

The Prison Litigation Reform Act

John Boston
The Legal Aid Society
Prisoners' Rights Project
199 Water Street, 6th floor
New York, N.Y. 10038
jboston@legal-aid.org

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Contents

I.	Introduction	1
II.	Scope and Definitions	1
III.	Prospective Relief	7
IV.	Exhaustion of Administrative Remedies	15
A.	The Statutory Requirement	15
B.	What Cases Must Be Exhausted?	20
	1. Scope of the Statute	20
	2. “Prison Conditions”	21
C.	What Happens If the Plaintiff Has Failed to Exhaust?	24
D.	How Is Exhaustion Addressed Procedurally?	28
	1. Burden of Pleading and Proof	28
	2. Waiver	33
	3. Procedural Vehicles for Raising Exhaustion	36
E.	What Is Exhaustion?	38
	1. What If the Prisoner Wins the Grievance?	44
	2. Exhausting All Issues	47
	3. Specificity of Grievances	54

4.	Exhausting Each Defendant	61
5.	Exhausting Items of Relief	67
6.	“Total Exhaustion”	67
7.	Mistakes in Exhausting: Strict or Substantial Compliance or “Special Circumstances” Justifying Non-Compliance?	71
8.	Compliance with Time Limits	85
	a. Initial Compliance	85
	b. Time Limits After Dismissal for Non-Exhaustion	92
F.	What Procedures Must Be Exhausted?	95
G.	"Available" Remedies	108
	1. Grievable and Non-Grievable Issues	110
	2. Unavailability Based on the Facts	114
	3. Estoppel	123
H.	What If the Problem Is Too Urgent To Exhaust?	125
I.	Statutes of Limitations	127
J.	Retroactivity of the Statute	131
K.	Exhaustion and Class Actions	132
V.	Mental or Emotional Injury	137
	A. What Does the Statute Do?	138
	B. What Is Mental or Emotional Injury?	140
	C. What Is Physical Injury?	150
VI.	Attorneys’ Fees	154
VII.	Filing Fees and Costs	159

VIII.	Three Strikes Provision	161
IX.	Screening and Dismissal	168
X.	Waiver of Reply	170
XI.	Hearings by Telecommunication and at Prisons	170
XII.	Revocation of Earned Release Credit	171
XIII.	Diversion of Damage Awards	171

APPENDIX A

	Additional Authority	173
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APPENDIX B

	The Prison Litigation Reform Act, as codified	177
I.	Scope and applicability of the statute	177
II.	Prospective relief restrictions	178
III.	Exhaustion of administrative remedies	182
IV.	Mental or emotional injury	183
V.	Attorneys' fees	183
VI.	Filing fees and costs/screening and dismissal	184
VII.	Three strikes provision	186
IX.	Waiver of reply	187
X.	Hearings by telecommunication and at prisons	187
XI.	Revocation of earned release credit	187
XII.	Diversion of damage awards	188
XIII.	Bankruptcy	188

The Prison Litigation Reform Act

I. Introduction

The Prison Litigation Reform Act of 1995 (PLRA), actually passed in 1996, amends and supplements the U.S. Code in a number of ways in order to restrict and discourage litigation by prisoners. Its provisions 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 the Appendix. This summary reviews the provisions of the statute, the most important judicial interpretations of it, and major open questions concerning its application, with emphasis on the state of the law in the Second Circuit. All opinions expressed are the author's.

II. Scope and definitions

The prospective relief sections of the PLRA apply to “civil action[s] with respect to prison conditions,” which are defined to include “any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but do not include habeas corpus proceedings challenging the fact or duration of confinement in prison.”¹ 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.”² “Prospective relief” is “all relief other than compensatory money damages.”³

The prisoner litigation sections of the PLRA mostly apply to “civil actions” brought by “prisoners.” 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.”⁴ Case law to date holds that military prisoners are “prisoners” under the PLRA,⁵ as are persons held in privately operated

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

⁴ 42 U.S.C. § 1997e(h); 28 U.S.C. § 1915(h); 28 U.S.C. § 1915A(c) (emphasis supplied).

⁵ *Marrie v. Nickels*, 70 F.Supp.2d 1252, 1262 (D.Kan. 1999).

prisons and jails,⁶ juvenile facilities,⁷ or an “intensive drug rehabilitation halfway house.”⁸

Persons who are civilly committed are generally not prisoners, even if their commitment has its origins in criminal proceedings.⁹ However, persons who are civilly committed but whose criminal charges are still technically pending remain pre-trial detainees and are therefore prisoners.¹⁰

⁶ See *Boyd v. Corrections Corporation of America*, 380 F.3d 989, 993-94 (6th Cir. 2004), *cert. denied*, 125 S.Ct. 1639 (2005); *Ross v. County of Bernalillo*, 365 F.3d 1181, 1184 (10th Cir. 2004); *Lodholz v. Puckett*, 2003 WL 23220723 at *4-5 (W.D.Wis., Nov 24, 2003), *reconsideration denied in part*, 2004 WL 67573 (W.D.Wis., Jan. 13, 2004) (all holding the PLRA exhaustion requirement applicable to persons held in private prisons).

⁷ *Christina A. ex rel. Jennifer A. v. Bloomberg*, 315 F.3d 990, 994-95 (8th Cir. 2003) (holding attorneys’ fees provisions apply to juveniles); *Alexander S. v. Boyd*, 113 F.3d 1373, 1383-85 (4th Cir. 1997), *cert. denied*, 522 U.S. 1090 (1998) (same); *Lewis v. Gagne*, 281 F.Supp.2d 429, 433 (N.D.N.Y. 2003) (holding exhaustion requirement applies to juveniles).

⁸ *Witzke v. Femal*, 376 F.3d 744, 752-53 (7th Cir. 2004). In *Ruggiero v. County of Orange*, 386 F.Supp.2d 434, 435-36 (S.D.N.Y. 2005), the court held the plaintiff to be a prisoner, even though he was held at a “Drug Treatment Campus” that state law deemed not to be a correctional facility, because he was at the “facility” as a result of a parole violation. See also *Miller v. Wayback House*, 2006 WL 297769 at *4 (N.D.Tex., Feb. 1, 2006) (assuming plaintiff, released on parole to halfway house, was a prisoner, without inquiring whether facility was a correctional facility under the statute).

⁹ See *Michau v. Charleston County, S.C.*, 434 F.3d 725, 727-28 (4th Cir. 2006) (person civilly detained pursuant to sexually violent predator statute); *Perkins v. Hedricks*, 340 F.3d 582, 583 (8th Cir. 2003) (person civilly detained in prison Federal Medical Center); *Troville v. Venz*, 303 F.3d 1256, 1260 (11th Cir. 2002) (person civilly detained for proceedings under “sexually violent predator” statute); *Agyeman v. I.N.S.*, 296 F.3d 871, 885-86 (9th Cir. 2002) (alien detained pending deportation); *Kolotronis v. Morgan*, 247 F.3d 726, 728 (8th Cir. 2001) (person committed after finding of not guilty by reason of insanity); *Page v. Torrey*, 201 F.3d 1136, 1139-40 (9th Cir. 2000) (persons detained under a “sexual predator” law after completion of their criminal sentences); *LaFontant v. INS*, 135 F.3d 158 (D.C.Cir. 1998) (immigration detainees); *Gashi v. County of Westchester*, 2005 WL 195517 at *1 (S.D.N.Y., Jan. 27, 2005) (immigration detainees). *Contra*, *Willis v. Smith*, 2005 WL 550528 at *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).

¹⁰ *Kalinowski v. Bond*, 358 F.3d 978, 979 (7th Cir.) (holding that persons held under the Illinois Sexually Dangerous Persons Act are prisoners for PLRA purposes), *cert. denied*, 124 S.Ct. 2843 (2004); 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).

Persons who are not, in fact, lawfully subject to detention are not prisoners.¹¹ Ex-prisoners are not prisoners; most decisions hold that the PLRA does not apply to suits they file after release, even if they concern events that occurred in prison.¹² There are exceptions, which in my view rely on strained reasoning and are wrong, since the plain language of the relevant statutes refers to some variation of “actions brought by a prisoner.”¹³ Courts have differed over whether a prisoner who

“so long as the detainee did not also face criminal charges”).

¹¹ Lee v. State Dept. of Correctional Services, 1999 WL 673339 at *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 at *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 at *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 for purposes of attorneys’ fees).

¹² Norton v. The City Of Marietta, OK, 432 F.3d 1145, 1150 (10th Cir. 2005); Nerness v. Johnson, 401 F.3d 874, 876 (8th Cir. 2005) (per curiam); Ahmed v. Dragovich, 297 F.3d 201, 210 n.10 (3d Cir. 2002) (citing cases); Janes v. Hernandez, 215 F.3d 541, 543 (5th Cir. 2000), *cert. denied*, 531 U.S. 1113 (2001); Greig v. Goord, 169 F.3d 165, 167 (2d Cir. 1999); Kerr v. Puckett, 138 F.3d 321, 322 (7th Cir. 1998); Rose v. Saginaw County, 232 F.R.D. 267, 275-77 (E.D.Mich. 2005); Wilson v. Hampton County, 2005 WL 2877725 at *3 (D.S.C., Oct. 31, 2005) (relying on *Greig v. Goord*); Black v. Franklin County, Kentucky, 2005 WL 1993445 at *4-5 (E.D.Ky., Aug. 16, 2005).

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. *Compare* Segalow v. County of Bucks, 2004 WL 1427137 at *1 (E.D.Pa., June 24, 2004) (holding that a prisoner who was released, filed his complaint, was reincarcerated, was released again, and filed an amended complaint naming a new party was not a prisoner for PLRA purposes) *with* Gibson v. Brooks, 335 F.Supp.2d 325, 330-31 (D.Conn. 2004) (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).

¹³ A few courts 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, since the congressional purpose of weeding out frivolous cases would be served thereby. 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 “a prisoner confined” in one of the listed types of institutions. Other decisions follow the statutory language and hold that § 1997e(e) does not apply to cases filed after release from prison.

files suit while in prison and then is released should continue to be treated as a prisoner,¹⁴ or whether the filing of an amended complaint after release means that the case is no longer “brought by a

See Kerr v. Puckett, 138 F.3d at 322 (“The statutory language does not leave wriggle room; a convict out on parole is not a ‘person incarcerated or detained in any facility who is . . . adjudicated delinquent for, violations of . . . the terms and conditions of parole.’”); Harris v. Garner, 216 F.3d 970, 976-80 (11th Cir.2000) (en banc); Gibson v. Kendrick, 2005 WL 1309161 at *1 (E.D.La., May 19, 2005); Billingsley v. Shelby County Dept. of Correction, 2004 WL 2757915 at *7 n.4 (W.D.Tenn., Nov. 24, 2004). Further, one recent New York decision directly refuses to follow *Cox* on the ground that the Circuit decision is explicitly non-precedential under governing rules and the analysis is incorrect. Kelsey v. County of Schoharie, 2005 WL 1972557 at *1-3 (N.D.N.Y., Aug. 5, 2005) (citing *Kerr* and *Harris*). Courts elsewhere have also rejected *Cox*. Rose v. Saginaw County, 232 F.Supp.2d 267, 277 (E.D.Mich. 2005) (rejecting *Cox v. Malone* analysis); Sutton v. Hopkins County, Ky., 2005 WL 3478152 at *3-4 (W.D.Ky., Dec. 19, 2005) (following *Rose*).

The decision in *Morgan v. Maricopa County*, 259 F.Supp.2d 985, 991 (D.Ariz. 2003), that a released prisoner was required to exhaust prison remedies even though he had been released before he filed suit, is equally inconsistent with the statute, as well as with Ninth Circuit (and Second Circuit) case law holding that only current criminal incarceration makes a plaintiff a prisoner. *See* Page v. Torrey, 201 F.3d 1136, 1139 (9th Cir. 2000); Greig v. Goord, 169 F.3d 165, 167 (2d Cir. 1999); *see also* Thomas v. Baca, 2005 WL 697986 at *2-3 (C.D.Cal., Mar. 23, 2005) (rejecting *Morgan*); Kritenbrink v. Crawford, 313 F.Supp.2d 1043, 1047-48 (D.Nev. 2004) (noting *Morgan*’s inconsistency with *Page*). *But see* Reyes v. State of Oregon, 2005 WL 1459662 at *2 (D.Or., June 21, 2005) (same as *Morgan*).

¹⁴ Compare Harris v. Garner, 216 F.3d 970, 973-76 (11th Cir. 2000) (en banc) (holding that plaintiffs released after filing remain prisoners for purposes of PLRA mental/emotional injury provision), *cert. denied*, 532 U.S. 1065 (2001); Becker v. Vargo, 2004 WL 1068779 at *3 (D.Or., Feb. 17, 2004) (same, for purposes of exhaustion requirement), *report and recommendation adopted*, 2004 WL 1071067 (D.Or., Mar. 12, 2004) and 2004 WL 1179332 (D.Or., May 27, 2004) *with* Dennison v. Prison Health Services, 2001 WL 761218 at * 2-3 (D.Me., July 6, 2001); Ovens v. State of Alaska, Dept. of Corrections, 2000 WL 34514101 at *3 (D.Alaska, Mar. 13, 2000) (both holding the opposite with respect to exhaustion requirement); *see* n.115, below, for additional conflicting authority concerning the exhaustion requirement.

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, ___ F.3d ___, 2006 WL 172357 (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.

prisoner.”¹⁵

It appears that prisoners cease to be prisoners upon death.¹⁶ Prisoners’ relatives bringing an action for a prisoner’s death are not themselves prisoners.¹⁷ Courts have taken different approaches to cases involving both prisoners and non-prisoners as plaintiffs.¹⁸

Civil actions do not include habeas corpus and other post-judgment proceedings challenging criminal convictions or sentences or their calculation.¹⁹ Most courts have now held that habeas proceedings not arising from the original criminal conviction or sentence are also not civil actions

¹⁵ Compare *Harris v. Garner*, 216 F.3d at 973-76 (holding that filing of amended complaint does not change plaintiffs’ status) with *Prendergast v. Janecka*, 2001 WL 793251 at *1 (E.D.Pa., July 10, 2001) (holding that the PLRA ceases to apply when a post-release amended complaint is filed); see also *Segalow v. County of Bucks*, cited in n. 12, above.

¹⁶ *Rivera-Quinones v. Rivera-Gonzalez*, 397 F.Supp.2d 334, 340 (D.P.R., Oct. 28, 2005); *Simmons ex rel. Estate of Simmons v. Johnson*, 2005 WL 2671537 at *2 (W.D.Va., Oct. 20, 2005); *Greer v. Tran*, 2003 WL 21467558 at *2 (E.D.La., June 23, 2003); *Treesh v. Taft*, 122 F.Supp.2d 887, 890 (S.D.Ohio. 2000).

¹⁷ *Netters v. Tennessee Dept. of Correction*, 2005 WL 2113587 at *3 n.3 (W.D.Tenn., Aug 30, 2005); *Greer v. Tran*, 2003 WL 21467558 at *2 (E.D.La., June 23, 2003); see *Rivera-Rodriguez v. Pereira-Castillo*, 2005 WL 290160 at *5-6 (D.P.R., Jan. 31, 2005) (holding that a prisoner’s guardian is not a prisoner).

¹⁸ See *Arsberry v. Illinois*, 244 F.3d 558 (7th Cir.) (holding that prisoner plaintiffs were barred for non-exhaustion but non-prisoners’ claims could be decided on the merits), *cert. denied*, 534 U.S. 1062 (2001); *Montcalm Pub. Corp. v. Com. of Va.*, 199 F.3d 168, 171-72 (4th Cir. 1999) (holding 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); *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”).

¹⁹ 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); *Zapata v. Scibana*, 2004 WL 1563239 at *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 at *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).

for PLRA purposes.²⁰ Under that holding, habeas challenges to prison disciplinary convictions resulting in the loss of good time are not governed by the PLRA,²¹ though subsequent damage actions would be.

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.²² However, challenges to seizures of property related to criminal proceedings have so far been treated as civil actions,²³ as have motions for disclosure of matters

²⁰ *Malave v. Hedrick*, 271 F.3d 1139, 1140 (8th Cir. 2001), *cert. denied*, 537 U.S. 847 (2002); *Walker v. O'Brien*, 216 F.3d 626, 633-36 (7th Cir.), *cert. denied*, 531 U.S. 1029 (2000), *overruling* *Newlin v. Helman*, 123 F.3d 429 (7th Cir. 1997), *cert. denied*, 522 U.S. 1054 (1998); *Blair-Bey v. Quick*, 151 F.3d 1036, 1039-41 (D.C.Cir.), *on rehearing*, 159 F.3d 591 (D.C.Cir. 1998); *Davis v. Fechtel*, 150 F.3d 486, 488-90 (5th Cir. 1998); *McIntosh v. U.S. Parole Commission*, 115 F.3d 809, 811-12 (10th Cir. 1997).

²¹ *Walker v. O'Brien*, 216 F.3d at 638-39.

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

²² *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).

²³ *U.S. v. Minor*, 228 F.3d 352 (4th Cir. 2000) (holding that an equitable challenge to a completed forfeiture is a civil action); *U.S. v. Jones*, 215 F.3d 467, 469 (4th Cir. 2000) (holding that a motion under Rule 41(e), Fed.R.Crim.P., for the return of seized property is a civil action); *U.S. v. Lacey*, 172 F.3d 880, 1999 WL 143881 (10th Cir., Mar. 17, 1999) (unpublished) (assuming that civil forfeiture case is subject to fees requirement); *Pena v. U.S.*, 122 F.3d 3 (5th Cir. 1997) (same as *Jones*).

before a grand jury.²⁴ Decisions are divided concerning motions made under the caption of a criminal prosecution addressing conditions of confinement related to the prosecution.²⁵

The PLRA exhaustion requirement is not limited to civil actions; the statute refers generally to “action[s] . . . with respect to prison conditions.”²⁶ PLRA exhaustion law has nonetheless generally not been applied in habeas proceedings, since habeas corpus has its own pre-existing exhaustion law.²⁷ It has been applied, however, to motions by the defendant in a criminal prosecution.²⁸

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,²⁹ while the exhaustion of administrative remedies provision applies to prisoners’ actions “with respect to prison conditions.”³⁰ 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,

²⁴ U.S. v. Campbell, 294 F.3d 824, 826-29 (7th Cir. 2002).

²⁵ 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, 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). However, 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).

²⁶ 42 U.S.C. § 1997e(a).

²⁷ *See, e.g.*, *U.S. v. Basciano*, 369 F.Supp.2d 344, 348 (E.D.N.Y. 2005).

²⁸ *See U.S. v. Ali*, 396 F.Supp.2d 703, 705-77 (E.D.Va. 2005) (applying exhaustion requirement to “special administrative measures” in federal prison). The court reached the same result in *U.S. v. Antonelli*, 371 F.3d 360, 361 (7th Cir. 2004), though there the criminal case had been long closed and the court said the plaintiff’s challenge to Bureau of Prisons’ policy forbidding prisoners from retaining their pre-sentence reports was “in actuality a separate, unrelated civil action.” *Id.*

²⁹ 28 U.S.C. § 1915(a)(2).

³⁰ 42 U.S.C. § 1997e(a).

is required to be narrowly drawn, to extend no further than necessary to correct a violation of federal rights, and to be the least intrusive means of doing so; courts are to give substantial weight to adverse impacts on public safety or criminal justice operations.³¹ This standard is not much different from pre-PLRA law governing federal court civil rights injunctions.³² Settlements must meet this need-narrowness-intrusiveness standard to be enforceable in federal court.³³ 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.³⁴

Prospective relief is defined as “all relief other than compensatory money damages.”³⁵ 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,³⁶ though the Second Circuit has expressed considerable doubt about that conclusion

³¹ 18 U.S.C. § 3626(a). One appeals court has held 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. *See Handberry v. Thompson*, 436 F.3d 52, 62-63 (2d Cir. 2006).

³² *Gilmore v. California*, 220 F.3d 987, 1006 (9th Cir. 2000); *Smith v. Arkansas Dept. of Correction*, 103 F.3d 637, 647 (8th Cir. 1996) (holding PLRA “merely codifies existing law and does not change the standards for determining whether to grant an injunction”); *Morales Feliciano v. Calderon Serra*, 300 F.Supp.2d 321, 339-40 (D.P.R. 2004) (“This language mimics long standing requirements for injunctive relief under Rule 65 of the Federal Rules of Civil Procedure. . . . [T]his is the old ‘over broadness’ doctrine used to measure garden variety injunctive relief under Rule 65.”), *aff’d*, 378 F.3d 42, 54-56 (1st Cir. 2004), *cert. denied*, 125 S.Ct. 910 (2005); *Dodge v. County of Orange*, 282 F.Supp.2d 41, 71-72 (S.D.N.Y. 2003), *appeal dismissed, remanded on other grounds*, 103 Fed.Appx. 688, 2004 WL 1567870 (2d Cir. 2004). *Compare, e.g., Toussaint v. McCarthy*, 801 F.2d 1080, 1086-87 (9th Cir. 1986), *cert. denied*, 481 U.S. 1069; *Dean v. Coughlin*, 804 F.2d 207, 213 (2d Cir. 1986); *Duran v. Elrod*, 760 F.2d 756, 760-61 (7th Cir. 1985) (all stating pre-PLRA restrictions on federal court injunctive powers).

³³ 18 U.S.C. §§ 3626(a), 3626(c)(1); *see, e.g., Laube v. Campbell*, 333 F.Supp.2d 1234 (M.D.Ala. 2004) (approving settlement under PLRA standard).

³⁴ 18 U.S.C. § 3626(c)(2).

³⁵ 18 U.S.C. § 3626(g)(7).

³⁶ *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.

without ruling on the question.³⁷ Attorneys' fees, even those awarded for monitoring compliance with an injunction, are not prospective relief.³⁸

One federal court has held 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.³⁹ The court did not comment on the potential Seventh Amendment problem its holding presents, and why it did not hold that the jury should be instructed to apply the PLRA standards. There are good reasons to think *Johnson v. Breeden* is wrong. One of them is simply the disparity between the ordinary usage of “prospective relief” to denote injunctive and declaratory relief,⁴⁰ contrary to *Johnson's* extension of that term to any sort of damage judgments. *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.”⁴¹ However, the rest of the relevant statutory language is clearly directed at injunctive relief. “Narrowly

³⁷ See *Benjamin*, 343 F.3d at 49 (dictum); see also *Plata v. Schwarzenegger*, 2005 WL 2932253 at *25-28 (Oct. 3, 2005) (applying need-narrowness-intrusiveness analysis to appointment of a receiver for prison medical care).

³⁸ *Carruthers v. Jenne*, 209 F.Supp.2d at 1299-1300.

³⁹ *Johnson v. Breeden*, 280 F.3d 1308, 1325 (11th Cir. 2002).

Other courts have mostly ignored *Johnson's* holding. In *Tate v. Dragovich*, 2003 WL 21978141 (E.D.Pa., Aug. 14, 2003), the court expressed great skepticism about *Johnson's* rationale: “At first blush, it seems that one can neither ‘narrowly draw’ punitive damages, nor adjust them to better ‘correct’ a violation of rights, nor render them any more or less ‘intrusive.’” *Id.* at *6 n.7. Even accepting the *Johnson* holding *arguendo*, the 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. *Id.* at *6-7. The PLRA's restrictions on compensatory damages in cases involving mental or emotional injury, 42 U.S.C. § 1997e(e), justify such disproportions between compensatory and punitive damages. *Id.* at *9.

⁴⁰ See, e.g., *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 170 (1996) (distinguishing “prospective relief” from “retrospective monetary relief”); *Landgraf v. USI Film Products*, 511 U.S. 244, 273-74 (1994) (majority opinion) and *id.* at 293 (dissenting opinion) (clearly using “prospective relief” to refer to injunctions); *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 75-76 (1992) (distinguishing prospective relief, an equitable remedy, from monetary relief).

⁴¹ *Id.* at 1325, citing *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000).

drawn” and “least intrusive” are the language of injunctive jurisprudence and not damages.⁴² 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 . . .”⁴³ makes no sense applied to an award of damages. The same is true of the provisions for termination of prospective relief.⁴⁴ While it may be technically accurate to describe punitive damages as “prospective” in the sense that their purpose is deterrent and therefore future-oriented, the notion that Congress would attempt to legislate restrictions on them without naming them, employing language not previously made applicable to them, is simply implausible. In my view, this holding invokes the Supreme Court’s warning that “interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.”⁴⁵

Even for purposes of injunctive relief only, the meaning of “narrowly drawn” and “least intrusive” is not always clear, and many decisions address the subject on an *ad hoc* basis without stating any general principles.⁴⁶ It is clear that enjoining defendants to follow the language of a

⁴² In *Tate v. Dragovich*, the court said: “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.’” 2003 WL 21978141 at *6 n.7.

⁴³ 18 U.S.C. § 3626(a)(1)(B).

⁴⁴ 18 U.S.C. § 3626(b).

⁴⁵ *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982). *But see* *Robbins v. Chronister*, ___ F.3d ___, 2006 WL 172357 (10th Cir. 2006) (rejecting absurdity doctrine in connection with another PLRA provision).

⁴⁶ *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); *Johnson v. Martin*, 2005 WL 3312566 at *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 at *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

statute they have violated is appropriate under the PLRA.⁴⁷ Courts have disagreed whether, upon finding a policy unconstitutional in a non-class action, they can simply enjoin the policy, or must restrict relief to the plaintiffs in the suit.⁴⁸ 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.⁴⁹ Agreements between the parties are “strong evidence,” if not dispositive, that provisions reflecting those agreements comply with the needs-narrowness-intrusiveness requirement,⁵⁰ and tracking existing agency or institutional policy is further evidence of PLRA

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).

⁴⁷ *Handberry v. Thompson*, 436 F.3d 52, 64-68 (2nd Cir. 2006).

⁴⁸ *Compare* *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.”); *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).

⁴⁹ *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 (9th Cir.) (affirming injunction benefiting named individuals; though an unconstitutional policy had been found, it had been directed at those persons), *cert. denied*, 534 U.S. 1066 (2001).

⁵⁰ *Benjamin v. Fraser*, 156 F.Supp.2d 333, 344 (2001), *aff’d in part, vacated and remanded in part on other grounds*, 343 F.3d 35 (2d Cir. 2003), *quoting* *Cason v. Seckinger*, 231 F.3d at 785 n. 8 (noting particularized findings are not necessary concerning undisputed facts, and the parties may make concessions or stipulations as they deem appropriate); *accord*, *Little v. Shelby County, Tenn.*, 2003 WL 23849734 at *1-2 (W.D.Tenn., Mar. 25, 2003) (“Where the parties in jail reform litigation agree on a proposed remedy, or modification of a proposed remedy, the Court will engage in limited review for the purpose of assuring continued compliance with existing orders and compliance with the Prison Litigation Reform Act. . . . Clearly, the least intrusive means in this case

compliance.⁵¹ 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.”⁵²

The needs-narrowness-intrusiveness test is applied with an eye towards practicality and towards the potential intrusiveness of enforcement of the remedy. Thus, where the failure to repair non-functioning jail windows was found to contribute to a constitutional violation, the court ordered the defendants to repair the windows, noting that such a requirement is not overly intrusive since it is “a routine task in any building,”⁵³ 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.”⁵⁴ Although the PLRA requires that remedies be tailored

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.”); *Morales Feliciano v. Calderon Serra*, 300 F.Supp.2d 321, 334 (D.P.R. 2004) (“The very fact that the defendants chose to join the plaintiffs in selecting this remedy would seem to mean—and must be taken to mean—that they understood it to be precisely tailored to the needs of the occasion, that it is narrowly drawn and least intrusive—in fact not intrusive at all.”) (footnote omitted), *aff’d*, 378 F.3d 42, 54-56 (1st Cir. 2004), *cert. denied*, 125 S.Ct. 910 (2005).

⁵¹ *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*, *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*, 436 F.3d 52, 65-69 (2d Cir. 2006) (affirming various relief 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).

⁵² *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).

⁵³ *Benjamin*, 156 F.Supp.2d at 350.

⁵⁴ *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

to violations, it allows highly intrusive remedies where the record supports their necessity.⁵⁵ As one court put it, in ordering appointment of a receiver to take over a large state prison medical care system, the PLRA “codifies the Court’s authority to issue prospective relief that fully remedies a constitutional violation, while mandating that the relief not be overly broad.”⁵⁶

The restrictions of 18 U.S.C. § 3626(a) apply only to the fashioning of prospective relief⁵⁷ and have no implications for other aspects of litigation, *e.g.*, decisions on class certification.⁵⁸

certainly permit a broken window or two.”); *accord*, *Handberry v. Thompson*, 436 F.3d 52, 64 (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); *Balla v. Idaho Bd. of Correction*, 2005 WL 2403817 at *10 (D.Idaho, Sept. 26, 2005) (holding retention of population limits and time limits for plumbing repairs met PLRA standards; relying on *Benjamin*). In *Handberry*, the court upheld a requirement that inmates in need of special education meet with a “school based support team” within five days of their identification, in view of such evaluations are required by law and the jail population is highly transient. *Id.*, 436 F.3d at 65-66. The defendants have sought rehearing on this point.

⁵⁵ *Morales Feliciano v. Rullan*, 378 F.3d 42, 54-56 (1st Cir. 2004) (finding remedy of privatization of medical care appropriate in light of failure of less intrusive measures; “[d]rastic times call for drastic measures.”), *cert. denied*, 125 S.Ct. 910 (2005); *Gates v. Cook*, 376 F.3d 323, 337, 341-42 (5th Cir. 2004) (requiring prison to meet American Correctional Association and National Commission on Correctional Health Care standards in mental health program; requiring provision of 20 foot candles of light in cells); *Hadix v. Johnson*, 2005 WL 2243091 at *49-52 (W.D.Mich., Sept. 14, 2005) (requiring replacement of locking system in addition to implementation of defendants’ own fire safety proposals), *reconsideration denied*, 2005 WL 2654287 (W.D.Mich., Oct 13, 2005); *Little v. Shelby County, Tenn.*, 2003 WL 23849734 at *1-2 (W.D.Tenn., Mar. 25, 2003) (approving very detailed plan for staffing and prisoner supervision); *Skinner v. Uphoff*, 234 F.Supp.2d 1208, 1218 (D.Wyo. 2002) (stating that a remedy for inmate-inmate violence must address the admitted “culture” impeding the effective supervision and discipline of staff; “systematic and prophylactic measures” may be ordered if necessary to correct the violations); *see Mayweathers v. Terhune*, 328 F.Supp.2d 1086, 1099 (E.D.Cal. 2004) (directing parties to propose an appropriate remedy where defendants’ claims of administrative difficulty were too general for the court to formulate a remedy conforming to the PLRA standards).

⁵⁶ *Plata v. Schwarzenegger*, 2005 WL 2932253 at *25 (N.D.Cal., Oct. 3, 2005); *see id.* at *27-28 (explaining why other remedies would be ineffective).

⁵⁷ *Williams v. Edwards*, 87 F.3d 126, 133 (5th Cir. 1996).

⁵⁸ *Shook v. El Paso County*, 386 F.3d 963, 969-71 (10th Cir. 2004), *cert. denied*, 125 S.Ct. 1869 (2005); *Anderson v. Garner*, 22 F.Supp.2d 1379, 1383 (N.D.Ga. 1997).

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.⁵⁹ The “current and ongoing” requirement does not appear in, and does not apply to, the PLRA provision governing the initial entry of relief.⁶⁰ 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.⁶¹ When a motion is filed to terminate prospective relief, the motion operates as a stay (suspension) of the relief after 30 days, which may be extended to 90 days for good cause.⁶² This provision too has been upheld against a separation of powers challenge.⁶³ Private settlement agreements not enforceable in federal court are not subject to the termination provisions.⁶⁴

There are additional provisions restricting “prisoner release orders,”⁶⁵ preliminary

⁵⁹ 18 U.S.C. § 3626(b); *see* Benjamin v. Fraser, 264 F.3d 175 (2d Cir. 2001) (affirming findings of continuing and ongoing violations); Balla v. Idaho Bd. of Correction, 2005 WL 2403817 at *5-10 (D.Idaho, Sept. 26, 2005) (finding ongoing violations merited retention of crowding-related relief), *clarified, reconsideration denied*, 2005 WL 3412806 (D.Idaho, Dec. 9, 2005); Benjamin v. Fraser, 161 F.Supp.2d 151 (S.D.N.Y.), *on motions for reconsideration*, 156 F.Supp.2d 333 (S.D.N.Y. 2001) (making additional findings of continuing and ongoing violations), *aff’d in part, vacated and remanded in part*, 343 F.3d 35 (2d Cir. 2003).

