $1000 bond requirement based on plaintiff's past failure to pay obligations), *reconsideration denied*, 2011 WL 1752235 (S.D.Ill., May 6, 2011); Pickett v. Hardy, 2010 WL 4103712, *1, 3 (citing "history of filing frivolous lawsuits and ignoring court orders," not limited to having three strikes).

[1448] Gay v. Chandra, 682 F.3d 590, 593-94 (7th Cir. 2012) (ordering a bond the plaintiff cannot pay is an abuse of discretion; the purpose of a bond is to conserve the plaintiff's assets to pay costs if he loses, not to sanction the plaintiff).

[1449] 28 U.S.C. § 1915(g).

In *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.

[1450] 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), *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).

[1451] 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), *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. Vasbinder, 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).

[1452] 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"); 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 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)

and/or threats have been held sufficient by most courts, though not all.[1453] 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.[1454] Other actions by prison officials may also negate imminent danger.[1455] The risk of future injury can be sufficient to invoke the imminent danger exception,[1456] though many such claims have been rejected as not imminent enough, or as too speculative.[1457] Conditions that are long-standing may be held not to constitute imminent

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(rejecting argument that plaintiffs' claim of deprivation of medication pre-dated complaint, reading plaintiff's papers liberally and finding evidence of imminent harm).

[1453] *Compare* Mendez v. Arizona Dept. of Corrections, 478 Fed.Appx. 437 (9th Cir. 2012) (unpublished) (allegation of recent brutal beating and threats of death if plaintiff sought legal redress met the imminent danger standard); Tucker v. Pentrich, 483 Fed.Appx. 28, 29-30 (6th Cir. 2012) (unpublished) (holding allegations of five explicit threats related to complaints about previous physical abuse met the imminent danger standard); Smith v. Clemons, 465 Fed.Appx. 835, 837 (11th Cir. 2012) (unpublished) (holding incident of physical abuse followed by threats of more from same officers satisfied imminent danger standard); Prall v. Bocchini, 421 Fed.Appx. 143, 145 (3d Cir. 2011) (holding allegation of physical abuse "at least once a week" clearly stated an ongoing danger that was imminent when the complaint was filed); Chavis v. Chappius, 618 F.3d 162, 170 (2d Cir. 2010) ("An allegation of a recent brutal beating, combined with three separate threatening incidents, some of which involved officers who purportedly participated in that beating, is clearly the sort of ongoing pattern of acts that satisfies the imminent danger exception."); Ford v. Godinez, 2013 WL 210846, *1-2 (S.D.Ill., Jan. 18, 2013) (holding allegations of physical abuse by staff, followed by more abuse and threats after he complained about it, established imminent danger); Claiborne v. Blauser, 2011 WL 2559443, *3 (E.D.Cal., June 27, 2011) (allegation of policy and practice that led to a beating satisfied imminent danger standard; multiple beatings not required) *with* Calton v. Wright, 2012 WL 3135675, *2, 5-6 (E.D.Tex., Aug. 1, 2012) (allegation of continued proximity to guards who had allegedly beaten the plaintiff four times in 13 months did not show imminent danger because incidents were past), *appeal dismissed*, No. 12-40901 (5th Cir., Sept. 11, 2012); Davis v. Flagg, 2011 WL 3207742, *1-2 (S.D.Miss., June 30, 2011) (holding complaint filed March 30, 2010, based on several assaults, most recently on March 17, 2010, did not show imminent danger because it was premised on past harms), *report and recommendation adopted*, 2011 WL 3207554 (S.D.Miss., July 28, 2011); Richardson v. Ray, 2010 WL 1028088, *1-2 (W.D.Va., Mar. 15, 2010) (finding no imminent danger where plaintiff filed suit in February 2009 and cited five violent assaults between late 2006 and September 2009; no "pattern of misconduct" alleged), *vacated and remanded on other grounds*, 402 Fed.Appx. 775 (4th Cir. 2010) (unpublished).

[1454] Palmer v. New York State Dept. of Corrections, 342 Fed.Appx. 654, 656 (2d Cir. 2009) (unpublished); 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).

[1455] Davidson v. Kaseta, 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).

[1456] *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).

[1457] *See* 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)**CHECK** , *report and recommendation adopted*, 2012 WL 5200113 (S.D.Ga., Oct. 22, 2012); Tierney v. Alo, 2012 WL 1409660, *2-3 (D.Haw., Apr. 20, 2012) (holding allegation of re-transfer to a prison where a guard

danger.[1458] Conditions must be shown to be personally dangerous to the plaintiff, not just dangerous generally.[1459]

Courts have disagreed over the appropriateness of reassessing imminent danger based on post-complaint events. Several decisions have held that entitlement to the imminent danger exception can be withdrawn based on post-complaint mitigation of the danger.[1460] Others have held that the imminent danger finding, once made, is not affected by post-complaint

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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); 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).

[1458] Brown v. Beard, 2010 WL 1257967, *4 (E.D.Pa., Mar. 25, 2010) (prisoner with Hepatitis C for 10 years did not show the risk to his health was imminent); Simpson v. Prison Health Services, Inc., 2010 WL 425157, *3 (W.D.Mich., Jan. 27, 2010) (lower back pain that has gotten worse and better over years with no indication it will become more serious); Simpson v. Pramstaller, 2010 WL 204146, *3 (W.D.Mich., Jan. 15, 2010) (skin condition of nearly 20 years' duration that "has flared and subsided on numerous occasions" without serious risk did not establish imminent danger).

[1459] **RESUME CITE CHECKING HERE**Jemison v. Thomas, 2012 WL 5997151, *2 (S.D.Ala., Nov. 1, 2012) (holding allegations of health-threatening heat and unsanitary food service and living conditions did not establish imminent danger where the plaintiff did not specifically allege current or future injury to himself); Miller v. County of Nassau, 2012 WL 4741592, *4 (E.D.N.Y., Oct. 3, 2012) (finding no imminent danger to this plaintiff from bad jail conditions); Fontroy v. Owens, 2012 WL 4473216, *1-2 (E.D.Pa., Sept. 28, 2012) (holding complaint that jail was grossly overcrowded with inadequate medical services, rats, vermin, and unsanitary conditions failed to allege that the plaintiff himself was in imminent danger); Ransom v. Ortiz, 2012 WL 3639120, *2 (E.D.Cal., Aug. 23, 2012) (holding plaintiff failed to allege that inadequate barbering sanitation endangered him personally); Moten v. Adams, 2012 WL 2529204, *2 (E.D.Cal., June 29, 2012) (holding plaintiff failed to allege how heat conditions posed a risk to him); Hatten v. Barker, 2011 WL 995854, *1 (D.Colo., Mar. 17, 2011) (holding allegation that a particular prison is dangerous and defendants are conspiring to put plaintiff in it does not establish imminent danger); Cardona v. Lappin, 2010 WL 3862814, *1-2 (M.D.Pa., Sept. 28, 2010) (holding general allegation that overcrowding causes violence did not show imminent danger to the plaintiff).

[1460] Short v. Rubenstein, 2010 WL 4968269, *3 (N.D.W.Va., Dec. 1, 2010) (rejecting argument that imminent danger need only exist at the time of filing, noting that plaintiff had been moved away from alleged danger); Jackson v. Jackson, 2010 WL 3655974, *4 n.6 (S.D.Ga., Mar. 18, 2010) (declining to dismiss where imminent danger court had previously recognized had been averted in the interim), *report and recommendation adopted*, 2010 WL 3655971 (S.D.Ga., Sept. 15, 2010), *aff'd*, 456 Fed.Appx. 813 (11th Cir. 2012); Stearnsmiller v. Florida, 2009 WL 5067668, *5 (N.D.Fla., Dec. 17, 2009) (noting law concerning assessment at time of filing, then ruling adversely based on lack of current complaint); Jones v. Spaeth, 2009 WL 1325716, *3 (E.D.Cal., May 12, 2009) (in two-year-old case, court allows parties to supplement the record to see if plaintiff's imminent danger is still extant); Coleman v. Furman, 2008 WL 6958560, *1 (E.D.Va., July 20, 2008) (finding no imminent danger based on post-complaint receipt of dental treatment).

circumstances.[1461] There is a similar disagreement over whether a danger that arose or worsened after the case was filed, and is ongoing, can establish imminent danger,[1462] or whether a threshold finding of no imminent danger is binding regardless of subsequent events.[1463] Ongoing pain or other consequences from past injuries do not constitute imminent danger.[1464]

Most courts address the imminent danger exception on the pleadings, at least initially.[1465] If colorable allegations are disputed, the court may hold a hearing or rely on affidavits,

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[1461] Cooley v. Zewe, 2012 WL 6677885, *1-2 (W.D.Pa., Dec. 21, 2012) (holding imminent danger is not reassessed as of the filing of an amended complaint, despite the usual rule that an amended complaint replaces the original complaint for all purposes); Ellington v. Alameida, 2010 WL 2650632, *5 (E.D.Cal., July 1, 2010) (holding imminent danger need not be reassessed upon filing of an amended complaint after prisoner was transferred away from the danger); Stewart v. King, 2010 WL 1628992, *4 (M.D.Tenn., Apr. 20, 2010) (imminent danger need not be shown again when complaint is amended); Simpson v. Thorpe, 2010 WL 1138426, *3 (W.D.Wis., Mar. 19, 2010) (declining to dismiss where plaintiff had been transferred away from danger), *reconsideration denied*, 2010 WL 2813123 (W.D.Wis., July 15, 2010) and 2010 WL 3667003 (W.D.Wis., Sept. 15, 2010); Andrews v. Cervantes, 2008 WL 1970345, *1 (E.D.Cal., May 5, 2008) (allowing filing of amended complaint though prisoner had been transferred away from alleged danger because it existed when the case was first filed), *report and recommendation adopted*, 2008 WL 2705405 (E.D.Cal., July 9, 2008); Dunigan v. FRDC, 2007 WL 2360101, *1 (E.D.Mo., Aug. 14, 2007) (rejecting argument that case filed under imminent danger exception should be dismissed when plaintiff was transferred to a different prison away from the danger).

[1462] *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.

[1463] *See* Armstrong v. Brunsman, 2012 WL 6057578, *1 (S.D.Ohio, Dec. 6, 2012) (holding allegation that plaintiff was assaulted because of filing this complaint was not cognizable for imminent danger purposes); Johnson v. Morales, 2012 WL 243319, *1 (S.D.Ga., Jan. 25, 2012) (dangerous events occurring after filing are "immaterial to the imminent danger inquiry"); Tholmer v. Yates, 2010 WL 1980180, *2 (E.D.Cal., May 17, 2010) (imminent danger alleged in an amended complaint, but not the initial complaint, cannot satisfy the statute); Wilkerson v. Kim, 2009 WL 1542818, *2 (S.D.Ill., June 2, 2009) (rejecting effort to "reset" the case with amended/supplemental complaint asserting dangers post-dating the initial filing), *reconsideration denied*, 2010 WL 55693 (S.D.Ill., Jan. 5, 2010); Trice v. Vazquez, 2006 WL 3191175, *2 (S.D.Ga., Nov. 1, 2006); *see also* Peterson v. Perdue, 2008 WL 3887630, *1 n.1, *3 (S.D.Ga., Aug. 21, 2008) (magistrate judge held that alleged threat of sexual assault did not meet standard because plaintiff had not been assaulted or injured; district judge held that subsequent sexual assault did not meet standard because it occurred *after* filing).

[1464] Bridges v. Cox, 2009 WL 36659, *1 (W.D.Wis., Jan. 7, 2009) (prisoner complaining about the continuing effects of past bad medical care did not show imminent danger); Reeves v. Correctional Medical Services, 2008 WL 4642592, *1 (E.D.Mich., Oct. 20, 2008); Cherry v. Boughton, 2008 WL 4609963, *1 (W.D.Wis., Jan. 8, 2008).

[1465] 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"); Ciarpiaglini 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 presumes 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).

depositions, etc., to resolve the question,[1466] though doing so is relatively uncommon. While 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.[1467] 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

[1466] 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* Tafari v. Baker, 2012 WL 5381235, *4 (N.D.N.Y., Oct. 31, 2012) (rejecting imminent danger claim after evidentiary hearing preceded by extensive dscovery); Allen v. Barnes, 2009 WL 1758806, *6-8 (S.D.Ala., June 18, 2009) (after granting IFP status, court revokes it upon reviewing plaintiff's medical history showing he received extensive care); Norwood v. Radtke, 2007 WL 5431018, *1 (W.D.Wis., Dec. 2, 2007) (allowing case to proceed based on alleged risk of assault by other prisoners, setting evidentiary hearing expecting either to grant preliminary relief or revoke *in forma pauperis* status); Brown v. City of Philadelphia, 2009 WL 1011966 (E.D.Pa., Apr. 14, 2009) (concluding based on a hearing that claims of imminent danger were meritless); James v. Dormire, 2008 WL 625027, *2-3 (W.D.Mo., Mar. 4, 2008) (court allowed claim to go forward based on allegations that sharing electric razors presented a danger of spreading infection, then found no imminent danger after a hearing because officials said they cleaned the razors between uses and wiped them down with Barbicide); Williams v. Goord, 2007 WL 952053, *6 (N.D.N.Y., Mar. 29, 2007) (holding complications of a knee injury did not meet the standard where plaintiff's exhibits show he had received a lot of medical treatment); Breach v. Prison Health Services, Inc., 2007 WL 951747, *4 (M.D.Ala., Mar. 27, 2007) (rejecting claim of imminent danger from denial of hernia surgery based on declaration from doctor that the condition can be treated non-surgically and should not be painful); Thomas v. Woodford, 2006 WL 3437525, *2 (E.D.Cal., Nov. 27, 2006) (rejecting claim of imminent danger based on allegedly inadequate medical care for blurry vision, gum disease, and HIV with risk of nerve damage; court reviewed medical records and said plaintiff was getting ongoing care); Morrison v. Brady, 2005 WL 3234300, *1-2 (E.D.Mich., Nov. 30, 2005) (holding exception inapplicable to prisoner who complained of denial of asthma medication, based on court's reading of his medical records). In one recent decision the court directed the plaintiff to supplement his IFP request "with an affidavit explaining the course of treatment he has received since he arrived at the Chillicothe Correctional Institution, accompanied by any medical records or grievances related to his claim that he is still being denied treatment in a way that threatens his future health or safety. It shall also address his current housing and bunk assignments and explain any efforts he has made to be granted accommodations." Pointer v. Marc, 2011 WL 847012, *3 (S.D.Ohio, Mar. 8, 2011), *subsequent determination*, 2011 WL 2669743 (S.D.Ohio, July 7, 2011), *report and recommendation adopted*, 2011 WL 3236526 (S.D.Ohio, July 28, 2011).

[1467] Stine v. U.S. Federal Bureau of Prisons, 465 Fed.Appx. 790, 794 n.4 (10th Cir. 2012) (unpublished) (noting that if defendants contest imminent danger after a grant of IFP status, the court must decide the dispute); Pellegrino v. Weber, 2010 WL 5249832, *4 (D.S.D., Sept. 27, 2010) (revoking IFP status based on imminent danger, citing evidence that defendants were trying to treat medical problems but plaintiff did not cooperate), *report and recommendation adopted*, 2010 WL 5248739 (D.S.D., Dec. 16, 2010); Slocumb v. Delaney, 2010 WL 1345270, *1, 4 (D.S.C., Mar. 30, 2010) (rejecting imminent danger claim on summary judgment after initially crediting it), *aff'd*, 422 Fed.Appx. 272 (4th Cir. 2011); Bronson v. Kerestes, 2010 WL 411720, *5 (M.D.Pa., Jan. 25, 2010) (granting motion to revoke IFP status based on doctor's declaration after review of plaintiff's medical condition), *reconsideration denied*, 2010 WL 1949037 (M.D.Pa., May 14, 2010); Harman v. Bell, 2008 WL 606998, *2 n.2 (E.D.Ark., Feb. 29, 2008) (plaintiff's allegation that failure to provide his prescribed high-calorie, high-protein diet consistently threatened his life established imminent danger at the pleading stage; defendants are free to challenge his allegations by properly supported motion); Baptiste v. Harper, 2007 WL 4224727, *1 (M.D.Ga., Nov. 27, 2007) (court granted IFP status initially, asked for a report from defendants, which they asked be treated as a summary judgment motion; court holds claim of risk of assault because the plaintiff had been labelled a snitch did not meet the standard where he had never asked for protective custody and had not been assaulted in months in general population).

assertion of imminent danger, the plaintiff should not be granted IFP status on appeal.[1468] Imminent danger is a question for the court, not a jury.[1469]

Courts have rejected numerous claims of imminent danger as incredible or insubstantial,[1470] or simply not serious enough.[1471] 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*

[1468] Almond v. Pollard, 443 Fed.Appx. 198, 201 (7th Cir. 2011) (unpublished). The reason this holding is questionable is that it presumes the district court's finding of a three strikes bar is correct and in practice will deny 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. 1414-1415, above.

[1469] 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").

[1470] *See* Brown v. City of Philadelphia, 331 Fed.Appx. 898, 899 (3d Cir. 2009), *cert. denied*, 130 S.Ct. 508 (2009) (court properly did not credit "vague, generalized, and unsupported claims"); Mathis v. Smith, 2006 WL 1342840, *1 (11th Cir., May 17, 2006) (unpublished) (affirming rejection on credibility grounds of claim of ongoing threats to life by guard because of prisoner's prior false representations, history of frivolous litigation, and unrelated allegations in his complaint); Williams v. Murray, 2011 WL 2391099, *1 (E.D.Cal., June 10, 2011) (rejecting claim that staff were trying to poison plaintiff with arsenic where he had made that allegation in ten prior cases over five years and was still alive); James v. Unshaw, 2009 WL 2567833, *4 (S.D.Ala., Aug. 17, 2009) (rejecting claim that involuntary Prolixin administration caused unspecified side effects and made plaintiff "crazy"); Hudnall v. Earnshaw, 2009 WL 1451648, *2 (S.D.Ala., May 20, 2009) (claim of denial of mental health care did not satisfy imminent danger standard where it had been going on for a year and where plaintiff did not identify any specific danger or provide a detailed account of his condition and needs); Tate v. Marshall, 2009 WL 1107752, *1 (M.D.Ala., Mar. 25, 2009) (rejecting claim that plaintiff was required to live around inmates "potentially infected with contagious diseases" who engaged in sexual activity with one another), *report and recommendation adopted*, 2009 WL 1107737 (M.D.Ala., Apr. 23, 2009); Merriweather v. Reynolds, 2008 WL 2076731, *3 (D.S.C. May 11, 2008) (rejecting allegations of threats, enemies, danger from prison gangs, etc.; "unsupported, vague, self-serving, conclusory speculation" does not establish imminent danger); Althouse v. Roe, 542 F.Supp.2d 543, 546 (E.D.Tex. 2008) (holding claim that attention deficit hyperactivity disorder might lead the plaintiff impulsively to put himself in danger was too speculative to show imminent danger); Burghart v. Corrections Corp. of America, 2008 WL 619308, *1 (W.D.Okla., Mar. 4, 2008) (complaints of migraine headaches, fatigue, depression, weight gain and sleeping disorders did not meet standard); *see Appendix A for additional authority on this point.*

[1471] Freeman v. Mohr, 2013 WL 434023, *2 (S.D.Ohio, Feb. 5, 2013) (rejecting claim based on hernia surgery despite plaintiff's alleged pain because the plaintiff received some medical care and the procedure is deemed elective); Berryhill v. Oklahoma Dept. of Corrections, 2012 WL 1391927, *1 (W.D.Okla., Apr. 20, 2012) (rejecting claim suggesting risk of loss of teeth); Lockett v. Wexford Health Sources, Inc., 2011 WL 6029816, *2 (C.D.Ill., Dec. 5, 2011) (rejecting claim based on alleged bad reaction to soy protein diet where medical records indicated good health despite plaintiff's allegation of serious symptoms); Tia v. Paderes, 2011 WL 4104506, *3 (D.Hawai'i, Sept. 13, 2011) (weight loss did not constitute imminent danger where plaintiff had been overweight and did not claim nutritional inadequacy), *reconsideration denied*, 2011 WL 4590406 (D.Hawai'i, Sept. 29, 2011); Green v. Curtin, 2010 WL 4318915, *3-4 (W.D.Mich., Oct. 22, 2010) (prisoner with sarcoidosis dependent on oxygen, who could not go to the yard for exercise because officials refused to provide a portable oxygen tank, did not show imminent danger because of resulting weight gain and diabetes because he could eat less and exercise in his cell); Cook v. Standley, 2010 WL 3433060, *2 (C.D.Ill., Aug. 26, 2010) ("Having feces and spit thrown on you as you walk down the gallery under the escort of correctional officers does not qualify as imminent danger within the meaning of the statute. Getting hit by a shoe is not imminent danger. . . ."); Barbour v. Stanford, 2010 WL 2754465, *1 n.1 (W.D.Va., July 12, 2010) ("potential accelerated rate of tooth decay" did not establish imminent danger); Simpson v. Prison Health Services, Inc., 2010 WL 425159, *3 (W.D.Mich., Jan. 27, 2010) (nasal dryness, sinusitis, chronic sore throat are not serious physical injury); Simpson v. Prison Health Services, Inc., 2010 WL 425157, *3 (W.D.Mich., Jan. 27, 2010) (chronic lower back pain "is not sufficiently dangerous or impairing" to be serious physical injury); Moore v. Barrow, 2010 WL 446128, *1 (S.D.Ga., Feb. 8, 2010) (migraine headaches held "not of the type of serious injury" that meets the standard).

complaint's allegations, sometimes supplemented by the prisoner's response to an order to show cause or objections to a magistrate judge's report.[1472] Some courts have rejected seemingly substantial allegations of threat of injury.[1473] Courts have reached disparate results in seemingly similar situations, which may be distinguished only by the articulateness of the plaintiff in describing the risk.[1474] 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.[1475]

[1472] *See, e.g.*, Senator v. Cates, 2012 WL 2046793, *2 (E.D.Cal., June 5, 2012) (finding no imminent danger based on court's lay reading of medical records attached to the complaint); Word v. Annucci, 2010 WL 2179954, *2 (S.D.N.Y., May 27, 2010) (complaint that second-hand smoke "lingers" in outdoor air and "partially spreads" indoors, with conclusory statements about health consequences, did not meet imminent danger standard); Simpson v. Prison Health Services, Inc., 2009 WL 4950487, *1 (W.D.Mich., Dec. 14, 2009) ("Where a prisoner has disputed the adequacy of medical treatment for a period of years but fails to allege any serious injury other than in a conclusory fashion, he has failed sufficiently to allege imminent danger."), *reconsideration denied*, 2010 WL 431371 (W.D.Mich., Jan. 25, 2010); Wilson v. Hubbard, 2009 WL 2971619, *2 (E.D.Cal., Sept. 11, 2009) ("While pain may constitute a serious physical injury, plaintiff could have treated his joint pain with prescribed Tylenol, for example, rather than the dietary supplements." Also, discontinuing those supplements is "unlikely" to have caused "*imminent* pain," but instead "a gradual worsening of symptoms."), r*eport and recommendation adopted*, 2009 WL 3381522 (E.D.Cal., Oct. 16, 2009); Reeves v. Peters, 2009 WL 1930043, *2, 5 (E.D.Mich., July 2, 2009) (rejecting claim of imminent danger based on complaint of ongoing inadequate cardiac care which had resulted in at least one hospitalization); Jackson v. Auburn Correctional Facility, 2009 WL 1663986, *5 (N.D.N.Y., June 15, 2009) (rejecting claim of imminent danger from second-hand smoke which aggravated the plaintiff's asthma; allegations were too conclusory to meet the narrowly-tailored imminent danger exception"); Lee v. Folk, 2009 WL 856989, *3 (S.D.Ala., Mar. 24, 2009) (rejecting complaint about being "sick" and "passing blood" for lack of specific allegations; "In fact, the opening from which the blood is passing is not mentioned."); Clay v. Hofbauer, 2008 WL 4534414, *2 (W.D.Mich., Sept. 29, 2008) (rejecting claim of imminent danger from second-hand smoke based on failure to enforce no-smoking rule and poor ventilation); *see Appendix A for additional authority on this point.*

[1473] *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); 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. Ette, 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.*

[1474] *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 result in a number of serious physical injuries") *with* Ellington v. Clark, 2011 WL 3500970, *5 (E.D.Cal., Aug. 8, 2011) ("Plaintiff complains that because he was deprived of ambulatory devices, such as a wheelchair or walker, he is forced to crawl. . . . The denial of ambulatory devices, without more, does not rise to the level of imminent danger. Plaintiff's allegations of imminent danger of serious physical injury are speculative."), *report and recommendation adopted*, 2011 WL 6780910 (E.D.Cal., Dec. 27, 2011); Lamb v. Lieber Correctional Inst., 2009 WL 4035903, *2 (D.S.C., Nov. 20, 2009) (holding allegation that plaintiff is denied "a medical bed," a "wheelchair and a handicap shower" for his "handicap problem" does not establish imminent danger); *see also* Bell v. Dileo, 2011 WL 1327711, *4 (E.D.Cal., Apr. 5, 2011) (holding allegations that plaintiff suffers from type II diabetes, chronic pain in the lumbar region and numbness of lower extremities, and that without intervention he will be

To meet the "serious physical injury" requirement, injury need not be so serious as to violate the Eighth Amendment in itself,[1476] and need not entitle the plaintiff to a preliminary injunction[1477]—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.[1478] At least one court has held that the fact that a plaintiff seeks only money damages, not an injunction, as relief "belies any representation that he might be under imminent danger."[1479]

Successful claims of imminent danger most commonly involve allegations of failure to treat serious or potentially serious medical conditions,[1480] potentially injurious failure to

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paralyzed or die, were too "vague and conclusory"); Maisano v. McNamee, 2010 WL 625793, *2 (D.Ariz., Feb. 18, 2010) (holding allegation that plaintiff "most likely" has Amyotrophic Lateral Sclerosis did not establish imminent danger because he did not explain the basis for the claim, provide a physician's diagnosis, or describe his symptoms). *Compare* Cooks v. Glasier, 2012 WL 910262, *1 (E.D.Mo., Mar. 16, 2012) (allegation of inadequate food causing weight loss satisfied imminent danger standard) *with* Sayre v. Waid, 2009 WL 249982, *3 (N.D.W.Va., Feb. 2, 2009) (rejecting claim of 30-pound weight loss because "weight loss, in and of itself, is not indicative of a serious physical injury").

