
CIVIL RIGHTS OF PRISONERS: THE SEVENTH CIRCUIT AND EXHAUSTION OF REMEDIES UNDER THE PRISON LITIGATION REFORM ACT

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INTRODUCTION

Recently, the images of Iraqi citizens imprisoned and tortured at Abu Ghraib enflamed the hearts and minds of many Americans who believed that our shared values forbid such treatment.¹ But within our own borders, we have turned a blind eye to the often severe and inhumane conditions and treatment of American citizens incarcerated in federal and state prisons.² One criminal judge in the Circuit Court of Cook County recently described a life spent in prison as "a kind of

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¹ See Larry Seaquist, Op-Ed., *U.S. Military's Bad-Guy Dragnet — A Terrible Way to Win a War*, CHRISTIAN SCIENCE MONITOR, May 5, 2004, available at <http://www.csmonitor.com/2004/0505/p09s02-coop.html>. See also David Dishneau, *Abu Ghraib Dog Handler Sentenced to Six Months for Tormenting Prisoners*, CHI. SUN-TIMES, March 23, 2006, available at: <http://www.suntimes.com/output/news/cst-nws-abu23.html>.

² Aside from the examples provided by the cases discussed below see *Mathie v. Fries*, 121 F.3d 808, 810-11 (2nd Cir. 1997) (inmate's had to be amputated due to medical neglect) and *Williams v. U.S.*, 747 F. Supp. 967, 971-82 (S.D.N.Y. 1990) (male inmate sexually assaulted by male prison guard).

slow, torturous death."³ Though Congress created a statute to allow citizens to sue individuals acting under color of state law for violating their constitutional rights, this protection is not equally available to all citizens.⁴ In fact, a large and steadily increasing group of individuals in American society, arguably those who have had their rights most severely curtailed, is not allowed to utilize the broad power of section 1983 as freely as other citizens.⁵

This unequal treatment was fostered through the Prison Litigation Reform Act of 1995 ("PLRA"), a federal statute enacted in response to the large number of prisoner lawsuits alleging civil rights violations.⁶ The PLRA, in contrast to previous congressional action, requires that inmates exhaust all administrative remedies before bringing suit alleging a civil rights violation under any federal statute.⁷ By placing an additional hurdle in front of prisoners who claim violations of their civil rights, Congress has shifted the balance away from protection of constitutional rights in favor of judicial economy.⁸ This additional

³ Stefano Esposito, *Killer Gets Life Despite Wishes of Girl's Mom*, CHI. SUN-TIMES, April 11, 2006 (quoting Judge Stanley Sacks) available at <http://www.chicagosuntimes.com/output/news/cst-nws-durr11.html>.

⁴ 42 U.S.C. § 1983 (2000). This section reads: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." See generally SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 (4th ed. 2004) (discussing what Section 1983 is and how it provides civil rights protection against state officials).

⁵ See *Porter v. Nussle*, 534 U.S. 516, 520 (2002) (holding that prison inmates must exhaust all available administrative remedies before instituting a Section 1983 suit).

⁶ 141 CONG. REC. S726 (daily ed. May 23, 1994) (Statement of Sen. Dole) (describing the detrimental effects of frivolous litigation on justice and court systems).

⁷ 42 U.S.C. § 1997 (1996).

⁸ David M. Adlerstein, *In Need of Correction: The "Iron Triangle" of the Prison Litigation Reform Act*, 101 COLUM. L. REV. 1681, 1683 (2001).

requirement has immediately and drastically affected the fundamental rights of prisoners by preventing them from seeking judicial remedies for many possibly valid claims.⁹ Further, this exhaustion requirement must be viewed in the context of the modern penal system, the complex and often labyrinthine regulations that govern prison life, the broad range of rights that are affected and the harsh conditions in which these prisoners live out their lives.

This Article examines the history of prisoner civil rights litigation, focusing on different congressional attempts to alleviate the burden on crowded federal dockets, while preserving the rights of prisoners. This is done by first addressing the predecessor of the PLRA, the Civil Rights of Institutionalized Persons Act ("CRIPA")¹⁰, and then discussing the purposes and consequences of the PLRA. This is followed by a discussion of several recent cases in which the Seventh Circuit has considered the scope of the PLRA's exhaustion requirement in prisoner civil rights actions. These cases reveal two trends in recent Seventh Circuit jurisprudence illustrating how the court has tried to strike a balance between the legitimate goals of the PLRA and the constitutional rights of prisoners. First, the Seventh Circuit will carefully consider the administrative remedies at issue to determine whether or not they are "available." Second, the court reasonably examines the actions of inmates to determine whether they have exhausted all their administrative remedies. Finally, this Note will address the future landscape of prisoner civil rights litigation, both in the Seventh Circuit and throughout the country.

BACKGROUND

While the number of individuals currently incarcerated in American prisons has steadily risen, numbering now over 1.5

⁹ Jennifer Winslow, *The Prison Litigation Reform Act's Physical Injury Requirement Bars Meritorious Lawsuits: Was It Meant To?*, 49 UCLA L. REV. 1655, 1668 (2002).

¹⁰ 42 U.S.C. §§1997-1997j (1980).

million,¹¹ the goal of correctional facilities has gradually shifted from rehabilitation to simple punishment.¹² Within the states governed by the Seventh Circuit, over 91,000 men and women are incarcerated in either federal or state correctional facilities.¹³ Though prisons are not meant to be pleasant places, the Supreme Court has repeatedly acknowledged, "prison walls do not form a barrier separating prison inmates from the protections of the Constitution."¹⁴ There are certain rights that inmates must forfeit as a consequence of their incarceration, but they are understandably protective of the few civil rights that they retain while incarcerated.¹⁵ This defensive and protective attitude by prisoners is exacerbated by the imbalance of power between the individual inmate and their alleged aggressors, the state or federal government supervising the facility.¹⁶ The Supreme Court noted this difficulty in *Preiser v. Rodriguez*, stating that "[w]hat for a private citizen would be a dispute with his landlord, with his employer, with his tailor, with his neighbor, or with his banker becomes, for the prisoner, a dispute with the State."¹⁷ Given the involuntary nature of their incarceration and the harsh conditions present in the penal system, it is not surprising that prisoners throughout the country often file lawsuits alleging violations of their constitutional rights under section 1983.¹⁸

After the Supreme Court acknowledged that inmates could bring suit under section 1983, the number of lawsuits skyrocketed from

¹¹ Allen J. Beck, U.S. Dep't of Justice, *Prisoners in 2004*, at 3. (2005) available at <http://www.ojp.gov/bjs/pub/pdf/p04.pdf>.

¹² Adlerstein, *supra* note 8, at n.5.

¹³ Beck, *supra* note 11, at 3.