⁶⁰ 18 U.S.C. § 3626(a)(1); *see* Austin v. Wilkinson, 372 F.3d 346, 360 (6th Cir. 2004), *aff’d in part, rev’d in part and remanded on other grounds*, 125 S.Ct. 2384 (2005).

⁶¹ 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*).

⁶² 18 U.S.C. § 3626(e); *see* Skinner v. Uphoff, ___ F.Supp.2d ___, 2006 WL 16332 5 at *8 (D.Wyo., Jan. 20, 2006) (postponing automatic stay in inmate violence case based on allegations of ongoing violence, delays in defendants’ remedial actions, etc.).

⁶³ Miller v. French, 530 U.S. 327 (2000); *see also* Merriweather v. Sherwood, 235 F.Supp.2d 339, 343-44 (S.D.N.Y. 2002) (upholding provision against due process challenge).

⁶⁴ Shultz v. Wells, 73 Fed.Appx. 794, 2003 WL 21911330 at *1 (6th Cir. 2003) (unpublished); York v. City of El Dorado, 119 F.Supp.2d 1106, 1108 (E.D.Cal. 2000).

⁶⁵ 18 U.S.C. § 3626(a)(3); *see* Castillo v. Cameron County, Texas, 238 F.3d 339, 348 (5th Cir. 2001); Berwanger v. Cottey, 178 F.3d 834, 836 (7th Cir. 1999); Ruiz v. Estelle, 161 F.3d 814, 821-27 (5th Cir. 1998), *cert. denied*, 526 U.S. 1158 (1999); Tyler v. Murphy, 135 F.3d 594, 595-96 (8th

injunctions,⁶⁶ and the use of special masters in prison conditions litigation.⁶⁷

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.”⁶⁸

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

Cir. 1998) (all construing the prisoner release order provision). The prisoner release provisions are applicable to newly imposed limits on prison population but not to the preservation of pre-existing relief in the face of a termination motion. *See Balla v. Idaho Bd. of Correction*, 2005 WL 2403817(D.Idaho, Sept. 26, 2005), *clarified, reconsideration denied*, 2005 WL 3412806 at *1 (D.Idaho, Dec. 9, 2005).

⁶⁶ 18 U.S.C. § 3626(a)(2) (limiting duration of preliminary injunctions to 90 days, requiring them to meet the need-narrowness-intrusiveness standards); *see 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); *Silva v. Mayes*, 2005 WL 1111230 (W.D.Wash., May 9, 2005) (recommending denial of preliminary injunction, emphasizing requirement to “give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the preliminary relief”), *report and recommendation adopted*, 2005 WL 1377906 (W.D.Wash., June 3, 2005); *Gates v. Fordice*, 1999 WL 33537206 (N.D.Miss., July 19, 1999) (holding that the PLRA did not change the standards for granting a preliminary injunction, but the relief must meet the PLRA standards).

⁶⁷ 18 U.S.C. § 3626(f); *see Benjamin v. Fraser*, 343 F.3d 35, 44 (2d Cir. 2003) (holding that a court monitor without quasi-judicial powers was not a special master for PLRA purposes and that the PLRA special master provisions did not apply to pre-existing court agents); *accord*, *Handberry v. Thompson*, 436 F.3d 52, 69 (2d Cir. 2006) (applying *Benjamin* holding to find “special monitor” in jail education case not governed by PLRA special master provisions); *Laube v. Campbell*, 333 F.Supp.2d 1234, 1239 (M.D.Ala. 2004) (applying *Benjamin* holding to find a “healthcare monitor” not governed by PLRA special master provisions); *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).

⁶⁸ 42 U.S.C. § 1997e(a).

federal case.”⁶⁹ The PLRA’s mandatory exhaustion requirement replaced the former discretionary approach to exhaustion⁷⁰ and 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.”⁷¹

The Second Circuit has addressed some of the most contentious PLRA exhaustion questions in five cases which were argued and decided together and which represent the starting point for analysis of the statute in this jurisdiction.⁷²

Though the exhaustion requirement is mandatory, it is not absolute, and all circuits to decide the question, including the Second, have held that the PLRA exhaustion requirement is not jurisdictional,⁷³ and almost all have held that courts therefore can apply doctrines of waiver, estoppel, and equitable tolling to excuse failure to exhaust.⁷⁴ The Second Circuit, like most courts, has held

⁶⁹ Porter v. Nussle, 534 U.S. 516, 524-25 (2002).

⁷⁰ Salahuddin v. Mead, 174 F.3d 271, 274 n. 1 (2d Cir. 1999).

⁷¹ 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*, 125 S.Ct. 1639 (2005); Alexander v. Tippah County, Miss., 351 F.3d 626, 630 (5th Cir. 2003), *cert. denied*, 541 U.S. 1012 (2004). Thus, the fact that the same issue has been the subject of a prior adverse ruling by the grievance system does not excuse exhaustion. *Morrow v. Goord*, 2005 WL 1159424 at *3 (W.D.N.Y., May 17, 2005).

⁷² *See* Ortiz v. McBride, 380 F.3d 649 (2d Cir. 2004), *cert. denied*, 125 S.Ct. 1398 (2005); Abney v. McGinnis, 380 F.3d 663 (2d Cir. 2004); Giano v. Goord, 380 F.3d 670 (2d Cir. 2004); Hemphill v. New York, 380 F.3d 680 (2d Cir. 2004); Johnson v. Testman, 380 F.3d 691 (2d Cir. 2004).

⁷³ Richardson v. Goord, 347 F.3d 431, 433-34 (2d Cir. 2003); *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*, 125 S.Ct. 344 (2004) and cases cited; Ali v. District of Columbia, 278 F.3d 1, 6 (D.C.Cir. 2002) and cases cited. *But see* Chandler v. Crosby, 379 F.3d 1278, 1286 n.16 (11th Cir. 2004) (noting this circuit has not decided the question).

⁷⁴ Underwood v. Wilson, 151 F.3d 292, 294 (5th Cir. 1998), *cert. denied*, 526 U.S. 1133 (1999); *accord*, Hemphill v. New York, 380 F.3d 680, 686 (2d Cir. 2004) (waiver and estoppel); Wright v. Hollingsworth, 260 F.3d 357, 358 n.2 (5th Cir. 2001) (reiterating *Underwood* holding after *Booth v. Churner*); Foulk v. Charrier, 262 F.3d 687, 697 (8th Cir. 2001); *see also* Anderson v. XYZ Correctional Health Services, Inc., 407 F.3d 674, 679-80 (4th Cir. 2005) (rejecting the argument that exhaustion is “not forfeitable”); *see generally* § IV.G.3, below, concerning estoppel. *But see* Steele

that non-exhaustion is an affirmative defense to be raised by defendants⁷⁵ and therefore can be waived by failure to do so.⁷⁶ 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.⁷⁷ 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,⁷⁸ 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.⁷⁹ These holdings are discussed in more detail in appropriate sections below.

Underlying many of the technical questions about the PLRA exhaustion requirement is a basic question of attitude, one which is now before the Supreme Court in *Woodford v. Ngo*.⁸⁰ One approach is reflected in some courts’ assertion that prison officials are entitled to insist on “strict

v. Federal Bureau of Prisons, 355 F.3d at 1209 (holding PLRA exhaustion cannot be waived even though non-jurisdictional); *Rutherford v. Cabling*, 2005 WL 2240355 at *3 (D.Colo., Sept. 14, 2005) (holding that estoppel cannot bar assertion of non-exhaustion because the latter is not an affirmative defense and can’t be waived).

Justice Thomas stated that the Supreme Court majority in *Johnson v. California*, 543 U.S. 499, 125 S.Ct. 1141 (2005), assumed, by failing to inquire about exhaustion in that case, that PLRA exhaustion is non-jurisdictional and waivable. 125 S.Ct. at 1159 n.1 (dissenting opinion).

⁷⁵ See *Hemphill v. New York*, 380 F.3d 680, 686 (2d Cir. 2004); *Jenkins v. Haubert*, 179 F.3d 19, 28-29 (2d Cir. 1999); see § IV.D.1, below.

⁷⁶ See *Handberry v. Thompson*, 436 F.3d 52, 59-60 (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.

⁷⁷ *Giano v. Goord*, 380 F.3d 670, 676 (2d Cir. 2004).

⁷⁸ *Abney v. McGinnis*, 380 F.3d 663, 667 (2d Cir. 2004).

⁷⁹ 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. *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); see § C, nn. 112-13; § IV.E.8.b, nn.388-91, below.

⁸⁰ No. 05-416; see *Ngo v. Woodford*, 403 F.3d 620 (9th Cir. 2005) (rejecting procedural default rule for prisoners who err in the grievance process), *cert. granted*, 126 S.Ct. 647 (2005)

compliance” with prison procedures,⁸¹ and thus to obtain dismissal when prisoners make technical mistakes in the grievance process. That attitude has now been rejected by the Second Circuit, which has held that prisoners may be “justified” in failing to pursue grievance procedures properly if they rely on a “reasonable belief” concerning those procedures.⁸² A reasonable misunderstanding of the exhaustion requirement itself may also justify failure to exhaust.⁸³ In reaching those conclusions, the court has rejected the analogy made by some other courts to the habeas corpus procedural default rule,⁸⁴ stating: “What is justification in the PLRA context for not following procedural requirements . . . cannot be decided by borrowing from other areas of the law. It must be determined by looking at the circumstances which might understandably lead usually uncounseled prisoners to fail to grieve in the normally required way.”⁸⁵

The Second Circuit’s relatively lenient approach is consistent with the Supreme Court’s observation, in the context of the administrative exhaustion requirement of Title VII of the Civil Rights Act of 1964, that “technicalities are particularly inappropriate in a statutory scheme in which

⁸¹ See, e.g., *Houze v. Segarra*, 217 F. Supp. 2d 394, 397 (S.D.N.Y. 2002). This issue is discussed further in § IV.E.7, below.

⁸² *Giano v. Goord*, 380 F.3d 670, 678 (2d Cir. 2004) (holding that a prisoner who failed to distinguish properly between “grievable matters relating to disciplinary proceedings, and non-grievable issues concerning the ‘decisions or dispositions’ of such proceedings” which had to be raised in a disciplinary appeal, was justified in filing an appeal but not a grievance); *accord*, *Braham v. Clancy*, 425 F.3d 177 (2d Cir. 2005) (remanding for consideration whether a prisoner who had obtained a cell change through several informal requests could have reasonably concluded that he had prevailed and need not file a formal grievance); *Hemphill v. New York*, 380 F.3d 680, 690 (2d Cir. 2004) (remanding for consideration of prisoner’s claim that he wrote to the Superintendent, rather than filing a grievance, consistently with a reasonable interpretation of the grievance regulations); *LaFauci v. New Hampshire Dept. of Corrections*, 2005 WL 419691 at *13-14 (D.N.H., Feb. 23, 2005) (holding prisoner who filed emergency grievance, then followed instructions to contact the Warden, then filed request slip with Unit Supervisor exhausted). Compare *Steele v. Federal Bureau of Prisons*, 355 F.3d 1204, 1214 (10th Cir. 2003) (holding exhaustion required “even if a prisoner ‘understood that the claims put forth in [his] complaint were “non-grievable” under prison policy.’”), *cert. denied*, 125 S.Ct. 344 (2004).

⁸³ *Rodriguez v. Westchester County Jail Correctional Dept.*, 372 F.3d 485, 487 (2d Cir. 2004) (holding that a prisoner who thought he did not have to exhaust a use of force claim—a reasonable view since it was later adopted by the Second Circuit—was justified in failing to exhaust).

⁸⁴ The inappropriateness of analogies between PLRA exhaustion and habeas exhaustion is discussed below at nn. 287-88, 323-30, and 371, and accompanying text.

⁸⁵ *Giano v. Goord*, 380 F.3d 670, 678 (2d Cir. 2004).

laymen, unassisted by trained lawyers initiate the process.”⁸⁶ A number of courts have relied on the analogy to Title VII and other statutes using the same administrative remedy scheme in interpreting the PLRA exhaustion requirement.⁸⁷ The Second Circuit, however, has not relied on that analogy in its PLRA exhaustion decisions and has questioned its utility in the context of “total exhaustion.”⁸⁸

⁸⁶ *Love v. Pullman*, 404 U.S. 522, 526 (1972).

⁸⁷ The Title VII requirement is analogous to the PLRA’s because both involve individuals’ claims of civil rights violations, and both involve resort to state agencies with their varying practices. *See Thomas v. Woolum*, 337 F.3d 720, 727-28 (6th Cir. 2003). Both are designed to encourage resolution of disputes without litigation by requiring them to be presented first to the agency so that informal remedies may be pursued. *Compare Porter v. Nussle*, 534 U.S. at 524-25 (PLRA) *with Oscar Mayer v. Evans*, 441 U.S. 750, 755 (1979) (holding exhaustion requirements of Title VII and ADEA are “intended to give state agencies a limited opportunity to resolve problems . . . and thereby to make unnecessary resort to federal relief”). The Title VII requirement, like the PLRA’s, is non-judicial. *Zipes v. Trans World Airlines*, 455 U.S. 385, 393 (1982). As in prisoner civil rights suits, judicial consideration under Title VII is *de novo* and (unlike many other administrative law schemes) is not limited to deferential review of a final agency decision based on an administrative record. *See Jones’El v. Berge*, 172 F.Supp.2d 1128, 1131-32 (W.D.Wis. 2001); *compare Califano v. Yamasaki*, 442 U.S. 682, 698-701 (1979), *citing* 42 U.S.C. § 205(g) (emphasizing the limits of judicial review in Social Security administrative scheme). Federal courts have used Title VII law as an interpretive guide to the PLRA in a number of cases. *See, e.g., Thomas v. Woolum, id.; Wyatt v. Terhune*, 315 F.3d 1108 (9th Cir.), *cert. denied*, 540 U.S. 810 (2003); *Jackson v. District of Columbia*, 254 F.3d 262, 268 (D.C. Cir. 2001); *Massey v. Helman*, 196 F.3d 727, 735 (7th Cir. 1999), *cert. denied*, 532 U.S. 1065 (2001); *Underwood v. Wilson*, 151 F.3d 292, 294-95 (5th Cir. 1998), *cert. denied*, 526 U.S. 1133 (1999); *Lewis v. Washington*, 265 F.Supp.2d 939, 942 (N.D.Ill. 2003); *Jones’El v. Berge, id.; accord, Artis-Bey v. District of Columbia*, 884 A.2d 626, 638-39 (D.C. 2005). *Cf. Weinberger v. Salfi*, 422 U.S. 749, 765 (1975) (stating “the doctrine of administrative exhaustion should be applied with a regard for the particular administrative scheme at issue”). The applicability of Title VII rules to the PLRA is discussed further in nn.172, 233-38, 269-70, 321-22, 366-71, and 546-48, below, and accompanying text.

⁸⁸ *Ortiz v. McBride*, 380 F.3d 649, 661 n. 10 (2d Cir. 2004), *cert. denied*, 125 S.Ct. 1398 (2005); *see* § IV.E.6, below, concerning the “total exhaustion” rule. In *Ortiz* the court said: “The goals of the anti-discrimination laws to provide and implement a broad, remedial scheme preventing such discrimination, . . . and the goals of the PLRA are so radically different, however, that we gain no insight from the analogy.” *Id.* This appears to be the wrong comparison; the right one would be between the anti-discrimination laws’ system of administrative charge-filing and the PLRA exhaustion requirement, or between the “broad, remedial scheme of the anti-discrimination laws” and the remedial scheme of 42 U.S.C. § 1983 as modified by the PLRA.

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. . . .”⁸⁹ Its terms are not restricted to “civil actions” as are some other PLRA provisions.⁹⁰ 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.⁹¹ Such a proceeding would still be subject to the habeas corpus exhaustion requirement, which is arguably more rigorous.⁹² 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.⁹³

The exhaustion requirement applies to persons held in private prisons and jails.⁹⁴

⁸⁹ 42 U.S.C. § 1997e(a). The meaning of the term “prisoner” is discussed in § II, above.

⁹⁰ 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). In *U.S. v. Ali*, 396 F.Supp.2d 703, 705-07 (E.D.Va. 2005), the district court applied the exhaustion requirement to a defense motion in a criminal prosecution to relax “Special Administrative Measures” that impinged on attorney-client contact and the criminal defendant’s ability to assist with his defense.

⁹¹ *Carmona v. U.S. Bureau of Prisons*, 243 F.3d 629, 632-34 (2d Cir. 2001); *accord*, *Monahan v. Winn*, 276 F.Supp.2d 196, 204 (D.Mass. 2003).

⁹² 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, not available under the PLRA. See *Perez v. Zenk*, 2005 WL 990696 at *2 (E.D.N.Y., Apr. 11, 2005).

⁹³ *McClure v. Oregon Dept. of Corrections*, 2005 WL 425469 at *7 (D.Or., Feb. 23, 2005) and cases cited; *Chamberlain v. Overton*, 326 F.Supp.2d 811, 815-16 (E.D.Mich. 2004). The exhaustion required by the PLRA would be exhaustion of the prison grievance system or other internal complaint system. In New York, prison officials persuaded a few courts that the ADA requires exhaustion of the Department of Justice disability complaint procedure *and* the prison grievance system, though they subsequently withdrew that argument. See nn. 412-16, below.

⁹⁴ See n. 6, above; see also *Pri-Har v. Corrections Corp. of America, Inc.*, 154 Fed.Appx. 886, 888, 2005 WL 3087891 at *2 (11th Cir., Nov. 18, 2005) (unpublished) (holding a federal prisoner in a private prison must exhaust the private prison’s remedy system, not the Bureau of Prisons’).

The phrase “under section 1983 . . . or any other Federal law” would appear to encompass all federal question cases,⁹⁵ but not cases removed to federal court under those courts’ diversity jurisdiction, since they are not “brought” under “Federal law” by a “prisoner” as the statute prescribes. State law claims brought in conjunction with federal claims cannot be dismissed for non-exhaustion under the PLRA.⁹⁶

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.”⁹⁷ So prior decisions holding that use of force cases are not about “prison conditions” and need not be exhausted are no longer good law. This is a non-issue in use of force cases arising in the New York City jails, since prisoners cannot bring “complaints pertaining to an alleged assault” under that system’s

⁹⁵ See *Alexander v. Walker*, 2003 WL 297536 at *2 (N.D.Cal., Feb. 10, 2003) (applying exhaustion requirement in § 1983 action removed from state court based on federal question).

⁹⁶ *Artis-Bey v. District of Columbia*, 884 A.2d 626, 631 (D.C. 2005); *Shaheed-Muhammad v. Dipaolo*, 393 F.Supp.2d 80, 92 n.5 (D.Mass. 2005); *Torres v. Corrections Corp. of America*, 372 F.Supp.2d 1258, 1262 (N.D.Okla. 2005).

⁹⁷ *Porter v. Nussle*, 534 U.S. 516, 532 (2002); see, e.g., *Krilich v. Federal Bureau of Prisons*, 346 F.3d 157, 159 (6th Cir. 2003) (holding that intrusions on attorney-client correspondence and telephone conversations are prison conditions notwithstanding argument that attorney-client relationship “transcends the conditions of time and place”); *U.S. v. Carmichael*, 343 F.3d 756, 761 (5th Cir. 2003) (holding that statutorily required collection of DNA is a prison condition), *cert. denied*, 540 U.S. 1136 (2004); *Castano v. Nebraska Dept. of Corrections*, 201 F.3d 1023, 1024 (8th Cir. 2000) (holding the failure to provide interpreters for Spanish-speaking prisoners is a prison condition), *cert. denied*, 531 U.S. 913 (2000); *Fitzgerald v. Schwarzenegger*, 2005 WL 2280921 at *3 (E.D.Cal. Sept. 16, 2005) (holding requirement applicable to prison ADA claims), *report and recommendation adopted*, 2005 WL 3030990 (E.D.Cal., Nov. 8, 2005); *Johnson v. Luttrell*, 2005 WL 1972579 at *3 (W.D.Tenn., Aug. 11, 2005) (“Plaintiff’s inability to obtain an application for an absentee ballot in a timely manner is a ‘prison conditions claim.’”); *Reid v. Federal Bureau of Prisons*, 2005 WL 1699425 at *3 (D.D.C., July 20, 2005) (holding Privacy Act claim about inaccuracy in prison records affecting classification was about prison conditions); *Salaam v. Consovoy*, 2000 WL 33679670 at *4 (D.N.J., Apr. 14, 2000) (holding that failure to provide proper parole hearing is a prison condition); see also *Allen v. Hickman*, ___ F.Supp.2d ___, 2005 WL 3610666 at *3-4 (N.D.Cal., Dec. 15, 2005) (dismissing a request for a stay of execution pending receipt of medical care for non-exhaustion because relief concerning medical care was available administratively even if a stay of execution was not).

grievance procedure, and therefore that system is not “available” to persons suing about assaults.⁹⁸ 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”⁹⁹ is now overruled. If it happened in prison, most likely it’s a prison condition.¹⁰⁰

A probationer required to reside in an “intensive drug rehabilitation halfway house” was held to be “confined,” if not in a “jail [or] prison,” then in an “other correctional facility,” in the terms of 42 U.S.C. § 1997e(a), and his complaint about his medical treatment there was therefore about “prison conditions.”¹⁰¹

Cases involving agencies outside the prison system may not be “prison conditions” cases even if the plaintiff is a prisoner. For example, one court held that a 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.¹⁰² This outcome makes sense because if the people responsible are not prison employees, the prison grievance system cannot do anything about the problem. Similarly, a court expressed doubt that a claim that prisoners were injured by dentists at

⁹⁸ DOC Directive 3375R, <http://www.nyc.gov/html/doc/pdf/3375R.pdf>, at § II.B; *see* Mojias v. Johnson, 351 F.3d 606, 608-10 (2d Cir. 2003).

⁹⁹ *Marvin v. Goord*, 255 F.3d 40, 42-43 (2d Cir. 2001), *overruled in pertinent part*, *Porter v. Nussle*, 534 U.S. 516 (2002).

¹⁰⁰ 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 held not to be 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 at *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.”

¹⁰¹ *Witzke v. Femal*, 376 F.3d 744, 752-53 (7th Cir. 2004); *accord*, *William G. v. Pataki*, 2005 WL 1949509 at *2-3 (S.D.N.Y., Aug. 12, 2005) (holding that question whether persons incarcerated pending parole revocation proceedings were entitled to be placed in less restrictive residential treatment programs for mental illness and chemical addiction involved prison conditions). *But see* *Miller v. Wayback House*, 2006 WL 297769 at *4 (N.D.Tex., Feb. 1, 2006) (holding claim about halfway house to which plaintiff was released on parole was about prison conditions, citing *Witzke*, but failing to analyze whether plaintiff was confined or whether facility was a correctional facility).

¹⁰² *Johnson v. Quinn*, 1999 WL 116222, at *3 (N.D. Ill. Feb. 26, 1999).

an outside hospital involved “prison conditions,” again citing the unlikelihood that the prison grievance system had any authority to take action on the complaint.¹⁰³

Cases challenging the legitimacy of incarceration itself are not about prison conditions.¹⁰⁴ In fact, if the litigant is still incarcerated, he or she must pursue relief for unlawful confinement via habeas corpus, which is not governed by the PLRA exhaustion requirement.¹⁰⁵ One court has held that a claim prisoners with mental illness were discharged without receiving psychiatric medication

¹⁰³ *Borges v. Administrator for Strong Memorial Hosp.*, 2002 WL 31194558 at *3 (W.D.N.Y., Sept. 30, 2002).

¹⁰⁴ *Fuller v. Kansas*, 2005 WL 1936007 at *2 (D.Kan., Aug. 8, 2005) (holding claims of false arrest and imprisonment are not prison conditions claims under the statute); *Wishorn v. Hill*, 2004 WL 303571 at *11 (D.Kan., Feb. 13, 2004) (holding detention without probable cause is not a prison condition); *Monahan v. Winn*, 276 F.Supp.2d 196, 204 (D.Mass. 2003) (holding that a Bureau of Prisons rule revision that abolished its discretion to designate certain offenders to community confinement facilities did not involve prison conditions); *see also 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)). *But see 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 at *4 (holding that the failure to provide proper parole hearings is a prison condition). *Salaam* may be distinguishable from *Valdivia* on the ground that parole hearings involve a process commenced in prison, while parole revocation proceedings are commenced and are based on events that took place outside prison.

¹⁰⁵ *See, e.g., Zapata v. Scibana*, 2004 WL 1563239 (W.D.Wis., July 9, 2004) (holding PLRA exhaustion requirement inapplicable to habeas challenge to good time calculation), *vacated on other grounds*, 2005 WL 752243 (W.D.Wis., Mar. 31, 2005); *Neal v. Fleming*, 2004 WL 792729 at *2 (N.D.Tex., Apr. 14, 2004) (holding complaint of improper denial of early release was not about prison conditions and habeas proceeding was not subject to PLRA exhaustion requirement), *report and recommendation adopted*, 2004 WL 1175736 (N.D.Tex., May 26, 2004).

One court has recently held that a motion by criminal defendants challenging their placement in isolated confinement after capital charges were lodged against them was appropriately treated as a habeas petition, thereby avoiding the question whether they were challenging prison conditions. *U.S. v. Catalan-Roman*, 329 F.Supp.2d 240, 250-51 (D.P.R. 2004). Other decisions, however, have held that proceedings addressing prison conditions should be treated as separate civil actions even if they are filed under the caption of a criminal case. *See U.S. v. Antonelli*, 371 F.3d 360, 361 (7th Cir. 2004) (holding a motion challenging prison policy forbidding inmates from retaining possession of pre-sentence reports should have been exhausted).

and referrals is not about prison conditions.¹⁰⁶

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.”¹⁰⁷ 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 be dismissed, even if exhaustion has been completed by the time the court reaches the exhaustion question.¹⁰⁸ Courts have disagreed whether they must dismiss the case of a plaintiff who has failed to exhaust but has been released and is no longer subject to the exhaustion requirement.¹⁰⁹

The Second Circuit, like most courts, has held that the PLRA eliminated the option to stay a case pending exhaustion.¹¹⁰ In my view this holding should be re-examined in an appropriate case.

¹⁰⁶ *Bolden v. Stroger*, 2005 WL 283419 at *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.* at *2.

¹⁰⁷ 42 U.S.C. § 1997e(a).

¹⁰⁸ *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.* 172-75, below, concerning when a case is considered filed for this purpose.

¹⁰⁹ *Compare* *Morris v. Eversley*, 205 F.Supp.2d 234, 241 (S.D.N.Y. 2002) (holding that considerations of judicial efficiency and economy weigh against dismissal); *Stevens v. Goord*, 2003 WL 21396665 at * 4 (S.D.N.Y., June 16, 2003) (following *Morris*, citing other cases), *on reargument*, 2003 WL 22052978 (S.D.N.Y., Sept. 3, 2003); *Dennison v. Prison Health Services*, 2001 WL 761218 at *2-3 (D.Me., July 10, 2001) (holding that exhaustion issue was moot as to released prisoner); *Ovens v. State of Alaska, Dept. of Corrections*, 2000 WL 34514101 at *3 (D.Alaska, Mar. 13, 2000) (holding that a prisoner released after filing “is now on the same footing as any other former prisoner who would not be required to exhaust”) *with* *Cox v. Mayer*, 332 F.3d at 425-27 (holding that allowing a claim that was filed unexhausted to go forward because the plaintiff had been released would undermine the statutory policy); *Becker v. Vargo*, 2004 WL 1068779 at *3 (D.Or., Feb. 17, 2004) (citing cases), *report and recommendation adopted*, 2004 WL 1071067 (D.Or., Mar. 12, 2004) *and* 2004 WL 1179332 (D.Or., May 27, 2004); *Richardson v. Romano*, 2003 WL 1877955 at *2 (N.D.N.Y., Mar. 31, 2003).

¹¹⁰ *Neal v. Goord*, 267 F.3d 116, 122 (2d Cir. 2001); *accord*, *McCaffrey v. Winn*, 2006 WL 344961 at *1 (D.Mass., Feb. 14, 2006); *Fleming v. Lindner*, 2005 WL 3287488 at *4 (E.D.Cal., Dec. 6, 2005).

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, which is 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.¹¹¹ No such factors were before the court in *Neal v. Goord*.

Further, the *Neal* holding is arguably weakened by subsequent authority. The Second Circuit has recently identified an exception to the dismissal rule, the effect of which is similar to the suggested discretion regarding stays. It held that a prisoner may be justified in failing to exhaust based on "special circumstances," *inter alia*, a reasonable interpretation of the grievance rule or actions by prison officials. In such a case, if remedies are still available, the case should be dismissed without prejudice; but if they are no longer available, the case should go forward; if they appear to be available but prove not to be, the case should be reinstated¹¹² (*i.e.*, a new complaint need not be filed). The court has held similarly where the prisoner did not exhaust because of a

¹¹¹ In *Kennedy v. Mendez*, 2004 WL 2280225 at *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. Similarly, in *Ouellette v. Maine State Prison*, 2006 WL 173639 (D.Me., Jan. 23, 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.* at *4.

¹¹² *Giano v. Goord*, 380 F.3d 670, 680 (2d Cir. 2004); *Hemphill v. New York*, 380 F.3d 680, 690 (2d Cir. 2004). This last proposition has considerable potential for confusion and delay. In my view it would be appropriate as a matter of case management for the court to ask defendants for a representation as to the continued availability of remedies before finalizing a disposition.

reasonable misunderstanding of the exhaustion requirement itself.¹¹³ One would think that under those decisions, a litigant who was justified in failing to exhaust before suit, but remedied or sought to remedy that failure later (e.g., by filing a grievance that was dismissed as untimely), would be allowed to go forward.

The Second Circuit has said that dismissal for non-exhaustion generally does not constitute dismissal for failure to state a cause of action.¹¹⁴ This view has two significant consequences. First is that a dismissal for non-exhaustion cannot be a “strike” potentially disqualifying a prisoner from *in forma pauperis* status under 28 U.S.C. § 1915(g).¹¹⁵ The other is that exhaustion is not subject to the provisions of 42 U.S.C. § 1997e(c) or 28 U.S.C. § 1915(e)(2)(B) providing for *sua sponte* dismissal at initial screening, before service of process.¹¹⁶ Other decisions have taken or assumed the opposite view,¹¹⁷ relying in my view on strained reasoning, since the detailed statutory scheme at issue clearly treats administrative exhaustion as a separate subject from screening and dismissal of complaints that are frivolous or do not state a claim, and since most courts agree that exhaustion is an affirmative defense and not an element of the plaintiff’s cause of action.¹¹⁸

In a few cases, dismissal for non-exhaustion has been accompanied by instructions to prison officials with respect to the grievance process. In one recent case where a prisoner with mental illness complained of denial of psychiatric treatment, the court directed prison officials to appoint someone to assist the plaintiff in exhausting his claims.¹¹⁹ Another court directed that the grievance appeal deadline be held open because the prisoner may have missed it out of “excusable confusion.”¹²⁰ In cases involving a prisoners who had made substantial efforts to exhaust, the courts have directed that prison officials “consider referral from this Court as a mitigating circumstance,”

¹¹³ *Rodriguez v. Westchester County Jail Correctional Dep’t*, 372 F.3d 485, 487 (2d Cir. 2004) (holding that a prisoner who misunderstood the exhaustion requirement in the same way the Second Circuit did was justified in failing to exhaust).

¹¹⁴ *Snider v. Melindez*, 199 F.3d 108, 111-12 (2d Cir. 1999) (dictum); *accord*, *Henry v. Medical Dept. at SCI-Dallas*, 153 F.Supp.2d 553, 555-56 (M.D.Pa. 2001).