[1475] Nash v. Fuerst, 2012 WL 4511269, * ___ (N.D.Ohio, Oct. 1, 2012) (noting that plaintiff had cited the same risk, recurrence of MRSA, in an earlier suit, and that judge had ordered medical follow-up); Ransom v. Ortiz, 2012 WL 3639120, *3-4 (E.D.Cal., Aug. 23, 2012); Broadhead v. Taylor, 2012 WL 2805037, *3 (S.D.Ala., June 13, 2012) (stating "the filing of repetitive actions based on similar assaults with similar injuries over the years corroborates the undersigned conclusion that plaintiff did not face an 'imminent danger of serious physical injury' at the time of filing), *report and recommendation adopted*, 2012 WL 2804266 (S.D.Ala., July 9, 2012); Tierney v. Abercrombie, 2012 WL 2526808, *2 (D.Haw., June 29, 2012); Tia v. Borges, 2012 WL 1537459, *2 (D.Haw., Apr. 30, 2012). *But see* Moore v. Aikens, 2012 WL 3128947, *1 (M.D.Ga., June 26, 2012) (finding imminent danger in allegation that blood pressure medication was stopped, even though this claim had been first asserted two years before), *report and recommendation adopted*, 2012 WL 3128945 (M.D.Ga., July 31, 2012) .

[1476] Gibbs v. Cross, 160 F.3d 962, 966-67 (3d Cir. 1998). *Contra*, Taylor v. Blessing, 2009 WL 425927, *2 (S.D.Ill., Feb. 20, 2009).

[1477] Morefield v. Brewton, 2008 WL 5209984, *2-3 (S.D.Ga., Dec. 11, 2008). *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).

[1478] Norwood v. Thurmer, 2010 WL 503088, *3 (W.D.Wis., Feb. 8, 2010), *motion to certify appeal denied*, 2010 WL 1418875 (W.D.Wis., Apr. 7, 2010); McSwain v. Sumnicht, 2009 WL 2601263, *4 (W.D.Wis., Aug. 19, 2009); Ammons v. Hannula, 2009 WL 799670, *3 (W.D.Wis., Mar. 24, 2009). A finding of imminent danger does not establish entitlement to a preliminary injunction, since the finding is made as of the time the case is filed, and the Rule 65 analysis of injunctive relief is not thus "frozen in time." Stine v. Allred, 2011 WL 3793771, *14 (D.Colo., Aug. 25, 2011).

[1479] Brownlee v. Swingle, 2010 WL 117720, *1 (E.D.Cal., Jan. 7, 2010), *aff'd*, 436 Fed.Appx. 810 (9th Cir. 2011) (unpublished); *accord*, Davidson v. Allen, 2010 WL 8510350, *1 (N.D.Fla., Oct. 7, 2010); *see* Williams v. Ashcroft, 2010 WL 329958, *3 (N.D.Cal., Jan. 20, 2010) (where plaintiff who had been transferred did not seek an injunction against medical staff at current prison, he did not sufficiently allege imminent danger).

[1480] Bradford v. Vella-Lopez, 2012 WL 4888396, *1 (9th Cir. 2012) (unpublished) (denial of treatment for blood clotting disorder); Stine v. U.S. Federal Bureau of Prisons, 465 Fed.Appx. 790, 793-95 (10th Cir. 2012) (unpublished) (allegation of failure to provide Omeprazole prescribed for chronic acid reflux); Vandiver v. Vasbinder, 416 Fed.Appx. 560, 562-63 (6th Cir. 2011) (unpublished) ("Failure to receive adequate treatment for potentially life-threatening illnesses such as [diabetes and Hepatitis C] clearly constitutes 'imminent danger' under the Act."); Fletcher v. Menard Correctional Center, 623 F.3d 1171, 1173 (7th Cir. 2010) (citing allegation of untreated injuries after a beating); Smith v. Wang, 370 Fed.Appx. 377, 378 (4th Cir. 2010) (unpublished) (citing failure to follow up on evidence of a tumor); Smith v. Mayes, 358 Fed.Appx. 411, 412 (4th Cir. 2009) (complaint of

accommodate disabilities,[1481] exposure to dangerous living conditions,[1482] or failure to protect from the risk of assault from other prisoners.[1483]

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refusal to provide care for Hepatitis C, painful hernia, acute edema, and herniated disk in spine, unless plaintiff acknowledged name "Smith" rather than "X," satisfied imminent danger standard); Jackson v. Jackson, 335 Fed.Appx. 14, 15 (11th Cir. 2009) (plaintiff "claims that he has a hernia that causes him to suffer from severe pain in his testicles and abdomen, blood in his urine, nausea, and weight loss. Jackson contends that without surgery, which the defendant prison officials will not approve, he will continue to suffer from those injuries and may even face tissue death, gangrene, and internal bleeding."); 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"); Ciarpiaglini v. Saini, 352 F.3d 328, 330-31 (7th Cir. 2003) (holding allegations of panic attacks leading to heart palpitations, chest pains, labored breathing, choking sensations, and paralysis meet the imminent danger standard); Liner v. Fischer, 2012 WL 2847910, *4 (S.D.N.Y., July 11, 2012) (holding allegation of denial of glaucoma medication and resulting risk of blindness sufficiently alleged imminent danger), *report and recommendation adopted*, 2012 WL 4849130 (S.D.N.Y., Oct. 12, 2012); Sturdevant v. Roal-Werner, 2012 WL 2312111, *2 (S.D.Ill., June 18, 2012) (holding nearly three-year denial of dental care to prisoner without teeth or dentures, whose eating was therefore impaired, whose digestion was impaired by lack of gall bladder, and whose diabetes was said to be aggravated by inability to eat properly, sufficiently alleged imminent danger); Chapa v. Alvarez, 2012 WL 1184445, *1 (D.Ariz., Apr. 9, 2012) (holding denial of pain medication and eyeglasses sufficiently alleged imminent danger); Stephen v. Kelso, 2012 WL 371604, *1 n.1 (E.D.Cal., Feb. 3, 2012) (noting imminent danger finding based on based on allegations that plaintiff was denied physician-recommended colon surgery after a confirmed finding of a polyp), *report and recommendation adopted*, 2012 WL 1131363 (E.D.Cal., Mar. 31, 2012); *see Appendix A for additional authority on this point.*

[1481] Fuller v. Wilcox, 288 Fed.Appx. 509, 511, 2008 WL 2961388 (10th Cir. 2008) (denial of a wheelchair, meaning that plaintiff must crawl, and could not walk to the shower or lift himself to his bed, "could result in a number of serious physical injuries"); McDonald v. Maue, 2012 WL 6016900, *1-2 (S.D.Ill., Dec. 3, 2012) (failure to heed plaintiff's post-surgery medical restrictions); Dye v. Grisdale, 2011 WL 5110402, *2 (W.D.Wis., Oct. 25, 2011) (rescission of single-cell feed-in status to prisoner with eating disorder/phobia that prevented him from eating around others, resulting in "serious hunger pains, lack of bowel movements for days at a time, headaches, weakness," constituted imminent danger); Claiborne v. Blauser, 2011 WL 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).

[1482] Brown v. Secretary Pennsylvania Dept. of Corrections, 2012 WL 2511307, *1 (3d Cir. 2012) (citing lack of open windows, no air conditioning, a ventilation system that is faulty and dirty, excessive heat, and polluted air); Smith v. Wang, 370 Fed.Appx. 377, 378 (4th Cir. 2010) (unpublished) (citing exposure to environmental tobacco smoke allegedly causing nosebleeds and headaches); Rankins v. Rowland, 2006 WL 1836671, *1 n.1 (4th Cir., June 27, 2006) (unpublished) (holding that an allegation that a poor ventilation system caused the plaintiff bodily harm and he was denied medical treatment for his symptoms made a "colorable showing" of imminent danger); Chapa v. Arpaio, 2013 WL 474367, *1 (D.Ariz., Feb. 7, 2013) (holding allegation of "poor ventilation and unsanitary conditions that allow the circulation of dust, pollen, and 'human pathogens'" resulting in watery eyes, numerous

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."[1484] This view is extreme and unwarranted, and several courts have rightly

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respiratory problems, and possible exposure to tuberculosis stated imminent danger); Williams v. Higgins, 2013 WL 310560, *4 (E.D.Cal., Jan. 25, 2013) (holding allegations of ongoing poisoning stated imminent danger); Cochran v. Geit, 2011 WL 3109991, *2 (W.D.Wis., July 26, 2011) (holding risk of having to climb to a top bunk without a ladder met imminent danger standard); Cole v. Ellis, 2010 WL 5564632, *2 (N.D.Fla., Dec. 28, 2010) (holding "the continuing harm of sleeping without heat during the winter months without additional clothing or blankets, could constitute an ongoing threat of serious physical harm"), *report and recommendation adopted*, 2011 WL 91002 (N.D.Fla., Jan. 11, 2011), *aff'd*, 451 Fed.Appx. 827 (11th Cir. 2011) (unpublished); Williams v. Lopez, 2010 WL 2197352, *1 (E.D.Cal., May 28, 2010) (allegation that defendants were about to transfer HIV-positive prisoner to prison where he would be exposed to potentially fatal valley fever met imminent danger standard); Peterson v. Thatcher, 2009 WL 2341978, *3 (N.D.Ind., July 27, 2009) (allegation that asthmatic plaintiff described by doctor as "very allergic to cat dander" was held in a housing area where cats were kept as pets met imminent danger standard); Smith v. Ozmint, 2008 WL 1883200, *4 (D.S.C., Apr. 23, 2008) (imminent danger standard met by allegations of use of hazardous Chinese products, 24-hour illumination in cells, exposure to deranged behavior and unsanitary conditions from mentally ill prisoners in the segregation unit, deprivation of sunlight, and exposure to mold), *aff'd*, 356 Fed.Appx. 646 (4th Cir. 2009) (unpublished), *cert. denied*, 131 S.Ct. 142 (2010).

[1483] 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. Gatez, 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 standard); Brady v. Elverado, 2009 WL 3873570, *1 (E.D.Mich., Nov. 17, 2009) (allegation that staff member threatened plaintiff and called him a snitch in other prisoners' presence); Kelly v. Gutierrez, 2009 WL 3460419, *2 (S.D.Tex., Oct. 21, 2009) (alleging plaintiff was assaulted both by staff and by gang members and officials would not transfer him); Cox v. Huddleston, 2009 WL 1534551, *1 (W.D.Ky., May 29, 2009) (alleging that plaintiff had had "trouble" with officers and inmates in his housing area and officials refused to move him somewhere safer); Cain v. Jackson, 2007 WL 2787979, *2 (S.D.Tex., Sept. 24, 2007) (alleging that plaintiff had been assaulted repeatedly by gang members and denied protective custody); Matthews v. U.S., 72 Fed.Cl. 274, 278 (Fed.Cl. 2006) (alleging that prison officials defamed plaintiff, resulting in threats and violence from other prisoners), *reconsideration denied*, 73 Fed.Cl. 524 (Fed.Cl. 2006). *But see* Childs v. Olson, 2010 WL 2400060, *1 (D.Colo., June 15, 2010) (rejecting claim that being falsely labelled a sex offender subjected plaintiff to risk of physical harm); Pettus v. Mangano, 2005 WL 1123761, *1 (E.D.N.Y., May 9, 2005) (holding that placement in a maximum security prison with "anti-social, aggressive, hostile, and violent inmates" did not meet the "imminent danger" standard).

[1484] Wallace v. Cockrell, 2003 WL 21418639, *3 (N.D.Tex., Mar. 10, 2003), *approved as supplemented*, 2003 WL 21447831 N.D.Tex., Mar. 27, 2003); *accord*, Ochoa v. Nakashima, 2012 WL 6204780, *2 (D.Nev., Oct. 22, 2012) (holding plaintiff with fanciful food complaint who had stopped eating in order to meet the imminent-harm standard at the time of the cmplaint was not allowed to proceed IFP); Gay v. Powers, 2011 WL 334282, *1 (S.D.Ill., Feb. 1, 2011) ("The Court is not inclined to grant Gay ready access to the federal judicial system every time that Gay takes it into his head to cut himself."); Cash v. Bernstein, 2010 WL 5222126, *3 (S.D.N.Y., Dec. 20, 2010) (declining to find imminent danger where plaintiff thwarted defendants' efforts to treat his medical problem (citing Nelson v. Scoggy, 2009 WL 5216955, *4 (N.D.N.Y., Dec. 30, 2009)); West v. Bennett, 2010 WL 1524626, *2 (S.D.Ga., Mar. 18, 2010) (allegation of failure to protect from self-mutilation, *inter alia*, did not satisfy imminent danger requirement), *report and recommendation adopted*, 2010 WL 1524613 (S.D.Ga., Apr. 15, 2010); Fails v. Simon, 2009 WL 5217072, *1 (N.D.Fla., Dec. 30, 2009); Argetsinger v. Ritter, 2009 WL 3201088, *4 (D.Colo., Sept. 29, 2009); Bea v. Watson, 2009 WL 1764834, *2 (W.D.Va., June 22, 2009); Steyer v. Rogers, 2008 WL 508596, *4 (D.N.J., Feb. 21, 2008). *Cf.* Brown v. President and CEO of Prison Health Services, Inc., 2012 WL 926146, *3 (E.D.Pa., Mar. 16, 2012) (holding claim of delayed medical care could not constitute imminent danger where it

rejected it.[1485] Many prison suicides, attempted suicides, and other acts of self-harm result directly from serious mental illness,[1486] 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.[1487]

There must be some relationship between the allegations of imminent danger and the substantive allegations in the complaint to fall within the exception.[1488] 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."[1489] If a plaintiff's allegations of imminent danger meet the statutory standard, the case as a whole should be allowed to proceed *in forma*

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resulted from plaintiff's own interference with and refusal of care), *order entered*, 2012 WL 917646 (E.D.Pa., Mar. 16, 2012).

[1485] Walker v. Scott, 472 Fed.Appx. 514, 515 (9th Cir. 2012) (unpublished) (allegation that "repeated placement in double-cell housing without first completing treatment for coping in that environment caused his mental health to deteriorate such that he became suicidal and violent towards others" satisfied imminent danger standard); Marshall v. Weber, 2012 WL 6591649, *1 (D.Md., Dec. 17, 2012 (noting plaintiff was allowed to proceed IFP based on allegations he "felt suicidal" and had swallowed razor blades and had bitten his tongue during a panic attack); Wilson v. Tilton, 2010 WL 1539851, *2 (E.D.Cal., June 16, 2010), *report and recommendation adopted*, 2010 WL 2765592 (E.D.Cal., July 13, 2010); Norwood v. Thurmer, 2010 WL 503088, *3 (W.D.Wis., Feb. 8, 2010) (allegation of ongoing failure to protect prisoner with suicidal tendencies constituted imminent danger), *motion to certify appeal denied*, 2010 WL 1418875 (W.D.Wis., Apr. 7, 2010); Gilbert-Mitchell v. Lappin, 2008 WL 4545343, *3 (S.D.Ill., Oct. 10, 2008) (allegation that discontinuation of psychotropic medications caused plaintiff to injure himself could mean that he was in imminent danger of self-injury without them). Several decisions have held that self-inflicted injury can satisfy the physical injury requirement of 42 U.S.C. § 1997e(e). *See* n. 1220, above.

[1486] *See, e.g.*, Sanville v. McCaughtry, 266 F.3d 724 (7th Cir. 2001); Eng v. Smith, 849 F.2d 80 (2d Cir. 1988).

[1487] 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).

[1488] *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).

[1489] Pettus v. Morgenthau, 554 F.3d 293, 298-99 (2d Cir. 2009); *accord*, Tafari v. Prack, 2012 WL 2571310, *3 (N.D.N.Y., May 23, 2012) (allegations of subsequent threats and harassment were unrelated to claims arising from disciplinary proceedings), *report and recommendation adopted*, 2012 WL 2571305, *1 (N.D.N.Y., July 3, 2012); Heard v. Tanner, 2011 WL 5149186, *2 (S.D.Ga., Sept. 28, 2011) (medical care allegations did not establish imminent danger in suit challenging handling of grievances), *report and recommendation adopted*, 2011 WL 5118890 (S.D.Ga., Oct. 25, 2011); McCoy v. F.B.I., 775 F.Supp.2d 188, 190 (D.D.C., Apr. 7, 2011) ("The imminent-danger exception only applies where 'the action is connected to the imminent danger.'" Plaintiff's FOIA action was not connected to his complaints of alleged danger in prison); Davis v. Middlesex Superior Court, 2011 WL 901805, *4 (D.Mass., Mar. 10, 2011) ("In order to invoke the exception of the three-strikes rule based on the allegation of imminent danger of serious bodily harm, two elements must be met: the harm must be imminent and the claim for relief asserted must be for the alleviation of that threat of harm.").

pauperis without being restricted to the claims to which the imminent danger is related.[1490] A claim of imminent danger does not excuse the prisoner from the PLRA's administrative exhaustion requirement.[1491]

5. Constitutional Issues

Challenges to the constitutionality of the three strikes provision have been unsuccessful.[1492] District court decisions holding the provision unconstitutional have been reversed or overruled.[1493]

[1490] 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"); Ciarpiaglini 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); Freeman v. Collins, 2011 WL 6339687, *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").

Some district courts have held to the contrary, in some instances contrary to their circuit's law. *See* Abdulaziz/Askew v. Williams, 2012 WL 6917788, *2 (E.D.Ark., Dec. 3, 2012) (limiting complaint to claims involving imminent danger); Thompson v. Medical College of Georgia, 2012 WL 4738674, *2 (M.D.Ga., Oct. 3, 2012) (directing plaintiff to file "a new, more focused lawuit" limited to claims involving imminent danger); Williams v. Sloan, 2012 WL 4717874, *2 (E.D.Ark., Sept. 24, 2012) (recommending dismissal for claims not involving imminent danger); Davis v. Hadden, 2012 WL 996612, *1 (E.D.Tenn., Mar. 22, 2012) (noting lack of circuit authority); Holton v. Wisconsin, 2011 WL 6886001, *3 (W.D.Wis., Dec. 29, 2011); Joiner v. Mason, 2011 WL 2142768, *4 (M.D.Ala., May 23, 2011); Aziz v. Crawford, 2009 WL 962819, *1 (E.D.Mo., Apr. 8, 2009) (allowing only those claims to go forward that presented an imminent danger); Shelley v. Hepp, 2009 WL 483161, *3 (W.D.Wis., Feb. 25, 2009) (holding claim related to imminent danger could go forward IFP, others could not); Miller v. Meadows, 2005 WL 1983838, *5 (M.D.Ga., Aug. 11, 2005) (allowing only those claims to go forward that presented an imminent danger).

Some courts have held that a complaint that satisfies the imminent danger exception cannot be amended to include claims that do not involve imminent danger. *See* McAlphin v. Toney, 375 F.3d 753 (8th Cir. 2004); Comeaux v. Broom, 2012 WL 4748200, *1 (N.D.Tex., Oct. 4, 2012); Conley v. McKune, 2012 WL 3637749, *3 (D.Kan., Aug. 23, 2012); Bingham v. Morales, 2012 WL 2375950, *1 n.2 (S.D.Ga., May 31, 2012), *report and recommendation adopted*, 2012 WL 2375349 (S.D.Ga., June 22, 2012); Ellington v. Alameida, 2007 WL 1501840, *2 (E.D.Cal., May 23, 2007).

[1491] 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.

[1492] *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), *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,

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 *in forma pauperis* procedures, as violating the right of access to courts.[1494]

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."[1495] As such, it is "generally subject to the same constitutional analysis" as is the right to free speech.[1496] 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.[1497] This body of law includes a principle of narrow tailoring.[1498]

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.[1499] 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.[1500]

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 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.[1501]

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).

[1493] *See* Lewis v. Sullivan, 135 F.Supp.2d 954 (W.D.Wis. 2001), *rev'd*, 279 F.3d 526 (7th Cir. 2002); Ayers v. Norris, 43 F.Supp.2d 1039, 1050-51 (E.D.Ark. 1999) (applying equal protection strict scrutiny where prisoner would be barred from court on a claim asserting a fundamental right), *overruled*, Higgins v. Carpenter, *supra*; Lyon v. Krol, 940 F.Supp. 1433 (S.D.Iowa 1996) (similar rationale), *appeal dismissed and remanded*, 127 F.3d 763, 765 (8th Cir. 1997) (finding lack of standing).

[1494] *See* DeLong v. Hennessey, 912 F.2d 1144, 1148 (9th Cir. 1990), *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).

[1495] California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 513 (1972).

[1496] Wayte v. U.S., 470 U.S. 598, 610 n. 11 (1985). Indeed, the Supreme Court has stated the matter more directly and acknowledged that advocacy in litigation is speech. Legal Services Corporation v. Velazquez, 531 U.S. 533, 542-43 (2001).

[1497] *Cf.* Thornburgh v. Abbott, 490 U.S. 401, 403 (1989).

[1498] NAACP v. Button, 371 U.S. 415, 438 (1963).

[1499] New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[1500] Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49, 60-61 (1993); Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 741 (1983); California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 511 (1972).

[1501] *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 *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,[1502] regardless of whether they are *in forma pauperis* or fee paid.[1503] This is a threshold requirement addressing the pleadings and does not impose on a court "an ongoing obligation to *sua sponte* and continuously evaluate the sufficiency of an inmate's action even after counsel has entered an appearance on behalf of the defendants."[1504] 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.[1505]

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 *in forma pauperis* scheme.[1506] 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 *in forma pauperis*, can be with prejudice.[1507] 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.[1508] The same is true of dismissal based on other affirmative defenses.[1509]

The Second Circuit, like most circuits, has held that under the PLRA, as under prior law, *pro se* litigants should be allowed to amend their complaints to avoid dismissal,[1510] though one federal circuit has held to the contrary.[1511] The PLRA also does not affect the rule that a court

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[1502] 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).

[1503] Plunk v. Givens, 234 F.3d 1128 (10th Cir. 2000).

[1504] Wolfel v. Collins, 2011 WL 14457, *3 (S.D.Ohio, Jan. 4, 2011). In *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.

[1505] 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'.").

[1506] 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.

[1507] 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 *in forma pauperis* statute, must be without prejudice, consistently with pre-PLRA law; the Second Circuit has not decided the question. *Id*. (citing cases).

[1508] Jones v. Bock, 549 U.S. 199, 214-15 (2007); *see* n. 273, above, for discussion of how non-exhaustion can, and cannot, be apparent on the face of the complaint.

[1509] *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).

[1510] Gomez v. USAA Federal Savings Bank, 171 F.3d 794, 795-96 (2d Cir. 1999); *accord*, Brown v. Johnson, 387 F.3d 1344, 1348-49 (11th Cir. 2004); Grayson v. Mayview State Hosp., 293 F.3d 103, 109-14 (3d Cir. 2002) (addressing 28 U.S.C. § 1915(e)(2)); Shane v. Fauver, 213 F.3d 113, 117 (3d Cir. 2000).