¹⁴ *Turner v. Safley*, 482 US 78, 84 (1987).

¹⁵ Adlerstein, *supra* note 8, at 1682.

¹⁶ Adlerstein, *supra* note 8, at 1683.

¹⁷ 411 U.S. 475, 492 (1973).

¹⁸ Aside from section 1983, prisoners may bring: habeas corpus claims, *Bivens* actions, a Federal Tort Claims Act against the US, or an Administrative Procedures Act claim against a specific BOP guideline or procedure.

6,600 in 1975 to 68,000 in 1996.¹⁹ This flood of litigation threatened to overwhelm already crowded federal court dockets.²⁰ These law suits addressed a broad range of interests, some of which were constitutionally recognizable and some which were not, including conditions of confinement, food, privacy, heat, mail, hair length, work details, segregation cells, religious practice and rehabilitation.²¹ As the number of inmate suits in federal court continued to rise, the increased presence of federal judicial review troubled many prison administrators, as well as state and local officials.²² Inmates were successful in achieving many meaningful reforms including greater access to legal materials²³ and medical treatment.²⁴, though there were certainly examples of frivolous lawsuits and inmates abusing the system.²⁵ Eventually in 1980, the steadily increasing number of

¹⁹ See Jamie Ayers, *To Plead or Not to Plead: Does the Prison Litigation Reform Act's Exhaustion Requirement Establish a Pleading Requirement or an Affirmative Defense?*, 39 U.C. DAVIS L. REV. 247, 248 (2005) (stating that the number of prisoner complaints rose from 6,600 in 1975 to more than 39,000 in 1994); Danielle M. McGill, *To Exhaust or Not to Exhaust?: The Prisoner Litigation Reform Act Requires Prisoners to Exhaust All Administrative Remedies Before Filing Excessive Force Claims in Federal Court*, 50 CLEV. ST. L. REV. 129, 130 (2003) (discussing that from 1980 to 1996, petitions filed by federal and state prisoners almost tripled, from 23,230 to 68,235).

²⁰ 141 CONG. REC. S726 (daily ed. May 23, 1994) (Remarks of Sen. Dole) (describing the detrimental effects of frivolous litigation on justice and court systems).

²¹ Donald P. Lay, *Exhaustion of Grievance Procedures for State Prisoners under Section 1997(e) of the Civil Rights Act*, 71 IOWA L. REV. 935, 936 n. 4 (1986).

²² Christopher E. Smith, *The Governance of Corrections: Implications of the Changing Interface of Courts and Corrections*, 2 CRIM. JUST. 113, 126 (2000) (“States could no longer run prisons and jails according to their own values and for their own convenience.”).

²³ *Bounds v. Smith*, 430 U.S. 817, 828 (1977) (mandating that prison officials provide inmates with access to legal materials).

²⁴ *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (obligating prison officials to provide prisoners with seriously needed medical care under the Eighth Amendment).

²⁵ Jeffrey R. Maahs & Rolando V. Del Carmen, *Curtailing Frivolous Section 1983 Inmate Litigation: Laws, Practices, and Proposals*, FED. PROBATION, Dec. 1995 at 53, 54 (estimating, “in one decade, [a single inmate] filed between 600 and

prisoner lawsuits and the resulting burden on crowded federal dockets, as well as congressional concerns about the constitutional rights of inmates, spurred federal legislative action.²⁶

A. *The Civil Rights of Institutionalized Persons Act*

In an effort to stem the tide of prisoner section 1983 litigation and strike a balance between deference to state officials and the rights of the institutionalized, Congress enacted the Civil Rights of Institutionalized Persons Act (“CRIPA”) in 1980.²⁷ Prior to 1980, inmates who wanted to sue in court were not required to exhaust their administrative remedies.²⁸ CRIPA applied only to section 1983 actions and contained the first exhaustion requirement for prisoner lawsuits.²⁹ CRIPA did not require mandatory exhaustion, however, and gave judges the power to require plaintiffs to exhaust administrative remedies when “appropriate and in the interests of justice.”³⁰ A judge could continue a case for up to 180 days if he

700 suits in federal and state courts, the vast majority of which were repetitive, frivolous, and filed *in forma pauperis*.”).

²⁶ See Lynn S. Branham, *The Prison Litigation Reform Act's Enigmatic Exhaustion Requirement: What It Means and What Congress, Courts and Correctional Officials Can Learn from It*, 86 CORNELL L. REV. 483, 493 (2001).

²⁷ 42 U.S.C. §§ 1997-1997j (1994 and Supp. III 1997). The question of whether the number of lawsuits increased is an interesting one: in 1980 there were 12,397 increasing 227% to 40,569 in 1995. But during the same time-span, the number of inmates increased 237%, thus the per capita rate of suits fell. Adam Slutsky, *Totally Exhausted: Why a Strict Interpretation of 42 U.S.C. § 1997E(A) Unduly Burdens Courts and Prisoners*, 73 Fordham L. Rev. 2289, 2294 (2005).

²⁸ See Winslow, *supra* note 9, at 1670. (stating that in 1964, in *Cooper v. Pate*, the Supreme Court held that the Civil Rights Act of 1871 protects the fundamental rights of inmates. 378 U.S. 546 (1964). After the Cooper decision, prisoners began to sue for civil rights violations at an astonishing rate).

²⁹ Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997(e) (1996).

³⁰ 42 U.S.C. § 1997(e)(a) (1996). See also *McCarthy v. Madigan*, 503 U.S. 140, 146 (1992)(holding that CRIPA's exhaustion requirement was not mandatory).

believed that the suit could be resolved using administrative remedies.³¹

This discretionary exhaustion requirement offered prison officials the ability to resolve violations in administrative proceedings without involving the courts.³² The exhaustion provision of CRIPA further limited its own application by mandating that exhaustion could only be required where the administrative remedies had been certified by the Attorney General as meeting certain minimum standards.³³ These standards required that inmates be afforded an advisory role in creating and applying a grievance procedure.³⁴ The Supreme Court created a balancing test for determining when to require exhaustion under CRIPA, "federal courts must balance the interest of the individual in retaining prompt access to a federal judicial forum against countervailing institutional interests favoring exhaustion."³⁵

Beyond the exhaustion requirement, CRIPA also gave the Attorney General of the United States authority to sue state and local officials responsible for facilities exhibiting a pattern or practice of flagrant or egregious violations of constitutional rights.³⁶ CRIPA also set forth guidelines for prison administrative procedures and required that states have their procedure certified by the Attorney General in order to require exhaustion of remedies.³⁷ Even with this discretionary exhaustion requirement, CRIPA allowed inmates to participate in the formation of the grievance procedures and many states refrained from having their procedures certified because of this requirement.³⁸ The states' refusal to adopt these provisions and alter their grievance procedures to accommodate inmates' civil rights had the opposite of

³¹ 42 U.S.C. (e)(a)(1) (1996).