¹¹⁵ *Snider, id.*; *see* § VIII, below, concerning the “three strikes” provision.

¹¹⁶ *Anderson v. XYZ Correctional Health Services, Inc.*, 407 F.3d 674, 681 (4th Cir.2005); *Ray v. Kertes*, 285 F.3d 287, 297(3d Cir. 2002); *Snider v. Melindez*, 199 F.3d 108, 111-12 (2d Cir. 1999); *Henry v. Medical Dept. at SCI-Dallas*, 153 F.Supp.2d 553, 555-56 (M.D.Pa., Apr. 26, 2001).

¹¹⁷ *See* § VIII, n. 659, below.

¹¹⁸ *See* § IV.D.1, below.

¹¹⁹ *Ullrich v. Idaho*, 2006 WL 288384 at *3 (D.Idaho, Feb. 6, 2006).

¹²⁰ *Cardona v. Winn*, 170 F.Supp.2d 131 (D.Mass. 2001).

allowing the plaintiff to pursue his grievance late,¹²¹ or have made dismissal contingent upon officials' allowing the prisoner to pursue a new grievance.¹²²

Dismissal for non-exhaustion is without prejudice, unless it is clear that remedies are no longer available.¹²³ Dismissal without prejudice is appealable under Second Circuit law.¹²⁴ In other circuits where the 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,¹²⁵ the prisoner has been released and can no longer pursue prison grievances,¹²⁶ or the statute of limitations has expired on the claim.¹²⁷ The refusal to dismiss for non-exhaustion may not be

¹²¹ *Burgess v. Morse*, 259 F.Supp.2d 240, 247 (W.D.N.Y. 2003).

¹²² *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).

¹²³ *Berry v. Kerik*, 366 F.3d 85, 87-88 (2d Cir. 2004); *Steele v. Federal Bureau of Prisons*, 355 F.3d 1204, 1213 (10th Cir. 2003), *cert. denied*, 125 S.Ct. 344 (2004). One court has recently held that *all* dismissals for non-exhaustion should be without prejudice, since, *inter alia*, “[s]tates may allow cure of failure to exhaust” or litigation in state court, and defenses to a new suit should be addressed directly in that suit. *Ford v. Johnson*, 362 F.3d 395, 401 (7th Cir. 2004).

One circuit has approved dismissal for non-exhaustion with prejudice with regard to the prisoner's ability to proceed *in forma pauperis*, stating: “By choosing to file and pursue his suit prior to exhausting administrative remedies as required, Underwood sought relief to which he was not entitled—that is, federal court intervention in prison affairs prior to the prison having had the opportunity to address the complaint within its grievance procedures.” *Underwood v. Wilson*, 151 F.3d 292, 296 (5th Cir. 1998), *cert. denied*, 526 U.S. 1133 (1999). 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. 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 at *4 (E.D.Tex., Sept. 19, 2005).

¹²⁴ *Salim Oleochemicals v. M/V SHROPSHIRE*, 278 F.3d 90, 93 (2d Cir. 2002), *cert. denied*, 537 U.S. 1088 (2002).

¹²⁵ *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).

¹²⁶ *Dixon v. Page*, 291 F.3d 485, 488 (7th Cir. 2002).

¹²⁷ *Ahmed v. Dragovich*, 297 F.3d 201, 207 (3d Cir. 2002); *Larkin v. Galloway*, 266 F.3d 718, 721 (7th Cir. 2001), *cert. denied*, 535 U.S. 992 (2002).

appealed interlocutorily.¹²⁸ A prisoner whose case is dismissed for non-exhaustion, but who is released before the limitations period has expired, can file a new complaint which will not be subject to the exhaustion requirement since the plaintiff is at that point no longer a prisoner.¹²⁹ Other issues involving cases that are dismissed for non-exhaustion after the limitations period has expired are addressed below.¹³⁰

D. How Is Exhaustion Addressed Procedurally?

When exhaustion is raised, the court should address it before it reaches the merits of the case,¹³¹ except that plainly meritless claims can be dismissed on the merits without exhaustion.¹³²

1. Burden of Pleading and Proof

The Second Circuit and most other circuits have held that exhaustion is an affirmative defense as to which defendants bear the burden of pleading and proof.¹³³ Since failure to exhaust

¹²⁸ *Davis v. Streekstra*, 227 F.3d 759, 762-63 (7th Cir. 2000); *see also* *Beltran v. O'Mara*, 2006 WL 240558 at *4 (D.N.H., Jan. 31, 2006) (declining to certify for interlocutory appeal question whether “total exhaustion” doctrine should be applied).

¹²⁹ *Dixon v. Page*, 291 F.3d at 488 n.1; *Ahmed v. Dragovich*, 297 F.3d at 210. Whether the prisoner *must* file a new complaint—i.e., whether the old complaint must be dismissed for non-exhaustion after the plaintiff’s release—is the subject of disagreement in the courts. *See* n.92, above.

Even if the limitations period has expired, state tolling rules may preserve the right to refile for cases dismissed for failure to exhaust. *See* § IV.I, below.

¹³⁰ *See* §§ IV.E.8.b, IV.I, below.

¹³¹ *Perez v. Wisconsin Dept. of Corrections*, 182 F.3d 532, 534 (7th Cir. 1999). As a practical matter, exhaustion should be resolved as early as possible, both for reasons of judicial economy and to carry out the statutory policy. *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).

¹³² 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).

¹³³ *See* *Hemphill v. New York*, 380 F.3d 680, 686 (2^d Cir. 2004); *Jenkins v. Haubert*, 179 F.3d 19, 28-29 (2^d Cir. 1999); *accord*, *Anderson v. XYZ Correctional Health Services, Inc.*, 407 F.3d 674, 683 (4th Cir.2005); *Nerness v. Johnson*, 401 F.3d 874, 876 (8th Cir. 2005) (*per curiam*); *Wyatt v. Terhune*, 315 F.3d 1108, 1117-18 (9th Cir.), *cert. denied*, 540 U.S. 810 (2003) and cases

is not a failure to state a claim,¹³⁴ the PLRA's provisions for *sua sponte* dismissal of cases failing to state a claim¹³⁵ are inapplicable. While courts have authority, even without statutory authorization, to dismiss on their own motion for non-exhaustion where the failure to exhaust is apparent on the face of the complaint or attached documents,¹³⁶ the Second Circuit has stated that plaintiffs are "entitled to notice and an opportunity to be heard" before such dismissal.¹³⁷

In courts where non-exhaustion is an affirmative defense, the burden to establish it encompasses, first, that there is an available remedy for the prisoner's complaint.¹³⁸ The Second Circuit has addressed this issue in cases dismissed at initial screening, and for that reason has spoken chiefly in terms of the court's obligation and not the parties' burden. It has held that a court may not dismiss for non-exhaustion without "establish[ing] the availability of an administrative remedy from

cited; *Casanova v. Dubois*, 304 F.3d 75, 78 n.3 (1st Cir. 2002); *Ray v. Kertes*, 285 F.3d 287, 295 (3d Cir. 2002); *Jackson v. District of Columbia*, 254 F.3d 262, 267 (D.C.Cir.2001); *Massey v. Helman*, 196 F.3d 727, 735 (7th Cir.1999).

¹³⁴ See § IV.C, n. 114, above.

¹³⁵ See § IX, below.

¹³⁶ *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); *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.")

¹³⁷ *Giano v. Goord*, 380 F.3d 670, 675 (2d Cir. 2004), *citing* *Snider v. Melindez*, 199 F.3d 108 (2d Cir.1999); *accord*, *Anderson v. XYZ Correctional Health Services, Inc.*, 407 F.3d at 682.

In *Snider*, the court stated: "Unless it is unmistakably clear that the court lacks jurisdiction, or that the complaint lacks merit or is otherwise defective, we believe it is bad practice for a district court to dismiss without affording a plaintiff the opportunity to be heard in opposition." 199 F.3d at 113. In a later decision, the court stated that "the better practice in a given case may be to afford notice and an opportunity to respond before dismissal when exhaustion is the basis for that action. . . . In future cases we leave it to the district court to determine . . . which procedural practice is most appropriate." *Neal v. Goord*, 267 F.3d 116, 123-34 (2d Cir. 2001). However, the court subsequently stated: "We now reiterate that notice and an opportunity to respond are *necessary* in cases such as these. . . ." *Mojias v. Johnson*, 351 F.3d 606, 611 (2d Cir. 2003) (emphasis supplied). *Giano* restates this stronger position, which must be regarded as the law in the circuit.

¹³⁸ *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").

a legally sufficient source.”¹³⁹ 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.¹⁴⁰ 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 more recent 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.”¹⁴¹ In that case, 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.¹⁴²

The burden to establish non-exhaustion encompasses showing that the plaintiff is a prisoner

¹³⁹ *Snider v. Melindez*, 199 F.3d at 114; *accord*, *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.”); *Clavier v. Goodson*, 2005 WL 3213914 at *3 (E.D.Mo., Nov. 30, 2005) (holding that defendants seeking summary judgment must submit evidence establishing what grievance procedure was available); *Bafford v. Simmons*, 2001 WL 1677574 at *4 (D.Kan., Nov. 7, 2001) (holding that defendants moving for summary judgment “must identify the specific remedies and provide evidence that they were not exhausted”).

¹⁴⁰ *Snider*, 199 F.3d at 113.

¹⁴¹ *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); *Goibert v. Lee*, 2005 WL 1705485 at *2 (M.D.Fla., July 19, 2005) (holding defendants who failed to submit the alleged jail grievance procedure failed to establish non-exhaustion of available remedies). In *Strole v. Coats*, 2005 WL 1668900 at *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.

The pernicious practice of relying on check marks and questionnaire answers to determine exhaustion persists in other jurisdictions. *See Williams v. Uy*, 2004 WL 937598 at *1 (N.D.Tex., Apr. 30, 2004), *appeal dismissed*, 111 Fed.Appx. 310 (5th Cir. 2004).

¹⁴² *See Kearsy 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 at *2-3 (S.D.N.Y., July 25, 2001).

who is required to exhaust.¹⁴³

Defendants must also reliably establish the failure to exhaust. Numerous courts have found prison officials' affidavits and documentation asserting that a prisoner failed to exhaust to be inadequate or outright inadmissible because they were completely conclusory,¹⁴⁴ failed to set out how records were searched,¹⁴⁵ rested on hearsay,¹⁴⁶ or otherwise failed to establish officials' claims.¹⁴⁷

¹⁴³ *Dutcher v. County of LaCrosse, WI*, 2005 WL 2100979 at *2 (W.D.Wis., Aug. 30, 2005) (denying dismissal for non-exhaustion where defendant failed to show that the plaintiff was a prisoner when suit was filed); *Moore v. Baca*, 2002 WL 31870541 at *2 (C.D.Cal. 2002) (holding that defendants seeking dismissal for non-exhaustion must show that plaintiffs were prisoners when they filed suit).

¹⁴⁴ *See Ray v. Kertes*, 130 Fed.Appx. 541, 543 (3rd 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); *Laws v. Walsh*, 2003 WL 21730714 at *3 n.3 (W.D.N.Y., June 27, 2003) (holding conclusory affidavit about records search and lack of appeals inadmissible).

¹⁴⁵ *Livingston v. Piskor*, 215 F.R.D. 84, 85-86 (W.D.N.Y. 2003) (holding that defendants' affidavits that they had no record of grievances and appeals by the plaintiff were inadequate where they did not respond to his allegations that his grievances were not processed as policy required, and where they gave no detail as to "the nature of the searches . . . , their offices' record retention policies, or other facts indicating just how reliable or conclusive the results of those searches are"); *Thomas v. New York State Dept. of Correctional Services*, 2002 WL 31164546 (S.D.N.Y., Sept. 30, 2003) (similar to *Livingston*).

¹⁴⁶ *Donahue v. Bennett*, 2003 WL 21730698 at *4 (W.D.N.Y., June 23, 2003) (holding counsel's hearsay affirmation about a telephone call with grievance officials did not properly support their motion).

In *Collins v. McCaughtry*, 2005 WL 503818 at *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. *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).

¹⁴⁷ *See 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); *Woods v. Arpaio*, 2006 WL

Two circuits have held that the plaintiff must plead exhaustion with specificity and support the pleading with documentation when available, and courts should dismiss *sua sponte* for noncompliance with that requirement.¹⁴⁸ The Sixth Circuit has also held that a prisoner may not amend his or her complaint to cure the failure to plead exhaustion.¹⁴⁹ The Eleventh Circuit appears

197149 at *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 at *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 at *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 at *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); *Lodato v. Ortiz*, 314 F.Supp.2d 379, 385 (D.N.J. 2004) (denying summary judgment where defendants said they had no record of plaintiff's grievance, but they also had no record of other grievances which were undisputably filed).

¹⁴⁸ *Steele v. Federal Bureau of Prisons*, 355 F.3d 1204, 1210 (10th Cir. 2003), *cert. denied*, 125 S.Ct. 344 (2004); *Knuckles El v. Toombs*, 215 F.3d 640, 642 (6th Cir.), *cert. denied*, 531 U.S. 1040 (2000); *Brown v. Toombs*, 139 F.3d 1102, 1104 (6th Cir.), *cert. denied*, 525 U.S. 833 (1998); *see Fitzgerald v. Corrections Corp. of America*, 403 F.3d 1134, 1139 (10th Cir. 2005) (affirming dismissal of complaint that was unaccompanied by documentation and "offered no description at all of any specific hearing or procedure, nor even referred to a specific interaction with any particular guard or other prison official"); *Boyd v. Corrections Corporation of America*, 380 F.3d 989 (6th Cir. 2004) (applying "pleading with specificity" requirement to various fact patterns), *cert. denied*, 125 S.Ct. 1639 (2005); *Saylor v. Caruso*, 2005 WL 1168451 at *2 (W.D.Mich., Apr. 12, 2005) (holding the Sixth Circuit requirement met by allegation that "[a]s a result of Defendants WARREN and MEYER's inaction Plaintiff SAYLOR filed an Administrative Grievance Step I, II and III, which were denied."), *report and recommendation adopted*, 2005 WL 1168448 (W.D.Mich., May 17, 2005). Courts within the Sixth Circuit have applied the requirement of documentation or particularized averments to Michigan's "modified grievance access," under which prisoners considered to have filed too many inappropriate grievances must request grievance forms from an official who provides them only after determining whether the issue is grievable and otherwise fits the grievance policy. *See, e.g., Robinson v. Lesatz*, 2005 WL 2978655 at *2 (W.D.Mich., Nov. 7, 2005) (holding case subject to dismissal for non-exhaustion where plaintiff did not submit copies of his request for a grievance form or its denial, and did not specify the date of the request and whether the defendant in the lawsuit was named in the request for the form); *Robinson v. Wertanen*, 2005 WL 2572036 at *2 (W.D.Mich., Oct. 12, 2005).

¹⁴⁹ *Baxter v. Rose*, 305 F.3d 486, 488 (6th Cir. 2002). This rule is limited to the context of screening and *sua sponte* dismissal; if the case survives initial screening, the plaintiff can amend in response to a motion alleging non-exhaustion. *Saylor v. Caruso*, 2005 WL 1168451 at *2 (W.D.Mich., Apr. 12, 2005), *report and recommendation adopted*, 2005 WL 1168448 (W.D.Mich.,

to require the plaintiff to plead exhaustion, but has provided no analysis.¹⁵⁰ The Fifth Circuit has articulated several positions, also without analysis.¹⁵¹

2. Waiver

As an affirmative defense, exhaustion may be waived by failure to raise it timely.¹⁵² A

May 17, 2005); *see also* Casarez v. Mars, 2003 WL 21369255 at *5 (E.D.Mich., June 11, 2003) (holding that a plaintiff who alleged exhaustion rather than evading the issue in his complaint, and submitted proof in response to a motion to dismiss, had exhausted notwithstanding the lack of “particularized averments” in the complaint). However, at least one district court has held that a plaintiff whose claim is dismissed for non-exhaustion may not, after exhaustion, amend the dismissed complaint to allege exhaustion. Boles v. Overton, 396 F.Supp.2d 808, 809-10 (E.D.Mich., Oct. 18, 2005).

At least one district court in the Tenth Circuit has de facto rejected this aspect of Sixth Circuit exhaustion law by directing a prisoner whose exhaustion pleading was deficient to supplement his complaint or face dismissal. Kearns v. Johnson County Adult Detention Center, 2006 WL 148889 at *2-3 (D.Kan., Jan. 19, 2006); Carter v. Bruce, 2005 WL 2874816 at *1-2 (D.Kan., Nov. 1, 2005).

¹⁵⁰ *See* Rivera v. Allin, 144 F.3d 719, 731 (11th Cir.1998) (“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.”); Strole v. Coats, 2005 WL 1668900 at *3 (M.D.Fla., July 11, 2005) (stating without authority plaintiff has the burden of pleading exhaustion); Reed v. Barnes, 2005 WL 1278868 at * 4 (N.D.Fla., May 27, 2005) (dismissing for failure to allege exhaustion), *report and recommendation adopted*, 2005 WL 1366620 (N.D.Fla., June 7, 2005); *see also* Lyons v. Trinity Services Group, Inc., 401 F.Supp.2d 1290, 1297 (S.D.Fla. 2005) (“It is well settled that in § 1983 actions, the prisoner carries the burden of *demonstrating* that he has exhausted administrative remedies.”) (emphasis supplied) .

¹⁵¹ *Compare* Underwood v. Wilson, 151 F.3d 292, 296 (5th Cir. 1998) (“As long as the plaintiff has alleged exhaustion with sufficient specificity, lack of admissible evidence in the record does not form the basis for dismissal.”) *with* Johnson v. Johnson, 385 F.3d 503, 516 n.7 (5th Cir. 2004) (noting that some prior decisions imply or assume exhaustion is part of the plaintiff’s claim, but questioning whether the matter has been decided) *and* Wendell v. Asher, 162 F.3d 887, 890 (5th Cir. 1998) (holding that PLRA exhaustion “imposes a requirement, rather like a statute of limitations”); *see* Combs v. Valdez, 2005 WL 2291626 at *5 (N.D.Tex., Sept. 13, 2005) (rejecting the documentation requirement of the Sixth and Tenth Circuits in light of *Underwood v. Wilson*).

¹⁵² Handberry v. Thompson, 436 F.3d 52, 59-60 (2d Cir. 2006) and cases cited (finding waiver); Ray v. Kertes, 285 F.3d 287, 293, 295 (3d Cir. 2002); Perez v. Wis. Dept. of Corr., 182 F.3d 532, 536 (7th Cir.1999). *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*

number of courts have held exhaustion waived, or at least waivable, by failure to raise it timely.¹⁵³ Some courts, but not the Second Circuit, have tied waiver to a showing of prejudice.¹⁵⁴ However,

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).

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*, 125 S.Ct. 344 (2004).

¹⁵³ Handberry v. Thompson, 436 F.3d 52, 59-60 (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); Smith v. Mensinger, 293 F.3d 641, 647 n.3 (3d Cir. 2002) (finding waiver on post-trial appeal where the defense had not been raised); Randolph v. Rodgers, 253 F.3d 342, 348 n. 11 (8th Cir. 2001) (holding exhaustion waived on appeal where not raised in the district court); Jones v. Gardels, 2006 WL 37039 at *3 (D.Del., Jan. 6, 2006) (holding failure to raise exhaustion before the close of discovery waived it); Markay v. Yee, 2005 WL 3555473 at *8 (E.D.Cal., Dec. 23, 2005) (holding defense waived where defendants did not include non-exhaustion in their motion to dismiss); Wilson v. Hendel, 2005 WL 775902 at *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); Leybinsky v. Millich, 2004 WL 2202577 at *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); Rose v. Garbs, 2003 WL 548384 at *4 n.3 (N.D.Ill., Feb. 26, 2003) (holding exhaustion waived when raised only in a reply brief); Mayoral v. Illinois Dept. Of Corrections, 2002 WL 31324070 at *1 (N.D.Ill., Oct. 17, 2002) (finding waiver where exhaustion was not raised until a summary judgment motion); Goodson v. Sedlack, 212 F.Supp.2d 255, 256 n.1 (S.D.N.Y. 2002) (finding waiver where exhaustion was not raised in or before a summary judgment motion); Rahim v. Sheahan, 2001 WL 1263493 at *6-7 and n.3 (N.D.Ill., Oct. 19, 2001) (finding waiver where the defense had not been raised through four complaints, a motion to dismiss, and an appeal); Williams v. Illinois Dept. of Corrections, 1999 WL 1068669 at *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).

¹⁵⁴ Curtis v. Timberlake, ___ F.3d ___, 2005 WL 3728794 at *2 (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) (holding exhaustion and other affirmative defenses may be raised at the summary judgment stage if the adverse party is not prejudiced).

it is clear that a claim of waiver is strongly supported by a showing of prejudice.¹⁵⁵

The exhaustion defense, once technically waived, may be revived procedurally¹⁵⁶ or in the exercise of the court's discretion.¹⁵⁷ However, 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

¹⁵⁵ See *Handberry v. Thompson*, 436 F.3d 52, 60 (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 at *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 at *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); *Rahim v. Sheahan*, 2001 WL 1263493 at *6-7 and n.3 (N.D.Ill., Oct. 19, 2001) (noting that one defendant 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).

¹⁵⁶ See *Jackson v. District of Columbia*, 254 F.3d 262, 267 (D.C.Cir. 2001) (holding it was not an abuse of discretion to construe a "notice" by one party that it would rely on another party's exhaustion defense as an amended answer properly raising the defense); *Massey v. Helman*, 196 F.3d 727 (7th Cir. 1999) (holding that the filing of an amended complaint revives defendants' right to raise exhaustion and other defenses), *cert. denied*, 532 U.S. 1065 (2001).

¹⁵⁷ See *Stephenson v. Dunford*, 320 F.Supp.2d 44, 48-49 (W.D.N.Y. 2004) (allowing amendment of answer to assert exhaustion 22 months after Supreme Court decision showed the defense was available), *vacated and remanded on other grounds*, 2005 WL 1692703 (2d Cir., July 13, 2005); *Stevens v. Goord*, 2003 WL 21396665 at *4 (S.D.N.Y., June 16, 2003) (allowing revival of waived exhaustion defense), *on reargument*, 2003 WL 22052978 (S.D.N.Y., Sept. 3, 2003). *Contra*, *Thomas v. Keyser*, 2004 WL 1594865 at *2 (S.D.N.Y., July 16, 2004) (declining to allow revival of defense); *Hightower v. Nassau County Sheriff's Dep't*, 325 F.Supp.2d 199, 205 (E.D.N.Y. 2004) (same), *vacated in part on other grounds*, 343 F.Supp.2d 191 (E.D.N.Y., Nov. 1, 2004).

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.

ways.”¹⁵⁸

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.¹⁵⁹

3. Procedural Vehicles for Raising Exhaustion

Summary judgment is the most common way of addressing exhaustion disputes in courts where exhaustion is not a pleading requirement.¹⁶⁰ Some courts have entertained motions under Rule 12(b)(1), Fed.R.Civ.P., which addresses dismissal for lack of subject matter jurisdiction and permits consideration of matters outside the pleadings and resolution of disputed facts; however, such a motion is inappropriate if failure to exhaust is not jurisdictional, as most courts have held.¹⁶¹ Nor is dismissal under Rule 12(b)(6) for failure to state a claim appropriate in courts where exhaustion is not a pleading requirement, except where non-exhaustion is apparent on the face of the complaint, since non-exhaustion is not failure to state a claim.¹⁶² Moreover, when factual disputes arise on a Rule 12(b)(6) motion, the motion must be converted to one for summary judgment if extrinsic matter is to be considered.¹⁶³ The Ninth Circuit has held that failure to exhaust is “a matter in abatement,

¹⁵⁸ *Rivera v. Goord*, 2003 WL 1700518 at *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.

Rivera’s holding has been overtaken by the broader one in *Rodriguez v. Westchester County Jail Correctional Dep’t*, 372 F.3d 485, 487 (2d Cir. 2004), which held that a prisoner had acted reasonably in failing to exhaust, and could therefore proceed without exhaustion if remedies were no longer available, because his actions were consistent with the erroneous legal position that the Second Circuit had adopted.

¹⁵⁹ See cases cited in n. 347, below.

¹⁶⁰ Where exhaustion is a pleading requirement, it is often addressed at the initial screening stage, and some courts have held that it must be. See *Steele v. Federal Bureau of Prisons*, 355 F.3d 1204, 1211 (10th Cir. 2003), *cert. denied*, 125 S.Ct. 344 (2004); *Baxter v. Rose*, 305 F.3d 486, 490 (6th Cir. 2002).

¹⁶¹ *Rodney v. Goord*, 2003 WL 21108353 at *2 (S.D.N.Y., May 15, 2003); *McCoy v. Goord*, 255 F.Supp.2d 233, 249 (S.D.N.Y. 2003); see n. 67, above, for cases holding PLRA exhaustion is not jurisdictional.

¹⁶² *McCoy v. Goord*, *id.*; see n. 114, above.

¹⁶³ *Doe v. Torres*, 2006 WL 290480 at *8 (S.D.N.Y., Feb. 8, 2006) (declining to consider extrinsic materials and to convert motion to dismiss to summary judgment); *Gabby v. Luy*, 2006 WL

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.¹⁶⁴

The Second Circuit has not addressed the question, and the most thorough district court discussion of the matter rejects the Ninth Circuit’s analysis. Instead it states that non-exhaustion that is clear from the face of the complaint and any documents the complaint incorporates should be addressed via a Rule 12(b)(6) motion, but where it is not clear from the face of the complaint, the 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. . . .”¹⁶⁵ Why it is not preferable for defendants simply to move for summary judgment on the “narrow issue of exhaustion” in the first instance is not clear from this analysis. District courts have demonstrated some tendencies to push the envelope in order to dispose of exhaustion disputes on motions to dismiss.¹⁶⁶

A number of courts have held that disputed facts concerning exhaustion cannot be resolved on motion.¹⁶⁷ Indeed, some courts have held or assumed that they present jury issues.¹⁶⁸ However,

167673 at *1 (E.D.Wis., Jan. 23, 2006) (rejecting argument that grievance documents are “public records” which may be judicially noticed on a motion to dismiss); *Foreman v. Commissioner Goord*, 2004 WL 385114 at *6 (S.D.N.Y., March 2, 2004) (citing cases); *Kaiser v. Bailey*, 2003 WL 21500339 at *4 (D.N.J., July 1, 2003); *McCoy v. Goord*, *id.*

¹⁶⁴ *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir.), *cert. denied*, 540 U.S. 810 (2003).

¹⁶⁵ *McCoy v. Goord*, 255 F.Supp.2d at 251.

¹⁶⁶ *See, e.g.*, *Mingues v. Nelson*, 2004 WL 324898 at *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 at *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 Gabby v. Luy*, 2006 WL 167673 at *1 (E.D.Wis., Jan. 23, 2006) (rejecting “public record” argument, converting motion to dismiss supported by grievance documents into summary judgment motion).

¹⁶⁷ *Dale v. Lappin*, 376 F.3d 652, 654-56 (7th Cir. 2004) (per curiam) (denying summary judgment based on plaintiff’s specific allegations that he could not get necessary forms); *Blount v. Johnson*, 373 F.Supp.2d 615, 618-19 (W.D.Va. 2005) (holding plaintiff’s allegation, supported by

the Ninth Circuit has held that exhaustion, as a “matter in abatement,” is not subject to the same rules as matters going to the merits, and that courts may decide factual disputes concerning it on motion, subject only to the “clearly erroneous” standard of appellate review.¹⁶⁹

E. What Is Exhaustion?

Exhaustion generally means appealing an adverse decision to the highest level of the grievance system,¹⁷⁰ and waiting to sue until the time for prison officials to render a decision has

some documentary evidence, that his grievance appeal was returned created a factual issue barring summary judgment); *Croswell v. McCoy*, 2003 WL 962534 (N.D.N.Y., Mar. 11, 2003) (denying summary judgment based on factual dispute about exhaustion); *Evans v. Nassau County*, 184 F.Supp.2d 238, 245 (E.D.N.Y. 2002); *Williams v. Joliet Correctional Medical Unit*, 2000 WL 152134 (N.D.Ill., Feb. 4, 2000); *Orange v. Strain*, 2000 WL 158328 (E.D.La., Feb. 10, 2000), *aff'd*, 252 F.3d 436 (5th Cir. 2001) (unpublished); *Howard v. Goord*, 1999 WL 1288679 at *3 (S.D.N.Y., Dec. 28, 1999); *Johnson v. Garraghty*, 57 F.Supp.2d 321, 329 (E.D.Va. 1999) (holding that disputed claim that defendants obstructed exhaustion merits an evidentiary hearing); *see Carroll v. Yates*, 362 F.3d 984, 985 (7th Cir. 2004) (reversing dismissal where plaintiff submitted an affidavit disputing the allegation that he had refused to cooperate with the grievance process); *Fouk v. Charrier*, 262 F.3d 687, 697-98 (8th Cir. 2001) (discussing exhaustion claim resolved on trial record).

¹⁶⁸ *See, e.g., Blount v. Johnson*, 373 F.Supp. 615, 619 (W.D.Va. 2005) (stating a factual dispute concerning exhaustion “is appropriately submitted to the trier of fact for resolution”); *Donahue v. Bennett*, 2004 WL 1875019 at *6 (W.D.N.Y., Aug. 17, 2004); *Kendall v. Kittles*, 2004 WL 1752818 at *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.”); *Branch v. Brown*, 2003 WL 21730709 at *12 (S.D.N.Y., July 25, 2003) (holding that “defendants must show that no reasonable jury could fail to find in their favor on this issue” to obtain dismissal for non-exhaustion), *judgment granted on other grounds*, 2003 WL 22439780 (S.D.N.Y., Oct. 28, 2003); *Williams v. MacNamara*, 2002 WL 654096 at *4 (N.D.Cal., Apr. 17, 2002).

¹⁶⁹ *Ritz v. Int’l Longshoremen’s and Warehousemen’s Union*, 837 F.2d 365, 369 (9th Cir. 1988) (per curiam), *cited in Wyatt v. Terhune*, 315 F.3d 1108, 1119-20 (9th Cir. 2003), *cert. denied*, 540 U.S. 810 (2003); *see Hazleton v. Alameida*, 358 F.Supp.2d 926, 928-33 (C.D.Cal. 2005) (applying *Ritz/Wyatt* rule); *Zarco v. Burt*, 355 F.Supp.2d 1168, 1171-74 (S.D.Cal. 2004) (same).

¹⁷⁰ “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); *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*, ___ F.3d ___, 2006 WL 435418 at *7 (7th Cir. 2006) (holding that a prisoner who followed all required steps but whose

expired.¹⁷¹ The Second Circuit and nearly all other courts have held that exhaustion must be completed *before* suit is brought.¹⁷² Courts have differed over whether suit is “brought” for this

grievance vanished, and who received no instructions what to do next, had exhausted).

Failure to appeal some grievances is not a failure to exhaust as long as the grievances that *were* exhausted address the issues before the court. *Greeno v. Daley*, 414 F.3d 645, 652 (7th Cir. 2005).

¹⁷¹ *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.”); *Underwood v. Wilson*, 151 F.3d 292, 295 (5th Cir. 1998), *cert. denied*, 526 U.S. 1133 (1999); *Page v. Breslin*, 2004 WL 2713266 at *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 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). *But see Mejia v. Goord*, 2005 WL 2179422 at *5 (N.D.N.Y., Aug. 16, 2005) (holding a prisoner who filed suit on the day his final appeal was decided did not exhaust). *See also* § IV.C, n. 108, above, concerning the proper disposition of a case in which exhaustion was completed after filing suit. If a prisoner files suit after the time limit for decision has passed, and then grievance authorities issue a late decision, the prisoner has exhausted. *Dimick v. Baruffo*, 2003 WL 660826 at *4 (S.D.N.Y., Feb. 28, 2003). *But see Sergeant v. Norris*, 330 F.3d 1084, 1085-86 (8th Cir. 2003) (affirming dismissal for non-exhaustion where time for response had passed before suit was filed, but prisoner had not made that clear to the district court).