[1511] Baxter v. Rose, 305 F.3d 486, 488 (6th Cir. 2002); McGore v. Wrigglesworth, 114 F.3d 601, 612 (6th Cir. 1997). This rule was based on the Sixth Circuit's views that exhaustion is a pleading requirement and that the

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.[1512]

The standard of appellate review under the PLRA screening provisions has not been decided in the Second Circuit.[1513]

One court has held that the PLRA-dictated screening process is generally good cause for extending the 120-day time period for serving process.[1514] Courts have disagreed over the effect of passing initial screening on defendants' right to seek dismissal under Rule 12(b)(6).[1515]

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 require a reply "if it finds that the plaintiff has a reasonable opportunity to prevail on the merits."[1516]

"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.[1517] No default or default judgment can be

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PLRA screening requirement trumps ordinary litigation practice, which includes the free amendment of complaints under Rule 15(a), Fed.R.Civ.P. The Supreme Court's decision in *Jones v. Bock* rejects both of these propositions, 549 U.S. at 213-17, so the Sixth Circuit no-amendment rule appears to be effectively overruled although the Court does not address it directly. *See* Whitmore v. Ohio, 2008 WL 151292, *2 n.1 (S.D.Ohio, Jan. 14, 2008). *But see* Lee-Bryant v. Beseau, 2009 WL 980810, *3 (W.D.Mich., Apr. 9, 2009) (applying *Baxter* without addressing *Jones*); Thomas v. Kaczmarek, 2008 WL 2230692, *1 (E.D.Mich., May 29, 2008) (same); Strodder v. Caruso, 2007 WL 2080416, *5 (E.D.Mich., July 19, 2007) (holding no-amendment rule survives *Jones*); *see also* Conway v. Wilkinson, 2007 WL 901531, *2 (S.D.Ohio, Mar. 26, 2007) (holding amendments to address exhaustion are permitted).

[1512] *See* Resnick v. Hayes, 213 F.3d 443, 446 (9th Cir. 2000); Gomez v. USAA Federal Savings Bank, 171 F.3d at 795-96.

[1513] 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 *de novo* standard). *But see* Bilal v. Driver, 251 F.3d 1346, 1348-49 (11th Cir.) (endorsing *de novo* standard for dismissals that do not state a claim and abuse of discretion standard for dismissals as frivolous), *cert. denied*, 534 U.S. 1044 (2001).

[1514] Shabazz v. Franklin, 380 F.Supp.2d 793, 799-800 (N.D.Tex. 2005).

[1515] *Compare* 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) *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), *leave to appeal denied*, 2010 WL 2035576 (D.Ariz., May 20, 2010).

[1516] 42 U.S.C. § 1997e(g); see, e.g., Daniel v. Power, 2005 WL 1958350, *2 (S.D.Ill., July 20, 2005) (after initial screening, " [d]efendants are ORDERED to timely file an appropriate responsive pleading to the Amended Complaint, and shall not waive filing a reply pursuant to 42 U.S.C. § 1997e(g).") The Supreme Court has rejected the argument that this provision requires prisoners to plead exhaustion of administrative remedies. Jones v. Bock, 549 U.S. 199, 216 (2007).

[1517] *See* Cameron v. Rantz, 2008 WL 5111875, *6 (D.Mont., Dec. 4, 2008); Rush v. Giurbino, 2007 WL 3473223, *2 (S.D.Cal., Nov. 14, 2007); Jones v. Bowersox, 2005 WL 1185598, *1-2 (W.D.Mo., May 18, 2005); Reed v. McBride, 96 F.Supp.2d 845, 849 (N.D.Ind. 2000).

entered if defendants have not been directed to answer the complaint.[1518] Some courts have gone further and held that prisoners cannot get a default judgment for failure to answer in a case filed from prison,[1519] though the question is not settled,[1520] and default judgments continue to be granted in some prison cases.[1521]

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.[1522] This statute seems mainly to ratify pre-existing practice.[1523]

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.[1524] This reasoning suggests the statute should not be viewed as extending to trials.[1525] Before the PLRA, courts had expressed a strong preference for having prisoner plaintiffs present in court for trial.[1526]

[1518] Lafountain v. Martin, 2009 WL 4729933, *4 (W.D.Mich. Dec. 3, 2009); Olmstead v. Balcarecel, 2007 WL 2121937, *3 (E.D.Mich., July 24, 2007); Cidone v. Chiarelli, 2007 WL 2068317, *1 n.1 (M.D.Pa., July 17, 2007); Wallin v. Brill, 2007 WL 781566, *5 (D.Colo., Mar. 13, 2007) (setting aside default), *aff'd*, 269 Fed.Appx. 820 (10th Cir. 2008), *cert. denied*, 129 S.Ct. 628 and 641 (2008).

[1519] Russell v. Tribley, 2011 WL 4387589, *7 (E.D.Mich., Aug. 10, 2011), *report and recommendation adopted*, 2011 WL 4396784 (E.D.Mich., Sept. 21, 2011); Rhinehart v. Scutt, 2010 WL 3701788, *8 (E.D.Mich., Aug. 16, 2010) (holding "where a defendant has failed to respond to a civil rights complaint brought by a prisoner, the Court's sole power is to order the defendant to file a reply"), *report and recommendation adopted*, 2010 WL 3701787 (E.D.Mich., Sept. 15, 2010); Bell v. Lesure, 2009 WL 1290984, *3-4 (W.D.Okla., May 6, 2009) (holding the PLRA forbids entry of default judgments in prisoner cases); Vinning v. Walls, 2009 WL 839052, *1 (S.D.Ill., Mar. 31, 2009) (holding default judgment could be entered, but no relief ordered, under the PLRA).

[1520] 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.

[1521] *See* Johnson v. MDOC, 2009 WL 224907, *3 (N.D.Miss., Jan. 28, 2009); Cameron v. Myers, 569 F.Supp.2d 762 (N.D.Ind. 2008).

[1522] 42 U.S.C. § 1997e(f).

[1523] *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).

[1524] U.S. v. Baker, 45 F.3d 837 (4th Cir. 1994), *cert. denied*, 516 U.S. 872 (1995).

[1525] *But see* Williams v. Forcade, 2004 WL 1698671, *1-2 (E.D.La., July 28, 2004) (directing that plaintiff participate in trial by telephone).

[1526] 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).

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.[1527] 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.[1528] 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.[1529]

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*.[1530]

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.[1531] 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.[1532] 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.[1533] 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.[1534] In addition, as plaintiff's counsel in that case

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[1527] 28 U.S.C. § 1932.

[1528] U.S. v. Belt, 2011 WL 3236065, *6 (D.Md., July 26, 2011) (refusing to revoke good time in action filed by the government seeking injunctive and declaratory relief against prisoner's litigation practices).

[1529] Rice v. National Security Council, 244 F.Supp.2d 594, 597, 605 (D.S.C. 2001) (citing cases), *aff'd*, 46 Fed.Appx. 212 (4th Cir. 2002), *cert. denied*, 538 U.S. 951 (2003). More recently, the court has applied this provision to statements made in a motion to vacate, set aside, or correct sentence under 18 U.S.C. § 2255, without commenting on whether such a motion by a convicted criminal defendant in his criminal case is a "civil action" brought by an adult convict as the statute requires. U.S. v. Williams, 2011 WL 4479537, *2-3 (D.S.C., Sept. 26, 2011). Another court has suggested in dictum that failure to disclose prior litigation history could result in revocation of good time under § 1932. Moody v. Bemberry, 2011 WL 6887703, *3 (D.N.J., Dec. 29, 2011).

[1530] 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.

[1531] Pub.L.No. 104-134, Stat. 1321 § 807 (April 24, 1996) (not codified; appears after 18 U.S.C.A. § 3626).

[1532] Pub.L.No. 104-134, Stat. 1321 § 808 (April 24, 1996) (not codified; appears after 18 U.S.C.A. § 3626).

[1533] 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.

[1534] 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

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.[1535]

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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).

[1535] *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).

APPENDIX A

Additional Authority

To make the preceding text more presentable, I have removed some cumulative materials from some of the longer footnotes.

Note 108: Turley v. Rednour, *3 (S.D.Ill., May 18, 2011) ("Requiring that Turley be housed in a different facility does not fall within the parameters of narrowly-drawn relief."); Williams v. Martin, 2011 WL 2268477, *6 (D.Nev., Apr. 20, 2011) (holding demand for "sixteen-point personalized medical plan" for deep vein thrombosis was overbroad, focusing on demand for Coumadin and housing that does not require plaintiff to be sedentary), *report and recommendation adopted*, 2011 WL 2214189 (D.Nev., June 7, 2011); Reynolds v. Rios, 2011 WL 617424, *3 (E.D.Cal., Feb. 10, 2011) (prisoner who complained of denial of magazines would not be entitled to have court's decision mailed to every federal prisoner); Fernandez v. Nevada, 2010 WL 5678693, *7 (D.Nev., Oct. 28, 2010) (holding sex offender denied hearing before psychological board necessary for parole eligibility was entitled to an injunction granting him the hearing, not to removal of sex offender classification), *report and recommendation adopted*, 2011 WL 344745 (D.Nev., Feb. 1, 2011); Sims v. Sayre, 2010 WL 3932080, *6 (N.D.Cal., Sept. 30, 2010) (stating that plaintiff failed to show that a transfer is the least intrusive 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 23211615, *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 127: Hadix v. Caruso, 465 F.Supp.2d 776, 804-06, 810-11 (W.D.Mich. 2006) (directing comprehensive medical staffing plan, plans for specialty care access, and creation and funding of Office of Independent Monitor with powers to intervene in patient care), *amended on reconsideration on other grounds*, 2007 WL 162279 (W.D.Mich., Jan. 16, 2007), *remanded on other grounds,* 2007 WL 2753026

(6th Cir. 2007) (per curiam); Hadix v. Caruso, 492 F.Supp.2d 743, 749-51, 753-54 (W.D.Mich. 2007) (rejecting defendants' plan for protecting high-risk prisoners from extreme heat, directing they be housed where the summer heat index is below 90), *remanded on other grounds,* 2007 WL 2753026 (6th Cir. 2007) (per curiam); Hadix v. Caruso, 461 F.Supp.2d 574 (W.D.Mich. 2006) (emphasizing throughout that medical care remedial plan is to be developed by defendants within court's broad outline), *remanded on other grounds,* 2007 WL 2753026 (6th Cir. 2007) (per curiam); Hadix v. Johnson, 2005 WL 2243091, *49-52 (W.D.Mich., Sept. 14, 2005) (requiring replacement of locking system in addition to implementation of defendants' own fire safety proposals), *reconsideration denied*, 2005 WL 2654287 (W.D.Mich., Oct. 13, 2005); Little v. Shelby County, Tenn., 2003 WL 23849734, *1-2 (W.D.Tenn., Mar. 25, 2003) (approving very detailed plan for staffing and prisoner supervision); *see* Mayweathers v. Terhune, 328 F.Supp.2d 1086, 1099 (E.D.Cal. 2004) (directing parties to propose an appropriate remedy where defendants' claims of administrative difficulty were too general for the court to formulate a remedy conforming to the PLRA standards); Goff v. Harper, 1997 WL 34715292, *52 (S.D.Iowa, June 5, 1997) (court directs defendants to come up with a remedial plan for the constitutional violations found, then directs them to "consider" eight highly specific measures).

Note 273: 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).

Note 279: Harsh v. Barone, 2011 WL 6100804, *5 (W.D.Pa., Nov. 18, 2011) (holding pleadings showing exhaustion of one claim did not establish that others were not exhausted); Johnson v. Westchester County Dept. of Correction Medical Dept., 2011 WL 2946168, *2 (S.D.N.Y., July 19, 2011) (complaint that asserts compliance with grievance rules but "lack[s] specifics as to how the plaintiff grieved his claim" is not subject to dismissal); Baker v. County of Missaukee, 2011 WL 1670953, *7 (W.D.Mich., Mar. 28, 2011) (incomplete pleading and documentation of exhaustion does not show non-exhaustion, since plaintiff has no obligation to plead exhaustion), *report and recommendation adopted*, 2011 WL 1670949 (W.D.Mich., May 3, 2011); Nible v. Knowles, 2010 WL 3245325, *3 (E.D.Cal., Aug. 17, 2010) (defendants must submit evidence of non-exhaustion, not just argue based on attachments to complaint); Hurd v. Sumner County Jail, 2010 WL 1494261, *2 (M.D.Tenn., Mar. 3, 2010) (statement that plaintiff had "just started [his] paperwork" was ambiguous, and non-exhaustion was not apparent on the face of a complaint that did not even state that the jail has a grievance system), *report and recommendation adopted*, 2010 WL 1494233 (M.D.Tenn., Apr. 14, 2010); Swinson v. Department of Corrections, 2009 WL 33330, *8 (W.D.Pa., Jan. 5, 2009) (court would not dismiss based on defendants' interpretation of supposed admission of non-exhaustion, since it was defendants' burden to plead and prove it); Castillo v. Costan, 2008 WL 398412, *2 (D.Del., Feb. 11, 2008) (court would not infer from

statements that plaintiff wrote to internal affairs and director of CiviGenics that he did not exhaust).

Note 296: 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).

Note 306: Peck v. Thomas, 2011 WL 5525964, *4 (D.Nev., Aug. 24, 2011) (declining to dismiss, despite admission of non-exhaustion, where defendants failed to describe or document an available procedure; court notes it was unclear how plaintiff could have grieved given that he was in transit and remained in the jail for only two days), *report and recommendation adopted*, 2011 WL 5525994 (D.Nev., Nov. 14, 2011); Dunmore v. Balicki, 2011 WL 1205481, *3 (D.N.J., Mar. 28, 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 grieved it); Warner v. Ewing, 2009 WL 806802, *2 (D.Neb., Mar. 26, 2009) (defendants failed to 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 existed 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); Goebert 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 311: 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 inadequate 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 315: 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 316: McLaughlin v. Freeman, 2010 WL 6052845, *4 (N.D.Ind., Nov. 5, 2010) (finding officials had responded to a grievance they said they had no record of), *report and recommendation adopted*, 2011 WL 886205 (N.D.Ind., Mar. 14, 2011); Kerce v. Ball, 2010 WL 5300880, *5 (M.D.Pa., Sept. 30, 2010), *report and recommendation adopted*, 2010 WL 5300877 (M.D.Pa., Dec. 20, 2010); Taylor v. Clark, 2010 WL 3069243, *7 (E.D.Cal., Aug. 4, 2010), *report and recommendation adopted*, 2010 WL 5393533 (E.D.Cal., Dec. 22, 2010); Mitchell v. Wolfe, 2010 WL 1923795, *3 (D.Md., May 10, 2010); Wilson v. Correctional Medical Services, 2010 WL 1032673, *3-4 (D.N.J., Mar 17, 2010), *subsequent determination*, 2010 WL 2521717 (D.N.J., June 15, 2010), *aff'd*, 412 Fed.Appx. 424 (3d Cir. 2010) (unpublished); Starnes v. Chase, 2010 WL 1050361, *2 (M.D.Ga., Feb. 23, 2010), *report and recommendation adopted*, 2010 WL 1050420 (M.D.Ga., Mar. 18, 2010); Tomas v. Neotti, 2009 WL 4806891, *3 (S.D.Cal., Dec. 8, 2009); Herrera v. Box Elder County Sheriff, 2009 WL 3855032, *3 (D.Utah, Nov. 17, 2009); Kelsey v. Chase, 2009 WL 3188938, *3 (M.D.Ga., Sept. 30, 2009); Franklin v. Bearden, 2009 WL 3052613, *5 (D.S.C., Sept. 23, 2009); McElroy v. Cox, 2009 WL 2705698, *3 (E.D.Cal., Aug. 25, 2009); Chisley v. Rowley, 2009 WL 2426252, *2 (D.Md., Aug. 6, 2009); Harris v. Jones, 2009 WL 6338406, *5 (W.D.Mich., July 13, 2009), *report and recommendation adopted*, 2010 WL 1424040 (W.D.Mich., Mar. 31, 2010); Iseley v. Beard, 2009 WL 1675731, *6 (M.D.Pa., June 15, 2009) (plaintiff's grievance appeal was dismissed for failure to take an intermediate appeal to the Superintendent, but plaintiff produced memos from the Superintendent showing he had taken that appeal); Ramos v. Monteiro, 2009 WL 1370998, *9 (C.D.Cal., May 14, 2009) (defendants said plaintiff never submitted a second level appeal; plaintiff produced it, and pointed out that when he resubmitted it, it was rejected as duplicative); Jones v. Spaeth, 2009 WL 1325716, *5-6 (E.D.Cal., May 12, 2009) (defendants said lack of a log entry showed appeal forms were not received, but plaintiff produced his copies with "received" stamps); Reeves v. Schetter, 2009 WL 884577, *4 (W.D.Mich., Mar. 30, 2009) (noting that grievances with written responses identified by plaintiff did not appear in defendants' records); Jaquez v. Newell, 2009 WL 523105, *2 (N.D.Okla., Feb. 27, 2009) (defendants said none of plaintiffs' requests asked for a grievance form, but plaintiff produced additional requests that did ask for forms; court suggests jail officials and the District Attorney should investigate the jail grievance process); Easley v. Nixon-Hughes, 2009 WL 237733, *3 (S.D.Ohio, Jan. 29, 2009) (plaintiff produced final decisions on grievances defendants said he did not file); Baker v. Schriro, 2008 WL 3877973, *5 (D.Ariz., Aug. 20, 2008); Menteer v. Applebee, 2008 WL 2649504, *6 (D.Kan., June 27, 2008) (finding material issue of fact where defendants said plaintiff filed no grievances but plaintiff produced copies of the grievances and the decisions on them); Marlin v. Dube-Gilley, 2008 WL 2952072, *2 (E.D.Ark., June 24, 2008) (plaintiff produced the grievance form that defendants said they could not find), *report and recommendation adopted*, 2008 WL 2952113 (E.D. Ark., July 29, 2008), *reconsideration denied*, 2008 WL 3992232 (E.D. Ark., Aug. 20, 2008); Hattrick v. FMC-Devens Staff, 2008 WL 687410, *5 (D.Mass., Mar. 5, 2008) (refusing to dismiss where defendants said they had no record of plaintiff's grievance but he produced other grievances not listed in their database); Bennett v. Douglas County, 2006 WL 1867031, *3 n.2 (D.Neb., June 30, 2006) (noting cases where jail officials had asserted they were "unable to locate" grievances but the prisoners produced them); Lodato v. Ortiz, 314 F.Supp.2d 379, 385 (D.N.J. 2004) (denying summary judgment where defendants said they had no record of plaintiff's grievance, but they also had no record of other grievances which were undisputably filed); *see* Wilks v. Stowers, 2010 WL 2104153, *3 (W.D.Wash., May 25, 2010) (noting that a quarter of the plaintiffs' appeals were lost or misplaced, "undermin[ing] the reliability" of defendants' evidence); Mennick v. Smith, 2009 WL

1783505, *2 n.1 (D.Idaho, June 20, 2009) (noting that prison staff inaccurately transcribed grievance information in their files, as shown by original forms provided by plaintiff); Collier v. Brown, 635 F.Supp.2d 1144, 1154 (C.D.Cal. 2008) (plaintiff's copy of a grievance bore official "received" stamp from appeals office, defendants' did not); Ortiz v. Kilquist, 2006 WL 2583714, *2 (S.D.Ill., Aug. 3, 2006) (noting that while defendants said they had no record of plaintiff's grievances, his medical records indicated he was seen because of a grievance).

Note 318: 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).

Note 324: Walton v. Breeyear, 2007 WL 446010, *8 (N.D.N.Y., Feb. 8, 2007) (finding waiver based on failure to plead); Wright v. Goord, 2006 WL 839532, *5 (N.D.N.Y., Mar. 27, 2006) (holding otherwise well taken non-exhaustion defense, raised on a summary judgment motion, was waived by failure to plead it or raise it by motion to dismiss); Jones v. Gardels, 2006 WL 37039, *3 (D.Del., Jan. 6, 2006) (holding failure to raise exhaustion in motion to dismiss, in interrogatories directed to affirmative defenses, or otherwise until a summary judgment motion filed after the close of discovery waived the defense); Markay v. Yee, 2005 WL 3555473, *8 (E.D.Cal., Dec. 23, 2005) (holding defense waived where defendants did not include non-exhaustion in their motion to dismiss), *report and recommendation adopted*, 2006 WL 403919 (E.D.Cal., Feb. 17, 2006); Rose v. Garbs, 2003 WL 548384, *4 n.3 (N.D.Ill., Feb. 26, 2003) (holding exhaustion waived when raised only in a summary judgment reply brief); Mayoral v. Illinois Dept. Of Corrections, 2002 WL 31324070, *1 (N.D.Ill., Oct. 17, 2002) (finding waiver where exhaustion was not raised until a summary judgment motion); Goodson v. Sedlack, 212 F.Supp.2d 255, 256 n.1 (S.D.N.Y. 2002) (finding waiver where exhaustion was not raised in or before a summary judgment motion); Rahim v. Sheahan, 2001 WL 1263493, *6-7 and n.3 (N.D.Ill., Oct. 19, 2001) (finding waiver where the defense had not been raised through four complaints, a motion to dismiss, and an appeal); *see* Dalluge v. Coates, 2008 WL 678647, *3 (E.D.Wash., Mar. 7, 2008) (answer admission that "the grievance process is completed" waived the defense), *reconsideration denied*, 2008 WL 828261 (E.D.Wash., Mar. 25, 2008), *aff'd*, 2009 WL 2222360 (9th Cir., July 27, 2009) (unpublished).

Note 399: 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).

Note 401: Rosado v. Fessetto, 2010 WL 3808813, *7 (N.D.N.Y., Aug. 4, 2010) (holding claim that plaintiff had filed grievances of which officials had no record, supported by declarations of other prisoners who had failed to get grievance responses, insufficient to avoid summary judgment), *report and recommendation adopted*, 2010 WL 3809991 (N.D.N.Y., Sept. 21, 2010); Hill v. Tisch, 2009 WL 3698380, *4 (E.D.N.Y., Oct. 30, 2009) (granting summary judgment where prisoner did not identify or describe the person who he said told him his issue was not grievable); Nekvasil v. Rehberg, 2009 WL 2824781, *7 (S.D.W.Va., Aug. 28, 2009) (granting summary judgment where plaintiff's affidavit was conclusory and contradicted her complaint and defendants submitted declarations showing non-exhaustion); Patch v. Arpaio, 2009 WL 211090, *3 (D.Ariz., Jan. 29, 2009) (holding plaintiff's "general allegations" that jail staff refused to accept his grievances and threatened to place him in protective custody could not withstand summary judgment against defendants' evidence that a grievance system existed for the plaintiff's problems); Winston v. Woodward, 2008 WL 2263191, *9-10 (S.D.N.Y. May 30, 2008) (citing plaintiffs' failure to state dates, details, or officers involved in alleged threats and harassment, or copy of relevant document, or "corroborating evidence," in granting summary judgment); Cole v. Arpaio, 2008 WL 2277885, *2 (D.Ariz., May 30, 2008) (similar to *Winston*); Josey v. Noonan, 2008 WL 2066400, *5 (D.S.C., May 13, 2008) ("the Court is not required to simply accept [plaintiff's] general and conclusory statement that he filed grievances concerning these claims when there is contrary documentary evidence"); Sanders v. Bennett, 2008 WL 754972, *7 (D.Kan., Mar. 19, 2008) ("while plaintiff claims he was repeatedly rebuffed in his efforts to obtain and pursue grievances, he has provided little specific detail"); Morgan v. Arizona, 2007 WL 2808477, *7 (D.Ariz., Sept. 27, 2007) (refusing to allow plaintiff to "subvert" the exhaustion requirement by merely submitting an affidavit stating that an officer told him he could not file a grievance); Baldauf v. Garoutte, 2007 WL 2697445, *8 (D.Colo., Sept. 11, 2007) (granting summary judgment to defendants because plaintiff did not provide specific dates for his allegations of interference with exhaustion, even though he provided names and descriptions of conduct); Fuentes-Ramos v. Arpaio, 2007 WL 1670142, *2 (D.Ariz., June 8, 2007) (granting summary 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 418: 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 McWeeney, 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 421: Kons v. Longoria, 2009 WL 3246367, *4 (E.D.Cal., Oct. 6, 2009); Curtis v. Buckley, 2008 WL 1970812, *2 (E.D.Cal., May 2, 2008), *report and recommendation adopted*, 2008 WL 2477631 (E.D.Cal., June 16, 2008); Stornes v. Guild, 2008 WL 828790, *4-5 (W.D.Mich., Mar. 27, 2008); Eberle v. Wilkinson, 2007 WL 1666229, *1-2 (S.D.Ohio, June 4, 2007); 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 before it was decided); Arreola v. Hickman, 2006 WL 2590890, *2 (E.D.Cal., Sept. 8, 2006); Christian v. Goord, 2006 WL 1459805, *6 (N.D.N.Y., May 22, 2006); Thompson v. Koneny, 2005 WL 1378832, *5 (E.D.Mich., May 4, 2005); Dimick v. Baruffo, 2003 WL 660826, *4 (S.D.N.Y., Feb. 28, 2003).

Note 428: 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) (declining 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).