³² Branham, *supra* note 26, at 494-95.

³³ Civil Rights of Institutionalized Persons Act (e)(a)(2).

³⁴ Minimum Standards for Inmate Grievance Procedures, 28 C.F.R. § 40.2.

³⁵ *McCarthy*, 503 U.S. at 146.

³⁶ 42 U.S.C. § 1997(a) (1996).

³⁷ 42 U.S.C. § 1997(e)(a)(2) (1996).

³⁸ 28 C.F.R. § 40.2 *See also* Lay, *supra* note 21 (discussing states' rejection of the advisory role of inmates).

the intended effect and actually increased the number of prisoner suits filed and contributed to the burden on federal dockets as well as increased costs to prisons caused by defending suits.³⁹ In response, many legal scholars, politicians and judges supported a change in the system that would reduce the number of frivolous lawsuits.⁴⁰

B. The Prison Litigation Reform Act of 1995

The civil rights of inmates were again the subject of Congressional legislation in 1996 with the passage of the aptly named amendment to CRIPA, the Prisoner Litigation Reform Act (“PLRA”).⁴¹ Though the legislative history is minimal, the PLRA was intended to stem the tide of purportedly frivolous prisoner lawsuits and reduce judicial oversight of correctional facilities.⁴² The PLRA represented a major change in prison litigation creating barriers such as requiring physical injury in tort claims, forcing even *in forma pauperis* prisoners to pay filing fees, and creating limits on attorney’s fees.⁴³ Most importantly, however, the PLRA drastically modified the CRIPA’s exhaustion of administrative remedies provision.⁴⁴ Under the PLRA, inmates are required to exhaust all administrative remedies available, mandating, “No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal

³⁹ See 142 CONG. REC. S10, 576 (daily ed. Sept. 16, 1996) (statement of Sen. Abraham) (States were spending \$81 million annually fighting frivolous prisoner suits). See also, Tracy M. Sullivan, *Prisoners' Seeking Monetary Relief for Civil Rights Claims: Must They Exhaust Administrative Remedies Under § 1997(e) Before Filing a Claim in Federal Court?*, 8 WASH. U. J.L. & POL'Y 419, 421 (2002) (As the prison population increased, lawsuits filed by prisoners nearly tripled between 1980 and 1996).

⁴⁰ See Slutsky, *supra* note 27, at 2295 (discussing the alliance of the National Association of Attorneys General and the National District Attorneys Association.)

⁴¹ 42 U.S.C. § 1997 (amended 1996).

⁴² 141 CONG. REC. S14413-14 (daily ed. September 27, 1995) (statement of Sen. Dole, who sponsored and introduced the PLRA).

⁴³ See Winslow, *supra* note 28, at 1660 and Adlerstein, *supra* note 9, n. 29.

⁴⁴ See Branham, *supra* note 26, at 494-96.

Law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.”⁴⁵

The PLRA's exhaustion requirement was more restrictive and differed from CRIPA in five important ways: First, the PLRA applies to all state, local and federal prisoners in contrast to CRIPA, which did not apply to federal prisoners or juveniles.⁴⁶ Second, the exhaustion requirement was broadened to include pretrial detainees as well as convicted prisoners.⁴⁷ Third, the PLRA requires dismissal of cases in which administrative remedies were not exhausted.⁴⁸ Before the PLRA, courts continued or stayed cases until prisoners had exhausted administrative remedies.⁴⁹ The PLRA lacks the discretionary application of the exhaustion requirement and removes the ability of judges to determine when requiring exhaustion is appropriate. Finally, before a court could require a prisoner to use a prison's administrative grievance process, the process had to meet certain requirements.⁵⁰ The PLRA removed the requirements that exhaustion of administrative remedies must be "appropriate and in the interests of justice" or that the administrative remedies be "plain, speedy and effective."⁵¹ The PLRA also removed the five statutory standards for administrative remedies and required only that the remedies be "available."⁵²

⁴⁵ 42 U.S.C. § 1997(e)(a) (1996).

⁴⁶ 42 U.S.C. § 1997(e)(h) (1996) (defining a "prisoner" subject to the exhaustion requirement as "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.").

⁴⁷ 42 U.S.C. § 1997(e)(h) (1996).

⁴⁸ 42 U.S.C. § 1997(e)(a) (1996).

⁴⁹ 42 U.S.C. § 1997(e)(a)(1) (1996).

⁵⁰ 42 U.S.C. § 1997(e)(a)-(b) (1996).

⁵¹ 42 U.S.C. § 1997(e)(a)-(b) (1996).

⁵² 42 U.S.C. § 1997(e)(a) (1996). Interestingly, an earlier version of the PLRA approved by the House of Representatives retained the CRIPA requirements that administrative remedies be "plain, speedy, and effective" and that the Attorney General or court find that they meet certain delineated standards or are otherwise

The impact of the PLRA on prisoner lawsuits for constitutional violations was immediate and substantial.⁵³ In the last year under CRIPA, inmates filed 41,679 civil rights petitions.⁵⁴ In 2000, four years after the passage of the PLRA, the number of civil rights petitions dropped to 25,504, a reduction of 39%.⁵⁵ Specifically, the more comprehensive and automatic exhaustion requirement greatly increased the number of inmate lawsuits that were dismissed for failure to exhaust all available administrative remedies.⁵⁶ The Supreme Court, in interpreting the new exhaustion requirement under the PLRA, held that inmates were required to exhaust all available administrative remedies regardless of whether the claims involved general circumstances of incarceration or particular incidents, thus ensuring that the PLRA will govern all prisoner lawsuits in every state.⁵⁷

THE SEVENTH CIRCUIT AND EXHAUSTION OF ADMINISTRATIVE REMEDIES

A. *Background Seventh Circuit Jurisprudence*

There are two Seventh Circuit cases that help provide context for its more recent decisions. The first is *Massey v. Helman*, in which the Seventh Circuit affirmed by strictly interpreting the PLRA's exhaustion requirement and clarified the definition of "available"

"fair and effective." H.R. J. RES. 667, 104th Cong. (1995). These requirements were removed without explanation from the final version of the PLRA..

⁵³ Slutsky, *supra* note 27, at 2302.

⁵⁴ John Scalia, U.S. Dep't of Justice, *Prisoner Petitions Filed in the U.S. District Courts, 2000, with Trends 1980-2000*, at 1 (2002), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ppfusd00.pdf>.

⁵⁵ See Scalia, *supra* note 54.

⁵⁶ See Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1627-28 (2003).