¹⁷² *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); *Miles v. Daniels*, 2004 WL 2110708 at *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).

This PLRA rule differs from the rule under Title VII, where the failure to obtain a right-to-sue letter (the conclusion of the EEOC administrative process) “is curable at any point during the duration of the action.” *Anjelino v. New York Times Co.*, 200 F.3d 73, 96 (3d Cir. 1999), *citing Gooding v. Warner-Lambert Co.*, 744 F.2d 354, 357-59 (3d Cir. 1984) (eschewing “highly technical

purpose when the complaint is first tendered to the clerk's office,¹⁷³ or 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*.¹⁷⁴ Most courts have held that new claims added by amendment to the complaint 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.¹⁷⁵

pleading rules, which only serve to trap the unwary practitioner"); *accord*, *Williams v. Washington Metro. Area Transit Auth.*, 721 F.2d 1412, 1418 n. 12 (D.C.Cir. 1983) and cases cited; *Fouche v. Jekyll Island-State Park Auth.*, 713 F.2d 1518, 1525 (11th Cir. 1983). *See generally* nn. 87, above, and nn. 172, 233-38, 269-70, 321-22, 366-71, and 546-48, below, and accompanying text, concerning Title VII.

¹⁷³ *See Ford v. Johnson*, 362 F.3d 395, 399-400 (7th Cir. 2004) (holding the prisoner must await the administrative decision before sending the complaint); *accord*, *Craver v. Norgaard*, 2006 WL 190463 at *1-2 (E.D.Cal., Jan. 19, 2006).

¹⁷⁴ *See Ellis v. Guarino*, 2004 WL 1879834 at *6 (S.D.N.Y. Aug. 24, 2004) (holding the plaintiff exhausted where the final step in the grievance process took place during the 11 months between submission of the complaint and the completion of processing in the *pro se* office; citing contrary cases); *accord*, *O'Neal v. Vaughn*, 2006 WL 191930 at *2 (E.D.Cal., Jan. 20, 2006).

¹⁷⁵ *See Cannon v. Washington*, 418 F.3d 714, 719-20 (7th Cir. 2005) (rejecting defendants' argument that new claims could not be added by amendment even if they had been exhausted); *accord*, *Barnes v. Briley*, 420 F.3d 673, 677-78 (7th Cir. 2005); *Anthony Smith v. Worsham*, 2005 WL 2239925 at *3-4 (D.Colo., Sept. 14, 2005); *Amador v. Superintendents of Dept. of Correctional Services*, 2005 WL 2234050 at *8 n.9 (S.D.N.Y. Sept. 13, 2005); *Carter v. Wright*, 211 F.R.D. 549, 551 (E.D.Mich. 2003); *Madison v. Mazzuca*, 2004 WL 3037730 at *14 (S.D.N.Y. Dec 30, 2004); *see also Miles v. Daniels*, 2004 WL 2110708 at *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 *Cline v. Fox*, 266 F.Supp.2d 489, 493 (N.D.W.Va. 2003), the court held that where a prisoner exhausted and sued about censorship of a book and then added a claim about subsequent removal of books from the library without exhausting, the library claim had to be dismissed. Subsequently, after exhaustion, the court allowed the claim to be reinstated. *Cline v. Fox*, 282 F.Supp.2d 490 (N.D.W.Va. 2003). *But see Harbin-Bey v. Rutter*, 420 F.3d 571, 580 (6th Cir. 2005) (holding that claims post-dating the original complaint and exhausted after its filing could not be added); *accord*, *Levi v. Hirsch*, 2005 WL 2671409 at *1 (E.D.Cal., Oct. 17, 2005), *report and recommendation adopted*, 2005 WL 3149858 (E.D.Cal., Nov. 22, 2005), *reconsideration denied*, 2005 WL 3336549 (E.D.Cal., Dec. 8, 2005); *Quackenbush v. Tennison*, 2005 WL 3020055 at *3 (E.D.Cal., Nov. 9, 2005), *report and recommendation adopted*, 2005 WL 3500536 (E.D.Cal., Dec. 20, 2005).

The lack of a response cannot mean that the prisoner has failed to exhaust; otherwise prison officials could keep prisoners out of court by simply ignoring their grievances.¹⁷⁶ Courts have not determined how long a prisoner must wait in a system with no deadline for the final appeal.¹⁷⁷

Some courts have held that if the grievance system allows prisoners to treat non-response as

¹⁷⁶ See *Brown v. Koenigsmann*, 2003 WL 22232884 at *4 (S.D.N.Y., Sept. 29, 2003); *accord*, *Jones v. Blanas*, 2005 WL 1868826 at *3 (E.D.Cal., Aug. 3, 2005); *White v. Briley*, 2005 WL 1651170 at *6 (N.D.Ill., July 1, 2005); *Casarez v. Mars*, 2003 WL 21369255 at *6 (E.D.Mich., June 11, 2003) (holding that prison officials' lack of response to a Step III grievance did not mean failure to exhaust); *John v. N.Y.C. Dept. of Corrections*, 183 F.Supp.2d 619, 625 (S.D.N.Y. 2002) (rejecting argument, three years after grievance appeal, that plaintiff must continue waiting for a decision). In *Dole v. Chandler*, ___ F.3d ___, 2006 WL 435418 at *7 (7th Cir. 2006), the court held a prisoner 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.

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 at *4 (W.D.N.Y., Sept. 30, 2005) (dictum); *Rodriguez v. Hahn*, 209 F.Supp.2d 344, 347-48 (S.D.N.Y. 2002). Similarly, a decision dismissing for non-exhaustion where a prisoner's grievance appeal had not been initially processed as a result of "administrative oversight" is probably erroneous, depending on how long the appeal was lost. See *Mendez v. Artuz*, 2002 WL 313796 at *2 (S.D.N.Y., Feb. 27, 2002).

¹⁷⁷ The Seventh Circuit has held, in connection with a grievance system that called for appeals to be decided within 60 days "whenever possible," that the remedy did not become "unavailable" because decision took six months. "Even six months is prompt compared with the time often required to exhaust appellate remedies from a conviction." *Ford v. Johnson*, 362 F.3d 395, 400 (7th Cir. 2004). The analogy to judicial proceedings seems inapposite in connection with a grievance process in which the prisoner has none of the normal safeguards of the judicial process. There is also considerable irony in the court's willingness to grant that sort of latitude to grievance systems while the same court insists on strict compliance by prisoners with short time limits. See *Pozo v. McCaughtry*, 286 F.3d 1022, 1023-24 (7th Cir.), *cert. denied*, 537 U.S. 949 (2002).

Other courts that have considered similar delays have not found a failure to exhaust. See *Olmsted v. Cooney*, 2005 WL 233817 at *2 (D.Or., Jan. 31, 2005) (holding prisoner who waited seven weeks after filing last appeal was not shown to have failed to exhaust); *Thompson v. Koney*, 2005 WL 1378832 (E.D.Mich., May 4, 2005) (holding that a decision delayed six and a half months was not "timely" and case could not be dismissed for non-exhaustion where prisoner filed after five and a half months); *McNeal v. Cook County Sheriff's Dep't*, 282 F.Supp.2d 865, 868 n.3 (N.D.Ill. 2003) (holding that 11 months is long enough, citing cases holding that seven months is long enough and one month is not); see *Taylor v. Doctor McWeeney*, 2005 WL 1378808 (S.D. Ohio, May 27, 2005) (holding that prisoner who waited a little over two months past a 30-day deadline for decision had waited a "reasonable" time and had exhausted).

a denial of the grievance, their failure to appeal the non-response is a failure to exhaust.¹⁷⁸ Conversely, if the prisoner cannot appeal absent a decision, and is denied a decision, the prisoner has sufficiently exhausted “available” remedies.¹⁷⁹ Other courts have simply held that prisoners who grieve but do not get a response have satisfied the exhaustion requirement, usually without inquiring whether they were technically entitled to appeal the lack of response.¹⁸⁰

¹⁷⁸ Cox v. Mayer, 332 F.3d 422, 425 n.2 (6th Cir. 2003); Donahue v. Bennett, 2004 WL 1875019 at *6 n.12 (W.D.N.Y., Aug. 17, 2004); Bailey v. Sheahan, 2003 WL 21479068 at *3 (N.D.Ill., June 20, 2003); Sims v. Blot, 2003 WL 21738766 at * 3 (S.D.N.Y., July 25, 2003); Larry v. Byno, 2003 WL 1797843 at *2 n.3 (N.D.N.Y., Apr. 4, 2003) (“This Court’s decision should not be seen as condoning” the failure to follow procedure by not rendering a decision); Harvey v. City of Philadelphia, 253 F.Supp.2d 827, 830 (E.D.Pa. 2003) (holding that failure to use a procedure permitting sending a grievance directly to the Commissioner if the prisoner believes he is being denied access to the process was a failure to exhaust); Crosswell v. McCoy, 2003 WL 962534 at *4 (N.D.N.Y., Mar. 11, 2003); Mendoza v. Goord, 2002 WL 31654855 at *3 (S.D.N.Y., Nov. 21, 2002) (dismissing for failure to appeal a non-response even though the plaintiff “tried many avenues to seek relief from prison authorities”); Petty v. Goord, 2002 WL 31458240 at *4 (S.D.N.Y., Nov. 4, 2002); Graham v. Cochran, 2002 WL 31132874 (S.D.N.Y., Sept. 25, 2002); Reyes v. Punzal, 206 F.Supp.2d 431, 432-33 (W.D.N.Y.2002); Martinez v. Dr. Williams R., 186 F.Supp.2d 353, 357 (S.D.N.Y. 2002); Saunders v. Goord, 2002 WL 1751341 at *3 (S.D.N.Y., July 29, 2002); Jorss v. Vanknocker, 2001 WL 823771 at *2 (N.D.Cal., July 19, 2001), *aff’d*, 44 Fed.Appx. 273, 2002 WL 1891412 (9th Cir. 2002); Smith v. Stubblefield, 30 F.Supp.2d at 1174; Morgan v. Arizona Dept. of Corrections, 976 F.Supp. 892, 895 (D.Ariz. 1997).

¹⁷⁹ 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); Woulard v. Food Service, 294 F.Supp.2d 596, 602 (D.Del. 2003); Smith v. Boyle, 2003 WL 174189 at *3 (N.D.Ill., Jan. 27, 2003); Taylor v. Dr. Barnett, 105 F.Supp.2d 483, 486 (E.D.Va. 2000); *see* 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).

¹⁸⁰ Boyd v. Corrections Corporation of America, 380 F.3d 989, 996 (6th Cir. 2004) (holding that “administrative remedies are exhausted when prison officials fail to timely respond to a properly filed grievance,” though distinguishing a case where the prisoner could proceed without a decision), *cert. denied*, 125 S.Ct. 1639 (2005); Lewis v. Washington, 300 F.3d 829, 833 (7th Cir. 2002) (holding failure to respond makes remedy unavailable); Shaheed-Muhammad v. Dipaolo, 393 F.Supp.2d 80, 97 (D.Mass. 2005) (noting officials’ failure to respond; stating, “[h]aving failed to abide by the strictures of their own regulations, defendants should not be allowed to claim plaintiff’s noncompliance as a bar.”); Rowe v. Corcoran State Prison, 2005 WL 1344379 at *2 (E.D.Cal. May 27, 2005) (stating “exhaustion occurs when prison officials fail to respond to a grievance within the policy time limits”); Williams v. First Correctional Medical, 2004 WL 2434307 at *1 n.4 (D.Del.,

In cases where prisoners have failed to appeal because the grievance system or its personnel gave misleading or confusing responses, courts have held that the prisoners exhausted.¹⁸¹ The Second Circuit has not addressed this question directly, but these decisions are consistent with its recent holdings that prisoners may be justified in failing to exhaust if they act on a reasonable, even if incorrect, interpretation of the rules,¹⁸² and that the actions of prison personnel that inhibit

Oct. 13, 2004) (“Defendants have presented insufficient evidence to show any response to the grievance forms, as mandated by the grievance procedure itself. Thus, the court finds that plaintiff exhausted his administrative remedies.”); *Holland v. Correctional Medical Systems*, 2004 WL 322905 at *3 (D.Del., Feb. 11, 2004); *additional authority for this point is collected in Appendix A*; see *Abney v. County of Nassau*, 237 F.Supp.2d 278, 282-83 (E.D.N.Y. 2002) (holding that plaintiff was not obliged to appeal a non-response where the grievance policy did not provide for such an appeal); *Artis-Bey v. District of Columbia*, 884 A.2d 626, 634 (D.C. 2005) (holding that where regulations required prison officials to respond within 15 days and said a prisoner “may” appeal if no timely response is received, prisoner was not obliged to appeal absent a response). In *Artis-Bey*, the court stated: “In addition to being grounded in the language of the regulation, our interpretation serves the purpose of resolving inmate complaints, if possible, at the lowest administrative level, without escalating the grievance process unnecessarily. . . . If every unconsented delay in response to a grievance required appeal, inmates would have to appeal to higher authorities over grievances that could and should be resolved at lower levels, simply to avoid forfeiting their right to an eventual civil action.” 884 A.2d at 635. *But see Allen v. Tobia*, 2003 WL 260708 at *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).

¹⁸¹ *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); *Clark v. Mason*, 2005 WL 1189577 at *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); *Lee v. Walker*, 2002 WL 980764 at *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 at *2-3 (N.D.Ill., July 2, 2001) (holding that a prisoner who got no response to his grievance, and complained to the Administrative Review Board, which told him to file another grievance, had sufficiently exhausted); *Feliz v. Taylor*, 2000 WL 1923506 at *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).

¹⁸² *Giano v. Goord*, 380 F.3d 670, 678 (2d Cir. 2004); *Hemphill v. New York*, 380 F.3d 680, 689-90 (2d Cir. 2004).

exhaustion may estop them from raising the defense.¹⁸³ The Second Circuit has 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.¹⁸⁴

1. What If the Prisoner Wins the Grievance?

Common sense and a growing body of case law hold that if the prisoner *wins* the grievance at an early stage, it's over and the prisoner has exhausted.¹⁸⁵ Similarly, if a prisoner grieves and

¹⁸³ *Hemphill v. New York*, 380 F.3d at 688-89.

¹⁸⁴ *Abney v. McGinnis*, 380 F.3d 663, 669 (2d Cir. 2004). *But see* *Braham v. Clancy*, 425 F.3d 177 (2d Cir. 2005) (holding that a prisoner who repeatedly requested a cell change to avoid being assaulted, then received the cell change after he was assaulted and did not file a formal grievance, did not exhaust notwithstanding *Abney* because a formal grievance remained available to him).

¹⁸⁵ *Brown v. Valoff*, 422 F.3d 926, 935 (9th Cir. 2005) (holding “a prisoner need not press on to exhaust further levels of review once he has either received all ‘available’ remedies at an intermediate level of review or been reliably informed by an administrator that no remedies are available”); *Ross v. County of Bernalillo*, 365 F.3d 1181, 1186-87 (10th Cir. 2004) (holding a prisoner who fell in the shower and then filed a Pre-Grievance Request Form asking that a mat be placed in the shower had exhausted when the prison put a mat in the shower, since no further relief was available); *Mullicane v. Marshall*, 2005 WL 3299079 at *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); *Roundtree v. Adams*, 2005 WL 1503926 at *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 at *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.”); *see Appendix A for additional authority on this point. Contra*, *Williamson v. Wexford Health Sources, Inc.*, 131 Fed.Appx. 888, 890 (3rd Cir. 2005) (unpublished) (holding plaintiff who grieved to get his medication, and got his medication, failed to exhaust because he didn’t appeal); *Dunmire v. DePasqual*, 2005 WL 2708396 at *4 (W.D.Pa., Sept. 23, 2005) (holding that a plaintiff who received an apology and a promise to correct the problem at the first level of the grievance system had not exhausted, noting that his damages claim must have been presented at all levels of the system; citing *Williamson v. Wexford*); *Ortiz v. Treon*, 2005 WL 1151103 at *1 (N.D.Tex., May 16, 2005); *Feliz v. Taylor*, 2000 WL 1923506 at *2 (E.D.Mich., Dec. 29, 2000).

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.”¹⁸⁶ The Second Circuit has recently adopted this position, rejecting as “impracticable” and “counter-intuitive” the State’s argument that prisoners should file appeals of favorable decisions just in case they are not implemented.¹⁸⁷

Some courts have held that a decision does not obviate the need for an appeal unless it is so completely favorable that no further relief is possible.¹⁸⁸ *Abney* appears to reject that view; the plaintiff’s grievance decisions, which the court held sufficiently favorable to complete the plaintiff’s

One court reached the same result where the prisoner had initiated a grievance and received relief (being separated from an assailant and transferred to another prison), but never received a decision at all. *Nitz v. French*, 2001 WL 747445 at *3 (N.D.Ill., July 2, 2001) (“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.”); *accord*, *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).

¹⁸⁶ *Sulton v. Wright*, 265 F.Supp.2d 292, 298-99 (S.D.N.Y. 2003); *accord*, *Kaplan v. New York State Dept. of Correctional Services*, 2000 WL 959728 at *3 (S.D.N.Y., July 10, 2000); *McGrath v. Johnson*, 67 F.Supp.2d 499, 510 (E.D.Pa. 1999), *aff’d*, 35 Fed.Appx. 357, 2002 WL 1271713 (3rd Cir.2002). *But see* *Dixon v. Page*, 291 F.3d 485, 490 (7th Cir. 2002) (observing that “[r]equiring a prisoner who has won his grievance in principle to file another grievance to win in fact,” risking the prospect of a “never-ending cycle of grievances,” “could not be tolerated”; but accepting prison officials’ claim that the prisoner could have taken a further appeal to the Director if the situation had not been resolved after 30 days).

¹⁸⁷ *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.”)

¹⁸⁸ *See* *Ross v. County of Bernalillo*, 365 F.3d 1181, 1186-87 (10th Cir. 2004) (“When there is *no possibility of any further relief*, the prisoner’s duty to exhaust available administrative remedies is complete.”) (emphasis supplied); *Green v. Cahal*, 2004 WL 1078988 at *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 at *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 at *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).

grievance obligations concerning inadequate medical care, said only that he would receive further attention from medical practitioners, and then that he should receive “appropriate footwear,” without guaranteeing he would receive any particular quality of care.¹⁸⁹ However, the subsequent decision in *Braham v. Clancy*¹⁹⁰ characterized *Abney* as a case where “a disposition of a grievance provided the relief requested but was never implemented,” and held it inapposite in 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, since the process could have granted further relief such as changes in policy or discipline of staff.¹⁹¹ It is unclear why the same is not true of *Abney*. The Seventh Circuit has now rejected the reasoning of *Braham*. 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.”¹⁹²

One court has held that if a grievance is resolved favorably, the only judicial relief that is

¹⁸⁹ *Abney*, 380 F.3d at 666, 669; see *Shaheen v. Hollins*, 2005 WL 2179400 at *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. Portoundo*, 2005 WL 2179398 at *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).

¹⁹⁰ 425 F.3d 177 (2d Cir. 2005).

¹⁹¹ *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 uncounselled prisoner in thinking he had satisfied the exhaustion requirement. *Id.* at 182. But see *Gabby v. Meyer*, 390 F.Supp.2d 801, 804 (E.D.Wis. 2005) (holding that where a prisoner grieved failure to take him to a hospital and failure to remove sutures timely, and prison staff did so, the failure to appeal further was not a failure to exhaust).

¹⁹² *Thornton v. Snyder*, 428 F.3d 690, 696-97 (7th Cir.2005). The court further noted that appealing a favorable result risks reversal, which in turn “would tend to increase, not decrease, the number of inmate suits,” contrary to the PLRA’s policy “to reduce the quantity and improve the quality of prisoner suits.” *Id.* (citation omitted). It concluded that arguing that the plaintiff “should have appealed to higher channels after receiving the relief he requested in his grievances is not only counter-intuitive, but it is not required by the PLRA. . . .” *Id.*

available is damages for injuries pre-dating the resolution.¹⁹³ 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,¹⁹⁴ and damages for any actual recurrence of the challenged conduct.

2. Exhausting All Issues

Each claim raised in a suit must have been exhausted in order to be heard.¹⁹⁵ That is the case

¹⁹³ *Dixon v. Goord*, 224 F.Supp.2d 739, 750-51 (S.D.N.Y. 2002).

¹⁹⁴ *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”).

¹⁹⁵ *Belton v. Robinson*, 2006 WL 231608 at *3-4 (D.N.J., Jan. 30, 2006) (holding that an appeal of a disciplinary conviction did not exhaust a claim that the officer injured the plaintiff during the incident); *Beltran v. O'Mara*, 405 F.Supp.2d 140, 152 (D.N.H. 2005) (holding that complaints about specific segregation conditions, such as lack of toilet paper, did not exhaust as to conditions in general or conditions not mentioned in the grievances), *on reconsideration*, 2006 WL 240558 (D.N.H., Jan. 31, 2006); *Henderson v. Sebastian*, 2004 WL 1946398 at *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 at *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); *see Mark v. Imberg*, 2005 WL 3201115 at *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). *But see Aiello v. Litscher*, 104

whether the claims are raised initially or added by subsequent amendment.¹⁹⁶ Some courts have held that if *any* issue has not been exhausted, the entire case must be dismissed; the Second Circuit has rejected this “total exhaustion” theory.¹⁹⁷

Some courts have pushed this idea so far as to treat as separate claims, for exhaustion purposes, closely related issues that arise from the same transaction or occurrence.¹⁹⁸ Some of these decisions, in effect, require uncounselled prisoners to make fine distinctions that many lawyers would miss.¹⁹⁹ As one court has pointed out, these decisions’ logic would also permit prison officials to “obstruct legal remedies to unconstitutional actions by subdividing the grievances, arguing, *e.g.*, that the Christians, Muslims, and Jews must each grieve denial of access to their own communal services.”²⁰⁰ Other decisions have dismissed claims because, even though the facts (*e.g.*,

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).

¹⁹⁶ See n. 175, above.

¹⁹⁷ See § IV.E.6, below.

¹⁹⁸ *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*, *Nichols v. Logan*, 2004 WL 2851944 at *8 (S.D.Cal., Nov. 23, 2004).

¹⁹⁹ See, *e.g.*, *Monsalve v. Parks*, 2001 WL 823871 (S.D.N.Y., July 19, 2001) (holding that even if the plaintiff exhausted concerning his 45-day disciplinary detention, he has to exhaust again with respect to his retention in administrative detention for the same alleged misconduct).

²⁰⁰ *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); *see* *Branch v. Brown*, 2003 WL 21730709 at *12 (S.D.N.Y., July 25, 2003) (holding that although some aspects of plaintiff’s complaint might technically fall outside his grievance, dismissal for non-exhaustion was improper because the gravamen of his complaint is that defendants failed and continued to fail to acknowledge his medical restriction), *judgment granted on other grounds*, 2003 WL 22439780 (S.D.N.Y., Oct. 28, 2003); *Sulton v. Wright*, 265 F.Supp.2d 292, 298 (S.D.N.Y. 2003) (“Rigid ‘issue exhaustion’ appears inappropriate when the fundamental issue is one of medical care from the same injury”); *Gomez v. Winslow*, 177 F.Supp.2d 977, 981-82 (N.D.Cal. 2001) (refusing to break down complaint of inadequate medical treatment into separate claims of failure to timely diagnose, failure to timely treat, and failure to inform); *Torrence v. Pelkey*, 164 F.Supp.2d 264, 278-79 (D.Conn. 2001) (declining to require exhaustion of new issues disclosed in discovery that arose from the “same series of events” concerning his medical care that he had exhausted). *But see* *English v. Redding*, 2003 WL 881000 at *4 (N.D.Ill., Mar. 6, 2003) (refusing

loss of property, improper discipline) were grieved, other allegations underlying a particular legal claim (e.g., discriminatory or retaliatory intent) were not raised in the grievance.²⁰¹ Such decisions are arguably contrary to the Second Circuit's holding that prisoners need only "object intelligibly to some asserted shortcoming" and need not plead legal theories in their grievances to satisfy the exhaustion requirement.²⁰² They are also arguably contrary to the Supreme Court's decision concerning "issue exhaustion."²⁰³ Further, such decisions, which have the practical effect of freezing the prisoner's legal claims as of the filing of the administrative grievance, are arguably contrary to the Federal Rules of Civil Procedure's direction that leave to amend complaints shall be "freely given."²⁰⁴ There is no indication that Congress intended to repeal that provision *sub silentio* for prisoners.

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 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

to apply *Lewis v. Washington* holding where prisoner had grieved being removed from protective custody at a different prison, and the discipline he received for the fight in which he was injured, but not the injury he was suing about).

An extreme example of prison officials' attempt to manufacture an exhaustion issue by subdividing the plaintiff's grievance is *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 at *2. Similarly, in *Underwood v. Mendez*, 2005 WL 2300361 (M.D.Pa., Sept. 9, 2005), 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 at *3; see *Mark v. Imberg*, 2005 WL 3201115 at *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).

²⁰¹ See nn. 240-243, below.

²⁰² See *Johnson v. Testman*, 380 F.3d 691, 697 (2d Cir. 2004).

²⁰³ See nn. 217-222, below.

²⁰⁴ Rule 15(a), Fed.R.Civ.P.

grievance where doing so may result in a never-ending cycle of exhaustion.”²⁰⁵ This narrow ruling 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 amend his complaint to add new applications of the policy without further exhaustion.²⁰⁶ This holding may not extend to more discrete incidents. However, it would seem applicable to ongoing problems such as a course of inadequate medical care for a single disease or injury, such that every new default or consequence of the lack of care need not be the subject of a new grievance.²⁰⁷ The Fifth Circuit has so held in a recent decision in which the plaintiff alleged an ongoing course of failure to protect him from sexual assault. The court held he had not exhausted as to any incidents that occurred more than 15 days before his first grievance (15 days being the grievance time limit), but once he had alerted

²⁰⁵ *Abney v. McGinnis*, 380 F.3d 663, 669 (2d Cir. 2004). *But see* *Pritchett v. Portoundo*, 2005 WL 2179398 at *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).

²⁰⁶ *Freeman v. Berge*, 2004 WL 1774737 at *5 (W.D.Wis. Jul 28, 2004) (“Enforcement of the 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); *see* *Mohammad v. Kelchner*, 2005 WL 1138468 at *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).

²⁰⁷ *See* *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 at *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). *But see* *Mayo v. Snyder*, 2006 WL 20534 at *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); *Balzarini v. Alameida*, 2006 WL 354641 at *2 (E.D.Cal., Feb. 15, 2006) (holding grievance seeking to see a specialist did not exhaust as to claim of denial of medication); *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).

prison officials to the repeated assaults, he had exhausted as long as they continued.²⁰⁸ But, the court cautioned, a grievance would not exhaust as to future incidents of a more discrete nature (*e.g.*, a month apart).²⁰⁹

Many of the cases that engage in close issue-parsing involve disciplinary appeals that are separate from the prison grievance procedure.²¹⁰ A suit that attacks the conduct of the disciplinary hearing itself is clearly exhausted by a disciplinary appeal.²¹¹ The next question is whether raising

²⁰⁸ *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.”)

²⁰⁹ *Johnson v. Johnson*, 385 F.3d at 521 n.13.

²¹⁰ *See* *Belton v. Robinson*, 2006 WL 231608 at *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 at *6 (S.D.N.Y., May 15, 2003) (holding an allegation of false disciplinary charges had to be grieved in addition to appealing the disciplinary conviction); *Tookes v. Artuz*, 2002 WL 1484391 at *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 at *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); *Samuels v. Selsky*, 2002 WL 31040370 at *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”).

In *Hopkins v. Coplan*, 2005 WL 615746 (D.N.H., Mar. 16, 2005), the court (citing *Johnson v. Testman*, 380 F.3d 691, 697 (2d Cir. 2004), discussed below) held that the prisoner’s disciplinary appeal did not exhaust his claim of a staff-prompted inmate assault, which it did not focus on or set out in detail. The court stated in dictum that if the appeal had set out the claim in detail and identified the relevant parties and their wrongful conduct, the court might treat it as “the functional equivalent of an exhausted grievance,” since it had been distributed to relevant prison staff and requiring the plaintiff “to restate the same claims to the same parties would seem pointless.” 2005 WL 615746 at *2.

²¹¹ *Jenkins v. Haubert*, 179 F.3d 19, 23 n.1 (2d Cir. 1999) (holding that disciplinary appeals exhausted as to challenge to disciplinary sanctions); *Rivera v. Goord*, 2003 WL 1700518 at *10

issues that are directly related to the subject of the disciplinary hearing, but do not challenge the conduct of the hearing itself, can be exhausted by a disciplinary appeal. The Supreme Court has stated that the exhaustion requirement is designed to give prison officials “time and opportunity to address complaints internally before allowing the initiation of a federal case.”²¹² Raising an issue in a disciplinary appeal certainly creates that opportunity, whether prison officials choose to take advantage of it or not. Moreover, cases that have held that disciplinary appeals do not exhaust as to issues ancillary to the conduct of the disciplinary hearing have generally done so without closely examining the scope of review of disciplinary appeals.²¹³ If a disciplinary appeal can in fact trigger review of circumstances underlying or related to the disciplinary proceeding, as well as the conduct of the hearing itself, it would seem that the appeal is a proper remedy and that pursuing it should be deemed to exhaust all issues within the appeal process’s scope of review. Conversely, the grievance system may restrict review of matters related to disciplinary proceedings.²¹⁴

The Second Circuit has taken a different approach both to disciplinary appeals and to the more general question of prisoners’ selecting the right remedy, holding that a prisoner was justified 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 through an appeal.²¹⁵ In such a case, the prisoner is not deemed to have exhausted, but must seek to exhaust

(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 at *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).

²¹² *Porter v. Nussle*, 534 U.S. at 525.

²¹³ *See, e.g., Benjamin v. Goord*, 2002 WL 1586880 at *2 (S.D.N.Y., July 17, 2002), *reconsideration denied*, 2002 WL 31202708 (S.D.N.Y., Oct. 1, 2002); *Cherry v. Selsky*, 2000 WL 943436 at *7 (S.D.N.Y., July 7, 2000).

²¹⁴ *See, e.g., Lindell v. O'Donnell*, 2005 WL 2740999 at *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.”)

²¹⁵ *Giano v. Goord*, 380 F.3d 670, 679 (2d Cir. 2004) (stating that even if the plaintiff was wrong, “his interpretation was hardly unreasonable”; the regulations “do not differentiate clearly between grievable matters relating to disciplinary proceedings, and non-grievable issues concerning the ‘decisions or dispositions’ of such proceedings.”); *accord, 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

remedies if they remain available; if not, the prisoner may proceed with the litigation.²¹⁶

These questions may be affected by the Supreme Court's decision in *Sims v. Apfel*,²¹⁷ which addressed the Social Security Act's requirement that claimants resort to the Social Security Appeals Council. The Court observed that the statute does not explicitly require "issue exhaustion"—by which it appeared to mean presentation in the administrative process of all arguments why a challenged decision is wrong—and that the arguments for issue exhaustion are weakest when administrative proceedings are not adversarial in character.²¹⁸ 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.²¹⁹ Justice O'Connor joined the plurality on narrower grounds.²²⁰ Prison grievance systems generally operate in an informal, nonadversarial

the opportunity to examine it."); *see Ray v. Kertes*, 130 Fed.Appx. 541, 544 (3rd Cir. 2005) (unpublished) (citing *Giano*); *Parish v. Lee*, 2004 WL 877103 at *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.")

²¹⁶ *Giano v. Goord*, 380 F.3d 670, 680 (2d Cir. 2004); *Hemphill v. New York*, 380 F.3d 680, 690-91 (2d Cir. 2004).

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. It is not clear whether this suggestion that the disciplinary appeal might satisfy the exhaustion requirement, as opposed to merely justifying the failure to exhaust, is intended to modify the holdings of *Giano* and *Johnson v. Testman*. At least one district court seems to have assumed, at least for purposes of the motion before it, that *Braham*'s holding does mean that a disciplinary appeal in which the prisoner gives sufficient notice of the challenged conduct to allow officials to act satisfies the exhaustion requirement with respect to issues other than the disciplinary proceeding itself. *Allah v. Greiner*, 2006 WL 357824 at *5 (S.D.N.Y., Feb. 15, 2006).