Note 435: Fitzgerald v. Busby, 2009 WL 4251087, *2 (E.D.Ark., Nov. 23, 2009); Voth v. Mills, 2009 WL 2952030, *1 (D.Or., Sept. 11, 2009); Frederick v. California Dept. of Corrections and Rehabilitation, 2009 WL 2045249, *1-2 (N.D.Cal., July 9, 2009), *leave to file for reconsideration denied*, 2010 WL 234857 (N.D.Cal., Jan. 14, 2010); Walkowiak v. Heinzl, 2009 WL 1307867, *2 (W.D.Wis., May 7, 2009); Franklin v. Scribner, 2009 WL 703234, *6-7 (S.D.Cal., Mar. 16, 2009); Pauline v. Patel, 2009 WL 454653, *7 (D.Hawai'i, Feb. 23, 2009), *report and recommendation adopted*, 2009 WL 750188 (D.Hawai'i, Mar. 19, 2009); Ellenburg v. Mahoney, 2008 WL 1992162, *5 (D.Mont., May 7, 2008); Chalif v. Spitzer, 2008 WL 1848650, *13 (N.D.N.Y., Apr. 23, 2008); Gray v. Mills, 2008 WL 313926, *4 (E.D.Ark., Feb. 1, 2008) (holding claim of retaliation could not be added to complaint, but must be filed in a new complaint after exhaustion); Nash v. Department of Corrections, 2007 WL 1991040, *2 (E.D.Wash., July 5, 2007); Hunt v. Hopkins, 2006 WL 1877107, *2 (D.Neb., July 6, 2006).

Note 436: Johnson v. Pollard, 2009 WL 3063327, *12 (E.D.Wis., Sept. 16, 2009); Murphy v. Grenier, 2009 WL 1044832, *19-20 (E.D.Mich., Apr. 20, 2009) (referring to claims that had not arisen as

of the original complaint and were to be added by supplemental complaint); Keup v. Hopkins, 2008 WL 427556, *4 (D.Neb., Feb. 14, 2008); Martinson v. Menifee, 2007 WL 2106516, *4 n.2 (S.D.N.Y., July 18, 2007) (holding claims unexhausted at initial filing, but exhausted at the time of an amended complaint 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); Ajaj v. U.S., 2006 WL 1305198, *7 (D.Colo., May 11, 2006); Anthony Smith v. Worsham, 2005 WL 2239925, *3-4 (D.Colo., Sept. 14, 2005); Amador v. Superintendents of Dept. of Correctional Services, 2005 WL 2234050, *8 n.9 (S.D.N.Y. Sept. 13, 2005); Cline v. Fox, 266 F.Supp.2d 489, 493 (N.D.W.Va. 2003), reconsideration granted, 282 F.Supp.2d 490 (N.D.W.Va. 2003) (dismissing unexhausted claim, then allowing it to be reinstated after exhaustion); Carter v. Wright, 211 F.R.D. 549, 551 (E.D.Mich. 2003); Madison v. Mazzuca, 2004 WL 3037730, *14 (S.D.N.Y., Dec. 30, 2004).

Note 444: Underwood v. Knowles, 2011 WL 1322531, *3 (E.D.Cal., Apr. 1, 2011) (noting unexplained failure to respond); Proctor v. Board of County Com'rs of County of Pottawatomie, 2010 WL 711198, *3 (W.D.Okla., Feb. 25, 2010) (noting undisputed failure to respond); Ratcliff v. Schriro, 2009 WL 2515623, *2-4 (D.Ariz., Aug. 13, 2009) (noting plaintiff filed informal grievance, formal grievance, and grievance appeal without response, then wrote to Director, whose office responded that he should file a grievance); James v. Hernandez, 2009 WL 1979261, *1 (S.D.N.Y., July 9, 2009) (noting lack of response to initial grievance and to appeals to Warden, Inspector General, and Board of Correction, but dismissing because he did not take the final appeal); Sims v. Piper, 2008 WL 3318746, *4 n.4 (E.D.Mich., Aug. 8, 2008) (noting defendants neither disputed nor explained their failure to address plaintiff's grievances at first two stages); Whitmore v. Walker, 2008 WL 926486, *2-4 (S.D.Ill., Apr. 2, 2008) (recounting plaintiff's repeated efforts and complete failure to get responses to his grievances); Clarke v. Thornton, 515 F.Supp.2d 435, 438-41 (S.D.N.Y. 2007) (noting plaintiff had filed seven grievances without proper response, but dismissing for non-exhaustion anyway because she did not appeal any of them to the final step).

Note 449: Williams v. Lewis, 2008 WL 860113 *3 (N.D.Cal., Mar. 28, 2008) (prisoner who got no response at the "informal level" did not exhaust because he failed to ask the Appeals Coordinator to waive the informal level requirement as the rules permitted); Clarke v. Thornton, 515 F.Supp.2d 435, 438-41 (S.D.N.Y. 2007); Williams v. Arpaio, 2007 WL 2903025, *3 (D.Ariz., Sept. 28, 2007); Walker v. Seal, 2007 WL 1169364, *2 (E.D.La., Apr. 19, 2007); Rockwell ex rel. Gill v. State Oregon, 2007 WL 1039521, *4 (D.Or., Apr. 3, 2007) (noting rules permitted filing a new grievance about the lack of response to an earlier grievance); Donahue v. Bennett, 2004 WL 1875019, *6 n.12 (W.D.N.Y., Aug. 17, 2004); Bailey v. Sheahan, 2003 WL 21479068, *3 (N.D.Ill., June 20, 2003); Sims v. Blot, 2003 WL 21738766, * 3 (S.D.N.Y., July 25, 2003); Larry v. Byno, 2003 WL 1797843, *2 n.3 (N.D.N.Y., Apr. 4, 2003) ("This Court's decision should not be seen as condoning" the failure to follow procedure by not rendering a decision); Harvey v. City of Philadelphia, 253 F.Supp.2d 827, 830 (E.D.Pa. 2003) (holding that failure to use a procedure permitting sending a grievance directly to the Commissioner if the prisoner believes he is being denied access to the process was a failure to exhaust); Croswell v. McCoy, 2003 WL 962534, *4 (N.D.N.Y., Mar. 11, 2003); Mendoza v. Goord, 2002 WL 31654855, *3 (S.D.N.Y., Nov. 21, 2002) (dismissing for failure to appeal a non-response even though the plaintiff "tried many avenues to seek relief from prison authorities"); Petty v. Goord, 2002 WL 31458240, *4 (S.D.N.Y., Nov. 4, 2002); Graham v. Cochran, 2002 WL 31132874 (S.D.N.Y., Sept. 25, 2002); Reyes v. Punzal, 206 F.Supp.2d 431, 432-33 (W.D.N.Y.2002); Martinez v. Dr. Williams R., 186 F.Supp.2d 353, 357 (S.D.N.Y. 2002); Saunders v. Goord, 2002 WL 1751341, *3 (S.D.N.Y., July 29, 2002); Jorss v. Vanknocker, 2001 WL 823771, *2 (N.D.Cal., July 19, 2001), *aff'd*, 44 Fed.Appx. 273, 2002 WL 1891412 (9th Cir. 2002); Smith v. Stubblefield, 30 F.Supp.2d at 1174; Morgan v. Arizona Dept. of Corrections, 976 F.Supp. 892, 895 (D.Ariz. 1997).

Note 454: Doyle v. Broussard, 2010 WL 5663012, *4 (W.D.La., Dec. 7, 2010), *report and recommendation adopted*, 2011 WL 308901 (W.D.La., Jan. 28, 2011); Jones v. Felker, 2010 WL 582131, *7 (E.D.Cal., Feb. 12, 2010) (summary judgment denied where plaintiff tried to grieve, got no response or log number, complained to central office with no response, appeal to central office was rejected for not going through channels), *report and recommendation adopted*, 2010 WL 1034097 (E.D.Cal., Mar. 17, 2010); Wilkerson v. Jenkins, 2010 WL 384737, *3 (D.Md., Jan. 27, 2010) (similar to *Dole v. Chandler*); Hill v. Truelove, 2010 WL 56144, *10 (W.D.Okla., Jan. 6, 2010); Hambrick v. Morton, 2009 WL 1759564, *1, 3 (S.D.Ga., June 19, 2009) (allegation that prisoner whose grievance remained pending after a year and who was denied an appeal form sufficiently alleged exhaustion of available remedies); Jones v. Spaeth, 2009 WL 1325716, *6 (E.D.Cal., May 12, 2009) (prisoner who did not receive a decision did not fail to exhaust since he could not appeal without it); Perry v. Green, 2009 WL 814447, *14 (E.D.Mich., Mar. 26, 2009) (plaintiff's grievance was returned without being given a number; "Perhaps it would have been difficult to appeal the rejection of an undocumented grievance."); Mintun v. Corrections Corp. of America, 2009 WL 666958, *4 (W.D.Okla., Mar. 10, 2009) (declining to dismiss for non-exhaustion where plaintiff could not file a grievance without responses to his informal complaints); Webb v. Beaty, 2008 WL 4889105, *4-5 (W.D.Okla., Nov. 12, 2008) (denying summary judgment where only response to required "request to staff" was officials were "looking into" the matter, with no decision provided); Franklin v. Butler, 2008 WL 4078797, *3 (E.D.Cal., Aug. 29, 2008) (similar to *Dole*), *report and recommendation adopted*, 2008 WL 4601081 (E.D.Cal., Oct. 15, 2008); Ortiz v. Hayman, 2008 WL 1319203, *4 (D.N.J., Apr. 10, 2008) (where prisoner alleged he gave his grievance to an officer for mailing, and defendants said he didn't file it because they had no record of it, the factual dispute barred summary judgment); Whitmore v. Walker, 2008 WL 926486, *2-4 (S.D.Ill., Apr. 2, 2008) (where prisoner repeatedly filed grievances with no response at the facility and the central office grievance body refused to consider them without a facility response, court refuses to dismiss for non-exhaustion); 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); 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); Cooper v. Rothstein, 2007 WL 1452989, *2 (N.D.Ill., May 17, 2007) (following *Brengettcy*); Woulard v. Food Service, 294 F.Supp.2d 596, 602 (D.Del. 2003); Green v. Hartman, 2006 WL 2699336, *3 (N.D.Ill., Sept. 18, 2006) (refusing to dismiss where plaintiff received no decision from which he could appeal and waited 60 days to file though the decision deadline was 30 days); Smith v. Boyle, 2003 WL 174189, *3 (N.D.Ill., Jan. 27, 2003); Taylor v. Dr. Barnett, 105 F.Supp.2d 483, 486 (E.D.Va. 2000).

Note 455: 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, Jr. v. Alveriaz, 2009 WL 3467836, *3 n.1, *10 (E.D.Pa., Oct. 26, 2009); Ming Ching Jin v. Hense, 2005 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 177424 (E.D.Cal., Jan. 20, 2006); Ellis v. Cambra, 2005 WL 2105039, *4-5 (E.D.Cal., Aug. 30, 2005) (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).

Note 456: Towns v. Cowan, 2011 WL 6302888, *2 (S.D.Ill., Nov. 15, 2011) (rejecting argument 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 adopted*, 2011 WL 127113 (E.D.Cal., Jan. 14, 2011); Bryant v. Wright, 2010 WL 3629443, *5-6 (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).

Note 459: Sims v. Piper, 2008 WL 3318746, *5 & n.7 (E.D.Mich., Aug. 8, 2008) (holding non-response at early stages means the prisoner has exhausted regardless of rules allowing appeal of non-response); Davis v. Kirk, 2007 WL 4353798, *8 (S.D.Tex., Dec. 11, 2007) (stating prisoner who received no decisions had "nothing from which to appeal"); Carter v. Morrison, 2007 WL 4233500, *7 (E.D.Pa., Nov. 28, 2007); Diaz v. Carroll, 2007 WL 2154202, *3 (D.Del., July 26, 2007) ("It is unclear to the court . . . 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 Investigation); Shaheed-Muhammad v. Dipaolo, 393 F.Supp.2d 80, 97 (D.Mass. 2005) (noting officials' 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, 2005 WL 1344379, *2 (E.D.Cal., May 27, 2005) (stating "exhaustion occurs when prison officials fail 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 (D.Del., Feb. 11, 2004); Lane v. Doan, 287 F.Supp.2d 210, 212-13 (W.D.N.Y. 2003) (holding a prisoner who made "reasonable attempts" to file and prosecute grievances, but had many of his grievances and inquiries ignored, had exhausted); Barrera v. Acting Executive Director of Cook County Dep't of Corrections, 2003 WL 21976753, *2-3 (N.D.Ill., Aug. 18, 2003) (holding that prisoner who received no response for 28 months had exhausted, notwithstanding claim that it was still under investigation after 28 months); Sweet v. Wende Correctional Facility, 253 F.Supp.2d 492, 495 (W.D.N.Y. 2003) (holding that prisoner's allegation that he commenced the grievance process but prison officials did not act on his complaints was sufficient to avoid summary judgment for non-exhaustion); Smith v. Boyle, 2003 WL 174189, *3 (N.D.Ill., Jan. 27, 2003) (holding that a plaintiff who waited seven months for a decision in a system that required a decision in order to appeal had no available remedy); Rose v. Garbs, 2003 WL 548384, *4 n.3 (N.D.Ill., Feb. 26, 2003); Dennis v. Johnson, 2003 WL 102399 (N.D.Tex., Jan. 7, 2003) (holding that plaintiff who filed a step two grievance and did not receive a timely response had exhausted); Martin v. Snyder, 2002 WL 484911, *3 (N.D.Ill., Mar. 28, 2002) (rejecting claim that plaintiff "should have filed even more grievances about defendants' failure to respond"); Armstrong v. Drahos, 2002 WL 187502, *1 (N.D.Ill., Feb. 6, 2002) ("If [plaintiff] received no response, there was nothing to appeal."); Harmon v. Aroostook County Sheriff's Dept., 2001 WL 1165406, *3 (D.Me., Oct. 2, 2001) Long v. Lafko, 2001 WL 863422, *2 n. 1 (S.D.N.Y., July 31, 2001); Bowers v. Mounet, 2001 WL 826556, *2 (D.Del., July 18, 2001); Nitz v. French, 2001 WL 747445, *3 (N.D.Ill., July 2, 2001); Reeder v. Department of Correction, 2001 WL 652021, *2 (D.Del., Feb. 22, 2001).

Note 460: 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).

Note 463: 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); 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 470: Worthen v. Oklahoma Dept. of Corrections, 2010 WL 3295010, *6 (W.D.Okla., Aug. 4, 2010), *report and recommendation adopted*, 2010 WL 3294999 (W.D.Okla., 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 Sheriff's 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 477: 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 499: 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. Braman, 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 503-504: 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 [be]cause 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. Tex., Jan. 11, 2007) (holding that a generalized statement sufficed to exhaust where the alleged violations were repetitive and involved the same defendants), *report and recommendation adopted*, 2007 WL 784343 (S.D.Tex., Mar. 12, 2007), *appeal dismissed*, 265 Fed.Appx. 296 (5th Cir. 2008) (unpublished); Watson v. Delgado, 2006 WL 1716869, *6-7 (S.D.N.Y., June 20, 2006) (holding a grievance that said an officer beat the plaintiff up, threatened to poison him if he complained, and asked that "the matter" be investigated, sufficiently exhausted plaintiff's use of force claim notwithstanding defendants' argument that the force claim was only there to explain the threat); Underwood v. Mendez, 2006 WL 860142, *5 (M.D.Pa., Mar. 31, 2006) (holding that a prisoner who complained of a retaliatory transfer need not also have mentioned in his grievance a falsified progress report and a conspiracy, since these were just factual allegations supporting his retaliation claim); Tillis v. Lamarque, 2006 WL 644876, *7 (N.D.Cal., Mar. 9, 2006) ("In determining whether a claim has been exhausted, a court must consider whether a reasonable investigation of the complaint would have uncovered the allegations now before it."); Hooks v. Rich, 2006 WL 565909, *5 (S.D.Ga., Mar. 7, 2006) ("Section 1997e(a) is not intended to result in 'fact-intensive litigation' over whether every fact relevant to the cause of action was included in the grievance."); Mester v. Kim, 2005 WL 3507975, *2 (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., July 6, 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.), `, 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 506: Monger v. Tilton, 2008 WL 3863696, *4-5 (E.D.Cal., Aug. 18, 2008) (statements made by plaintiff during grievance interviews and acknowledged in the response to his grievance helped show what was grieved), *report and recommendation adopted*, 2008 WL 4379180 (E.D.Cal., Sept. 25, 2008); Freeman v. Salopek, 2008 WL 743952, *4 (M.D.Fla., Mar. 19, 2008) (rejecting claim that grievance was "undated, unclear, and vague" where final decisionmaker gave response addressing the precise issue raised in the grievance); Carter v. Symmes, 2008 WL 341640, *5 (D.Mass., Feb. 4, 2008) (issue not raised in the grievance, but spelled out in a timely letter from counsel, and actually investigated by defendants, was exhausted); Holley v. California Dept. of Corrections, 2007 WL 586907, *6-8 (E.D.Cal., Feb. 23, 2007) (holding prisoner who complained about being required to cut his hair, asserting religious discrimination at the first stage and gender discrimination at the last, and received a decision on the merits, exhausted), *report and recommendation adopted,* 2007 WL 869956 (E.D.Cal., Mar. 22, 2007); Ambriz v. Kernan, 2007 WL 214594, * 6 (E.D.Cal., Jan. 25, 2007) (noting that the "responses of the reviewers flesh out the circumstances of which plaintiff was complaining," finding exhaustion), *report and recommendation adopted*, 2007 WL 869732 (E.D.Cal., Mar. 21, 2007); Baskerville v. Blot, 224 F.Supp.2d. 723, 730 (S.D.N.Y. 2002) (applying "time and opportunity" rationale to hold that plaintiff exhausted as to issues that were actually investigated as a result of his grievance).

Note 514: Gravley v. Beard, 2010 WL 3829370, *2 (W.D.Pa., Aug. 31, 2010) ("Retaliation is a separate claim and prisoners must raise a specific claim of retaliation in their prison grievance in order to exhaust administrative remedies."), *report and recommendation adopted*, 2010 WL 3829434 (W.D.Pa., Sept. 23, 2010); Thomas v. Pichardo, 2010 WL 3119623, *13 (S.D.Fla., June 2, 2010) (stating "the essence of each claim . . . must have clearly been outlined and complained of in the prisoner's underlying administrative grievances"), *report and recommendation adopted*, 2010 WL 3119544 (S.D.Fla., Aug. 3, 2010); Sowemimo v. Bader, 2010 WL 2803980, *2 (S.D.Ill., July 15, 2010) (plaintiff who "presented his grievances about the propriety of his account charges, not their allegedly retaliatory nature" did not exhaust retaliation claim); O'Roy v. Mares, 2010 WL 653579, *2 (E.D.Cal., Feb. 19, 2010); Thomas v. Sheppard-Brooks, 2009 WL 3365872, *5 (E.D.Cal., Oct. 16, 2009), *report and recommendation adopted*, 2009 WL 4042876 (E.D.Cal., Nov. 20, 2009); Baker v. Liadacker, 2009 WL 3297497, *6 (N.D.Fla., Oct.

13, 2009); Parker v. Walker, 2009 WL 1209066, *3-4 (S.D.Ill., May 4, 2009); Green v. Rubenstein, 644 F.Supp.2d 723, 746 (S.D.W.Va. 2009); Brown v. Karlow, 2009 WL 700200, *2-3 (E.D.Cal., Mar. 16, 2009) (plaintiff who did not mention retaliatory motive until final grievance appeal did not exhaust retaliation claim); Brown v. Austin, 2009 WL 613316, *5 (S.D.N.Y., Mar. 4, 2009); Douglas v. Caruso, 2008 WL 4534061, *9 (W.D.Mich., Sept. 30, 2008) (grievance alleging retaliation exhausted as to retaliatory acts, including those that came after the grievance was filed); Wine v. Pollard, 2008 WL 4379236, *3 (W.D.Wis., Sept. 23, 2008) (prisoner must identify the retaliatory act and the protected conduct in the grievance, though need not identify all defendants involved); Wilson v. Woodford, 2008 WL 1970817, *3 (E.D.Cal., May 2, 2008), *report and recommendation adopted,* 2008 WL 2697547 (E.D.Cal., July 8, 2008); Dawson v. Norwood, 2007 WL 3302102, *9 (W.D.Mich., Nov. 6, 2007); Greene v. North Kern State Prison, 2006 WL 3050822, *2 (E.D.Cal., Oct. 25, 2006); Curtis v. Solomon, 2006 WL 1653608, *4 (N.D.Fla., June 7, 2006); Lindell v. Casperson, 360 F.Supp.2d 932, 949 (W.D.Wis. 2005), *aff'd*, 169 Fed.Appx. 999 (7th Cir., Mar. 13, 2006), *cert. denied*, 549 U.S. 874 (2006); Scott v. Gardner, 2005 WL 984117, *3-4 (S.D.N.Y., Apr. 28, 2005); Ellis v. Cambra, 2005 WL 2105039, *7 (E.D.Cal., Aug. 30, 2005), *report and recommendation adopted*, 2006 WL 547921 (E.D.Cal., Mar. 3, 2006); Parker v. Kramer, 2005 WL 1343853, *3 (E.D.Cal., Apr. 28, 2005) (holding retaliation allegation must be made in grievance to give prison officials "fair notice" of the events that are later sued about, even though 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"); Robins v. Atchue, 2006 WL 1283470, *4 (E.D.Cal., May 10, 2006) (holding disciplinary appeal that did not mention retaliation could not exhaust a retaliation claim), *report and recommendation adopted*, 2006 WL 1882940 (E.D.Cal., July 7, 2006).

Note 515: 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); Barretto 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).

Note 516: Gordon v. Stalder, 2007 WL 4976050, *4-5 (W.D.La., Dec. 27, 2007) (grievance

about inadequate medical care did not exhaust claim that certain treatments were afforded only to Caucasian prisoners); Farrell v. Unit Staff, 2007 WL 3377077, *3 (W.D.Okla., Nov. 13, 2007); Sparks v. Rittenhouse, 2007 WL 987473, *9 (D.Colo., Mar. 29, 2007); Williby v. Woodford, 2007 WL 611240, *5 (E.D.Cal., Feb. 27, 2007), *report and recommendation adopted*, 2007 WL 869017 (E.D.Cal., Mar. 20, 2007); Valienterbanales v. Robinson, 2006 WL 1540995, *2 (W.D.Va., May 31, 2006); Irvin v. Dormire, 2005 WL 998597, *1 (W.D.Mo., Apr. 18, 2005); Goldsmith v. White, 357 F.Supp.2d 1336, 1338-41 (N.D.Fla. 2005); Young v. Goord, 2002 WL 31102670, * 4 (E.D.N.Y., Sept. 3, 2002) (holding that a prisoner who alleged in his grievance only that he had been disciplined for conduct that did not violate the 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 521: 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 523: 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 1882940 (E.D.Cal. July 7, 2006); Mark v. Imberg, 2005 WL 3201115, *7 (W.D.Wis., Nov. 28, 2005) (holding claim that was buried in discussion of another claim, was not decided, and was not identified by the plaintiff in his grievance appeal was not exhausted).

Note 526: Nunez v. Hasty, 2006 WL 2589254, *7 (E.D.N.Y., Sept. 8, 2006) (holding injured prisoner's grievance asking for MRI and specialist examination exhausted more generally as to inadequate medical care and deteriorating physical condition); Wilkerson v. Doughty, 2006 WL 2568213, *3 (S.D.Ill., Sept. 5, 2006) (holding that request by a paraplegic for an eggcrate mattress exhausted his complaint about bedsore treatment); Martin v. Alameida, 2006 WL 495997, *2 (E.D.Cal., Feb. 28, 2006) (holding complaint about denial of medical care exhausted allegations that supervisors acquiesced in the denial and did not train subordinates), *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); Sulton 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 530: Morrison v. Carey, 2009 WL 3126497, *4-5 (E.D.Cal., Sept. 24, 2009) (grievance against being housed with a chronic smoker despite plaintiff's medical condition exhausted the claim that this problem resulted from failure to train or supervise), *report and recommendation adopted*, 2009 WL

4931889 (E.D.Cal., Dec. 15, 2009); Ramos v. Monteiro, 2008 WL 4184644, *13 (C.D.Cal., Sept. 8, 2008) (claim of inadequate training does not set forth a separate claim but a theory of liability as to certain defendants); Conyers v. Abitz, 2007 WL 2773763, *10-11 (E.D.Wis., Sept. 21, 2007) (holding grievance alleging denial of Ramadan participation exhausted claim that one defendant failed to overrule another defendant's decision); 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); Martin v. Alameida, 2006 WL 495997, *2 (E.D.Cal., Feb. 28, 2006) (holding complaint about denial of medical care exhausted allegations that supervisors acquiesced in the denial and did not train subordinates), *report and recommendation adopted*, 2006 WL 845516 (E.D.Cal., Mar. 30, 2006).