⁵⁷ *Porter v. Nussle*, 534 U.S. 516, 520 (2002).

remedies.⁵⁸ Massey claimed that because his lawsuit sought money damages and there were no administrative procedures in which he could collect monetary compensation, there were no administrative remedies “available” within the meaning of the PLRA.⁵⁹ Relying on the earlier decision, the court clarified that the “effectiveness” of an administrative remedy is not the same as its “availability.”⁶⁰ The court further stated that the inquiry was whether an administrative grievance procedure existed and not whether the inmate was satisfied with the results.⁶¹ The Seventh Circuit affirmed the dismissal of the district court, but acknowledged that if Massey’s hernia had healed before he filed his lawsuit, then he could have been exempted from the exhaustion requirement because money may have been the *only* remedy to his harm.⁶² *Massey v. Helman* also established that defendants must plead exhaustion of remedies as an affirmative defense under rule 8(c) of the Federal Rules of Civil Procedure.⁶³

The second case is *Pozo v. McCaughtry*, in which the Seventh Circuit addressed whether an inmate’s failure to file a timely appeal would satisfy the exhaustion of remedies requirement of the PLRA.⁶⁴ First, the court pointed out that inmates must file complaints and appeals in the manner provided by the prison’s administrative rules.⁶⁵ But the court went further to say that if an inmate failed to file a

⁵⁸ *Massey v. Helman*, 196 F.3d 727, 729 (7th Cir. 1999). Massey had not sought any administrative relief before bringing his suit. *See also* *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), (requiring prisons to provide inmates with seriously needed medical care to avoid constituting cruel and unusual punishment under the Eighth Amendment).

⁵⁹ *Massey*, 196 F.3d .at 733-34.

⁶⁰ *Id.* (citing *Perez v. Wisconsin Department of Corrections*, 182 F.3d 532 (7th Cir. 1999)).

⁶¹ *Id.*

⁶² *Id.* at 734.

⁶³ *Id.* at 735.

⁶⁴ 286 F.3d 1022, 1023 (2002).

⁶⁵ *Id.* at 1025.

grievance within the prescribed period of time, then he would be barred from bringing a suit regardless of the merits of his claim.⁶⁶

B. The Two Trends in Recent Seventh Circuit Exhaustion Analysis

In 2005, the Seventh Circuit's holdings have attempted to restore the balance between the civil rights of prisoners and autonomy for prison officials. There are two related trends that appear in much of the courts recent jurisprudence that are helping to achieve this return to equilibrium. First, the Seventh Circuit has carefully reviewed the administrative procedures at issue to determine whether they are "available" for purposes of the exhaustion requirement. As the cases below reveal, this is not simply a rubber-stamp review and has led the court to find exhaustion in many cases where the correctional facility argued that there were indeed administrative remedies that were not exhausted before the suit was filed and the district court agreed by dismissing the suit.

The second trend involves the court's consideration given to inmate efforts to utilize internal prison procedures, even if these efforts are ultimately unsuccessful in resolving the disputed conduct or condition. Again, the court has found exhaustion where an inmate has attempted to use grievance procedures or other "available" administrative remedies, even where prison officials have argued that those efforts were not sufficient. These two related trends, as evidenced by the following cases, show how the Seventh Circuit has attempted to balance inmate rights against the competing objectives of administrative autonomy and avoiding crowded federal dockets.

1. The Seventh Circuit's Evaluation of "Available" Administrative Remedies.

In a recent case, *Turner v. Huston*, the Seventh Circuit carefully reviewed the actions of prisoner officials and determined that they had

⁶⁶ *Id.* at 1024. The Supreme Court recently granted certiorari to decide this issue. *Woodford v. Ngo*, 403 F.3d 620 (cert. granted Nov. 14, 2005).

made administrative remedies unavailable.⁶⁷ Turner had filed his suit alleging six separate violations of his civil rights.⁶⁸ First, the court reiterated that in order to meet the exhaustion requirement, an inmate must “file complaints and appeals in the place, and at the time, the prison’s administrative rules require.”⁶⁹ Next, in reviewing the administrative remedies at issue, the court considered that the Illinois Legislature had required that county jails permit inmates to submit complaints to the jail administration in written form and, if those complaints were not resolved at the local level, to submit a further complaint to the Jail and Detention Standards Unit of the IDOC.⁷⁰ In order to seek review of the local decision, however, the prison rules required that a copy of the local decision must be attached to the complaint.⁷¹

Turner alleged that he had submitted written grievances on four of his six claims, but never received any response from prison officials.⁷² As a result, he was unable to submit any appeals because he never received any decision whatsoever and would not be able to attach it to his appeal as required.⁷³ Further, the court noted the prison administrators never even explained the grievance procedures that Turner was supposed to have used to him and failed to respond to his grievances in any way.⁷⁴ Accordingly, the court found that the

⁶⁷ 137 Fed. App’x 880, 882 (2005).

⁶⁸ He alleged that issues of a magazine were unreasonably withheld, the heat was not turned on before mid-November and inmates were denied blankets despite the freezing temperatures, he was subject to disciplinary segregation without adequate notice or an opportunity to rebut the charges, he was denied phone rights while in segregation, he was denied access to a copy machine, notary public, prompt mailing service or legal documents or an adequate law library, and he was denied an extra sheet even though a doctor had directed he be given one to treat a skin condition. *Id.* at 881.

⁶⁹ *Id.* (citing *Pozo v. McCaughtry*, 286 F.3d 1022, 1025 (7th Cir. 2002)).

⁷⁰ *See* ILL. ADMIN. CODE tit. 20 § 701.160(c) (2005).

⁷¹ *See* ILL. ADMIN. CODE tit. 20, § 701.160(c)(2) (2005).

⁷² *Turner*, 137 Fed. App’x at 881.

⁷³ *Id.* at 882.

⁷⁴ *Id.*

administrative remedies offered by the prison officials had been rendered unavailable to Turner.⁷⁵ And where administrative remedies are unavailable, they are deemed exhausted for purposes of § 1997(e)(a).⁷⁶ The Seventh Circuit upheld the dismissal of two of Turner's claims, however, where he had never submitted grievances at the local level.⁷⁷ Even though Turner argued that filing these grievances would probably not have accomplished anything, the court held that the apparent futility of filing a grievance is not an exception to the exhaustion requirement.⁷⁸

In *Brengettcy v. Horton*, the Seventh Circuit considered the case of an inmate at the Cook County Department of Corrections ("CCDOC") who alleged violations of his constitutional rights under Section 1983 stemming from a physical altercation with a corrections officer.⁷⁹ The defendants filed two motions to dismiss, one of which was based on Brengettcy's alleged failure to exhaust administrative remedies as required by the PLRA, section 1997(e)(a).⁸⁰ Initially, Judge Bucklo, who presided over the case, dismissed both motions.⁸¹

On appeal, the Seventh Circuit first examined the circumstances leading to the lawsuit, focusing on the confrontation with the correctional officers, to determine what remedies were indeed

⁷⁵ *Id.* See also *Dale v. Lappin*, 376 F.3d 652, 656 (7th Cir. 2004) (preventing inmates from submitting grievances, or failing to respond to their grievances, renders administrative remedies unavailable).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Turner*, 882-883, citing *Booth v. Churner*, 532 U.S. 731, 741 n.6 (2001); *Dixon v. Page*, 291 F.3d 485, 488 (7th Cir. 2002); and *Massey v. Wheeler*, 221 F.3d 1030, 1034 (7th Cir. 2000).

