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. 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. Thanks to Kelli Lanski for assistance in preparation. 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.” 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.” One court has held that police holding cells are not prisons. “Prospective relief” is “all relief other than compensatory money damages.”

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—a point that may precede actual filing by some time, since most prisoners seek in forma pauperis status and the processing of their applications may take weeks or even months.

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1 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”).
2 18 U.S.C. § 3626(g)(5).
3 Bowers v. City of Philadelphia, 2007 WL 219651, *34 n.40 (E.D.Pa., Jan. 25, 2007). In Bowers, the police holding cells were separate from the jails, which had their own intake facilities. 2007 WL 219651, *5-6.
4 18 U.S.C. § 3626(g)(7). Interpretation of this term is discussed in § III, below.
A prisoner is “any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.” Case law to date holds that military prisoners are “prisoners” under the PLRA, as are persons held in privately operated prisons and jails or juvenile facilities. Most decisions reach the same result with respect to “halfway houses” or drug treatment programs that the person is confined in as a result of a criminal charge or conviction, though results may vary depending on whether the facility is restrictive enough that the plaintiff can be said to be “confined” in it.


6 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.


10 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 “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 (D.Ill., Mar. 11, 2009) (persons confined in federal Contract Community Corrections Centers must exhaust); Fernandez v. Morris, 2008 WL 2775638, *2 (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).

11 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
Persons who are civilly committed are generally not prisoners,\(^\text{12}\) 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,\(^\text{13}\) nor are persons held in connection with immigration proceedings.\(^\text{14}\) However, persons who are civilly committed but whose criminal proceedings are still pending remain pre-trial detainees and are therefore prisoners.\(^\text{15}\) This category includes criminal defendants held in mental hospitals because of incompetency to assist in their defense.\(^\text{16}\) A defendant psychiatrically confined after a finding of not guilty by reason of insanity is civilly committed and therefore not a prisoner,\(^\text{17}\) but a person committed pursuant to statutory requirement after a “guilty but insane” verdict is a prisoner.\(^\text{18}\)

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\(^\text{12}\) Perkins v. Hedricks, 340 F.3d 582, 583 (8th Cir. 2003) (person civilly detained in prison Federal Medical Center).

\(^\text{13}\) 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), \textit{cert. denied}, 126 S.Ct. 2936 (2006); Trouille v. Venz, 303 F.3d 1256, 1260 (11th Cir. 2002); Page v. Torrey, 201 F.3d 1136, 1139-40 (9th Cir. 2000); 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); McCloud v. McDonald, 2008 WL 4177217, *3 (D.S.C., Sept. 8, 2008). \textit{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, ___ F.Supp.2d ___, 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).

\(^\text{14}\) 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”).

\(^\text{15}\) Koloctronis v. Morgan, 247 F.3d 726, 728 (8th Cir. 2001); Mullen v. Surtshin, 590 F.Supp.2d 1233, 1240 (N.D.Cal. 2008); 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).


\(^\text{17}\) Koloctronis v. Morgan, 247 F.3d 726, 728 (8th Cir. 2001); Mullen v. Surtshin, 590 F.Supp.2d 1233, 1240 (N.D.Cal. 2008); 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).

Persons who are not lawfully subject to detention are not prisoners.\textsuperscript{19} Prospective prisoners are not prisoners; an arrestee even if he is subsequently jailed,\textsuperscript{20} 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.\textsuperscript{21}

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.\textsuperscript{22} However, persons released on parole to residential facilities they are not free to leave remain prisoners because they are

\textsuperscript{19} 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).

\textsuperscript{20} 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). \textit{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). \textit{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. \textit{Id.} However, that line was drawn to determine whether the Fourth Amendment or the Due Process Clause applies to excessive force claims, \textit{see} Brothers v. Klevenhagen, 28 F.3d 452, 455-57 (5th Cir. 1994), \textit{cert. denied}, 513 U.S. 1045 (1994), and does not appear apposite to determining the PLRA’s applicability.


“confined” to institutions that fit the definition of “correctional facilities.” 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. However, most (and the better reasoned) decisions follow the statutory language and hold that § 1997e(e) does not apply to cases filed after release from prison. 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.

23 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. 10, above.

24 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); 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.


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, though some have held that the filing of an amended complaint after release means that the case is no longer “brought by a prisoner.”

A prisoner who files and is released may voluntarily

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).

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. See MareeBey v. Nash, 53 Fed. Appx. 240 (4th Cir., Dec. 16, 2002); Bloch v. Samuels, 2006 WL 2239016, *3-4 (S.D.Tex., Aug. 3, 2006) (plaintiff was in custody in a halfway house). 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 statute. 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).


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 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).

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.

28 Compare Harris v. Garner, 216 F.3d at 973-76 (holding that filing of amended complaint does not change plaintiffs’ status); Barrett v. Maricopa County Sheriff’s Office, 2010 WL 46786, *4 (D.Ariz., Jan. 4, 2010) (same); Barnhardt v. Tilton, ___ F.Supp.2d ____, 2009 WL 330090, *3 (E.D.Cal. 2009) (same) with 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
dismiss and refile the action and avoid the PLRA’s requirements as long as the limitations period has not expired. In cases where persons are released and reincarcerated, whether the plaintiff was incarcerated at the time the suit was filed determines whether he or she is a prisoner for PLRA purposes. A prisoner who delivers a complaint to prison officials for mailing to court remains a prisoner for PLRA purposes even if the complaint arrives at court after his or her release. Persons who join a


30 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 Smedley v. Reid, 2010 WL 391831, *4 (S.D.Cal., Jan. 27, 2010); Shembo v. Bailey, ___ F.Supp.2d ___, 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, ___ F.Supp.2d ___, 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).

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.\textsuperscript{32}

Prisoners cease to be prisoners upon death and therefore need not exhaust.\textsuperscript{33} Prisoners’ relatives or estates bringing an action for a prisoner’s death are not themselves prisoners.\textsuperscript{34} 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.\textsuperscript{35} In cases involving both prisoners and non-prisoners as plaintiffs, the non-prisoners’ claims are not governed by the PLRA.\textsuperscript{36} A “protection and advocacy” organization is not a prisoner.\textsuperscript{37}


In the \textit{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.


\textsuperscript{34} 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).

\textsuperscript{35} Braswell v. Corrections Corp. of America, 2009 WL 2447614, *4 (M.D.Tenn., Aug. 10, 2009). Braswell cites cases in which the courts applied the PLRA to suits by guardians, but without discussion or specific holding on the point.

\textsuperscript{36} 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), \textit{cert. denied}, 534 U.S. 1062 (2001); 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). \textit{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 \textit{Montcalm Pub. Corp. v. Com. of Va.}, 199 F.3d 168, 171-72 (4th Cir.
Civil actions do not include habeas corpus and other post-judgment proceedings challenging criminal convictions or sentences or their calculation. 38 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. 39 Under that holding, habeas challenges to prison disciplinary convictions resulting in the loss of good time are not governed by the PLRA, 40 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, 41 though it is questionable at this point whether habeas is a proper vehicle for such challenges. 42

1999), the court held that a publisher who intervened in a prisoner’s challenge to prison censorship was bound by the PLRA attorneys’ fees provisions, since it intervened in a case brought by a prisoner rather than filing its own complaint. 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.


38 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.


41 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).

42 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:
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. However, challenges to seizures of property related to criminal proceedings have so far been treated as civil actions, as have motions for disclosure of matters before a grand jury. Decisions are divided concerning motions made under the caption of a criminal prosecution addressing conditions of confinement related to the prosecution. In general, motions in already filed civil cases addressed to those cases’ subject matter are not considered separate

“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.

See In re Jacobs, 213 F.3d 289, 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).


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

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. 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.Okl., Feb. 5, 2009).

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. U.S. v. Luong, 2009 WL 2852111, *2 (E.D.Cal., Sept. 2, 2009) (rejecting requests for orthopedic boots and jail law library visits).
“actions” requiring exhaustion under the PLRA. However, a motion by a non-party to intervene in an already filed case requires exhaustion.

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

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, while the exhaustion of administrative remedies provision applies only to prisoners’ actions “with respect to prison conditions.” Always check the language of the particular provision you are dealing with.

III. Prospective 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. The restriction to “federal rights” means that federal courts may not grant prospective relief in prison litigation based on state law under their supplemental jurisdiction because § 3626 overrides 28 U.S.C. § 1367, the supplemental jurisdiction statute. Courts are to give substantial weight to adverse impacts on public safety or

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49 See § IV.B.1, below.


51 § 1997e(a).

52 See § IV.B.1, below.


54 Handberry v. Thompson, 446 F.3d 335, 344-46 (2d Cir. 2006). Courts have also held that they cannot grant prospective relief that is not directly related to the claims in the complaint; e.g., that they cannot grant relief with respect to obstructions to the plaintiff’s ability to litigate the case.
criminal justice operations, and to avoid directing the violation of state law unless necessary to correct violations of federal rights. This need-narrowness-intrusiveness standard is not much different from pre-PLRA law governing federal court civil rights injunctions.

The restrictions of 18 U.S.C. § 3626(a) apply only to the fashioning of prospective relief and have no implications for other aspects of litigation, e.g., decisions on class certification. Common sense and the Federal Rules of Civil Procedure suggest


55 18 U.S.C. § 3626(a)(1); see 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).


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

59 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 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.
that any determination about the propriety of particular relief be made only after a violation of federal rights has been found.\footnote{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 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.” Fed.R.Civ.P. 54(c). 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. Nonetheless, some decisions have done so. See, e.g., Arnold v. Sullivan, 2009 WL 224077, *4 (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).}


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.\footnote{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).}

Prospective relief is defined as “all relief other than compensatory money damages.”\footnote{18 U.S.C. § 3626(g)(7).}

Several courts have held that special masters, court monitors, or other monitoring arrangements designed to effectuate injunctive relief are not themselves relief subject to the prospective relief restrictions,\footnote{See 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.}

though the Second Circuit has expressed considerable doubt about that conclusion without ruling on the question.\footnote{See Benjamin, 343 F.3d at 49 (dictum); see also Plata v. Schwarzenegger, 2005 WL 2932253, *25-28 (Oct. 3, 2005) (applying need-narrowness-intrusiveness analysis to appointment of a receiver for prison medical care).} Attorneys’ fees, even those awarded for monitoring compliance with an injunction, are not
Orders issued in the course of pre-trial case management are not prospective relief.\textsuperscript{66} One federal appeals court has held in \textit{Johnson v. Breeden}\textsuperscript{68} that punitive damages—which are unquestionably “other than compensatory money damages”—are prospective relief, 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.\textsuperscript{69} 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,\textsuperscript{70} and why it did not hold that the jury should be instructed to apply the PLRA standards.

There are other good reasons to think \textit{Johnson} is wrong. One of them is simply the disparity between it and the ordinary usage of “prospective relief” to denote injunctive and declaratory relief.\textsuperscript{71} \textit{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.”\textsuperscript{72} 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.\textsuperscript{73} 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 . . .”\textsuperscript{74} makes no sense applied to an award of damages. The same is true of the provisions for termination of prospective relief.\textsuperscript{75} 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

\textsuperscript{66} Carruthers v. Jenne, 209 F.Supp.2d at 1299-1300.
\textsuperscript{67} In re Arizona, 528 F.3d 652, 658 (9th Cir. 2008) (\textit{Martinez} order (direction that defendants submit a report on facts relevant to a pro se prisoner claim), was not “relief”), \textit{cert. denied,} 129 S.Ct. 2852 (2009).
\textsuperscript{68} Johnson v. Breeden, 280 F.3d 1308 (11th Cir. 2002).
\textsuperscript{69} Johnson v. Breeden, 280 F.3d at 1325.
\textsuperscript{70} 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.”).
\textsuperscript{72} \textit{Id.} at 1325, \textit{citing} Stenberg v. Carhart, 530 U.S. 914, 942 (2000).
\textsuperscript{73} 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).
\textsuperscript{74} 18 U.S.C. § 3626(a)(1)(B).
\textsuperscript{75} 18 U.S.C. § 3626(b).
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.”\textsuperscript{76} To date there is little law actually applying the Johnson holding.\textsuperscript{77} However, one district court has surpassed Johnson’s absurdity by holding that the prospective relief provisions abolish punitive damages altogether in prison cases.\textsuperscript{78}

Even for purposes of injunctive relief only, the meaning of “narrowly drawn” and “least intrusive” is not always clear,\textsuperscript{79} and many decisions address the subject on an \textit{ad hoc} basis without stating any general principles.\textsuperscript{80} (The requirement to avoid

\textsuperscript{76}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”). \textit{But see} Robbins v. Chronister, 435 F.3d 1238, 1241-44 (10th Cir. 2006) (rejecting absurdity doctrine in connection with another PLRA provision).

\textsuperscript{77}One court concluded that it 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. \textit{Id.}, *9.

In \textit{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. \textit{2006 WL 839339}, *2. In \textit{Rieara v. Sweat}, 2007 WL 853465, *5-6 (S.D.Ga., Mar. 16, 2007), the court declined to dismiss a claim for punitive damages on the ground that its propriety is initially for the trier of fact, subject to subsequent court review under the \textit{Johnson v. Breeden} rule.


\textsuperscript{79}\textit{See} Caruso v. Zenon, 2005 WL 5957979, *5 n.9 (D.Colo., Oct. 18, 2005) (pointing out that the more narrow a remedy is, the more it may intrude on officials’ ability to exercise discretion).

\textsuperscript{80}\textit{See}, e.g., 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); 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); 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
unnecessary violations of state law has so far been little litigated.\textsuperscript{81}) It is clear that enjoining defendants to follow the language of a statute they have violated is appropriate under the PLRA.\textsuperscript{82} Courts have disagreed whether, upon finding a policy

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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); 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).\textsuperscript{81} See 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); 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.”)\textsuperscript{82} 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).
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unconstitutional in a non-class action, they can simply enjoin the policy, or must restrict relief to the plaintiffs in the suit.\textsuperscript{83} Systemic relief must be supported by proof of a systemic violation; if a violation is narrowly focused on a few individuals, or on part of a system, relief should be focused accordingly.\textsuperscript{84} Agreements between the parties are “strong evidence,” if not dispositive, that provisions reflecting those agreements comply with the needs-narrowness-intrusiveness requirement,\textsuperscript{85} and tracking existing agency or

\textsuperscript{83} Compare 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 Internet); 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.”); 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) with 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).

\textsuperscript{84} See 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 (9\textsuperscript{th} Cir.) (affirming injunction benefiting named individuals; though an unconstitutional policy had been found, it had been directed at those persons), \textit{cert. denied}, 534 U.S. 1066 (2001).

\textsuperscript{85} Benjamin v. Fraser, 156 F.Supp.2d 333, 344 (2001), \textit{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, McBean v. City of New York, 2007 WL 2947448, *3 (S.D.N.Y., Oct. 5, 2007) (weighing parties’ agreement that detailed requirements meet need-narrowness-intrusiveness standard); Morales Feliciano v. Calderon Serra, 300 F.Supp.2d 321, 334 (D.P.R. 2004) (“The very fact that the defendants chose to join the plaintiffs in selecting this remedy would seem to mean—and must be taken to mean—that they understood it to be precisely tailored to the needs of the occasion, that it is narrowly drawn and least intrusive—in fact not intrusive at all.”) (footnote omitted), \textit{aff’d}, 378 F.3d 42, 54-56 (1st Cir. 2004), \textit{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
institutional policy is further evidence of PLRA compliance. Plaintiffs’ proposals may be deemed narrow and non-intrusive if the defendants do not come forward with anything. Assuming time deadlines must meet the need-narrowness-intrusiveness standard, defendants must justify any delay in implementation, since “by providing defendants any time at all to implement the ordered relief the Court allows defendants to further trespass on detainees’ constitutional rights.”

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 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).

86 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); Thomas v. McNeil, 2009 WL 605306, *1 (M.D.Fla., Mar. 9, 2009) (“By borrowing terms, procedures and DOC regulations already in place in related circumstances, the Court has endeavored to redress the found constitutional violation, while at the same time following the mandate of 18 U.S.C. § 3626(a)(1).”), judgment entered, 2009 WL 605306 (M.D.Fla., Mar. 9, 2009).


88 Benjamin, 156 F.Supp.2d at 344; 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).
building,” and since “a comprehensive repair program is the only rational means to correct the system-wide violation, and is far less intrusive than the Court making window-by-window repair/replace determinations.”

Although the PLRA requires that remedies be tailored to violations, it allows highly intrusive remedies where the record supports their necessity. As one court put it,

89 *Benjamin*, 156 F.Supp.2d at 350.

90 *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, *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); *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).

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.”  

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” does not prohibit these actions if they could have been taken under the courts’ existing equitable powers.

Injunctions in prison conditions litigation may be terminated on motion 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. Relief may not be continued based on the

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prospect of future violations, but the court may reimpose relief after termination if a new showing of constitutional violation is made and if the court has retained jurisdiction of other aspects of the case. The “current and ongoing” requirement does not appear in, and does not apply to, the PLRA provision governing the initial entry of relief. Presumably the pre-existing law of mootness applies at this initial stage. The termination provision has been upheld against challenges based on the separation of powers, due process, and equal protection grounds.

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

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 stated that the court must terminate relief that is 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). Others have taken what seems to me a more sensible position: if the record shows that a constitutional violation remains, the relief should be adapted to the record. 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); see Benjamin v. Fraser, 156 F.Supp.2d at 345-55 (formulating relief based on hearing record with little regard to prior consent judgment).

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).

96 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”; motion granted).


A later decision in this litigation holds that while 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.


100 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).
cause.  

This provision too has been upheld against a separation of powers challenge. Private settlement agreements not enforceable in federal court are not subject to the termination provisions.

There are additional provisions restricting “prisoner release orders,” which may be entered only by a three-judge federal court, and which provide for intervention as of right by certain law enforcement officials and other officeholders. The prisoner release provisions are applicable to newly imposed limits on prison population but not to the

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104 18 U.S.C. § 3626(a)(3); see 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); 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).


preservation of pre-existing relief in the face of a termination motion.\textsuperscript{107} These provisions were virtually unused until recently.\textsuperscript{108}

Preliminary injunctions must meet the same need-narrowness-intrusiveness standards as other prospective relief.\textsuperscript{109} They are limited in duration to 90 days, but courts may enter sequential preliminary injunctions if the factual justification for relief continues to exist.\textsuperscript{110}

The use of special masters has also been limited in prison conditions litigation,\textsuperscript{111} 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\textsuperscript{112} and does not displace the courts’ pre-existing equitable authority to appoint a receiver.\textsuperscript{113}

\begin{itemize}
\item \textsuperscript{108} Coleman v. Schwarzenegger, 2009 WL 2430820 (E.D.Cal., Aug. 4, 2009) (ordering plan to reduce California prison population from nearly 200% of design capacity to 137.5% of capacity), stay denied, 2009 WL 2851846 (E.D. Cal., Sep. 3, 2009), appeal dismissed for want of jurisdiction, ___ S.Ct. ___, 2010 WL 154851 (Mem) (Jan. 19, 2010); Roberts v. County of Mahoning, Ohio, 495 F.Supp.2d 784, 786 (N.D.Ohio 2007) (noting entry of prisoner release order by consent).
\item \textsuperscript{110} Mayweathers v. Newland, 258 F.3d 930, 936 (9th Cir. 2001) (holding that courts may enter sequential preliminary injunctions if the factual justification continues to exist); 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).
\item \textsuperscript{111} 18 U.S.C. § 3626(f); see Roberts v. County of Mahoning, 495 F.Supp.2d 670, (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).
\item \textsuperscript{112} 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
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.”

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.” The PLRA’s mandatory exhaustion requirement replaced the former discretionary approach to exhaustion 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

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115 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.”)

Exhaustion of available remedies has been held mandatory under the PLRA even if state law or prison rules makes it optional. Short v. Greene, 577 F.Supp.2d 790, 793 & n.4 (S.D.W.Va. 2008). 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 grievancrancy policy. See n. 293, below.
be futile.”\footnote{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); 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).} Thus, the fact that prior grievance decisions or standing prison policy seem to dictate the response does not justify non-exhaustion.\footnote{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).} However, the Court has more recently stated that the statutory term “exhausted” has the same meaning as in administrative law,\footnote{Woodford v. Ngo, 548 U.S. at 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.} and it has drawn on the understanding of the term in habeas corpus as well,\footnote{Woodford v. Ngo, 548 U.S. at 101; accord, Anderson v. XYZ Correctional Health Services, Inc., 407 F.3d 674, 677-78 (4th Cir. 2005); Steele v. Federal Bureau of Prisons, 355 F.3d 1204, 1208 (10th Cir. 2003), cert. denied, 543 U.S. 925 (2004) and cases cited; Richardson v. Goord, 347 F.3d 431, 433-34 (2d Cir. 2003).} leading one Justice to suggest that the exceptions to exhaustion requirements recognized in those bodies of law should apply as well under the PLRA.\footnote{Underwood v. Wilson, 151 F.3d 292, 294 (5th Cir. 1998), cert. denied, 526 U.S. 1133 (1999); accord, Hemphill v. New York, 380 F.3d 680, 686 (2d Cir. 2004) (waiver and estoppel); Wright v. Hollingsworth, 260 F.3d 357, 358 n.2 (5th Cir. 2001) (reiterating Underwood holding after} 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.\footnote{Id., 548 U.S. at 103-04 (Breyer, J., concurring); see § IV.E.7, below, concerning this point. Cf. Muhammad v. Close, 540 U.S. 749, 751 (2005) (suggesting the PLRA exhaustion requirement is a “lower gate” than the habeas requirement).}

Though the PLRA exhaustion requirement is mandatory, it is not absolute, and the Supreme Court has confirmed the view of most circuits that it is not jurisdictional.\footnote{Jones v. Bock, 549 U.S. 199 (2007).} Most circuits to consider the question have held that courts therefore can apply doctrines of waiver, estoppel, and equitable tolling to excuse failure to exhaust.\footnote{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).} The Supreme
Court has held that non-exhaustion is an affirmative defense to be raised by defendants;\textsuperscript{125} it follows that the defense can be waived by failure to do so, as the Second Circuit had already held.\textsuperscript{126} The Second Circuit has also held that “special circumstances” may justify failure to exhaust and allow the prisoner to proceed without exhaustion if remedies are no longer available.\textsuperscript{127} 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,\textsuperscript{128} 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.\textsuperscript{129} These holdings are discussed in more detail in appropriate sections below. The Supreme Court decision in \textit{Woodford v. Ngo},\textsuperscript{130} 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.\textsuperscript{131}

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.\textsuperscript{132} 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.\textsuperscript{133}

\textit{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. 598-602, 819-820 concerning equitable tolling.


\textsuperscript{126} 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.

\textsuperscript{127} Giano v. Goord, 380 F.3d 670, 676 (2d Cir. 2004); accord, Brownell v. Krom, 446 F.3d 305, 311-13 (2d Cir. 2006).

\textsuperscript{128} Abney v. McGinnis, 380 F.3d 663, 667 (2d Cir. 2004).

\textsuperscript{129} 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).

\textsuperscript{130} 548 U.S. 81 (2006).

\textsuperscript{131} See §§ IV.E.7 and IV.E.8, below.


\textsuperscript{133} Bisgeier v. Michael [sic] Dept. of Corrections, 2008 WL 227858, *4 (E.D.Mich., Jan. 25, 2008) (parolees were not required to exhaust even though they were covered by grievance procedures).
B. What Cases Must Be Exhausted?

1. Scope of the Statute

The exhaustion requirement applies to prisoners’ “action[s] . . . brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner. . . .” Its terms are not restricted to “civil actions” as are some other PLRA provisions. 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. Such a proceeding would still be subject to the habeas corpus exhaustion requirement, which is arguably more rigorous. Decisions are mixed on whether a motion by the defendant in a criminal proceeding that affects prison conditions requires exhaustion. 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.

135 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).
137 See Carmona, 243 F.3d at 633-34; U.S. v. Basciano, 369 F.Supp.2d 344, 348 (E.D.N.Y. 2005). On the other hand, the common law exhaustion rules that a court would apply in habeas corpus proceedings arising from prison administrative matters allow a number of exceptions, including futility, which may not be available under the PLRA. See Putnam v. Winn, 441 F.Supp.2d 253, 255-56 (D.Mass. 2006) (noting that habeas exhaustion could be waived by court); Perez v. Zenk, 2005 WL 990696, *2 (E.D.N.Y., Apr. 11, 2005); see also nn. 487-489, below, for conflicting Supreme Court dicta and separate opinions on this subject.
138 See n. 46, 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).
A motion to enforce the terms of a judgment is not a separate “action” requiring exhaustion, nor is a request for further relief in already-filed litigation.

The exhaustion requirement applies generally to private prisons and jails and to private contractors operating in prisons and jails, although particular grievance systems may not be available remedies because they exclude private contractors and their employees from coverage, in terms or in practice.

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, 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, though the plaintiff must have satisfied any state law exhaustion requirement.

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141 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. 44-46, above.


143 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)); see also n. 157, 705-707, citing additional relevant case law.


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

2. “Prison Conditions”

Prisoners are required to exhaust cases if they involve “prison conditions.” That phrase applies “to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong.” So prior decisions holding that use of force cases are not about “prison


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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.) 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” is now overruled. If it happened in prison, most likely it’s a prison condition.

Complaints that arise in halfway houses or residential treatment 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. However, several courts have

because relief concerning medical care was available administratively even if a stay of execution was not).

150 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). This directive has recently been revised but the substance of this point is unchanged: “Inmate allegations of assault or harassment by either staff or inmates are not grievable under the grievance mechanism.” Appendix G, New York City Dep’t of Correction Directive 3375R-A, Inmate Grievance Resolution Program at § II.C.2 (March 13, 2008) (http://www.nyc.gov/html/doc/downloads/pdf/3375R-A.pdf).


152 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.

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 for purpose of prisoner release provisions of PLRA).

153 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
held that issues involving prisoners’ placement in or transfer from halfway houses or “community corrections centers” are not about prison conditions.\textsuperscript{154}

Cases involving agencies outside the prison system may not be “prison conditions” cases even if the plaintiff is a prisoner. For example, an unpublished appellate decision holds that a prisoner’s placement on a watch list by the Department of Homeland Security “occurred outside the prison gates” and was not a prison condition, but the consequences of the classification imposed in prison (segregated housing, telephone restrictions, etc.) were.\textsuperscript{155} Similarly, another court held that claims against police officers based on an interrogation and a refusal to allow the plaintiff to call an attorney were not prison conditions claims, even though the interrogation took place in

\begin{itemize}
\item Some grievance systems explicitly exclude from their coverage claims involving persons or agencies outside the prison system. \textit{See} § IV.G.1, below.
\end{itemize}


\textsuperscript{155} Almahdi v. Ridge, 2006 WL 3051791, *2 (3d Cir., Oct. 27, 2006) (unpublished); \textit{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); 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); Crompton 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). \textit{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).
the jail. These outcomes make sense because if the people responsible are not prison employees, the prison grievance system cannot do anything about the problem. Outcomes are mixed with respect to complaints about outside medical providers.

Cases challenging the legitimacy of incarceration itself are not about prison conditions. Courts have reached differing decisions on matters related to parole release or revocation. In any case, if the litigant is still incarcerated, he or she must

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156 Battle v. Whetsel, 2006 WL 2010766, *3 n.4 (W.D.Okl., 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).

157 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. Accord, 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). However, some later decisions have held to the contrary. Contra, 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); 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). 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).


159 Compare 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); Hernandez-Vazquez v. Ortiz-Martinez, 2010 WL 132343, *4 (D.P.R., Jan. 8, 2010) (delayed parole hearing 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, 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,
pursue relief for unlawful confinement via habeas corpus, which is not governed by the PLRA exhaustion requirement. One court has recently suggested—wrongly, in my view—that “all state prisoner cases that are not classified as habeas corpus cases are considered cases ‘regarding prison conditions,’ and are subject to the administrative exhaustion requirement of § 1997e(a).” Even if that rule were accepted, it would not entirely settle matters, since courts continue to differ about the precise line between habeas and civil litigation with respect to placement in or removal from segregated housing.

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

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

The statute says that “No action shall be brought . . . until such administrative remedies as are available are exhausted.” It does not say what courts should do if the plaintiff has not exhausted.

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. Courts have

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).


Compare Levine v. Apker, 455 F.3d 71, 78 (2d Cir. 2006); 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 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) (holding a civil action provides the correct remedy).

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.


See Neal v. Goord, 267 F.3d 116, 122 (2d Cir. 2001); accord, Johnson v. Jones, 340 F.3d 624, 627-28 (8th Cir. 2003) (citing cases, overruling prior authority); see nn. 297, below, concerning when a case is considered filed for this purpose.
disagreed whether they must dismiss the case of a plaintiff who has failed to exhaust but has been released after filing and is no longer subject to the exhaustion requirement.\textsuperscript{166}

In cases where the prisoner has failed to exhaust for excusable reasons, such as actions by prison staff that make the remedy unavailable in practice, the case can generally go forward without exhaustion, or the prisoner will be deemed to have exhausted.\textsuperscript{167} However, one recent decision holds 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 runarround), . . .”\textsuperscript{168} The court does not specify what it means by “innocent” and by “runaround” and what relationship those terms might have with the availability of remedies,\textsuperscript{169} 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.”

Most courts that have addressed the question have held that, once an unexhausted claim is dismissed, it must be re-filed, and may not be reinstated after exhaustion through a post-judgment motion.\textsuperscript{170} The Sixth Circuit has held that the plaintiff need not pay a


\textsuperscript{167} Such instances are discussed in §§ IV.E, IV.E.7, and G.2-3, passim.

\textsuperscript{168} Pavey v. Conley, 544 F.3d 739, 742 (7th Cir. 2008), cert. denied, 129 S.Ct. 1620 (2009).

\textsuperscript{169} 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.

new filing fee when re-filing a claim that was previously dismissed for non-exhaustion.\textsuperscript{171} Other courts have generally assumed without analysis that a new filing fee is due.\textsuperscript{172}

The Second Circuit, like most courts, has held that the PLRA eliminated the option to stay a case pending exhaustion.\textsuperscript{173} 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 instructing district courts to stay cases in which they thought exhaustion was appropriate, the logical conclusion from that amendment and the present statute’s silence on the subject is that the matter is now left to the courts’ discretion. That discretion may be appropriately exercised to grant stays pending exhaustion in cases where prisoners have tried to exhaust but have failed to do so because of misunderstanding or technical mistakes or because of circumstances beyond their control, or because of other unusual circumstances. No such factors were before the court in \textit{Neal v. Goord}. There are a few cases in which courts have granted such stays, or directed the functional equivalent of a stay, under such circumstances.\textsuperscript{174} The view that such action should be permitted is supported by the

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\item \textsuperscript{171}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. \textit{Accord}, Goodson v. Cortney, 2006 WL 3314537, *1-2 (D.Kan., Oct. 24, 2006).
\item \textsuperscript{174}In \textit{Brown v. Walker}, 2009 WL 2447977, *2 (S.D.Ill., July 7, 2009), 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
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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).