Note 550: 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 556: 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 that 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 568: Wade v. Cain, 2011 WL 612732, *2 (M.D.La., Jan. 13, 2011) (disciplinary appeal did not exhaust plaintiff's related complaint of staff sexual assault), *report and recommendation adopted*, 2011 WL 606842 (M.D.La., Feb. 11, 2011); Bennett v. Fischer, 2010 WL 5525368, *6 (N.D.N.Y., Aug. 17, 2010) (disciplinary appeal did not exhaust related religious exercise claim), *report and recommendation adopted*, 2011 WL 13826 (N.D.N.Y., Jan. 4, 2011); Terrase v. Cain, 2008 WL 717737, *2 (M.D.La., Mar. 17, 2008) (a disciplinary appeal did not exhaust a claim of failure to protect, since it did not give officials adequate notice of that claim); Singh v. Goord, 520 F.Supp.2d 487, 497-98 (S.D.N.Y. 2007) (holding successful disciplinary appeal challenging discipline for refusing work contrary to religious beliefs did not exhaust plaintiff's challenge to the underlying disciplinary rule; a separate grievance was required); Chavis v. Goord, 2007 WL 2903950, *9-10 (N.D.N.Y., Oct. 1, 2007) (holding disciplinary appeal did not exhaust plaintiff's claim for retaliation and interference with religious exercise; noting case is "readily distinguishable" from due process challenges to hearing); Webster v. Kurtz, 2006 WL 893606, *2 (D.Colo., Mar. 31, 2006) (holding that successful disciplinary appeal did not exhaust claims of subsequent retaliation and refusal to reinstate visiting privileges; these should have been grieved notwithstanding rule prohibiting grieving disciplinary convictions); 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); Rodney v. Goord, 2003 WL 21108353, *6 (S.D.N.Y., May 15, 2003) (holding an allegation of false disciplinary charges had to be grieved in addition to appealing the disciplinary conviction); Tookes v. Artuz, 2002 WL 1484391, *4 (S.D.N.Y., July 11, 2002) (holding that appeal of disciplinary conviction did not exhaust as to claim against officer who allegedly wrote a false disciplinary report); Cherry v. Selsky, 2000 WL 943436, *7 (S.D.N.Y., July 7, 2000) (same as *Tookes*); Hattie v. Hallock, 8 F.Supp.2d 685, 689 (N.D.Ohio 1998) (holding that in

order to challenge a prison rule, the prisoner must not only appeal from the disciplinary conviction for breaking it, but must also grieve the validity of the rule), *judgment amended*, 16 F.Supp.2d 834 (N.D.Ohio 1998).

Note 611: Downing v. Correction Medical Services Inc., 2009 WL 511849, *7 (W.D.Mich., Feb. 26, 2009) (naming some individuals plus all Bureau of Health Care personnel "throughout and down to the institutional level for those who have been treating me over the last 20 months" sufficed); Heggie v. Michigan Dept. of Corrections, 2008 WL 5459338, *5-7 (W.D.Mich., Nov. 26, 2008) (grievance against "health care" was "more than sufficient to put on notice any and all individuals and entities involved with providing health care to prisoners" at the prison), *report and recommendation adopted in pertinent part, rejected in part*, 2009 WL 36612 (W.D.Mich., Jan. 5, 2009); Young v. Good, 2008 WL 4816474, *4 (W.D.Pa., Nov. 4, 2008) (grievance identifying "food services" sufficiently identified Food Services Supervisor, Cook Supervisor, and Deputy Warden who supervised food services); Austin v. Correctional Medical Services, Inc., 2008 WL 4426342, *5 (W.D.Mich., Sept. 26, 2008) (grievance naming "the Medical Services Department" sufficiently gave notice as to all health care providers at the prison), on reconsideration in part on other grounds, 2008 WL 4911795 (W.D.Mich., Nov. 13, 2008); Stevenson v. Michigan Dept. of Corrections, 2008 WL 623783, *11 (W.D.Mich., Mar. 4, 2008) (a policy requiring plaintiff to provide "the facts" including "who" did not require naming all defendants; naming "health care" exhausted against the private provider of medical care); Jackson v. Caruso, 2008 WL 828118, *4 (W.D.Mich., Feb. 12, 2008) ("library staff" sufficed to exhaust against individual members of the library staff), *report and recommendation adopted as modified on other grounds*, 2008 WL 828116 (W.D.Mich., Mar. 26, 2008).

Note 689: 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 691: 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. Dipaolo, 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 697: 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 actuall 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).

Note 714: Whitney v. Simonson, 2007 WL 3274373, *2 (E.D.Cal., Nov. 5, 2007) (dismissing because plaintiff filed a new grievance rather than seeking reinstatement of his existing grievance; court admits defendants' approach is "hyper-technical" but holds *Woodford* requires dismissal), *report and recommendation adopted*, 2007 WL 4591593 (E.D.Cal., Dec. 28, 2007), *aff'd*, 317 Fed.Appx. 690 (9th Cir. 2009) (unpublished); Cadogan v. Vittitow, 2007 WL 2875464, *2-3 (E.D.Mich., Sept. 30, 2007) (dismissing where grievance was rejected for "including extraneous information, going beyond the scope of the issue being grieved"—by attaching 7 pages of information relating to requests for dental care, medical information, and dental care standards, apparently relevant to claim); Cordova v. Frank, 2007 WL 2188587, * 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); Chatman v. Johnson, 2007 WL 2023544, *6 (E.D.Cal., July 11, 2007) (dismissing where prisoner re-submitted his appeal to Inmate Appeals Branch rather than to the appeals coordinator as directed), *report and recommendation adopted*, 2007 WL 2796575 (E.D.Cal., Sept. 25, 2007); Scarborough v. Cohen, 2007 WL 934594, *6 (N.D.Fla., Mar. 26, 2007) (dismissing for non-exhaustion where plaintiff had filed an "inmate request form" rather than an "informal grievance" before formally grieving); Hashiyah v. Wisconsin Dept. of Corrections, 2006 WL 2845701, *10 (E.D.Wis., Sept. 29, 2006) (dismissing for non-exhaustion where grievance was dismissed because plaintiff added his religious name as well as his "incarcerated name"); McNeal v. Cabana, 2006 WL 2794337, *1 (N.D.Miss., Jan. 23, 2006) (dismissing for non-exhaustion because the plaintiff mailed his appeal directly to the appeal body rather than using a request for services form).

Note 727: Mennick v. Smith, 2009 WL 1783505, *2 (D.Idaho, June 20, 2009); Riker v. Gibbons, 2009 WL 910971, *1 (D.Nev., Mar. 31, 2009) (defendants could not rely on "no multiple issues" rule where they had decided the issues plaintiff's grievance raised); Halpin v. David, 2009 WL 789684, *6 (N.D.Fla., Mar. 20, 2009); Solliday v. Spence, 2009 WL 559526, *10 (N.D.Fla., Mar. 2, 2009) (defendants could not rely on untimeliness where grievance about sexual assault was not dismissed as untimely, but was denied because the process could not provide the requested remedies of money damages or reduction of sentence); Torrez v. McKee, 2008 WL 4534126, *7 (W.D.Mich., Sept. 30, 2008) (where intermediate appeal was dismissed on procedural grounds, but final appeal addressed the merits, plaintiff exhausted); Pasley v. Oliver, 2008 WL 4056552, *6 (W.D.Mich., Aug. 27, 2008) (plaintiff's failure to discuss issue informally with defendant before filing grievance was not a failure to exhaust where officials decided the merits); Subil v. U.S. Marshal, 2008 WL 835712, *5 (N.D.Ind., Mar. 24, 2008) (declining to dismiss for non-exhaustion where grievance was not filed in the normal channels, but the final reviewing authority accepted and responded to it); Broder v. Correctional Medical Services, Inc., 2008 WL 704229, *2 (E.D.Mich., Mar. 14, 2008); Pierce v. Hillsborough County Dept. of Corrections, 2008 WL 215716, *6 (D.N.H., Jan. 24, 2008); Furnace v. Evans, 2008 WL 160968, *3-4 (N.D.Cal., Jan. 15, 2008); Trenton v. Arizona Dept. of Corrections, 2008 WL 169642, *4 (D.Ariz., Jan. 14, 2008); Baker

v. Vanderark, 2007 WL 3244075, *7-8 (W.D.Mich., Nov. 1, 2007) (citing *Woodford* "proper exhaustion" holding as requiring officials to raise procedural defects timely); Riley v. Hawaii Dept. of Public Safety, 2007 WL 3072777, *4-6 (D.Haw., Oct. 17, 2007) (holding prisoners complaining of sexual assault who completed the emergency grievance procedure as instructed, and whose complaints were processed through it, had exhausted despite not also completing the standard grievance process); Odighizuwa v. Strouth, 2007 WL 1170640, *4 (W.D.Va., Apr. 17, 2007), *aff'd*, 261 Fed.Appx. 498 (4th Cir. 2008) (unpublished); Ellis v. Albonico, 2007 WL 809804, *4 (E.D.Cal., Mar. 15, 2007) (where defendants couldn't locate plaintiff's alleged first level grievance, but the warden said his complaint would be 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.").

Note 743: Sampson v. Ozmint, 2010 WL 4929849, *7 (D.S.C., Nov. 2, 2010) (rejecting grievance finding that plaintiff had not made sufficient efforts to resolve his problem informally), *aff'd*, 2010 WL 4930996 (D.S.C., Nov. 30, 2010); Roberson v. Torres, 2010 WL 3842376, *5 (E.D.Mich., July 19, 2010) (rejecting grievance findings that plaintiff had failed to resolve his complaints informally), *report and recommendation adopted*, 2010 WL 3834630 (E.D.Mich., Sept. 27, 2010); Henderson v. Phillips, 2010 WL 3894574, *2 (N.D.Ind., Sept. 29, 2010) (rejecting finding that plaintiff did not indicate efforts at informal resolution, where the record plainly showed otherwise); Jones v. White, 2010 WL 1382109, *4-5 (N.D.Ind., Mar. 30, 2010) (holding remedy was made unavailable by procedural rejection of grievance that was unsupported by the grievance record), *reconsideration denied*, 2011 WL 1296755 (N.D.Ind., Mar. 31, 2011); Bowers v. Burnett, 2009 WL 7729553, *9 (W.D.Mich., July 27, 2009) (rejecting grievance body's determination that grievance was duplicative and was about the rejection of another grievance; finding claim exhausted); Banks v. Cox, 2009 WL 1505579, *2 (W.D.Wis., May 28, 2009) (rejecting finding that plaintiff didn't appeal where plaintiff averred that he 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 met 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 contrived and hypertechnical 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); Wilkerson 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 circumstances" under grievance rules for late grievance).

Note 745: Hinton v. Bowers, 2011 WL 3329641, *2-4 (W.D.Okla., July 18, 2011) (holding a prisoner who did not follow instructions failed to exhaust even if the instructions were wrong), *report and recommendation adopted*, 2011 WL 3329706 (W.D.Okla., Aug. 3, 2011), *aff'd*, 458 Fed.Appx. 755 (10th Cir. 2012); Davis v. Corrections Corp. of America, 2011 WL 1304639, *4 (E.D.Okla., Mar. 31, 2011); Rivera v. Pennsylvania Dept. of Corrections, 2010 WL 339854, *3 (W.D.Pa., Jan. 22, 2010) (prisoner who disregarded instruction to comply with a two-page limit failed to exhaust), *aff'd*, 388 Fed.Appx. 107 (3d Cir. 2010), *cert. denied*, 131 S.Ct. 978 (2011); Rivera v. Pennsylvania Department of Corrections, 2009 WL 3447388, *5 (W.D.Pa., Oct. 21, 2009) (prisoner who appealed rather than follow instructions to conform to two-page limit on statement of facts in grievances failed to exhaust); Nunez v. Federal Bureau of Prisons, 2008 WL 5096001, *3 (E.D.Ky., Dec. 1, 2008) (prisoner who appealed rather than following directions to comply with rules did not exhaust); Abdulhaseeb v. Calbone, 2008 WL 904661, *15 (W.D.Okla., Apr. 2, 2008) (holding prisoner failed to exhaust when he did not comply with demand to supplement his grievance with information about additional grievances he had filed after the one in question, despite his belief that the demand was unreasonable); Skipper v. South Carolina Dept. of Corrections, 2008 WL 608575, *4 (D.S.C., Mar. 4, 2008); Keeton v. Forsythe, 2008 WL 436945, *2 (E.D.Cal., Feb. 14, 2008) (plaintiff failed to exhaust when he did not comply with instruction to resubmit his grievance because his writing was too small to read), *report and recommendation adopted*, 2008 WL 780700 (E.D.Cal., Mar. 20, 2008); Whitney v. Simonson, 2007 WL 3274373, *2 (E.D.Cal., Nov. 5, 2007) (dismissing claim of prisoner who filed a new grievance rather than trying to reinstate the old one as instructed; court concedes this approach is "hyper-technical" but required by *Woodford v. Ngo*), *report*

and recommendation adopted, 2007 WL 4591593 (E.D.Cal., Dec. 28, 2007), *aff'd*, 317 Fed.Appx. 690 (9th Cir. 2009) (unpublished); Richardson v. Llamas, 2007 WL 2389835, *3 (E.D.Cal., Aug. 20, 2007) (holding plaintiff did not exhaust where he failed to cooperate with an interview concerning his complaint of sexual abuse), *report and recommendation adopted*, 2007 WL 2904087 (E.D.Cal., Oct. 1, 2007); Cyrus v. Shepard, 2007 WL 2155527, *7-8 (M.D.Pa., July 26, 2007) (holding a plaintiff who used a "sensitive grievance" procedure, was told to use the regular procedure, and didn't, failed to exhaust); Walton v. Ayon, 2007 WL 1792309, *2 (E.D.Cal., June 19, 2007), *report and recommendation adopted*, 2007 WL 3170679 (E.D.Cal., Oct. 26, 2007); Fleming v. Geo Group, Inc., 2007 WL 162535, *2 (W.D.Okla., Jan. 18, 2007) (dismissing for non-exhaustion where prisoner ignored instructions to submit a legible copy of his grievance and appealed twice instead); Faysom v. Timm, 2005 WL 3050627, *2-3 (N.D.Ill., Nov. 9, 2005) (holding plaintiff who did not respond to Administrative Review Board's request for more information and clarification failed to exhaust); Jones v. Doty, 2005 WL 2860971, *2 (E.D.Tex., Oct. 28, 2005) (holding a prisoner who used the "sensitive grievance" procedure and was told he should use the regular grievance procedure, but did not, failed to exhaust, even though he appealed the denial of the "sensitive grievance"); Robinson v. Shannon, 2005 WL 2416116, *5 (M.D.Pa., Sept. 30, 2005) (holding that prisoner who was instructed on appeal to attach the Superintendent's response did not exhaust where he failed to respond and say there was no response); Hazleton v. Alameida, 358 F.Supp.2d 926, 935 (C.D.Cal. 2005) (holding prisoner who failed to follow instructions did not exhaust); Colon v. Harvey, 344 F.Supp.2d 896, 898 (W.D.N.Y. 2004) (holding plaintiff who sent his grievance appeal directly to the Superintendent, and then disregarded an instruction to contact the Grievance Clerk to appeal, failed to exhaust); Chase v. Peay, 286 F.Supp.2d 523, 529 (D.Md. 2003) (holding a prisoner who neither followed directions to resubmit a separate grievance for each issue, nor appealed that direction, failed to exhaust), *aff'd*, 98 Fed.Appx. 253 (4th Cir. 2004); Jones v. H.H.C., Inc., 2003 WL 1960045, *4 (S.D.N.Y., Apr. 8, 2003) (prisoner who made an "end-run around the grievance system" by going directly to "Inmate Counsel" and Warden did not exhaust); Kaiser v. Bailey, 2003 WL 21500339, *5-6 (D.N.J., July 1, 2003) (holding that a prisoner who failed to follow explicit instructions as to how to comply with complaint procedures failed to exhaust even under the "substantial compliance" standard); Wallace v. Burbury, 2003 WL 21302947, *4 (N.D.Ohio, June 5, 2003) (". . . where a prisoner is notified that a document relating to his grievance has been lost or misfiled, failure to refile constitutes a failure to exhaust. . . ."); Jeanes v. U.S. Dept. of Justice, 231 F.Supp.2d 48, 50-51 (D.D.C. 2002) (holding that a prisoner who bypassed the initial steps of the process, and then ignored instructions to use them because his grievance did not meet the standards for bypassing them, failed to exhaust); Ford v. Page, 2002 WL 31818996, *3 (N.D.Ill., Dec. 13, 2002) (holding that a plaintiff who refused directions to grieve one issue at a time failed to exhaust); Saunders v. Goord, 2002 WL 31159109, *4 (S.D.N.Y., Sept. 27, 2002) (holding that a prisoner who refused to put his commitment name on the grievance failed to exhaust); Barkley v. Brown, 2002 WL 1677709, *3 (N.D.Cal., July 2002) (holding that prisoner who withheld cooperation with grievance system by refusing to be interviewed and to sign necessary documents had not exhausted); Newell v. Angelone, 2002 WL 378438, *6 (W.D.Va., Mar. 7, 2002) (holding that failure to follow instructions and file a separate grievance for each issue was a failure to exhaust), *aff'd*, 2003 WL 22039201 (4th Cir. 2003) (unpublished).

Note 768: Thompson v. Worcester County, 2011 WL 4829972, *3 (D.Mass., Oct. 11, 2011) (rejecting grievance body's finding of untimeliness based on apparent mis-count of days); Edwards v. Schrubbe, 807 F.Supp.2d 809, 812-13 (E.D.Wis. 2011) (rejecting grievance body's finding of untimeliness of grievance about continuing violation); Vasquez v. Shartle, 2011 WL 1004934, *2-3 (N.D.Ohio, Mar. 18, 2011) (relying on "prison mailbox" rule, rather than grievance body's interpretation of exhaustion rule, to assess timeliness; case is habeas petition but construction of regulations should be the same as in a civil action); Killebrew v. Jackson, 2011 WL 976545, *7 (E.D.Wis., Mar. 17, 2011) (holding grievance was timely where grievance officials rejected carbon copy, told plaintiff to submit the original, and declared it untimely when he promptly did so); Williams v. Cate, 2011 WL 444788, *8 (E.D.Cal., Feb. 8, 2011) (same as *Williams v. Franklin*), *report and recommendation adopted in part*,

rejected in part on other grounds, 2011 WL 1121965 (E.D.Cal., Mar. 24, 2011); Riggs v. MacDonald, 2011 WL 534014, *3 (D.Mont., Jan. 25, 2011) (same as *Williams v. Franklin*), *report and recommendation adopted*, 2011 WL 534038 (D.Mont., Feb. 15, 2011); Barker v. Belleque, 2011 WL 285228, *4 (D.Or., Jan. 26, 2011) (holding timeliness of medical care complaint should have been measured from denials of care complained of, not from onset of condition); Schadel v. Evans, 2010 WL 2696456, *2-3 (C.D.Ill., July 7, 2010) (holding timeliness of grievance appeal was determined by prison mailbox rule, not date of receipt at destination); Johnson v. Rush, 2010 WL 500445, *5 (M.D.Pa., Feb. 5, 2010) (declining to credit grievance decision dismissing as untimely where the record did not show when he filed it or when he received the previous determination); Davis v. Hedgpeth, 2010 WL 308035, *3 (E.D.Cal., Jan. 19, 2010) (declining to dismiss for non-exhaustion where court concluded that handing an appeal to an officer for mailing constituted forwarding it to the appeals coordinator under prison rules), *report and recommendation adopted*, 2010 WL 890495 (E.D.Cal., Mar. 10, 2010); Underwood v. Correctional Medical Services, 2010 WL 1064400, *6 (E.D.Mich., Jan. 13, 2010) (independently calculating timeliness of grievance, rejecting finding that it was untimely), *report and recommendation adopted*, 2010 WL 1064149, *2 (E.D.Mich., Mar. 19, 2010) (stating "an erroneous determination of the timeliness of a grievance appeal by administrative authorities does not require the court to make the same erroneous determination"); Williams v. Hickman, 2009 WL 2379979, *3-5 (E.D.Cal., July 30, 2009) (declining to dismiss for non-exhaustion where plaintiff provided a sworn statement indicating that he had mailed his appeal timely, and defendants produced no contrary evidence; rejecting argument that where plaintiff did not date the appeal, he could not prove when it was sent); Fox v. Rodgers, 2009 WL 1508429, *3 (E.D.Mich., May 29, 2009) (rejecting grievance body's finding of untimeliness where plaintiff declared under penalty of perjury that he had mailed it timely, and rules referred to date of mailing and not date of receipt); Barretto v. Smith, 2009 WL 1271984, *6 (E.D.Cal., Mar. 6, 2009) (holding rejection as untimely 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); Price v. Kozak, 569 F.Supp.2d 398, 407 (D.Del. 2008) (holding plaintiff's grievances timely despite their inexplicable rejection as late); Fosselman v. Evans, 2008 WL 4369984, *2 (N.D.Cal., Sept. 24, 2008) (same); Kelley v. DeMasi, 2008 WL 4298475, *4 (E.D.Mich., Sept. 18, 2008) (where grievance response told plaintiff to wait 7-10 days to learn the 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), *aff'd on other grounds*, 507 F.3d 605 (7th Cir. 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 774: 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); Petrucelli 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. Schneiter, 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 777: 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 779: 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) (unpublished), *cert. denied*, 555 U.S. 854 (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 (S.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 808: Wisenbaker v. Farwell, 2010 WL 3385303, *8 (D.Nev., June 7, 2010) (holding grievance two years late exhausted where merits were decided), *report and recommendation adopted*, 2010 WL 3385310 (D.Nev., Aug. 24, 2010); Moran v. Dovey, 2010 WL 1342917, *4 (E.D.Cal., Apr. 5, 2010); Mallory v. Marshall, 659 F.Supp.2d 231, 237 (D.Mass 2009); Seibel v. Johnson, 2009 WL 2590428, *7 (D.N.D., Aug. 19, 2009); Smith v. Fitter, 2008 WL 4861514, *6 (C.D.Cal., Nov. 10, 2008); Ellis v. Vadlamudi, 568 F.Supp.2d 778. 785-86 (E.D.Mich. 2008) (citing *Woodford v. Ngo*'s analogy to the habeas corpus procedural default rule, and pointing out that in habeas, if a state court decides the merits, procedural default is excused); Harris v. West, 2008 WL 695404, *3 (W.D.Mich., Mar. 11, 2008); Stevenson v. Michigan Dept. of Corrections, 2008 WL 623783, *12 (W.D.Mich., Mar. 4, 2008); Shaw v. Frank, 2008 WL 283007, *8 (E.D.Wis., Jan. 31, 2008) (grievance untimely by five years), *aff'd*, 2008 WL 2906766 (7th Cir. 2008); Johnson v. Beardslee, 2007 WL 2302378, *3 (W.D.Mich., Aug. 8, 2007); Jenkins v. Baumler, 2007 WL 2023538, *3 (E.D.Cal., July 11, 2007), *report and recommendation adopted*, 2007 WL 2782875 (E.D.Cal., Sept. 25, 2007); Coronado v. Schriro, 2007 WL 1687604, *5 (D.Ariz., June 8, 2007); Armitige v. Cherry, 2007 WL 1751738, *6 (S.D.Tex., May 30, 2007); Maraglia v. Maloney, 2006 WL 3741927, *7 (D.Mass., Dec. 18, 2006); Laurencio v. Secretary, 2006 WL 2729642, *5 (M.D.Fla., Sept. 25, 2006) (holding exhaustion requirement satisfied where grievance was rejected as untimely at two lower levels but addressed and investigated on the merits at the highest level); Jones v. Stewart, 457 F.Supp.2d 1131, 1134-37 (D.Nev. 2006); Harris v. Aidala, 2006 WL 2583256, *2 (W.D.N.Y., Sept. 6, 2006); Griswold v. Morgan, 317 F.Supp.2d 226, 229-30 (W.D.N.Y. 2004).

Note 822: Mavins v. McFadden, 2009 WL 4906573, *5 (D.S.C., Dec. 18, 2009) ("It appears that there is no reported federal case supporting a requirement that a plaintiff pursue any type of state APA judicial review by a separate agency which is not part of the prison system before seeking relief in federal court."); Richardson v. South Carolina Dept. of Corrections, 2009 WL 2972994, *4 n.2 (D.S.C., Sept. 10, 2009); James v. South Carolina Dept. of Corrections, 2009 WL 1147994, *2 n.2 (D.S.C., Apr. 27, 2009); Littlejohn v. Ozmint, 2009 WL 692876, *5 (D.S.C., Mar. 13, 2009); Johnson v. Ozmint, 567 F.Supp.2d 806, 820 n.5 (D.S.C. 2008); Gore v. Kirkland, 2008 WL 2224395, *1 n.2 (D.S.C., May 29, 2008); Frost v. Ozmint, 2008 WL 426381, *3 (D.S.C., Feb. 13, 2008) ("This district has almost uniformly rejected such an argument."), *on reconsideration in part*, 2008 WL 615864 (D.S.C., Feb. 29, 2008); Hughes v. Staudt, 2008 WL 220093, *5 (D.S.C., Jan. 23, 2008); Greene v. Stonebreaker, 2007 WL 2288123, *4-5 (D.S.C., Aug. 6, 2007); Brown v. Evans Correctional Institution Medical Staff, 2007 WL 1290359, *4 (D.S.C., Apr. 30, 2007) ("the fact that the South Carolina legislature made a court available to prisoners who wanted to appeal a final decision by the SCDC denying a SCDC grievance does not alter the federal PLRA by extending its administrative exhaustion requirement to include exhaustion in all state judicial forums."); Cabbagestalk v. Dubose, 2007 WL 201028, *3 n.1 (D.S.C., Jan. 22, 2007); Wagner v. U.S., 486 F.Supp.2d 549, 558 n.2 (D.S.C. 2007), *appeal dismissed*, 31 Fed.Appx. 267 (4th Cir. 2007); Randolph v. South Carolina Dept. of Corrections, 2006 WL 4508058, *3-4 (D.S.C., Nov. 27, 2006), *report and recommendation adopted*, 2007 WL 1290579 (D.S.C., Apr. 30, 2007); Charles v. Ozmint, 2006 WL 1341267, *4 n.3 (D.S.C., May 15, 2006) (holding that appeal to an administrative law judge under state Administrative Procedures Act "would invoke state judicial remedies" and is not required by the PLRA).