⁷⁹ 423 F.3d 674, 677 (7th Cir. 2005).

⁸⁰ *Id.*

⁸¹ *Id.* The case was transferred for administrative reasons to Judge St. Eve, who entered judgment in the defendants' favor on the exhaustion argument after it was presented to her in a motion for summary judgment. The Seventh Circuit held that there was not a compelling reason, as required, to overturn Judge Bucklo's ruling regarding exhaustion. *Id.* at 681.

available.⁸² Brengettcy's complaint alleged that on August 21, 2000 he was verbally abused by one of the defendants, Officer Horton, and then physically attacked.⁸³ When Brengettcy fought back, reinforcements were called and he was repeatedly beaten and kicked by officers, even after he was handcuffed, and was then thrown down a flight of stairs where he was knocked unconscious.⁸⁴ Brengettcy awoke the next morning in the hospital with pain throughout his body, sutures in his lip, and chipped front teeth.⁸⁵ Two days later, on August 23, 2000, he filed a written grievance with the CCDOC concerning the incident, which was within fifteen days as required by CCDOC's grievance policy.⁸⁶ He did not receive a reply within thirty days as the policy dictated and was not notified that his grievance would take longer to resolve.⁸⁷ In October, Brengettcy asked Officer McCullen about the status of his grievance was told that sometimes the grievances are destroyed by corrections officers or other officials.⁸⁸ On November 27, 2000, he filed another grievance and again the CCDOC failed to respond within 30 days or give notice that it would take longer.⁸⁹ Brengettcy brought suit under Section 1983 on March 13, 2001, alleging that the officers' conduct violated his civil rights.⁹⁰

In considering the defendants' motion to dismiss, Judge Bucklo reasoned that "[p]laintiff's grievance was filed in 2000. Defendants do not dispute that plaintiff never received a response... A plaintiff is not require[ed] to wait an unreasonable length of time-during which evidence, witnesses and memories may be lost - for a decision before he can go forward with his federal suit."⁹¹

⁸² *Id.* at 677-78.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 678.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*.

⁸⁹ *Id.*.

⁹⁰ *Id.* at 678-79.

⁹¹ *Id.* at 678-79.

When considering the question of exhaustion, the court first reiterated the holding that exhaustion is “an affirmative defense that the defendants have the burden of pleading and proving.”⁹² Requiring that prisoners file grievances and appeals according to the prison’s administrative rules⁹³, a prison official’s failure to respond to a prisoner’s claim can render administrative remedies unavailable.⁹⁴ This rule, also followed by the Fifth⁹⁵ and Eighth⁹⁶ Circuits, is based on a refusal to interpret the PLRA so narrowly as to permit prison officials to “exploit the exhaustion requirement through indefinite delay in responding to grievances.”⁹⁷ In examining the facts, the court found that Brengettscy followed the CCDOC policy regarding filing grievances, but had not received any response as was required. Further, the court found that while the policy allowed a prisoner to appeal a decision within five days of its receipt, there was no policy regarding what prisoner should do when the CCDOC fails to respond and there is no decision for them to appeal.⁹⁸ Accordingly, the court reversed the entry of summary judgment for the defendants on the alleged failure to exhaust because Brengettscy alleged that he filed a grievance within the time period mandated by CCDOC rules and the defendants had failed to meet their burden of proof.⁹⁹

In *Westefer v. Snyder*, the Seventh Circuit considered the claims of several prisoners, all members of various prison gangs, that they had been transferred to Tamms Correction Center (“Tamms”) as retaliation

⁹² *Id.* at 682 (citing *Dale v. Lappin*, 376 F.3d 652, 655 (7th Cir. 2004)).

⁹³ *Pozo v. McCaughtry*, 286 F.3d 1022, 1025 (7th Cir. 2002).

⁹⁴ *Lewis v. Washington*, 300 F.3d 829, 835 (7th Cir. 2002).

⁹⁵ *Powe v. Ennis*, 177 F.3d 393, 394 (5th Cir. 1999); *Underwood v. Wilson*, 151 F.3d 292, 295 (5th Cir. 1998).

⁹⁶ *Fouk v. Charrier*, 262 F.3d 687, 698 (8th Cir. 2001); *Miller v. Norris*, 247 F.3d 736, 740 (8th Cir. 2001).

⁹⁷ *Brengettscy*, 423 F.3d 674 at 682.

⁹⁸ *Id.*

⁹⁹ *Id.*

for exercising their First Amendment rights.¹⁰⁰ Tamms is the highest security prison in Illinois and was designed to be harsh, so that the threat of transfer to Tamms would deter prisoners throughout the IDOC from disobeying prison rules.¹⁰¹ The district court had dismissed the suits of several of the prisoners for failure to exhaust their administrative remedies.¹⁰² As usual, the Seventh Circuit's analysis began by examining the administrative procedures by which the inmates could have challenged their transfers to Tamms.¹⁰³

As an initial matter, the court requested that the parties file supplemental briefs discussing the administrative procedures available to a Tamms prisoner because the record and initial briefs did not present a "clear picture."¹⁰⁴ The IDOC has two avenues by which inmates must challenge their transfer to Tamms: through the transfer review hearing process and the inmate grievance process.¹⁰⁵ Additionally, Illinois regulations establish two types of transfer hearings at Tamms, depending on the inmate's segregation category upon arrival at the facility.¹⁰⁶ Prisoners are classified as subject to either administrative or disciplinary segregation, and different review processes govern each category.¹⁰⁷

Inmates in administrative detention are given a transfer review hearing within ten working days of their arrival at Tamms "whenever possible."¹⁰⁸ At this hearing inmates can make statements challenging their placement, submit documentary evidence and request that the transfer committee interview witnesses.¹⁰⁹ This transfer committee

¹⁰⁰ 422 F.3d 570, 572-573 (7th Cir. 2005).

¹⁰¹ *Id.* at 572.

¹⁰² *Id.* at 576.

¹⁰³ *Id.* at 577.

¹⁰⁴ *Id.* at 577.

¹⁰⁵ *Id.* at 578. Transfer review hearing at ILL. ADMIN. CODE tit. 20 § 505.60(a) (2005) and the grievance procedure at ILL. ADMIN. CODE tit. 20 § 504.810(a) (2005).