176 *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”).


allowing the plaintiff to pursue his grievance late,\textsuperscript{179} or have made dismissal contingent upon officials’ allowing the prisoner to pursue a new grievance.\textsuperscript{180} The first post-
\textit{Woodford} 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.\textsuperscript{181}

Dismissal for non-exhaustion is generally without prejudice.\textsuperscript{182} Some courts, including the Second Circuit, have held that it may be with prejudice if it is clear that remedies are no longer available, \textit{e.g.}, because they are time-barred.\textsuperscript{183} 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.\textsuperscript{184}

One circuit has approved dismissal for non-exhaustion with prejudice with regard to the prisoner’s ability to proceed \textit{in forma pauperis}, stating that a prisoner who filed without exhaustion “sought relief to which he was not entitled—\textit{that is, federal court

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\item[\textsuperscript{179}] 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).


\item[\textsuperscript{181}] 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).


\item[\textsuperscript{184}] Ford v. Johnson, 362 F.3d 395, 401 (7th Cir. 2004).
\end{footnotes}
intervention in prison affairs prior to the prison having had the opportunity to address the complaint within its grievance procedures.”

Such a disposition is not only in my view an unwarrantedly punitive response to what may be only the blunder of a pro se litigant, but is also an outright denial of access to courts if the prisoner is indigent and unable to pay the filing fee up front. Further, this rule has not been reexamined after Jones v. Bock and appears invalid under that decision. In Jones, the Court held that PLRA provisions should not be read to overturn the ordinary practices of litigation, under the Federal Rules and otherwise, without a clear direction by Congress. 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.

These questions are important only in a limited number of cases after the Supreme Court’s holding that prisoners must comply with the procedural rules of the prison’s administrative system, including time limits, or their claims will be procedurally defaulted. It is only in cases where the prisoner has completed exhaustion after the litigation was filed, or prison officials allow the filing of an out-of-time grievance, or the prisoner is released from prison and can refile without being subject to the exhaustion requirement, that dismissal for non-exhaustion without prejudice is of any value to the prisoner.

Dismissal without prejudice is appealable under Second Circuit law. In other circuits where the general rule is different, dismissal for non-exhaustion may still be appealable as a practical matter when the reason for dismissal cannot be cured, as when the time for filing a grievance has expired, the prisoner has been released and can no longer pursue prison grievances, or the statute of limitations has expired on the claim. The refusal to dismiss for non-exhaustion may not be appealed

185 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).
189 Salim Oleochemicals v. M/V SHROPSHIRE, 278 F.3d 90, 93 (2d Cir. 2002), cert. denied, 537 U.S. 1088 (2002).
190 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).
191 Butler v. Adams, 397 F.3d 1181, 1183 (9th Cir. 2005); Mitchell v. Horn, 318 F.3d 523, 528-29 (3d Cir. 2003); see Barnes v. Briley, 420 F.3d 673, 676-77 (7th Cir. 2005) (finding appellate jurisdiction where the district court had dismissed because plaintiff failed to exhaust claims in amended complaint before filing his original complaint, which could not be cured).
192 Dixon v. Page, 291 F.3d 485, 488 (7th Cir. 2002).
interlocutorily. At least one court has held that a partial dismissal for non-exhaustion should not be entered as an appealable final judgment because of the policy against piecemeal appeals. District courts’ rulings on whether a plaintiff has exhausted are reviewed de novo.

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. However, plainly meritless claims can be dismissed on the merits without considering exhaustion.

1. Burden of Pleading and Proof

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. That means failure to exhaust is not failure to state a claim except where non-exhaustion is apparent on the face of the complaint. This holding resolved a conflict among circuits and overruled a body of law that had required plaintiffs to plead exhaustion with specificity and support the pleading with documentation when available, with district courts directed

196 Johnson v. Rowley, 569 F.3d 40, 44 (2d Cir. 2009).
197 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’.”); McCoy v. Goord, 255 F.Supp.2d 233, 248-49 (S.D.N.Y. 2003); see Torrence v. Pesanti, 239 F.Supp.2d 230, 234 (D.Conn. 2003) (stating that exhaustion should be dealt with quickly so plaintiffs’ claims are less likely to be time-barred if it is necessary to re-file after exhaustion). Torrence’s holding has little practical relevance because most grievance deadlines are so short that a court will never resolve an exhaustion issue before the deadline passes.

Even under Perez v. Wisconsin DOC, if material facts are disputed concerning exhaustion, but not the merits, the court may proceed to summary judgment on the merits. See Gray v. Hinsley, 2008 WL 2005029, *1-4 (S.D.Ill., May 8, 2008).
198 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).
to dismiss *sua sponte* for noncompliance with that requirement. One circuit had also held that prisoners cannot amend their complaints to cure inadequate pleading of exhaustion, a rule that is now meaningless except in cases where the complaint shows failure to exhaust on its face.

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 are inapplicable to exhaustion except where non-exhaustion is apparent on the face of the complaint. Courts do have authority, even without statutory authorization, to dismiss on their own motion based on non-exhaustion or other affirmative defenses. However, this authority, too, is generally limited to non-exhaustion that is apparent on the face of the complaint. Further, the Second Circuit has held that plaintiffs are "entitled to notice and an opportunity to be heard" before such dismissal unless it is "unmistakably clear" that the complaint is subject to dismissal.

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201 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).

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

203 It is also probably abrogated even for those cases by *Jones v. Bock*’s holding that the PLRA’s screening requirement does not justifiably 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*).

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

205 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).

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

207 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
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. 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

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.

208 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, 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); 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.”); see *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); 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); 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); 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); Henderson 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). *But see* Moultrie v. South Carolina Dept. of Corrections, 2009 WL 3124426, *1 (D.S.C., Sept. 29, 2009) (inferring non-exhaustion solely from time between filing of grievance and of complaint, and dismissing); 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).
availability of an administrative remedy from a legally sufficient source.

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. 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.”

(Nonetheless, the pernicious practice of relying on check marks and questionnaire answers to determine exhaustion persists in some jurisdictions. A number of courts have rejected prison officials’ arguments that if the 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.

209 Snider v. Melindez, 199 F.3d 108, 114 (2d Cir. 1999).
210 Snider, 199 F.3d at 113.
211 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).

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).


213 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). 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
In my view, in light of these decisions and simple logic, 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 indicates 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 or its inability to provide a particular remedy, or that the prisoner began the process but it is not completed.

Some courts have essentially flouted Jones v. Bock’s procedural holding. 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 whether the inmate exhausted all administrative remedies.” Some district courts have taken this holding to authorize, 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); Bransom 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. Bennett, 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).

214 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).

215 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.’”).


217 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. Bennett, 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
notwithstanding Jones, a demand that prisoner plaintiffs establish exhaustion even if it is not apparent on the face of the complaint, and in some cases before defendants put it in issue.\footnote{\cite{218}}

Such a requirement appears contrary to Jones’s holding that the defendants must raise the exhaustion defense.\footnote{\cite{219}} 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,\footnote{\cite{220}} 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 local rule sidestep Jones by requiring prisoners to affirmatively plead exhaustion.”\footnote{\cite{221}} That is exactly what is happening in some district courts in the Ninth Circuit, where the matter has not yet attracted appellate attention. Some recent district court exhaustion dismissals note that prisoners filing suit in the district must use a court-approved complaint form, which requires prisoners to “attach copies of papers related to the grievance procedure,” without mentioning Jones.\footnote{\cite{222}} The Fifth Circuit has acknowledged that such a practice is just another way to “sidestep Jones,” invalid because “it is defendants’ job to raise and prove such an affirmative defense.”\footnote{\cite{223}}

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

\footnote{\cite{219}} 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.”)
\footnote{\cite{220}} 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).
\footnote{\cite{221}} Carbe v. Lapin, 492 F.3d 325, 327-28 (5th Cir. 2007).
don’t seem to see the connection between its holding and their actions.\textsuperscript{224} In other cases, Jones is not mentioned at all.\textsuperscript{225} The same type of error crops up at later stages in other cases.\textsuperscript{226} Of course many other decisions get Jones right.\textsuperscript{227}

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.\textsuperscript{228}

\textsuperscript{224} See 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).

\textsuperscript{225} See 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); see Appendix A for additional authority on this point. See also 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).


\textsuperscript{227} 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.”).

\textsuperscript{228} 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
Defendants’ burden of establishing non-exhaustion\(^{229}\) encompasses, first, showing that there was an available remedy at the relevant time and place for the particular complaint raised by the prisoner.\(^{230}\)

It is also defendants’ burden to establish that a remedy was made known to prisoners.\(^{231}\)

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).\(^{232}\)

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\(^{229}\) 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).

\(^{230}\) 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.”); 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); 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.

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.

\(^{231}\) 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); 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).

Defendants must also reliably establish the failure to exhaust. 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, failed to set out how records were maintained or searched, rested on screening dismissal of a complaint which 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.

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

\[
\text{\ldots [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 \textit{“on March 12, 2008”} by a plaintiff who alleges that he \textit{“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 \textit{“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.}
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234 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); 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).

235 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); 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); 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
hearsay, or otherwise failed to establish officials’ claims. (In a number of cases, plaintiffs have produced documentation of grievances that prison officials had no record 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); 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). 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).


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. 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). See also 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).

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 Record” lacks a foundation and is not shown to be complete), cert. denied, 540 U.S. 810 (2003); Phipps v. Sheriff of Cook County, ___ F.Supp.2d ___, 2009 WL 4146391, *4 (N.D.Ill., Nov. 25, 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); 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); 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); 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.”); 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); 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); see Appendix A for additional authority on this point.
of or claimed did not exist.\textsuperscript{238}) If plaintiffs attach exhaustion-related documentation to their complaints, officials may not establish non-exhaustion simply by pointing to omissions in those documents, unless they also show that the documents present the complete picture of the plaintiff’s exhaustion efforts.\textsuperscript{239}

Officials must also show what prisoners were required to do to exhaust.\textsuperscript{240} 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.\textsuperscript{241}


\textsuperscript{240} 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
Once defendants have produced evidence to meet their burden of showing non-
exhaustion, plaintiff must produce evidence supporting exhaustion, showing which
claims were exhausted and how, and how and whether any claims were not exhausted
because of wrongful action by the defendant. Courts have sometimes rejected
plaintiffs’ submissions as conclusory, insufficiently detailed, or uncorroborated, in some
instances arguably inconsistently with the usual rules for assessing evidence.

2. Waiver

As an affirmative defense, exhaustion may be waived by failure to raise it, or to
raise it timely. Ordinarily, affirmative defenses including exhaustion are required to be
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
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).

(“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. 545-546.


See 264-266, below for further discussion of this issue.

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); 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);. 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, 125 S.Ct. 1141, 1159 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
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).
pled in the answer or raised by motion to dismiss. An omitted exhaustion defense may be asserted in an amended answer, but courts may deny such amendments when they


In Panaro v. City of North Las Vegas, 423 F.3d 949, 952 (9th Cir. 2005), the court held that exhaustion can be raised at the summary judgment stage, even if not pled, as long as the adverse party is not prejudiced. Accord, Parks v. Falge, 2009 WL 4823386, *3 (D.Nev., Dec. 8, 2009); 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).
are sought late in the case.\textsuperscript{247} There is some variation in procedural practice among federal courts. For example, some courts allow exhaustion to be raised for the first time by summary judgment motion.\textsuperscript{248} Pleading aside, exhaustion may be waived by failing to pursue it reasonably promptly during the course of the litigation.\textsuperscript{249} Some courts, but not


\textsuperscript{247} 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.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 Dept‘, 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).

\textsuperscript{248} 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); Parks v. Falge, 2009 WL 4823386, *3 (D.Nev., Dec. 8, 2009) (applying Panaro); 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). But see Burnette v. Bureau of Prisons, 2009 WL 1650072, *3 (W.D.D.C., 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.”).

\textsuperscript{249} 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
the Second Circuit, have tied waiver to a showing of prejudice. However, it is clear in any court including those in the Second Circuit that a claim of waiver is strongly supported by a showing of prejudice. In some cases, courts have allowed relief from waiver based on changes in exhaustion law during a case’s pendency.

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).

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).

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); 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).

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 752859, *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
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.253

3. 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,254 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.255 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.256

Most courts address exhaustion on motion for summary judgment as a matter of course.257 In some cases, motions under Rule 12(b)(6) are converted to summary judgment because they are supported by extrinsic matter.258 Most courts hold that if there acted reasonably in failing to 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).253 See cases cited in nn. 545-546, below.

254 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.255 See § IV.D.1, above.

257 See, e.g., 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); Hinojosa v. Johnson, 277 F. App’x 370, 379-80 (5th Cir. 2008) (vacating grant of summary Judgment, holding prisoner entitled 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).

258 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 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).
is a material factual dispute, summary judgment must be denied, and the factual dispute is ordinarily reserved for the trier of fact. Exhaustion disputes would therefore go to a jury if one has been requested, and several courts have so held, in some cases because affirmative defenses are usually for the jury, in others because factual disputes in general are usually viewed as the province of the jury. However, other courts have held evidentiary hearings to resolve exhaustion issues without any theoretical discussion of why such a procedure is appropriate.


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.”)

Notwithstanding the foregoing discussion, some district courts have demonstrated a tendency to push 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. Others have granted summary judgment in contested cases, either declaring the pro se plaintiffs’ representations too conclusory or insufficiently detailed, or rejecting prisoners’ statements in the absence of


263 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); Cannon v. Mason, 2009 WL 1422016, *2 (E.D.Okl., May 20, 2009) (“In deciding a motion to dismiss based on nonexhaustion, the court can consider the administrative materials submitted by the parties.”), appeal dismissed, 2009 WL 4979702 (10th Cir., Dec. 22, 2009); 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). But 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); 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.III., 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).

264 See, e.g., 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
Such deviation from the usual summary judgment practice under the Federal Rules is not consistent with the Supreme Court’s reasoning in *Jones v. Bock*.


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. It would seem to make more sense to allow discovery on exhaustion under Fed.R.Civ.P. 56(f) and allow the motion to be renewed after completion of discovery, as the court did in *Kellogg v. New York State Dept. of Correctional Services*, 2009 WL 2058560, *3* (S.D.N.Y., July 15, 2009).

*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).

Several circuits have now taken different tacks. The Ninth Circuit has held that failure to exhaust is “a matter in abatement, which is subject to an unenumerated Rule 12(b) motion, rather than a motion for summary judgment,” since “summary judgment is on the merits, whereas dismissal for failure to exhaust” is not. As a “matter in abatement,” the court said, exhaustion is not subject to the same rules as matters going to the merits, and courts may decide factual disputes concerning it on motion, subject only to the “clearly erroneous” standard of appellate review. However, a series of California decisions have emphasized the similarity of the “matter in abatement” procedure to summary judgment, stating that credibility issues cannot be decided on motion.


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.


The matter in abatement approach rests on apparently idiosyncratic Ninth Circuit precedent, and until recently, courts outside the Ninth Circuit rejected it or ignored it. The Eleventh Circuit, however, has now adopted it 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.” These decisions were not precedent-based but rested on the court’s view of the policies underlying the PLRA, an approach to PLRA exhaustion subsequently rejected in Jones v. Bock. Post-Jones decisions in that district than adopted the matter in abatement approach to support their conclusion, emphasizing courts’ ability to decide disputed factual questions on motion, even as courts within the Ninth Circuit backed


Some district courts have suggested, bizarrely, that the Wyatt holding is undermined by Jones v. Bock’s holding that exhaustion is an affirmative defense. 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 Benavidez court thoroughly refutes Wyatt’s approach, pointing out that summary judgment is not necessarily on the merits, and arguing 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. Benavidez, id.


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.\textsuperscript{274}

A month later, however, the court issued a precedential opinion adopting the matter in abatement approach,\textsuperscript{275} 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.\textsuperscript{276} Although the published opinion presented the matter in abatement procedure as civil procedure business as usual, mingling citations to Wright & Miller and Moore’s Federal Practice with citations to Ninth Circuit cases, the dissenting member of the panel pointed out that the Eleventh Circuit, unlike the Ninth, had previously treated affirmative defenses including exhaustion of administrative remedies consistently as 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.\textsuperscript{277} Courts in the Eleventh Circuit have been less inhibited than those in the Ninth about deciding credibility issues on motion.\textsuperscript{278}

\begin{itemize}
\item \textsuperscript{274}Singleton v. Department of Corrections, 2008 WL 2043505, *1 (11th Cir., May 14, 2008).
\item \textsuperscript{275}Bryant v. Rich, 530 F.3d 1368 (11th Cir. 2008), \textit{cert. denied}, 129 S.Ct. 733 (2008).
\item \textsuperscript{277}Bryant, 530 F.3d at 1379-82, \textit{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.
\item The court has now instructed district courts applying the matter in abatement rule 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 and then decide exhaustion. Turner v. Burnside, 541 F.3d 1077, 1082-83 (11th Cir. 2008). The court says nothing about discovery or hearings.
\item \textsuperscript{278}See, \textit{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), \textit{cert. denied}, 2010 WL 155197 (2010); 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”).
\end{itemize}
No other circuit has adopted the matter in abatement approach, though a few district courts have done so.\textsuperscript{279} The Seventh Circuit, by contrast, 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.\textsuperscript{280} 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.\textsuperscript{281} The court’s 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.”\textsuperscript{282} Hearings on exhaustion have been held in a number of cases under this holding.\textsuperscript{283}

This 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. Further, the proposition that all discovery is postponed except for exhaustion-related discovery

\textsuperscript{279} See McClain, Jr. v. Alveriaz, 2009 WL 3467836, *3 n.1, *9 (E.D.Pa., Oct. 26, 2009) (following Bryant v. Rich, with no reference to split of authority or explanation why it adopted the Bryant rule; 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) (following Bryant v. Rich, with no indication why it adopted that view and not the majority view; finding plaintiff “makes no showing” he could not file a grievance, without explaining why it is the plaintiff’s burden, or acknowledging Jones v. Bock).

\textsuperscript{280} Pavey v. Conley, 544 F.3d 739, 742 (7th Cir. 2008), cert. denied, 129 S.Ct. 1620 (2009). 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)).

\textsuperscript{281} In practice, litigants still seek summary judgment in many cases, and upon the denial of summary judgment the court may hold a hearing. See 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); 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).

\textsuperscript{282} Pavey v. Conley, 544 F.3d at 741.

appears to run afoul of the Supreme Court’s warning that the exhaustion requirement does not displace usual litigation practices under the Federal Rules of Civil Procedure, and that its explicit provisions may not be enhanced based on judges’ policy views. The court does not address this holding of Jones v. Bock. Further, it contrives a seemingly unprecedented (at least it cites no precedent) means of addressing facts that are essential to the exhaustion decision but are also germane to the merits of the plaintiff’s claim: insofar as such an overlap exists, the jury will find the merits facts “without being bound by (or even informed of)” the district court’s determinations. Under this view, it is possible for two contradictory factual findings to coexist in the same case. This does not seem like a usual litigation practice.

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

This square conflict among circuits will have to be resolved by the Supreme Court.

One decision characterized a failure to exhaust as a failure to prosecute, allowing the court to dismiss sua sponte, a view that has little to recommend it but originality.

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284 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).
285 Pavey, 544 F.3d at 742.
286 Dillon v. Rogers, 544 F.3d ___, 2010 WL 378306, *7 (5th Cir. 2010).
288 Dillon, id., n.4.
289 The Court denied certiorari in all of the major circuit decisions under discussion that have been extant long enough for a petition to be filed and decided. 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).

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 all three, 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.
E. What Is Exhaustion?

Exhaustion under the PLRA means “proper exhaustion,” *i.e.*, “compliance with an agency’s deadlines and other critical procedural rules.” It also means completing the administrative process by appealing an adverse decision to the highest level of the administrative system, though a few courts have held that where the obligation to appeal is framed in permissive terms, the prisoner need not complete the appellate stage before filing suit. Having appealed, prisoners are obliged to wait to sue until the time for prison officials to render a decision has expired. If a prisoner files suit after the

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

292 “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).

293 See Woodard v. O’Brien, 2010 WL 148301, *15 (N.D.Iowa, Jan. 14, 2010) (where rule contained some mandatory language but also used the phrase “may appeal,” prisoner “easily could conclude” appeal was permissive); Campbell v. Johnson, 2008 WL 222691, *7 (N.D.Fla., Jan. 25, 2008) (exhaustion did not require pursuing additional steps after filing an Inmate Request Form where those steps were described as optional); 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).

These decisions should probably not be relied on, since their holding seems inconsistent with the fundamental obligation imposed by the statute—though it could be argued that they are supported by the proposition that complying with the grievance rules satisfies the exhaustion requirement. In any case there is contrary authority. See 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); 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). It is arguable that the statutory language requiring exhaustion trumps contrary language in a grievance policy. See Short v. Greene, 577 F.Supp.2d 790, 793 & n.4 (S.D.W.Va. 2008); see also n. 480, below. Cf. Turner v. Burnside, 541 F.3d 1077, 1083-84 (11th Cir. 2008) (prisoner whose grievance was torn up by the warden was not required to re-file it or grieve the warden’s action, since the rules did not say so, and was not required to file an emergency grievance, since that procedure was an optional alternative to the regular process he had tried to use).

294 Powe v. Ennis, 177 F.3d 393, 394 (5th Cir. 1999) (“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.”); accord, Whittington v. Ortiz, 472 F.3d 804, 807-08 (10th Cir. 2007); Underwood v. Wilson, 151 F.3d 292, 295 (5th Cir. 1998), cert. denied, 526 U.S. 1133 (1999); Pellum v. Burtt, 2008 WL 759084, *16 (D.S.C., Mar. 20, 2008) (where grievance system
time limit for decision has passed, and then grievance authorities issue a late decision, the prisoner has exhausted.295

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); see Appendix A for additional authority on this point; see also 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). 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 because the prison policy stated that exhaustion is completed upon filing. Hall v. Dormire, 2009 WL 648883, *3 (W.D.Mo., Mar. 10, 2009).


The Second Circuit and nearly all other courts have held that exhaustion must be completed before suit is brought. 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. If a case subject to the exhaustion

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 refilled 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. Neal v. Goord, 267 F.3d 116, 122 (2d Cir. 2001); accord, Johnson v. Jones, 340 F.3d 624, 627-28 (8th Cir. 2003) (citing cases, overruling prior authority); see 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). But 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); 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); 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). 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. 174, 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.

297 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 399034, *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
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.\footnote{298}

A number of courts have held that new claims added by amended or supplemental complaint (including claims involving newly joined parties) need not have been exhausted before the filing of the original complaint; they need only be exhausted before the plaintiff seeks to add them to the case.\footnote{299} There is contrary authority,\footnote{300} much processing in the pro se office; citing contrary cases). Under the “prison mailbox” rule, a prisoner’s complaint is deemed filed when it is placed in the prison mail system. \textit{See n. 5, above.}

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. \textit{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) \textit{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), \textit{report and recommendation adopted}, 2009 WL 54899 (E.D.Cal., Jan. 8, 2009).


of it concentrated in a single judicial district. Some of these courts have said that the terms of Rule 15, Fed.R.Civ.P., concerning amendment of complaints cannot prevail over the substantive requirements of the later-enacted § 1997e(a).

The majority rule in this district is generally attributed to McKinney v. Carey, 311 F.3d 1198 (9th Cir. 2002). See Cohea v. Pliler, 2009 WL 720964, *3 (citing McKinney, 311 F.3d at 1199). McKinney does not address the question of joining properly exhausted claims in an amended complaint.


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Court has said the opposite: that the exhaustion requirement should not be read to over turn ordinary practice under the Federal Rules of Civil Procedure unless Congress so specified. 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. It also suggests that if claims are appropriately brought in the same case consistently with the joinder rules, the exhaustion requirement should not be interpreted to require that they be brought separately, as is the consequence of the rule against adding later-exhausted claims. Further, allowing joinder of later-exhausted claims without regard to the filing date of the initial complaint is more consistent with Jones’ approach to the “total exhaustion” question, which calls for the exhaustion status of each claim to be assessed independently of the other claims in the case.

A claim that is filed without exhaustion cannot generally be cured by reasserting it in an amended complaint after exhaustion, despite the general rule that an amended complaint replaces the prior complaint for all purposes.

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*304* See Roundtree v. Adams, 2007 WL 1232173, *8-9 (E.D.Cal., Apr. 25, 2007) (relying on Jones). In Murphy v. Grenier, 2009 WL 1044832, *19-20 (E.D.Mich., Apr. 20, 2009), the court did not rely on Jones, but held that barring the assertion of new claims under Rule 15(d), the rule governing supplemental complaints, was impermissible because it would amount to a repeal by implication of that Rule in prisoner cases. Accord, Lee v. Birkett, 2009 WL 3465210, *1-2 (E.D.Mich., Oct. 23, 2009), objections overruled, 2009 WL 3806262 (E.D.Mich., Nov. 12, 2009). Murphy also emphasized that it addressed claims which could not be exhausted before the original complaint because they did not exist at that time. However, its 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 (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)).

*305* See nn. 1002-1004, below, for discussion of cases holding that the PLRA does not overturn the joinder rules in other respects.

A particularly absurd result under the “no newly exhausted claims” rule can be found in Benyamini v. Sharp, 2009 WL 5205355, *1 (E.D.Cal., Dec. 17, 2009), in which the court held 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. *306* Jones v. Bock, 549 U.S. 199, 924 (2009) (“There is no reason failure to exhaust on one [claim] necessarily affects any other.”).

What if the prisoner files a grievance and gets no response? The case law is replete with such instances. Failure to respond cannot mean failure to exhaust; otherwise prison officials could keep prisoners out of court by simply ignoring their grievances. Hence, as noted, once a prisoner has filed the final appeal and the deadline

Plaster v. Kneal, 2008 WL 4090790, *4 n.1 (M.D.Pa., Aug. 29, 2008). Courts are divided over whether the filing of an amended complaint by a plaintiff who has been released after filing the initial complaint from prison makes the exhaustion requirement inapplicable. See n. 28, above.

As Demouchet and Dickerson note, the Fifth Circuit (unfortunately, in an unpublished case) recently disapproved of dismissal for non-exhaustion based solely on the fact that exhaustion was ongoing at the time of filing. However, there had already been one set of appellate proceedings in that case, and the complaint had been dismissed and refiled after exhaustion was completed, so it is difficult to tell to what extent the Fifth Circuit is departing from the consensus of circuits about pre-filing exhaustion, and to what extent it was influenced by the particulars of the case before it. See Collins v. Stalder, 335 Fed.Appx. 450, 453-54 n.11, 2009 WL 1833966, *2 n. 11 (5th Cir., June 26, 2009).


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. See 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)
for a final response has passed, exhaustion is complete. Systems with no deadline for the
final appeal present a more difficult problem, and courts have not resolved how long a
prisoner must wait in the absence of a final deadline.\footnote{310}

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\footnote{311}—though some decisions say

(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. \textit{See} Mendez v. Artuz, 2002 WL 313796,
*2 (S.D.N.Y., Feb. 27, 2002).

\textit{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 inappposite 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.}

Other courts that have considered similar delays have not found a failure to exhaust. \textit{See}
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.
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); \textit{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). \textbf{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).

\footnote{311 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); Alatorre v. Reese, 2009 WL 1587091, *3 (S.D.Miss., June 5, 2009); 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-
grievance about the lack of response to an earlier grievance); Donahue v. Bennett, 2004 WL
(N.D.Ill., June 20, 2003); Sims v. Blot, 2003 WL 21738766, * 3 (S.D.N.Y., July 25, 2003); see

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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.\textsuperscript{312} That
presumably means they can appeal from the lack of a decision even after dismissal for
non-exhaustion. Conversely, if the prisoner cannot appeal without a decision, and is
denied a decision, the prisoner has sufficiently exhausted “available” remedies.\textsuperscript{313} 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.\textsuperscript{314} Other
courts have simply held that prisoners who grieve but do not get a response have satisfied

\begin{appendix}
\section*{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).}
\textsuperscript{313} 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); 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) (denying to dismiss for non-exhaustion where plaintiff could not file a grievance without responses to his informal complaints); Webb v. Beatty, 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); 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); 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); see 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).
\end{appendix}
the exhaustion requirement, usually without inquiring whether they were technically entitled to appeal the lack of response.\textsuperscript{315}

Where a grievance simply disappears, and in the absence of a record cannot be appealed, the prisoner should be held to have exhausted,\textsuperscript{316} though several courts have held that a prisoner in that situation is obliged to take steps to reinstate and pursue the grievance or otherwise follow up on the matter.\textsuperscript{317} Prisoners whose grievances are

\textsuperscript{315} 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), \textit{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); 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.”); \textit{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 \textit{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 unconscionable 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. \textit{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).


\textsuperscript{317} 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
rejected with no avenue of appeal available, e.g. by returning them unrecorded or “unprocessed,” have satisfied the exhaustion requirement.\textsuperscript{318} Conversely, if a grievance is rejected without decision, but there is some means to pursue it further, the prisoner must take advantage of it.\textsuperscript{319}

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

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318 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. Ifediola, 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.

319 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). 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).
they could not appeal, or gave other responses that proved to be misleading or confusing. The Second Circuit has held that a prisoner who failed to appeal his property claim was justified by special circumstances in his failure to exhaust because he followed prison officials’ erroneous advice to pursue a grievance instead. It has also

320 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); 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); 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). Prisoners’ reliance on misinformation from prison staff is discussed further at nn. 758-760, below.

321 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.II., 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 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, 126 S.Ct. 2862 (2006).

322 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
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.323

Exhaustion must be done personally; except in class actions, a prisoner cannot rely on another prisoner’s exhaustion,324 unless of course prison procedures so permit.325 If officials consolidate several prisoners’ grievances and issue a joint response, they cannot thereafter obtain dismissal of individual grievants’ claims on the ground that they did not initially raise all the issues in the consolidated grievance.326

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.327 This is true a

personnel that inhibit exhaustion may estop them from raising the defense. Hemphill, 380 F.3d at 688-89.

323 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.


325 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).


327 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
fortiori where prison officials refuse to process a grievance or appeal on the ground that the prisoner has already received the relief sought. 328 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—otherwise “prison officials could keep prisoners out of court indefinitely by saying ‘yes’ to their grievances and ‘no’ in practice.” 329 However, some courts have held that an administrative decision does not

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); 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); see Appendix A for additional authority on this point. Contra, Salley v. PA Dept. of Corrections, 2006 WL 1410825, *4 (3d Cir., May 23, 2006) (unpublished) (holding that a prisoner who complained he was denied access his legal mail, filed a grievance and was told the error was corrected, had not exhausted his damages claim; further, “if Salley received a favorable decision, he can not file a federal claim on the incident.”); 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); Williams v. Hull, 2009 WL 1586832, *7 (W.D.Pa., June 4, 2009) (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); Ortiz v. Treon, 2005 WL 1151103, *1 (N.D.Tex., May 16, 2005); Feliz v. Taylor, 2000 WL 1923506, *2 (E.D.Mich., Dec. 29, 2000).