Note 837: James v. Superior Court of New Jersey Bergen County, 2007 WL 3071794, *10 (D.N.J., Oct. 19, 2007) (holding tort claims require exhaustion of the tort claim procedure), *vacated on other grounds*, 287 Fed.Appx. 140, 2008 WL 2783242 (3d Cir. 2008); Richard v. Capps, 2007 WL 2428928, *3-4 (N.D.Tex., Aug. 28, 2007) (noting no need to canvass ARP exhaustion for a FTCA claim. "The exhaustion requirements for a *Bivens* claim are separate and distinct from the exhaustion requirements under the FTCA."); Davis v. Miner, 2007 WL 1237924, *5 (M.D.Pa., Apr. 26, 2007)

(dismissing *Bivens* claim for failure to exhaust administrative remedy, noting plaintiff can still file tort claim and proceed under FTCA); McClenton v. Menifee, 2006 WL 2474872, *16 (S.D.N.Y., Aug. 22, 2006) ("The exhaustion procedures under the two statutes differ, and the fulfillment of one does not constitute satisfaction of another.") (citation omitted); Hartman v. Holder, 2005 WL 2002455, *6-8 (E.D.N.Y., Aug. 21, 2005) (allowing FTCA claim to go forward notwithstanding failure to exhaust ARP and dismissal of *Bivens* claims; rejecting argument that FTCA administrative claim exhausted *Bivens* claims, or that prisoner could have reasonably believed it did); Taveras v. Hasty, 2005 WL 1594330, *2-3 (E.D.N.Y., July 7, 2005) (holding prisoner who filed tort claim but not ARP complaint exhausted his FTCA claim but not his *Bivens* claim); Williams v. U.S., 2005 WL 44533, *1 (D.Kan., Jan. 7, 2005) ("With respect to his FTCA claims, plaintiff must file an administrative tort claim prior to filing suit. . . . With respect to his *Bivens* claims, plaintiff must first complete the administrative grievance process."); Bolton v. U.S., 347 F.Supp.2d 1218, 1221 (N.D.Fla. 2004) (holding prisoner seeking damages properly followed the "appropriate statutorily-mandated procedure" by filing an FTCA claim); Baez v. Bureau of Prisons, Warden, 2004 WL 1777583, *7 (S.D.N.Y. May 11, 2004) (assuming that FTCA requires only submission of tort claim); Baez v. Parks, 2004 WL 1052779, *7 (S.D.N.Y., May 11, 2004) (same); Williams v. U.S., 2004 WL 906221 (S.D.N.Y., Apr. 28, 2004) (treating FTCA exhaustion as requiring tort claim and *Bivens* exhaustion as requiring Administrative Remedy Procedure filing); Gaughan v. U.S. Bureau of Prisons, 2003 WL 1626674, *2 (N.D.Ill., Mar. 25, 2003); Hylton v. Federal Bureau of Prisons, 2002 WL 720605, *2 (E.D.N.Y., March 11, 2002) (holding that the plaintiff could exhaust for Federal Tort Claims Act purposes without exhausting under the PLRA as required for a *Bivens* claim).

Note 859: Langton v. Combalecer, 2008 WL 896062, *3 (E.D.Mich., Mar. 31, 2008) (holding defendants were "disingenuous" to argue that plaintiff should have grieved his sexual abuse claim, since state policy provided that all such grievances were to be referred to Internal Affairs, to which plaintiff had complained); Jackson v. Caruso, 2008 WL 828118, *4 (W.D.Mich., Feb. 12, 2008) (noting that issues regarding the content of a policy are properly raised via the Warden's Forum and not the grievance system), *report and recommendation adopted as modified on other grounds*, 2008 WL 828116 (W.D.Mich., Mar. 26, 2008); Berryman v. Granholm, 2007 WL 2259334, *10-11 (E.D.Mich., Aug. 3, 2007) (same as *Jackson v. Caruso*); Beltran v. O'Mara, 405 F.Supp.2d 140, 150 (D.N.H. 2005) (holding that filing a grievance about classification, rather than the required classification appeal, did not exhaust), *on reconsideration*, 2006 WL 240558 (D.N.H., Jan. 31, 2006); Lindell v. Casperson, 360 F.Supp.2d 932, 949 (W.D.Wis. 2005) (holding that filing a grievance, rather than the required non-delivery of mail complaint, did not exhaust), *aff'd*, 169 Fed.Appx. 999 (7th Cir., Mar. 13, 2006), *cert. denied*, 549 U.S. 874 (2006); Wallace v. Burbury, 2003 WL 21302947, *3-4 (N.D.Ohio, June 5, 2003) (holding that filing a "general" grievance rather than the required Request for Accommodation of Religious Beliefs did not exhaust); Mack v. Artuz, 2002 WL 31845087, *6 (S.D.N.Y., Dec. 19, 2002) (holding complaint about "Central Monitoring Case" status was exhausted through separate CMC appeal process); Timley v. Nelson, 2001 WL 309120, *1 (D.Kan., Feb. 16, 2001) (holding that a plaintiff with a religious claim who "pursued some avenues of administrative relief" but did not follow the Request for Religious Accommodation procedure had not exhausted).

Note 866: 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).

Note 870: Muhammad v. Pico, 2003 WL 21792158, *23 (S.D.N.Y., Aug. 5, 2003) (holding that letters to Commissioner or Superintendent do not exhaust); Croswell v. McCoy, 2003 WL 962534, *4 (N.D.N.Y., Mar. 11, 2003) (holding that a letter to the Superintendent did not exhaust); Moore v. Baca, 2002 WL 31870541, *2 (C.D.Cal., Dec. 11, 2002) (holding that a letter from counsel to the Sheriff does not exhaust in a jail with a grievance procedure); Sunn v. Cattell, 2002 WL 31455482 (D.N.H., Oct. 31, 2002) (holding that a letter to the Governor forwarded to the prison warden did not exhaust); McNair v. Sgt. Jones, 2002 WL 31082948, *7 (S.D.N.Y., Sept. 18, 2002) (holding that verbal complaints, complaints to the Legal Aid Society, and letters to the Superintendent do not exhaust), *report and recommendation adopted*, 2003 WL 22097730 (S.D.N.Y., Sept. 10, 2003); Saunders v. Goord, 2002 WL 1751341, *3 (S.D.N.Y., July 29, 2002) (holding that writing letters to superintendent does not substitute for filing grievances); Nunez v. Goord, 2002 WL 1162905 (S.D.N.Y., June 3, 2002); Skinner v. Cunningham, 2002 WL 337446, *2 (D.N.H., Feb. 28, 2002).

Note 871: Mason v. Smith, 2007 WL 2386411, *7-8 (S.D.Ga., Aug. 17, 2007) (holding referral of grievance to Internal Affairs did not excuse plaintiff from completing the grievance process, since the grievance policy did not say it did), *aff'd*, 261 Fed.Appx. 225 (11th Cir. 2008), *cert. denied*, 555 U.S. 853 (2008); Hill v. Robinson, 2005 WL 3299808, *3 (W.D.Wis., Dec. 5, 2005) (holding complaint to Federal Bureau of Prisons Inspector General did not exhaust); Roach v. Bandera County, 2004 WL 1304952, *4 (W.D.Tex., June 9, 2004) (holding that independent investigations by Sheriff and FBI did not exhaust); Bokin v. Davis, 2003 WL 21920922, *3 (N.D.Cal., Aug. 7, 2003) (holding that internal affairs investigations are not administrative remedies); Hock v. Thipedeau, 245 F.Supp.2d 451, 454-55 (D.Conn. 2003) (holding that direct, voluntary cooperation with a prison-initiated investigation does not satisfy the exhaustion requirement), *reconsideration denied*, 2003 WL 21003431 (D.Conn. Apr. 28, 2003).

Note 920: Williams v. City of Philadelphia, 2010 WL 3986104, *14-15 (E.D.Pa., Oct. 8, 2010) (holding overcrowding non-grievable where grievance policy excludes "matters beyond the control" of the prison system and it was clear the prisons could not control crowding); McQuilkin v. Central New York Psychiatric Center, 2010 WL 3765847, *10-11 (N.D.N.Y., Aug. 27, 2010) (citing grievance decisions stating that Office of Mental Health policies and procedures were not within grievance system's jurisdiction), *report and recommendation adopted*, 2010 WL 3765715 (N.D.N.Y. Sep 20, 2010); Benning v. Georgia, 2010 WL 4000616, *1 (M.D.Ga., Oct. 12, 2010) (holding rules of state Board of Corrections were not grievable where grievance policy excluded "[m]atters over which the Department [of Corrections] has no control"); Westefer v. Snyder, 2010 WL 235003, *4 (S.D.Ill., Jan. 15, 2010) (noting decisions of the Director are non-grievable); Upthegrove v. Westerhouse, 2009 WL 961132, *3 (W.D.Wis., Apr. 8, 2009) (noting "administrative rules of the department" were non-grievable, rules of particular prisons were not); Setzke v. Norris, 2009 WL 723244, *7 (W.D.Ark., Mar. 17, 2009) (noting issues pertaining to parole release and state sex offender registration statute were non-grievable); Cromer v. Braman, 2008 WL 907468, *16 (W.D.Mich., Mar. 31, 2008) (where grievance was rejected as raising a non-grievable issue, plaintiff had exhausted); Rickman v. Michigan Dept. of Corrections, 2008 WL 907469, *6 (W.D.Mich., Mar. 31, 2008) (rejecting argument that a grievance rejected as non-grievable means the plaintiff didn't exhaust); Lawson v. Hall, 2008 WL 793635, *4 (S.D.W.Va., Mar. 24, 2008)

(noting that West Virginia grievance policy exempts claims of physical or sexual abuse from coverage); Murphy v. Colorado Dept. of Corrections (CDOC), 2008 WL 608583, *5 (D.Colo., Mar. 4, 2008) (noting exclusion of prisoners transferred under Interstate Corrections Compact from grievance system made remedy unavailable to them); Charity v. Carroll, 2007 WL 2408527, *5 (E.D.Cal., Aug. 21, 2007) (finding that grievance system did not address actions performed at the request of authorities in another state), *report and recommendation adopted*, 2007 WL 2703165 (E.D.Cal., Sept. 14, 2007); Mitchell v. Caruso, 2006 WL 3825077, *2 (E.D.Mich., Dec. 26, 2006) (noting that "the content of a policy or procedure" is not grievable in Michigan); Clark v. Mason, 2005 WL 1189577, *5 (W.D.Wash., May 19, 2005) (listing non-grievable issues in Washington prison system); Cordero v. Bureau of Prisons, 2005 WL 1205808, *1 (M.D.Pa., Apr. 27, 2005) (noting that Privacy Act and Freedom of Information Act matters are excluded from the federal Administrative Remedy Program); Richards v. Massachusetts Dept. of Correction, 2005 WL 283203, *1 (D.Mass., Feb. 7, 2005) (noting that Massachusetts system allows grievances about "matters concerning access to medical or mental health care" but not "medical or clinical decisions related to an inmate's physical or mental condition"); Murphy v. Martin, 2004 WL 1658489, *3 (E.D.Mich., May 28, 2004) (noting that Michigan system makes non-grievable "the content of policy or procedure"); 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 claims against it were grievable), *adhered to on reargument*, 2003 WL 22052978 (S.D.N.Y., Sept. 3, 2003); Borges v. Administrator for Strong Memorial Hosp., 2002 WL 31194558, *3 (W.D.N.Y., Sept. 30, 2002) (holding defendants did not show that grievance procedure was available to prisoners injured by dentists at an outside hospital, given their policy making non-grievable any action taken by an "outside agency"); Baldwin v. Armstrong, 2002 WL 31433288, *1 (D.Conn., Sept. 12, 2002) (holding that a claim about calculation or application of good time credit need not be exhausted where the grievance policy, which lists grievable matters, does not include good time); Nicholson v. Snyder, 2001 WL 935535, *3 (D.Del., Aug. 10, 2001) (holding that classification decisions excluded from the grievance procedure need not be exhausted); Anderson v. Goord, 2001 WL 561227, *4 (S.D.N.Y., May 24, 2001) (holding exhaustion requirement inapplicable because individual decisions of Temporary Release Committee are not grievable), *aff'd in part, vacated in part*, 317 F.3d 194 (2d Cir. 2003); Freeman v. Snyder, 2001 WL 515258, *6 (D.Del., Apr. 10, 2001) (holding that defendants' admission that an issue was not grievable 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 934: 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 (M.D.Pa., 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 935: 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 939: Chen v. U.S., 2011 WL 2039433, *12 (E.D.N.Y., May 24, 2011) (holding unfamiliarity with English merits assistance in filing appeals under prison regulations, but does not excuse non-exhaustion); Grant v. Henderson, 2011 WL 902357, *4-6 (N.D.Fla., Feb. 7, 2011) (holding language problems do not excuse non-exhaustion as a matter of law; also finding claim factually erroneous), *report and recommendation adopted*, 2011 WL 902228 (N.D.Fla., Mar. 15, 2011); Albino v. Baca, 2010 WL 883856, *4-5 (C.D.Cal., Mar. 10, 2010) (dismissing for non-exhaustion where Spanish-speaking prisoner said *inter alia* that he had never received an orientation, had hever heard of the grievance policy, and had not seen it in Spanish), *aff'd*, ___ F.3d ___, 2012 WL 4215918 (9th Cir. 2012); Benavidez v. Stansberry, 2008 WL 4279559, *4 (N.D.Ohio, Sept. 12, 2008) (there is no exception to the exhaustion requirement for prisoners who cannot read the procedures in English).

Note 941: 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); Whitington 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 942: 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, 2007) (rejecting argument that prisoner who was dyslexic and mentally ill was not required to exhaust), *aff'd*, 272 Fed.Appx. 311 (4th Cir. 2008) (unpublished); Yorkey v. Pettiford, 2007 WL 2750068, *4-5 (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. Dixion, 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. Kennedy, 2006 WL 18314, *2 (S.D.Tex., Jan. 4, 2006) (dismissing despite prisoner's claim he didn't know of the exhaustion requirement and a prior brain injury made it difficult for him to remember things); Bakker v. Kuhnes, 2004 WL 1092287 (N.D.Iowa, May 14, 2004) (rejecting plaintiff's argument that his 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).

Note 943: Gomez v. Swanson, 2009 WL 1085274, *4 (E.D.Cal., Apr. 22, 2009) ("He has 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. Schriro, 2008 WL 2705376, *3 (D.Ariz., July 9, 2008) (dismissing for non-exhaustion where plaintiff 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, 2008 WL 2558021, *2 (E.D.Mich., June 24, 2008) (dismissing for non-exhaustion despite plaintiff's 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 pleadings"); Lawson v. Davis, 2008 WL 1885813, *2 (W.D.Va., Apr. 28, 2008) (dismissing challenge to 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 Fed.Appx. 77, 2008 WL 2945397 (4th Cir. 2008) (unpublished); Evans v. McWilliams, 2007 WL 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 (D.Ariz., Oct. 10, 2007).

Note 948: Jones v. Cowens, 2010 WL 3239286, *2 (D.Colo., Aug. 12, 2010) (holding allegation that prisoner returned from state to local custody did not actually have access to state grievance system barred summary judgment); Corye v. Carr, 2010 WL 396363, *7-8 (N.D.N.Y., Jan. 26, 2010) (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. 10, 2009) (same); Green v. Roberts, 2008 WL 4767471, *4 (M.D.Ala., Oct. 29, 2008) (holding prisoner who was transferred from jail, wrote to the jail seeking to exhaust, and received no response satisfied the exhaustion requirement); Carr v. Hazelwood, 2008 WL 4556607, *5 (W.D.Va., Oct. 8, 2008) (jail 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 v. Figueroa, 2008 WL 4525527, *6 (W.D.Okla., Oct. 2, 2008) (Vermont prisoner in private prison in 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) (declining 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) (declining 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) (declining 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 949: Medley v. Luther, 2008 WL 5103209, *3-4 (C.D.Cal., Dec. 3, 2008) (prisoner who learned she had been exposed to TB in jail only after she had been returned to state prison had to exhaust jail grievance process, which was allegedly available to former prisoners); In re Bayside Prison Litigation, 2008 WL 2387324, *5 (D.N.J., May 19, 2008) (prisoner transferred within New Jersey prison system could still use the grievance system); Cohea v. Jones, 2008 WL 114956, *5 (E.D.Cal., Jan. 11, 2008) (same for California), *report and recommendation adopted*, 2008 WL 496143 (E.D.Cal., Feb. 21, 2008), *aff'd*, 2009 WL 1452627 (9th Cir., May 26, 2009) (unpublished); Jackson v. Walker, 2007 WL 2344938, *5 (E.D.Ky., Aug. 14, 2007) (holding transfer did not excuse non-exhaustion because the process can be completed by mail), *amended on reconsideration in part*, 2007 WL 2702325 (E.D.Ky., Sept. 12, 2007), *amended in part*, 2007 WL 3145957 (E.D.Ky., Oct. 25, 2007); Lawrence v. Washington, 2006 WL 1071510, *2 (D.D.C., Apr. 21, 2006) (holding transfer within system did not excuse failure to exhaust where regulations permit grievances after transfer), *aff'd*, 204 Fed.Appx. 27 (D.C. Cir. 2006); James v. Williams, 2005 WL 4859251, *2 (W.D.N.C., May 24, 2005) (noting that the prisoner had 11 days to file a new grievance after his first one was rejected and that under the grievance policy he could have filed it at the new prison as well); Soto v. Belcher, 339 F.Supp.2d 592, 595 (S.D.N.Y. 2004) (holding transfer did not excuse exhaustion since regulations permit grievances after transfer); Delio v. Morgan, 2003 WL 21373168, *3 (S.D.N.Y., June 13, 2003); Timmons v. Pereiro, 2003 WL 179769, *2 (S.D.N.Y., Jan. 27, 2003) (holding that transfer out of state did not excuse failure to exhaust where there was time to file before the plaintiff was moved and in any case the system permits grievances to be pursued after transfer), *aff'd in part, vacated in part, and remanded*, 88 Fed.Appx. 447, 2004 WL 322702 (2d Cir. 2004); Steele v. New York State Dept. of Correctional Services, 2000 WL 777931 (S.D.N.Y., June 19, 2000) (holding that a prisoner who was out of the institution during the entire time for filing a grievance was nonetheless obliged to file a grievance because the deadline could be waived in "extreme circumstances"; prisoner's conduct characterized as "deliberate bypass"), *motion to vacate denied*, 2000 WL 1731337 (S.D.N.Y., Nov. 21, 2000).

Note 962: Marquez v. Antilus, 2010 WL 2629409, *1-2 (D.N.H., June 28, 2010) (specific allegations of threats and intimidation supported claims of estoppel and special circumstances and barred summary judgment for non-exhaustion); Paynes v. Runnels, 2008 WL 4078740, *6 (E.D.Cal., Aug. 29, 2008) (offer to plaintiff to provide a safe housing placement only if he dropped the grievance made the grievance process unavailable), *report and recommendation adopted*, 2008 WL 4464828 (E.D.Cal., Sept. 30, 2008); Zaritsky v. Crawford, 2008 WL 4132225, *8 (D.Nev., Aug. 29, 2008) (refusing to dismiss where prisoner had previously reported an inmate attack and no protective action had been taken); Cotton-Schrichte v. Peate, 2008 WL 3200775, *1, 4 (W.D.Mo., Aug. 5, 2008) (remedies were unavailable to a prisoner who was raped, threatened into silence, and later beaten); Morris v. Zefferi, 2008 WL 2952114, *2 (E.D.Mo., July 28, 2008) (remedies would be unavailable based on allegations that staff member warned plaintiff that there would be "repercussions" from filing a grievance and prisoners had been punished for them; "Whatever you do, do not piss them off!"); Norris v. County of Lycoming, 2008 WL 2914513, *8 (M.D.Pa., July 24, 2008) (allegation that prisoner was told to stop submitting requests for medical attention and placed in restrictive housing when he tried to follow up on his requests raised question whether remedies were available); Banks v. One or More Unknown Named Confidential Informants of Federal Prison Camp Canaan, 2008 WL 2563355, *4 (M.D.Pa., June 24, 2008) ("Courts have invariably held that affirmative misconduct by prison officials—designed to impede or prevent an inmate's attempts to exhaust—may render administrative remedies unavailable"), *reconsideration denied*, 2008 WL 2810156 (M.D.Pa., July 21, 2008); Baker v. Schriro, 2008 WL 622020, *8 (D.Ariz., Mar. 4, 2008) (holding plaintiffs' allegations of threats by staff and of practice of requiring grievances to be screened by gang members satisfied "ordinary firmness" standard), *review denied*, 2008 WL 2003757

(D.Ariz., May 8, 2008); Mitchell v. Adams, 2008 WL 314129, *9-13 (E.D.Cal., Feb. 4, 2008) (citing course of threatening conduct affecting multiple grievances), *report and recommendation adopted*, 2008 WL 595922 (E.D.Cal., Mar. 3, 2008); Harcum v. Shaffer, 2007 WL 4190688, *5 (E.D.Pa., Nov. 21, 2007) (holding that threats causing the prisoner to withdraw his grievance "removed the availability of further administrative remedies"); Stanley v. Rich, 2006 WL 1549114, *2 (S.D.Ga., June 1, 2006) (stating "threats of violent reprisal may, in some circumstances, render administrative remedies 'unavailable' or otherwise justify an inmate's failure to pursue them"; citing *Hemphill*); Holiday v. Giusto, 2005 WL 3244329, *2-3 (D.Or., Nov. 30, 2005) (adopting *Hemphill* analysis); Osborne v. Coleman, 2002 WL 32818913, *4 (E.D.Va. Sept. 9, 2002) (holding that an allegation that the plaintiff was threatened to dissuade him from pursuing grievances created a factual issue barring summary judgment as to failure to exhaust); *see* Ealey v. Schriro, 208 F.3d 217, 2000 WL 235048, *1 (8th Cir., Mar. 2, 2000) (unpublished) (allegation that authorities threatened prisoner with retaliation "may" support claim remedies are unavailable), *cert. denied*, 531 U.S. 901 (2000).

Note 965: Funk v. Washburn, 2007 WL 1747384, *2 (M.D.Fla., June 18, 2007) (holding fear of reprisal does not excuse exhaustion, and state had special procedure for filing with the Office of the Secretary in such cases); Broom v. Rubitschun, 2006 WL 3344997, *5 (W.D.Mich., Nov. 17, 2006) ("Plaintiff argues that he should not have to grieve those Defendants who harassed and retaliated against him. . . . The PLRA does not excuse exhaustion for prisoners who are under imminent danger of serious physical injury, much less for those who are afraid to confront their oppressors."); Ware v. Tappin, 2006 WL 3533116, *6-7 (W.D.La., Nov. 3, 2006) (holding fear of retaliation is "no valid defense for failing to exhaust"); Enright v. Heine, 2006 WL 2594485, *2 (D.Mont., Sept. 11, 2006) ("Even a prisoner's fear of retaliatory action could not excuse her from pursuing administrative remedies."); Broom v. Engler, 2005 WL 3454657, *3 (W.D.Mich., Dec. 16, 2005) (stating, where plaintiff recounted threats he received, "[t]he PLRA does not excuse exhaustion for a prisoner . . . who is afraid to complain"); Umstead v. McKee, 2005 WL 1189605, *2 (W.D.Mich. May 19, 2005) (stating "it is highly questionable whether threats of retaliation could in any circumstances excuse the failure to exhaust administrative remedies").

Note 966: 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.Y., 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 placement in administrative segregation was only a "generalized fear of retaliation [which] is not an exception to the exhaustion requirement"), *report and recommendation adopted*, 2006 WL 2255517 (E.D.Cal., Aug. 7, 2006); Stanley v. Rich, 2006 WL 1549114, *2 (S.D.Ga., June 1, 2006) (rejecting "non-specific allegations of fear" and complaints of "allegedly malevolent stares alone").