²¹⁷ 530 U.S. 103 (2000).

²¹⁸ 530 U.S. at 109-10 (majority opinion).

²¹⁹ *Id.* at 110-12.

²²⁰ *Id.* at 112-14.

manner²²¹ without representation by counsel, and the *Sims* plurality analysis would seem applicable to them.²²² That analysis would seem to imply that as long as the basic facts are stated in a grievance, the prisoner should be able to raise in litigation any legal argument arising from those facts.

3. Specificity of Grievances

How specific and detailed must a grievance be to meet the exhaustion requirement? The Second Circuit has recently ruled on this question, noting that the requirement is designed to provide “time and opportunity to address complaints internally” before suit is filed.²²³ The court continued: “As such, it is not dissimilar to the rules of notice pleading, which prescribe that a complaint ‘must contain allegations sufficient to alert the defendants to the nature of the claim and to allow them to defend against it.’”²²⁴ Accordingly, the court adopted the Seventh Circuit’s formulation that, if prison regulations do not prescribe any particular content for inmate grievances, “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.

²²¹ 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 resolution.” New York State Dep’t of Correctional Services Directive No. 4040, Part I, *quoted in* Branch v. Brown, 2003 WL 21730709 at *10 (S.D.N.Y., July 25, 2003) (holding that the quoted language “appears to favor a liberal reading of the scope of grievances”), *judgment granted on other grounds*, 2003 WL 22439780 (S.D.N.Y., Oct. 28, 2003); *accord*, Sedney v. Hasse, 2003 WL 21939702 at *4 (S.D.N.Y., Aug. 12, 2003).

²²² The court endorsed this view in dictum in *Thomas v. Woolum*, 337 F.3d 720, 734-35 (6th Cir. 2003), suggesting that *Sims* supported the view that individual defendants need not be identified in a grievance in order to be sued later, though it acknowledged that circuit precedent bound it to a contrary holding. Otherwise, there has been no significant consideration of the effect of *Sims* on PLRA exhaustion.

²²³ *Johnson v. Testman*, 380 F.3d 691, 697 (2d Cir. 2004), *quoting* *Porter v. Nussle*, 534 U.S. at 524-25.

²²⁴ *Johnson v. Testman*, *id.*, *quoting* *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 234 (2d Cir.2004).

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, a claim should not be dismissed unless it appears “beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief,” *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), and *pro se* plaintiffs are held “to less stringent standards than formal pleadings drafted by lawyers.” *Haines v. Kerner*, 404 U.S. 519, 520 (1972).

All the grievance need do is object intelligibly to some asserted shortcoming.”²²⁵ The court added:

We believe that this formulation is a sound one. Uncounseled inmates navigating prison administrative procedures without assistance cannot be expected to satisfy a standard more stringent than that of notice pleading. Still, the PLRA's exhaustion requirement does require that prison officials be “afford[ed] . . . time and opportunity to address complaints internally.” *Porter*, 534 U.S. at 524-25. In order to exhaust, therefore, inmates must provide enough information about the conduct of which they complain to allow prison officials to take appropriate responsive measures.²²⁶

The leniency of this standard is shown by the Seventh Circuit’s most recent application of it, which holds that a prisoner sufficiently exhausted a claim against prison staff that he was sexually assaulted through their deliberate indifference with a grievance that said: “[T]he administration don’t [sic] do there [sic] job. [A sexual assault] should’ve never [sic] happen again,” and asked that the assailant be criminally prosecuted.²²⁷

²²⁵ *Johnson, id.*, quoting *Strong v. David*, 297 F.3d 646, 650 (7th Cir.2002); see also *Parker v. Kramer*, 2005 WL 1343853 at *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”).

The Seventh Circuit asserted the “object intelligibly” standard as a default rule to be used in the absence of a different requirement in the grievance policy. The Second Circuit does not appear to have adopted this aspect of the Seventh Circuit’s rationale. See n. 247, below.

²²⁶ *Johnson, id.* The Sixth Circuit has also relied on the Seventh Circuit’s formulation in requiring a grievance only to give “fair notice of the alleged mistreatment or misconduct that forms the basis of the constitutional or statutory claim” made in litigation, since that standard “does not disturb the policies advanced by amended § 1997e. . . . A fair notice standard continues to give state prison officials first opportunity to respond to a prisoner’s allegations of mistreatment or misconduct.” *Burton v. Jones*, 321 F.3d 569, 575 (6th Cir. 2003); see *Johnson v. Johnson*, 385 F.3d 503, 516-17 (5th Cir. 2004) (adopting *Burton v. Jones* holding, but stating that “the amount of information necessary will likely depend to some degree on the type of problem about which the inmate is complaining” and that “the specificity requirement should be interpreted in light of the grievance rules of the particular prison system”).

²²⁷ *Riccardo v. Rausch*, 375 F.3d 521, 524 (7th Cir. 2004) (describing grievance as “at the border of intelligibility”), *cert. denied*, 125 S.Ct. 1589 (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

The Second Circuit's adoption of this holding is consistent with other decisions that have observed, *e.g.*, that "[i]t would be illogical to impose a higher technical pleading standard in informal prison grievance proceedings than would be required in federal court,"²²⁸ on pain of having constitutional claims forever barred—especially since prisoners may have only a few days to prepare and submit their grievances.²²⁹ Courts have acknowledged the policy of liberal construction of *pro se* pleadings in holding, *e.g.*, 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."²³⁰ Other courts have taken a similar

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); *Mark v. Imberg*, 2005 WL 3201115 at *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 at *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 at *3 (W.D.Wis., Jul 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."); *But see 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 at *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 at *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).

²²⁸ *Sulton v. Wright*, 265 F.Supp.2d 292, 298 (S.D.N.Y. 2003).

²²⁹ Some jail and prison systems have extraordinarily short deadlines for filing grievances. *See n. 376, below.*

²³⁰ *Irvin v. Zamora*, 161 F.Supp.2d 1125, 1135 (S.D.Cal. 2001); *accord*, *Johnson v. Johnson*, 385 F.3d 503, 517-18 (5th Cir. 2004) (agreeing that legal theories need not be presented in

approach without much theoretical discussion.²³¹ Of course if the grievance process actually results

grievances; holding that a prisoner who complained of sexual assault, made repeated reference to his sexual orientation, and said nothing about his race had exhausted his sexual orientation discrimination claim but not his racial discrimination claim); *Burton v. Jones*, 321 F.3d 569, 575 (6th Cir. 2003) (holding grievance need not “allege a specific legal theory or facts that correspond to all the required elements of a particular legal theory”); *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.”); *see 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); *Baskerville v. Blot*, 224 F.Supp.2d 723, 730 (S.D.N.Y. 2002) (holding that a grievance that mentioned a staff assault, but asked for no relief for it, and focused chiefly on a medical care issue, sufficed to exhaust as to the assault); *Thomas v. Zinkel*, 155 F.Supp.2d 408, 413 (E.D.Pa. 2001) (holding that 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); *Lewis v. Washington*, 197 F.R.D. 611, 614 (N.D.Ill. 2000) (holding that prisoners’ grievances about their placement in a particular housing status encompassed their complaints about allegedly unconstitutional conditions found there).

In *Pleasant v. Jenkins*, 2005 WL 2250849 (E.D.Tex., Sept. 15, 2005), the court held that a prisoner’s failure to include certain details of his complaint in a Step 2 grievance was not a failure to exhaust because they had been included in the Step 1 grievance and the Step 2 decisionmaker would have had access to the information. 2005 WL 2250849 at *3.

²³¹ *See 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); *Mester v. Kim*, 2005 WL 3507975 at *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); *Pineda-Morales v. De Rosa*, 2005 WL 1607276 at *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 at *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); *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

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.²³²

The more liberal approach is also consistent with exhaustion law under Title VII of the Civil Rights Act of 1964, which seems to me and to many courts, if not the Second Circuit, to present a particularly apt analogy to the PLRA.²³³ Suits under Title VII need only assert claims that are “like or reasonably relate to” the allegations of the administrative charge,²³⁴ with some courts looking beyond the charge to the scope of the investigation by the E.E.O.C. that could “reasonably be expected to grow out of” the charge.²³⁵ (Prison grievance systems commonly conduct investigations in response to grievances.²³⁶) The stringency with which even this requirement is applied depends on whether the complainant had the assistance of counsel in preparing the administrative charge.²³⁷ New acts which occur during the pendency of an E.E.O.C. investigation may be included in the

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

²³² *Baskerville v. Blot*, 224 F.Supp.2d. 723, 730 (S.D.N.Y. 2002) (applying “time and opportunity” rationale to hold that plaintiff exhausted as to issues that were actually investigated as a result of his grievance).

²³³ *See nn.* 87, 172, 269-70, 321-22, 366-71, and 546-48, concerning Title VII.

²³⁴ *Cheek v. Western & Southern Ins. Co.*, 31 F.3d 497, 500 (7th Cir. 1994).

²³⁵ *E.E.O.C. v. Farmer Bros.*, 31 F.3d 891, 899 and n. 5 (9th Cir. 1994) and cases cited. *But see Saunders v. Goord*, 2002 WL 31159109 at *4 (S.D.N.Y., Sept. 27, 2002) (holding that a prison grievance should itself provide “enough detail regarding the alleged incidents so that it could evaluate the merit of his grievances and take the appropriate course of action,” apparently without resort to any further investigation).

²³⁶ *See, e.g., New York State Dep’t of Correctional Services, Directive 4040, Inmate Grievance Program* (Aug. 22, 2003), at § VI.D-E (discussing staff interviews and other investigative procedures).

²³⁷ *Duggins v. Steak ‘N Shake, Inc.*, 195 F.3d 828, 832 (6th Cir. 1999); *Hicks v. ABT Assoc., Inc.*, 572 F.2d 960, 965 (3d Cir. 1978), *cited in Anjelino v. New York Times Co.*, 200 F.3d 73, 94 (3d Cir. 1999); *see also Love v. Pullman*, 404 U.S. 522, 526 (1972) (stating that “technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers initiate the process.”).

suit.²³⁸ The nature of prison grievance systems, too, supports such an approach. One court has stated of the New York state prison grievance system: “By its own terms, DOCS policy appears to favor a liberal reading of the scope of grievances, as the [grievance program] itself is ‘not intended to support an adversary process, but is designed to promote mediation and conflict resolution.’”²³⁹

Despite the foregoing, some courts have insisted on what amounts to pleading of legal theories in certain kinds of grievances. In one unreported case, the Seventh Circuit held 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.”²⁴⁰ 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. Some courts have similarly held that grieving a retaliatory act is not sufficient; the prisoner must also allege retaliatory motive in the grievance.²⁴¹ Some decisions have taken a similar approach to equal protection claims where the prisoner grieved some adverse conduct but did not allege in the

²³⁸ *Anjelino v. New York Times Co.*, 200 F.3d at 94, 96.

²³⁹ *Branch v. Brown*, 2003 WL 21730709 at *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 Department of Correctional Services Directive 4040, Part I.

²⁴⁰ *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).

²⁴¹ *See, e.g.*, *Ellis v. Cambra*, 2005 WL 2105039 at *7 (E.D.Cal., Aug. 30, 2005); *Lindell v. Casperson*, 360 F.Supp.2d 932, 949 (W.D.Wis. 2005); *Scott v. Gardner*, 2005 WL 984117 at *3-4 (S.D.N.Y., Apr. 28, 2005); *Parker v. Kramer*, 2005 WL 1343853 at *3 (E.D.Cal., Apr. 28, 2005) (holding retaliation allegation must be made in grievance to give prison officials “fair notice” of the events that are later sued about, even though inmates need not “draft grievances with the precision of an attorney, laying out every fact, identifying every defendant by name, and identifying which constitutional rights were violated by which actions or omissions”); *see also Lindell v. O'Donnell*, 2005 WL 2740999 at *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.”).

grievance that the conduct was discriminatory.²⁴² One court has held that a prisoner who alleged loss of property including papers he needed for a legal proceeding failed to exhaust his claim of denial of access to courts resulting from loss of the papers.²⁴³ The courts are divided over whether claims asserted under the Religious Land Use and Institutionalized Persons Act that were exhausted before that statute was enacted must be exhausted again.²⁴⁴ 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.

The “object intelligibly” standard, which the Second Circuit adopted in *Johnson v. Testman*, was originally framed as a default rule by the Seventh Circuit. The question, says that court, is one of choice of law. Since state law governs state prisons and federal administrative law governs federal prisons, “the grievances must contain the sort of information that the administrative system

²⁴² See *Johnson v. Johnson*, 385 F.3d 503, 518 (5th Cir. 2004) (holding that a prisoner who complained of sexual assault, made repeated reference to his sexual orientation, but said nothing about his race had exhausted his sexual orientation discrimination claim but not his racial discrimination claim); *Irvin v. Dormire*, 2005 WL 998597 at *1 (W.D.Mo., Apr. 18, 2005); *Goldsmith v. White*, 357 F.Supp.2d 1336, 1338-41 (N.D.Fla. 2005); *Young v. Goord*, 2002 WL 31102670 at *4 (E.D.N.Y., Sept. 3, 2002) (holding that a prisoner who alleged in his grievance only that he had been disciplined for conduct that did not violate the rules could not litigate an equal protection claim that he was disciplined for discriminatory reasons), *aff’d in part, vacated in part on other grounds*, 67 Fed.Appx. 638, 2003 WL 21243302 (2d Cir. 2003).

²⁴³ *Brownell v. Krom*, 2004 WL 2516610 at *5 (S.D.N.Y., Nov. 8, 2004), *appeal docketed*, No. 04-6364 (2d Cir.). By contrast, another district court held 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. *Hoffenberg v. Federal Bureau of Prisons*, 2004 WL 2203479 at *12 (D.Mass., Sept. 14, 2004).

²⁴⁴ 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 at *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.”); *Wilson v. Moore*, 2002 WL 950062 at *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*.

requires.”²⁴⁵ So if state law calls for “code-pleading,” requiring identification of “each ‘element’ of a ‘cause of action,’” prisoners must meet that standard.²⁴⁶

It does not appear that the Second Circuit in *Johnson v. Testman* intended to adopt this choice of law analysis, since in adopting the “object intelligibly” bottom line it cited only the competing concerns for “[u]ncounseled inmates navigating prison administrative procedures without assistance” and prison officials’ need for enough information “to take appropriate responsive measures.”²⁴⁷ It did not canvass the Bureau of Prisons administrative remedy policy to ensure it contained no contrary pleading requirement. In any case, the Seventh Circuit choice of law approach is highly questionable, since the PLRA is a federal statute implementing federal policies. Indeed, the Seventh Circuit acknowledged: “The only constraint is that no prison system may establish a requirement inconsistent with the federal policy.”²⁴⁸ But, as noted, the relevant federal policies, which the Seventh Circuit does not mention, would seem to be the federal courts’ liberal pleading policies and the PLRA’s purpose to give prison officials a chance to resolve disputes before they get to court. It is difficult to believe that Congress intended for prisoners with meritorious claims to be barred for failure to conform to technical requirements that they may not be literate or educated enough to meet,²⁴⁹ in documents that they must generally file within a matter of days.

4. Exhausting Each Defendant

A variation of the question of the required specificity of grievances is whether a prisoner must name all potential defendants in the grievance to preserve the right to sue them. The Second Circuit has not ruled explicitly on this issue,²⁵⁰ though as stated below, in my view it has implicitly answered “no.” The case law in other courts is divided, ranging from “yes,” through several variations of “not necessarily,” to “no.”

The Sixth Circuit has held that all defendants a prisoner wishes to sue must be named in a

²⁴⁵ *Strong v. David*, 297 F.3d 646, 649 (7th Cir.2002). This court’s view of the extent of prisoners’ obligation to conform to all the technical requirements of prison grievance systems is questionable. *See* §§ IV.E.7, n. 323-336; IV.E.8, nn. 351-53, below.

²⁴⁶ *Strong v. David*, *id.*

²⁴⁷ *Johnson v. Testman*, 380 F.3d 691, 697 (2d Cir. 2004).

²⁴⁸ *Strong v. David*, 297 F.3d at 649.

²⁴⁹ *See* § IV.E.7, n. 298, below.

²⁵⁰ The issue is raised in *Brownell v. Krom*, No. 04-6364 (2d Cir.), though it may not be decided. The defendants have taken the position that naming of defendants was unnecessary in that case, though it might be in other cases. Brief for Defendants-Appellants at 28-29 (May 18, 2005).

grievance.²⁵¹ Similarly but more narrowly, the Eighth Circuit has held without much discussion that a prisoner who filed a grievance alleging that officers abused him, but did not raise their supervisor's failure to supervise and to take action against the officers, and his retaliation against the prisoner for complaining, had not exhausted as to his supervisory claims.²⁵²

In the “not necessarily” column, the Fifth Circuit has said that exhaustion requires “‘fair notice’ of the problem that will form the basis of the prisoner’s suit.” It stated that “the amount of information necessary will likely depend to some degree on the type of problem about which the inmate is complaining”—e.g., a claim of staff misconduct might require more details concerning who was involved and when it occurred, while a claim that a cell is habitually infested with vermin or commissary prices were too high might not require naming anyone.²⁵³ Staff members can be

²⁵¹ *Curry v. Scott*, 249 F.3d 493, 504 (6th Cir. 2001). Some district courts have tempered the harshness of the *Curry* holding on particular facts. *See Iacovone v. Wilkinson*, 2005 WL 3299032 at *5 (S.D. Ohio, Dec. 2, 2005) (holding that failure to name defendants was not a failure to exhaust where the plaintiff’s detailed description of his complaint permitted their identification and he did not know their correct identities); *Blackshear v. Messer*, 2003 WL 21508190 at *2 (N.D. Ill., June 30, 2003) (holding that prisoner who failed to identify the nurse he was complaining about had exhausted, since that person could be identified from other information in his grievance “with a little follow-up investigation by the Jail”); *Smeltzer v. Hook*, 235 F.Supp.2d 736, 741-42 (W.D. Mich. 2002) (declining to apply *Curry* holding where the plaintiff did not allege that unauthorized conduct violated the Eighth Amendment, but challenged a prison policy; under those circumstances, failure to name individuals did not hamper the defendants’ investigation).

Most Sixth Circuit courts have applied the exhaust-per-defendant rule mechanically. A particularly absurd application of it is *Vandiver v. Martin*, 304 F.Supp.2d 934, 943-44 (E.D. Mich. 2004), in which the plaintiff was held not to have exhausted against the corporate medical provider because his grievance said only that the provider would be liable if his foot was amputated—though he named individual medical practitioners employed by the provider. *See also Iron v. Shavell*, 2004 WL 3370566 at *3 (E.D. Mich., Mar. 31, 2004) (holding a prisoner who complained of denial of “Peg-Interferon” treatment for Hepatitis C did not exhaust because he did not identify a particular individual or name the defendant eventually sued).

²⁵² *Kozohorsky v. Harmon*, 332 F.3d 1141, 1143 (8th Cir. 2003). *But see Harris v. Moore*, 2005 WL 1876126 at *2 (E.D. Mo., Aug. 8, 2005) (holding that claim against prison policymakers did not require naming of defendants, but suggesting that a claim against “a certain prison guard” would require naming the guard in the grievance).

²⁵³ *Johnson v. Johnson*, 385 F.3d 503, 517 (5th Cir. 2004); *see 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, without explaining why *Johnson v. Johnson* so applied in this case), *report and recommendation adopted*, 2005 WL 1163301 (N.D. Tex., May 9, 2005); *Warner v. Gonzales*, 2004 WL 2331615 at *2-3 (N.D. Tex., Oct. 13, 2004) (applying *Johnson v. Johnson*).

identified by functional descriptions as well as name.²⁵⁴ The Eleventh Circuit rejected the view that § 1997e(a) “*always* prohibits a prisoner from suing any defendant other than those named in the administrative grievance,” holding that it only “requires that a prisoner provide as much relevant information as he reasonably can in the administrative grievance process”—including the names of perpetrators and witnesses that the prisoner knows.²⁵⁵ Other circuits have linked their holdings on this subject to the requirements of the grievance policy, though how firmly remains to be seen. The Ninth Circuit has held that a prisoner was not required to identify the defendants in a grievance where the grievance policy instructed prisoners only to “describe the problem” and did not require identification of individuals.²⁵⁶ The court did not say whether it would reach the opposite result if the grievance policy did require identifying defendants. The Seventh Circuit, too, implicitly rejected a “name the defendants” rule while emphasizing that the grievance policy did not require a particular degree of specificity in grievances.²⁵⁷

²⁵⁴ *Johnson*, 385 F.3d at 523 (holding identification of Unit Classification Committees was sufficient to exhaust as to their members); *Gibson v. Shabaaz*, 2005 WL 1515396 at *7 (S.D.Tex., June 23, 2005) (holding reference to nurse and optometrist were sufficient to exhaust; defendants could have reviewed plaintiff’s medical records and learned their identities).

²⁵⁵ *Brown v. Sikes*, 212 F.3d 1205, 1207-08 (11th Cir. 2000); *accord*, *Nelson v. Madan*, 2005 WL 2416036 at *2 (M.D.Fla., Sept. 30, 2005).

²⁵⁶ *Butler v. Adams*, 397 F.3d 1181 (9th Cir. 2005); *accord*, *Lewis v. Mitchell*, ___ F.Supp.2d ___, 2005 WL 3783884 at *3 (S.D.Cal., Oct. 5, 2005) (holding *Butler* rule is not limited to Americans with Disabilities Act claims); *Massie v. Early*, 2005 WL 2105304 at *3 (E.D.Cal., Aug. 31, 2005), *report and recommendation adopted*, 2006 WL 47389 (E.D.Cal., Jan. 6, 2006). In *Spruill v. Gillis*, 372 F.3d 218, 234 (3rd Cir. 2004), the court held that failure to name a particular defendant was a procedural default since the grievance policy required it, but that the default was excused because the grievance process itself identified the staff member involved. The court noted in particular that the accusation against that defendant did not involve specific incidents of conduct, but of his involvement in a larger-scale denial of adequate medical care. Applying this standard, one district court has held that identifying defendants by reference to another document (i.e., referring to them as defendants in a prior lawsuit) satisfies the requirement. *Wolfgang v. Smithers*, 2005 WL 2347244 at *4-5 (M.D.Pa., Sept. 26, 2005).

²⁵⁷ *Riccardo v. Rausch*, 375 F.3d 521, 524 (7th Cir. 2004), *cert. denied*, 125 S.Ct. 1589 (2005); *accord*, *Barnes v. Briley*, 420 F.3d 673, 678-79 (7th Cir. 2005); *Cannon v. Washington*, 418 F.3d 713, 718 (7th Cir. 2005) (rejecting plaintiffs’ argument that confiscating his legal papers with the defendants’ names kept him from grieving timely, since he didn’t need their names for his grievance); *Freeman v. Inch*, 2005 WL 1154407 at *5 (M.D.Pa., May 16, 2005) (noting that federal prison grievance system required plaintiff only “to provide a brief statement of his complaint and to state his reason for appealing the previous rejection”), *on reconsideration*, 2005 WL 1322734 (M.D.Pa., June 2, 2005).

In a recent unreported decision, the Seventh Circuit confirmed that it does not require

Several district courts have explicitly rejected the “name the defendants” requirement, and in my view the Second Circuit has rejected it by implication. In declining to require naming of defendants, courts have acknowledged that “it is not notice to individual actors that is important but notice to the prison administration. 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.”²⁵⁸ Courts have also emphasized the notorious difficulties *pro se* prisoners have in identifying and naming all the proper defendants even within the statute of limitations for judicial proceedings.²⁵⁹ One 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 § 1983.²⁶⁰ Moreover, the idea that “fair notice” requires naming individuals in grievances ignores the practical reality that prison officials will generally not grant or deny grievances based solely on what the prisoner writes. They will conduct an investigation, and in some cases a hearing, and will be able to ask the prisoner for necessary information that does not appear in the written grievance.²⁶¹

exhaustion by defendant. *Dye v. Kingston*, 130 Fed.Appx. 52, 55 (7th Cir. 2005) (unpublished), *citing* *Strong v. David*, 297 F.3d 646, 649 (7th Cir.2002).

²⁵⁸ *Freeman v. Berge*, 2004 WL 1774737 at *3; *accord*, *Johnson v. Johnson*, 385 F.3d at 522 (stating “the primary purpose of the exhaustion requirement is to alert prison officials to a problem, not to provide personal notice to a particular official that he may be sued”); *Turley v. Catchings*, 2004 WL 2092008 at *2-3 (N.D.Ill., Sept. 15, 2004).

²⁵⁹ *See, e.g.*, *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 at *4 (N.D.Cal., May 17, 2002) (“... [D]efendants’ argument that Lira must exhaust by filing a grievance naming the specific persons he ultimately seeks to sue goes too far, as an inmate may not know all the names of the defendants until after he files a civil action and conducts discovery, in which case, he would have to dismiss his action and file anew under defendants’ reasoning.”)

²⁶⁰ *Freeman v. Berge*, 2004 WL 1774737 at *3-4 (W.D.Wis. Jul 28, 2004).

²⁶¹ For example, the New York City jail grievance directive provides for “informal review” in which “[w]hen necessary and appropriate, inmate representatives will accompany staff representatives during the *fact finding* process.” Absent informal resolution, the prisoner may request a hearing “where witnesses may be called.” New York City Department of Correction, *Directive 3375R, Inmate Grievance Resolution Program*, <http://www.nyc.gov/html/doc/pdf/3375R.pdf>, at 6, § III.B (March 4, 1985). Similarly, the New York

The point about amendment of complaints cannot be overemphasized, and it is exemplified by the Eighth Circuit decision in *Kozohorsky v. Harmon*, in which a prisoner’s supervisory liability claim was held barred because he did not complain of the supervisory failure in his grievance about abuse by the line staff.²⁶² The Federal Rules’ policy that leave to amend shall be “freely given”²⁶³ allows not only for amendment based on newly discovered facts, but 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 subsequently appears, often by court appointment based on the court’s perception of the merit of the case.²⁶⁴ An “exhaust per defendant” rule 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.

As noted, the Second Circuit has not ruled explicitly on this issue, but its holding that the grievance “need not lay out the facts, articulate legal theories, or demand particular relief,” but must only “object intelligibly to an asserted shortcoming,” appears inconsistent with a requirement to name all defendants in the grievance.²⁶⁵ This conclusion is buttressed by the holding of the Seventh Circuit, originator of the “object intelligibly” standard, that the exhaustion requirement was (barely) satisfied by a grievance about a sexual assault that alleged only: “[T]he administration don’t [sic] do there [sic] job. [A sexual assault] should’ve never [sic] happen again.”²⁶⁶

State prisons’ grievance process provides for formal interviews with staff members and prescribes when inmate grievance representatives may and may not participate in investigations, 7 N.Y.C.R.R. § 701.3(j), and also provides for formal hearings with witnesses absent informal resolution. 7 N.Y.C.R.R. § 701.7(a)(4).

²⁶² 332 F.3d at 1143.

²⁶³ Rule 15(a), Fed.R.Civ.P.

²⁶⁴ *See Hodge v. Police Officers*, 802 F.2d 58, 61 (2d Cir. 1986).

²⁶⁵ *Turner v. Goord*, 376 F.Supp.2d 321, 324 (W.D.N.Y. 2005), *citing* *Johnson v. Testman*, 380 F.3d 691, 697 (2d Cir. 2004). The *Turner* court also noted that the New York State grievance regulations do not require the naming of individuals. It did note that the plaintiff had not grieved his allegations of “systemic problems” in the prison infirmary that certain defendants were aware of, so he could not bring suit about those factual allegations. *Id.*

²⁶⁶ *Riccardo v. Rausch*, 375 F.3d 521, 524 (7th Cir. 2004), *cert. denied*, 125 S.Ct. 1589 (2005). Though the “exhaust each defendant” issue was not discussed explicitly in *Riccardo*, its holding directly addressed the degree of specificity required of grievances under the “object intelligibly” standard. In a subsequent unreported decision, the Seventh Circuit stated: “We and the majority of the circuits have never endorsed, though, the defendants’ invitation to engraft onto §

Though there is some district court authority in the circuit supporting the “exhaust each defendant” rule,²⁶⁷ it is dubious in light of the Second Circuit’s adoption of the “object intelligibly” standard. Moreover, in some of the cases which appear to require naming of defendants in grievances, close reading shows that the *actions* of the defendants at issue had not been described in the grievance.²⁶⁸

This issue is one as to which Title VII exhaustion law is not analogous to the PLRA. In Title VII proceedings, defendants in litigation must have been named in the administrative charge. That rule is appropriate for Title VII, but inappropriate for importation into the PLRA context, in part because the statute itself limits Title VII civil actions to respondents “named in the charge.”²⁶⁹ There is no such restriction in the PLRA exhaustion requirement. More importantly—and the reason why the restriction makes sense for Title VII but for the PLRA—is that Title VII liability is entity liability; the plaintiff need not (indeed, cannot) name the particular individuals responsible for the alleged discrimination.²⁷⁰ By contrast, of course, most prisoner suits are brought under 42 U.S.C. § 1983, which provides for liability of “persons,” and which is governed by a stringent requirement to

1997e(a) a requirement that defendants to a civil suit be first named in an inmate’s prison grievance.” *Dye v. Kingston*, 130 Fed.Appx. 52, 55 (7th Cir. 2005) (unpublished).

²⁶⁷ See *Foreman v. Goord*, 2004 WL 1886928 at *3 (S.D.N.Y. Aug. 23, 2004); *Connor v. Hurley*, 2004 WL 885828 at *3 (S.D.N.Y., Apr. 26, 2004); *Moulier v. Forte*, 2003 WL 21468612 at *1 (S.D.N.Y., June 25, 2003) (dismissing for failing to name defendants in grievance, failing to explain why). In *Brownell v. Krom*, 2004 WL 2516610 at *5 (S.D.N.Y., Nov. 8, 2004), *appeal docketed*, No. 04-6364, the court cited the failure of the plaintiff to name the defendants in dismissing for non-exhaustion, even though it conceded that the plaintiff obtained those names only after the completion of the grievance proceedings.

²⁶⁸ See, e.g., *Dashley v. Correctional Medical Services, Inc.*, 345 F.Supp.2d 1018, 1024 (E.D.Mo. 2004); *Evan v. Manos*, 336 F.Supp.2d 255, 258-59 (W.D.N.Y. 2004) (noting that the plaintiff’s grievance did not name the defendant dentist *and* did not allege that he received inadequate care from any facility dentist). In *Dawkins v. Jones*, 2005 WL 196537 at *7 (S.D.N.Y., Jan. 31, 2005), the court states: “A plaintiff has to administratively exhaust the claim against every defendant in that claim—that is, exhaustion as to one named defendant concerning a particular incident does not constitute exhaustion as to other defendants involved in that incident.” The court cites four district court cases for this proposition, none of which support it, because all of them address separate *conduct* as well as separate defendants that were not named in the grievances.

²⁶⁹ 42 U.S.C. § 2000e-5(f)(1).

²⁷⁰ *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1314-17 (2d Cir. 1995).

demonstrate defendants' personal responsibility for the wrong.²⁷¹ As noted above,²⁷² tracing the lines of personal responsibility within the time and procedural limits of the prison grievance process is an impossible burden.

5. Exhausting Items of Relief

Prisoners need not “demand particular relief” to exhaust administrative remedies.²⁷³ That conclusion follows from the Supreme Court’s holding 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.²⁷⁴ Once a prisoner’s claim is exhausted, “[a]ny claim for relief that is within the scope of the pleadings” may be litigated without further exhaustion.²⁷⁵

6. “Total Exhaustion”

The Second Circuit has rejected the proposition that the presence of any unexhausted issues

²⁷¹ See, e.g., *Spencer v. Doe*, 139 F.3d 107, 112 (2d Cir. 1998), citing *Williams v. Smith*, 781 F.2d 319, 323-24 (2d Cir. 1986).

²⁷² See nn. 259-260, above.

²⁷³ *Johnson v. Testman*, 380 F.3d 691, 697 (2d Cir. 2004), quoting *Strong v. David*, 297 F.3d 646, 650 (7th Cir. 2002).