328 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).

obviate the need for an appeal unless it is so completely favorable that no further relief is possible.\textsuperscript{330} The Ninth Circuit has stated the matter less absolutely, 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.”\textsuperscript{331}

\textsuperscript{330} See Ross v. County of Bernalillo, 365 F.3d 1181, 1186-87 (10th Cir. 2004) (“When there is \textit{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 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 \textit{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. 356, below.

The Second Circuit appeared initially to set a somewhat more lenient standard, holding that a plaintiff who complained of his podiatric care and received a series of grievance decisions saying only that he would receive further attention from medical practitioners, and then that he should receive “appropriate footwear,” but without guaranteeing he would receive any particular quality of care, had exhausted.\(^{332}\) It 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”); 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). 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.

\(^{332}\) 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).
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.\footnote{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.”); \textit{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).} However, the subsequent decision in \textit{Braham v. Clancy}\footnote{425 F.3d 177 (2d Cir. 2005).} characterized \textit{Abney} as a case where “a disposition of a grievance provided the relief requested but was never implemented,” and held it inapposite to a case where the prisoner had informally sought a cell change to avoid assault, had received a cell change after being assaulted, and had not filed a formal grievance afterward. The court said he had not exhausted because the process could have granted further relief such as changes in policy or discipline of staff.\footnote{\textit{Id.} at 182-83. The court did acknowledge that having received the cell change might be the sort of “special circumstance” that would justify an uncounseled prisoner in thinking he had satisfied the exhaustion requirement. \textit{Id.} at 182.} It is unclear why the same is not true of \textit{Abney}. The Second Circuit reaffirmed the reasoning of \textit{Braham} in \textit{Ruggiero v. County of Orange},\footnote{467 F.3d 170 (2d Cir. 2006).} holding that a prisoner who prevailed informally was required to exhaust the grievance process because of “the larger interests at stake,” \textit{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.”\footnote{\textit{Ruggiero}, 467 F.3d at 178-79; accord, Harvey v. Brown, 2010 WL 338052, *3-4 (D.N.J., Jan. 25, 2010) (following \textit{Ruggiero} and \textit{Braham} on near-identical facts to \textit{Braham}).} While \textit{Braham} and \textit{Ruggiero} can be distinguished from \textit{Abney} because neither of the former involved a formal grievance, their reasoning does not turn on that distinction, but arguably supports an open-ended requirement that favorable grievance decisions must always be appealed to a level at which policies are reconsidered.

The Seventh Circuit has rejected the reasoning of \textit{Braham} and \textit{Ruggiero}. It held that a prisoner who asked for a transfer out of a dangerous cell, and got it before the grievance appeal time limit had expired, exhausted even though he didn’t appeal. The court stated 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.”\footnote{Thornton v. Snyder, 428 F.3d 690, 696-97 (7th Cir. 2005), cert. denied, 126 S.Ct. 2862 (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.” \textit{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. . . .” \textit{Id.}} More generally, the apparent holding of \textit{Braham} and \textit{Ruggiero} is dangerously open-ended. Since there will always be something else prison officials
could do, it amounts to a holding that prisoners should always appeal favorable decisions—the outcome rejected in *Abney*.

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

2. Specificity of Grievances

How specific and detailed must a grievance be to meet the exhaustion requirement? The answer is dictated by the Supreme Court’s adoption of a “proper exhaustion” requirement: “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.”

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339 In *Levy v. Washington State Dept. of Corrections*, 2009 WL 1107698, *7-8* (W.D.Wash., Apr. 23, 2009), the plaintiff obtained the relief he sought (an end to restrictions on his physical activity) through his grievance, but the court concluded from the fact that he wished to bring legal action 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. Similarly, in *Fagans v. Nooth*, 2009 WL 1067047, *2* (D.Or., Apr. 17, 2009), the plaintiff complained of inadequate medical care but did not complete the process because, he said, he got the surgery he needed. The court said:

Plaintiff 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.

*Id.* This view would have some merit in an injunctive case. It has none if the claim is for damages for pain, suffering, disability, etc., before the surgery, 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).


341 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”).

This seemingly straightforward holding raises a number of questions which the lower courts have not yet begun to grapple with, e.g.: Is there any limit on the specificity that prisons can demand in their grievances? To what extent are courts bound by the decisions of prison grievance bodies finding grievances inadequately specific?\textsuperscript{343} What should the court do if a grievance has been decided on the merits, but defendants argue that the allegations in the subsequent judicial complaint were not stated specifically enough in the grievance?\textsuperscript{344}

At present, it appears that most prison grievance systems do not require great specificity—though that may change in light of \textit{Jones v. Bock} as prison officials realize that making their systems more demanding may make it easier to get prisoners’ lawsuits dismissed.\textsuperscript{345} 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, \textit{i.e.}, specific persons/areas contacted and responses received.”\textsuperscript{346} The New York City jail grievance directive that

\textsuperscript{343} See 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).

\textsuperscript{344} See § IV.E.7, below, for further discussion of these issues; see also Crawford v. Dretke, 2007 WL 784343, *1 (S.D.Tex., Mar. 12, 2007) (inferring that grievances were specific enough where they were rejected for untimeliness but not lack of specificity), appeal dismissed on other grounds, 265 Fed.Appx. 296 (5th Cir. 2008).

\textsuperscript{345} The Michigan grievance system at issue in \textit{Jones} required both that grievances “be as specific as possible” and that they be “brief and concise,” but contained no specific requirements for content. \textit{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 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”).

\textsuperscript{346} 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
was effective until March 2008 says nothing about specificity in its text; the grievance form itself says only “Please describe problem as briefly as possible” (with four and a half lines for the answer) and “Action requested by inmate” (two and three-quarters lines). The March 2008 revision borrows part of the New York State formulation: in addition to the prisoner’s identifying information, the grievance “must contain . . . a concise, specific description of the problem/complaint and the action requested.” It also retains the above quoted language on the grievance form itself.

The 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.” That standard has been endorsed by the Second and Tenth Circuits as well. Its leniency is shown by the Seventh Circuit’s holding that a

promote mediation and conflict resolution.” Branch v. Brown, 2003 WL 21730709, *10 (S.D.N.Y., July 25, 2003), judgment granted on other grounds, 2003 WL 22439780 (S.D.N.Y., Oct. 28, 2003), quoting New York State Dep’t of Correctional Services Directive 4040, Part I. The current version of the policy retains similar language. See Appendix D, Directive 4040 at § 701.1(b) (July 1, 2006); see also Appendices E and F (earlier versions). The Tenth Circuit, in refusing to dismiss a claim for non-exhaustion, emphasized similar language in the federal Administrative Remedy Program policy, noting that that system is an inquisitorial one in which officials are responsible for investigating grievances thoroughly. Kikumura v. Osagie, 461 F.3d 1269, 1284 (10th Cir. 2006).


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).

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); see 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.

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
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\textsuperscript{352} (though the Second Circuit has

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.

\textsuperscript{352} 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); 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.”); see Appendix A for additional authority on this point. But see 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).
required a surprising degree of specificity in one case applying it). 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.

Decisions of other courts before Jones v. Bock were generally consistent with the notion of a notice pleading standard, and those decisions remain good law where the administrative rules do not demand more. Many decisions have taken a similar

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

354 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 he was denied notice and a hearing, under a grievance policy directing prisoners to “state briefly but completely the problem on which you desire assistance. Provide as many details as possible.”) That approach is consistent with Jones v. Bock, which held that the Michigan grievance policy, which said to “be as specific as possible” but did not prescribe any specific content for grievances, did not require naming of defendants. Jones, 549 U.S. at 218. 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”).

355 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).

356 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); Burston 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 grievances 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.Md., 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
approach without much theoretical discussion.\textsuperscript{357} One recent decision finds a “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.\textsuperscript{358} 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.\textsuperscript{359} The

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, \textit{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, \textit{report and recommendation adopted}, 2006 WL 1882940 (E.D.Cal., July 7, 2006).

In \textit{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. \textsuperscript{355} See \textit{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 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); 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); \textit{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).

\textsuperscript{355} 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).

\textsuperscript{356} 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); Granger v. Kayira, 2009 WL 3824710, *7 (N.D.Ill., Nov. 12,
converse is not true: if a prisoner adequately grieves an issue, the failure of the grievance decision to address it does not mean the prisoner failed to exhaust.\textsuperscript{360}

As noted above, courts have said that legal theories need not be exhausted.\textsuperscript{361} Despite the foregoing, some courts have insisted on what amounts to pleading of legal theories in certain kinds of grievances. In \textit{Brownell v. Krom},\textsuperscript{362} the plaintiff complained

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\item 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); 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), \textit{report and recommendation adopted}, 2008 WL 4379180 (E.D.Cal., Sept. 25, 2008); Freeman v. Salopek, 2008 WL 743952, *4 (M.D.Cal., 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), \textit{report and recommendation adopted}, 2007 WL 869956 (E.D.Cal., Mar. 22, 2007); Ambriz v. Kern, 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), \textit{report and recommendation adopted}, 2007 WL 869732 (E.D.Cal., Mar. 21, 2007); Baskerville v. Blot, 224 F.Supp.2d. 723, 730 (S.D.Ohio 2002) (applying “time and opportunity” rationale to hold that plaintiff exhausted as to issues that were actually investigated as a result of his grievance); 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 n . 545-546, below.


\textsuperscript{361} 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.”); 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 Smith v. Deluax, 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).

\textsuperscript{362} 446 F.3d 305 (2d Cir. 2006).
about loss of property including legal papers, and then brought suit alleging that the loss had resulted from intentional misconduct by prison staff, based on information that he did not have at the time of his grievance. The court held the grievance insufficient, stating that “the grievance may not be so vague as to preclude prison officials from taking appropriate measures to resolve the complaint internally,” and weighing heavily prison officials’ assertion that an allegation of intentional misconduct would trigger a different level of investigation than an ordinary property claim. This is a surprising holding—if the obligation is to “object intelligibly to some asserted shortcoming,” from the prisoner’s standpoint, the shortcoming visible to him was just that he didn’t have his property. The *Brownell* court tempered its holding by reversing the dismissal of the case on the ground that there were special circumstances excusing the plaintiff’s failure to exhaust properly, because the necessary information came to him long after the grievance deadline had passed and the grievance form did not inform him that late grievances could be allowed based on “mitigating circumstances,” leading to a reasonable belief he could not raise the new facts in another grievance. Still, the implication that prisoners ordinarily must file 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, though the courts

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

364 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*, 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. 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).

365 446 F.3d at 312-13.

are far from unanimous on this point. Some decisions have taken a similar approach to

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); see Appendix A for further authority on this point; see also 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 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.Okl., 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.Okl., Aug. 24, 2007).

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.

discrimination claims where the prisoner grieved some adverse conduct but did not allege in the grievance that the conduct was discriminatory.\textsuperscript{368} Decisions are in conflict on the need to specify a conspiracy claim in a grievance.\textsuperscript{369} The courts are divided on whether


claims asserted under the Religious Land Use and Institutionalized Persons Act that were exhausted before that statute was enacted must be exhausted again. 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.

3. Exhausting All Issues

Each claim raised in a suit must have been exhausted in order to be heard. That is the case whether it is raised in the initial complaint or added by subsequent amendment. To be exhausted, claims must have been sufficiently recognizable in the


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.

372 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., Jun 21, 2007).

373 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); 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.

371 See n. 299-307, above, concerning amendment of complaints and the exhaustion requirement.
grievance to give prison officials notice that the prisoner was complaining about them.\footnote{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); 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); 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).} One recent decision finds a “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.\footnote{Flanagan v. Shipman, 2009 WL 4043063, *6 n.4 (N.D.Fla., Nov. 20, 2009).} 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.\footnote{Jones v. Bock, 549 U.S. 199, 220-24 (2007); see § IV.E.6, below.}

Exactly what constitutes a separate claim for exhaustion purposes is not clear. Some courts have defined them broadly in determining what has been exhausted.\footnote{See, e.g., 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...}
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. This proposition has at least been limited by the Supreme

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378 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, Cottrell v. Wong, 2009 WL 3011250, *7 (E.D.Cal., Sept. 17, 2009), report and recommendation adopted, 2009 WL 5198091 (E.D.Cal., Dec. 22, 2009); Adams v. Bouchard, 591 F.Supp.2d 1191, 1196 (W.D.Okla. 2008) (holding supervisory liability claims are distinct claims that must be exhausted separately); Nichols v. Logan, 2004 WL 2851944, *8 (S.D.Cal., Nov. 23, 2004). This problem is also discussed at nn. 454-455, below.

A similar problem may be presented where prison staff are sued for failing to intervene in the unconstitutional actions of other staff members. 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).
Court’s rejection of the argument that every person sued must have been named in the prisoner’s administrative complaint, and some courts have rejected it entirely. However, 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.

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379 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).


381 See 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); Amador v. Superintendents of Dep’t of Correctional Services, 2007 WL 4326747, *8 (S.D.N.Y., Dec. 4, 2007) (holding that prisoner who complained of sexual abuse by an officer failed to exhaust her injunctive claim against supervisory defendants for failing to correct systemic problems allowing such conduct); 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
Supervisory liability aside, some “exhaust all claims” decisions, in effect, require uncounseled prisoners to make fine distinctions that many lawyers would miss.\textsuperscript{382} As one court has pointed out, this approach would permit prison officials to “obstruct legal remedies to unconstitutional actions by subdividing the grievances, arguing, \textit{e.g.}, that the Christians, Muslims, and Jews must each grieve denial of access to their own communal services,”\textsuperscript{383} though courts have generally rejected extreme attempts to manufacture non-exhaustion by subdividing prisoners’ complaints.\textsuperscript{384} Other decisions have dismissed claims because, even though the facts (\textit{e.g.}, loss of property, improper discipline) were grieved, other allegations underlying a particular legal claim (\textit{e.g.}, discriminatory or requires it. \textit{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).

\textsuperscript{382} See, \textit{e.g.}, 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); Mensalve 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).

\textsuperscript{383} Lewis v. Washington, 197 F.R.D. 611, 614 (N.D.Ill. 2000) (construing grievances about placement in “unapproved protective custody” status as encompassing complaints about conditions in that unit). \textit{But see} English v. Redding, 2003 WL 881000, *4 (N.D.Ill., Mar. 6, 2003) (refusing to apply \textit{Lewis v. Washington} holding where prisoner had grieved being removed from protective custody at a different prison, and being disciplined for the fight in which he was injured, but not the injury he was suing about).

\textsuperscript{384} See, \textit{e.g.}, 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), \textit{report and recommendation adopted}, 2006 WL 860142 (M.D.Pa., Mar. 31, 2006), the plaintiff alleged that he had been transferred for retaliatory and racial reasons, and the defendants argued that his assertions that defendants falsified his progress report and conspired against him had to be specifically exhausted. The court said these were “integrally related” to his exhausted claim and rejected the argument. 2005 WL 2300361, *3; see 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), \textit{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).
retaliatory intent) were not raised in the grievance. Such decisions are arguably contrary to the holding of the Second Circuit and other courts that prisoners need only “object intelligibly to some asserted shortcoming” and need not plead legal theories in their grievances to satisfy the exhaustion requirement.

These decisions are also arguably inconsistent with the Supreme Court’s holding that “issue exhaustion”—by which it appeared to mean presentation in the administrative process of all arguments why a challenged decision is wrong—is not required in appeals to the Social Security Appeals Council, since the relevant statute does not explicitly require it, and the arguments for issue exhaustion are weakest when administrative proceedings are not adversarial in character. Four Justices then observed that Social Security proceedings are inquisitorial rather than adversarial, with the ALJ responsible for developing the issues, and with no separate representative advocating the Commissioner’s position before the ALJ; that the regulations characterize review as done in an “informal, nonadversary manner”; and that many Social Security claimants are unrepresented or represented by non-attorneys. For these reasons, they said, issue exhaustion is not required.

Prison grievance systems, too, generally operate in an informal, nonadversarial manner without representation by counsel. For example, the New York State prison grievance procedure states that it is “not intended to support an adversary process, but is designed to promote mediation and conflict reduction.” The federal prison grievance system similarly is intended “to solve problems and be responsive to issues inmates raise.” Thus the Sims plurality analysis would seem applicable to them and to imply that as long as the basic facts affecting the prisoner are stated in a grievance, 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.

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

385 See nn. 366-368, above.
386 See Johnson v. Testman, 380 F.3d 691, 697 (2d Cir. 2004); see nn. 350-353, 361, for further discussion of these propositions.
388 Id. at 110-12. (Justice O’Connor joined the plurality on narrower grounds. Id. at 112-14.)
389 Appendix D, New York State Dep’t of Correctional Services Directive No. 4040, Inmate Grievance Program § 701.1(b) (July 1, 2006).
390 Kikumura v. Osagie, 461 F.3d 1269, 1284 (10th Cir. 2006) (quoting policy).
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.

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.” 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. Other decisions persuasively hold that once a prisoner has grieved a prison policy, he can challenge new applications or consequences of the policy without further exhaustion. Similarly, one court has held that a prisoner challenging “Special Administrative Measures” (SAMs) restricting his communications need not re-exhaust annually when those measures were

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392 Rule 15(a), Fed.R.Civ.P.
395 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); 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); 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); 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); 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).
renewed with slight modifications, since the result would be “an endless cycle of exhaustion regarding the same issue. . . .”

Such holdings may not extend to more discrete or factually dissimilar incidents. For example, one court has held that a grievance complaining generally of censorship procedures does not exhaust with respect to each item censored under the procedures, since publications may present different regulatory and constitutional issues depending on their content. However, 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, within reason. The Fifth Circuit has so held, within limits, in a decision

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396 Ayyad v. Gonzales, 2007 WL 324564, *6 (D.Colo., Jan. 30, 2007). But see Hale v. Ashcroft, 2009 WL 2601312, *3, 10 (D.Colo., Aug. 19, 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).

397 See 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).


399 See 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
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.401 But, the court cautioned, a grievance would not exhaust as to future

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”); 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). But see Mayo v. Snyder, 166 Fed.Appx. 845, 848, 2006 WL 205343, *3 (7th Cir., Jan. 5, 2006) (unpublished) (holding grievance seeking medical care for back pain did not exhaust as to events after the filing of the grievance); accord, Taylor v. Holmes, 2009 WL 2170250, *6 (W.D.Mich., July 21, 2009); Vantassell 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).

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 process).

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.

401 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
incidents of a more discrete nature (e.g., a month apart). Similarly, 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. 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, assuming the grievance rules permit their consideration.

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).


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
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.”

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. A suit that attacks the


See Farid v. Ellen, ___ F.3d ___, 2010 WL 308971, *13 (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”); 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 grievances 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). 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 3104370, *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
conduct of the disciplinary hearing itself is clearly exhausted by a disciplinary appeal, unless the grievance rules provide otherwise. 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. 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 in filing only a disciplinary appeal, and not a grievance, based on a reasonable belief that his complaint about the retaliatory fabrication of evidence against him could only be pursued in that manner. Remarkably, New York has not clarified the distinction between grievances.

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”).

408 Davis v. Barrett, 575 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. Deluax, 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 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).


410 Woodford v. Ngo, 548 U.S. 81 (2006); see 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). 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).

411 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).

412 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
and appeals since that decision. Indeed, it has made in court precisely the opposite argument from that in Giano, arguing that a prisoner who did file a grievance about a grievable matters relating to disciplinary proceedings, and non-grievable issues concerning the ‘decisions or dispositions’ of such proceedings.”); accord, 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. Brown, 2010 WL 1444000, *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).

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.
claim of retaliatory false discipline should instead have pursued a disciplinary appeal. There is also evidence that on some occasions, prison personnel have treated complaints as non-grievable, contrary to prison rules, simply because a disciplinary proceeding had been commenced concerning the same subject matter. 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.

In some cases, courts have held that disciplinary appeals do not exhaust as to issues ancillary to the conduct of the disciplinary hearing, but they have generally done so without closely examining the scope of review of disciplinary appeals.

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414 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).


416 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).

417 See 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.Col., 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”).

that the prisoner seeks to litigate is reasonably understood as within the prescribed scope of review of a disciplinary appeal, a disciplinary appeal exhausts it. That conclusion applies a fortiori where the grievance system restricts review of matters related to disciplinary proceedings. More generally, where prison policy provides insufficient guidance to prisoners as to which remedy to pursue, they should be deemed to have exhausted if they pursue either, since doing so will serve the statute’s purpose of giving prison officials “time and opportunity to address complaints internally before allowing the initiation of a federal case.”

Raising an issue in a disciplinary appeal certainly creates that opportunity, whether prison officials choose to take advantage of it or not.

4. Exhausting Each Defendant

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

419 Porter v. Nussle, 534 U.S. at 525.

420 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.Okl., 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, 212-24 (2007).


422 Jones v. Bock, id. Some courts seem not to get this point even after Jones. See, e.g., 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 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.”
the Court also said that, as with other aspects of exhaustion, “it is the prison’s requirements, and not the PLRA, that define the boundaries of proper exhaustion.” Thus if the grievance system itself requires naming the responsible personnel, prisoners must comply in order to exhaust.

At present, the New York State and New York City grievance systems do not contain such requirements, nor do the majority of grievance procedures nationwide. Courts will not reach to infer a requirement of naming defendants from more general requirements in a grievance policy.

Some systems do require naming of staff, and some have added such requirements in recent years. Even where grievance rules do not require identifying

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423 Jones v. Bock, id.
424 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) (http://www.nyc.gov/html/doc/downloads/pdf/3375R-A.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).
425 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).
426 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); Holloway v. Correctional Medical Services, 2007 WL 1445701, *3 (E.D.Mo., May 11, 2007) (grievance policy 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.”).
individual staff members, if the grievance does not address particular individuals’ conduct, courts may hold the claim against them is not exhausted, though this requirement need not be exacting and decisions on the point are far from unanimous.

Courts are generally in agreement that under a name-the-defendant policy, if an individual is not sufficiently identified in a grievance, that person cannot be sued. The more drastic view, that if any defendant was not identified the entire case must be dismissed, is ruled out by the Supreme Court’s rejection of the “total exhaustion” rule were involved or are witnesses”); see also n. 345, above, concerning changes in grievance systems to require identification of staff.

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).

428 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 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”).

429 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).

430 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. 399, above.

This problem is indistinguishable from the one discussed above in § IV.E.3 under the rubric “Exhausting All Issues.”

431 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.
under which the presence of any unexhausted claim required dismissal of the entire case.  

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

Courts wrestled with this problem before Jones v. Bock, often under court-made “name the defendant” rules that were overruled by Jones. Courts acknowledged that a prisoner cannot be required to provide information he or she does not possess. Some held that a description of the defendant’s position or conduct will suffice. Some held

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433 Espinal v. Goord, 558 F.3d 119, 126 n. 5 (2d Cir. 2009).
434 Some grievance rules recognize this possibility at least in part. Thus, the Illinois rule says that if the griever 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)). 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.
435 See nn. 524-551, below, on the validity and enforceability of grievance rules; nn. 743-749, below, on whether grievance rules can make remedies unavailable in practice.
438 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); 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,
that exhaustion is adequate where a defendant is identified by prison officials in the response to the prisoner’s grievance.\textsuperscript{438} Others held that naming of defendants is not required where the prisoner’s complaint concerns a policy and not the unauthorized conduct of staff,\textsuperscript{439} 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.\textsuperscript{440} However, some pre-\textit{Jones} decisions were absurdly harsh.\textsuperscript{441}

\textit{Jones v. Bock} has not drastically altered this landscape. Some courts interpret name the defendant rules strictly,\textsuperscript{442} and there continue to be absurdly harsh decisions.\textsuperscript{443} Other decisions have struck a more plausible balance between the demands of the “proper exhaustion” rule and officials’ need for notice and what is reasonably possible for

\begin{itemize}
  \item \textit{Spruill v. Gillis}, 372 F.3d 218, 234 (3d Cir. 2004); \textit{accord}, 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); Sisney v. Reisch, 2007 WL 951858, *5 (D.S.D., Mar. 26, 2007) (similar to Williams); Sides v. Cherry, 2007 WL 1411841, * 3 (W.D.Pa., May 10, 2007) (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”).
  \item \textit{Spruill v. Gillis}, 372 F.3d 218, 234 (3d Cir. 2004); \textit{accord}, 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); Sisney v. Reisch, 2007 WL 951858, *5 (D.S.D., Mar. 26, 2007) (similar to Williams); Sides v. Cherry, 2007 WL 1411841, * 3 (W.D.Pa., May 10, 2007) (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”).

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\end{itemize}
prisoners to understand and carry out. Grievances that state the prisoner’s lack of knowledge of responsible persons but sufficiently describe the problem have been held adequate, as have grievances in which individuals have been named in appeals and not the initial stage. Prisoners have been held to have exhausted where officials’ responses indicated that they knew the identities of the relevant persons, or simply that the grievance provided enough information that they could figure it out easily enough. Courts have held that naming the relevant entity can sufficiently identify the proper individual defendant and vice versa. Similarly, naming a department or functional


447 Kelley v. DeMasi, 2008 WL 4298475, *3 (E.D.Mich., Sept. 18, 2008) (where plaintiff did not know of Correctional Medical Services’ involvement until it was described in the response to the Step 1 grievance, he exhausted); 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).

448 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) (failure to name defendants was not a failure to exhaust where grievance gave officials enough information to investigate; claim involved whether plaintiff was at the right pay grade), report and recommendation adopted in part, rejected in part on other grounds, 2008 WL 4457807 (E.D.Mich., Sept. 30, 2008).

449 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).
unit that is generally responsible for the subject matter of the prisoner’s complaint has been held sufficient. One recent decision, relying on pre- Jones authority, acknowledged that prisoners may not know who is responsible for actions that affect them, and held that prisoners can only be required to provide as much information, including potential defendants’ names, as “the prisoner can reasonably provide.”

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. This concern is


452 Sanks v. Franklin, 2010 WL 234785, *6 (M.D.Ga., Jan. 13, 2010) (quoting Brown v. Sikes, 212 F.3d 1205, 1210 (11th Cir. 2000)). The court framed the issue as “whether Plaintiff knew or reasonably should have known who was responsible” for the alleged deprivation. Id.

453 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
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 and decisions holding, in substance, that if the prisoner grieves what happened to him or her, allowing prison officials to determine who was at fault, the plaintiff has exhausted. The latter view is more consistent with the statute’s central purpose of giving prison officials notice so they can solve problems before litigation is commenced.

\[454\] 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); 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. 378-381, 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.

\[455\] 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),

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In this regard, the *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\(^{456}\) 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.\(^{457}\) An integral part of the usual federal practice is that leave to amend complaints shall be “freely given,”\(^{458}\) 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.\(^{459}\)

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.\(^{460}\)

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\(^{456}\) 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).


\(^{458}\) Rule 15(a), Fed.R.Civ.P.

\(^{459}\) See *Hodge v. Police Officers*, 802 F.2d 58, 61 (2d Cir. 1986).

\(^{460}\) 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
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. Grievance systems generally do not seem to make provision for such supplemental filings, which is not surprising, since those systems were never designed as a rehearsal for litigation, but as quick and informal problem-solving mechanisms. In one system, grievances adding new names to prior complaints have been dismissed as “duplicative,” and decisions are mixed as to whether such a grievance fails to exhaust. Other decisions seem to hold prisoners to a standard of procedural clairvoyance, dismissing their cases for failing to take actions that do not seem to be prescribed in the grievance rules.

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).

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. . .”).


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.”
Some courts have held that 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.\textsuperscript{464} As one court put it, “defendants cannot argue that the requirement of naming all persons a plaintiff may later sue is a ‘critical procedural requirement’ under \textit{Woodford} and also take the position that it need not object to plaintiff’s failure to comply with this provision during the grievance process.”\textsuperscript{465} Defendants have objected that 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 have credited this argument.\textsuperscript{466} But the argument “begs the question—is the requirement to name all those involved a ‘critical procedural’ requirement under \textit{Woodford}?”.\textsuperscript{467} 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.

5. Exhausting Items of Relief

Courts have held that prisoners need not “demand particular relief” to exhaust administrative remedies. 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. The Seventh Circuit held that even under its procedural default rule, now adopted by the Supreme Court, “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.”

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469 Booth, 532 U.S. at 740-41.


471 Strong v. David, 297 F.3d at 649; accord, 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); 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, 127 S.Ct. 1212 (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
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.\footnote{472} Since these propositions are based on the central reasoning of the decision in \textit{Booth v. Churner}, it seems unlikely that the Court’s statement in \textit{Jones v. Bock} that “it is the prison’s requirements, and not the PLRA, that define the boundaries of proper exhaustion”\footnote{473} overrules it in the absence of any statement by the Court to that effect.

6. **“Total Exhaustion”**

The Supreme Court has rejected the “total exhaustion” rule, which said that if a prisoner includes any unexhausted claims in a complaint, the whole case had to be dismissed.\footnote{474} Under its decision, only the unexhausted claims need be dismissed.\footnote{475}

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\textit{Saunders v. Goord}, 2002 WL 31159109, *4 (S.D.N.Y., Sept. 27, 2002), that the prisoner failed to exhaust in part because he failed to specify the action he wished taken, is erroneous under \textit{Booth}. A closer case is presented by \textit{Singh v. Goord}, 520 F.Supp.2d 487, 497-98 (S.D.N.Y., Oct. 9, 2007), which holds that a prisoner who prevailed in his disciplinary appeal did not exhaust his claim for an injunction against further discipline for refusing work assignments contrary to his religious beliefs; that relief would have required a separate grievance. The court in \textit{Hart v. Baldwin}, 2009 WL 2185904, *8 (N.D.Iowa, July 23, 2009), \textit{report and recommendation adopted in part, rejected in part on other grounds}, 2009 WL 3055304 (N.D.Iowa, Sept. 21, 2009), squarely (and erroneously, for the reasons stated above) held that a prisoner who did not ask for money damages in his grievance did not exhaust. \textit{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).
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\footnote{472}{\textit{Jones'El v. Berge}}, 172 F.Supp.2d 1128, 1134 (W.D.Wis. 2001); \textit{accord}, 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).


\footnote{475}{Before \textit{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. \textit{See} 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 \textit{Jones}, although \textit{Lira} provides more detailed analysis”). In my view there is no support for preservation of the \textit{Lira} exception in \textit{Jones v. Bock}’s categorical rejection of total exhaustion.}
7. The “Proper Exhaustion” Requirement

The Supreme Court, resolving a conflict among circuits, 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. More precisely, it held that “the PLRA exhaustion requirement 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.” 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.”