¹⁰⁶ *Id.* at 578.

¹⁰⁷ *Id.* at 578.

¹⁰⁸ ILL. ADMIN. CODE tit. 20 § 505.60(a) (2005).

¹⁰⁹ ILL. ADMIN. CODE tit. 20 § 505.60(b) (2005).

makes a recommendation to the warden, who approves or denies the recommendation before forwarding it to the Deputy Director.¹¹⁰ In contrast, inmates who are transferred to Tamms in disciplinary segregation are not afforded an initial transfer review hearing.¹¹¹ In fact, prisoners in disciplinary segregation only receive a hearing when their term of disciplinary segregation ends.¹¹² The court was concerned by this provision's possible application, where a prisoner who was transferred while serving a long disciplinary sentence would not be able to contest their transfer until the end of that long sentence.¹¹³ After the initial transfer review hearing, inmates are reviewed every ninety days to determine whether placement at Tamms is still appropriate.¹¹⁴ Again, however, inmates in disciplinary segregation are not given this quarterly review.¹¹⁵ Finally, individuals in administrative segregation are given an annual review while those in disciplinary segregation are not.¹¹⁶

The court found that this transfer review process was not an adequate administrative remedy for two reasons.¹¹⁷ First, prisoners who were transferred in, and remained in, disciplinary segregation had not yet qualified for a review hearing.¹¹⁸ Accordingly, this remedy was not "available" to them and did not have to be exhausted.¹¹⁹ Second, prisoners are not informed of the reasons for their transfer to Tamms and cannot contest these reasons at their review hearings.¹²⁰ If a prisoner does find out the reasons for his transfer after completing the initial transfer review, they must wait at least one more year before

¹¹⁰ ILL. ADMIN. CODE tit. 20 § 505.60(b) and (d) (2005).

¹¹¹ ILL. ADMIN. CODE tit. 20 § 505.60(a) (2005).

¹¹² ILL. ADMIN. CODE tit. 20 §505.60(a) (2005).

¹¹³ *Westefer v. Snyder*, 422 F.3d 570, 578 (7th Cir. 2005).

¹¹⁴ ILL. ADMIN. CODE tit. 20 §505.70(a) (2005).

¹¹⁵ *Westefer*, 422 F.3d at 578 (citing 20 ILL. ADMIN. CODE §505.70(a) (2005)).

¹¹⁶ ILL. ADMIN. CODE tit. 20 §505.70(b) (2005).

¹¹⁷ *Westefer*, 422 F.3d at 579-80.

¹¹⁸ *Id.* at 579, (relying on ILL. ADMIN. CODE tit. 20 §505.60(a) (2005)).

¹¹⁹ *Id.* (citing *Lewis v. Washington*, 300 F.3d 829, 833 (7th Cir. 2002)).

¹²⁰ *Id.*

they can present evidence at an annual review hearing.¹²¹ Relying on these issues, the Seventh Circuit found that the IDOC had not shown that the prisoners had failed to exhaust their administrative remedies.¹²²

In examining the second administrative remedy by which an inmate could appeal their transfer to Tamms, the grievance process, the Seventh Circuit found confusion within the IDOC guidelines.¹²³ In Illinois, “incidents, problems, and complaints” can be addressed through grievances.¹²⁴ The grievance process cannot, however, be used for complaints “regarding decisions that are outside the authority of the Department, such as parole decisions, clemency, or order regarding length of sentence or decisions that have been rendered by the Director.”¹²⁵ The court interpreted the phrase “or decisions that have been rendered by the Director” to possibly apply to the administrative decision to transfer an inmate to Tamms.¹²⁶ The court also found that the IDOC’s ultimate grievance appeal body, the Administrative Review Board (“ARB”), had been inconsistent in categorizing inmate grievances requesting transfers as properly before them on appeal or an administrative prerogative of IDOC.¹²⁷ The court also considered the fact that a Tamms counselor and other IDOC officials had given contradictory advice to inmates about the proper venue for their transfer appeals.¹²⁸

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ ILL. ADMIN. CODE tit. 20 §504.810(a) (2005).

¹²⁵ ILL. ADMIN. CODE tit. 20 §504.810(a) (2005).

¹²⁶ *Westefer*, 422 F.3d at 579.

¹²⁷ *Id.* at 579-580. (The ARB had addressed one prisoner’s grievance complaining of his transfer, but had refused to address another prisoner’s grievance for transfer saying it was administrative prerogative of IDOC).

¹²⁸ *Id.* at 580 (A Tamms counselor said he could not use grievance system, other prison officials said this was the only way to contest transfer.)

Finally, the court examined the variety of Tamms-specific regulations in the Illinois Administrative Code¹²⁹ for a provision addressing how a prisoner could challenge his transfer to Tamms.¹³⁰ Finding none, the court concluded that if there were a regulation that specified the proper means for this challenge, then prisoners would be required to fulfill its administrative requirements.¹³¹ In struggling to determine whether an administrative remedy existed at all, the court predicted, “[i]f the ARB took consistent positions on its authority to address a transfer grievance, a clear route for the prisoner at least would be evident and we could proceed to determine its effectiveness.”¹³² But absent any such consistency or other remedy, the court concluded that the grievance process was not an “available” administrative remedy for the prisoners who wished to appeal their transfers.¹³³

2. The Seventh Circuit’s Evaluation of “Exhaustion”

In December 1994, Donald Greeno began complaining of severe heartburn while incarcerated at Racine Correctional Institution.¹³⁴ Over the next three years, Greeno was repeatedly denied necessary medical treatment and eventually suffered severe and permanent digestive damage.¹³⁵

In June 2000, Greeno filed suit under Section 1983, alleging that his doctors and other Wisconsin Department of Correction’s employees had shown deliberate indifference to his serious medical needs in violation of the Eighth Amendment.¹³⁶ Greeno also alleged deliberate indifference by the employees who had processed his

¹²⁹ ILL. ADMIN. CODE tit. 20 §505(2005).

¹³⁰ Westefer, 422 F.3d at 580.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ Greeno v. Daley, 414 F.3d 645, 649 (7th Cir. 2005).