²⁷⁴ *Booth*, 532 U.S. at 740-41; see *Strong v. David*, 297 F.3d at 649 (stating that “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.”); *Lira v. Director of Corrections of State of California*, 2002 WL 1034043 at *4 (N.D.Cal., May 17, 2002). The suggestion to the contrary in *Luckerson v. Goord*, 2002 WL 1628550 at *2 (S.D.N.Y., July 22, 2002), is therefore erroneous. In that case, where the plaintiff initially grieved and requested that asbestos tests be conducted, and then sued complaining of asbestos-related problems and seeking damages, medical monitoring, etc., the real issue is not the plaintiff’s failure to ask for particular remedies in the grievance system, but his failure to grieve a claim of actual exposure to asbestos as opposed to a request that the presence of asbestos be determined. Similarly, the holding in *Saunders v. Goord*, 2002 WL 31159109 at *4 (S.D.N.Y., Sept. 27, 2002), that the prisoner failed to exhaust in part because he failed to specify the action he wished taken, is erroneous under *Booth*.

²⁷⁵ *Jones’El v. Berge*, 172 F.Supp.2d 1128, 1134 (W.D.Wis. 2001).

in the complaint will require the dismissal of exhausted issues as well (“total exhaustion”).²⁷⁶ There is now a square conflict of circuits on this issue which the Supreme Court will have to resolve.²⁷⁷

Though it acknowledged that a complaint containing any unexhausted claims is not properly “brought” under the exhaustion requirement, the court observed that the statute does not direct courts to “kill it rather than to cure it,”²⁷⁸ and the other PLRA section that governs dismissals of prisoner actions is also silent on that point.²⁷⁹ There is no indication in the legislative history that Congress considered or had any intention concerning the subject.²⁸⁰ Nor is there any reason to believe that a total exhaustion rule will serve the purpose to “reduce the quantity and improve the quality of prisoner suits” any better than dismissal only of unexhausted claims. Such a rule would result in the refiling of exhausted claims after dismissal of the whole action, and the difficulty of many

²⁷⁶ *Ortiz v. McBride*, 380 F.3d 649 (2d Cir. 2004), *cert. denied*, 125 S.Ct. 1398 (2005); *accord*, *Lira v. Herrera*, 427 F.3d 1164, 1170 (9th Cir. 2005), *pet. for cert. filed*, 74 USLW 3425 (Jan. 6, 2006); *Beltran v. O'Mara*, 405 F.Supp.2d 140, 156-58 (D.N.H. 2005), *on reconsideration*, 2006 WL 240558 (D.N.H., Jan. 31, 2006); *see Henderson v. Sebastian*, 2004 WL 1946398 at *5 (W.D.Wis., Aug. 25, 2004) (noting Seventh Circuit’s partial dismissals for non-exhaustion, stating this “tacit rejection” of total exhaustion is “consistent with the Second Circuit’s holding”), *modification denied*, 2004 WL 2110773 (W.D.Wis., Sept. 21, 2004) (stating it regards Seventh Circuit rejection of total exhaustion is “settled”); *see also Abuhoran v. Morrison*, 2005 WL 2140537 at *6 n.28 (E.D.Pa., Sept. 1, 2005) (noting the question is unsettled in the Third Circuit).

²⁷⁷ *Jones Bey v. Johnson*, 407 F.3d 801 (6th Cir. 2005), *pet. for cert. filed*, 74 USLW 3424 (Jan. 9, 2006); *Ross v. County of Bernalillo*, 365 F.3d 1181, 1188-90 (10th Cir. 2004) (relying on analogy to habeas corpus total exhaustion rule); *Kozohorsky v. Harmon*, 332 F.3d 1141, 1142 (8th Cir. 2003) (stating that the rule is required by the “plain language” of the exhaustion statute, and that it was “guided” by the habeas corpus total exhaustion rule). *But see Garner v. Unknown Napel*, 374 F.Supp.2d 582, 584-85 (W.D.Mich. 2005) (declining to follow *Jones Bey* on the ground that it is contrary to earlier circuit precedent, *Hartfield v. Vidor*, 199 F.3d 305 (6th Cir.1999)); *see also Shabazz v. Martin*, 2006 WL 305673 at *3 (E.D.Mich, Feb. 9, 2006) (declining to apply *Jones Bey* retroactively to prisoner who filed when *Hartfield* was the governing law). *Contra*, *Vartinelli v. Moskalik*, 2006 WL 314448 at *1-2 (W.D.Mich., Feb. 9, 2006) (applying *Jones Bey* retroactively).

²⁷⁸ *Ortiz*, 380 F.3d at 657; *accord*, *Lira v. Herrera*, 427 F.3d at 1171-73. *But see Ramirez v. Bray*, 2005 WL 2249900 at *2 (N.D.Cal., Sept. 15, 2005) (stating that since the PLRA itself does not provide for curing failure to exhaust, allowing a prisoner to delete unexhausted claims “would not appear to cure the deficiency”).

²⁷⁹ *Ortiz*, 380 F.3d at 657., *citing* 42 U.S.C. § 1997e(c); *accord*, *Lira*, 427 F.3d at 1171-72.

²⁸⁰ *Alexander v. Davis*, 282 F.Supp.2d 609, 610 (W.D.Mich. 2003) (noting that the argument from the statutory use of “claim” and “action” is a “thin reed upon which to hang” a total exhaustion rule, absent evidence that Congress focused on the issue).

exhaustion questions means that the court would have to familiarize itself with the whole case and the parties' positions initially to address exhaustion, then again when the exhausted claims were refiled.²⁸¹

The court rejected as inapposite one circuit's reliance on the habeas corpus total exhaustion rule,²⁸² since the habeas exhaustion requirements "arise out of fundamental principles of sovereignty,"²⁸³ but there is "no comity issue of equal gravity" at stake in prisoners' civil rights actions, since those claims need not be pursued in state courts, and state prison administrators reviewing grievances generally restrict their review to whether prison policy has been violated.²⁸⁴ In addition, state grievance proceedings—unlike the state judicial proceedings to which federal courts defer in habeas cases—are generally not governed by rules of evidence or other safeguards to ensure accurate fact-finding, so they are much less likely than state court proceedings to create a more complete factual record that will assist federal court review.²⁸⁵ Moreover, the court said, requiring exhaustion on a claim-by-claim basis serves comity interests just as well as total exhaustion, since in either case, federal courts will not hear prisoners' claims unless they are exhausted.²⁸⁶

Prisoners' civil rights actions are also different from habeas challenges to criminal convictions, since in the latter, all issues raised are likely to be challenges to "a singular event—the

²⁸¹ *Ortiz*, 380 F.3d at 659; *see Lira v. Herrera*, 427 F.3d at 1174 (noting that dismissal of exhausted claims would result in their refile and would "promote the precise inefficiency the PLRA was designed to avoid—requiring courts to docket, assign, and process two cases where one would do"); *Beltran v. O'Mara*, 405 F.Supp.2d 140, 158-59 (D.N.H. 2005), *on reconsideration*, 2006 WL 240558 (D.N.H., Jan. 31, 2006); *Clark v. Mason*, 2005 WL 1189577 at *9 (W.D.Wash., May 19, 2005) ("Few apparent judicial efficiencies would be achieved by dismissal of the entire action, given that dismissal would be without prejudice and plaintiff could simply refile his complaint after removing unexhausted claims.")

²⁸² *Compare Ross v. County of Bernalillo*, 365 F.3d 1181, 1188-90 (10th Cir. 2004).

²⁸³ *Ortiz*, 380 F.3d at 660, *citing* *Rose v. Lundy*, 455 U.S. 509, 518 (1982); *see Lira v. Herrera*, 427 F.3d at 1173 (regarding statute's text and structure as dispositive. "For that reason, any analogy to habeas corpus is unpersuasive.").

²⁸⁴ *Ortiz*, 380 F.3d at 660. The court was equally unimpressed with the analogy to Title VII, which has a total exhaustion rule, stating: "The goals of the anti-discrimination laws to provide and implement a broad, remedial scheme preventing such discrimination, . . . and the goals of the PLRA are so radically different, however, that we gain no insight from the analogy." *Id.* at 661 n.10. In my view this comparison is mistaken. *See* § IV.A, n.88, above.

²⁸⁵ *Ortiz*, 380 F.3d at 661.

²⁸⁶ *Ortiz*, *id.*

petitioner's conviction in state court," while civil rights actions routinely seek to address multiple grievances which may or may not be interrelated.²⁸⁷ Unexhausted habeas claims are more likely to be capable of exhaustion and subsequent re-filing than are civil rights claims, since prison grievance systems have short deadlines and claims dismissed for non-exhaustion therefore "are usually forever gone."²⁸⁸ For these reasons the likelihood that a court will have to revisit the same interconnected series of facts under a claim-by-claim exhaustion rule is lower for civil rights actions than for habeas proceedings, and the benefits of a total exhaustion rule correspondingly less.

The *Ortiz* court added that ordinarily, it expected that district courts that had dismissed unexhausted claims would proceed to decide the exhausted ones rather than wait for the plaintiff to attempt to exhaust and refile the dismissed claims.²⁸⁹ The Ninth Circuit, however, has qualified that result, holding that in cases involving claims that are "closely related and difficult to untangle, dismissal of the defective complaint with leave to amend to allege only fully exhausted claims, is the proper approach."²⁹⁰

There is some ambiguity in the operation of the total exhaustion rule in some courts that have adopted it. The Tenth Circuit, after initially stating that a complaint containing an unexhausted claim must be dismissed,²⁹¹ has stated in unreported cases that, as is the case in habeas corpus, a district court may allow a prisoner plaintiff to dismiss his unexhausted claims and proceed with the exhausted claims.²⁹² The Eighth Circuit has similarly backed away from a mandatory dismissal rule in favor of permitting the prisoner to amend the complaint to omit unexhausted claims.²⁹³ However,

²⁸⁷ *Ortiz, id.*; *accord*, *Lira v. Herrera*, 427 F.3d at 1174-76.

²⁸⁸ *Ortiz*, 380 F.3d at 661-62.

²⁸⁹ *Ortiz*, 380 F.3d at 663. This treatment of unexhausted claims is in some tension with the more agnostic attitude about availability of remedies expressed in the court's simultaneous holding that a claim that was not exhausted, but with justification, should be dismissed unless it appears that remedies are no longer available; if remedies appear to be available but prove not to be so in practice, the case should be reinstated. *Giano v. Goord*, 380 F.3d 670, 679-80 (2d Cir. 2004).

²⁹⁰ *Lira v. Herrera*, 427 F.3d at 1176.

²⁹¹ *Ross v. County of Bernalillo*, 365 F.3d 1181, 1189 (10th Cir. 2004).

²⁹² *West v. Kolar*, 108 Fed.Appx. 568, 570, 2004 WL 1834634 at *2 (10th Cir., Aug. 17, 2004), *citing* *Rose v. Lundy*, 455 U.S. 509 (1982); *accord*, *Alloway v. Booher*, 128 Fed.Appx. 705 (10th Cir. 2005); *Wolters v. Conner*, 2004 WL 2496699 at *3 (D.Kan., Nov. 4, 2004).

²⁹³ *Compare* *Graves v. Norris*, 218 F.3d 884 (8th Cir. 2000) (per curiam) (requiring dismissal) *with* *Kozohorsky v. Harmon*, 332 F.3d 1141, 1144 (8th Cir. 2003) (holding amendment should be permitted); *Monaco v. Sawyer*, 2004 WL 2066831 at *2 (D.Minn., Aug.31, 2004) (same); *see* *Beltran v. O'Mara*, 405 F.Supp.2d 140, 158 (D.N.H. 2005) ("The court sees little difference between

the Sixth Circuit's adoption of the rule has been unqualified.²⁹⁴

The total exhaustion rule exacts a heavy and punitive price against prisoners who make technical mistakes that are characteristic of *pro se* litigants, since a single misstep or failure to appreciate a subtle legal point will mean that the prisoner must do the work of re-filing the entire case and must pay a new \$255 filing fee to preserve any claims that have been properly exhausted.²⁹⁵

7. Mistakes in Exhausting: Strict or Substantial Compliance or “Special Circumstances” Justifying Non-Compliance?

Courts have disagreed whether prisoners who try to exhaust, but make mistakes,²⁹⁶ should be forever barred from pursuing otherwise meritorious federal constitutional claims. This question may shortly be resolved by the Supreme Court, which has granted certiorari in a case involving the question whether the PLRA exhaustion requirement is governed by a procedural default rule like that

[*Kozohorsky*'s] tack and the simple dismissal of the nonexhausted claims without prejudice . . . the result without the total exhaustion rule.”), *on reconsideration*, 2006 WL 240558 (D.N.H., Jan. 31, 2006).

²⁹⁴ See *Jones Bey v. Johnson*, 407 F.3d 801 (6th Cir. 2005), *pet. for cert. filed*, 74 USLW 3424 (Jan. 9, 2006).

²⁹⁵ Thus, in *Edmonds v. Payne*, 2005 WL 2287006 (W.D.Ky., Sept. 16, 2005), all of the plaintiff's multiple claims were dismissed for non-exhaustion as to one claim against one defendant. The plaintiff explained that he did not exhaust that claim because he had been transferred out of the relevant jail, and, though he had been returned to it, it was too late to file a grievance. “The plaintiff misses the point, however, that once he had been returned to custody at Metro Corrections, he would have been able to file a grievance against Deputy Chief Payne. The fact that the grievance may have been untimely or otherwise futile does not excuse the plaintiff's failure to file a grievance and provide corrections officials the opportunity to address it internally, before resort to federal court.” 2005 WL 2287006 at *5. The fact that a *pro se* litigant's case is dismissed, rather than permitting it to go forward without the unexhausted claim, or permitting the plaintiff to file an amended complaint, on facts such as this is in my view a travesty of justice. See also *Neff v. Bowzer*, 2006 WL 208701 at *6-7 (W.D.Ky., Jan. 24, 2006) (stating review of claim of painful medical condition that “troubles the conscience of those having hardened sensibilities” was “regrettably constrained” by total exhaustion rule).

²⁹⁶ Prisoners may also be obstructed by staff or circumstances from pursuing grievances timely and properly. Such cases raise questions of whether a remedy is “available” within the meaning of the statute, whether the defendants are estopped from raising non-exhaustion, or whether the prisoner was justified in failing to exhaust. These issues are discussed in nn. 308-310 of this section and §§ IV.G.1-3, below.

applied in federal habeas corpus.²⁹⁷ The question is of enormous importance because of the propensity of prisoners (predominantly legally unsophisticated and poorly educated, and frequently mentally ill or of limited literacy,²⁹⁸ in general or in English) to make procedural mistakes, and because the short deadlines in many prison grievance systems do not leave enough time for prisoners to prepare their grievances carefully and seek out others' assistance as necessary.²⁹⁹ In addition, allowing prison conditions suits to be barred by the violation of technical rules in a grievance system in which prison personnel both design the rules and decide what is a default would go a long way towards permitting prison systems to create a regime of impunity for themselves and their employees.³⁰⁰ As one court put it: "While it is important that prisoners comply with administrative procedures designed by the Bureau of Prisons, rather than using any they might think sufficient, . . . it is equally important that form not create a snare of forfeiture for a prisoner seeking redress for perceived violations of his constitutional rights."³⁰¹

²⁹⁷ *Ngo v. Woodford*, 403 F.3d 620, 631 (9th Cir. 2005), *cert. granted*, 126 S.Ct. 647 (2005).

²⁹⁸ The National Center for Education Statistics reported in 1994 that seven out of ten prisoners perform at the lowest literacy levels. Karl O. Haigler et al., U.S. Dept. of Educ., *Literacy Behind Prison Walls: Profiles of the Prison Population from the National Adult Literacy Survey* xviii, 17- 19 (1994) (available at <http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=94102>).

²⁹⁹ *See Love v. Pullman*, 404 U.S. 522, 526 (1972) (stating, in connection with Title VII exhaustion, that "technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers initiate the process").

³⁰⁰ *See Ngo v. Woodford*, 403 F.3d 620, 631 (9th Cir. 2005) (" . . . [P]rison administrators should not be given an incentive to fashion grievance procedures which prevent or even defeat prisoners' meritorious claims."), *cert. granted*, 126 S.Ct. 647 (2005).

³⁰¹ *Rhames v. Federal Bureau of Prisons*, 2002 WL 1268005 at *5 (S.D.N.Y., June 6, 2002); *accord*, *Ouellette v. Maine State Prison*, 2006 WL 173639 at *3 n.2 (D.Me., Jan. 23, 2006) (noting that once suit is filed, "the defendants in hindsight can use any deviation by the prisoner to argue that he or she has not complied with 42 U.S.C. § 1997e(a) responsibilities"); *Campbell v. Chaves*, 402 F.Supp.2d 1101, 1106 n.3 (D.Ariz. 2005) (noting danger that grievance systems might become "a series of stalling tactics, and dead-ends without resolution"); *LaFauci v. New Hampshire Dept. of Corrections*, 2005 WL 419691 at *14 (D.N.H., Feb. 23, 2005) ("While proper compliance with the grievance system makes sound administrative sense, the procedures themselves, and the directions given to inmates seeking to follow those procedures, should not be traps designed to hamstring legitimate grievances."); *Dimick v. Barufio*, 2003 WL 660826 at *5 (S.D.N.Y., Feb. 28, 2003) ("Congress did not intend the PLRA to be a minefield, in which one misstep causes the dismissal of a possibly valid claim."); *O'Connor v. Featherston*, 2002 WL 818085 at *2 (S.D.N.Y., Apr. 29, 2002), *quoting* *Holloway v. Gunnell*, 685 F.2d 150, 154 (5th Cir. 1982) (disapproving dismissal "by a technical reading of the available administrative procedures when plaintiff has made detailed allegations showing a substantial effort to obtain an administrative remedy").

Some courts have suggested that the exhaustion requirement will be satisfied by “substantial compliance” with grievance rules³⁰² or by reasonable efforts to comply.³⁰³ Others have held or stated that strict compliance is required, either by analogy with the habeas corpus procedural default doctrine³⁰⁴ or simply by assertion.³⁰⁵ (Ironically, even prisoners who *do* comply strictly with

³⁰² See *Nyhuis v. Reno*, 204 F.3d 65, 77-78 (3d Cir. 2000); *Artis-Bey v. District of Columbia*, 884 A.2d 626, 638-39 (D.C. 2005) (adopting substantial compliance standard and holding that “minor defects” in exhaustion—there, a four-month delay in exhausting—should not bar suit as long as the prisoner has used every level of review); compare *Keys v. Craig*, 2005 WL 3304140 at *1 n.3 (3d Cir., Dec. 7, 2005) (unpublished) (stating “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.”) (dicta); *Ahmed v. Dragovich*, 297 F.3d 201, 209 (3d Cir. 2002) (“Whatever the parameters of ‘substantial compliance’ referred to [in *Nyhuis*], it does not encompass a second-step appeal five months late nor the filing of a suit before administrative exhaustion, however late, has been completed.”); see *Wolff v. Moore*, 199 F.3d 324, 327 (6th Cir. 1999) (holding that substantial compliance suffices only in cases where the claim arose before PLRA's enactment).

³⁰³ See *Palmer v. Goss*, 2003 WL 22327110 at *4 (S.D.N.Y., Oct. 10, 2003) (holding prisoner made reasonable efforts to exhaust where he filed a grievance but did not appeal because he had learned that key evidence had been destroyed), *reconsideration denied*, 2003 WL 22519446 (S.D.N.Y., Nov. 5, 2003); *Croswell v. McCoy*, 2003 WL 962534 at *4 (N.D.N.Y., Mar. 11, 2003) (holding “reasonable attempt” to exhaust may be sufficient, especially where it is alleged that prison staff impeded efforts); *O'Connor v. Featherston*, 2003 WL 554752 at *3 (S.D.N.Y., Feb. 27, 2003) (holding that a plaintiff who complained to the Inspector General rather than grieving, in reliance on the prison Superintendent's misinformation, and then tried for months to get a response, had made “reasonable attempts” that met the exhaustion requirement); *Thomas v. New York State Dept. of Correctional Services*, 2002 WL 31164546 at *3 (S.D.N.Y., Sept. 30, 2002) (applying “reasonable attempt” standard); *O'Connor v. Featherston*, 2002 WL 818085 (S.D.N.Y., Apr. 29, 2002) (“While O'Connor may have failed to exhaust the technical requirements of DOCS' grievance procedures, it cannot be said that his efforts to comply, which included a FOIA request, an appeal of the denial of that request, several inquiries to various divisions within DOCS, were not substantial or reasonable.”); *Zolicoffer v. Scott*, 55 F.Supp.2d 1372, 1375 (N.D.Ga. 1999) (requiring “good faith, bona fide effort to comply”), *aff'd*, 252 F.3d 440 (11th Cir. 2001); see *Lewis v. Gagne*, 281 F.Supp.2d 429, 433-35 (N.D.N.Y. 2003) (holding that 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).

³⁰⁴ *Pozo v. McCaughtry*, 286 F.3d 1022, 1023-24 (7th Cir.), *cert. denied*, 537 U.S. 949 (2002) (adopting habeas corpus procedural default rule); *accord*, *Johnson v. Meadows*, 418 F.3d 1152, 1158-59 (11th Cir. 2005), *pet. for cert. filed* (Sept. 8, 2005); *Ross v. County of Bernalillo*, 365 F.3d 1181, 1185-86 (10th Cir. 2004); see *Ford v. Johnson*, 362 F.3d 395, 397-98 (7th Cir. 2004) (holding

grievance rules may be attacked for it by prison officials' lawyers.³⁰⁶)

The most sensible general statement on this question is that of the District of Columbia Court of Appeals:

The proper measure of required adherence to administrative procedures should be that which achieves the purposes of the PLRA without unduly restricting inmates' access to court. The Supreme Court has expressed the view that the main purpose of the PLRA's exhaustion requirement is to reduce litigation:

that procedural default bars a federal suit only if the state tribunal has relied on the default).

Another circuit has recently adopted a procedural default rule, but in such a manner as to leave the bottom line unintelligible. In *Spruill v. Gillis*, 372 F.3d 218 (3d Cir. 2004), the court held that the PLRA exhaustion requirement should have a "procedural default component," though it conceded that the habeas analogy is not "entirely satisfactory." *Id.*, 372 F.3d at 228-30. Like the Seventh Circuit, it stated that the question is one of choice of law. *Id.* at 230. However, the court then stated that imposition of procedural requirements "must . . . not be imposed in a way that offends the Federal Constitution or the federal policy embodied in § 1997e(a)," and said it had "made the same observation (albeit in somewhat different terms)" in stating that compliance with grievance rules need only be "substantial." *Id.* at 232; *see Keys v. Craig*, 2005 WL 3304140 at *1 n.3 (3d Cir., Dec. 7, 2005) (unpublished) (holding failure even to 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.") (dicta). (*Spruill* is discussed in more detail below.)

³⁰⁵ *See Days v. Johnson*, 322 F.3d 863, 866 (5th Cir. 2003) (citing circuit's "strict approach"); *Harris v. Le Roy Baca*, 2003 WL 21384306 at *3 (C.D.Cal., June 11, 2003) (rejecting plaintiff's attorney's allegation that he had exhausted for his client by sending the Sheriff a grievance, since doing so was inconsistent with jail procedure), *affirmed*, 2005 WL 834676 (9th Cir., Apr. 12, 2005); *McCoy v. Goord*, 255 F.Supp.2d 233, 246 (S.D.N.Y. 2003) (asserting without explanation that strict compliance is required). The court in *Rhames v. Federal Bureau of Prisons*, 2002 WL 1268005 at *5 (S.D.N.Y. June 6, 2002), rhetorically acknowledged that strict compliance was important "to avoid the possibility that frequent and deliberate flouting of the administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures," but it then applied a standard more like substantial compliance, noting that the prisoner, who had erred in following the grievance procedure, had submitted grievance forms and made "persistent complaints." It warned of the risk that prison procedures could become "a snare of forfeiture for a prisoner seeking redress."

³⁰⁶ In *Manley v. Mazzuca*, 2004 WL 253314 at *2 (S.D.N.Y., Feb. 10, 2004), defense counsel complained that the plaintiff had filed a grievance about his medical care, arguing that he should have complained to the doctor instead, and that his claim should be dismissed for his "manipulative and duplicitous behavior."

[T]o this purpose, Congress afforded corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case. In some instances, corrective action taken in response to an inmate's grievance might improve prison administration and satisfy the inmate, thereby obviating the need for litigation. . . . In other instances, the internal review might "filter out some frivolous claims." . . . And for cases ultimately brought to court, adjudication could be facilitated by an administrative record that clarifies the contours of the controversy. . . .

Because the purpose of inmate grievance procedures and the PLRA exhaustion requirement is not to finally adjudicate any and all claims by inmates against their detention facilities, but rather to provide "an opportunity [for the correctional facility] to satisfy those inmate grievances the state wishes to handle internally . . . [as] 'an accommodation of our federal system designed to give the State an initial opportunity to pass upon and correct alleged violations of its prisoners' federal rights,'" . . . minor defects in the inmate's execution of this procedure should not be a per se bar to civil suit so long as the inmate has provided notice of his or her grievance to the correctional facility at every level of review. . .

.³⁰⁷

The Second Circuit has rejected a strict compliance requirement, holding that failure to exhaust, or to exhaust correctly, may be excused by "special circumstances,"³⁰⁸ and that the plaintiff's reasonable though mistaken understanding of the PLRA³⁰⁹ or a reasonable understanding of the grievance rules themselves can provide such justification.³¹⁰ The court has further held that threats

³⁰⁷ *Artis-Bey v. District of Columbia*, 884 A.2d 626, 638 (D.C. 2005), *quoting* *Booth v. Churner*, 532 U.S. 731, 737 (2001) (footnotes omitted).

³⁰⁸ *Berry v. Kerik*, 366 F.3d 85, 87-88 (2d Cir.2004).

³⁰⁹ *Rodriguez v. Westchester County Jail Correctional Dept.*, 372 F.3d 485, 487 (2d Cir. 2004). In *Rodriguez*, 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*, *Barad v. Comstock*, 2005 WL 1579794 at *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.")

³¹⁰ *Braham v. Clancy*, 425 F.3d 177, 184 (2d Cir. 2005) (directing lower court to assess whether a prisoner who had informally sought and received a cell change might reasonably have concluded that he had prevailed and need not proceed further administratively); *Giano v. Goord*, 380 F.3d 670, 678-79 (2d Cir. 2004) (holding that a prisoner who pursued his complaint of retaliatory disciplinary charges and falsified evidence through a disciplinary appeal rather than a grievance acted

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.³¹¹ It has rejected any analogy to the habeas corpus procedural default rule, holding that what constitutes justification under the PLRA for failing to follow procedural rules “must be determined by looking at the circumstances which might understandably lead usually uncounselled prisoners to fail to grieve in the normally required way.”³¹² To date, the Second Circuit and lower courts have held or suggested that special circumstances may include (in addition to threats, intimidation, and misunderstanding of grievance rules or exhaustion requirement) a reasonable misunderstanding of the facts relevant to exhaustion,³¹³ a prisoner’s diligent efforts to follow the grievance rules in a changing legal situation,³¹⁴ a grievance response so incomprehensible

reasonably; noting that a learned district judge had adopted the same interpretation); *Johnson v. Testman*, 380 F.3d 691, 696-97 (2d Cir. 2004) (holding that a federal prisoner’s argument that he adequately raised his inmate-inmate assault claim through an appeal of the disciplinary proceeding that arose from the incident should be considered by the district court); *Hemphill v. New York*, 380 F.3d 680, 689-90 (2d Cir. 2004) (holding that plaintiff’s arguments that lack of clarity in grievance regulations supported the reasonableness of his belief that he could exhaust by writing directly to the Superintendent); *see Ouellette v. Maine State Prison*, 2006 WL 173639 at *3-4 (D.Me., Jan. 23, 2006) (declining to dismiss for non-exhaustion where the prisoner had “subjectively believed he had met a dead end” based on non-response to his grievance; inviting request for a stay to complete exhaustion).

³¹¹ *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. The court 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. *Id.* 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).

³¹² *Giano v. Goord*, 380 F.3d 670, 678 (2d Cir. 2004).

³¹³ *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).

³¹⁴ *Rivera v. Pataki*, 2005 WL 407710 at *12 (S.D.N.Y., Feb. 7, 2005) (noting the plaintiff had filed at a time when it appeared that his claim need not be exhausted, and had tried to exhaust

that the plaintiff had no idea what to do next,³¹⁵ other procedural irregularities in the grievance process,³¹⁶ release from custody while a grievance is pending,³¹⁷ or other circumstances that unfairly obstruct or discourage using a grievance procedure.³¹⁸

These Second Circuit decisions do not address the significance of noncompliance with procedural rules in the absence of justifications such as reasonable if mistaken understandings of the rules or intimidation by correction staff. What if the prisoner simply blunders, or does not learn his rights sufficiently quickly or thoroughly? Two circuits have adopted what is potentially a more sweeping view, holding that a prisoner whose grievance was dismissed as untimely nevertheless exhausted when he took the last available appeal.³¹⁹ Like the Second Circuit, they rejected the

after dismissal for non-exhaustion mandated by a subsequent Supreme Court decision).

³¹⁵ Warren v. Purcell, 2004 WL 1970642 at *6 (S.D.N.Y., Sept. 3, 2004).

³¹⁶ In *Roque v. Armstrong*, 392 F.Supp.2d 382 (D.Conn. 2005), it appears that neither the prisoner nor the grievance system entirely followed the rules; the court denied summary judgment, emphasizing the fact that he had received a response from the Commissioner, the final grievance authority. 392 F.Supp.2d 391. See also *Ouellette v. Maine State Prison*, 2006 WL 173639 at *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); *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.")

³¹⁷ Scott v. DelSignore, 2005 WL 425473 at *6 (W.D.N.Y., Feb. 18, 2005).

³¹⁸ See *Barad v. Comstock*, 2005 WL 1579794 at *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). In *Baker v. Andes*, 2005 WL 1140725 at *8 (E.D.Ky., May 12, 2005), the court applied Second Circuit law and found special circumstances where prison officials "(1) failed to adopt PLRA-compliant Inmate Orientation Handbook disseminated 'Complaint' information; (2) permitted Baker to be isolated in 'the hole' by his alleged assailant after the alleged assault; (3) enticed Baker to assert his grievances via audio/video recording in lieu of filling out a paper complaint which they erroneously deemed to be mandatory; and (4) swiftly transferred Baker out of the LCDC under circumstances whereby he had no opportunity to file a paper complaint."

³¹⁹ *Ngo v. Woodford*, 403 F.3d 620, 631 (9th Cir. 2005) ("We . . . hold that the PLRA's exhaustion requirement does not bar subsequent judicial consideration of an exhausted administrative appeal that was denied on state procedural grounds."), *cert. granted*, 126 S.Ct. 647 (2005); *Thomas v. Woolum* 337 F.3d 720 (6th Cir. 2003). Arguably the District of Columbia Court of Appeals has taken the same approach; though it articulated a "substantial compliance" standard, suggesting that compliance may properly be assessed by considering both the prisoner's efforts and

analogy to habeas corpus and its procedural default rule.³²⁰ They noted that the Supreme Court has squarely held that violation of state administrative time limits cannot bar a Title VII or Age Discrimination in Education Act plaintiff from suing in federal court notwithstanding those statutes' requirement of resort to state remedies.³²¹ The Sixth Circuit relied on those cases for the propositions that "state procedural rules should not be able to prevent a federal court from remedying a harm that Congress sought to prevent" and that "the prison grievant is generally the epitome of the lay person, unassisted by a trained lawyer, seeking to invoke the legal process."³²² Whether this holding will apply to all procedural errors by prisoners in the administrative process, as the court's reasoning would suggest, remains to be decided.

The Seventh Circuit, by contrast, has adopted its strict compliance approach based on law interpreting the federal habeas corpus exhaustion requirement,³²³ an analogy that the Second Circuit

prison officials' own degree of compliance (there, "apparent failure to respond at almost every step of the proceeding"), it also stated that a prisoner substantially complies "by filing a grievance and pursuing it through every level of appeal and of administrative review." *Artis-Bey v. District of Columbia*, 884 A.2d 626, 636, 639 (D.C. 2005).