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, notwithstanding the concern that numerous courts had previously expressed about this possibility. Several post-Woodford decisions have cited that statement in holding that prisoners who didn’t fully comply with procedural

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478 Woodford, 548 U.S. at 106.
479 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.’”).
481 Some courts have held that if grievance rules make exhaustion or appealing optional, then they are optional for PLRA purposes as well. See n. 293, 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.
requirements, but who were arguably “tripped up” by them, should not have their cases dismissed for non-exhaustion.\textsuperscript{483}

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 \textit{pro se} and are forced to comply with numerous unforgiving deadlines and other procedural requirements.\textsuperscript{484}

\textsuperscript{483} 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-\textit{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”), \textit{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); \textit{see} Marshall v. Peterson, 2007 WL 925851, *3 n.4 (S.D.Cal., Mar. 14, 2007) (stating prisoner whose grievances were returned because he didn’t sign them, then ruled untimely when he signed and returned them, even though the rules did not authorize returning grievances for lack of signature, was victimized by a “trap for the unwary”); Flory v. Claussen, 2006 WL 3404779, *3-4 (W.D.Wash., Nov. 21, 2006) (holding \textit{Woodford} did not authorize creating a “trap for the unwary”; prisoner who followed officials’ advice as to which remedy to use exhausted); \textit{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.”).

\textsuperscript{484} \textit{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 \textit{pro se} litigants. \textit{See, e.g.,} Hughes v. Rowe, 449 U.S. 5, 9 (1980) (noting “settled law” that \textit{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 \textit{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.”); \textit{see also} Flory v. Claussen, 2006 WL 3404779, *3-4 (W.D.Wash., Nov. 21, 2006) (quoting \textit{Love v. Pullman} in refusing to find non-exhaustion where plaintiff had followed officials’ advice as to which remedy to use).
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.” It also noted that the habeas corpus exhaustion doctrine is “substantively similar” to the administrative law of exhaustion. In response, Justice Breyer, concurring in the judgment, observed:

Administrative law, however, contains well established exceptions to exhaustion. See Sims v. Apfel, 530 U.S. 103, 115 (2000) (BREYER, J., joined by Rehnquist, C. J., and SCALIA and KENNEDY, JJ., dissenting) (constitutional claims); Shalala v. Illinois Council on Long Term Care, Inc., 529 U.S. 1, 13 (2000) (futility); McKart v. United States, 395 U.S. 185, 197-201 (1969) (hardship); McCarthy v. Madigan, 503 U.S. 140, 147-148 (1992) (inadequate or unavailable administrative remedies); see generally II R. Pierce, Administrative Law Treatise § 15 (4th ed.2002). Moreover, habeas corpus law, which contains an exhaustion requirement that is “substantively similar” to administrative law’s and which informs the Court’s opinion, ante, at 2386, also permits a number of exceptions. See post, at 2396, n. 5 (STEVENS, J., dissenting) (noting that habeas corpus law permits “petitioners to overcome procedural defaults if they can show that the procedural rule is not firmly established and regularly followed, if they can demonstrate cause and prejudice to overcome a procedural default, or if enforcing the procedural default rule would result in a miscarriage of justice” (citations omitted)).

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.” 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.

The central question after Woodford is how absolute its “proper exhaustion” holding is.\textsuperscript{490} 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.\textsuperscript{491} The Second Circuit had developed the most systematic approach to that question, which it summarized as follows:

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

. . . What constitutes justification in the PLRA context “must be determined by looking at the circumstances which might understandably lead usually uncounselled prisoners to fail to grieve in the normally required way.”\textsuperscript{492}

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,\textsuperscript{493} though it has assumed the framework remains intact in a recent non-precedential decision.\textsuperscript{494} The first district court to address the question 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

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(E.D.Cal., Oct. 6, 2006); Collins v. Goord, 438 F.Supp.2d 399, 411 n.13 (S.D.N.Y. 2006); see nn. 495-497, below, for further discussion of this point.
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\textsuperscript{490} 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.

\textsuperscript{491} These lines of cases are addressed more comprehensively in § IV.G.2, below.

\textsuperscript{492} 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).


“mandatory” but subject to the “caveats” outlined in *Hemphill v. New York*.\(^{495}\) Subsequent district court decisions have generally made the same assumption,\(^{496}\) some explicitly noting Justice Breyer’s acknowledgment of Second Circuit caselaw.\(^{497}\) One 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.”\(^{498}\) 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

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\(^{495}\) 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).


\(^{498}\) 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.
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.⁴⁹⁹

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, 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.⁵⁰¹ 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.”⁵⁰² 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.⁵⁰³

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

⁴⁹⁹ Hairston, 2006 WL 2309592, *8. Mr. Hairston, who complained of excessive force, did not file a grievance within the prescribed time frame. However, he had been placed in segregated housing, and stated that contrary to prison policy, he was unaware of any grievance staff making rounds in the SHU, creating a factual question whether the remedy was actually available to him or whether defendants should be estopped from relying on non-exhaustion. His wife wrote to the Superintendent requesting an investigation within the prescribed time period for grievances. While such a letter does not suffice to exhaust by itself, if it results in an Inspector General’s investigation, it may constitute “special circumstances” satisfying the PLRA’s purposes, and causes the same result as invoking the prison system’s expedited grievance procedure. Since the plaintiff never received notice of any decision on his complaint (he received the results of the Inspector General’s investigation only in discovery after filing suit), he had no opportunity to appeal it. Meanwhile, Mr. Hairston received a disciplinary hearing, and attempted to raise his claim of assault, but was not allowed to do so there; he raised it in his disciplinary appeal as well. Once he was released from SHU and advised by another prisoner to do so, he filed a grievance, which both rejected it on its merits and stated it was untimely; he did not appeal because he thought he could not appeal an untimely grievance, 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).

⁵⁰⁰ 425 F.3d 177 (2d Cir. 2005).

⁵⁰¹ Braham, 425 F.3d at 183, quoting Johnson v. Testman, 380 F.3d 691, 697 (2d Cir. 2004).

⁵⁰² Macias v. Zenk, 495 F.3d 37, 43-44 (2d Cir. 2007).

“unavailable.” The Eleventh Circuit has done the same, citing the
Seventh Circuit decision as well. Similarly, the Ninth Circuit, citing
the Seventh and Eleventh Circuit decisions and a more recent
statement of the Second Circuit standard, has held that a
litigant’s failure of timely exhaustion was excused because he took
“reasonable and appropriate steps to exhaust . . . and was precluded
from exhausting, not through his own fault but by the Warden’s
mistake.” 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.

More specific questions remaining after Woodford, some of them
directly related to pre-existing Second Circuit law, include the
following:

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

504 Kaba v. Stepp, 458 F.3d 678, 684-86 (7th Cir. 2006).
505 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).
506 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.
507 Dillon v. Rogers, __ F.3d ___, 2010 WL 378306, *6 (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).
509 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
did not say whether claim of retaliation would make the
transfer grievable); Torres v. Anderson, ___ F.Supp.2d ___,
2009 WL 4878197, *4 (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). A similar scenario with
an opposite result is presented in Marshall v. Knight, 2006
WL 3714713

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This lack of clarity in grievance systems—either in the written rules or in prison officials’ actions or instructions in particular cases—is a recurrent theme in prison exhaustion cases. Thus, in Brownell v. Krom, the court cited prison officials’ erroneous advice that the plaintiff’s lost property was not the responsibility of the prison he had been transferred to, which resulted in a failure to investigate; a prison official’s advice to abandon his property claim and pursue a grievance instead, resulting in loss of the ability to appeal the property claim; and the lack of any apparent provision in the grievance system for raising newly discovered facts in a previously filed grievance. Such examples can be multiplied, in the Second Circuit and elsewhere. Thus, the Seventh Circuit, in a decision 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. 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 Cutler v. Correctional Medical Services, 2010 WL 339760, *5 (D.Idaho, Jan. 22, 2010) (noting that requirement to identify responsible staff members is listed in only one of four documents addressing grievance policy; “While lawyers and judges can print and lay out the policy, directive, form, and handout side by side for comparison and contrast, inmate laypersons would be able to do so only with significant difficulty.”); Woodard v. O’Brien, 2010 WL 148301, *15 (N.D.Iowa, Jan. 14, 2010) (finding plaintiff complied with procedure “to the best of his ability to understand it,” citing ambiguous appeal rule, the grievance officer’s failure to recognize his attempts at informal resolution, and officer’s failure to advise him what more he needed to do).
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.513 Similarly, there are many cases in which officials’ actions or instructions with respect to particular grievances create uncertainty as to how to proceed.514 In other cases, the prisoner’s knowledge of 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); 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); 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). 513 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) (“...[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. 320-322, above, and nn. 689-690, 758-761, below. 514 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; “[]nothing 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); Johnson v. Miller, 2009 WL
the facts does not permit timely compliance with the grievance rules.\textsuperscript{515} In some cases an unsettled legal situation concerning the exhaustion requirement itself has been held to constitute special circumstances justifying failure to exhaust correctly.\textsuperscript{516}

\textsuperscript{515} 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, 129 S.Ct. 128 (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).

\textsuperscript{516} 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
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. 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. Conversely, other 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.

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517 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, Torres v. Anderson, ___ F.Supp.2d ___, 2009 WL 4878197, *5 (E.D.N.Y., Dec. 18, 2009) (finding special circumstances in failure to make clear whether rule on place of filing post-transfer grievance was mandatory).

518 Curtis v. Timberlake, 436 F.3d 709, 712 (7th Cir. 2005); 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).

519 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); see 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); Burkett v. Marshall, 2009 WL 454133, *5-6 (S.D.Ga., Feb. 23, 2009) (defendants failed to show that appeal procedure not in the inmate handbook was actually available to prisoners); Sims v. Rewerts, 2008 WL 2224132, *5-6 (E.D.Mich., May 29, 2008) (declining to dismiss where plaintiff failed to comply with a time limit that had been changed without notice); Cabrera v. LeVierge, 2008 WL 215720, *5-6 (D.N.H., Jan. 24, 2008) (refusing to hold prisoners to rules and procedures not described in inmate handbook); Lampkins v. Roberts, 2007 WL 924746, *3 (S.D.Ind., Mar. 27, 2007) (refusing to dismiss for missing a five-day time deadline which was not made known in the materials made available to prisoners). 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).
2. What if the prisoner is misled or his exhaustion efforts obstructed by prison staff? Numerous cases hold that non-exhaustion caused by such actions by prison staff do not bar the prisoner from proceeding with a subsequent lawsuit.\(^{520}\) 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.

3. 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.\(^{521}\) 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.\(^{522}\) 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*.\(^{523}\)

4. Is there any limit to the procedural rules that can be enforced by procedural default? As noted, *Woodford* declined to address the possibility of rules created to trip prisoners up,\(^{524}\) though that concern had been expressed in numerous pre-*Woodford* decisions.\(^{525}\) 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),

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\(^{520}\) *See* nn. 758-761, below.

\(^{521}\) *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. 733-741, below, for further comment on this subject.

\(^{522}\) *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).

\(^{523}\) *Turner v. Burnside*, 541 F.3d 1077, 1084 (11th Cir. 2008); *Kaba v. Stepp*, 458 F.3d 678, 684-86 (7th Cir. 2006).

\(^{524}\) *Woodford*, 548 U.S. at 102-03.

\(^{525}\) *See* cases cited in n. 482, above.
holds that § 1997e(a) requires each prisoner to exhaust a process and not a remedy.\textsuperscript{526}

One would think that there are several federal policies, not necessarily limited to § 1983 and § 1997e(a), implicated by the \textit{Woodford} procedural default rule, among them the policies of notice pleading and of leniency in construing the pleadings of \textit{pro se} litigants, the policy that procedural rules should not be applied to set traps for unwary litigants, and the policy allowing complaints to be freely amended within and sometimes beyond the limitations period, all of which may be compromised by demanding rules and short deadlines in prison grievance systems.\textsuperscript{527}

\textit{Woodford} itself states that “[p]roper exhaustion demands compliance with an agency’s deadlines and other critical procedural rules because no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings.”\textsuperscript{528} The implication is that there are some procedural rules whose violation is not “critical” and does not threaten the system’s functioning.\textsuperscript{529} This view is consistent

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\textsuperscript{526} Strong v. David, 297 F.3d 646, 649-50 (7th Cir. 2002).
\textsuperscript{527} 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. 561, below.
\textsuperscript{528} \textit{Woodford}, 548 U.S. at 90-91.
\textsuperscript{529} 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, ___ F.Supp.2d ____, 2009 WL 4878197, *5 (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 said that a policy as to what issues were suitable for the grievance system must not be critical, since the determination of non-grievability is itself appealable. However, in that case the prisoner was following the rules as written and prison officials seemed to be misinterpreting their own rules or using unwritten rules at variance from those the prisoners relied on. See Woods v. Lozer, 2007 WL 173704, *3 (M.D.Tenn., Jan. 18, 2007). Another court, without using the word “critical,” excused a prisoner’s sending of his appeal directly to the appellate decision-maker rather than sending it via the designated recipient, noting that the latter received the appeal and had an opportunity to address the problem; the court mentions in the discussion officials’ belief that they have discretion in how strictly to apply their own time deadlines. Parker v. Robinson, 2006 WL 2904780, *11-12 (D.Me., Oct. 10, 2006). 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). \textit{Cf.} Ellison v. New Hampshire Dept. of
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with the earlier holding of the Third Circuit that, even under a procedural default rule, compliance need only be “substantial,” an observation that it deemed equivalent to its later statement that procedural requirements “must . . . not be imposed in a way that offends the Federal Constitution or the federal policy embodied in § 1997e(a).” However, that court has not been explicit about what it means by these formulations.

The risk posed by Woodford’s holding is that prison officials will reject prisoners’ grievances for the most trivial of rules violations, or will promulgate rules designed to


Nyhuis v. Reno, 204 F.3d 65, 77-78 (3d Cir. 2000).


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 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, * (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).

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); 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); 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
Another risk, little explored by the courts, is that grievance rules may make it impossible for prisoners to frame the claims that they wish to litigate. This issue has arisen repeatedly (though has not always been recognized) in connection with rules prohibiting grievances from raising “multiple issues,” among others.

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) (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 griev ing); 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); 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”).

See n. 345, 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).

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, Baker v. Drew, 2009 WL 2588905, *4 (M.D.Ala., Aug. 19, 2009). 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).

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.
This problem is discussed thoughtfully (despite the unsatisfactory result, later reversed) in a recent district court decision which adopts the proposition not addressed by Woodford about “tripping up” prisoners as a principle of PLRA application: “several courts have recognized the concern alluded to but not decided in Woodford: where excessively technical procedural requirements frustrate the proper exercise of that

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.Okl., 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), 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.

537 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).
procedure by all but the most sophisticated inmates, is the grievance procedure “available” within the meaning of the PRLA [sic].”538 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.”539

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.540 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.”541 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”).542

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.543 (On appeal, the court did not address the district court’s constitutional


539 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)”).


542 Lafountain, id.

543 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
analysis, but rejected its reading of the grievance, finding as a matter of law that the grievance only raised one issue.\footnote{LaFountain v. Martin, 334 Fed.Appx. 738, 741 (6th Cir. 2009) (per curiam).}

Before \textit{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.\footnote{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); 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 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); 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)); 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 procedural issues in the grievance, might waive such issues, especially in light of uncertainty whether the grievance system was available).} Nothing in \textit{Woodford} is to the contrary of those holdings, and many post-\textit{Woodford} decisions are to the same effect.\footnote{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); Lee v. Smith, 2010 WL 1148876, *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); Menneck 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,
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.\[547\] Some courts have said that the Woodford opinion sets out a “merits test” (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.\[548\] 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.”\[549\] Courts have disagreed over whether a grievance exhausts if it is rejected both on the merits and for procedural reasons.\[550\] If the purpose of the

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


549 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).

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

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

Some courts have suggested that they are without power to re-examine prison officials’ decisions rejecting grievances for procedural reasons, an approach which has led to extreme and unconscionable results. Other federal courts have reviewed the


Woodford, 548 U.S. at 90.

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

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). The appeals court for that circuit has subsequently stated, in an unpublished opinion: “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.” Hoeft v. Wisher, 2006 WL 1373176, *2 (7th Cir., May 8, 2006). 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). 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.
merits of such rejections, usually without much discussion of the source or extent of their power. Indeed, the same judge who disclaimed any power to review the state’s application of its rules in one earlier-cited case has done exactly that in later decisions. A couple of decisions have attempted to state general standards in this area.

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 was true); see also Roam v. Curry, 2009 WL 1308909, *1 (N.D.Cal., May 11, 2009) (denying amendment to complaint as futile since officials had rejected the plaintiff’s grievance as “obscured by pointless verbiage or voluminous unrelated documentation” without independent examination).

554 In Moore v. Bennette, 517 F.3d 717, 722, 729, 730 (4th Cir. 2008), discussed above at n. 537, 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 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); 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); see Appendix A for additional authority on this point; see n. 571, 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.

555 Lindell v. O’Donnell, discussed in n. 553, above.

550 One case 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.”
One 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.” 557 Another court began by noting 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.” 558 This 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. This court further observed that instructions by grievance officials that are contrary to the relevant state regulations may make the remedy unavailable. 559

Several decisions have refused to dismiss for non-exhaustion where a prisoner’s grievance had been rejected as duplicative of an earlier grievance. 560

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557 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”).


559 Lafountain, id.

6. 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. 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—though one decision is remarkably vociferous concerning the prisoner’s obligation to follow erroneous instructions.

from trying again and doing it right even if the later grievance is otherwise proper. 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.

See 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); 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); 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); see Appendix A for additional authority on this point.

See 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); Young v. Hightower, 395 F.Supp.2d 583, ___, 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).

Starks v. Lewis, 2008 WL 2570960, *5 (W.D.Okl., June 24, 2008) (“Even when prison authorities are incorrect about the existence of the perceived deficiency, the inmate must follow the prescribed steps to cure it . . . . An inmate's disagreement with prison officials as to the appropriateness of a particular procedure under the circumstances, or his belief that he should not have to correct a procedural deficiency does not excuse his obligation to comply with the available process . . . .”), aff’d, 313 Fed.Appx. 163 (10th Cir. 2009). Contra, Lafountain v. Martin, 2008 WL 1923262, *16 (W.D.Mich., Apr. 28, 2008) (suggesting that instructions by grievance personnel contrary to state regulations may make the remedy unavailable), vacated and remanded on other grounds, 334 Fed.Appx. 738 (6th Cir. 2009) (per curiam).
7. 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 \textit{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.\textsuperscript{564}

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.”\textsuperscript{565} Thus a grievance rejected administratively as untimely does not suffice to exhaust.\textsuperscript{566} The Court was aware of, and apparently untroubled by, the very short deadlines of most prison grievance systems.\textsuperscript{567} 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.\textsuperscript{568}

\textsuperscript{564} See cases cited in n. 579, below.
\textsuperscript{565} \textit{Woodford v. Ngo}, 548 U.S. 81, 90-91 (2006). \textit{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).
\textsuperscript{566} See, e.g., Scott v. Ambani, 577 F.3d 642, 647 (6th Cir. 2009).

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).

\textsuperscript{568} For example, in \textit{Wilbert v. Quartermen}, 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
The 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. 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. Nor did it say to what extent federal courts are free to re-examine administrative determinations that a grievance is untimely.

569 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). Woodford, 548 U.S. at 93. See nn. 487-489, above.

570 Lower courts are divided on this point, as to procedural determinations generally and not just time limits. See nn. 553-559, above. Some courts have held that grievance bodies’ determinations are essentially unreviewable. 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) Other courts have independently assessed such determinations. See Williams v. Franklin, 2008 WL 5192628, *2 (10th Cir., Dec. 12, 2008) (rejecting determination of untimeliness that was obviously wrong); 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); Williams v. Hickman, 2009 WL 23799797, *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); 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
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 in the normally required way,” such as prisoners’ misunderstanding of the exhaustion requirement or of the relevant prison regulations, though it noted that those were not necessarily the only circumstances to justify failure to exhaust. For example, a reasonable if mistaken appreciation of the facts, not remedied until after the grievance deadline, may also justify non-exhaustion or result in unavailability of a remedy. As noted in the previous section, this framework

untimely on appeal even though the appeal was timely; the court held that the dismissal was improper and plaintiff had exhausted.

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).

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.

Williams, id., citing Rodriguez v. Westchester County Jail Correctional Dep’t, 372 F.3d 485 (2d Cir. 2004).

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).

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. Bruren, 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).

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); Marbury v. Abraham, 2008 WL 207934, *1-2 (S.D.Ohio, Jan. 24, 2008) (where prison staff’s actions prevented plaintiff from mailing a notice of appeal timely, grievance deadline ran from the denial of his motion for a delayed appeal, not from the act of
appears to survive Woodford, since the kinds of fact patterns addressed in Second Circuit law were not addressed and were not before the Court in Woodford.

Regardless of the state of the justification/special circumstances rule, circumstances that prevent a prisoner from filing timely would mean that the grievance system was not an “available” remedy for purposes of the exhaustion rule;\textsuperscript{577} 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. However, there is a trap here for unwary litigants. A number of courts have held that under those circumstances, a prisoner should file a grievance when the obstacle to exhaustion is removed—that is, file an untimely grievance notwithstanding the holding of Woodford v. Ngo that an untimely grievance does not satisfy the exhaustion requirement. This is the sort of counter-intuitive proposition that serves only to victimize unsophisticated litigants. A particularly absurd example of this argument was rejected in Goebert v. Lee County, in which the grievance appeal procedure was shown to be unknown to the

578 See § IV.G.3, below.
579 Bryant v. Rich, 2007 WL 1558718, *2 (11th Cir., May 31, 2007) (unpublished) (holding prisoner who said he didn’t grieve for fear of assault should have exhausted after transfer), superseded on other grounds, 530 F.3d 1368 (11th Cir. 2008), cert. denied, 129 S.Ct. 733 (2008); Coleman v. Cook, 2009 WL 3109741, *5 (C.D.Cal., Sept. 22, 2009); Wright v. State Correctional Institution at Greene, 2009 WL 2581665, *3 (W.D.Pa., Aug. 20, 2009); Lipscomb v. Hickey, 2009 WL 671308, *2 (S.D.W.Va., Feb. 18, 2009), report and recommendation adopted as modified, 2009 WL 671398 (S.D.W.Va., Mar. 10, 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); In re Bayside Prison Litigation, 2008 WL 2387324, *5 (D.N.J., May 19, 2008); Chavez v. Thornton, 2008 WL 2020319, *4-5 (D.Colo., May 9, 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); 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); Poole v. Rich, 2007 WL 2238831, *3-4 (S.D.Ga., Aug. 1, 2007) (same as Bryant v. Rich, supra), aff’d, 2008 WL 185527 (11th Cir. 2008), cert. denied, 129 S.Ct. 119 (2008); see Appendix A for additional authority on this point. Contra, 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).
580 510 F.3d 1312 (11th Cir. 2007).
prisoners; defendants argued that the plaintiff should have filed a grievance when she learned of the procedure through discovery in the litigation, three years after the expiration of the five-day appeal deadline. The court stated that “an administrative remedy that was not discovered, and which could not have been discovered through reasonable effort, until it was too late for it to be used is not an ‘available’ remedy.”

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

581 *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.

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

583 See *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. Woodward*, 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 plaintif 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* *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 “borders on sophistry”), aff’d, 184 Fed.Appx. 316 (4th Cir. 2006).
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.\textsuperscript{584} The court rejected the analogy to \textit{Johnson v. Johnson},\textsuperscript{585} 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 \textit{Johnson} as addressing a series of discrete events, the \textit{Ellis} court instead analogized to the treatment of complaints about chronic medical problems as “continuing violations” for limitations purposes.\textsuperscript{586} A few decisions have rejected any allowance for ongoing violations in applying grievance time limits.\textsuperscript{587} 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.\textsuperscript{588}

Some grievance systems build in discretion to waive time limits; for example, the New York State grievance system permits late grievances for “mitigating

\textsuperscript{587} \textit{See 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 \textit{[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.” \textit{See also} 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), \textit{report and recommendation adopted in part and remanded on other grounds}, 2008 WL 907453 (W.D.Mich., Mar. 28, 2008). \textit{Cf.} McNeil v. Howard, 2009 WL 3241280, *2-3 (10th Cir., Oct. 9, 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), \textit{pet. for cert. filed,} No. 09-9081 (Feb. 3, 2010).
\textsuperscript{588} 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. . . .”).

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circumstances,” which include “e.g., attempts to resolve informally by the inmate,” etc. 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. 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

589 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 Dept 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” was his surgery and not his knowledge of its side-effects, he reasonably believed no remedy remained available to him).

590 7 N.Y.C.R.R. § 701.7(a)(1); Appendix D at § 701.6(g)(1)(i)(a).

591 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”); 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).
unavailability of grievance representatives to prisoners in a segregated unit.\(^{592}\) That approach is consistent with the Second Circuit’s observation, in finding a prisoner’s explanation for his late grievance inadequate, that “[w]e therefore do not find Williams’ justification persuasive”\(^{593}\)—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.\(^{594}\) 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).\(^{595}\) That is, if the system will not entertain the plaintiff’s late grievance, the plaintiff need not

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\(^{592}\) Graham, id. at 322 and n. 9; see O’Connor v. Featherston, 2002 WL 818085, *2 (S.D.N.Y., Apr. 29, 2002) (refusing to be bound by rejection of request to file a late grievance where the plaintiff had been kept in medical restriction for the 14 days in which he was required to file a timely grievance); Cardona v. Winn, 170 F.Supp.2d 131 (D.Mass. 2001) (holding that the grievance appeal deadline should be extended because the prisoner may have missed it out of “excusable confusion”); see also Lawyer v. Gatto, 2007 WL 549440, *7 (S.D.N.Y., Feb. 21, 2007) (holding that grievance supervisor’s rejection of claimed mitigating circumstances rendered the remedy unavailable, where earlier grievances had disappeared); Moore v. Louisiana Dept. of Public Safety and Corrections, 2002 WL 1791996, *4 (E.D.La., Aug. 5, 2002) (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. Rhoemes, 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 n. 553-554, 571, above.

\(^{593}\) 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).


\(^{595}\) 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).
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. Some decisions, however, have simply directed that grievance officials consider grievances on their merits after dismissal for non-exhaustion.

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

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. 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 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). See nn. 124, above, and 819-820, below.


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.\(^{602}\)

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.\(^{603}\) Results are mixed in cases where a decision addresses both timeliness and the merits.\(^{604}\) Time limits that are not made known to the prisoners cannot be enforced to bar their suits.\(^{605}\)

\(^{602}\) 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).


\(^{604}\) 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
If a grievance system has no time limit, delay in filing cannot bar a prisoner’s claim for non-exhaustion. An unexhausted claim should be dismissed without prejudice, and the litigant will have the opportunity to seek to exhaust.

F. What Procedures Must Be Exhausted?

The PLRA requires the exhaustion of “such administrative remedies as are available.” 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. Courts have declined to require exhaustion of processes that do not appear organized or empowered to provide actual solutions to individual prisoners’ complaints; though they may be available, in effect, they are not remedies. Thus, one court has held that a process that has no authority over anything except to “make recommendations for change” to administrative officials need not be exhausted because that is not the type of “responsive action” envisioned in Booth. Another has held that a “Warden’s Forum,” a body

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 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).

See cases cited in n.519, above.


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, 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).

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
consisting of elected inmate representatives who alone have the right to raise issues there, was not an available remedy because the plaintiff did not have a “personal, direct right” to pursue a complaint before that body.\textsuperscript{611} These holdings only address gross structural characteristics of the supposed remedies;\textsuperscript{612} as previously noted, an argument that resort to a grievance system is futile is not cognizable under the PLRA.\textsuperscript{613}

The prison’s rules will determine which remedy must be used if there is more than one.\textsuperscript{614} Judicial remedies, including appeals from the agency to a court, need not be exhausted,\textsuperscript{615} though there has been a peculiar dispute about this point in South

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\textsuperscript{612} Thus, one court has held that a “Self-Initiated Progress Report” process, which permitted prisoners denied parole to seek reconsideration six months or more later and show that circumstances have changed, was not equivalent to a grievance system and need not be exhausted. Armstrong v. Beauclair, 2007 WL 1381790, *8-9 (D.Idaho, Mar. 29, 2007) (“It is clear that the SIPR is not a problem-solving mechanism. . . .”). (The court did not address the question whether the exhaustion requirement was even applicable to denial of parole, which arguably is not an issue of “prison conditions” subject to the exhaustion requirement. See § IV.B.2, above.) Similarly, a system that exists only on paper is not an available remedy. Thus, where it was alleged that “[t]here is no grievance committee here, your grievances are simply turned over to the person you file on and you get threatened,” the court could not dismiss for non-exhaustion. Martin v. Sizemore, 2005 WL 1491210, *1, *3 (E.D.Ky., June 22, 2005).


\textsuperscript{615} 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); 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).


A recent decision rings a new change 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
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,” and that “[c]ompliance with prison grievance procedures, therefore, is all that is required by the PLRA to ‘properly exhaust.’” 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. (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 the prison where the prisoner is held, 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 that administrative tort claims procedures need not be exhausted, and

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2829900, *3 (D.S.C., Sept. 1, 2009), aff’d, 2010 WL 331498 (4th Cir., Jan. 28, 2010). Therefore, it holds, prisoners must appeal to that court, but not further to the South Carolina Supreme Court. Id., *4.

620 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).
621 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. 633, below.
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. 623

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.’” 624

The decision continues:

Legislative history also suggests that the statutory phrase “administrative remedies” refers exclusively to prison grievance procedures. Senator Kyl, one of the co-sponsors of the PLRA, testified:

Mr. President, I join Senator Dole in introducing the Prison Litigation Reform Act of 1995. This bill will deter frivolous inmate lawsuits. . . . Section 7 will make the exhaustion of administrative remedies mandatory. Many prisoner cases seek relief for matters that are relatively minor and for which the prison grievance system would provide an adequate remedy. 625

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), predecessor to the PLRA, 626 as shown by

623 Id. at 1069.
626 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).
legislative history and judicial interpretation. 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.

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. In effect, the FTCA and Bivens

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628 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.”)

629 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”).

630 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.

631 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); 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
claims are treated as separate worlds for exhaustion purposes, without much theoretical discussion of why. An exception may or may not exist at the U.S. Marshals Service, where court decisions 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.


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.

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.
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,\(^634\) a state statutory procedure for seeking a declaratory judgment from a state agency,\(^635\) a state statutory “citizen’s complaint” procedure,\(^636\) or state medical malpractice administrative procedures.\(^637\)

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.\(^638\) 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,”\(^639\) rejecting the argument that that remedy need not be exhausted because it

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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).