Note 967: Stewart v. Howard, 2010 WL 3907227, *9 (N.D.N.Y., Apr. 26, 2010) (holding plaintiff's allegation of fear of filing grievances against certain staff was "belied by his actual conduct" of filing a different grievance against one of the officers), *report and recommendation adopted*, 2010 WL 3907137 (N.D.N.Y., Sept. 30, 2010); Dixon v. Correction Corp. of America, Inc., 2010 WL 1462350, *5 (D.Idaho, Apr. 8, 2010) ("Plaintiff's continued engagement in the grievance process shows that Plaintiff was not prevented from exhausting his administrative remedies based on prison staff's conduct toward him."), *aff'd*, 420 Fed.Appx. 766 (9th Cir. 2011); Baker v. County of Sonoma, 2010 WL 1038401, *21 (N.D.Cal., Mar 19, 2010) (ruling on state exhaustion law); Garcia v. Baca, 2008 WL 5119156, *5 (C.D.Cal., Dec. 2, 2008); Guerra v. Arkansas Dept. Correction, 2007 WL 4591589, *3 (E.D.Ark., Dec. 28, 2007) (holding that plaintiff who failed to appeal his grievance could not credibly argue that he was intimidated, since he filed a grievance in the first place); Hernandez v. Coffey, 2006 WL 2109465, *4 (S.D.N.Y., July 26, 2006) (same as Guerra), *vacated on other grounds*, 582 F.3d 303 (2d Cir. 2009); 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).

Note 976: 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 979: 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 2035474 (E.D.Wis., May 12, 2008), *and* 2008 WL 3992772 (E.D.Wis., Aug. 22, 2008); Williams v. Washington, 2008 WL 2078124, *4 (W.D.Wash., Feb. 21, 2008) (prisoner whose grievance was rejected because he was not allowed to have more than five grievances "active" at one time, and who did not withdraw a grievance so he could file the new one, failed to exhaust), *report and recommendation adopted*, 2008 WL 2078123 (W.D.Wash., 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).

Note 981: 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 plaintiff's 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 982: 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) (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); 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) (declining 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).

Note 986: Brown v. Fischer, 2010 WL 5797359, *3 (N.D.N.Y., Dec. 8, 2010), *report and recommendation adopted*, 2011 WL 552039 (N.D.N.Y., Feb. 9, 2011); Bailey v. Fortier, 2010 WL 4005258, *6-7 (N.D.N.Y., Aug. 30, 2010), *report and recommendation adopted*, 2010 WL 3999629 (N.D.N.Y., Oct. 12, 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); Bertres 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 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); 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); Ziemba 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 989: Noland v. Garfield County Detention Center, 2009 WL 5067206, *6 (W.D.Okla., 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 prisoner 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. Bahlarama, 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.Okla., 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 3306637, *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 991: 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) (declining 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 992: 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 statement 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 993: 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 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. Hawaii 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) (declining 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. Schuetzle, 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. Sherrer, 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 grieved, "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 995: 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) (declining 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 996: Dillard v. Pierce County, 2011 WL 2530971, *3 (W.D.Wash., May 31, 2011) (rejecting claim of ignorance where Inmate Handbook was available to every prisoner), *report and recommendation adopted*, 2011 WL 2516388 (W.D.Wash., June 23, 2011); Tope v. Fabian, 2010 WL 3307351, *9-11 (D.Minn., July 29, 2010), *report and recommendation adopted*, 2010 WL 3307354 (D.Minn., Aug. 19, 2010); Shesler v. Carlson, 2010 WL 2803091, *5 (E.D.Wis., July 15, 2010); Graham v. County of Gloucester, Va., 668 F.Supp.2d 734, 739-40 (E.D.Va., Nov. 4, 2009); Bryant v. Williams, 2009 WL 1706592, *7-8 (W.D.N.Y., June 17, 2009); Francisco v. Reese, 2009 WL 77458, *4 (S.D.Miss., Jan. 9, 2009) (claim of ignorance of remedy discounted where plaintiff had signed for receipt of information about it); Russell v. Unknown Cook County, Sheriff's Officers, 2004 WL 2997503, *4 & n.4 (N.D.Ill., Dec. 27, 2004) (stating that defendants must establish such a handbook exists and is distributed); Rizzuto v. City of New York, 2003 WL 1212758, *5 (S.D.N.Y., Mar. 17, 2003); Carter v. Woodbury County Jail, 2003 WL 1342934 (N.D.Iowa, Mar. 18, 2003); Edwards v. Alabama Dep't of Corrections, 81 F.Supp.2d 1242, 1256-57 (M.D.Ala. 2000); Andrews v. Maryland, 2004 WL 3262745, *2 (D.Md., June 3, 2004).

Note 1012: Collins v. Cline, 2009 WL 1862429, *1 (D.Kan., June 26, 2009); Smith v. Rose, 2009 WL 1444140, *4-5 (W.D.Wis., May 20, 2009) (allegation that grievance appeal was blocked does not state a claim but would be relevant if defendants sought dismissal for non-exhaustion); Lopez v. McGill, 2009 WL 179787, *5 (D.Conn., Jan. 21, 2009); Avent v. Doe, 2008 WL 877176, *9 (N.D.N.Y., Mar. 31, 2008); Chapman v. Johnson, 2008 WL 899224, *2 (W.D.Va., Apr. 1, 2008); Tolliver v. Thornton, 2007 WL 4219459, *1 (N.D.Cal., Nov. 29, 2007); Irvin v. Fluery, 2007 WL 3036493, *4 (W.D.Mich., Oct. 16, 2007) (holding obstruction of the grievance system did not deny access to courts because remedies would not be "available" in that situation), *vacated in part on reconsideration on other grounds*, 2008 WL 2714450 (W.D.Mich., July 8, 2008), *reconsideration denied*, 2008 WL 2922894 (W.D.Mich., July 28, 2008); Mayo v. Illinois Dept. of Corrections, 2007 WL 1424544, *1 (C.D.Ill., May 11, 2007); Rhodes v. Hoy, 2007 WL 1343649, *6-7 (N.D.N.Y., May 5, 2007), *dismissed on other grounds*, 2007 WL 1674093 (N.D.N.Y., June 7, 2007); Magee v. Middendorf, 2006 WL 488646, *1 (S.D.Ill., Feb. 28, 2006); Kitchen v. Peguese, 2005 WL 4827386, * 3 (D.Md., Nov. 23, 2005).

Note 1015: 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 1023: Sanders v. Norris, 2008 WL 2926198, *2 n.8 (E.D.Ark., July 24, 2008) ("Recognizing an exception for 'urgent medical needs' would defeat the purpose of the exhaustion requirement, which is to give prison officials the first opportunity to promptly remedy a situation within the prison system."); Shendock v. Green Rock Correctional Center, 2008 WL 2038794, *1-2 (W.D.Va., May 12, 2008) (prisoner must pursue grievance even if the harm is done before exhaustion can be completed); Aburomi v. U.S., 2006 WL 2990362, *1 (D.N.J. Oct. 17, 2006) ("It is understandable that Plaintiff would want immediate treatment for a perceived recurrence of cancer, but the administrative remedy program is mandatory regardless of the nature of the relief sought."); Kane v. Winn, 319 F. Supp. 2d 162, 223 (D.Mass. 2004) (rejecting "grave harm" argument while noting that the administrative process takes less than four months and the plaintiff was complaining about lack of treatment for a slowly progressing case of Hepatitis C); Griffin v. Samuels, 2008 WL 961241, *3 (D.N.J., Apr. 8, 2008); Cochran v. Caruso, 2008 WL 397597, *3 (W.D.Mich., Feb. 11, 2008) (plaintiff's allegation of urgent need for medical intervention did not justify failure to exhaust before filing); Rendelman v. Galley, 2007 WL 2900460, *2 (D.Md., Feb. 15, 2007) (dismissing despite plaintiff's claim of imminent danger and request for a "protective order" pending exhaustion), *aff'd*, 230 Fed.Appx. 314 (4th Cir. 2007), *cert. denied*, 552 U.S. 953 (2007); Williams v. CDCR, 2007 WL 2384510, *4 (E.D.Cal., Aug. 17, 2007) ("The presence of exigent circumstances does not relieve a plaintiff from fulfilling this requirement."), *report and recommendation adopted*, 2007 WL 2793117 (E.D.Cal., Sept. 26, 2007); Ford v. Smith, 2007 WL 1192298, *2 (E.D.Tex., Apr. 23, 2007) (dismissing where plaintiff said his safety was in danger and he sought a continuance until exhaustion was completed); Patterson v. La. Corr. Servs., Inc., 2006 WL 3845017, *6 (W.D. La. Oct. 20, 2006); Dartson v. Kastner, 2006 WL 3702634, *2 (E.D. Tex. Dec. 13, 2006); Bovarie v. Giurbino, 421 F. Supp. 2d 1309, 1314 (S.D. Cal. 2006) (holding "irrelevant" prisoner's claim that the time constraints imposed on him by litigation did not allow for completion of grievance process concerning law library access); Jones v. Oaks Corr. Facility Health Servs., 2005 WL 3312562, *2 (W.D. Mich. Dec. 7, 2005) (stating even a case that presents imminent danger of serious physical harm must be exhausted); Calderon v. Anderson, 2005 WL 2277398, *5 (S.D. W.Va. Sept. 19, 2005) (stating exhaustion was required despite the prisoner's claim of "life-or-death situation"); Drabovskiy v. United States, 2005 WL 1322550, *2 (E.D. Ky. June 2, 2005); Joseph v. Jocson, 2004 WL 2203298, *1 (D. Or. Sept. 29, 2004) ("Plaintiff contends he should not be required to exhaust available remedies because delay may result in irreparable harm. Exhaustion is mandatory.").

Note 1155: McFarlin v. Livingston, 2011 WL 7562688, *2 (E.D.Tex., Nov. 15, 2011), *report and recommendation adopted*, 2012 WL 947546 (E.D.Tex., Mar. 20, 2012); Witmer v. Grady County Jail, 2011 WL 4578453, *2 (W.D.Okla., Sept. 30, 2011) ("The Court also notes no allegation that Plaintiff suffered a physical injury that might satisfy the requirements of the [PLRA]."); Van Scott v. Cherish, 2011 WL 3421551, *3 (W.D.Pa.. July 14, 2011) (dismissing claim for compensatory damages where plaintiff alleged emotional injury but did not allege physical injury), *report and recommendation adopted*, 2011 WL 3421526 (W.D.Pa., Aug. 4, 2011); Fleury v. Collins, 2011 WL 1706835, *3 (D.Colo., Apr. 14, 2011), *report and recommendation adopted*, 2011 WL 1706908 (D.Colo., May 5, 2011); Vega v. McCann, 2010 WL 1251444, *4 (N.D.Ill., Mar. 23, 2010); Young v. Beard, 2009 WL 3111742, *6 (M.D.Pa., June 1, 2009) ("Plaintiff makes no allegations of physical injury in his amended complaint. . . . Absent claims of physical injury, compensatory damages are barred.") (footnote omitted), *report and*

recommendation adopted in part, rejected in part on other grounds, 2009 WL 3111736 (M.D.Pa., Sept. 23, 2009); Polk v. Bowman, 2008 WL 4937592, *2 (N.D.Tex., Nov. 18, 2008) ("It is also now established law that a plaintiff must recite that he suffered more than a de minimis physical injury."); Salter v. Dallas Sheriff's Dept., 2008 WL 4393268 (N.D.Tex., Sept. 26, 2008) ("Plaintiff has failed to allege a physical injury under 42 U.S.C. § 1997e(e)."); Singh v. Mental Health Dept. of Attica Correctional Facility, 2008 WL 4371777, *4 (N.D.N.Y., Sept. 18, 2008) (citing "Failure to Allege Physical Injury Under the PLRA" as one of several bases for dismissal).

Note 1174: Reese v. Oliver, 2011 WL 2940947, *6 (S.D.Ala., June 20, 2011) (applying § 1997e(e) to a claim of economic injury because of lack of physical injury), *report and recommendation adopted*, 2011 WL 2940629 (S.D.Ala., July 20, 2011); Portier v. Defusco, 2008 WL 5533987, *10 (D.Colo., Nov. 26, 2008) (plaintiff "has not alleged that he suffered any physical injury, which is a requirement for an inmate to bring a federal claim for monetary damages"), *stay denied*, 2009 WL 130343 (D.Colo., Jan. 20, 2009), *report and recommendation adopted*, 2009 WL 823551 (D.Colo., Mar. 27, 2009), *reconsideration denied*, 2009 WL 2338056 (D.Colo., July 27, 2009); Nelis v. Kingston, 2007 WL 4171517, *6 (E.D.Wis., Nov. 20, 2007) ("under the Prison Litigation Reform Act (PLRA), recovery in prisoner lawsuits is limited where, as here, there is no showing of physical injury"); Wimble v. Cotton, 2007 WL 756597, *3 (D.Vt., Mar. 8, 2007) ("It is well established that a prisoner may not collect compensatory damages for a constitutional violation without showing that he has suffered a physical injury."); Bownes v. MDOC Employees, 2006 WL 3690743, *1 (N.D.Miss., Dec. 12, 2006) (stating "the Plaintiff has not alleged the requisite physical injury that must accompany any § 1983 claim for damages"); Dingler v. Bowles, 2003 WL 22964269 (N.D.Tex., Dec. 12, 2003), *appeal dismissed*, 101 Fed.Appx. 441, 2004 WL 1386303 (5th Cir. 2004) (unpublished).

Note 1178: Van Wyhe v. Reisch, 536 F.Supp.2d 1110, 1126 (D.S.D. 2008) (applying § 1997e(e) to removal from religious diet), *aff'd in part, rev'd in part on other grounds,* 581 F.3d 639 (8th Cir. 2009), *cert. denied sub nom.* Reisch v. Sisney, 130 S.Ct. 3323 (2010) *and sub nom.* Sisney v. Reisch, 131 S.Ct. 2149 (2011); Sisney v. Reisch, 533 F.Supp.2d 952, 973-74 (D.S.D. 2008) (applying § 1997e(e) to various religious deprivations), *aff'd in part on other grounds, rev'd in part on other grounds sub nom.* Van Wyhe v. Reisch, *supra*; Nelis v. Kingston, 2007 WL 4171517, *6 (E.D.Wis., Nov. 20, 2007) (applying § 1997e(e) to claim of exclusion from religious exercises); Priest v. Department of Corrections, 2007 WL 2728354, *1-2 (N.D.Fla., Sept. 14, 2007) (applying § 1997e(e) to Muslim prisoner's claim of subjection to blasphemy in 12-step addiction program); Gill v. Hoadley, 2007 WL 1341468, * 4 (N.D.N.Y., May 4, 2007) (applying § 1997e(e) to deprivation of religious exercise); Perez v. Frank, 2007 WL 1101285, *17 (W.D.Wis., Apr. 11, 2007) (holding plaintiff asserting various religious violations "will not be entitled to compensation for any emotional or spiritual distress he may have suffered"); Quin'ley v. Corrections Corporation of America, 2007 WL 624539, *1 (N.D.Miss., Feb. 23, 2007) (applying mental/emotional injury provision to failure to provide Asaru religious services, refusing to credit claim that migraines, insomnia, cramps and nervous problems resulted); Scott v. Ozmint, 467 F.Supp.2d 564, 569 (D.S.C. 2006) (holding claim of refusal to recognize religion barred absent physical injury); Massingill v. Livingston, 2006 WL 2571366, *2-3 (E.D.Tex., Sept. 1, 2006) (holding claims asserting various religious restrictions were subject to mental/emotional injury provision); Daniels v. Waller, 2006 WL 763115, *2 (S.D.Miss., Mar. 24, 2006) (holding claim of refusal to acknowledge Muslim name was one for mental or emotional injury).

Note 1179: Mauwee v. Donat, 2009 WL 3161836, *19 (D.Nev. May 28, 2009), *report and recommendation adopted in part, rejected in part on other grounds*, 2009 WL 3062787 (D.Nev., Sept. 18, 2009) (damages can be recovered based on constitutional violations and not on alleged mental or emotional injury); Porter v. Caruso, 2008 WL 3978972, *9 (W.D.Mich., Aug. 22, 2008) (§ 1997e(e) does not apply to First Amendment claims); Eng v. Blood, 2008 WL 2788894, *4 (N.D.N.Y., July 17, 2008) ("[the] physical injury requirement does not apply to actions for First Amendment violations"); Fabricius

v. Maricopa County, 2008 WL 2001264, *4 (D.Ariz., May 7, 2008) (complaint of forced exposure to "Judaeo-Christian" (Christmas) music was not subject to § 1997e(e)); Goodrick v. Roane, 2007 WL 853980, *7 (D.Idaho, Mar. 19, 2007) (holding plaintiff who complained of confiscation of Muslim oils was not limited in remedies to the $20 and replacement costs the defendants offered him); Reischauer v. Jones, 2007 WL 1521578, *9 (W.D.Mich., May 23, 2007) (noting plaintiff deprived of religious publications did not seek damages for "emotional injury" but for "the violation itself"); Carr v. Whittenburg, 2006 WL 1207286, *2-3 (S.D.Ill., Apr. 28, 2006) (stating that specific First Amendment violations may be compensable through "general damages" or "presumed damages" even without proof of injury, though damages cannot be recovered based on the abstract value or importance of the right); Shabazz v. Martin, 2006 WL 305673, *6 (E.D.Mich., Feb. 9, 2006) (following *Canell*); Percial v. Rowley, 2005 WL 2572034, *2 (W.D.Mich., Oct. 12, 2005) (following *Canell*); Lipton v. County of Orange, NY, 315 F.Supp.2d 434, 457 (S.D.N.Y. 2004) ("Although § 1997e(e) applies to plaintiff's First Amendment retaliation claim, a First Amendment deprivation presents a cognizable injury standing alone and the PLRA 'does not bar a separate award of damages to compensate the plaintiff for the First Amendment violation in and of itself.'") (quoting Ford v. McGinnis,198 F.Supp.2d 363, 366 (S.D.N.Y.2001)); Cancel v. Mazzuca, 205 F.Supp.2d 128, 138 (S.D.N.Y. 2002) (noting that plaintiff "brought this action, inter alia, for alleged violations of his First Amendment rights, rather than 'for mental or emotional injury.'").

Note 1186: Prevost v. Orleans Parish Prison, 2010 WL 2218571, *1-2 (E.D.La., Apr. 20, 2010) (insect infestation, mold and mildew on walls, open electrical wires, excessive water leaks and moisture), *report and recommendation adopted*, 2010 WL 2218159 (E.D.La., May 26, 2010); Nichols v. Head, 2010 WL 1224091, *3 (M.D.Ga., Mar. 22, 2010) (confinement without a working light), *reconsideration denied*, 2010 WL 4261395 (M.D.Ga., Oct. 21, 2010); Diggs v. Nelson Coleman Corr. Ctr., 2010 WL 1038229, *1 (E.D.La., Feb. 17, 2010) (litany of conditions complaints), *report and recommendation adopted*, 2010 WL 1038230 (E.D.La., Mar. 17, 2010); Carroll v. Gusman, 2009 WL 2949997, *1, 7 (E.D.La., Sept. 10, 2009) (allegation that plaintiff was abandoned in a locked cell for four days and nights without food, water, light, etc., after Hurrican Katrina); Hutt v. Hofman, 2009 WL 2601927, *8 (D.Vt., Aug. 18, 2009) ("Without an Eighth Amendment claim, however, [a segregated prisoner's] only claim is for a due process violation—a claim that, by its nature, does not inflict physical injury."); Richard v. Cupp, 2009 WL 840218, *4, 6 (W.D.La., Mar. 25, 2009) (allegations that plaintiff had to sleep on the floor for two weeks, and was exposed to smelly and unsanitary toilets and moldy showers); Bryant v. Moore, 2008 WL 190462, *2-3 (E.D.Ark., Jan. 18, 2008) (deprivation of food, water, and restroom during trip to hospital); Stainbrook v. Houston, 2007 WL 3244086, *1 (D.Neb., Nov. 1, 2007) (deaf prisoner's complaint of lack of visual alarm system and assistive communications devices); Norman v. TDCJ-ID, 2007 WL 3037129, *6 (E.D.Tex., Oct. 18, 2007) (applying § 1997e(e) to claim of failure to accommodate disability); Jones v. Stadler, 2007 WL 2900495, *1-2 (M.D.La., Oct. 2, 2007) (allegation that bilateral amputee was deprived of his prosthesis, requiring him to scoot across the floor to get to the toilet); Lopez v. S.C.D.C., 2007 WL 2021875, *3 (D.S.C., July 6, 2007) (confinement for seven days without toilet, sink, bed, mattress, soap, toothbrush, running water, so plaintiff had to urinate and defecate on the floor or in trays or cups and was unable to shower); Ashe v. Smith, 2007 WL 1423730, *1-2 (D.S.C., May 10, 2007) (exposure to human waste during cell block floods); Meyers v. Arpaio, 2007 WL 1302746, *5 (D.Ariz., May 3, 2007) (crowding and resulting violent conditions, where plaintiff was not himself injured); Lloyd v. Briley, 2007 WL 917385, *5 (N.D.Ill., Mar. 23, 2007) (confinement in strip cell with no light and no running water); Henderson v. Johnson, 2007 WL 781767, *6-7 (C.D.Ill., Mar. 12, 2007) (setting aside $300 jury award for segregation where plaintiff submitted no evidence of physical injury; reducing punitive damages from $5,000 to $500); Ellis v. ABL Food Serv., 2007 WL 196860, *1-2 (M.D.Ga., Jan. 23, 2007) (rusty pipes and chipping ceiling paint in the cooking area, resulting in rust and paint chips in the food); Jones v. Epps, 2006 WL 3196460, *1 (S.D.Miss., Nov. 3, 2006) (exposure to human waste from defective toilets), *certificate of appealability denied,* 2008 WL 1932402 (S.D.Miss., Apr. 28, 2008); Pearson v. Strain, 2006 WL 3858737, *11 (E.D.La., Oct. 30, 2006) (thirst, hunger pains,

and brief nausea from the smell of feces and urine in the aftermath of Hurricane Katrina); Owens v. Leavins, 2006 WL 1313192, *3 (N.D.Fla., May 12, 2006) (plaintiff "complains only that he was subjected to disciplinary confinement" but alleges no physical injury); Vega v. Hill, 2005 WL 3147862, *3 (N.D.Tex., Oct. 14, 2005) (allegations of "exposure to mold, mildew, dead bugs, dirty showers, and spoiled food"); Stames v. Gillespie, 2004 WL 1003358, *9 (D.Kan., Mar. 29, 2004) (denial to segregation prisoner of showers, drinking water, and water for cleaning and personal hygiene, and of communicating with lawyer and family); Gibson v. Ramsey, 2004 WL 407025 (N.D.Ill., Jan. 29, 2004) (crowding, noise, bad water and lack of ventilation); Hammond v. Briley, 2004 WL 413293, *5 (N.D.Ill., Jan. 29, 2004) (lack of a working light in cell); Osterback v. Johnson, 2003 WL 25571396, *6 (M.D.Fla., June 2, 2003) (complaint of placement in segregation and resulting loss of 11 pounds, nausea, back pain, sinus condition, appetite loss and headaches); Adnan v. Santa Clara County Dept. of Corrections, 2002 WL 32058464, *3 (N.D.Cal., Aug. 15, 2002) (prisoner kept in solitary confinement, his hands and feet shackled, and subjected to body cavity strip searches and allowed out of his cell only three hours a week); Lynch v. Robinson, 2002 WL 1949731, *2 (N.D.Ill., Aug. 22, 2002) (restrictions of segregated confinement).

Note 1190: Washington v. Brown, 2010 WL 2737141, *19 (E.D.Cal., July 12, 2010) ("Because plaintiff's claims are premised on constitutional violations, he is not barred by § 1997e(e) and may recover compensatory damages without a showing of physical injury."), *report and recommendation adopted*, 2010 WL 3341645 (E.D.Cal., Aug. 25, 2010); Low v. Stanton, 2010 WL 234859, *4 (E.D.Cal., Jan. 14, 2010) (Fourteenth Amendment claim of denial of telephone access during booking "may have very little financial value" but is still viable), *report and recommendation adopted*, 2010 WL 684969 (E.D.Cal., Feb. 23, 2010); Lira v. Director of Corrections, 2008 WL 619017, *12 (N.D.Cal., Mar. 4, 2008) (allowing claim of eight-year SHU confinement leading to PTSD to go forward); Carr v. Whittenburg, 2006 WL 1207286, *3 (S.D.Ill., Apr. 28, 2006) (stating that specific First Amendment violations may be compensable even without proof of injury); Lipton v. County of Orange, NY, 315 F.Supp.2d 434, 457 (S.D.N.Y. 2004) ("Although § 1997e(e) applies to plaintiff's First Amendment retaliation claim, a First Amendment deprivation presents a cognizable injury standing alone and the PLRA 'does not bar a separate award of damages to compensate the plaintiff for the First Amendment violation in and of itself.'") (quoting Ford v. McGinnis,198 F.Supp.2d 363, 366 (S.D.N.Y.2001)); Cancel v. Mazzuca, 205 F.Supp.2d 128, 138 (S.D.N.Y. 2002) (noting that plaintiff "brought this action, inter alia, for alleged violations of his First Amendment rights, rather than 'for mental or emotional injury.'")