¹³⁵ *Id.*

¹³⁶ *Id.* at 651.

inmate complaints relating to his medical care.¹³⁷ On appeal, the defendants argued that Greeno had failed to exhaust his administrative remedies as required because he “did not appeal every single complaint that he filed through the highest level of review, the Department of Corrections Secretary.”¹³⁸ The Seventh Circuit rejected this argument and found that there was no requirement that every inmate complaint be appealed through the highest level.¹³⁹ The court also found that Greeno had exhausted his administrative remedies as required by § 1997(e)(a) where he had filed every grievance according to the prison’s policies, detailed exactly what his injuries and needs were, and appealed at least seven of his complaints to the Department of Corrections Secretary, “Greeno fully exhausted his prison remedies with respect to complaints that alerted prison officials to the nature of his problem and gave them an opportunity to resolve it.”¹⁴⁰ “In short, Greeno took all steps prescribed by the prison grievance system, thus satisfying the exhaustion requirement.”¹⁴¹ The Seventh Circuit concluded by vacating the district court’s judgment and allowing Greeno’s claims against most of the prison employees to continue.¹⁴²

Rodger Thornton is an inmate serving out a life sentence in the IDOC, currently at the Pontiac Correctional Center.¹⁴³ After a disciplinary charge, Thornton was placed in a segregation cell on January 13, 2000.¹⁴⁴ Thornton was very upset by the conditions in his cell and wrote letters to the Director of the Pontiac Correctional Center, the Warden, and other officials.¹⁴⁵ Thornton received no response to these requests and submitted an emergency grievance to

¹³⁷ *Id.*

¹³⁸ *Id.* at 652.

¹³⁹ *Id.*

¹⁴⁰ *Id.* (citing *McCoy v. Gilbert*, 270 F.3d 503, 512 (7th Cir. 2001)).

¹⁴¹ *Id.* See *Ford v. Johnson*, 362 F.3d 395, 397 (7th Cir. 2004).

¹⁴² *Id.* at 658, 659.

¹⁴³ *Thornton v. Snyder*, 428 F.3d 690, 692 (7th Cir. 2005).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

the warden asking to be moved on January 28, 2000, two weeks after his placement in the segregation cell.¹⁴⁶ Thornton subsequently received a letter stating that his grievance did not constitute an emergency.¹⁴⁷

On February 22, 2000, after being transferred to another segregation cell, Thornton filed a grievance requesting a clean mattress in his new cell.¹⁴⁸ After receiving another unsatisfactory mattress, Thornton was given a satisfactory one on May 11. The next day, prison officials dismissed the February 22 grievance as moot since Thornton had received an acceptable mattress.¹⁴⁹

Thornton eventually brought suit against several prison officials pursuant to Section 1983 for alleged violations of his Eighth Amendment right to be free from cruel and unusual punishment.¹⁵⁰ He sought monetary damages for the time he was confined in the initial segregation cell as well as the time he was in the second segregation cell without a mattress.¹⁵¹ The district court granted summary judgment for the defendants on Thornton's cell condition claims on the basis that he had failed to exhaust his administrative remedies.¹⁵²

¹⁴⁶ *Id.* As written, the grievance stated in part:

This seg cell north 106 is in very poor shape. There appears to be human feces smeared on the walls covering most of the inside of the cell. It has a foul smell to it. The toilet leaks. There is 2 to 3 inches of water on the floor, it clearly has a sewer aroma to it. The water that comes from the sink is discolored it looks like rust water. The conditions of this mattress sir is so bad that there is no way I can or will sleep on it. Its stained and its got a piss smell to it...I can't even eat cuz of the smell in this cell. I've already had several asthma attacks since I've been back here. Sir please help this is just not right at all...Please I beg of you before I contract some major health problems get me out of here.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 693.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

The Seventh Circuit first examined the grievance process followed by the IDOC, codified in the Illinois Administrative Code.¹⁵³ Under that procedure, an inmate can submit a written grievance to a designated grievance officer, who then submits his recommendation to the institution warden.¹⁵⁴ In response, the warden “shall advise the offender of the decision in writing within two months after receipt of the written grievance, where reasonably feasible.”¹⁵⁵ Alternatively, an inmate can request that a grievance be handled on an emergency basis by submitting the grievance directly to the warden.¹⁵⁶ If the warden determines that there is a substantial risk of imminent personal injury or other serious or irreparable harm, the grievance is to be handled on an emergency basis.¹⁵⁷ The process also provides: “[i]f, after receiving the response of the [warden], the offender still feels that the problem, complaint, or grievance has not been resolved to his or her satisfaction, he or she may appeal in writing to the Director within 30 days after the date of the decision.”¹⁵⁸ With this policy in hand, the Seventh Circuit turned to the defendants’ argument that Thornton had failed to exhaust his administrative remedies.¹⁵⁹

The defendants’ initial exhaustion argument was that Thornton did not even properly begin the grievance process regarding the conditions in his first segregation cell.¹⁶⁰ Under this argument, the defendants’ claimed that after the warden found that the grievance was not an emergency, the grievance ceased to exist.¹⁶¹ The Seventh Circuit disagreed, however, because Thornton had followed the procedures for filing an emergency grievance when he submitted his grievance

¹⁵³ *Id.* at 694 (citing ILL. ADMIN. CODE tit. 20 § 504.800 *et seq.* (2005))

¹⁵⁴ *Id.* (citing ILL. ADMIN. CODE tit. 20 §§ 504.810; 504.830 (2005)).

¹⁵⁵ ILL. ADMIN. CODE tit. 20 § 504.830(d) (2005).

¹⁵⁶ ILL. ADMIN. CODE tit. 20 § 504.840 (2005).

¹⁵⁷ ILL. ADMIN. CODE tit. 20 § 504.840 (2005).

¹⁵⁸ ILL. ADMIN. CODE tit. 20 § 504.850(2005).

¹⁵⁹ *Thornton v. Snyder*, 428 F.3d 690, 694 (7th Cir. 2005).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

directly to the warden.¹⁶² When the warden only informed Thornton that his grievance was not an emergency and did not discuss the merits of the grievance, “There is nothing in the current regulatory text, however, that requires an inmate to file a new grievance after learning that it will not be considered on an emergency basis.”¹⁶³ Additionally, the fact that Thornton was transferred, and thus received exactly the relief he had requested, before the thirty-day time for him to appeal the warden’s decision had expired led the court to reject this initial argument.¹⁶⁴

In response to the defendants’ larger exhaustion argument, Thornton argued that he had properly filed his grievances and received exactly the relief he asked for and thus fulfilled his duty to exhaust his administrative remedies.¹⁶⁵ As to his initial grievance filed on January 28, Thornton had asked to be transferred and was indeed transferred to another cell by February 22.¹⁶⁶ In his second grievance, Thornton requested a replacement mattress and subsequently received one.¹⁶⁷ After he was given the new mattress, the grievance officer and warden found that the grievance was now moot and dismissed it as such.¹⁶⁸ The defendants contended that Thornton should have appealed both of these grievances to the Director of the Department of Corrections as allowed in the grievance procedures.¹⁶⁹ The court disagreed with the defendants’ interpretation of the PLRA exhaustion requirement, however, and found that Thornton did not have to “appeal grievances that were resolved as he requested and where money damages were not available.”¹⁷⁰

¹⁶² *Id.* (citing ILL. ADMIN. CODE tit. 20 § 504.840 (2005)).