\(^634\) Handberry v. Thompson, 2003 WL 194205, *11* (S.D.N.Y., Jan. 28, 2003) (“In *Porter [v. Nussle]*, the Court noted that Congress wished to afford *corrections officials* the opportunity to address complaints internally. . . . This observation is inconsistent with a rule requiring exhaustion of a remedy which is outside of the prison and which does not involve prison authorities.”), *aff’d in part, vacated in part, and remanded on other grounds*, 446 F.3d 335 (2d Cir. 2006). On appeal, the court did not address whether IDEA exhaustion was required by the PLRA, but held that if it was, the IDEA remedy was not “available” for purposes of plaintiffs’ claims. 446 F.3d at 344 n.3.


\(^638\) O’Guinn v. Lovelock Correctional Center, 502 F.3d 1056, 1062-64 (9th Cir. 2007).


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does not result in action but only in findings or advice, and that it does not even investigate most individual complaints submitted to it. Other courts, however, held that exhaustion of the DOJ remedy was not required. The question became moot as to the Department of Correctional Services 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. As far as I know, it has not been addressed or even raised elsewhere, except in the above cited Ninth Circuit O’Guinn decision.

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.

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641 Burgess, 2004 WL 527053, *4. Plaintiff submitted letters to other prisoners from DOJ stating that because of limited resources and numerous complaints, it does not investigate individual prisoner complaints except as part of a review of the entire state prison system.


In Sharif, the court first addressed the PLRA exhaustion requirement and noted that the plaintiff had exhausted the prison grievance procedure, then rejected the argument that the plaintiff failed to exhaust remedies with respect to his ADA and Rehabilitation Act claims, holding that neither statute requires exhaustion of DOJ remedies. Id., *3. Thus, Sharif holds, in substance, that the PLRA exhaustion requirement is satisfied by exhaustion of the internal prison grievance system, and that whether ADA and Rehabilitation Act remedies must be exhausted is determined by those statutory schemes and not by the PLRA.


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.\(^{645}\)

In such cases, the specialized system, rather than the inapplicable grievance system, must be exhausted,\(^{646}\) consistently with the general rule that prisoners must

\(^{645}\) 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.

follow the prisons’ rules governing administrative remedies. A prisoner who exhausts the specialized complaint system for a problem need not also file a grievance about the same problem unless the prison’s rules so direct. If the administrative system gives the prisoner a choice among multiple remedies, exhausting one of the choices will satisfy the exhaustion requirement. 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.

Accommodation procedure had not exhausted; 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).

In Brown v. Valoff, 422 F.3d 926, 937-40 (9th Cir. 2005), the court 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. 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.


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. 408-420. 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 408.


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 Baker v. Finnan, 2009 WL 4506331, *2 (S.D.Ind., Nov. 30, 2009) (dismissed for non-exhaustion absent evidence that referral to internal affairs prevented continuation of the grievance process).
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. However, when a complaint is referred to an internal affairs or similar body, and it does not appear that there is any further remedy for the prisoner, the prisoner has exhausted.

The distinctions among remedies are not always clear as applied to a particular case, and courts have held that prisoners are not to be victimized for legitimate misunderstandings. Thus, the Second Circuit has held that a prisoner complaining of a retaliatory disciplinary charge based on falsified evidence was justified in filing a

651 Several courts have refused to dismiss for non-exhaustion where their grievances or complaints were referred for investigation and it was unclear what, if anything, the prisoner was required or allowed to do to complete exhaustion. 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); 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).

652 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); 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); 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).
disciplinary appeal rather than a grievance, since his interpretation of the rules was reasonable even if wrong. Prisoners are also entitled to rely on the instructions of prison personnel as to which remedy to use. 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.

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

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653 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 identify” 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 Amador v. Superintendents of Dep’t of Correctional Services, 2007 WL 4326747, *7-8 (S.D.N.Y., Dec. 4, 2007) (dismissing sexual abuse claims of prisoners who complained to Inspector General, as official instructions said they could, rather than filing grievances); 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. 407-420, above.

654 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); 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. Clauussen, 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. 760, below, concerning prisoners’ reliance on prison personnel’s advice whether issues are grievable.

655 Woodford v. Ngo, 548 U.S. 81, 103 (2006); see §IV.E.7, above, for further discussion of this point.
official, 656 or cooperating in an internal investigation 657—will generally not meet the PLRA exhaustion requirement. 658 Of course the provisions of a particular grievance system may lead to a different conclusion, 659 as may the circumstances of a particular case. 660

656 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.


659 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
Other decisions have held that complaints that were in fact reviewed at the highest levels of the agency satisfy the exhaustion requirement even if they were not processed through the grievance system.\textsuperscript{661} Some of these are arguably overruled by the Supreme

\textsuperscript{660}In re Bayside Prison Litigation, 2009 WL 1803271, *2 (3d Cir., June 25, 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); 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).

\textsuperscript{661}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); 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); Franklin v. Oneida Correctional Facility, 2008 WL 2690243, *7 (N.D.N.Y., July 1, 2008) (denying summary judgment where prisoner’s letter to Commissioner prompted an investigation that might have made a grievance redundant); 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), \textit{report and recommendation adopted in part,} 2001 WL 243535 (S.D.N.Y., Mar. 12, 2001); see Prendergast v. Janecka, 2001 WL 793251, *1 (E.D.Pa., July 10, 2001) (“Moreover, exhaustion may have occurred. Plaintiff claims to have notified several prison officials, including the warden, of his alleged lack of dental treatment.”)

In \textit{Lewis v. Gagne}, the court gave great weight to the fact that the facility’s own orientation handbook presented the grievance system as only one of several ways residents could assert their rights, and the facility’s own actions showed that it addressed and investigated problems that were not presented through the grievance system. 281 F.Supp.2d at 434.
Court’s holding that the exhaustion requirement is governed by a procedural default standard, insofar as prison rules prescribe use of the grievance system or some other particular administrative system for particular kinds of complaints. The Second Circuit has taken this view in *Macias v. Zenk*, 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. *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.”

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. 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.

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, or its widely followed decision in *Hemphill v. New*

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663 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.

664 495 F.3d 37 (2d Cir. 2007).


666 *Macias* v. Zenk, 495 F.3d at 43-44.

667 *See* nn. 545-546, above.

668 *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).

669 *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. 508 et seq., 653, above.
York, where the plaintiff wrote to the Superintendent rather than filing a grievance concerning an alleged assault by staff. He said that he had been assaulted again and threatened if he complained in any fashion. The court held that the threats against him may have made the grievance procedure unavailable to him, but not the informal alternative of a letter to the Superintendent:

The test for deciding whether the ordinary grievance procedures were available must be an objective one: that is, would “a similarly situated individual of ordinary firmness” have deemed them available. Cf. Davis v. Goord, 320 F.3d 346, 353 (2d Cir. 2003) (articulating the “individual of ordinary firmness” standard in the context of a prisoner retaliation claim). Moreover it should be pointed out that threats or other intimidation by prison officials may well deter a prisoner of “ordinary firmness” from filing an internal grievance, but not from appealing directly to individuals in positions of greater authority within the prison system, or to external structures of authority such as state or federal courts. This may be so, if for no other reason, because seeking a criminal investigation or filing a civil rights complaint may enable an inmate to draw outside attention to his complaints, thereby neutralizing threatened retaliatory conduct from prison employees.

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.” 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.”

In adopting its procedural default rule requiring “proper exhaustion,” i.e., exhaustion compliant with the agency’s “critical procedural rules,” 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.

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670 380 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).
671 Hemphill, id. at 688. The effect of threats and retaliation on exhaustion obligations is discussed further at nn. 733-741, below.
672 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.
673 Hemphill, id. at 690 n.8.
675 See nn. 495-499, above.
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 the highest level of the grievance system, the Central Office Review Committee. 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. 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.

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. District court decisions rejected that view.

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676 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.

677 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.

678 See 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).

679 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.
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. In my view, poorly 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.

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.” In August 2003, while Hemphill and its companion cases were being briefed, the Department of Correctional Services amended its grievance rules to provide, Eversley, supra, as well as testimony from the DOCS grievance director in other proceedings. Hemphill v. New York, 380 F.3d 680, 690 n.7 (2d Cir. 2004); see also Larry v. Byno, 2003 WL 1797843 (N.D.N.Y., Apr. 4, 2003) (noting that letter to Superintendent was treated as a harassment grievance, assigned a grievance number, and investigated; claim dismissed because the prisoner did not appeal the failure to render a decision).

In Gadson, prison officials did not record and treat the plaintiff’s harassment complaint according to the harassment grievance procedures, leading the court to observe: “Prison officials cannot have it both ways—they cannot obstruct an inmate’s pursuit of administrative remedies exhaustion by failing to comply with statutory procedure on the one hand, and then claim that the inmate did not properly exhaust these remedies on the other.” 2002 WL 982393, *3; accord, Evans v. Jonathan, 253 F.Supp.2d 505, 509 (W.D.N.Y. 2003).

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).

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. 545-546, 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).

Hemphill, 380 F.3d at 689.
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. 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 straightened out without needing to do so. The Second Circuit initially held that a prisoner who succeeded in resolving his complaint informally had exhausted, since the grievance policy says that the formal process was intended to supplement, not replace, informal methods, in effect, 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.

684 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.


Thus this issue is not fundamentally different from the question what is the effect of a favorable grievance decision.\footnote{687}

In subsequent cases the Second Circuit appears to have abandoned its informal exhaustion holding. In \textit{Braham v. Clancy},\footnote{688} 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 because he failed to file a formal grievance after the assault. The court reasoned that the grievance process could have provided other relief, such as changes in policies and procedures or discipline of staff, and therefore remedies remained available within the meaning of the statute.\footnote{689} Similarly, in \textit{Ruggiero v. County of Orange},\footnote{690} 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 \textit{Marvin v. Goord} “does not imply that a prisoner has exhausted his administrative remedies every time he receives his desired relief through informal channels.”\footnote{691}

received an apology had informally exhausted). \textit{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).

In \textit{Stephenson v. Dunford}, 320 F.Supp.2d 44, 51 (W.D.N.Y. 2004), \textit{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.


\footnote{687} See § IV.E.1, above.

\footnote{688} 425 F.3d 177 (2d Cir. 2005).

\footnote{689} \textit{Braham}, 425 F.3d at 183. However, the court declined to dismiss for non-exhaustion, holding that the plaintiff’s informal requests might have given prison officials sufficient notice of the problems “‘to allow them to take appropriate responsive measures,’ thereby satisfying the exhaustion of administrative remedies requirement,” \textit{id.}, \textit{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. \textit{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 \textit{Braham} does not survive the “proper exhaustion” holding of \textit{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 \textit{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, \textit{id.}, so the court had no occasion to decide whether such a claim would satisfy the exhaustion requirement.

\footnote{690} 467 F.3d 170, 177 (2d Cir. 2006)

\footnote{691} \textit{Ruggiero}, 467 F.3d at 177. For further discussion of \textit{Braham} and \textit{Ruggiero}, see nn. 334-337, above.
If prison rules provide that an informal complaint is sufficient to complete the administrative process, a prisoner who does so has exhausted.\textsuperscript{692} 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.\textsuperscript{693}

G. “Available” Remedies

The statute requires exhaustion of remedies that are “available,” and under \textit{Booth} v. \textit{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.”\textsuperscript{694} No particular structure or degree of formality is required of a grievance system as long as it is constituted to act on individuals’ complaints.\textsuperscript{695} Remedies may be deemed unavailable if there is no “clear route” for challenging the conduct in question.\textsuperscript{696}

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

\textsuperscript{692} 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).


\textsuperscript{694} Booth v. Churner, 532 U.S. 731, 736 (2001) (emphasis supplied) (holding unavailability of damages did not make remedy unavailable); \textit{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.”); see Brown v. Croak, 312 F.3d 109, 113 (3d Cir. 2002) (“‘Available’ means ‘capable of use; at hand.’ \textit{See} Webster’s II, New Riverside University Dictionary 141 (1994 ed.); \textit{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 \textit{Braham} v. \textit{Clancy}, 425 F.3d 177 (2d Cir. 2005), the court held that a prisoner who sought a change of cellmate to avoid being assaulted, was assaulted after no action was taken, and was moved after the assault still had an available remedy via the grievance system; even though the action he had been seeking had been accomplished, the prison system could still have provided other relief, such as changing policies and procedures or disciplining staff. However, the court also held that receiving the cell change could be a “special circumstance” that might lead an uncounseled prisoner reasonably to conclude that he had satisfied the exhaustion requirement. \textit{See also} 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). \textit{But see} Noonor 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).

\textsuperscript{695} \textit{Westefer} v. \textit{Snyder}, 422 F.3d 570, 580 (7th Cir. 2005) (finding record “hopelessly unclear” whether particular decisions could be challenged through the grievance process); \textit{see} nn. 411-415, 508-515, 653-655, above, and 758, 761, below, concerning the lack of clarity in prison remedies.

\textsuperscript{696} See nn. 609-612, above.
should be considered first.\textsuperscript{697} 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.\textsuperscript{698}

1. Grievable and Non-Grievable Issues

The first question about the “availability” of an administrative remedy is whether it has authority to provide “some redress” for the kind of complaint that is at issue.\textsuperscript{699} It is common for some issues not to be “grievable” in a particular grievance system because the system explicitly excludes them from coverage,\textsuperscript{700} or because the informal practices of staff have the same effect.\textsuperscript{701} For example, the New York City jail grievance directive lists the following “non-grievable issues”:

\textsuperscript{697} Abney v. McGinnis, 380 F.3d 663, 667 (2d Cir. 2004).
\textsuperscript{698} See nn. 127, 322, 595, 672-673, above, and § IV.G.3, and n. 820, below.
\textsuperscript{699} 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 \textit{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.
\textsuperscript{701} 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
1. matters under investigation by the Inspector General;
2. complaints pertaining to an alleged assault or verbal harassment;
3. complaints pertaining to matters in litigation;
4. complaints where there is already an existing appeal mechanism within the Department of Correction (that is, determinations of disciplinary hearings and classification);
5. matters outside the jurisdiction of the Department of Correction; and
6. complaints which do not directly affect the inmate.

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 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 successor, Appendix G).

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).

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. Several other courts have dismissed New York City cases while erroneously citing the New York State prison grievance procedure.

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 jail’s 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, 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.

In a third case, decided by the same judge on the same day, the jail Grievance Coordinator submitted an affidavit stating that he told the plaintiff that to grieve medical concerns “he would need written physician authorization for each request,” a requirement that does not appear in the grievance policy.

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

to reach the issue on appeal). But see Berry v. Kerik, 237 F.Supp.2d 450, 451 (S.D.N.Y. 2002) (stating—incorrectly in my view—that under Porter v. Nussle, 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).


source.” 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.

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. 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.

Prisoners will

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708 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.’”)

709 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).

710 See § IV.F.2, n. 646, 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).

711 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 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
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.\textsuperscript{712}

2. Unavailability Based on the Facts

A remedy may also be unavailable for reasons peculiar to a particular case. For example, one prisoner was held not to have had an available remedy because his hand was broken and he could not prepare a timely grievance, and was not allowed to file an untimely one when he was again able to write.\textsuperscript{713} Courts have acknowledged other medical reasons making administrative remedies unavailable,\textsuperscript{714} though in some cases they have not credited purported medical excuses.\textsuperscript{715} A number of decisions have held, the ground that plaintiffs had at least to start the grievance process to determine whether any remedies were available.

\textsuperscript{712} See n. 760, below.

\textsuperscript{713} Days v. Johnson, 322 F.3d 863, 867 (5th Cir. 2003) (noting that “one’s personal ability to access the grievance system could render the system unavailable”).

\textsuperscript{714} See 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 and was isolated from anyone who could help him); 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 excuses proper exhaustion).

\textsuperscript{715} 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); Leaf v. Felker, 2010 WL 144357, *4 (E.D.Cal., Jan. 8, 2010) (holding injuries did not justify non-exhaustion where medical records indicated plaintiff was in good health, his injuries would not have interfered with thinking and communication, and he made other complaints during the same period); Hunter v. Indiana Dept. of Corrections, 2009 WL 3199170, *6 (N.D.Ind., Sept. 29, 2009) (holding physical and mental condition of prisoner just released from the hospital did not justify non-exhaustion where he made other complaints during the same time period); Lopez v. Smelosky, 2009 WL 3062342, *3 (S.D.Cal., Sept. 22, 2009) (rejecting claim of medical inability to file a grievance since plaintiff was not housed in a medical unit, he filed another grievance in the same time period, and he had been medically cleared for normal activity before the grievance deadline expired); Chavez v. Thorton, 2008 WL
as Days implies, that prisoners who could not file grievances when they would be timely were obliged to file them untimely, notwithstanding the governing “proper exhaustion” rule. 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, impaired literacy or lack of education, language barrier, or

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716 See cases cited in n. 579, above.

717 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 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).

718 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. Ifediola, 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). 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


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 Cole v. Sobina, 2007 WL 4460617, *7 (W.D.Pa., Dec. 19, 2007) (refusing to dismiss for non-exhaustion where plaintiff alleged mental disabilities which could account for his noncompliance with grievance procedures); Whittington v. Sokol, 491 F.Supp.2d 1012, 1019 (D.Colo. 2007) (refusing to dismiss for non-exhaustion where plaintiff alleged he had no remedies because he was mentally incapacitated and was transferred to a mental institution shortly after the incident he sued about); Petty v. Goord, 2007 WL 724648, *8 (S.D.N.Y., Mar. 5, 2007) (refusing to dismiss for non-exhaustion where prisoner was transferred to a mental hospital after filing a grievance and missed the final deadline; the court notes there is no evidence before it of his mental state at the time, and holds that two months plus in a mental hospital constituted special circumstances); Ullrich v. Idaho, 2006 WL 288384, *3 (D.Idaho, Feb. 6, 2006) (dismissing for non-exhaustion, but directing prison officials to appoint someone to assist the plaintiff, who alleged mental illness and denial of psychiatric treatment, complete exhaustion); LaMarche v. Bell, 2005 WL 2998614, *3 (D.N.H., Nov. 8, 2005) (acknowledging that evidence of mental illness might support argument that late grievance should be deemed effective); see also Macahilas v. Taylor, 2008 WL 220364, * 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-
mental disabilities prevented exhaustion, though often on the ground that the plaintiff did not sufficiently plead or provide evidentiary support for the claim—a rather Catch-

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” to solve the problem administratively, but it did not clarify what it thought the PLRA requires or permits in this sort of situation.

See 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); see Walker v. Lovelle, 2009 WL 1313221, *2 (N.D.Cal., May 11, 2009) (rejecting claim of mental health problems where the prisoner had filed and appealed other grievances); Baker v. Schriro, 2008 WL 622020, *5-6 (D.Ariz., Mar. 4, 2008) (rejecting claim of inability to follow grievance procedure where plaintiff was representing himself in three criminal appeals and initiating three civil rights actions during the same time period), review denied, 2008 WL 2003757 (D.Ariz., May 8, 2008); 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); 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); 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
22ish approach to pro se litigants who assert that their mental disabilities prevented them from properly completing an administrative process that is supposed to be simpler than litigation. The court that has most extensively discussed the appropriate standard for determining such claims reached a conclusion that is quite unfavorable to plaintiffs, holding that the question is whether

an inmate's mental incapacity rendered him unable to communicate in any intelligible form for a particular period. The relevant issue is not whether the individual can be classified as “mentally ill,” but rather, whether the individual's impairment renders him unable to comply with the grievance procedure. If an inmate's physical or mental incapacity rendered him completely unable to file a grievance, and this is evidenced to the Court's satisfaction, the inmate will not be required to do so during that period. Once the inmate recovers sufficiently to file a grievance, however, the inmate must attempt to comply with the facility's grievance procedure and the grievance must be denied before those administrative remedies are rendered unavailable for purposes of the PLRA. 723

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. 724 However, transfer or absence will not automatically

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723 Braswell v. Corrections Corp. of America, 2009 WL 2447614, *8 (M.D.Tenn., Aug. 10, 2009). In Braswell, the 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. Id., *9.

724 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); 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. Adapt...
excuse exhaustion; 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. This determination can be difficult

Flowers v. City of New York (DOCS), 2009 WL 3415153, *3 (S.D.N.Y., Oct. 22, 2009) (transfer was no excuse where plaintiff remained in city jails for three months after his incident and did not exhaust); Hill v. U.S. Attorney's Office, E.D.N.Y., 2009 WL 2524914, *5 (E.D.N.Y., Aug. 14, 2009) (plaintiff transferred to federal prison after 10 days had time to file a grievance at county jail); Napier v. Laurel County, Ky., 2009 WL 2255767, *3-4 (E.D.Ky., July 29, 2009) (where post-transfer grievances were in fact processed, prisoner was obliged to submit one even though policy was unclear); 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). Defendants have the burden of proof on this point as on other issues concerning exhaustion. Key v. Fischer, 2008 WL 2653840, *6 (S.D.N.Y., July 7, 2008) (declining to dismiss where defendants provided no
to make in some systems.\textsuperscript{726} In some cases courts have simply assumed that the grievance system was available to the absent prisoner without inquiring whether that was actually the case,\textsuperscript{727} rather than “establish[ing its] availability . . . from a legally sufficient source.”\textsuperscript{728} Thus, New York City has represented to the federal courts that its grievance system cannot be used by persons out of City custody,\textsuperscript{729} but in at least one case a federal court has simply declared without support that the prisoner should have exhausted by mail.\textsuperscript{730} 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 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

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).

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.


\textsuperscript{726} See 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); \textit{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).

\textsuperscript{726} Snider v. Melinendez, 199 F.3d 108, 114 (2d Cir. 1999).


\textsuperscript{730} 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 \textit{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.” \textit{Id.} at n.3.
efforts to protect and preserve his rights from the new location to which he is moved or from the original facility promptly upon his return there.”

The court does not explain (and there is no indication that it considered) exactly how a prisoner is supposed to keep informed of these matters when the means of giving the prisoner notice is to send a decision to a place where he is no longer held.

A remedy may be made unavailable by the acts or omissions of prison personnel. For example, there is a recurrent pattern in American prisons of threats and retaliation against prisoners who file grievances, litigation, and other complaints. The Second Circuit has held that threats or assaults directed at preventing prisoners from complaining may make otherwise available remedies unavailable in fact if “‘a similarly

732 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).
situated individual of ordinary firmness’ [would] have deemed [the remedy] available,” the standard applied in First Amendment retaliation cases.\textsuperscript{734} Numerous other courts have adopted that holding or a similar formulation.\textsuperscript{735} Some district courts have rejected this view.\textsuperscript{736} Others have rejected such arguments on the narrower ground that the plaintiff’s factual allegations are insufficient to support the claim,\textsuperscript{737} or that the plaintiff’s


\textsuperscript{735} 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 Kabab); Kabab v. Stepp, 458 F.3d 678, 684-86 (7th Cir. 2006) (adopting Hemphill analysis); 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); see Appendix A for additional authority on this point.


\textsuperscript{737} See, e.g., 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
filing of other complaints is inconsistent with it. However, 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.’ Thus the fact that a prisoner has, e.g., written a letter of complaint to the Superintendent (as in Hemphill) does not establish that he or she was not deterred from filing an ordinary grievance. Nor does the filing of grievances or complaints on one subject negate the possibility of intimidation as to others. As the Seventh Circuit observed in adopting and applying the Hemphill standard, ‘The ability to take advantage of administrative grievances is not an ‘either-or’ proposition.’

Other obstructive actions or circumstances may make remedies unavailable. A remedy may be unavailable because it simply is not functioning when or where the


Madyun v. Cook, 2006 WL 2053466, *2 (7th Cir., July 24, 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); 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).

Hemphill, 380 F.3d at 688. In Turner v. Burnside, 541 F.3d 1077, 1086 (11th Cir. 2008), the court quoted the above-quoted language from Hemphill and said “[t]hat makes sense to us,” but did not preclude the district court from considering that the plaintiff had filed a lawsuit in determining whether the threat deterred the plaintiff or would have deterred a reasonable prisoner of ordinary firmness.

Some prison systems provide a means for prisoners to make complaints to higher authority outside the prison, and courts may consider that fact in assessing claims of fear of retaliation. See Bigbee v. Sadowski, 2008 WL 4330566, *3 (W.D.Wis., Feb. 21, 2008).


Kaba v. Stepp, 458 F.3d at 688-86 (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).
prisoner needs to file a grievance.\textsuperscript{742} Prison rules and procedures may make remedies unavailable. For example, a rule denying postage to indigents to mail a grievance appeal may make the appeal unavailable,\textsuperscript{743} as may the absence of copying facilities where the rules require multiple copies of documents,\textsuperscript{744} deprivation of writing materials or documentation to prisoners in a segregation unit or elsewhere,\textsuperscript{745} or other situations that make prisoners unable to comply with grievance rules.\textsuperscript{746} Sometimes prisoners in a

\textsuperscript{742} 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); 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”).

\textsuperscript{743} 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. Schneider, 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).

\textsuperscript{744} 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”).


\textsuperscript{746} See, e.g., 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); Brown v. Runnels, 2006 WL
particular status or situation are simply excluded from using the grievance system. \^{747} 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. \^{748} A

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); see n. 313, 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. \^{747} 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 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). \^{748} Rules limiting prisoners to a certain number of grievances may make the remedy unavailable for prisoners who are over the limit. 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 6669555, *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). But 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); 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); 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); 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
system of “modified grievance access,” which requires prior permission to file a grievance, makes the remedy unavailable if permission is not granted.749

Remedies may also be made unavailable by actions by supervisors or grievance staff with respect to particular grievances or grievants,750 by purposeful misconduct,751 or

unavailable for problems that occurred over a period of months). See Appendix A for additional authority on this point.


750 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); 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.”); see Appendix A for additional authority on this point; see n. 318, 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.
by neglect or accident,\textsuperscript{752} or events that are merely unexplained,\textsuperscript{753} though courts are unlikely to credit vague or conclusory claims of obstruction.\textsuperscript{754} Numerous decisions hold

\textsuperscript{751} 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); 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); see Appendix A for additional authority on this point.

\textsuperscript{752} 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 \textit{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.

\textsuperscript{755} 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
that the failure or refusal to provide necessary forms makes the remedy unavailable or otherwise excuses failure to exhaust,\textsuperscript{755} though some courts reject such claims out of hand if they are not supported by considerable factual detail or evidence of effort to obtain the forms,\textsuperscript{756} or if the prisoner filed other grievances around the same time.\textsuperscript{757}


\textsuperscript{755}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); 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. Quiagley, 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”); 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 or knew about it). But see 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); 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).

\textsuperscript{756}See, e.g., Noland v. Garfield County Detention Center, 2009 WL 5067206, *6 (W.D.Okl., Dec. 15, 2009) (rejecting claim of denial of forms by a single staff member where the plaintiff did not explain why he didn’t try to get forms from someone else, and there was no time limit for grievances); Wall v. Black, 2009 WL 3215344, *6 (S.D.Miss., Sept. 30, 2009) (holding 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.Okl., Mar. 25, 2008) (citing plaintiff’s failure to state “to whom or when the requests were made or to explain his access to certain forms and not others”); Dye v. Bartow, 2007 WL 3306771, *6 (E.D.Wis., Nov. 6, 2007) (citing plaintiff’s failure to identify the forms he requested and the date of request, to supply a copy of his request, or to submit evidence detailing officials’ response to his requests), aff’d, 282 F.ed.Appx. 434 (7th Cir. 2008) (unpublished); Beasley v. Kontek, 2007
A remedy may be deemed unavailable if prisoners are misinformed by prison personnel about its operation or availability\textsuperscript{758}—though many such claims have been rejected.\textsuperscript{759} A number of decisions have refused to dismiss for non-exhaustion where 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).\textsuperscript{757} See, e.g., Guel v. Larkin, 2008 WL 1994942, *5-6 (W.D.Ark., May 6, 2008).

\textsuperscript{758}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); Pavé 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); 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); Rye v. Erie County Prison, ___ F.Supp.2d ___, 2009 WL 2982640, *3 (W.D.Pa., Sept. 14, 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); 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. Jahneke, 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); see Appendix A for additional authority on this point; see also 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).

\textsuperscript{757}See 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); 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
prisoners had relied on prison personnel’s representations that an issue was non-grievable. 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.

760 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); 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); 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); see Appendix A for additional authority on this point; see also 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); Singh v. Goord, 520 F.Supp.2d 487, 496 (S.D.N.Y., Oct. 9, 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).

761 Williams v. Marshall, 2008 WL 4787152, *4 (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);
However, 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.\textsuperscript{762} Courts may also discount

\textsuperscript{762}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); 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); Torres v. Anderson, ___ F.Supp.2d ___, 2009 WL 4878197, *4 (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 denial of 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); 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, 127 S.Ct. 1212 (2007).


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

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prisoners’ claims of ignorance of remedies where the prisoners have a record of using them.\textsuperscript{763} In some instances, a remedy may be made unavailable by officials’ nondisclosure of information necessary for the prisoner to know to make a complaint.\textsuperscript{764}

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.\textsuperscript{765} 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.\textsuperscript{766}

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.\textsuperscript{767}

There is an open question whether a remedy that is too slow to prevent irreparable harm is “available” for PLRA purposes.\textsuperscript{768}

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.\textsuperscript{769} 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

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Courts have held that prisons are under no obligation to inform prisoners about the PLRA exhaustion requirement itself, even though they may be required to inform prisoners about the grievance procedure. Regan v. Frank, 2008 WL 508067, *5 (D.Haw., Feb. 26, 2008).


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.


See n. 579, above.

See § IV.H, below.

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.” 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, ___ F.Supp.2d ___, 2009 WL 3013666, *30 (D.Colo., Sept. 17, 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).
exhaustion.\textsuperscript{770} This argument is a bit simplistic in cases of purposeful obstruction by prison staff, since prisoners, who are mostly proceeding \textit{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.\textsuperscript{771}

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,\textsuperscript{772} or misleading of prisoners about the availability or


\textsuperscript{771} For a rare case in which a \textit{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 \textit{inter alia} that defendants falsely claimed not to have received plaintiff’s grievances).

\textsuperscript{772} 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); 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 \textit{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 \textit{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.
requirements of remedies. Some courts, however, have said that claims of estoppel are limited to cases of affirmative misrepresentation or misconduct by officials. The Second Circuit has suggested that it is better to consider unavailability first, which makes sense because it is simpler and the effect of an estoppel argument in this context remains a bit murky.


See 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.”); Tweed v. Schuetze, 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). But see Dillon v. Rogers, ___ F.3d ___, 2010 WL 378306, *6 (5th Cir. 2010) (estoppel is not appropriate where plaintiff did not show reasonable reliance on other party’s conduct); Berry v. City of New York, 2002 WL 31045943, *8 (S.D.N.Y., June 11, 2002) (declining to credit estoppel claim where the plaintiff had used the grievance system successfully on other occasions).


Initially, the Second Circuit held that defendants’ actions “may . . . estop[] the State from asserting the exhaustion defense.”