In *Milton v. Lawton*, 2005 WL 2397145 at *3 (E.D.Cal., Sept. 27, 2005), the court applied the *Ngo* holding to a grievance that was rejected as untimely and never appealed, stating there was no argument or evidence that the plaintiff had any available remedy remaining. Similarly, in *Richardson v. Sullivan*, 2005 WL 2465936 at *3 (E.D.Cal., Jan. 5, 2005), the court applied it where the prisoner's grievance was "cancelled" after he refused to be interviewed on the ground that he had been so instructed by the Investigative Services Unit). *See also* *Massie v. Early*, 2005 WL 2105304 at *2 (E.D.Cal., Aug. 31, 2005) (holding that a prisoner whose grievance was rejected at the highest level of appeal with instructions to return to the middle level which he had skipped, and was then rejected as untimely, and who received no response when he returned to the highest level, had exhausted), *report and recommendation adopted*, 2006 WL 47389 (E.D.Cal., Jan. 6, 2006); *Young v. Hightower*, 395 F.Supp.2d 583, ___, 2005 WL 2739243 at *3-4 (E.D.Mich. 2005) (holding that plaintiff's failure to comply with a request for additional documentation after appealing to the highest level was not a failure to exhaust under *Thomas v. Woolum* holding). .

³²⁰ *Ngo*, 403 F.3d at 627-29; *Thomas*, 337 F.3d at 725-26; *see Giano*, 380 F.3d at 678.

³²¹ *Ngo*, 403 F.3d at 629-30; *Thomas*, 337 F.3d at 727-29.

³²² *Id.* at 728-29; *accord, Ngo*, 403 F.3d at 630.

³²³ 286 F.3d at 1024, *citing* *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999).

This approach has led to some extreme and unconscionable results. For example, 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, however, said it was without power to re-examine

has rejected³²⁴ and that is invalid for numerous reasons. The PLRA exhaustion requirement refers to “action[s] . . . with respect to prison conditions.”³²⁵ The Supreme Court and lower courts have been at pains for decades to distinguish between challenges to conditions of confinement, pursued via § 1983, and challenges affecting a prisoner’s custody, which must be pursued via federal habeas corpus before a § 1983 action even accrues.³²⁶ There is no indication in the PLRA’s text of any intent to blur the distinction between conditions cases and habeas corpus. Moreover, almost simultaneously with passage of the PLRA, which was designed to remedy the purported abuses of prisoner civil litigation, Congress separately enacted a major overhaul of federal habeas corpus law designed to remedy the purported abuses of habeas corpus.³²⁷ When Congress separately and contemporaneously rewrites two statutory schemes, it makes no sense to assume that rules are intended to be borrowed between the two schemes.³²⁸ The habeas exhaustion requirement—unlike the PLRA’s—calls for exhaustion of state *judicial* remedies, and thus invokes the highest degree of concern for state-federal comity.³²⁹ Moreover, habeas corpus review is a deferential review of the

prison officials’ decisions rejecting grievances for procedural reasons. 2005 WL 2740999 at *18; *see id.* at *22, *26 (finding additional claims defaulted). *But see* Gabby v. Luy, 2006 WL 167673 at *4 (E.D. Wis., Jan. 23, 2006) (holding that a prisoner who filed one grievance and failed to appeal, then filed a second grievance which was rejected on the ground that the issue had been raised in the previous grievance, had exhausted).

³²⁴ *Giano v. Goord*, 380 F.3d 670, 678 (2d Cir. 2004) (“Nor is it appropriate to analogize the PLRA’s exhaustion requirement to the procedural default rule applicable in the habeas context. . . . [T]he differences between habeas cases and prison litigation under § 1983 are legion.”)

³²⁵ 42 U.S.C. § 1997e(a).

³²⁶ *See* *Wilkinson v. Dotson*, 544 U.S. 74, ___, 125 S.Ct. 1242, 1247-48 (2005); *Heck v. Humphrey*, 512 U.S. 477 (1994); *Preiser v. Rodriguez*, 411 U.S. 475 (1973). As the Seventh Circuit itself put it: “[P]ostconviction relief and prisoner civil rights relief are analytically very different.” *Martin v. U.S.*, 96 F.3d 853, 855 (7th Cir.1996). As one recent decision pointed out, *Cain-El v. Burt*, 2003 WL 21648721 at *4 (E.D. Mich., Mar. 31, 2003), *report and recommendation adopted*, 2003 WL 21653129 (E.D. Mich., June 3, 2003), in a habeas proceeding, a federal court may stay proceedings pending exhaustion of state remedies, an option most courts have held is not permitted under the PLRA. *See* nn. 110-111, above, and nn. 515-517, below.

³²⁷ Anti-Terrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 110 Stat. 1214 (1996).

³²⁸ Courts have cited these near-simultaneous enactments as reasons not to subject habeas petitions to the PLRA filing fee requirements, *Carson v. Johnson*, 112 F.3d 818, 820 (5th Cir. 1997), or the PLRA “three strikes” provision. *Martin v. U.S.*, 96 F.3d at 855-56.

³²⁹ *Ortiz v. McBride*, 380 F.3d 649, 660-61 (2d Cir. 2004), *cert. denied*, 125 S.Ct. 1398 (2005); *Ngo v. Woodford*, 403 F.3d at 627-28; *see O’Shea v. Littleton*, 414 U.S. 488, 502 (1974)

validity of a state court judgment,³³⁰ rather than *de novo* review of the conduct of prison personnel. In that respect it is similar to administrative exhaustion in Social Security cases, where review is of the validity of a final agency decision, and which has been held not at all analogous to PLRA exhaustion.³³¹

The Seventh Circuit also articulated a policy justification for its strict compliance view, stating that

unless the prisoner completes the administrative process by following the rules the state has established for that process, exhaustion has not occurred. Any other approach would allow a prisoner to “exhaust” state remedies by spurning them, which would defeat the statutory objective of requiring the prisoner to give the prison administration an opportunity to fix the problem. . . .³³²

These concerns are grossly exaggerated. There is considerable territory between “spurning” administrative remedies³³³ and making procedural mistakes, especially in a grievance system that

(affirming dismissal of challenge to allegedly discriminatory judicial practices on the ground it might require an “ongoing federal audit” of the state judicial system). The high degree of deference to state judicial systems is based in part on the view that they are as competent as federal courts to resolve constitutional questions and that they provide all the procedural safeguards of formal judicial proceedings, including the constitutionally mandated protections of criminal defendants, neither of which is true of prison grievance systems. *See Cleavinger v. Saxner*, 474 U.S. 193, 206 (1985) (describing non-judicial nature of prison disciplinary proceedings).

³³⁰ *See* 28 U.S.C. § 2254(d)(1) (requiring a habeas petitioner to show that the challenged action “(1) resulted in a *decision* that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a *decision* that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.”)

³³¹ *Jones’El v. Berge*, 172 F.Supp.2d 1128, 1131-32 (W.D.Wis. 2001).

³³² *Pozo v. McCaughtry*, 286 F.3d 1022, 1023-24 (7th Cir.), *cert. denied*, 537 U.S. 949 (2002); *accord*, *Johnson v. Meadows*, 418 F.3d 1152, 1159 (11th Cir. 2005) (emphasizing that prison officials did not in fact review the plaintiff’s untimely grievance), *pet. for cert. filed* (Sept. 8, 2005); *Spruill v. Gillis*, 372 F.3d 218, 230 (3rd Cir. 2004). *Spruill*, however, later said that its rule would be satisfied by compliance that is “substantial.” 372 F.3d at 232.

³³³ Numerous decisions have held that a prisoner who intentionally and without justification disregards the rules of the grievance system or instructions by grievance personnel as to how to proceed fails to exhaust. *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

may allow only days to prepare and file a grievance, and especially when the grievant is poorly educated and without counsel. (In *Pozo*, the plaintiff had ten days to appeal the denial of his grievance and waited a year. Other, less serious defaults cannot be characterized as “spurning” the system.³³⁴) Further, there is no reason for prisoners to “spurn” administrative remedies, since those

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); *Faysom v. Timm*, 2005 WL 3050627 at *2-3 (N.D.Ill., Nov. 9, 2005) (holding plaintiff who did not respond to Administrative Review Board’s request for more information and clarification failed to exhaust); *Jones v. Doty*, 2005 WL 2860971 at *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 at *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); *see Appendix A for additional authority on this point. But see Young v. Hightower*, 395 F.Supp.2d 583, ___, 2005 WL 2739243 at *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); *Richardson v. Sullivan*, 2005 WL 2465936 at *3 (E.D.Cal., Jan. 5, 2005) (holding that prisoner’s refusal to be interviewed and subsequent cancellation of his grievance did not constitute non-exhaustion where the grievance process had addressed the merits of his complaint); *Vega v. Alameida*, 2005 WL 1501531 (E.D.Cal., June 20, 2005) (declining to dismiss where a prisoner’s grievance and appeal were “cancelled” because he was “incorporative” based on *Ngo v. Woodford* holding, and on defendants’ failure to provide facts supporting the cancellation of the grievance); *Griffen v. Cook*, 2005 WL 1113830 at *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).

In at least one case, a claim has been dismissed for non-exhaustion where the prisoner did follow advice given in a grievance response and filed a disciplinary appeal rather than appealing the grievance denial; the court said the disposition had not rejected the grievance as non-grievable. *Lee v. Unknown Palus*, 2005 WL 2253582 at *4 (W.D.Mich., Sept. 15, 2005).

The Second Circuit has noted that there may be circumstances (e.g., threats from staff of violence or other retaliation) where prisoners have good reason not to follow the usual prison grievance process. *Hemphill v. New York*, 380 F.3d 680, 688 (2d Cir. 2004).

³³⁴ *See, e.g., Harper v. Laufenberg*, 2005 WL 79009 at *2 (W.D.Wis., Jan. 6, 2005) (dismissing for non-exhaustion where a prisoner’s initial grievance, filed near the end of a 14-day time limit, was rejected for raising more than one issue, and his resubmitted grievance was rejected as untimely under the original 14-day limit); *Gauntt v. Miracle*, 2002 WL 1465763 at *2 (N.D.Ohio,

remedies are faster than litigation and give the prisoner an additional opportunity to win a favorable ruling.³³⁵ In any case a rule that forgives procedural errors by prisoners does not allow bypass of the administrative remedy; “the inmate must still submit his untimely [or otherwise procedurally deficient] grievance to the prison and appeal all denials of his claims completely through the prison’s administrative process to satisfy the PLRA’s exhaustion requirement,” allowing prison officials to act on the prisoner’s complaint notwithstanding procedural errors if they choose to do so.³³⁶

A different justification for a strict compliance rule has been simply stated by one federal appeals court: “Nothing in the Prison Litigation Reform Act . . . prescribes appropriate grievance procedures or enables judges, by creative interpretation of the exhaustion doctrine, to prescribe or oversee prison grievance systems.”³³⁷ The short answer is that tolerance of procedural error by federal courts does not “prescribe or oversee prison grievance systems”; rather, it determines under what circumstances a federal lawsuit will go forward, and prison officials may run their grievance systems as they like.

The Third Circuit has presented a more elaborate case for procedural default, but on examination its holding appears to be a kinder, gentler rule than the Seventh Circuit’s strict compliance version. Although it accepted the Seventh Circuit’s view that the question is one of choice of law and that there should be a “procedural default component” to PLRA exhaustion, it found the habeas corpus analogy not “entirely satisfactory.”³³⁸ Therefore it canvassed Congress’s goals in the exhaustion requirement. The court named these as “(1) to return control of the inmate grievance process to prison administrators; (2) to encourage development of an administrative record, and perhaps settlements, within the inmate grievance process; and (3) to reduce the burden on the federal courts by erecting barriers to frivolous prisoner lawsuits,” and said that all of them are better served by a “procedural default component” than by interpreting the statute “merely to require termination of all administrative grievance proceedings.”³³⁹ The notion of “return[ing] control” of the grievance process is based on the elimination in the PLRA of the federal standard-setting and

June 10, 2002) (barring prisoner’s claim for missing a five-day deadline). Also noteworthy is *Lugo v. Ryan*, 2006 WL 163534 at *1 (D.Ariz., Jan. 19, 2006), which cites a rule requiring 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” Under a procedural default rule, a prisoner who omitted that recitation could subsequently be barred from proceeding in court.

³³⁵ *Ngo v. Woodford*, 403 F.3d at 629; *Thomas v. Woolum*, 337 F.3d at 732.

³³⁶ *Ngo*, 403 F.3d at 630.

³³⁷ *Wright v. Hollingsworth*, 260 F.3d 357, 358 (5th Cir.2001).

³³⁸ *Spruill v. Gillis*, 372 F.3d 218, 228-30 (3d Cir. 2004).

³³⁹ *Spruill v. Gillis*, 372 F.3d at 230.

certification process of prior law. The court said: “It would be anomalous, to say the least, to refuse to give effect to the very rules that the PLRA encourages state prison authorities to enact.”³⁴⁰ But elimination of that federal machinery is not inconsistent with a rule such as the Second Circuit’s that excuses non-exhaustion (though it requires subsequent exhaustion if remedies remain available) based on a prisoner’s reasonable, even if mistaken, understanding of the prison system’s own rules, and acknowledges the possibility that circumstances may make the prescribed means of exhaustion unavailable or may estop the defendants from relying on them. Moreover, the court’s notion, that the absence of a procedural default rule will mean that there will be separate sets of state and federal rules that prisoners must comply with both to get their grievances heard and to pursue federal litigation, is considerably exaggerated.³⁴¹ Exhaustion rules such as the Second Circuit’s do not propose a parallel set of procedural rules; they define circumstances in which the consequences of failing to follow the state’s rules do not extend to barring otherwise meritorious federal claims.

It is indisputable that the exhaustion requirement was intended to help unburden the courts from frivolous prisoner litigation. However, dismissal for procedural default has only a coincidental relationship to frivolousness and can be expected to affect meritorious cases at least as much as frivolous ones.³⁴² Indeed, *Spruill* states: “Finally, Congress wanted to erect *any barrier it could* to suits by prisoners in federal court, and a procedural default rule surely reduces caseloads (even though it may be a blunt instrument for doing so).”³⁴³ But in fact there is no evidence at all that Congress wished to keep meritorious cases out of court, and considerable evidence to the contrary.³⁴⁴

Having made these arguments, *Spruill* backs away from them, stating that grievance systems’ procedural requirements “must . . . not be imposed in a way that offends the Federal Constitution or

³⁴⁰ *Spruill, id.* at 231 (footnote omitted).

³⁴¹ *Spruill, id.*

³⁴² *See* *Ngo v. Woodford*, 403 F.3d at 630.

³⁴³ *Spruill, id.* at 230.

³⁴⁴ For example, sponsors and proponents of the PLRA said: “These reasonable requirements will not impede meritorious claims by inmates but will greatly discourage claims that are without merit.” 141 Cong Rec H 1472, *H1480 (Rep. Canady) (discussing exhaustion, screening, and filing fee provisions of PLRA. “If we achieve a 50-percent reduction in bogus Federal prisoner claims, we will free up judicial resources for claims with merit by both prisoners and nonprisoners.” 141 Cong Rec S 7523, *S7526 (Sen. Kyl) (discussing exhaustion requirement *inter alia*). “Indeed, I do not want to prevent inmates from raising legitimate claims.” 141 Cong Rec S 14611, *H14626 (Sen. Hatch, introducing an amendment “virtually identical” to the PLRA). “This amendment will allow meritorious claims to be filed, but gives the judge broader discretion to prevent frivolous and malicious lawsuits filed by prison inmates.” 141 Cong Rec S 14611, *S14628 (Sen. Thurmond) (discussing amendment identical to entire PLRA; *see* 141 Cong Rec S 14611, *H14626).

the federal policy embodied in § 1997e(a). We made the same observation (albeit in somewhat different terms) in *Nyhuis*, . . . where we explained that the policy of § 1997e(a) is that ‘compliance with the administrative remedy scheme will be satisfactory if it is substantial.’”³⁴⁵ This appears to be a far cry from the strict compliance rule that the Seventh Circuit derived from procedural default, though exactly how far remains to be seen.³⁴⁶

Even under a strict compliance or procedural default rule, if prison officials decide the merits of a grievance rather than rejecting it for noncompliance, they cannot rely on that noncompliance to seek dismissal of subsequent litigation for non-exhaustion.³⁴⁷ Further, the Seventh Circuit has held (albeit in an unpublished opinion) that compliance with grievance procedures is measured by actual practice, even when that practice diverges from written policy³⁴⁸—as is often the case in prisons.

³⁴⁵ *Spruill, id.* at 232; *see Boyd v. Pugh*, 2005 WL 1430087 at *2 (M.D.Pa., June 17, 2005) (interpreting *Spruill* to permit litigation of defaulted claims when “equitable considerations warrant review of the claim”).

³⁴⁶ The only clue as to what this embrace both of procedural default and substantial compliance means appears in dicta in a recent 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*, 2005 WL 3304140 at *1 (3d Cir., Dec. 7, 2005) (dicta).

³⁴⁷ *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 (3rd Cir. 2004); *Ross v. County of Bernalillo*, 365 F.3d 1181, 1186 (10th Cir. 2004); *Pozo v. McCaughtry*, 286 F.3d 1022, 1025 (7th Cir.), *cert. denied*, 537 U.S. 949 (2002); *see Barnes v. Briley*, 420 F.3d 673, 679 (7th Cir. 2005) (holding claim was not procedurally defaulted where an initial grievance was rejected as untimely but plaintiff later “restarted” the grievance process and received a decision on the merits); *Simpson v. Nickel*, 2005 WL 2429805 at *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 at *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).

³⁴⁸ *Curtis v. Timberlake*, ___ F.3d ___, 2005 WL 3728794 at *2-3 (7th Cir., Oct. 6, 2005).

8. Compliance with Time Limits

Time limits present a particularly important issue of compliance with prison procedural rules, chiefly because they are so extraordinarily short—as little as two or three days in some cases (e.g., New York City), and very often considerably less than a month (e.g., 14 days in New York State).³⁴⁹ The question whether missing a grievance time limit bars a subsequent civil rights suit is now before the Supreme Court.³⁵⁰

a. Initial Compliance

Many courts have assumed without much discussion that the PLRA requires prisoners to comply with grievance system time limits in order to exhaust.³⁵¹ Those courts that have presented rationales for dismissing complaints that were not timely exhausted have said that exhaustion is governed by a procedural default rule, or that federal courts otherwise lack authority to alter state procedural rules,³⁵² and that a contrary rule would “allow inmates to bypass the exhaustion requirement by declining to file administrative complaints and then claiming that administrative remedies are time-barred and thus not then available.”³⁵³ Even under a rule of strict compliance, however, a late filing that the system accepts and resolves on the merits satisfies the exhaustion

³⁴⁹ See n. 376, below.

³⁵⁰ See *Ngo v. Woodford*, 403 F.3d 620, 631 (9th Cir. 2005) (“We . . . hold that the PLRA’s exhaustion requirement does not bar subsequent judicial consideration of an exhausted administrative appeal that was denied on state procedural grounds.”), *cert. granted*, 126 S.Ct. 647 (2005).

³⁵¹ See, e.g., *Soto v. Belcher*, 339 F.Supp.2d 592, 595 (S.D.N.Y. 2004); *Richardson v. Boland*, 2003 WL 21664569 at *2 (N.D.Tex., July 15, 2003), *report and recommendation adopted*, 2003 WL 21977078 (N.D.Tex., Aug. 19, 2003), *aff’d*, 83 Fed.Appx. 608, 2003 WL 22965237 (5th Cir. 2003); *Wallace v. Burbury*, 2003 WL 21302947 at *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); *Long v. Lafko*, 254 F.Supp.2d 444, 448 (S.D.N.Y. 2003); *Patterson v. Goord*, 2002 WL 31640585 at *1 (S.D.N.Y., Nov. 21, 2002).

³⁵² *Johnson v. Meadows*, 418 F.3d 1152, 1159 (11th Cir. 2005), *pet. for cert. filed* (Sept. 8, 2005); *Ross v. County of Bernalillo*, 365 F.3d 1181, 1186 (10th Cir. 2004); *Days v. Johnson*, 322 F.3d 863, 866 (5th Cir. 2003) (citing circuit’s “strict approach”); *Pozo v. McCaughtry*, 286 F.3d 1022, 1023-24 (7th Cir. 2002) (procedural default), *cert. denied*, 537 U.S. 949 (2002).

³⁵³ *Wright v. Morris*, 111 F.3d 414, 417 n. 3 (6th Cir.), *cert. denied*, 522 U.S. 906 (1997); *accord*, *Pozo v. McCaughtry*, *id.* (“Any other approach would allow a prisoner to ‘exhaust’ state remedies by spurning them. . . .”); *Days v. Johnson*, 322 F.3d at 867-68.

requirement,³⁵⁴ and circumstances that prevent a prisoner from filing timely make the grievance system unavailable for purposes of the exhaustion rule.³⁵⁵

The Second Circuit has not endorsed a strict compliance approach to time limits, but in *Williams v. Comstock*,³⁵⁶ it addressed time limits in the framework of its earlier decisions holding that non-exhaustion can be justified under “circumstances which might understandably lead usually uncounselled prisoners to fail to grieve in the normally required way.”³⁵⁷ The court cited its prior decisions referring to prisoners’ misunderstanding of the exhaustion requirement³⁵⁸ or of the relevant prison regulations,³⁵⁹ though it noted that those were not necessarily the only circumstances to justify

³⁵⁴ *Riccardo v. Rausch*, 375 F.3d 521, 524 (7th Cir. 2004), *cert. denied*, 125 S.Ct. 1589 (2005); *Ross v. County of Bernalillo*, 365 F.3d at 1186; *Pozo v. McCaughtry*, 286 F.3d at 1025; *Griswold v. Morgan*, 317 F.Supp.2d 226, 229-30 (W.D.N.Y. 2004); *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); *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. *But see 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).

The fact that the system grants permission for late filings under some circumstances does not mean that a late filing without permission exhausts. *Patel v. Fleming*, 415 F.3d 1105, 1110 (10th Cir. 2005).

³⁵⁵ *Days v. Johnson*, 322 F.3d at 867-68; *see* § IV.G.2, below.

³⁵⁶ 425 F.3d 175 (2d Cir. 2005) (*per curiam*).

³⁵⁷ *Williams*, 425 F.3d at 176.

³⁵⁸ *Williams, id.*, *citing* *Rodriguez v. Westchester County Jail Correctional Dep’t*, 372 F.3d 485 (2d Cir. 2004).

³⁵⁹ *Williams, id.*, *citing* *Giano v Goord*, 380 F.3d 670, 677 (2d Cir. 2004).

A reasonable if mistaken appreciation of the facts may also justify non-exhaustion or result in unavailability of a remedy. 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.

failure to exhaust.³⁶⁰ In *Williams*, the plaintiff had waited two years to file a grievance, and cited no justifying circumstances other than his physical and mental disability during the 14-day period for filing a grievance. Absent an explanation of why he waited two years, the court held that “the failure to timely file the grievance in accordance with IGP rules amounted to a failure to exhaust administrative remedies in this case.”³⁶¹ (The court did not address the argument, discussed below, that noncompliance with state administrative time limits cannot bar a federal claim.)

The *Williams* decision, with its extreme delay in grieving, does not address the situation of the prisoner who is late, but not that late, simply because he or she did not move quickly enough to file a grievance (or to find out what the grievance system requires) to comply with the very short time limits typical of prison grievance systems. The Sixth and Ninth Circuits have held more broadly that non-compliance with grievance system time limits does not require dismissal for non-exhaustion.³⁶² They point out that the statute’s purpose is not “to defeat valid constitutional claims” and that it contains no language regarding the timeliness of administrative filings or procedural default.³⁶³ Since the purpose of the exhaustion requirement is to give prison authorities an

³⁶⁰ *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).

³⁶¹ *Williams*, 425 F.3d at 177. It is not unlikely that the plaintiff waited two years because he initially thought that having missed the 14-day deadline, he could not file a grievance.

³⁶² *Ngo v. Woodford*, 403 F.3d 620 (9th Cir. 2005), *cert. granted*, 126 S.Ct. 647 (2005); *Thomas v. Woolum* 337 F.3d 720 (6th Cir. 2003); *accord*, *Caudell v. Rose*, 378 F.Supp.2d 725, 727-28 (W.D.Va. 2005) (stating plaintiff may refile after exhausting even if remedy is time-barred); *Washington v. Proffit*, 2005 WL 1176587 at *2 (W.D.Va., May 17, 2005) (stating that prison officials are generally required to allow prisoners to exhaust even where it would be futile), *report and recommendation adopted*, 2005 WL 1429312 (W.D.Va., June 17, 2005). In *Bowler v. Young*, 2002 WL 32868160 (W.D.Va., June 12, 2002), *aff’d*, 57 Fed.Appx. 177 (4th Cir. 2003), the court cogently explained why “it is entirely rational to argue” that grievance time limits should not be enforced: it would “give states the power to shorten a two-year statute of limitations on a federal claim to a mere thirty (30) days or less”; officials might be less than objective in applying a “safety valve” provision permitting consideration of grievances late because of circumstances beyond the prisoner’s control; and *pro se* plaintiffs face “severe obstacles . . . when litigating inside a prison—lack of legal education, unexpected lockdowns or transfers, and possible retaliation. . . .” The court then adopted a procedural default approach anyway, at least for cases where the prisoner had no discernible excuse for lateness. *Id.* at *2-3.

³⁶³ *Thomas v. Woolum*, 337 F.3d at 726; *accord*, *Ngo v. Woodford*, 403 F.3d at 630.

opportunity to resolve controversies,³⁶⁴ they can scarcely complain if they decline that opportunity.³⁶⁵ Moreover, in the analogous context of Title VII³⁶⁶ and the Age Discrimination in Employment Act, which uses the Title VII administrative complaint scheme, “the Supreme Court has specifically held that a plaintiff’s failure to comply with state statutes of limitations cannot prevent the plaintiff from proceeding to federal court,”³⁶⁷ for several reasons: the absence of any reference to timeliness under state law in the statutory text, the fact that “laymen, unassisted by trained lawyers, initiate the [administrative] process”; and that state procedural rules should not prevent a court from remedying a harm that Congress sought to prevent.³⁶⁸

The latter two arguments unquestionably apply with equal force in the context of the PLRA. First, the prison grievant is generally the epitome of the lay person, unassisted by a trained lawyer, seeking to invoke the legal process. Further, if states may not use administrative time limits to defeat an ADEA or a Title VII claim, they should not be able to defeat a claim under the Civil Rights Act of 1871, Congress’s preeminent declaration that state officials may not undermine federal law.³⁶⁹

The Sixth and Ninth Circuits reject the concern that prisoners will purposefully file grievances late in order to defeat the grievance system, since there is no reason it is to the prisoner’s advantage to do so, and since that argument was explicitly rejected by the Supreme Court in the Title VII/ADEA

³⁶⁴ *Porter v. Nussle*, 534 U.S. at 525.

³⁶⁵ *Thomas v. Woolum*, 337 F.3d at 726; *accord*, *Ngo v. Woodford*, 403 F.3d at 629 (“It is for the prison to decide whether to exercise its discretion and accept or refuse the opportunity to hear the case on the merits regardless whether the grievance is timely filed.”); *Cline v. Fox*, 282 F.Supp.2d 490, 494 (N.D.W.Va. 2003) (declining to dismiss where prisoner’s grievance was dismissed as untimely, since prison officials had had an opportunity to address the complaint).

³⁶⁶ The Second Circuit has not relied on the Title VII analogy in its PLRA exhaustion decisions, and in the context of rejecting the “total exhaustion” rule, *see* § IV.E.6 below, it dismissed the utility of that analogy. *Ortiz v. McBride*, 380 F.3d 649, 661 n.10 (2d Cir. 2004), *cert. denied*, 125 S.Ct. 1398 (2005).

³⁶⁷ *Thomas, id.* at 727.

³⁶⁸ *Id.* at 728, *quoting* *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 761 (1979) (internal quotation marks omitted). The quoted language originated in *Love v. Pullman Co.*, 404 U.S. 522, 527 (1972). *See generally* nn.172, 233-38, 269-70, and 321-22, above, and 546-48, below, concerning the Title VII analogy.

³⁶⁹ *Thomas, id.* at 729; *accord*, *Ngo v. Woodford*, 403 F.3d at 629-30; *Pogue v. Calvo*, 2004 WL 443517 at *3 (N.D.Cal., Feb. 24, 2004).

context.³⁷⁰ They also reject the analogy of *Pozo v. McCaughtry* with the habeas corpus procedural default rule, noting that the analogy to Title VII and the ADEA is more apt.³⁷¹

The District of Columbia Court of Appeals has taken a position which can be viewed either as similar to the Second Circuit’s fact-sensitive approach to procedural issues including timeliness, or to the Sixth and Ninth Circuit’s refusal to enforce time limits altogether. In *Artis-Bey v. District of Columbia*,³⁷² the prisoner filed a timely grievance, received no answer, filed a second grievance four months later, and then filed an appeal upon its denial. When he received no answer to the appeal, he filed a second intermediate appeal, then appealed the lack of response to the highest level, again receiving no response. The court held that “[e]ven if . . . [he can be faulted]” for waiting months to refile his grievance and for appealing twice at the intermediate level instead of going immediately to the final level, he “at least, substantially complied with the [procedure]—particularly when compared with the DOC’s apparent failure to respond at almost every step of the proceeding.”³⁷³ However, the court goes on to endorse the analogy to Title VII and other civil anti-discrimination statutes and hold that “procedural defects in an inmate’s pursuit of administrative remedies do not bar a civil suit per se, provided that the inmate substantially complied with the established procedure by filing a grievance and pursuing it through every level of appeal of administrative review.”³⁷⁴

³⁷⁰ *Thomas, id.* at 732, citing *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 764 (1979); *accord, Ngo*, 403 F.3d at 629-30.

³⁷¹ As the Sixth Circuit stated:

There are key distinctions between the administrative grievance process and the habeas process that warrant disparate applications of a procedural default requirement. The notions of comity that prevent federal courts from unduly interfering with the state criminal judicial process in the habeas context do not have precisely the same resonance and intensity when federal courts are analyzing the outcome of a non-criminal state administrative process and when § 1983 interposes the federal courts as a vindicator of federal rights.

Thomas, 337 F.3d. at 727 n.2; *accord, Ngo*, 403 F.3d at 627-28. *See generally* nn. 287-88 and 323-30, above, concerning the inappropriateness of analogies to habeas corpus.

As noted above, *see* nn. 91, 262, above, the Second Circuit has found the Title VII analogy unhelpful in the context of “total exhaustion.” It seems more apposite here, since the relevant Title VII/ADEA authority deals explicitly with the question presented here of time limits facing a lay complainant required to resort to a state administrative process as a precondition of pursuing a federal court action.

³⁷² 884 A.2d 626, 638-39 (D.C. 2005).

³⁷³ *Artis-Bey*, 884 A.2d at 636.

³⁷⁴ *Artis-Bey*, 884 A.2d at 639.

One of the *Woolum* court's concerns was the possibility that prison officials would set extremely short deadlines for grievances in order to limit their liability.³⁷⁵ That concern is well taken, since very short deadlines are already common in prison grievance systems.³⁷⁶ (Indeed, courts have questioned whether New York's 14-day time limit is simply too short to be enforced in all cases.³⁷⁷)

For perspective, it is worth noting that the Supreme Court has held that a six-month statute of limitations is simply too short to be borrowed for cases brought under 42 U.S.C. § 1983; though it might be appropriate for the administrative proceedings for which it was designed, the Court held it inconsistent with the goals of § 1983.³⁷⁸ It is also worth noting that the state administrative time limit the Supreme Court refused to enforce in a federal ADEA proceeding was 120 days, though its

³⁷⁵ *Thomas v. Woolum*, *id.* at 729 n.3 (citing Kentucky's five-day grievance deadline and three-day appeal deadline); *see* *Ngo v. Woodford*, 403 F.3d at 630 n.4 (stating that under a procedural default rule, the two-year statute of limitations for § 1983 claims in California "would effectively shrink to fifteen working days," the state grievance time deadline).