Note 1191: Benge v. Scalzo, 2008 WL 2157024, *10 (D.Ariz., May 21, 2008) (allegations of psychiatric neglect were not subject to § 1997e(e)); Wittkamper v. Arpaio, 2008 WL 1994908, * 1-2 (D.Ariz. May 6, 2008) (allegations of unsanitary conditions were not subject to § 1997e(e)); Davis v. Arpaio, 2008 WL 1840732, *2-3 (D.Ariz. Apr. 23, 2008) (holding allegations of denial of rights with respect to clothing, hygiene, legal calls, recreation, library access, medical problems, sleep deprivation, etc., were not subject to § 1997e(e)); Cockcroft v. Kirkland, 2008 WL 683446, *7 (N.D.Cal., Mar. 10, 2008) ("the violation of a constitutional right has a compensatory value regardless of what the physical/emotional injuries are"; plaintiff alleged exposure to waste from back-flushing toilet); Harris v. Arpaio, 2008 WL 190399, *8 (D.Ariz., Jan. 18, 2008) (plaintiff could seek compensatory and other damages for delay in medical diet), *reconsideration denied*, 2008 WL 508651 (D.Ariz., Feb. 21, 2008); Fields v. Ruiz, 2007 WL 1821469, *7 (E.D.Cal., June 25, 2007) (holding prisoner alleging he was confined in a cell with an overflowing toilet for 28 days was not "seeking compensatory damages for mental or emotional injuries"; 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); Hill v. Arpaio, 2007 WL 1120305, *3 (D.Ariz., Apr. 11, 2007) (holding plaintiff could not recover for mental stress caused by crowding, but could recover for violation of the Fourteenth Amendment); 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).

Note 1218: 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); McDonald v. Smith, 2003 WL 22208554 (N.D.Tex., Sept. 25, 2003) (holding "large amount of muscle spasm across lumbar sacral area of back" after a use of force did not meet the physical injury requirement); 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.).

Note 1219: Ruffin v. Winnebago County Jail, 2010 WL 3359478, *7 (S.D.Ill., Aug. 25, 2010) (repeated bruising and swelling of arms and legs resulting from lack of accessible facilities for wheelchair-bound prisoner satisfied § 1997e(e)); Blackshear v. Bailey, 2010 WL 934002, *10 (M.D.Fla., Mar. 10, 2010) (claim of ongoing head and back pain required further factual development; "minor" injury is not the same as *de minimis*); Story v. Lucas, 2010 WL 964696, *13 (W.D.Ark., Feb. 25, 2010) (contusion of elbow and back pain after use of force satisfied § 1997e(e)), *report and recommendation adopted*, 2010 WL 964620 (W.D.Ark., Mar. 16, 2010); Story v. Knighton, 2009 WL 2136107, *8 (W.D.Ark., July 15, 2009) (swollen ankles and feet from extended placement in leg irons, which persisted for days after release, satisfied § 1997e(e)); Jackson v. Armstrong, 2008 WL 3876604, *5-6 (S.D.Ohio, Aug. 20, 2008) (edema of forearm and pain from repeated baton blows were "palpable physical injury" satisfying § 1997e(e)); Sanders v. Day, 2008 WL 748170, *2 (M.D.Ga., Mar. 19, 2008) (holding allegation of kicking and using pepper spray on a handcuffed suspect was not *de minimis*; no details stated); Lathon v. Washbourne, 2007 WL 2710429, *8 (W.D.Ark., Sept. 13, 2007) (holding a bleeding leg, swollen testicles, and injuries to back and neck satisfied the physical injury requirement); Edwards v. Miller, 2007 WL 951696, *1-2 (D.Colo., Mar. 28, 2007) (allegation of being punched in the face and bitten on the arm over a 10-minute period, causing damage to forehead and facial injuries, and leaving a lasting effect in the form of severe headaches, is more than *de minimis*); Cotney v. Bowers, 2006 WL 2772775, *7 (M.D.Ala., Sept. 26, 2006) (holding bruised ribs that took weeks to heal could be found not *de minimis*); Oliver v. Gaston, 2006 WL 2805343, *6 (S.D.Miss., Sept. 7, 2006) (holding "numerous swollen spots, bruises and abrasions to the face and scalp" were more than *de minimis*); Evans v. Alameida, 2006 WL 618298, *1 (E.D.Cal., Mar. 10, 2006) (noting prior decision that "abrasions and bleeding" met the standard), *report and recommendation adopted*, 2006 WL 1774875 (E.D.Cal., June 26, 2006); Hardin v. Fullenkamp, 2001 WL 35816398, *7 (S.D.Iowa, June 22, 2001) (holding evidence prisoner was cut and bruised and other inmates' affidavits that they saw him beaten and later limping met the standard).

Note 1223: Butler v. LaBarge, 2010 WL 3907263, *1 (N.D.N.Y., May 21, 2010) (officer's alleged feeling of genitals and aggressive rubbing of buttocks was not physical injury), *report and*

recommendation adopted, 2010 WL 3907258 (N.D.N.Y. Sep 30, 2010); Petry v. Couvillon, 2010 WL 2710395, *5 (W.D.La., May 17, 2010) (rubbing of knee and thigh "in a sexual manner" along with implied sexual proposition did not satisfy § 1997e(e)), *report and recommendation adopted*, 2010 WL 2710392 (W.D.La., July 6, 2010); Beene v. Rasseki, 2010 WL 2196597, *6 (M.D.Tenn., May 27, 2010) (claim of "alleged homosexual advances" did not allege physical injury); Gist v. Little Sandy Correctional Complex, 2010 WL 1839911, *4 (E.D.Ky., May 7, 2010) (claim of sexual harassment consisting of verbal abuse and minor touching did not allege physical injury); McCoy v. Bazzle, 2009 WL 3169963, *2-3 (D.S.C., Sept. 28, 2009) (allegation that officer sexually harassed plaintiff by touching his buttocks 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, 2008 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 1225: Chatham v. Adcock, 2007 WL 2904117, *16 (N.D.Ga., Sept. 28, 2007) (holding hallucinations, anxiety, and nightmares resulting from denial of Xanax did not meet physical injury requirement); Granger v. Naphcare Medical Contractor, 2007 WL 2825915, *4 (E.D.Tex., Sept. 26, 2007) (allegation of nosebleed and blurred vision from medication error did not meet the physical injury standard); Ladd v. Dietz, 2007 WL 160762, *1 (D.Neb., Jan. 17, 2007) (holding pain resulting from placing ear medication in plaintiff's eye was "not enough" to constitute physical injury); Morgan v. Dallas County Sheriff Dept., 2005 WL 57282, *2 (N.D.Tex., Jan. 11, 2005) (holding that a complaint of "undue pain . . . on a regular basis" resulting from denial of medication is insufficient to establish physical injury), *report and recommendation adopted*, 2005 WL 2075796 (N.D.Tex., Aug. 26, 2005); Davis v. Bowles, 2004 WL 1205182, *2 (N.D.Tex., June 1, 2004) (holding an increase in blood pressure to 180/108 and headaches resulting from withholding of prescribed medication did not meet the physical injury threshold), *report and recommendation adopted*, 2004 WL 1381045 (N.D.Tex., June 18, 2004).

Note 1226: Dickinson v. Livingston, 2010 WL 3810779, *1 (E.D.Tex., Aug. 10, 2010) (staph infection allegedly caused by conditions of confinement), *report and recommendation adopted*, 2010 WL 3810633 (E.D.Tex., Sept. 23, 2010); Andrade v. Christ, 2009 WL 3004575, *4 (D.Colo., Sept. 18, 2009) (pain resulting from failure to treat traumatic injury); Bain v. Cotton, 2009 WL 1660051, *7 (D.Vt., June 12, 2009) ("severe chronic pain" from termination of drug regime for prisoner who had serious head and spinal injuries from auto accident); DeRoche v. Funkhouse, 2008 WL 881286, *7 (D.Ariz., Mar. 28, 2008) (further liver damage and daily pain, swelling, nausea and hypertension from lack of treatment for Hepatitis C satisfied the physical injury requirement); Maddle v. Correctional Medical Services, Inc., 2008 WL 839715, *6 (M.D.Tenn., Mar. 26, 2008) (presence of a thyroid mass requiring testing and then surgery satisfied the physical injury requirement, notwithstanding that the surgery was successful even though delayed; plaintiff complained of pain and complications including bleeding, nausea, and

difficulties swallowing, eating, and breathing); Custard v. Young, 2008 WL 791954, *10 (D.Colo., Mar. 20, 2008) ("pain, bleeding, swelling, scarring" to gums and a significant loss of weight resulting from denial of denture adhesive, dental care or a soft diet satisfied § 1997e(e) at the pleading stage); Perrey v. Donahue, 2007 WL 4277621, *6 (N.D.Ind., Dec. 3, 2007) (holding complaint of "prolonged and extreme pain, constant malaise, body soreness and aches, diarrhea, headaches, [and] loss of appetite" met the physical injury pleading standard); Boles v. Dansdill, 2007 WL 2770473, *21 (D.Colo., Sept. 20, 2007) (holding allegation that denial of medical care made plaintiff "physically ill" satisfied physical injury standard at pleading stage); Reeves v. Wallington, 2007 WL 1016979, *2 (E.D.Mich., Mar. 29, 2007) (holding standard met by shortness of breath, chest pain, hospitalization for observation and to rule out myocardial infarction following delay in receiving medication and exposure to chemical agents), *subsequent determination*, 2007 WL 2300798 (E.D.Mich., Aug. 7, 2007); Such v. Vincent, 2007 WL 906170, *3-5 (W.D.Pa., Mar. 22, 2007) (holding standard met by allegations that refusal to permit paralyzed prisoner to self-catheterize increased urinary tract infections, pain from being unable to urinate as needed, and incontinence); Clifton v. Eubank, 418 F.Supp.2d 1243, 1248 (D.Colo. 2006) (addressing "prolonged" pain attendant upon labor and stillbirth), *on reconsideration on other grounds*, 2006 WL 893600 (D.Colo., Apr. 5, 2006); Fleming v. Clarke, 2005 WL 2170093, *2 (D.Neb., Sept. 6, 2005) (holding swelling, pain, and deterioration resulting from denial of prescribed knee brace met physical injury requirement); Martin v. Gold, 2005 WL 1862116, *9 (D.Vt., Aug. 4, 2005) (holding pain resulting from lack of dentures met physical injury requirement, though resulting headaches and hunger pains might not). *But see* Smith v. Dallas County Jail System, 2007 WL 1140215, *2 (N.D.Tex., Apr. 16, 2007) (staph infections did not satisfy physical injury requirement); Calderon v. Foster, 2007 WL 1010383, *8 (S.D.W.Va., Mar. 30, 2007) (pain, standing alone, is *de minimis*; plaintiff alleged two hours of chest pain which was resolved with nitroglycerine), *aff'd*, 264 Fed.Appx. 286 (4th Cir. 2008) (unpublished); Purtell v. Corrections Corp. of America, 2007 WL 1464376, *2 (N.D.Miss., Mar. 26, 2007) (severe headache for a day and a half was *de minimis*); Cooper v. Dretke, 2006 WL 3447679, *3 (S.D.Tex., Nov. 21, 2006) (holding that failure to repair a hearing aid that the prisoner used to alleviate symptoms associated with tinnitus did not show required "specific physical injury"); Cranford v. Payne, 2006 WL 2701273, *7 (S.D.Miss., Aug. 23, 2006) (holding a scalp infection is *de minimis*); Williams v. Smith, 2006 WL 938980, *2 (W.D.Ky., Apr. 10, 2006) (holding asthma attack requiring hospitalization was *de minimis*).

Note 1228: Jones v. Helder, 2011 WL 1194008, *6 (W.D.Ark., Mar. 8, 2011) (holding complaints of diarrhea, joint pain, muscle soreness, and migraines resulting from inadequate diet did not constitute physical injury), *report and recommendation adopted*, 2011 WL 1193733 (W.D.Ark., Mar. 29, 2011); Sims v. Caruso, 2011 WL 672232, *2 (W.D.Mich., Feb. 18, 2011) (loss of "some weight" does not satisfy the statute); May v. Donneli, 2009 WL 3049613, *3 (N.D.N.Y., Sept. 18, 2009 (minor weight loss was de minimis); Ransburgh v. Ladner, 2009 WL 1766793, *1 (S.D.Miss., June 22, 2009) (denial of food for 28 hours did not meet requirement), reconsideration denied, 2010 WL 376960 (S.D.Miss., Jan. 26, 2010); Linehan v. Crosby, 2008 WL 3889604, *13 (N.D.Fla., Aug. 20, 2008) (weight loss from denial of a kosher diet did not meet requirement); Bradford v. Caruso, 2008 WL 3843291, *3 (E.D.Mich., Aug. 14, 2008) (same as Linehan); Green v. Padula, 2007 WL 4124830, *2-3 (D.S.C., Sept. 25, 2007) (holding three-day denial of food and several hours' restraint during strip cell placement did not meet the physical injury requirement), *report and recommendation rejected in part on other grounds*, 2007 WL 4124663 (D.S.C., Nov. 19, 2007); Ghashiyah v. Wisconsin Dept. of Corrections, 2006 WL 2845701, *11 (E.D.Wis., Sept. 29, 2006) (holding 20 30 pound weight loss was not a physical injury).

Note 1231: 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).

Note 1279: Calderon v. Dickhaut, 2011 WL 3652766, *2 (D.Mass., Aug. 17, 2011) ("The filing fee—which represents only a modest portion of the Court's cost of deploying its resources—is a means to insure that resources are not consumed thoughtlessly. There is no basis to relieve any prisoner plaintiff, including Calderon, of the consequences of an improvident filing because upon reflection, he decides he would like to use the monies which will be applied to his filing fee in some other manner."); Bey v. Sullivan, 2011 WL 2413997, *1-2 (D.Mass., June 9, 2011) (holding district court cannot waive filing fee); Hassan v. Maricopa County Sheriff's Office, 2010 WL 3724747, *3 (D.Ariz., Sept. 16, 2010) (holding court could not waive filing fee after dismissal where it had granted plaintiff's IFP request); Williams v. Adams, 2010 WL 3199936, *1 (D.Nev., Aug. 11, 2010) (holding court could not refund filing fee to prisoner seeking to withdraw suit); Slater v. Lemens, 2010 WL 960004, *2 (E.D.Wis., Mar. 12, 2010) (plaintiff "incurred the filing fee by filing the notice of appeal"); Stewart v. Baker, 2009 WL 1211350, *1 (W.D.Mo., May 1, 2009) ("The filing of a notice of appeal is considered a consent by the inmate to allow prison officials to deduct an initial partial appellate filing fee and later installments from the prisoner's account."), *motion to proceed in forma pauperis denied*, 2009 WL 1664471 (W.D.Mo., June 12, 2009), *aff'd*, 360 Fed.Appx. 696 (8th Cir. 2010); Morgan v. Baker, 2008 WL 4831414, *1 (D.Conn., Nov. 5, 2008) (court cannot excuse filing fee as part of settlement of case).

Note 1317: Perkins v. Napoli, 2011 WL 6148988, *1 (W.D.N.Y., December 12, 2011) (allowing 30 days to pay the fee); Emmett v. Warren, 2011 WL 4835679, *2 (E.D.Tex., Oct. 11, 2011) (allowing 15 days to pay the fee); Rindahl v. Daugaard, 2011 WL 4625984, *4 (D.S.D., Sept. 30, 2011); Woods v. Dewberry, 2011 WL 6097986 (E.D.Tex., Dec. 5, 2011) (allowing 30 days to pay); Luevano v. Perry, 2011 WL 4625934, *1 (D.Minn., Sept. 12, 2011) (dismissing after plaintiff failed to pay during month-plus allowed), *report and recommendation adopted*, 2011 WL 4625911 (D.Minn., Oct. 3, 2011); Muhammad v. Sisto, 2011 WL 2493775, *2 (E.D.Cal., June 22, 2011) (allowing payment of filing fee within the 21 days for filing objections; citing authority that payment of the filing fee moots issues concerning denial of IFP status); Williams v. Murray, 2011 WL 2391099, *2 (E.D.Cal., June 10, 2011) (allowing 30 days to pay the fee); Bogan v. Brunsman, 2011 WL 4915055, *2 (S.D.Ohio, May 27, 2011) (allowing 30 days to pay the fee), *report and recommendation adopted*, 2011 WL 4915016 (S.D.Ohio, Oct. 14, 2011); Cardona v. Bledsoe, 2011 WL 1832777, *7 (M.D.Pa., May 12, 2011) (allowing 21 days to pay the fee); McGrew v. Barr, 2011 WL 1107195, *4 (M.D.La., Mar. 22, 2011) (allowing 30 days to pay the fee); Pickens v. Dretke, 2011 WL 855688, *5 (E.D.Tex., Jan. 26, 2011) (allowing 30 days to pay the filing fee), *report and recommendation adopted*, 2011 WL 846845 (E.D.Tex., Mar. 8, 2011); Price v. Cunningham, 2011 WL 864677, *4 (E.D.Cal., Mar. 10, 2011) (allowing chance to pay the filing fee, noting dismissal would be harsh because plaintiff's claim might be time-barred), *report and*

recommendation adopted, 2011 WL 2110761, *2 (E.D.Cal., May 25, 2011) (allowing 45 days to pay); Pinder v. Linkous, 2010 WL 6032627, *2 (W.D.Ark., Nov. 16, 2010) (noting litigant ordinarily would get a chance to pay the fee, but this plaintiff's claims were subject to dismissal as frivolous), *report and recommendation adopted*, 2011 WL 868811 (W.D.Ark., Mar 14, 2011); Houston v. Schwarzenegger, 2009 WL 3487625, *6 (E.D.Cal., Oct. 23, 2009) (rejecting contrary authority, rejecting argument that litigant should not "reap the early benefits" of IFP status such as service by the Marshals; dismissal would cause delay and inconvenience and might result in the claim's being time-barred; court grants 30 days to pay filing fee), *report and recommendation adopted*, 2010 WL 530154 (E.D.Cal., Feb. 9, 2010); Greene 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 1470: 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 1472: 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 1473: 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).

Note 1480: Freeman v. Collins, 2011 WL 6339687, *4 (S.D.Ohio, Dec. 19, 2011) (holding refusal to treat "severe medical complications to his throat, neck, shoulder, and spine" despite prior medical recommendations and prescriptions" met the imminent danger standard); Davis v. Middlesex Superior Court, 2011 WL 1344155, *2 (D.Mass., Apr. 7, 2011) (holding alleged "dire circumstances with respect to his medical care for both his skin condition and his diabetic condition" met imminent danger standard); Funtanilla v. Williams, 2010 WL 3769134, *1 (E.D.Cal., Sept. 22, 2010) (allegation of denial of treatment for dental injury and spreading gum infection met imminent danger standard); Barefoot v. Pettit, 2010 WL 2332279, *2 (E.D.N.C., June 9, 2010) (allegation of denial of dental care resulting in periodontal disease and permanent structural bone damage); Stewart v. King, 2010 WL 1628992, *3, 5 (M.D.Tenn., Apr. 20, 2010) (allegation of ongoing threats by medical staff to mistreat prisoner with infection presenting risk of amputation); Rindahl v. Reisch, 2010 WL 597175, *1 (D.S.D., Feb. 18, 2010) (holding numbness in neck and arms and evidence of lack of follow-up on spinal injury met imminent danger standard); Scobellitti v. Goldson, 2010 WL 335696, *1 (N.D.Cal., Jan. 22, 2010) (complaint of denial of toothpaste for two years, resulting in severe periodontal disease and risk of tooth loss and possibly heart disease, met standard); Almond v. Doyle, 2009 WL 3762000, *2 (W.D.Wis., Nov. 6, 2009) (allegation of untreated painful back and groin ailments, exacerbation of back pain by removal of

mattress); Day v. Bannish, 2009 WL 2589556, *1-2 (D.Conn., Aug. 21, 2009) (allegation of chronic infection causing pain and ulcers on legs satisfied imminent danger standard); Pettus v. Oakes, 2009 WL 2392025, *1 (W.D.N.Y., Aug. 3, 2009) (allegation that discontinuation of medication resulted in disabling pain such that the prisoner could not walk properly satisfied the imminent danger standard); Callegari v. Lee, 2009 WL 2258337, *1 (N.D.Cal., July 28, 2009) (allegation of failure to treat Hepatitis A, B and C satisfied imminent danger standard); Marts v. Yu, 2009 WL 2355768, *1 (N.D.Fla., July 24, 2009) (allegation of untreated hepatitis C, hypertension, hypoglycemia and heart problems met standard, if only "marginally"); Bennett v. Moore, 2009 WL 1871856, *1 (S.D.Ill., June 26, 2009) (allegation of refusal of recommended surgery for a torn colon resulting from sexual assault sufficiently alleged imminent danger); Bell v. Phillips, 2009 WL 1535883, *3 (E.D.Mo., June 1, 2009) (allegation that prison staff cuffed plaintiff's hands behind his back contrary to a medical order met the standard); Joiner v. Commissioner, 2009 WL 928869, *2 (M.D.Ala., Apr. 3, 2009) (allegation that though plaintiff had received much medical care, defendants had failed to arrange recommended follow-up, cancelled all outside medical visits, refused to allow assessment of alleged injury during post-surgical care, and failed to provide adequate pain medication, inter alia); Reeves v. Correctional Medical Services, 2008 WL 5102257, *1 (E.D.Mich., Dec. 1, 2008) (allegation of disabling pain in back, legs, and groin, with threat of paralysis if spinal problems were not properly addressed, satisfied imminent danger standard); Almond v. Wisconsin, 2008 WL 2903574, *1 (E.D.Wis., July 24, 2008) (allegation of untreated infection satisfied requirement); Grissom v. Pininski, 2008 WL 2218262, *1-2 (W.D.Wis., May 23, 2008) (allegation of denial of medical care for apparent broken wrist met the imminent danger standard); Pennington v. Kelly, 2008 WL 927694, *1 (E.D.Ark., Apr. 3, 2008) (noting that court had allowed plaintiff with three strikes to go forward based on a complaint of failure to treat Hepatitis C); Jensen v. Knowles, 2008 WL 744726, *2 (E.D.Cal., Mar. 18, 2008) (holding complaint of failiure to provide diabetic diet met the standard, noting need "to avoid overly detailed inquiries into what dangers are serious enough"); Weidow v. Crist, 2007 WL 4570569, *2 (N.D.Fla., Dec. 20, 2007) (plaintiff must allege "specific facts which indicate ongoing serious physical injury, or a pattern of misconduct evidencing the likelihood of imminent serious physical injury"); Bacon v. Epps, 2006 WL 1382314, *2 (W.D.Mo., May 17, 2006) (allowing claim to go forward under imminent danger standard that a dentist's drill bit came loose, was lost inside plaintiff, and he did not receive treatment even after passing blood); Voth v. Lytle, 2005 WL 3358909, *1 (D.Or., Dec. 8, 2005) (holding plaintiff's claim of severe pain and rectal bleeding and overruling of recommendations for surgery satisfy the "imminent danger of serious physical injury" standard notwithstanding defendants' claim that the condition is "relatively stable and long standing").

APPENDIX B

The Prison Litigation Reform Act, as Codified

I. SCOPE AND APPLICABILITY OF THE STATUTE

From the prospective relief provisions:

18 U.S.C. § 3626(h). Definitions.

* * *

(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:

42 U.S.C. § 1997e(h). 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.

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 intervener--

(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

42 U.S.C. § 1997e(a). Applicability 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

42 U.S.C. § 1997e(e). Limitation on recovery.

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.

28 U.S.C. § 1346 (b). [from Federal Tort Claims Act]

* * *

(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.

V. ATTORNEYS' FEES

42 U.S.C. § 1997e(d). Attorney's 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

28 U.S.C. § 1915. Proceedings *in forma pauperis*

(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.

42 U.S.C. § 1997e(c). Dismissal.

(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

28 U.S.C. § 1915(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.

18 U.S.C. § 983(h)(3) (from the Civil Asset Forfeiture Reform Act of 2000)

(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

42 U.S.C. §1997e(f). Hearings.

(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

28 U.S.C. § 1932.

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

Pub.L. 104-134, Title I, § 101[(a)][Title VIII, § 808], Apr. 26, 1996, 110 Stat. 1321-76; renumbered Title I Pub.L. 104-140, § 1(a), May 2, 1996, 110 Stat. 1327

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

Pub.L. 104-134, § 101[(a)][Title VIII, § 807], Apr. 26, 1996, 110 Stat. 1321-75; renumbered Title I Pub.L. 104-140, § 1(a), May 2, 1996, 110 Stat. 1327

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); . . .