However, it has also said that where several defendants played different roles in the acts giving rise to estoppel, “it is possible that some individual defendants may be estopped, while others may not be.”

Some courts have treated estoppel as a personal defense and have declined to apply it where the persons responsible for the estopping conduct were not the named defendants.

Others, however, have held defendants estopped to claim non-exhaustion where the actions of grievance personnel, or other staff members who were not named defendants, unjustifiably prevented the prisoner from exhaustion. This result makes sense.

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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.
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,\(^{780}\) 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,\(^{781}\) consistently with the general principle that exhaustion must precede filing.\(^{782}\) 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.\(^{783}\) The Second Circuit once

\(^{780}\) “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).

\(^{781}\) Horacek v. Caruso, 2009 WL 125398, *3 (W.D.Mich., Jan. 15, 2009); 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); see Appendix A for additional authority on this point; see also 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).

\(^{782}\) See § IV. E, above.

\(^{783}\) See 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
said the question was open whether there was an irreparable harm exception to PLRA exhaustion, but apparently no lower court has granted relief based on that statement, and courts have questioned whether it is consistent with Supreme Court decisions. 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.

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. No one seems actually to have obtained relief on that basis yet (though one court threatened to grant it and jail officials hastily addressed the problem), 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.

This question may also be framed in terms of the statutory language: arguably a remedy that cannot be exhausted in time to prevent irreparable harm is not “available” for 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).

\(784\) See Marvin v. Goord, 255 F.3d 40, 43 (2d Cir. 2001).


\(786\) 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. 173-176, above.

\(787\) Jackson v. District of Columbia, 254 F.3d 262, 267–68 (D.C. Cir. 2001). 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.


purposes of such a claim. The only decision I am aware of that comes close to ruling on that argument rejects it.\footnote{790}

Courts have held that an allegation of “imminent danger of serious physical harm” for purposes of avoiding the PLRA’s “three strikes provision”\footnote{791} does not except the prisoner from the exhaustion requirement.\footnote{792}

I. Statutes of Limitations

Decisions to date mostly hold that the statute of limitations is tolled during administrative exhaustion.\footnote{793} 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,\footnote{794} and a few have held

\footnote{790} In \textit{Smith v. N.C.D.O.C.}, 2007 WL 1200097 (W.D.N.C., Apr. 19, 2007), 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.

\footnote{791} 28 U.S.C. § 1915(g); see § VIII, below.


\footnote{793} Brown v. Valoff, 422 F.3d 926, 943 (9th Cir. 2005) (“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. \textit{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 \textit{Ricks} was not one which had to be exhausted before suit could be brought, so \textit{Ricks} is not relevant to the question of tolling during exhaustion under the PLRA. In \textit{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 \textit{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.

that the period is not tolled under state law.\textsuperscript{795} Other decisions have been unclear or equivocal on the basis for tolling during exhaustion.\textsuperscript{796} A few decisions have stated unequivocally that the PLRA itself requires tolling during exhaustion.\textsuperscript{797}

The limitations period is not further tolled during exhaustion of state judicial remedies, since the statute does not require judicial exhaustion.\textsuperscript{798} Nor is it automatically tolled during the pendency of a suit dismissed for failure to exhaust,\textsuperscript{799} though as noted below, equitable tolling may be appropriate in some such cases.

One court has held that the limitations period, if tolled for exhaustion, begins to run again when the prisoner is released, since the exhaustion requirement no longer

\textsuperscript{795} 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), \textit{report and recommendation adopted}, 2010 WL 420035 (D.Colo., Feb. 1, 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).


\textit{[§ 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.}

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—an assumption that courts have rejected in other contexts. 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. One court has held that where a prisoner received no response to his grievances, the limitations period was tolled until he gave up. Others have held that absent a response, the limitations period should be deemed to run again starting at the deadline (if any) for prison officials to resolve a grievance—i.e., at the time the prisoner is entitled to bring suit. If several administrative proceedings arise from the subject matter of a lawsuit, tolling ends for each claim when the relevant proceeding is finished; the claims are not all tolled until the last proceeding concludes.

The limitations period is not tolled by an administrative proceeding that could not have remedied the problem of which the prisoner complains, or one that was not proper under the grievance rules. Exhaustion does not toll (or revive) the limitations period if the period has already expired when the prisoner commences exhaustion. Similarly, one court has held that an untimely attempt to exhaust does not toll the

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801 See n. 30, above.
804 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).
806 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).
limitations period. Courts have disagreed whether tolling for exhaustion runs consecutively or concurrently with other tolling provisions that may apply.

In cases that are dismissed for non-exhaustion, the claim will often be presumptively time-barred because of the delay in litigating exhaustion. These cases do not necessarily involve prisoners’ neglect of their legal duty to exhaust. Some of them may involve prisoners’ technical mistakes or misunderstandings in exhaustion, failure to exhaust because of threats or intimidation, or changes in the governing law of exhaustion after the prisoner has filed.

There are several possible ways to save meritorious claims dismissed for non-exhaustion after the limitations period has run. Some states have tolling provisions, which are applicable in federal court § 1983 actions, that give a litigant whose case is timely filed, but is then dismissed for reasons other than the merits, a certain period of time to re-file. That is the case in New 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, and

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811 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).

812 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.

813 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. 124, 598-602, above, and 819-820, below, concerning equitable tolling.

814 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
state law may further toll that six-month period during the pendency of administrative proceedings.\textsuperscript{815} However, not all state statutes of this type will benefit prisoners whose cases have been dismissed for non-exhaustion.\textsuperscript{816}

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.\textsuperscript{817} 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,\textsuperscript{818} but other decisions have held or suggested that equitable tolling may be applicable more generally.\textsuperscript{819} 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.\textsuperscript{820} 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 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, \textsuperscript{819} (S.D.N.Y., Jan. 27, 2005).

\textsuperscript{815} The relevant statute provides: “Where the commencement of an action has been stayed by a court or by statutory prohibition, the duration of the stay is not a part of the time within which the action must be commenced.” N.Y.C.P.L.R. § 204(a). The \textit{Villante} defendants’ argument, then—which appears correct—is that the PLRA exhaustion requirement is a “statutory prohibition” for purposes of § 204(a).

\textsuperscript{816} 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).

\textsuperscript{817} Wright v. Hollingsworth, 260 F.3d 357, 359 (5th Cir. 2001); \textit{accord}, Clifford v. Gibbs, 298 F.3d 328, 333 (5th Cir. 2002); \textit{see} nn. 124, 598-602, above, concerning equitable tolling.


\textsuperscript{819} See Ransom v. Westphal, 2009 WL 3756354, \textsuperscript{*}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 \textit{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. 598-602, above.

\textsuperscript{820} 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).
foreclosed by case law holding that stays are no longer permitted under the PLRA and that unexhausted claims must be dismissed.\textsuperscript{821} 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.\textsuperscript{822} 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.\textsuperscript{823}

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 \textit{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.”\textsuperscript{824} 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\textsuperscript{825} as well as cases where the plaintiff

\textsuperscript{821} See Neal v. Goord, 267 F.3d 116, 122 (2d Cir. 2001); see nn. 173-176, above.
\textsuperscript{822} 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).
\textsuperscript{823} Compare Spruill v. Gillis, 372 F.3d 218, 230 (3d Cir. 2004) (“Congress wanted to erect \textit{any barrier} it could to suits by prisoners in federal court, and a procedural default rule surely reduces caseloads (even though it may be a blunt instrument for doing so).”) (emphasis supplied) with Kane v. Winn, 319 F.Supp.2d 162, 220-21 (D.Mass. 2004) (“There is nothing in the PLRA’s legislative history to suggest that Congress intended to keep meritorious claims out of court. . . . Courts cannot lightly presume that Congress has an intent hostile to our legal system’s firmly embedded commitments to providing access to the courts to vindicate valid human rights claims, and interpreting the PLRA as a deliberate attempt to thwart such claims would obviously raise serious constitutional questions.”)
\textsuperscript{824} Rule 60(b)(1),(5),(6), Fed.R.Civ.P.
\textsuperscript{825} 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.”)
made an error of law. An prisoner who has relied on exhaustion law that was overruled in *Booth v. Churner* or *Porter v. Nussle*, or who did not anticipate them in a circuit where the question had not been decided when his or her complaint was filed, and whose claim may never be tried without relief, would seem to have a persuasive case under this body of law, as would a prisoner whose failure to exhaust was otherwise justified under the Second Circuit’s decisions. Although several courts have held that Rule 60(b) cannot be used to reinstate cases after a dismissal for non-exhaustion, these courts have not addressed this limitations issue.

It also would seem logical that a prisoner who has filed an action that will be dismissed for failure to exhaust or to exhaust properly should file a second action after non-exhaustion is cured but before the limitations period has run.

In addition to statute of limitations problems, the deadline for filing an administrative complaint will invariably have passed by the time of a dismissal for non-exhaustion. This problem is dealt with elsewhere.

A claim that is otherwise timely is not time-barred because exhaustion occurred outside the limitations period.

J. **Retroactivity of the Statute**

The PLRA exhaustion requirement does not apply to actions or appeals filed before its enactment. It does apply to suits filed after enactment even if the events complained about occurred before enactment. However, if the time limit on the administrative remedy had passed when the exhaustion requirement was enacted, so the

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828 See § IV.E.8, above.


830 Consequences of the retroactive application of Supreme Court decisions interpreting the PLRA are addressed in nn.512. 602, above.


prisoner never had a chance to comply with it, exhaustion is not required.\footnote{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).} 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.\footnote{Shariff v. Coombe, 655 F.Supp.2d 274, 284 (S.D.N.Y. 2009). Clarkson v. Coughlin, 2006 WL 587345, *3 (S.D.N.Y., Mar. 10, 2006). 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).} A post-PLRA motion to enforce a judgment in a case filed before enactment of the PLRA is not subject to the exhaustion requirement.\footnote{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. Guerey, 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, ___ F.Supp.2d ___, 2009 WL 4146391, *5 (N.D.Ill., Nov. 25, 2009) (exhaustion by a single class member will exhaust for the class); Young v. County of Cook, 2009 WL 2231782, *4 (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).}  

**K. Exhaustion and Class Actions**

In class actions,\footnote{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).} most decisions to date state that the PLRA requires only the named plaintiffs (and often a single named plaintiff) to exhaust.\footnote{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. Guerey, 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, ___ F.Supp.2d ___, 2009 WL 4146391, *5 (N.D.Ill., Nov. 25, 2009) (exhaustion by a single class member will exhaust for the class); Young v. County of Cook, 2009 WL 2231782, *4 (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).} Other courts have
simply certified classes without inquiring into exhaustion by anyone but the named plaintiffs, without commenting on the theoretical issue. These decisions are consistent with the general practice in class actions, which the PLRA does not purport to displace. There may be exceptions for exhaustion requirements that are jurisdictional, as the PLRA’s is not, or are found in statutory schemes that emphasize the need for maintaining case-by-case agency adjudication and in which the court’s role is limited to deferential review of an agency decision, but these concerns are inapplicable under the PLRA, since judicial review of prisoners’ civil rights complaints is de novo and not restricted to an administrative record or determination. 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.

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

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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).


See § IV.A, n. 123, above.


those cases in a Rule 23(b)(3) class action seeking damages for all class members.\textsuperscript{845} 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.\textsuperscript{846} Another court in a putative class damages suit noted that two of several named plaintiffs had been released before suit was filed, and questioned whether other class members were required to exhaust.\textsuperscript{847} 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.\textsuperscript{848}

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.”\textsuperscript{849} That holding remains applicable when plaintiffs in a class action seek preliminary relief benefiting individual unnamed class members.\textsuperscript{850} The PLRA does not disturb pre-existing principles of notice pleading and liberal construction, especially of \textit{pro se} pleadings,\textsuperscript{851} and those principles are equally applicable in class actions.\textsuperscript{852}

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, especially as matters of

\textsuperscript{846} Sanchez, id., *3-4.
\textsuperscript{847} Phipps v. Sheriff of Cook County, ___ F.Supp.2d ___, 2009 WL 4146391, *4, *14 n.11 (N.D.Ill., Nov. 25, 2009). Since plaintiffs sought only damages, there was no issue of released plaintiffs’ standing to seek injunctive relief.
\textsuperscript{848} 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).
\textsuperscript{849} Jones’El v. Berge, 172 F.Supp.2d at 1132.
\textsuperscript{850} 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).
\textsuperscript{851} See n. 1153, below.
\textsuperscript{852} 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).
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. Similarly, the Second Circuit and others have held that the grievant need not “demand particular relief.” Once the complaint has been exhausted, then, the court should be free to consider any remedy that appears necessary to cure whatever violation of law the record shows.

Common sense as well supports this conclusion. 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 policies that they may not even have access to. It makes no sense to apply what is, in effect, an exacting pleading

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853 In *Flynn v. Doyle*, 2007 WL 805788 (E.D.Wis., Mar. 14, 2007), 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. *But see* *Amador v. Superintendents of Dep’t of Correctional Services*, 2007 WL 4326747, *8-9* (S.D.N.Y., Dec. 4, 2007) (holding that plaintiff in putative class action who complained of sexual abuse by a staff member had failed to exhaust injunctive claims of systemic problems permitting such conduct); *Amador v. Superintendents of Dept. of Correctional Services*, 2005 WL 2234050, *7-8* (S.D.N.Y., Sept. 13, 2005) (acknowledging dispute whether prisoners alleging sexual abuse and seeking institutional reform must grieve policies and procedures as well as plaintiffs’ individual sexual abuse claims).

854 *See* §§ IV.G, IV.G.1, above.

855 *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.

856 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.

857 For example, 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.
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,\(^858\) to the underlying conduct that was grieved.\(^859\)

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.\(^860\) 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,\(^861\) 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.\(^862\)

\(^858\) 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).

\(^859\) 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).


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).

\(^861\) See §IV.E.8, n. 567, above.


\((b)\) **Grievances must be personal.** An inmate must be personally affected by the policy or issue he/she is grieving, or must show that he/she will be personally affected by that policy or issue unless some relief is granted or changes made. All grievances must be filed in an individual capacity.

\((d)\) **Class actions not accepted.** Individuals personally affected by a matter which affects a class of inmates may only file a grievance on their own behalf. Grievances which are raised in terms of class actions should be referred to the Inmate Liaison Committee.
In cases filed before the PLRA, the post-PLRA joinder of new plaintiffs relates back to the filing of the original complaint, so exhaustion is not required, even if class certification was not sought until after enactment. Nor is exhaustion required before moving to enforce an existing class action judgment.

When prison officials move to terminate a judgment under the PLRA, prisoners need not exhaust to contest the motion. One court observed: “[The intervening] Plaintiff did not ‘bring’ this action; he is defending it. Requiring the representative prisoner to exhaust his administrative remedies prior to defending a 3626(b) motion would produce an absurd result that is not contemplated by the statute.”

V. Mental or Emotional Injury

The PLRA says 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.” There is a similar provision amending the Federal Tort Claims Act.

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 that can be done with it.

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,” though a few courts have held that § 1997e(e)

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.

866 See 18 U.S.C. § 3626(b); nn. 95, 102, above.
applies to them notwithstanding its language.\textsuperscript{870} Dismissal should be without prejudice to refiling once the prisoner is no longer incarcerated.\textsuperscript{871} In a class action, the provision is applicable only to the named plaintiffs, not unnamed class members.\textsuperscript{872}

One circuit has held that the statute applies to a claim that arose before, and was unrelated to, the plaintiff’s present incarceration.\textsuperscript{873} 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.\textsuperscript{874} However, the statute says that “no Federal civil action may be brought”\textsuperscript{875} 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.\textsuperscript{876} If that is the case, a suit filed in state court is not a “Federal civil action” when brought, so § 1997e(e) should not be applicable to it under any circumstances—and certainly not when the case’s presence in federal court is procured by the adverse party.\textsuperscript{877} However, the statute has been applied to state law claims filed in federal courts under their supplemental jurisdiction.\textsuperscript{878}

\textsuperscript{870} See § II, n. 24, above.
\textsuperscript{871} 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).
\textsuperscript{873} Napier v. Preslicka, 314 F.3d 528, 532-34 (11th Cir. 2002), rehearing denied, 331 F.3d 1189 (11th Cir. 2004), 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. The same court has suggested in an unreported decision that “in custody” is a broader term than imprisonment. 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); see Ellison v. Logan, 2009 WL 1438254, *5 (M.D.Fla., May 18, 2009) (arrest is a form of custody, so § 1997e(e) applies to injuries sustained while under arrest).
\textsuperscript{874} Mitchell v. Brown & Williamson Tobacco Corp., 294 F.3d 1309, 1315 (11th Cir. 2002).
\textsuperscript{875} 42 U.S.C. § 1997e(e) (emphasis supplied).
\textsuperscript{876} 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. 22-32, above.
\textsuperscript{877} 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
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 Second Circuit has made matters look simple by construing the statute in a manner that tortures its language and leaves fundamental questions open—though, as it emphasizes, most other circuits have done the same. In Thompson v. Carter, the court held:

We agree with the majority of our sister circuits 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. Because the words “[f]ederal civil action” are not qualified, they include federal civil actions brought to vindicate constitutional rights. However, the provision does not prevent a prisoner from obtaining injunctive or declaratory relief. . . . By its terms, it does not limit the prisoner’s right to request injunctive or declaratory relief. Nor should it be read as a general preclusion of all relief if the only injury the prisoner can claim—other than the intangible harm presumed to flow from constitutional injuries—is emotional or mental. Although by reading the statutory language in a distorted fashion, one could conclude that an inmate who can allege only emotional injury cannot bring a federal civil action, the more logical reading of the statute does not preclude injunctive and declaratory relief. Moreover, any ambiguity in the statutory language is cured by its section heading, “Limitation on recovery.” See Pennsylvania Dep’t of Corr. v. Yeskey, 524 U.S. 206, 212 (1998) (indicating that although title of statute can not limit the statute’s plain meaning, it can shed light on otherwise ambiguous language). Both in its text and in its caption, Section 1997e(e) purports only to limit recovery for emotional and mental injury, not entire lawsuits.

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.”).


284 F.3d 411 (2d Cir. 2002).

Thompson., 284 F.3d at 417.

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)).
The court goes on to adopt the so far unanimous view that § 1997e(e) does not bar injunctive or declaratory relief,\textsuperscript{882} and the “majority position” that § 1997e(e) does not limit the availability of nominal or punitive damages, but only compensatory damages: “Because Section 1997e(e) refers only to claims for mental or emotional suffering, we agree with the majority position.”\textsuperscript{883} The court later reiterates that “compensatory damages for actual injury, nominal, and punitive damages remain available,” and for that reason, it need not decide whether it is unconstitutional to deny all damages against defendants against whom injunctive claims are no longer available.\textsuperscript{884}

This construction is nonsense, since the statute explicitly says “[n]o . . . action may be brought” and not “no compensatory damages may be recovered”; the court does exactly what Yeskey forbade by using the statute’s title to limit its plain meaning. However, it is now established law and must be applied.\textsuperscript{885}

\textsuperscript{882} Thompson, 284 F.3d at 418. One circuit has held that the statute would be an unconstitutional limitation on judicial remedies for constitutional violations if it did not allow for injunctive relief and contempt sanctions. Zehner v. Trigg, 133 F.3d 459, 461-63 (7th Cir. 1997). Other courts have held that injunctive and declaratory relief remain available without addressing the constitutional question so explicitly. See 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)).


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).

\textsuperscript{884} Thompson v. Carter, 284 F.3d at at 419.

\textsuperscript{885} For what it is worth, in my view the correct analysis of the statute—one which gives effect to the statutory word “action”—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. 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.”);
As noted, the majority view is that § 1997e(e) restricts only compensatory damages. However, some courts have held that it also restricts punitive damages. Despite the distinction made by most circuits between compensatory and other damages, many courts simply dismiss claims they deem to involve only mental or emotional injury, without regard to the prisoner’s right to seek punitive and/or nominal damages.

The applicability and effect of the statute is typically addressed on motions to dismiss and for summary judgment. One district court has refused to decide it on motion, holding: “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.” Failure to object and preserve the applicability of the physical injury requirement at the jury instruction stage waives the argument.

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. This holding is contrary to the routine assumption in the case law that physical injury is a pleading requirement, and the resulting practice of dismissing at initial screening for

See 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., Sept. 26, 2005) (adhering to previously stated view).


failure to allege it. In fact, some district courts within the relevant circuit appear to be unaware of the decision. If the statute creates an affirmative defense, the existence of a physical injury need not be pled, but the district court should be free to dismiss if the complaint on its face shows that the plaintiff is a prisoner seeking damages for mental or emotional injury without physical injury. However, again by analogy to the exhaustion requirement, courts should not be able to dismiss where the plaintiff simply fails to plead a physical injury without otherwise characterizing his injury.

My view is that the mental/emotional injury provision should be viewed as neither a defense nor a pleading requirement, but simply as a damages rule that comes into play

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It is telling that one of the first applications of Douglas 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”).


only when a trier of fact finds liability, as a few decisions have suggested. Douglas relied for its conclusion 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. Since, as described above, the courts have interpreted that phrase in § 1997e(e) to mean a limitation on remedies and not on actions or (as in Jones) claims, it makes little sense to insist that the linguistic similarity is dispositive. Rather, the statute should be given a procedural interpretation that fits its substantive interpretation.

B. What Is Mental or Emotional Injury?

Aside from its analytical shortcomings, Thompson v. Carter fails to resolve a central problem presented by § 1997e(e): what is mental or emotional injury? Some courts have made it sound simple, e.g.: “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.” Some courts have also recognized a variety of constitutional injuries that are neither physical nor mental or emotional, and therefore are not affected by the statute.

894 See cases cited in n. 888, above.
897 Thompson itself recognizes this point, acknowledging that § 1997e(e) does not bar compensatory damages for the plaintiff’s claim of loss of property. 284 F.3d at 418; accord, Robinson v. Page, 170 F.3d 747, 748 (7th Cir. 1999); see Suggs v. Caballero, 2009 WL 368208, *6 (E.D.Mich., Feb. 11, 2009) (loss of skilled job assignment after transfer). But see 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). Other such interests that some courts have acknowledged are neither physical nor emotional in nature include First Amendment rights, see nn. 905-907, below; a claim of exclusion from an alcohol treatment program in violation of the disability statutes, see Parker v. Michigan Dept. of Corrections, 2001 WL 1736637, *2 (W.D.Mich., Nov. 9, 2001); Fourth Amendment bodily privacy claim and Eighth Amendment conditions of confinement and medical care claims, see Waters v. Andrews, 2000 WL 1611126, *4 (W.D.N.Y., Oct. 16, 2000); freedom from racial discrimination, see Mason v. Schriro, 45 F.Supp.2d 709, 716-20 (W.D.Mo. 1999); access to courts, see 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); freedom from arrest and incarceration without probable cause, see Friedland
Other courts, however, have not recognized this distinction. There remains 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.\(^{898}\) (Admittedly, the failure of litigants even to frame the issue properly has no doubt contributed to this failure.\(^{899}\) ) Worse, there is a persistent tendency in some courts simply to declare, e.g.: “[A] prisoner may not maintain an action for monetary damages against state officials based on an alleged constitutional violation absent some showing of a physical injury.”\(^{900}\)

v. Fauver, 6 F.Supp.2d 292, 310 (D.N.J. 1998); 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 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. Conversely, in Clemmons v. Armontrout, 2005 WL 3088697, *4 n.1 (W.D.Mo., Nov. 17, 2005), the court held that a 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.

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. However such injury is characterized, “mental or emotional” does not seem quite le mot juste. See Castillo v. Self, 2007 WL 1741852, *3 (E.D.La., June 14, 2007).

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.

A leading example of this conceptual confusion is *Allah v. Al-Hafeez*, cited with apparent approval in *Thompson v. Carter*, in which the prisoner complained that prison policies prevented him from attending services of his religion, and the court, in the course of holding that he couldn’t pursue a compensatory damage claim, simply assumed that the injury for which he sought compensation must be a mental or emotional one. Is not being able to go to church a mental or emotional injury? On its face it is a concrete deprivation that occurs in the real world and not in someone’s head, and characterizing it as a mental or emotional injury seems to miss the point of the constitutional protection, which is to protect people’s liberty–i.e., their ability to act in the world in particular ways–and not just to protect them from feeling bad. Nonetheless, there is now a legion of decisions holding or assuming that religious deprivations and other First Amendment violations are no more than mental or emotional injuries. While there are also a
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, most of them have not done much to explain why. (One court has

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).


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.

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
asserted that “§ 1997e(e) is unconstitutional to the extent that it precludes First Amendment claims” such as the retaliation claim at issue.\textsuperscript{907}

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\textsuperscript{908} and racial discrimination\textsuperscript{909} among many others.\textsuperscript{910}

\begin{itemize}
\item 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.”\textsuperscript{\textit{Royal}}, 375 F.3d at 729 (Heaney, J., dissenting) (observing the Act was designed to limit non-meritorious or frivolous litigation to assure that legitimate claims receive due consideration). This Court is convinced that allowing prison officials to violate inmate First Amendment rights with impunity, resolute in the knowledge that a First Amendment physical injury will virtually never manifest itself within the meaning of section 1997e(e), is not what Congress intended when it passed the Act. “Prison walls do not form a barrier separating prison inmates from the protections of the Constitution.”\textsuperscript{\textit{Turner} v.\textit{Safley}}, 482 U.S. 78, 84 (1987).
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\item Siggers-El v. Barlow, 433 F.Supp.2d 811, 816 (E.D.Mich. 2006);\textit{accord}, Suggs v. Caballero, 2009 WL 368208, *6 (E.D.Mich., Feb. 11, 2009). This statement is arguably dictum, since the court goes on to say that it is interpreting the statute to allow damages for mental/emotional injuries arising from the First Amendment claim.\textit{Id}.
\end{itemize}
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”—are barred by § 1997e(e) absent allegations of physical injury. Such holdings appear inconsistent with Eighth 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, 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).


912 See, e.g., 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 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 Hurricane 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); 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 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).
that determines their lawfulness.\footnote{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.”)} It is questionable whether a claim alleging conditions that are \textit{objectively} intolerable is an \textit{“action for mental or emotional injury,” even if such injury (not surprisingly) results from them.}\footnote{A few decisions make this sort of distinction. In \textit{Nelson v. CA Dept of Corrections}, 2004 WL 569529 (N.D.Cal., Mar. 18, 2004), \textit{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.” \textit{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 \textit{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).}

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),

\footnote{Shaheed-Muhammad v. Dipaolo, 393 F.Supp.2d 80, 108 (D.Mass. 2005); \textit{accord}, 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); 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); 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.’”), \textit{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.’”). \textit{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’))"} completely separate
from any mental or emotional injury. Some courts have said the same thing—that “damages resulting from constitutional violations” are “separate categories of damages” from physical or mental injuries—in cases about unconstitutional conditions of confinement or restrictive confinement without due process, though others have rejected that proposition.\footnote{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 of 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.”); 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. . . .”); 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); 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).}

\footnote{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); 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 indefinite damage allegedly arising from a violation of his constitutional rights.”), cert. denied, 544 U.S. 1061 (2005).}
That approach is consistent with the general background of tort law, the basis of the law of damages under 42 U.S.C. § 1983, which courts have unaccountably neglected in applying § 1997e(e). Tort principles support a narrow construction of the phrase “mental or emotional injury,” one which does not encompass intangible deprivations of liberty and personal rights. The leading nineteenth-century damages treatise divided damages into six classes: injuries to property, physical injuries, mental injuries, injuries to family relations, injuries to personal liberty, and injuries to reputation. Following this categorization, in defamation law, mental or emotional injury does not encompass other forms of intangible injury such as damage to reputation or alienation of associates, which are separately cognizable. Similarly, in false imprisonment cases, damages are awarded for the loss of liberty wholly apart from any mental or emotional distress, physical injury, or any other category of injury. The Second Circuit has 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 court treated mental and emotional injury as a completely separate category of injury from loss of liberty, stating: “The damages recoverable for loss of liberty for the period spent in a wrongful confinement are

919 The following discussion is based on research by Prof. Margo Schlanger of Washington University Law School.
920 Arthur G. Sedgwick & Joseph H. Beale, Jr., 1 Sedgwick’s Treatise on Damages 50-51 (8th ed. 1891).
921 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 . . . .”).
922 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).
923 Kerman v. City of New York, 374 F.3d 93, 121 (2d Cir. 2004).
separable from damages recoverable for such injuries as physical harm, embarrassment, or emotional suffering; even absent such other injuries, an award of several thousand dollars may be appropriate simply for several hours’ loss of liberty.”

Applying this approach to 42 U.S.C. § 1997e(e) supports the conclusion that prisoners’ claims of deprivation of First Amendment or other intangible rights, confinement without due process in settings that drastically restrict the limited liberty of ordinary prison life, or placement under conditions which deprive them of the “minimal civilized measure of life’s necessities,” should be viewed in the first instance as claims of deprivation of personal liberty and not primarily as inflictions of mental or emotional injury. To the extent a particular plaintiff asserts mental or emotional injury resulting from such deprivation (e.g., claustrophobia or a stress disorder), damages for that additional injury are not recoverable without a showing of physical injury. This approach is illustrated by one pre-PLRA case in which the court found that the plaintiff had been placed in punitive segregation without due process, and awarded damages of $50 a day for the fact of the confinement itself. It treated the resulting emotional injury—”distress flowing from the fact of punitive segregation,” in the court’s terms—as a separate item of damages, awarding only nominal damages for it in the absence of record proof. Under this approach, there will still be a limited number of cases in which the deprivation consists entirely of the infliction of mental or emotional injury, e.g., the deprivation of psychiatric treatment not resulting in suicide or self-mutilation, and in which no compensatory damages may be recovered.

These conclusions are buttressed by another tort analogy. Section 1997e(e) essentially codifies the common law “physical impact” rule, under which negligence plaintiffs may recover for emotional distress only if it is accompanied the negligent infliction of a physical impact. The concerns behind this rule include the view that

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924 Kerman, 374 F.3d at 125. 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.


926 As noted above at nn. 906, 914-916, some federal courts applying § 1997e(e) have reached essentially this conclusion, though they have not grounded it in tort principles.


929 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”);
mental suffering is relatively trivial in most cases, and that evidence of it is “easy to fabricate, hard to controvert.” Courts have recognized similar concerns underlying § 1997e(e). At common law, and in cases where the PLRA’s physical injury provision applies, the physical injury “in essence, vouch[es] for the asserted emotional injury.” But where a plaintiff has proven, and seeks damages for, a deprivation of liberty or subjection to intolerable conditions of constitutional magnitude, that injury requires no further vouching. In such a case, § 1997e(e) should have no application except to the extent the plaintiff explicitly seeks recovery for psychological injury caused by the constitutional deprivation.