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 694-695.

¹⁶⁶ *Id.* at 695.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

In rejecting the defendants' interpretation that the PLRA required inmates to appeal grievance resolved favorably to the highest level possible, the court looked to its previous interpretations as well as the analysis of the Second and Tenth Circuits on this issue.¹⁷¹ First, the court found that if an injury has been healed by the time a lawsuit begins, nothing other than damages could be a "remedy," and if the administrative process cannot provide compensation then there is no administrative remedy to exhaust.¹⁷² This conclusion was buttressed by the Tenth and Second Circuits' interpretation that prisoners are not required to appeal favorable decisions.¹⁷³ Even where the defendants relied on the statement in *Booth v. Churner* that futility is not an excuse for failure to exhaust available remedies, the Seventh Circuit found that the circumstances of the case made *Booth* inapplicable.¹⁷⁴ While there was a possibility of some relief in *Booth*, Thornton had already received what he requested in his grievances and there was nothing else that prison officials could give him, "Without the possibility of some relief, the administrative officers would presumably have no authority to act on the subject of the complaint, leaving the inmate with nothing to exhaust."¹⁷⁵

Finally, the Seventh Circuit addressed several policy arguments advanced by the defendants, chief among them the contention that the grievance system is designed to provide notice to prison officials of systemic problems and inmates should be required to pursue further administrative review to ensure such notice is given.¹⁷⁶ The court disagreed and countered that Thornton had properly submitted his grievances and prison officials were aware of his complaints and it is not "Thornton's responsibility to notify persons higher in the chain when this notification would be solely for the benefit of the prison

¹⁷¹ *Id.* at 695-696.

¹⁷² *Id.*

¹⁷³ *Id.* (citing *Ross v. County of Bernalillo*, 365 F.3d 1181, 1187 (10th Cir. 2001) and *Ortiz v. McBride*, 380 F.3d 649, 653 (2nd Cir. 2004)).

¹⁷⁴ *Id.* (citing *Booth v. Churner*, 532 U.S. 731, 734 (2001)).

¹⁷⁵ *Id.* (quoting *Booth*, 532 U.S. at 746 n.6 (2001)).

¹⁷⁶ *Id.* at 696-97.

administration.”¹⁷⁷ Further, requiring inmates to appeal favorable decisions would risk reversal of these decisions and thus increase, not decrease, the number of inmate suits, in contrast to the very purpose of the PLRA.¹⁷⁸ Accordingly, the court reversed the lower court’s entry of summary judgment against Thornton and found that he had exhausted his administrative remedies as required.¹⁷⁹

TRENDS AND OVERALL ANALYSIS

Though each case is fact-specific, the cases discussed above illustrate the two prevailing trends in the Seventh Circuit’s interpretation of inmate claims under Section 1983. These two related trends recognize that an efficient exhaustion requirement creates a burden on both prison officials and prison inmates. In determining whether any administrative remedies are “available,” the deference given to prison officials traditionally by the courts with regard to the operation of prisons and their administration will not prevent the court from closely examining alleged constitutional violations and the administrative remedies available to aggrieved inmates. By requiring that prison officials offer effective and comprehensive administrative remedies, the Seventh Circuit actually reinforces the primary goal of the PLRA, a reduction in the number of lawsuits and an increase in the quality of lawsuits that actually get onto federal dockets. Through these decisions, the court has been able to critique several administrative procedural requirements and tip the balance in favor of civil rights where these remedies are unavailable.

The second group of cases focuses less on the adequacy of the specific administrative remedy and more on the conduct of the prisoner who has filed suit. As long as prisoner follow the administrative procedures as they are described, they will satisfy the exhaustion of remedies requirement of the PLRA. Further, prisoners are not forced to appeal favorable decisions in order to preserve their

¹⁷⁷ *Id.* at 697.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

ability to bring suit to vindicate their rights. Additionally, the court will find that administrative remedies have been exhausted where the inmate has filed their grievances in a timely manner, even if the prison officials have not responded as required.

Even though inmates are required to exhaust administrative procedures, the Seventh Circuit's characterization of the exhaustion requirement under the PLRA as an affirmative defense places the burden on prison officials to show what an inmate should have done and why they should have done it. Though this burden may be heavy, it is justified for several reasons. First, prison officials are in a much better position than inmates to understand the often-confusing administrative regulations and procedures necessary for resolving complaints and would, therefore, be better able to explain an inmate's failure to the court. Second, studies show that a large percentage of inmate suits are brought *pro se* and to require the average inmate to adequately understand the administrative procedures and further show how they were or were not "available" would lead to the dismissal of many legitimate Section 1983 claims and, thereby, damage to the civil rights of prisoners everywhere. This is beyond the simple fact that seven out of ten prisoners have only the lowest level of reading and writing ability.¹⁸⁰

In the cases discussed above, the Seventh Circuit correctly shifted the burden of proof onto prison officials, rather than placing it on uneducated and abused prisoners. This helped insure that prisons were indeed responding to inmate grievances or appeals for change, or that at least the inmates were given a voice with which to protect their constitutional rights. While this goes against the interpretations of many of the district courts throughout the Seventh Circuit, it serves the purpose of the PLRA where it requires that prisons adopt reasonable and effective administrative procedures so that inmates do not need to bring suit in federal court in order to have their rights protected. While there may be inmates that will file frivolous lawsuits even where there are administrative remedies available, the recent cases

¹⁸⁰ Karl O. Haigler et al., *Literacy Behind Prison Walls* 17-19 (1994), available at <http://www.nces.ed.gov/pubs94/94102.pdf>.

decided by the Seventh Circuit show that many inmates present valid claims that could have been remedied had the grievance or other administrative procedure functioned effectively.

CONCLUSION

The increasing number of inmates in American prisons and subsequent overcrowding are likely to lead to an increasing number of lawsuits filed by prisoners. In the face of this tide, the pressure on federal courts to manage their dockets will only continue to grow. Under the PLRA, every inmate lawsuit that enters federal court will force the court to weigh the rights of prisoners against the administrative remedies available to them. In the Seventh Circuit, the court should continue to place the burden on prison officials to show that there were indeed administrative remedies that should have been exhausted. Further, the court should continue to closely scrutinize the “availability” of administrative remedies to ensure that grievance procedures are effective. Finally, given the fact that many prisoners will not be able to retain lawyer to litigate their section 1983 or other civil rights claims, the court must look at the conduct of the inmate in the context of the particular administrative remedies available to determine whether they have exhausted all available administrative remedies. Only in this way can the court insure that they do not sacrifice justice for the sake of judicial economy and protect the fundamental civil rights of prisoners.