The proper categorization of damages under § 1997e(e) remains an open question in the Second Circuit. Thompson v. Carter sheds little light on the matter. The alleged deprivation in that case was confiscation of prescribed medication, and the court simply remanded to allow the plaintiff to amend his complaint and clarify what he was asking for. In doing so, it noted that the district court did not know whether the plaintiff sought “actual damages for his loss of property, nominal or punitive damages, damages for a physical injury, or damages solely for an emotional injury without any claim of physical injury.” That comment cannot be construed as even suggesting a position on the deprivation of intangible rights, either deprivations of liberty such as alleged in Allah v. al-Hafeez or other First Amendment cases, or cases involving restrictive or oppressive conditions of confinement. That is because the Eighth Amendment right to medical care

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.”).

Francis H. Bohlen, Right to Recover for Injury Resulting from Negligence Without Impact, 50 Am. L. Reg. 141, 142, 143, 146 (1902).

See, e.g., Dawes v. Walker 239 F.3d 489, 496 (2d Cir. 2001) (Walker, J., special statement) (in structuring § 1997e(e) to preclude prisoners from “recovery” “for mental and emotional injury suffered while in custody without a prior showing of physical injury,” Congress looked to the common law of torts); Zehner v. Trigg, 952 F.Supp. 1318, 1325 (S.D.Ind.) (“[B]y enacting § 1997e(e), Congress took a page from the common law by limiting claims for mental and emotional injuries, which can easily be feigned or exaggerated, in the absence of physical injury.”), aff’d, 133 F.3d 459 (7th Cir. 1997); Cain v. Virginia, 982 F.Supp. 1132, 1135 (E.D.Va. 1997); Kerr v. Puckett, 967 F.Supp. 354 (E.D.Wis.1997), aff’d, 138 F.3d 321 (7th Cir. 1998).

Dawes v. Walker, 239 F.3d at 495 (Walker, J., special statement).

This approach is illustrated by the decision in Soto v. Lord, discussed in n. 927, 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).

284 F.3d at 419.
is primarily concerned with protecting prisoners from the infliction of needless physical pain and injury.\footnote{Estelle v. Gamble, 429 U.S. 97, 103 (1976).}

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,”\footnote{284 F.3d at 417 (emphasis supplied).} 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,\footnote{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.} or the loss of freedom and quality of life resulting from placement in particularly restrictive or inhumane prison conditions. Subsequent case law, in the Second Circuit or elsewhere, has not advanced the state of judicial understanding on this point.\footnote{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.}

Given this confusion, it seems to me that plaintiffs should confront this issue head-on in their complaints—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.

One further source of confusion in the application of § 1997e(e) is that intangible constitutional rights are extremely hard to value, often resulting in awards of nominal damages, and the Supreme Court has cautioned that damage awards cannot be based on the “abstract ‘importance’ of a constitutional right.” Some courts may 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.

C. What Is Physical Injury?

The Second Circuit, like most courts, has held that physical injury “must be more than de minimis, but need not be significant” to satisfy § 1997e(e), and has held that “alleged sexual assaults,” also described as “intrusive body searches,” “qualify as

939 Williams v. Kaufman County, 352 F.3d 994, 1012 (5th Cir. 2003) (noting the frequency of nominal awards under § 1983); see, e.g., Carlo v. City of Chino, 105 F.3d 493 (9th Cir. 1997) (noting nominal award for denial of telephone access to overnight detainee), cert. denied, 523 U.S. 1036 (1998); Sockwell v. Phelps, 20 F.3d 187 (5th Cir. 1994) (noting nominal award for racial segregation).


941 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); 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).
physical injuries as a matter of common sense” and “would constitute more than *de minimis* injury.” However, there is a square disagreement among courts as to where

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the *de minimis* threshold is to be found.\textsuperscript{943} 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.\textsuperscript{944} 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 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).\textsuperscript{945}

Not surprisingly, a number of courts have dismissed identifiable traumatic injuries as *de minimis*.\textsuperscript{946} Others have held that relatively superficial traumatic injuries are actionable under § 1997e(e).\textsuperscript{947}

\textsuperscript{943} 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).


\textsuperscript{945} 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*, Phipps v. Sheriff of Cook County, ___ F.Supp.2d ____, 2009 WL 4146391, *7* (N.D.Ill., Nov. 25, 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).

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. Some, but not all, courts have found the requirement satisfied by:

- loss of consciousness;\(^{948}\)
- physiological disturbances resulting from medication withdrawal, overdose, or error;\(^{949}\)

facial burns that “healed well” and “had no lasting effect” did not satisfy statutory threshold); *see Appendix A for additional authority on this point.


\(^{948}\) 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 showing of physical injury).

• the consequences of illness or failure to treat illness or injury, both immediate\textsuperscript{950} and longer-term or prospective,\textsuperscript{951}

• denial of adequate food,\textsuperscript{952}

2008 WL 2219307 (E.D.Cal., May 27, 2008); Robinson v. Johnson, 2008 WL 394977.\textsuperscript{*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. See Perez v. U.S., 2009 WL 1426765, \textsuperscript{*2-3 (3d Cir., May 22, 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”); Andrade v. Christ, 2009 WL 3004575, \textsuperscript{*4 (D.Colo., Sept. 18, 2009) (pain resulting from failure to treat traumatic injury); Bain v. Cotton, 2009 WL 1660051, \textsuperscript{*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, \textsuperscript{*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, \textsuperscript{*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); see Appendix A for additional authority. But see Tuft v. Chaney, 2007 WL 3378347, \textsuperscript{*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, \textsuperscript{*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, \textsuperscript{*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, \textsuperscript{*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).\textsuperscript{951} Young v. Beard, 2007 WL 1549453, \textsuperscript{*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, \textsuperscript{*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, \textsuperscript{*3 a.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, \textsuperscript{*3-4 (N.D.Tex., June 15, 2006) (holding staphylococcus exposure and a “dormant” staph infection were de minimis).\textsuperscript{952} Shepard v. Alvarez, 2009 WL 1872016, \textsuperscript{*8-9 (S.D.Fla., May 21, 2009) (evidence of 40-pound weight loss from inadequate material factual issue as to physical injury); Williams v. Humphreys, 2005 WL 4905109, \textsuperscript{*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...
• food contamination or poisoning;\textsuperscript{953}
• muscle atrophy from denial of exercise;\textsuperscript{954}
• exposure to harmful substances;\textsuperscript{955}


• infliction of pain or illness through extreme conditions of confinement or physical abuse; \(^{956} \text{ or physical abuse;}^{957}\)

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); see also cases cited in nn. 869, 969, above, concerning asbestos exposure.

\(^{956}\) 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).

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).

• stillbirth or miscarriage.\textsuperscript{958}

As the footnotes indicate (\textit{i.e.}, those cases denoted with \textit{“But see”}), there are numerous cases where allegations of non-trivial physiological disturbances are rejected as \textit{de minimis} or as not constituting physical injury.\textsuperscript{959} 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,\textsuperscript{960} raising the prospect that torture may not be compensable as

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  \item 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.


\end{itemize}
long as it is inflicted with sufficient care to leave no marks.\textsuperscript{961} In some cases, courts have resolved factual issues on motion in declaring that injuries do not meet the statutory requirement.\textsuperscript{962}

What is missing from these decisions is any attempt to state general principles, other than the relatively contentless “more than \textit{de minimis}” rule, as to what the statutory term “physical injury” means. One exception is a district court decision which cited dictionary definitions of “physical” as “of or relating to the body,” and of “injury” as “an act that damages, harms, or hurts: an unjust or undeserved infliction of suffering or harm: wrong,” and held that a reasonable jury could find that the statute satisfied by exposure to noxious odors, including those of human wastes, and “dreadful” conditions of confinement (including inability to keep clean while menstruating, denial of clothing except for a paper gown, and exposure to prurient ogling by male prison staff and construction workers).\textsuperscript{963} This expansive approach outruns the rest of the case law, but

\textsuperscript{961} That would be an apt characterization of \textit{Jarriett v. Wilson}, 2005 WL 3839415 (6th Cir., July 7, 2005), in which a prisoner’s complaint that he was forced to stand in a two-and-a-half-foot square cage for about 13 hours, naked for the first eight to ten hours, unable to sit for more than 30 or 40 minutes of the total time, in acute pain, with clear, visible swelling in a portion of his leg that had previously been injured in a motorcycle accident, during which time he repeatedly asked to see a doctor. \textit{Id.}, *8 (dissenting opinion). The appeals court affirmed the dismissal of his claim as \textit{de minimis} on the ground that the plaintiff did not complain about his leg upon release or shortly thereafter when he saw medical staff. \textit{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.” \textit{Jarriett v. Wilson}, 414 F.3d 634 (6th Cir. 2005). Similarly, in \textit{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.

\textit{Jarriett} contrasts with \textit{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 \textit{de minimis}, despite the lack of long-term damage, in part because it was “calculated to produce real physical harm.” 2007 WL 2537839, *4.

\textsuperscript{962} 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).

other courts have so far failed to put forward any alternative approach that is helpful in assessing cases of physiological disturbances, disease processes, infliction of pain without visible trauma, etc.

There is an alternative statute-based approach which, if adopted, would significantly clarify the meaning of “physical injury” and help narrow the inconsistency in results under § 1997e(e). The basic federal criminal civil rights statute, 18 U.S.C. § 242, requires a showing of “bodily injury” in order to support a sanction of more than one year in prison. That term is not defined in the statute. However, several other federal criminal statutes define 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.” Several circuits have adopted that definition for purposes of § 242 as well, and there is no apparent reason why it should not be applied under § 1997e(a) as well. Doing so would not eliminate all ambiguity from the definition of physical injury, but would resolve many borderline cases.

Several courts have held that the physical manifestations of emotional distress are not physical injury for purposes of this provision, a result that seems unsupported by
the statutory language, which directly implies that mental or emotional injury with physical injury should be actionable. Decisions are split on the question whether the risk of future injury meets the § 1997e(e) standard.969

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.970


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).

969 Compare 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 entitled the plaintiff to nominal damages regardless of present injury); Crawford v. Artuz, 1999 WL 435155 (S.D.N.Y., June 24, 1999) (holding that a claim for asbestos exposure without present physical injury was not barred by the statute because it did not assert mental or emotional injury); see Robinson v. Page, 170 F.3d 747, 749 (7th Cir. 1999) (leaving open question whether required physical injury “must be a palpable, current injury (such as lead poisoning) or a present condition not injurious in itself but likely to ripen eventually into a palpable physical injury.”).
However, the statute does not require that the plaintiff allege that the physical injury itself violated his or her legal rights.\footnote{Compare Phillips v. Steinbeck, 2008 WL 821789, *21 (D.Colo., Mar. 26, 2008) (plaintiff who alleged he was labelled an informant by staff and assaulted by inmates in retaliation for complaints about staff could seek damages for both Eighth Amendment and access to courts claims based on injuries from assault); Root v. Watkins, 2007 WL 5029118, *8 (D.Colo., Aug. 28, 2007) (plaintiff alleged that one defendant refused to do anything about loud prisoner conduct, and when he complained to another defendant, he was labelled a snitch and then attacked by other prisoners; he could seek damages against both defendants), objections overruled, 2008 WL 793513 (D.Colo., Mar. 19, 2008); Fogle v. Pierson, 2008 WL 821803, *9 (D.Colo., Mar. 26, 2008) (prisoner complaining of injury from protracted segregation could seek damages both for due process claim for segregation placement and claim of denial of access to courts which arguably prolonged the confinement); Noguera v. Hasty, 2001 WL 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); Johnson v. Dallas County Sheriff Dept., 2008 WL 2378269, *3 (N.D.Tex., June 6, 2008) (alleged sexual assault was a physical injury, but conduct of officials after the assault did not inflict injury and was not actionable); Slusher v. Samu, 2006 WL 3371636, *13 (D.Colo., Nov. 21, 2006) (holding that a prisoner with multiple claims could only recover damages for the one claim as to which he alleged physical injury).}

\footnote{In Tate v. Alamance County Jail, 2007 WL 2156319 (M.D.N.C., July 26, 2007), the plaintiff alleged that defendants had denied him pain medication after surgery. The court rejected defendants’ argument that the plaintiff “must allege that there was a physical injury which resulted from the failure to provide requested medication. However, the clear words of the statute only state that the mental or emotional injury must have a prior physical injury component to it, not that the mental or emotional injury resulted in a physical injury.” Here the “prior physical injury component” was the surgery. 2007 WL 2156319, *1. (The court did not comment on the defendants’ assumption that pain is a mental or emotional injury, which appears incorrect.)}

\footnote{See § II, nn. 6-36, concerning the definition of “prisoner.” One court has 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). 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).}

VI. Attorneys’ Fees

In actions brought by prisoners,\footnote{See § II, nn. 6-36, concerning the definition of “prisoner.” One court has 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). 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).} the PLRA restricts fees awarded pursuant to 42 U.S.C. § 1988 to 150% of the rates “established” under the Criminal Justice Act.\footnote{Compare Phillips v. Steinbeck, 2008 WL 821789, *21 (D.Colo., Mar. 26, 2008) (plaintiff who alleged he was labelled an informant by staff and assaulted by inmates in retaliation for complaints about staff could seek damages for both Eighth Amendment and access to courts claims based on injuries from assault); Root v. Watkins, 2007 WL 5029118, *8 (D.Colo., Aug. 28, 2007) (plaintiff alleged that one defendant refused to do anything about loud prisoner conduct, and when he complained to another defendant, he was labelled a snitch and then attacked by other prisoners; he could seek damages against both defendants), objections overruled, 2008 WL 793513 (D.Colo., Mar. 19, 2008); Fogle v. Pierson, 2008 WL 821803, *9 (D.Colo., Mar. 26, 2008) (prisoner complaining of injury from protracted segregation could seek damages both for due process claim for segregation placement and claim of denial of access to courts which arguably prolonged the confinement); Noguera v. Hasty, 2001 WL 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); 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).} The
attorneys’ fees restrictions are not limited to cases involving prison conditions.\textsuperscript{974} They apply to cases about juvenile institutions.\textsuperscript{975}

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.\textsuperscript{976} One court has held that the PLRA rate may be enhanced for excellent results.\textsuperscript{977}

The restrictions do not apply to fees sought on any basis other than 42 U.S.C. § 1988.\textsuperscript{978} 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.\textsuperscript{979} Courts have also taken varying approaches in cases where different claims are governed by different fee statutes.\textsuperscript{980}

\begin{footnotesize}
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\item\textsuperscript{975} \textit{Christina A. ex rel. Jennifer A. v. Bloomberg}, 315 F.3d 990, 994 (8th Cir. 2003).
\item\textsuperscript{977} At present, the rate authorized under the CJA is $118 an hour, 150% of which is $177.00 an hour. \textit{Graves} v. \textit{Arpaio}, 633 F.Supp.2d 834, 854 (D.Ariz. 2009).
\item\textsuperscript{978} \textit{Skinner} v. \textit{Uphoff}, 324 F.Supp.2d 1278, 1287 (D.Wyo. 2004).
\item\textsuperscript{979} \textit{See, e.g.}, \textit{Armstrong} v. \textit{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); \textit{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); \textit{Beckford} v. \textit{Irvin}, 60 F.Supp.2d 85 (W.D.N.Y. 1999) (holding that Americans with Disabilities Act fee provisions are not limited by PLRA).
\item\textsuperscript{980} \textit{Compare Webb} v. \textit{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), \textit{cert. denied}, 537 U.S. 948 (2002); \textit{Norwood} v. \textit{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), \textit{vacated on other grounds}, 572 F.3d 626 (9th Cir. 2009) \textit{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).
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Fees must be “directly and reasonably incurred in proving an actual violation of the plaintiff’s rights” to be awarded under the PLRA. This apparently includes all hours spent in the course of litigation where an actual violation is shown as long as they are reasonable. Several courts have held that injunctive proceedings that are settled may support an award of fees if there are findings of legal violation or a record that supports such findings. 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. Fees are probably not recoverable in cases that are favorably resolved but do not result in an enforceable judgment for the plaintiff.

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).


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.

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.3d 755, 758 (9th Cir. 2002) (denying fees where district court had issued a temporary restraining order, found “serious questions” and a reasonable likelihood of success on the merits, but no finding or concession of
Fees awarded under this provision must be “proportionately related to the court ordered relief for the violation.” Alternatively, fees may be awarded if they are “directly and reasonably incurred in enforcing the relief ordered for the violation.”

Up to 25% of money judgments must be used to satisfy attorneys’ fees claims. Courts have disagreed whether this provision gives courts discretion to apply less than 25%, and if so how to exercise that discretion (a point on which the statute gives no guidance). Defendants cannot be made to pay fees greater than 150% of a money liability was ever made and the court said the record didn’t support an independent conclusion to that effect. But see Weaver v. Clarke, 933 F.Sup. 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).

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Up to 25% of money judgments must be used to satisfy attorneys’ fees claims. Courts have disagreed whether this provision gives courts discretion to apply less than 25%, and if so how to exercise that discretion (a point on which the statute gives no guidance). Defendants cannot be made to pay fees greater than 150% of a money liability was ever made and the court said the record didn’t support an independent conclusion to that effect. But see Weaver v. Clarke, 933 F.Sup. 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).
judgment," even if their actions after the judgment cause the fees to increase. When the plaintiff obtains injunctive relief as well as damages, the 150% limit is either inapplicable or applicable only to those hours expended solely for the purpose of

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, 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, 752 F.3d 496 (9th Cir. 2009), plaintiff received a punitive award of $339,000 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).

990 42 U.S.C. § 1997e(d)(2); see Pearson v. Welborn, 471 F.3d 732, 742-43 (7th Cir. 2006) (holding fees limited to $1.50 where plaintiff recovered only $1.00 in nominal damages); Boivin v. Black, 225 F.3d 36 (1st Cir. 2000) (same). But see Torres v. Walker, 356 F.3d 238, 243 (2nd 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).

991 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).
obtaining damages.\footnote{One decision holds the 150% limit applicable to a case in which the prisoner’s claim concerned events that antedated his incarceration.} Courts have rejected arguments that the attorneys’ fees restrictions deny equal protection.\footnote{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).} 

\section*{VII. Filing Fees and Costs}

Prisoners proceeding \textit{in forma pauperis} in civil actions or appeals are now required to pay filing fees in installments according to a statutory formula.\footnote{Robbins v. Chronister, 435 F.3d 1238, 1241-44 (10th Cir. 2006) (en banc).} Once a prisoner files a complaint or notice of appeal, the court generally lacks authority to forgive or refund the fee,\footnote{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), \textit{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); 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.”), \textit{motion to proceed in forma pauperis denied}, 2009 WL 1664471 (W.D.Mo., June 12, 2009), \textit{aff’d}, 2010 WL 88274 (8th Cir., Jan. 12, 2010); Morgan v. Baker, 2008 WL 4831414, *1 (D.Conn., Nov. 5, 2008) (court cannot excuse filing fee as part of settlement of case).} though there are some variations in local practice.\footnote{Johnson v. Daley, 339 F.3d 582 (7th Cir. 2003) (en banc), \textit{cert. denied}, 541 U.S. 935 (2004); Jackson v. State Bd. of Pardons and Paroles, 331 F.3d 790, 796-98 (11th Cir.), \textit{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), \textit{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).} 

This provision applies to cases filed in federal court. In cases filed in state court and removed to federal court by defendants, the defendants pay the fees. Hairston v. Blackburn, 2010 WL 145793, *1 (S.D.Ill., Jan. 12, 2010). It applies only to civil actions and appeals. \textit{See} Garza v. Thaler, 585 F.3d 888, 889-90 (5th Cir. 2009) (district court did not have power under the PLRA or its discretion to require IFP litigant to pay appellate filing fee in installments in habeas corpus appeal).
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. 998

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.” 999 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. I have not encountered other cases excusing prisoners from the civil filing fee where they have used the wrong remedy, i.e., filed a § 1983 action for relief obtainable only via habeas corpus. 997 In some cases, courts have dismissed at initial screening, or allowed voluntary withdrawal, without assessing filing fees. See, e.g., Wade v. Swiecatowski, 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. Spezzale, 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 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).

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). 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).

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.”

Others have held that prisoners joining similar claims in a single suit must each pay a filing fee, and some have gone further by holding that prisoners also cannot file jointly but must each file a separate complaint. This extraordinary holding that the PLRA overturns the joinder rules of Fed.R.Civ.P. 20 is unsupported by statutory language or history. Two circuits agreed with Hubbard that each prisoner in multiple-plaintiff litigation must pay a full filing fee, but have

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).

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.


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 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 non-prisoner joint plaintiffs; prisoners' circumstances make joint litigation
rejected its holding that the PLRA prohibits multiple-plaintiff suits, stating that there is no reason to believe Congress intended to repeal the joinder rules. The latter holding 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. Jones would also seem to weigh against the imposition of multiple filing fees in multi-party cases. Less drastically, some courts have held that the joinder 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.

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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).

1004 Hagan, 570 F.3d at 154-55; Boriboune, 391 F.3d at 854-55.


1006 The relevant statute says: “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. . . .” 28 U.S.C. § 1914(a) (emphasis supplied). That language certainly suggests that a single filing fee is required even if there are multiple plaintiffs. 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.

1007 See George v. Smith, 507 F.3d 605, 607-08 (7th Cir. 2007); 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 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.
Prisoners are required to provide certified statements of their prison accounts. A complaint should not be dismissed for prison officials’ failure to provide the necessary information, or without determining whether the prisoner has done what he or she can to follow the procedures and make required payments. Refusal by prison officials to provide the required information would violate the right of access to courts. Prisoners generally may not be prohibited from bringing an action because they owe fees on a prior action. However, one federal circuit has held that prisoners who seek dishonestly to evade payment of filing fees or fail to pay fees incurred because they are subject to the “three strikes” provision can be denied IFP status or barred from filing. The

1008 Spaight v. Makowski, 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); 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).

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).

1009 McGore v. Wigglesworth, 114 F.3d 601, 607-08 (6th Cir. 1997); see 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, 2009 WL 4609755, *2 n.2 (10th Cir., Dec. 8, 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).

1010 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. Meadows, 351 F.3d 1324, 1331-32 (10th Cir. 2003) (agreeing that courts must ascertain whether prisoners sought to comply with orders to authorize fee payments before dismissing, rejecting plaintiff’s claim on the merits), cert. denied, 541 U.S. 1035 (2004); see Armstrong v. Mukasey, 2008 WL 5401606, *2 (D.N.J., Dec. 22, 2008) (“To the extent Plaintiff asserts that prison officials have refused to provide the certified account statement, any such assertion must be supported by an affidavit detailing the circumstances of Plaintiff’s request for a certified account statement and the prison officials' refusal to comply, including the dates of such events and the names of the individuals involved.”). But see Baldauf v. Garoutte, 2007 WL 2697445, *12-13 (D.Colo., Sept. 11, 2007) (dismissing for repeated failures to make required payments).


1012 Walp v. Scott, 115 F.3d 308 (5th Cir. 1997).

1013 28 U.S.C. § 1915(g); see next section for further discussion.

1014 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
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.1015

Assessed costs must be paid in full in the same manner as filing fees.1016 However, courts retain their pre-PLRA discretion to assess or refrain from assessing costs against indigent prisoners.1017

If a case is dismissed for failure to exhaust administrative remedies and then is referred 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.1018 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,1019 though some have held that they must pay any fees that were already due before their release.1020

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1016 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.

1017 Whitfield v. Scully, 241 F.3d at 273; Feliciano v. Selsky, 205 F.3d 568, 572 (2d Cir. 2000). The Second Circuit has held that “[u]nless there is a specific direction by the court for the payment of costs by a prisoner proceeding in *forma pauperis*, no costs may be taxed by the prevailing party.” *Feliciano*, *id.* The Sixth Circuit has rejected this view. *Skinner*, 463 F.3d at 521-22.

1018 See n. 171.


1020 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).
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. Apart from that imminent danger exception, the statutory language is mandatory and categorical. That means a prisoner who can’t pay the whole fee up front is out of court—though some courts have held that, having filed the action or appeal, they have to pay the filing fee even if they don’t.

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).


1021 28 U.S.C. § 1915(g); see 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).

1022 In exceedingly rare circumstances, courts have declined to impose a strike for a case within the statutory bounds. See 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).

1023 One 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).
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. Some courts have held that exclusion from IFP status means that the court cannot appoint counsel; that is wrong because it is contrary to the relevant statutory language. Conversely, 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.

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. Two circuits have held otherwise. Needless to say, this statute bars many

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1024 See Ammons v. Gerlinger, 547 F.3d 724, 725-26 (7th Cir. 2008); Schultz v. Wallace, 2006 WL 6000792, *2 (W.D.Wis., Feb. 28, 2006); McSwain v. Wallintin, 2003 WL 2318750 (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 appeal court, was granted it despite having three strikes, and then the court examined the merits).

1025 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 fees owed cannot be barred from filing under “imminent danger of serious physical injury” except to three strikes statute).


1027 The counsel appointment provision says: “The court may request an attorney to represent any person unable to afford counsel.” 28 U.S.C. § 1915(e)(1) (emphasis supplied). 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.” 28 U.S.C. § 1915(a)(1). Given this statutory language, I think that the provision for appointment of counsel involves a separate analysis from “bringing an action” IFP, even though it appears in the IFP statute. 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).


1029 See, e.g., 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); 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
litigants with substantial claims from litigating them. The limitations period is not tolled by three strikes status, so a prisoner cannot wait until after release to file suit if the limitations period expires while he is incarcerated. Further, the inclusion in the statutory criteria of failure to state a claim allows prisoners to be charged strikes for raising claims that are legitimately debatable and about which courts are divided. One court has held that a litigant with three strikes can be barred from filing any further papers in court until all previously incurred fees have been paid. However, that rule cannot be extended to bar in forma pauperis filings by prisoners whose cases satisfy the “imminent danger of serious physical injury” exception to § 1915(g).

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1032 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.”).

1033 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).

1034 Sloan v. Lesza, 181 F.3d 857, 859 (7th Cir. 1999).

1035 Miller v. Donald, 541 F.3d 1091, 1099 (11th Cir. 2008).
“Strikes” comprise only actions dismissed for the reasons stated in the statute.\textsuperscript{1036} Dismissal for suing an immune defendant is not a strike, since that reason does not appear in § 1915(g) even though it appears in other PLRA sections pertaining to \textit{in forma pauperis} proceedings.\textsuperscript{1037} Dismissals for lack of prosecution,\textsuperscript{1038} lack of jurisdiction,\textsuperscript{1039} 

\textsuperscript{1036} 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); 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); Daniels v. Woodford, 2008 WL 2079010, *6, 8 (C.D.Cal., May 13, 2008) (determination that an appeal would not be taken in good faith is not a strike); 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. \textit{But see} 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. \textit{See} Partee v. Connolly, 2009 WL 1788375, *3 (S.D.N.Y., June 23, 2009) (appeal filed two years late was frivolous).


or expiration of the statute of limitations are not strikes. If the substantive reason for
the disposition is one of the statutory grounds, the case is a strike even if the dismissal is
technically framed in some other terms. Thus, dismissal, for this purpose, includes
denial of in forma pauperis status at initial screening on the grounds specified in the
statute, even if the district court does not use the word “dismissed.” Some courts
have held that dismissal for abuse of the judicial system is a strike. That is a
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

a strike because plaintiff failed to obey an order to pay the filing fee and delayed with “frivolous
excuses”).

Thompson v. Drug Enforcement Admin., 492 F.3d 428, 437 (D.C.Cir. 2007); Lewis v.
Norton, 2009 WL 1041815, *3 n.3 (E.D.Wis., Apr. 17, 2009), aff’d, 2009 WL 4730392 (7th Cir.,
Dec. 11, 2009); Daniels v. Woodford, 2008 WL 2079010, *6, 8 (C.D.Cal., May 13, 2008); Ray v.
lack of standing; court does not explain how this jurisdictional dismissal fits § 1915(g)); Crane v.
to state a claim, no explanation).

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).

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). But see Miller v. California State Prison, 2009 WL 1211068, *2 (E.D.Cal.,
May 1, 2009) (dismissal for failure to submit an amended complaint as ordered, after finding that
initial complaint did not state a claim, was not a strike), 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).

O’Neal v. Price, 531 F.3d 1146, 1152-53 (9th Cir. 2008).

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, 129 S.Ct. 49 (2008); Hoffman v.
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);
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).
during litigation. One recent decision holds 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. 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.” Cases need not be about prison conditions for their dismissal to constitute a strike. If the basis of a dismissal cannot be determined, the dismissal cannot be counted as a strike. Dismissals in state court are not strikes. The grant of summary judgment is not a strike. Voluntary dismissal is not a strike. Cases that were not

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1044 See 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). 
1045 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. But see 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)).
1046 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).
filed while the plaintiff was a prisoner are not strikes. 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.” Mere affirmance of the district court’s dismissal is not a strike, nor is dismissal of the appeal on grounds not specified in the statute. Strikes include dismissals that antedate the PLRA and dismissals of cases that were fee-paid.

Most courts have held that partial dismissal on the enumerated grounds is not a strike. One federal appeals court has held to the contrary, with little basis in my

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1054 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); 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); 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 affirmation 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).

1055 Tafari v. Hues, 473 F.3d 440, 442-44 (2d Cir. 2007) (holding an appeal dismissed as premature was not a strike).


1058 See 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”); Tafari v. Hues, 539 F.Supp.2d 694, 701-02 (S.D.N.Y. 2008) (extensive discussion
The result of this rule is that, in effect, prisoners proceeding *pro se* must file perfect complaints to avoid being penalized. Another court has held that strikes 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).

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 has now reiterated its view that any frivolous claim in a complaint makes the complaint count as a strike, and has 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); accord, 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); Townsend v. Walker, 2006 WL 1663713, *2 (S.D.Ill., June 8, 2006); 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 seeking to rationalize this rule, after acknowledging that the plaintiff’s objection to it “makes some sense” and “is well taken,” said:

The rationale of recording strikes for any “claim” must be that strikes are given for “wasted resources.” Under this reasoning, it makes perfect sense to afford strikes for legal theories asserted. Plaintiff is not required to assert legal theories, only facts giving rise to a claim. To the extent plaintiff presses certain claims, good or not, the court must address the merits of each of those claims. Imagine an extreme example, where a prisoner might allege facts giving rise to an Eighth Amendment claim but assert claims under every state and federal law imaginable. Although plaintiff falls on the other end of this spectrum, the court of appeals has made it clear that the unit of assessment for strikes is “claims,” so even a single defective claim is grounds for a strike. Therefore, I will deny plaintiff’s motion to reconsider recording a strike against him in this case. Upthegrove v. Holm, 2009 WL 1296969, *1-2 (W.D.Wis., May 7, 2009).

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
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.” Note that one district court has held that prisoners who join unrelated claims in an amended complaint filed after warning of this problem will be charged strikes for all such claims, citing no basis in the statute or elsewhere for doing so.

A dismissal in a habeas corpus action is not a strike. Courts have disagreed over whether actions dismissed because they were mistakenly filed under 42 U.S.C. § 1983, but should have been filed as habeas petitions, count as strikes. One circuit has held that a complaint dismissed without prejudice is not a strike, and some district courts...
in that circuit have applied that rule to dismissals of cases required to be pursued via habeas corpus, while warning the plaintiff that a second attempt to pursue the claim without first getting the underlying judgment overturned would be frivolous and would be a strike for that reason. 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. 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, 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. A motion filed in an already filed case is not a strike.

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. That means dismissal for non-exhaustion should generally not be a strike. Some courts

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1066 Andrews v. King, 398 F.3d at 1123 n.12.


1069 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’”).

1070 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).

Before Jones v. Bock, some courts held that exhaustion was a pleading requirement, and many cases were dismissed for failing to plead exhaustion. Presumably those cases should not be counted as strikes after Jones even if the dismissals were characterized as for frivolousness or failure to state a claim. But see Finley v. Doe, 2008 WL 2645472, *2 (S.D.W.Va., June 30, 2008) (court merely recites dispositions, which are on the statutory grounds, without examining whether the dismissals were for failing to plead exhaustion). The usual rule that designation of strikes will not be re-examined in later litigation, see n. 1088, below, presumably should not apply when the legal basis of the dismissal has been eliminated.

have held that a dismissal for non-exhaustion is a strike because it seeks “relief to which [the plaintiff] is not entitled” and is therefore is frivolous.\textsuperscript{1072} 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.\textsuperscript{1073} 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.”\textsuperscript{1074} 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.\textsuperscript{1075}

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, \textsuperscript{*}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, a few decisions continue to assert that non-exhaustion dismissals are strikes, some in unexamined reliance on Rivera. See, e.g., Garland v. Broward County Courthouse, 2009 WL 3497078, \textsuperscript{*}2 (S.D.Fla., Oct. 27, 2009); Crane v. Hatton, 2009 WL 3112077, \textsuperscript{*}2 (N.D.Cal., Sept. 23, 2009); Martin v. Hall, 2009 WL 2606081, \textsuperscript{*}2 (M.D.Ga., Aug. 20, 2009); Rivera v. McNeil, 2009 WL 1154118, \textsuperscript{*}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).\textsuperscript{1072} See, e.g., Wallmark v. Johnson, 2003 WL 21488141, \textsuperscript{*}1 (N.D. Tex., Apr. 28, 2003).

Booth v. Carril, 2007 WL 295236, \textsuperscript{*}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).\textsuperscript{1073} Tafari v. Hues, 473 F.3d 440, 443 (2d Cir. 2007).

The assertion that unexhausted claims are “premature as a matter of law” and therefore strikes, Ostrander v. Dennis, 2004 WL 1047642, \textsuperscript{*}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.\textsuperscript{1074} Presumably the converse is also true. See Phillips v. Hussey, 2009 WL 3188432, \textsuperscript{*}3-4 (E.D.Wash., Sept. 30, 2009) (holding non-exhaustion dismissal frivolous and therefore a strike...
One court has held that in a multi-plaintiff lawsuit, each plaintiff’s claims must be treated as a separate “action,” and each plaintiff must be charged a strike for each plaintiff whose “action” is entirely dismissed—a result with little evident basis in statutory language or logic. In a class action, only the named plaintiffs are subject to the three strikes provision.

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. However, the practice is widespread of declaring a strike when an action or an appeal is dismissed, even in the circuits that have held to the contrary.

where plaintiff, who was familiar with the exhaustion requirement from prior litigation, simply misrepresented that he had exhausted).

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).

See Swenson v. MacDonald, 2006 WL 240233, *3-4 (D.Mont., Jan. 30, 2006). Swenson points out that Boriboune’s imposition of strikes based on the separate claims of individual plaintiffs contradicts the statute’s reference to “action[s]” rather than claims; that its view that each prisoner litigant is responsible under Rule 11 for statements made by other plaintiffs is inconsistent with the lack of authority of pro se litigants to make representations on behalf of anyone other than themselves and with pro se prisoners’ limited ability to investigate the merits of others’ claims; and that the practical difficulties of multi-plaintiff prisoner litigation does not lend itself to assuming one litigants’ responsibility for all actions and decisions in such litigation.

Meisberger v. Donahue, 245 F.R.D. 627, 630 (S.D.Ind. 2007).


“A dismissal should not count against a petitioner until he has exhausted or waived his appeals.”

If a finding of frivolousness is reversed on appeal, the strike is eliminated. Of course, a prisoner who receives a third strike in the district court cannot seek appellate review of that decision in forma pauperis under the statute’s literal language, leading some courts to hold that IFP status should be available for an appeal of a third strike determination.

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.

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.

The defendants bear the burden of producing sufficient evidence to show that a prisoner is barred from IFP status by § 1915(g); once defendants make a prima facie case, the burden shifts to the prisoner. 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 must establish that the dismissals were on the grounds prescribed by § 1915(g).


Jennings, 175 F.3d at 780; Adepegba, 103 F.3d at 387.

Jennings, 175 F.3d at 779-80; Adepegba, 103 F.3d at 387.

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).


§ 1915(g).

One would think that an error in classifying a dismissal as a strike would be subject to correction, especially since many prisoners were probably charged with strikes for dismissals for failure to exhaust administrative remedies in jurisdictions where exhaustion was considered a pleading requirement before the contrary decision in Jones v. Bock.

The three strikes provision cannot be applied to revoke *in forma pauperis* status in a case filed before the plaintiff had three strikes, since the statute is a limit on prisoners’ ability to “bring” suit, not on their ability to maintain suits previously brought. A case is “brought” for these purposes when the plaintiff tenders the complaint to the court, even if there is a significant time lag caused by the *in forma pauperis* and merits screening before it is filed. For the same reason, a case filed when the plaintiff was not a prisoner cannot be a strike even if the plaintiff becomes a prisoner later.

Some courts have applied the three strikes provision to cases filed in state court and removed to federal court by the defendants, without explaining how a prisoner who filed in state court can be subject to a statute that applies to those who “bring a civil action or appeal a judgment in a civil action or proceeding under this section,” *i.e.*, who invoked the federal *in forma pauperis* provisions when the case was “brought.”

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

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).

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).

*See* Feathers v. McFaul, 274 Fed.Appx. 467, 469, 2008 WL 1808507, *2 (6th Cir., Apr. 22, 2008) (holding two prior dismissals were for failure to plead exhaustion and were not strikes).


*O'Neal v. Price*, 531 F.3d 1146, 1151-52 (9th Cir. 2008).

*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).

This view seems 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). Section 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.

One court has 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. This decision, too, ignores the key proviso applying the statute only to those cases “brought” under the federal IFP statute.

One federal appeals court has held that the three strikes provision is not the exclusive basis for denying IFP status to prisoners perceived to have abused the privilege. A court may deny IFP status to a prisoner who does not have three strikes based on “the number, content, frequency, and disposition of [the litigant’s] previous filings to determine if there is a pattern of abusing the IFP privilege in his litigation history.”

This power is said to be distinct from the courts’ power to enjoin the activities of abusive litigants, and requires a lesser showing of abuse, since the latter involves a direct restriction on the right access to courts, and the denial of IFP status is merely the restriction of a privilege. Having held that it is not restricted in this area by the terms of the PLRA, the court then adopted the terms of the PLRA with respect to the “imminent danger of serious physical injury” exception, discussed below, stating that such an exception “would comport with the considered policy judgment of Congress as expressed in the PLRA”—despite its willingness to depart from the policy judgment of Congress in the PLRA as to when to exclude prisoners from IFP status.

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1098 Butler v. Department of Justice, 492 F.3d 440, 446 (D.C.Cir. 2007).
1099 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.
1100 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”).
A prisoner who is in “imminent danger of serious physical injury” may proceed in
forma pauperis notwithstanding the three strikes provision.\textsuperscript{1101} “Imminent danger” has
been said to exist “[w]hen a threat or prison condition is real and proximate.”\textsuperscript{1102} The
danger must exist at the time the complaint is filed.\textsuperscript{1103} Past danger does not constitute
imminent danger unless there is reason to believe it will recur.\textsuperscript{1104} 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.\textsuperscript{1105} Other actions by
prison officials may also negate imminent danger.\textsuperscript{1106} The risk of future injury can be
sufficient to invoke the imminent danger exception,\textsuperscript{1107} though many such claims have

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\textsuperscript{1101} 28 U.S.C. § 1915(g);
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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.
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\textsuperscript{1102} 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
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\textsuperscript{1103} 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; see 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).
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\textsuperscript{1104} 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
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\textsuperscript{1105} Palmer v. New York State Dept. of Corrections, 2009 WL 2243706, *2 (2d Cir., July 28,
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).
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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).
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\textsuperscript{1107} See 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

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been rejected as not imminent enough. Conditions that are long-standing may be held not to constitute imminent danger.

Courts have disagreed over the appropriateness of reassessing imminent danger based on post-complaint events. Some decisions have said that a danger that arose after the case was filed, and is ongoing, does not establish imminent danger. Ongoing pain or other consequences from past injuries do not constitute imminent danger.

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).

See 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).


Most courts address the imminent danger exception on the pleadings.\footnote{1113} If colorable allegations are disputed, the court may hold a hearing or rely on affidavits, depositions, etc., to resolve the question,\footnote{1114} 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.\footnote{1115}

\footnote{1112} 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”); Ciarpagliini 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); 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).


\footnote{1114} Gibbs v. Roman, 116 F.3d 83, 86 (3d Cir. 1997); accord, White v. State of Colorado, 157 F.3d 1226, 1232 (10th Cir. 1998), cert. denied, 526 U.S. 1008 (1999); see 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).

\footnote{1115} 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);
Courts have rejected numerous claims of imminent danger as incredible or insubstantial,\textsuperscript{1116} or simply not serious enough.\textsuperscript{1117} Many courts seem simply to have

\textit{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); \textit{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); \textit{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).

made *ad hoc* judgments about the credibility of the prisoner’s claim based on no more than the *pro se* complaint’s allegations, sometimes supplemented by the prisoner’s response to an order to show cause or objections to a magistrate judge’s report. Some

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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).

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Courts have rejected seemingly substantial allegations of threat of injury. Courts have reached disparate results in seemingly similar situations, which may be distinguished only by the articulateness of the plaintiff in describing the risk.

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).

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); 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); 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
To meet the “serious physical injury” requirement, injury need not be so serious as to violate the Eighth Amendment in itself, and need not entitle the plaintiff to a preliminary injunction—though at least one court has held that if the plaintiff has sufficiently alleged imminent injury, it should treat the complaint as requesting a preliminary injunction and proceed with a hearing. 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.”

Successful claims of imminent danger most commonly involve allegations of failure to treat serious or potentially serious medical conditions, potentially injurious


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 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).


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”); Ciarpagliani 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); Scobelliti 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); Smith v. Mayes, 2009 WL 5126655, *1 (4th Cir., Dec. 23, 2009) (complaint of 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); Almond v. Doyle, 2009 WL 3762000, *2 (W.D.Wis., Nov. 6, 2009) (allegation of untreated painful back and
failure to accommodate disabilities, exposure to dangerous living conditions, or failure to protect from the risk of assault from other prisoners.

failure to accommodate disabilities, exposure to dangerous living conditions, or failure to protect from the risk of assault from other prisoners.
One court has held that self-inflicted injury cannot constitute imminent danger because “[e]very prisoner would then avoid the three strikes provision by threatening suicide.”\footnote{1129} This statement is extreme and unwarranted. Many prison suicides and

\footnotetext[1127]{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); 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, 2009 WL 4756569 (4th Cir., Dec. 14, 2009) (unpublished).}


attempted suicides result directly from serious mental illness, and barring from court mentally ill prisoners seeking treatment for their mental illness or other measures to ameliorate its risks would be callous and life-threatening. However, a risk of self-inflicted injury may not be imminent under the circumstances.

If a plaintiff’s allegations meet the statutory standard, the relevant claim should be allowed to go forward without being restricted to the precise defendants and allegations currently responsible for the danger. However, a risk that is not related to the allegations in the complaint does not fall within the exception. The Second Circuit has held that there must be some “nexus” between the complaint’s allegations and the danger of injury, and has analogized the matter to standing: “In deciding whether such a nexus exists, we will consider (1) whether the imminent danger of serious physical injury that a three-strikes litigant alleges is fairly traceable to unlawful conduct asserted in the complaint and (2) whether a favorable judicial outcome would redress that injury.”

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1130 See, e.g., Sanville v. McCaughtry, 266 F.3d 724 (7th Cir. 2001); Eng v. Smith, 849 F.2d 80 (2d Cir. 1988).
1131 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).
1132 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”); Ciapaglini 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); 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). *But see McAlphin v. Toney, 375 F.3d 753 (8th Cir. 2004) (holding that a complaint that satisfies the imminent danger exception cannot be amended to include claims that don’t involve imminent danger); 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); Ellington v. Alameida, 2007 WL 1501840, *2 (E.D.Cal., May 23, 2007) (same as McAlphin); 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). Cf. Pettus v. Morgenthau, 554 F.3d 293, 300 (2d Cir. 2009) (reserving question whether one claim related to an imminent danger will allow the prisoner to proceed on other unrelated claims).
1133 See 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).
1134 Pettus v. Morgenthau, 554 F.3d 293, 298-99 (2d Cir. 2009).
A claim of imminent danger does not excuse the prisoner from the PLRA’s administrative exhaustion requirement.\footnote{McAlphin v. Toney, 375 F.3d 753, 755 (8th Cir. 2004); Jensen v. Knowles, 621 F.Supp.2d 921, 927 (E.D.Cal. 2008).} Challenges to the constitutionality of the three strikes provision have been unsuccessful.\footnote{See, e.g., Polanco v. Hopkins, 510 F.3d 152, 156 (2d Cir. 2007); Lewis v. Sullivan, 279 F.3d at 528-31 (7th Cir. 2002); Higgins v. Carpenter, 258 F.3d 797, 801 (8th Cir. 2001), \textit{cert. denied}, 535 U.S. 1040 (2002); Rodriguez v. Cook, 169 F.3d 1176, 1178-82 (9th Cir. 1999); 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).} District court decisions holding the provision unconstitutional have been reversed or overruled.\footnote{See \textit{Lewis v. Sullivan}, 135 F.Supp.2d 954 (W.D.Wis. 2001), \textit{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), \textit{overruled}, Higgins v. Carpenter, \textit{supra}; Lyon v. Krol, 940 F.Supp. 1433 (S.D.Iowa 1996) (similar rationale), \textit{appeal dismissed and remanded}, 127 F.3d 763, 765 (8th Cir. 1997) (finding lack of standing).}

In my view the statute is unconstitutional. The appellate cases have ignored prior authority striking down overbroad restrictions on filing lawsuits, including denial of access to \textit{in forma pauperis} procedures, as violating the right of access to courts.\footnote{See \textit{DeLong v. Hennessey}, 912 F.2d 1144, 1148 (9th Cir. 1990), \textit{cert. denied}, 498 U.S. 1001 (1990); Abdul-Akbar v. Watson, 901 F.2d 329, 332 (3d Cir. 1990); Matter of Davis, 878 F.2d 211, 212-13 (7th Cir. 1989); \textit{In re Powell}, 851 F.2d 427, 431-34 (D.C.Cir. 1988); Abdullah v. Gatto, 773 F.2d 487, 488 (2d Cir. 1982).} 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.”\footnote{California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 513 (1972).} As such, it is “generally subject to the same constitutional analysis” as is the right to free speech.\footnote{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).} 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.\footnote{\textit{Cf. Thornburgh v. Abbott}, 490 U.S. 401, 403 (1989).} This body of law includes a principle of narrow tailoring.\footnote{\textit{NAACP v. Button}, 371 U.S. 415, 438 (1963).} 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.\footnote{New York Times Co. v. Sullivan, 376 U.S. 254 (1964).} 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.¹¹⁴⁴

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.

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,¹¹⁴⁵ regardless of whether they are in forma pauperis or fee paid.¹¹⁴⁶ 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.¹¹⁴⁷ 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.¹¹⁴⁸ 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.¹¹⁴⁹ The same is true of dismissal based on other affirmative defenses.¹¹⁵⁰

¹¹⁴⁶ Plunk v. Givens, 234 F.3d 1128 (10th Cir. 2000).
¹¹⁴⁸ 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).
¹¹⁴⁹ Jones v. Bock, 549 U.S. 199, 214-15 (2007); see n. 208, above, for discussion of how non-exhaustion can, and cannot, be apparent on the face of the complaint.
¹¹⁵⁰ 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
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, though one federal circuit has held to the contrary. The PLRA also does not affect the rule that a court reviewing a complaint must accept as true all allegations of material fact and construe them in the light most favorable to the plaintiff, or the rule that courts must construe *pro se* pleadings liberally.

The standard of appellate review under the PLRA screening provisions has not been decided in the Second Circuit.

One court has held that the PLRA-dictated screening process is generally good cause for extending the 120-day time period for serving process. Another has held that once a complaint passes initial screening, it is the law of the case that it states a claim, and a motion to dismiss should be denied on grounds of law of the case unless the complaint has been amended in the interim.

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.”

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of the complaint, or else that the court has provided notice and an opportunity to be heard for the prisoner).


1153 *See* Resnick v. Hayes, 213 F.3d 443, 446 (9th Cir. 2000); Gomez v. USAA Federal Savings Bank, 171 F.3d at 795-96.


The court may require a reply “if it finds that the plaintiff has a reasonable opportunity to prevail on the merits.”

“Reasonable opportunity to prevail” seems to mean no more than that the case has survived initial screening—i.e., the complaint states a claim, is not frivolous or malicious, and does not seek damages from an immune defendant. No default or default judgment can be entered if defendants have not been directed to answer the complaint. Some courts have gone further and held that prisoners cannot get a default judgment in a case filed from prison, though the question is not settled.

XI. Hearings by Telecommunication and at Prisons

The PLRA encourages the use of telecommunications to hold pre-trial proceedings without removing the prisoner from the prison, and authorizes arrangements to hold hearings in the same manner. This statute seems mainly to ratify pre-existing practice.

It is not clear whether this PLRA provision extends to trials or other evidentiary proceedings. A non-PLRA decision authorizing psychiatric commitment hearings by video emphasized that (unlike trials) such decisions are generally based on expert testimony and do not depend much on either the witnesses’ demeanor or the “impression” made by the person being committed, and that the proceeding does not involve factfinding in the usual sense. This reasoning suggests the statute should not be


1162 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).

viewed as extending to trials. Before the PLRA, courts had expressed a strong preference for having prisoner plaintiffs present in court for trial.

XII. Revocation of Earned Release Credit

The PLRA authorizes courts 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. There is not a word in the statute about the procedural protections due the prisoner if this statute is invoked. In my view it 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. I am unaware of any judicial constructions of this statute; the only reported applications of it appear to be in several cases in the District of South Carolina.

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. 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. 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. 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. In addition, as plaintiff’s counsel in that case argued, the statute applies only to...
compensatory damages, and settlements are not generally characterized as compensatory or punitive, so it cannot be determined what part, if any, of a settlement represents compensatory damages.

Some states, including New York, have passed statutes governing the disposition of damage awards received by prisoners. It is arguable that the PLRA provisions preempt such statutes insofar as they affect awards made in federal court in cases brought under federal law.\footnote{1173}

\footnote{1173} "is not applicable in this case because the parties have reached a private settlement agreement." The court expressed confidence that the District Attorney had ample means in state court to enforce the restitution order. \textit{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).

\textit{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), \textit{cert. denied}, 964 F.2d 853 (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 225: 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 230: 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,
Note 237: Romeo v. Marshall, 2008 WL 4375776, *3 (C.D.Cal., Aug. 25, 2008) (defendants who failed to show that 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); 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); 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); 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); 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); 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); Ellis v. Albionico, 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); 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); 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); 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); 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); 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); 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); 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 294: 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 318: 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 327: Smith v. Yarbrough, 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. Atttygala, 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

Note 352: 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.”).

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.), cert. denied, 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 372: 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’Marra, 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 399: 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 514: Woods v. Carey, 2007 WL 2254428, *3 (E.D.Cal., Aug. 3, 2007) (holding plaintiff exhausted where he could not complete the process because prison officials rejected his appeal on procedurally 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.Okl., 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 prisoner’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 554: 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).

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. ...”); Jeans 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).

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 579: 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, 129 S.Ct. 119 (2008); 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); 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); 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); 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 file a grievance because of threats of retaliation should have done so once transferred to the “safety” of another state); 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); 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); 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); 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);
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); 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).


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 724: 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 737: 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 746: 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 184, 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.
Note 748: 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 750: 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); Rollins 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 751: 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 755: 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 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 758: 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); 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); 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); 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”); 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); 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); 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); 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); 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); 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.III., 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).


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.”); Alvarex 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 946: 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.).


APPENDIX B

The Prison Litigation Reform Act, as Codified

I. SCOPE AND APPLICABILITY OF THE STATUTE

From the prospective relief provisions:


* * *

(2) the term “civil action with respect to prison conditions” means any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison;

(3) the term “prisoner” means any person subject to incarceration, detention, or admission to any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program;

* * *

(5) the term “prison” means any Federal, State, or local facility that incarcerates or detains juveniles or adults accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law;

From the prisoner litigation provisions:


As used in this section, the term “prisoner” means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.

28 U.S.C. § 1915A(c). Definition.--As used in this section, the term “prisoner” means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.
II. PROSPECTIVE RELIEF RESTRICTIONS

18 U.S.C. § 3626. Appropriate remedies with respect to prison conditions

(a) Requirements for relief.--

(1) Prospective relief.--(A) Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.

(B) The court shall not order any prospective relief that requires or permits a government official to exceed his or her authority under State or local law or otherwise violates State or local law, unless--

(i) Federal law requires such relief to be ordered in violation of State or local law;

(ii) the relief is necessary to correct the violation of a Federal right; and

(iii) no other relief will correct the violation of the Federal right.

(C) Nothing in this section shall be construed to authorize the courts, in exercising their remedial powers, to order the construction of prisons or the raising of taxes, or to repeal or detract from otherwise applicable limitations on the remedial powers of the courts.

(2) Preliminary injunctive relief.--In any civil action with respect to prison conditions, to the extent otherwise authorized by law, the court may enter a temporary restraining order or an order for preliminary injunctive relief. Preliminary injunctive relief must be narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the preliminary relief and shall respect the principles of comity set out in paragraph (1)(B) in tailoring any preliminary relief. Preliminary injunctive relief shall automatically expire on the date that is 90 days after its entry, unless the court makes the findings required under subsection (a)(1) for the entry of prospective relief and makes the order final before the expiration of the 90-day period.

(3) Prisoner release order.--(A) In any civil action with respect to prison conditions, no court shall enter a prisoner release order unless--

(i) a court has previously entered an order for less intrusive relief that has failed to remedy the deprivation of the Federal right sought to be remedied through the prisoner
(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**


No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

(b) Failure of State to adopt or adhere to administrative grievance procedure

The failure of a State to adopt or adhere to an administrative grievance procedure shall not constitute the basis for an action under section 1997a or 1997c of this title.
IV. MENTAL OR EMOTIONAL INJURY


No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury.


* * *

(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


(1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney’s fees are authorized under section 1988 of this title, such fees shall not be awarded, except to the extent that--

(A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff’s rights protected by a statute pursuant to which a fee may be awarded under section 1988 of this title; and

(B)(i) the amount of the fee is proportionately related to the court ordered relief for the violation; or

(ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.

(2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney’s fees awarded against the defendant. If the award of attorney’s fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.

(3) No award of attorney’s fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under
section 3006A of Title 18, for payment of court-appointed counsel.

(4) Nothing in this subsection shall prohibit a prisoner from entering into an agreement to pay an attorney’s fee in an amount greater than the amount authorized under this subsection, if the fee is paid by the individual rather than by the defendant pursuant to section 1988 of this title.

VI. FILING FEES AND COSTS/SCREENING AND DISMISSAL


(a)(1) Subject to subsection (b), any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant’s belief that the person is entitled to redress.

(2) A prisoner seeking to bring a civil action or appeal a judgment in a civil action or proceeding without prepayment of fees or security therefor, in addition to filing the affidavit filed under paragraph (1), shall submit a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the complaint or notice of appeal, obtained from the appropriate official of each prison at which the prisoner is or was confined.

(3) An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

(b)(1) Notwithstanding subsection (a), if a prisoner brings a civil action or files an appeal in forma pauperis, the prisoner shall be required to pay the full amount of a filing fee. The court shall assess and, when funds exist, collect, as a partial payment of any court fees required by law, an initial partial filing fee of 20 percent of the greater of--

(A) the average monthly deposits to the prisoner’s account; or

(B) the average monthly balance in the prisoner’s account for the 6-month period immediately preceding the filing of the complaint or notice of appeal.

(2) After payment of the initial partial filing fee, the prisoner shall be required to make monthly payments of 20 percent of the preceding month’s income credited to the prisoner’s account. The agency having custody of the prisoner shall forward payments from the prisoner’s account to the clerk of the court each time the amount in the account
exceeds $10 until the filing fees are paid.

(3) In no event shall the filing fee collected exceed the amount of fees permitted by statute for the commencement of a civil action or an appeal of a civil action or criminal judgment.

(4) In no event shall a prisoner be prohibited from bringing a civil action or appealing a civil or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee.

(c) Upon the filing of an affidavit in accordance with subsections (a) and (b) and the prepayment of any partial filing fee as may be required under subsection (b), the court may direct payment by the United States of the expenses of (1) printing the record on appeal in any civil or criminal case, if such printing is required by the appellate court; (2) preparing a transcript of proceedings before a United States magistrate in any civil or criminal case, if such transcript is required by the district court, in the case of proceedings conducted under section 636(b) of this title or under section 3401(b) of title 18, United States Code; and (3) printing the record on appeal if such printing is required by the appellate court, in the case of proceedings conducted pursuant to section 636(c) of this title. Such expenses shall be paid when authorized by the Director of the Administrative Office of the United States Courts.

(d) The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases.

(e)(1) The court may request an attorney to represent any person unable to afford counsel.

(2) Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that--

(A) the allegation of poverty is untrue; or

(B) the action or appeal--

(i) is frivolous or malicious;

(ii) fails to state a claim on which relief may be granted; or

(iii) seeks monetary relief against a defendant who is immune from such relief.

(f)(1) Judgment may be rendered for costs at the conclusion of the suit or action as in other proceedings, but the United States shall not be liable for any of the costs thus incurred. If the United States has paid the cost of a stenographic transcript or printed record for the prevailing party, the same shall be taxed in favor of the United States.

(2)(A) If the judgment against a prisoner includes the payment of costs under this
subsection, the prisoner shall be required to pay the full amount of the costs ordered.

(B) The prisoner shall be required to make payments for costs under this subsection in the same manner as is provided for filing fees under subsection (a)(2).

(C) In no event shall the costs collected exceed the amount of the costs ordered by the court.

(g) In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

(h) As used in this section, the term ‘prisoner’ means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.

28 U.S.C. § 1915A. Screening

(a) Screening.--The court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.

(b) Grounds for dismissal.--On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint--

(1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or

(2) seeks monetary relief from a defendant who is immune from such relief.

(c) Definition.--As used in this section, the term “prisoner” means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.


(1) The court shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief.
(2) In the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief, the court may dismiss the underlying claim without first requiring the exhaustion of administrative remedies.

VII. THREE STRIKES PROVISION


In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.


(3) In addition to the limitations of section 1915 of title 28, United States Code, in no event shall a prisoner file a claim under a civil forfeiture statute or appeal a judgment in a civil action or proceeding based on a civil forfeiture statute if the prisoner has, on three or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous or malicious, unless the prisoner shows extraordinary and exceptional circumstances.

IX. WAIVER OF REPLY

42 U.S.C. § 1997e(g).

(1) Any defendant may waive the right to reply to any action brought by a prisoner confined in any jail, prison, or other correctional facility under section 1983 of this title or any other Federal law. Notwithstanding any other law or rule of procedure, such waiver shall not constitute an admission of the allegations contained in the complaint. No relief shall be granted to the plaintiff unless a reply has been filed.

(2) The court may require any defendant to reply to a complaint brought under this section if it finds that the plaintiff has a reasonable opportunity to prevail on the merits.
X. HEARINGS BY TELECOMMUNICATION AND AT PRISONS


(1) To the extent practicable, in any action brought with respect to prison conditions in Federal court pursuant to section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility, pretrial proceedings in which the prisoner’s participation is required or permitted shall be conducted by telephone, video conference, or other telecommunications technology without removing the prisoner from the facility in which the prisoner is confined.

(2) Subject to the agreement of the official of the Federal, State, or local unit of government with custody over the prisoner, hearings may be conducted at the facility in which the prisoner is confined. To the extent practicable, the court shall allow counsel to participate by telephone, video conference, or other communications technology in any hearing held at the facility.

XI. REVOCATION OF EARNED RELEASE CREDIT


In any civil action brought by an adult convicted of a crime and confined in a Federal correctional facility, the court may order the revocation of such earned good time credit under section 3624(b) of title 18, United States Code, that has not yet vested, if, on its own motion or the motion of any party, the court finds that--

(1) the claim was filed for a malicious purpose;

(2) the claim was filed solely to harass the party against which it was filed; or

(3) the claimant testifies falsely or otherwise knowingly presents false evidence or information to the court.

Note: There are two statutes numbered 28 U.S.C. § 1932. The other has nothing to do with prisoners or prison litigation.

XII. DIVERSION OF DAMAGE AWARDS (not codified)
A. Notice to Crime Victims of Pending Damage Award


Prior to payment of any compensatory damages awarded to a prisoner in connection with a civil action brought against any Federal, State, or local jail, prison, or correctional facility or against any official or agent of such jail, prison, or correctional facility, reasonable efforts shall be made to notify the victims of the crime for which the prisoner was convicted and incarcerated concerning the pending amount of any such compensatory damages.

B. Payment of Damage Award in Satisfaction of Pending Restitution Orders


Any compensatory damages awarded to a prisoner in connection with a civil action brought against any Federal, State, or local jail, prison, or correctional facility or against any official or agent of such jail, prison, or correctional facility, shall be paid directly to satisfy any outstanding restitution orders pending against the prisoner. The remainder of any such award after full payment of all pending restitution orders shall be forwarded to the prisoner.

XIII. BANKRUPTCY

11 U.S.C. § 523. Exceptions to discharge

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—

* * *

(17) for a fee imposed by a court for the filing of a case, motion, complaint, or appeal, or for other costs and expenses assessed with respect to such filing, regardless of an assertion of poverty by the debtor under section 1915(b) or (f) of of title 28 (or a similar non-Federal law), or the debtor's status as a prisoner, as defined in section 1915(h) of title 28 (or a similar non-Federal law); . . .