³⁷⁶ *See, e.g.*, *Cupp v. Bamberg*, 2006 WL 38998 at *3 (D.S.C., Jan. 5, 2006) (noting three-day time limit); *Jordan v. Van Winkle*, 2005 WL 2614855 at *1 (N.D.Ind., Oct. 14, 2005) (noting 48-hour time limit), *reconsideration denied*, 2006 WL 44250 (N.D.Ind., Jan. 5, 2006). In *Booth v. Churner*, No. 99-1964, *amici* including the instant plaintiff's counsel lodged with the Court the grievance procedures of some 21 states, cities, and institutions and referred to them in their brief. Brief of the American Civil Liberties Union, The Legal Aid Society of the City of New York, and the Prison Reform Advocacy Center as *Amici Curiae* in Support of Petitioner, 2000 WL 1868111 at *11 n.9, *12 n.13 (Dec. 14, 2000). Examples of the short deadlines include Tennessee (7 calendar days); Utah (7 calendar days); Kentucky (5 working days); Georgia (5 calendar days); Metro Dade (Florida) (3 working days); Rhode Island (3 days); City of New York, Inmate Grievance Form 7101-5 (3 days); Oklahoma, § IV.A. (must attempt "informal resolution" within 3 days). *Id.* Similarly short deadlines apply to appeals of grievances. *Id.* at *12 n.13. A more systematic recent survey yielded similar findings of short deadlines. *Woodford v. Ngo*, No. 05-416, Brief of the Jerome N. Frank Legal Services Organization of the Yale Law School as *Amicus Curiae*, 2006 WL 304573 (Feb. 2, 2002).

³⁷⁷ *See Nelson v. Rodas*, 2002 WL 31075804 at *4 n.10 (S.D.N.Y., Sept. 17, 2002) ("The Court reiterates its concern, however, that while DOCS' requirement that grievances be brought within fourteen days may serve valid institutional purposes, it may be too short a 'statute of limitations' period to the extent exhaustion of grievance procedures is a PLRA prerequisite to a § 1983 lawsuit."); *Vasquez v. Artuz*, 1999 WL 440631 at *8 (S.D.N.Y., June 28, 1999) (questioning whether 14 days provides adequate time to file a grievance).

³⁷⁸ *Burnett v. Grattan*, 468 U.S. 42 (1984).

length did not play a part in the Court's analysis.³⁷⁹ Although some courts have expressed misgivings in dicta,³⁸⁰ the question whether a prison grievance time limit can simply be too short to be enforced consistently with the federal civil rights statutes seems not to have been directly posed by any court.

If a challenged condition is ongoing, presumably a prisoner's failure to exhaust when it begins does not mean that a subsequent grievance over the condition's continuation is barred as untimely.³⁸¹ A contrary holding or policy would deny access to courts in the most literal sense—although the case presently before the Supreme Court involves just such an administrative decision.³⁸²

Some grievance systems, including New York's, build in discretion to waive time limits; several courts have held that in those systems, a prisoner who misses a grievance time deadline must pursue such a waiver.³⁸³ The New York State grievance system permits late grievances for

³⁷⁹ *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 759 (1979).

³⁸⁰ *See* cases cited in n. 337, above; *see also* *Johnson v. True*, 125 F.Supp.2d 186, 189 and n.4 (W.D.Va. 2000) (holding it inappropriate to dismiss for non-exhaustion if a subsequent grievance would be time-barred), *appeal dismissed*, 32 Fed.Appx. 692, 2002 WL 596403 (4th Cir. 2002); *Hattie v. Hallock*, 16 F.Supp.2d 834, 837 (N.D.Ohio 1998) (suggesting in dictum that federal claims should not be barred because of prisoners' untimely filing of grievances).

³⁸¹ *See* *Abuhoran v. Morrison*, 2005 WL 2140537 at *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").

³⁸² *Ngo v. Woodford*, 403 F.3d 620, 628 (9th Cir. 2005) (noting that prison officials had declared the plaintiff's grievance untimely despite his argument that he was challenging an ongoing restriction), *cert. granted*, 126 S.Ct. 647 (2005).

³⁸³ *Patel v. Fleming*, 415 F.3d 1105, 1110-11 (10th Cir. 2005) (holding that prisoner's late grievance was not saved by provisions for time extensions where he never sought one); *Pozo v. McCaughtry*, 286 F.3d 1022, 1025 (7th Cir.) (same as *Patel*), *cert. denied*, 537 U.S. 949 (2002); *Harper v. Jenkin*, 179 F.3d 1311, 1312 (11th Cir. 1999) (holding that a prisoner whose grievance was dismissed as untimely was obliged to appeal, since the system provided for waiver of time limits for "good cause"); *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 at *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).

“mitigating circumstances,”³⁸⁴ which include “e.g., attempts to resolve informally by the inmate.” etc.”³⁸⁵ One New York district court has tried to spell out the relationship between that provision and the PLRA exhaustion requirement, holding that the prisoner must seek permission to file an untimely grievance and offer an explanation for its untimeliness. If permission is denied, upon refiling, the plaintiff must explain his failure to file timely, describe his subsequent efforts to file a late grievance, and state the alleged mitigating circumstances justifying the failure of timeliness. Since exhaustion is not jurisdictional, the court said, it will be required to decide whether exhaustion should be waived based on mitigating circumstances, such as transfer to another facility or the unavailability of grievance representatives to prisoners in a segregated unit.³⁸⁶ All of these holdings appear inconsistent with or superseded by the Second Circuit’s decisions concerning availability, estoppel, and justification, which appear to suggest that the court will assess justification for missing time limits without regard to the administrative procedure for exceptions.³⁸⁷

b. Time Limits after Dismissal for Non-Exhaustion

A plaintiff whose claims are 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—will

³⁸⁴ *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).

³⁸⁵ 7 N.Y.C.R.R. § 701.7(a)(1).

³⁸⁶ *Graham, id.* at 322 and n. 9; *see Moore v. Louisiana Dept. of Public Safety and Corrections*, 2002 WL 1791996 at *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); *O'Connor v. Featherston*, 2002 WL 818085 at *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”). *But see Patterson v. Goord*, 2002 WL 31640585 at *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).

³⁸⁷ *See* §§ IV.E.7, above, and IV.G, below. In *Williams v. Comstock*, 425 F.3d 175, 176 (2d Cir. 2005) (per curiam), the plaintiff’s grievance was two years late, and his explanation addressed only a short part of that time. The court cited its prior holding that prisoners who have failed to follow grievance rules “must allege ‘circumstances which might understandably lead usually uncounselled prisoners to fail to grieve in the normally required way.’” 425 F.3d at 176, *quoting* *Giano v. Goord*, 380 F.3d 670, 678 (2d Cir. 2004). However, it added: “*We* therefore do not find *Williams*’ justification persuasive.” *Id.* (emphasis supplied). Thus it appears the court is to assess justification for untimely grievances independently.

almost always have missed the deadline for administrative proceedings. The Second Circuit, however, 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).³⁸⁸ That is, if the system will not entertain the plaintiff's late grievance, the plaintiff need not exhaust. This rule has been applied to a plaintiff who mistakenly but reasonably believed he did not have to exhaust his use of force claim, before the Supreme Court ruled otherwise;³⁸⁹ a plaintiff who reasonably, though possibly erroneously, believed that his complaint about falsified evidence used for retaliatory reasons at a disciplinary hearing was properly exhausted through a disciplinary appeal rather than a grievance;³⁹⁰ and a plaintiff who said that he had failed to exhaust properly because of physical threats and intimidation by prison staff.³⁹¹

Plaintiffs whose cases do not fit the special circumstances rule will have to rely on the broader holding of *Thomas v. Woolum*³⁹² and *Ngo v. Woodford*³⁹³ that state administrative time limits cannot bar assertion of federal claims, or on the narrower argument that the rule of equitable tolling

³⁸⁸ *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).

³⁸⁹ *Rodriguez v. Westchester County Jail Correctional Dept.*, 372 F.3d 485, 487 (2d Cir. 2004). The court said that Mr. Rodriguez's belief was reasonable because a panel of the Second Circuit entertained the same belief, even though the plaintiff did not actually rely on the Second Circuit decision in question; his failure to exhaust antedated it. *See Rivera v. Pataki*, 2005 WL 407710 at *11-13 (S.D.N.Y., Feb. 7, 2005) (holding that prisoner showed special circumstances where he "did the best he could to follow DOCS regulations while responding to an evolving legal framework," *i.e.*, the changing law regarding exhaustion of use of force claims). *Rivera* notes that the prison system itself had declared that the change in law could be treated as a mitigating circumstance, but it was not in the plaintiff's case.

Rodriguez overrules district court decisions that have denied relief to prisoners who did not actually rely on the overruled Second Circuit law, such as *Thomas v. Cassleberry*, 315 F.Supp.2d 301, 303-04 (W.D.N.Y., Apr. 13, 2004) and cases cited.

³⁹⁰ *Giano v. Goord*, 380 F.3d 670, 678-79 (2d Cir. 2004); *see also Braham v. Clancy*, 425 F.3d 177, 183-84 (2d Cir. 2005) (noting that prisoner who had made three informal requests for a cell change and raised prison officials' nonresponsiveness to them in a disciplinary appeal "appears to have a colorable argument that . . . he was attempting to follow prison regulations with respect to exhaustion").

³⁹¹ *Hemphill v. New York*, 380 F.3d 680, 690-91 (2d Cir. 2004).

³⁹² 337 F.3d 720 (6th Cir. 2003); *see nn.* 362-371, above.

³⁹³ 403 F.3d 620 (9th Cir. 2005), *cert. granted*, 126 S.Ct. 647 (2005).

applies to the administrative proceedings as well as to reinstatement of the lawsuit. Though I am not aware of a decision explicitly applying equitable tolling to prison administrative deadlines, a similar equitable approach has been applied by one court to cases in which the defendants initially did not raise exhaustion in light of the case law at that time, then raised it after the Supreme Court decision in *Porter v. Nussle*. The court held that relieving the defendants of their procedural waiver of the exhaustion defense was conditioned on defendants' permitting the plaintiff to exhaust late.³⁹⁴ The central point is that whether remedies have been exhausted is ultimately a question of interpretation of the PLRA, a federal statute, and therefore a matter of federal law and not one of rubber-stamping the actions of prison grievance personnel.³⁹⁵

Plaintiffs may also seek to take advantage of the system's own exceptions to its time limits, if any, though it is unclear how likely it is that prison officials will entertain grievances after litigation has been filed and dismissed. The "mitigating circumstances" acknowledged by New York's grievance system include "e.g., attempts to resolve informally by the inmate, etc."³⁹⁶ The regulation formerly specified "referrals back to the IGP from the courts," but that language was removed in the 2003 amendment to the regulation.³⁹⁷ (One court had attempted to refer a case back to the IGP under this section, only to be told by the prison system that it would not hear the case because it was time-barred. During the 14-day filing period, the plaintiff had been rendered unconscious and hospitalized as a result of allegedly deficient medical care. The court then held that administrative remedies were not available for that plaintiff.³⁹⁸) Some decisions, however, have

³⁹⁴ *Rivera v. Goord*, 2003 WL 1700518 at *13 (S.D.N.Y., Mar. 28, 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 at *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").

³⁹⁵ *See Graham v. Perez*, 121 F.Supp.2d 317, 322 and n. 9 (S.D.N.Y. 2000) (holding that if prison officials reject late grievance claiming mitigating circumstances, court must determine for itself whether mitigating circumstances exist).

³⁹⁶ 7 N.Y.C.R.R. § 701.7(a)(1).

³⁹⁷ 7 N.Y.C.R.R. § 701.7(a)(1); *see Rivera v. Goord*, 253 F.Supp.2d 735, 753 n.12 (S.D.N.Y. 2003) (quoting prior version of regulation).

³⁹⁸ *Cruz v. Jordan*, 80 F.Supp.2d 109 (S.D.N.Y. 1999); *see also 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 period for filing a grievance was nonetheless obliged to file a grievance because the deadline was discretionary in "extreme circumstances"; failure to do so was characterized as "deliberate bypass"), *motion to vacate denied*, 2000 WL 1731337 (S.D.N.Y.,

simply directed that grievance officials consider re-filed grievances on their merits.³⁹⁹

F. What Procedures Must Be Exhausted?

The Supreme Court has said that the purpose of the PLRA exhaustion requirement is “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.”⁴⁰⁰ Courts have generally assumed that the PLRA requires exhaustion of administrative remedies *within prison systems*. Thus, the Seventh Circuit has stated that “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*. . . .”⁴⁰¹

The most thorough explication of this point is in the Ninth Circuit’s holding (with which no other circuit has disagreed) that administrative tort claims procedures need not be exhausted, and that nothing in the PLRA’s legislative history showed any intent by Congress to displace the prior understanding to that effect.⁴⁰² 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

Nov. 21, 2000); *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).

³⁹⁹ *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); *Rivera v. Goord*, 253 F.Supp.2d 735, 753-54 (S.D.N.Y. 2003) (dismissing for non-exhaustion, based on change in exhaustion law, only on condition that new grievances be considered, since plaintiff had relied on prior law).

⁴⁰⁰ *Porter v. Nussle*, 534 U.S. 516, 524-25 (2002) (emphasis supplied).

⁴⁰¹ *Massey v. Helman*, 196 F.3d 727, 733-34 (7th Cir. 1999), *cert. denied*, 532 U.S. 1065 (2001) (emphasis supplied); *accord*, *Alexander v. Hawk*, 159 F.3d 1321, 1326 (11th Cir. 1998) (holding that “available” remedies under the PLRA refers to prison administrative remedy programs).

⁴⁰² *Rumbles v. Hill*, 182 F.3d 1064 (9th Cir. 1999), *cert. denied*, 528 U.S. 1074 (2000). One recent district court decision suggests in dicta that tort claims procedures must be exhausted. *William G. v. Pataki*, 2005 WL 1949509 at *6 (S.D.N.Y., Aug. 12, 2005)

indication that it intended prisoners also to exhaust state tort claim procedures.⁴⁰³

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.’”⁴⁰⁴ 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.⁴⁰⁵

One court in dictum has adopted the same reasoning concerning the impartial hearing requirement of the Individuals with Disabilities in Education Act, stating: “In *Porter*, 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.”⁴⁰⁶

This argument is further supported by the fact that the term “administrative remedies” clearly

⁴⁰³ *Id.* at 1069.

⁴⁰⁴ *Id.* at 1069-70, quoting Lacey, 990 F.Supp. 1199, 1206 (E.D.Cal. 1997); accord, Jones v. Courtney, 2005 WL 562719 at *4 (D.Kan., Mar. 7, 2005); Blas v. Endicott, 31 F.Supp.2d 1131, 1132 (E.D.Wis. 1999). *Contra*, William G. v. Pataki, 2005 WL 1949509 at *5 (S.D.N.Y., Aug. 12, 2005).

⁴⁰⁵ 141 Cong. Rec. S7526-7527 (May 25, 1995) (emphasis added); see also Aiello v. Litscher, 104 F.Supp.2d 1068, 1074 (W.D.Wis. 2000) (holding that a prisoner who had exhausted the internal prison grievance system need not also pursue a statutory procedure for seeking a declaratory judgment from a state agency).

⁴⁰⁶ Handberry v. Thompson, 2003 WL 194205 at *11 (S.D.N.Y., Jan. 28, 2003), *aff'd in part, vacated in part, and remanded on other grounds*, 436 F.3d 52 (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. 2006 WL 91911 at *6 n.3.

referred to internal prison remedies in the Civil Rights of Institutionalized Persons Act (CRIPA),⁴⁰⁷ predecessor to the PLRA,⁴⁰⁸ as shown by legislative history⁴⁰⁹ and judicial interpretation.⁴¹⁰ 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

⁴⁰⁷ 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).

⁴⁰⁸ Intent and usage in predecessor statutes is highly relevant in construing contemporary statutes. *See, e.g.*, *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169-83 (1963); *U.S. v. Awadallah*, 349 F.3d 42, 54 (2d Cir. 2003), *cert. denied*, 125 S.Ct. 861 (2005); *Moretti v. C.I.R.*, 77 F.3d 637, 643 (2d Cir. 1996) (relying on judicial interpretation of term in predecessor statute where current statute used that same term).

⁴⁰⁹ *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.”)

⁴¹⁰ *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”).

interpretation was contrary to its current intent.⁴¹¹

Despite the foregoing, the New York State Department of Correctional Services has raised, and then abandoned, the argument that prisoners with complaints under Title II of the Americans with Disabilities Act must exhaust not only the prison grievance system but also the Department of Justice disability complaint procedure. The results 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,"⁴¹² rejecting the argument that that remedy need not be exhausted because it does not result in action but only in findings or advice,⁴¹³ and that it does not even investigate most individual complaints submitted to it.⁴¹⁴ Other courts, however, held that exhaustion of the DOJ remedy was not required.⁴¹⁵ The question became moot as to the Department of Correctional

⁴¹¹ 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 in the case with CRIPA and the PLRA.

⁴¹² *Burgess v. Garvin*, 2003 WL 21983006 at *3 (S.D.N.Y., Aug. 19, 2003), *on reconsideration*, 2004 WL 527053 (S.D.N.Y., March 16, 2004); *accord*, *William G. v. Pataki*, 2005 WL 1949509 at *5-6 (S.D.N.Y., Aug. 12, 2005); *Scott v. Goord*, 2004 WL 2403853 at *7 (S.D.N.Y., Oct. 27, 2004); *Rosario v. N.Y. State Dept. of Correctional Services*, 2003 WL 22429271 *3 (S.D.N.Y., Sept. 24, 2003), *vacated and remanded*, 400 F.3d 108 (2d Cir. 2005) (*per curiam*).

⁴¹³ *Burgess*, 2004 WL 527053 at *2; *Rosario*, 2003 WL 22429271 at *4. Compare *In re Bayside Prison Litigation*, 190 F.Supp.2d 755, 771-72 (D.N.J. 2002) (holding that a process with no authority except to "make recommendations for change" to administrative officials" need not be exhausted because it fails to provide for the "responsive action" envisioned in *Booth*); *Freeman v. Snyder*, 2001 WL 515258 at *7 (D.Del., Apr. 10, 2001) (holding that the "vague, informal process" described by defendants is "hardly a grievance procedure").

⁴¹⁴ *Burgess*, 2004 WL 527053 at *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.

⁴¹⁵ *Degrafinreid v. Ricks*, 2004 WL 2793168 at *14 n.10 (S.D.N.Y., Dec. 6, 2004); *Velo v. State of N.Y.*, 339 F.Supp.2d 505, 519 (S.D.N.Y., Sept. 30, 2004) ("Filing a complaint with the DOJ, an external federal agency, does not allow correctional officers to respond directly to inmates' grievances nor does it allow them to remedy the issues raised in the grievance. Requiring prisoners to grieve with external agencies does not serve the underlying purpose of the exhaustion requirement."); *Singleton v. Perilli*, 2004 WL 74238 at *4 (S.D.N.Y., Jan 16, 2004) (*dictum*); *Shariff v. Artuz*, 2000 WL 1219381 (S.D.N.Y., Aug. 28, 2000); see *Lavista v. Beeler*, 195 F.3d 254, 257 (6th Cir. 1999) (holding that resort to the ADA procedures did not suffice to exhaust, stating: "Congress intended the exhaustion requirement to apply to the *prison's* grievance procedures,

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.⁴¹⁶ I am not aware that it has been addressed, or even raised, in any other jurisdiction.

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.⁴¹⁷

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:

*the individual decisions or dispositions of the following are not grievable: Temporary Release Committee, Central Monitoring Case status, Time Allowance Committee, Family Reunion Program, Media Review, disciplinary proceedings, inmate property claims (of any amount) and records review (Freedom of Information Requests, expunction). However, the policies, rules, and procedures of any of these programs or procedures may be the subject of a grievance.*⁴¹⁸

In such cases, the specialized system, rather than the inapplicable grievance system, must be exhausted.⁴¹⁹ Similarly, one court has held that if a grievance is referred to another complaint or

regardless of what other administrative remedies might also be available.”).

In *Sharif*, the court first addressed the PLRA exhaustion requirement and noted that the plaintiff had exhausted the prison grievance procedure, then rejected the argument that the plaintiff failed to exhaust remedies with respect to his ADA and Rehabilitation Act claims, holding that neither statute requires exhaustion of DOJ remedies. *Id.* at *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.

⁴¹⁶ Compare *Rosario v. Goord*, 400 F.3d 108 (2nd Cir. 2005) (per curiam) (repudiating argument) with *William G. v. Pataki*, 2005 WL 1949509 (S.D.N.Y., Aug. 12, 2005) (accepting argument in action defended by state Division of Parole and Office of Mental Health).

⁴¹⁷ *Burgess v. Garvin*, 2004 WL 527053 at *5 (S.D.N.Y., March 16, 2004).

⁴¹⁸ DOCS Directive 4040 at § III.E (emphasis added). The state regulations say the same thing but do not give the list of non-grievable programs. See N.Y. Comp. Codes R. & Regs. tit. 7, § 701.3.

⁴¹⁹ See *Richardson v. Spurlock*, 260 F.3d 495, 499 (5th Cir. 2001) (holding that filing an “administrative” appeal rather than the required “disciplinary” appeal did not exhaust); *Jenkins v.*

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.⁴²⁰ The *Brown* holding is potentially problematical, since internal affairs and inspector general's offices do not necessarily notify the prisoner when an investigation is completed, and there may be protracted delays in resolution, especially in cases of serious misconduct where there are also criminal investigations or proceedings.

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

Haubert, 179 F.3d 19, 23 n. 1 (2d Cir. 1999) (holding that appeal of disciplinary conviction satisfied the exhaustion requirement); *Beltran v. O'Mara*, 405 F.Supp.2d 140, 150 (D.N.H. 2005) (holding that filing a grievance about classification, rather than the required classification appeal, did not exhaust), *on reconsideration*, 2006 WL 240558 (D.N.H., Jan. 31, 2006); *Lindell v. Casperson*, 360 F.Supp.2d 932, 949 (W.D.Wis. 2005) (holding that filing a grievance, rather than the required non-delivery of mail complaint, did not exhaust); *Wallace v. Burbury*, 2003 WL 21302947 at *3-4 (N.D. Ohio, June 5, 2003) (holding that filing a "general" grievance rather than the required Request for Accommodation of Religious Beliefs did not exhaust); *Mack v. Artuz*, 2002 WL 31845087 at *6 (S.D.N.Y., Dec. 19, 2002) (holding complaint about "Central Monitoring Case" status was exhausted through separate CMC appeal process); *Timley v. Nelson*, 2001 WL 309120 at *1 (D.Kan., Feb. 16, 2001) (holding that a plaintiff with a religious claim who "pursued *some* avenues of administrative relief" but did not follow the Request for Religious Accommodation procedure had not exhausted); *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).

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.

⁴²⁰ *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).

reasonable even if wrong.⁴²¹

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.⁴²²

Numerous courts have held that other forms of complaint besides filing a grievance—most often, writing a letter to the prison superintendent or other highly placed official—will generally not meet the PLRA exhaustion requirement.⁴²³ (That would not be the case, of course, if letters to

⁴²¹ *Giano v. Goord*, 380 F.3d 670, 678-79 (2d Cir. 2004) (noting that a “learned” district judge had adopted the same interpretation); *see also Westefer v. Snyder*, 422 F.3d 570, 580 (7th Cir. 2005) (holding defendants did not establish failure to exhaust available remedies where policies did not “clearly identif[y]” the proper remedy and there was no “clear route” for prisoners to challenge certain decisions); *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).

⁴²² *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. Louisiana 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 vested 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 Freeman v. Snyder*, 2001 WL 515258 at *7 (D.Del., Apr. 10, 2001) (holding that the “vague, informal process described by the defendants is ‘hardly a grievance procedure’”).

⁴²³ *See Panaro v. City of North Las Vegas*, 423 F.3d 949, 953 (9th Cir. 2005) (holding that participation in an internal affairs investigation did not exhaust because it did not provide a remedy for the prisoner, even though the officer was disciplined); *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); *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); *Freeman v. Francis*, 196 F.3d 641, 644 (6th Cir. 1999) (holding that investigations by prison Use of Force Committee and Ohio State Highway Patrol did not substitute for grievance exhaustion even though criminal charges were brought against the officer); *Lavista v. Beeler*, 195 F.3d 254, 257 (6th Cir. 1999) (holding that Americans with Disability Act procedures did not meet PLRA exhaustion requirement); *Townes v. Paule*, ___ F.Supp.2d ___, 2005 WL 3591981 at *5-6 (S.D.Cal., Dec. 13, 2005) (holding filing of “citizen complaint” rather than prison grievance did not exhaust); *Davis v. Farry*, 2005 WL 3336493 at *3 (W.D.Wis., Dec. 7, 2005)

officials are considered grievances under state law.⁴²⁴) In the Second Circuit, if the prisoner's complaint results in a favorable resolution, the prisoner will be deemed to have exhausted by "informal" means and to have met the statutory requirement.⁴²⁵ 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.⁴²⁶ That view is supported

("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."); *Hill v. Robinson*, 2005 WL 3299808 at *3 (W.D.Wis., Dec. 5, 2005) (holding complaint to Federal Bureau of Prisons Inspector General did not exhaust); *Roach v. Bandera County*, 2004 WL 1304952 at *4 (W.D.Tex., June 9, 2004) (holding that independent investigations by Sheriff and FBI did not exhaust); *see Appendix A for additional authority on this point.*

⁴²⁴ *Shaheed-Muhammad v. Dipaolo*, 393 F.Supp.2d 80, 96-97 (D.Mass. 2005).

⁴²⁵ *See nn. 444-445, below.*

⁴²⁶ *Camp v. Brennan*, 219 F.3d 279 (3rd 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 at *7 (E.D.Ky., May 12, 2005) (holding that prisoner who cooperated with authorities and gave audio and video statements had sufficiently exhausted claim that he was gratuitously beaten by an officer who was fired as a result); *Lewis v. Gagne*, 281 F.Supp.2d 429, 434-35 (N.D.N.Y. 2003) (holding that juvenile detainee's mother's complaints to institutional officials and contacts with an attorney, family court, and the state Child Abuse and Maltreatment Register, which were known to the facility director and agency counsel, sufficed to exhaust; "Noting that an investigation into the incident did ensue, it is reasonable that plaintiffs believed that at least one effort they took accomplished the same result that filing through the formal process would have produced."); *O'Connor v. Featherston*, 2003 WL 554752 at *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 at *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 at *11 (S.D.N.Y., July 21, 2000) (holding requirement satisfied where prisoner's informal complaint of rape resulted in Internal Affairs investigation), *report and recommendation adopted in part*, 2001 WL 243535 (S.D.N.Y., Mar. 12, 2001); *see Prendergast v. Janecka*, 2001 WL 793251 at *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.") *Contra*, *Hock v. Thipedeau*, 245 F.Supp.2d 451, 454-55 (D.Conn. 2003) (holding that direct, voluntary cooperation with a prison-initiated investigation does not satisfy the exhaustion requirement), *reconsideration denied*, 2003 WL 21003431 (D.Conn. Apr. 28, 2003).

by the Supreme Court’s statement that Congress in the PLRA “afforded corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case.”⁴²⁷ When prison officials not only had the opportunity to address a complaint, but did so, it is difficult to see why further administrative wheel-spinning should be required *after* the matter has been decided at the highest levels of the agency.

The Second Circuit has partially addressed this issue in *Hemphill v. New York*,⁴²⁸ 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.⁴²⁹

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.”⁴³⁰ Since justification for failure to exhaust does not

In *Lewis v. Gagne*, the court gave great weight to the fact that the facility’s own orientation handbook presented the grievance system as only one of several ways residents could assert their rights, and the facility’s own actions showed that it addressed and investigated problems that were not presented through the grievance system. 281 F.Supp.2d at 434.

⁴²⁷ *Porter v. Nussle*, 534 U.S. at 525.

⁴²⁸ 380 F.3d 680 (2d Cir. 2004).

⁴²⁹ *Hemphill, id.* at 688.

⁴³⁰ *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

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.”⁴³¹

Hemphill also bears on another ongoing dispute in 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 recent 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.⁴³² (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.⁴³³)

This expedited procedure occasioned much controversy. In at least one case, prison authorities took the position that following their own harassment grievance procedure did not

the immediate supervisors of his purported attackers was too fraught with danger.” *Id.*

⁴³¹ *Hemphill, id.* at 690 n.8.

⁴³² 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.

⁴³³ 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 at *2 (S.D.N.Y., Apr. 26, 2004); Rivera v. Goord, 2003 WL 1700518 at *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 at *1.

constitute exhaustion.⁴³⁴ District court decisions to date rejected that view.⁴³⁵ 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.⁴³⁶ 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.⁴³⁷

⁴³⁴ In *Houze v. Segarra*, 217 F.Supp.2d 394 (S.D.N.Y. 2002), a DOCS official submitted an affidavit stating that harassment complaints were not filed as grievances, given grievance numbers, or otherwise processed as grievances, and could not be appealed to the Central Office Review Committee. "Such a matter becomes a grievance, and therefore is appealable to CORC, only if the inmate files a grievance complaint in accordance with [the ordinary grievance procedures]." *Id.* at 398. These claims appear to directly contradict the rules governing the harassment grievance procedure set forth in DOCS' own policy and described in *Morris v. Eversley*, *supra*, as well as testimony from the DOCS grievance director in other proceedings. *Hemphill v. New York*, 380 F.3d 680, 690 n.7 (2d Cir. 2004); *see also* *Larry v. Byno*, 2003 WL 1797843 (N.D.N.Y., Apr. 4, 2003) (noting that letter to Superintendent was treated as a harassment grievance, assigned a grievance number, and investigated; claim dismissed because the prisoner did not appeal the failure to render a decision).

⁴³⁵ *Morris v. Eversley*, 205 F.Supp.2d at 240-41; *Perez v. Blot*, 195 F.Supp.2d 539, 544-46 (S.D.N.Y. 2002); *Gadson v. Goord*, 2002 WL 982393 at *3 (N.D.N.Y., May 10, 2002).

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

⁴³⁶ *Houze v. Segarra*, 217 F.Supp.2d at 395-96; *McNair v. Sgt. Jones*, 2002 WL 31082948 at *7 n.3 (S.D.N.Y., Sept. 18, 2002); *Byas v. State of New York*, 2002 WL 1586963 at *2 (S.D.N.Y., July 17, 2002). *Contra*, *Rivera v. Goord*, 2003 WL 1700518 at *12 (S.D.N.Y., Mar. 28, 2003) ("Although Rivera did not comply with the technical requirements of the expedited procedure [by writing the Superintendent], this failure does not automatically amount to a failure to exhaust.")

Some decisions simply assert that letters to the Superintendent do not exhaust, without discussing the harassment grievance procedure. *See, e.g.*, *Harris v. Totten*, 244 F.Supp.2d 229, 233 (S.D.N.Y. 2003).

⁴³⁷ *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

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.”⁴³⁸ In August 2003, while *Hemphill* and its companion cases were being briefed, the Department of Correctional Services amended its grievance rules to provide, as the prior version had not, that a prisoner who files a harassment grievance must, in addition, file a regular grievance. The amendment allegedly “clarified” the regulation, which the plaintiff argued demonstrated the lack of clarity of the previous version. The court held his argument about lack of clarity “not manifestly meritless” and remanded for a determination whether the plaintiff was justified on that ground in not following normal grievance procedures.⁴³⁹ 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.

The PLRA does not require exhaustion of judicial remedies, including appeals from the agency to a court.⁴⁴⁰ Other legal rules unrelated to the PLRA may require exhaustion of judicial remedies in certain cases.⁴⁴¹

The PLRA generally does not require exhaustion of notice of claim procedures in tort claims systems.⁴⁴² However, if a particular grievance system refers prisoners to a tort claims system,

that the procedural defect is a failure to exhaust. *See* n. 316, 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.

⁴³⁸ *Hemphill*, 380 F.3d at 689.

⁴³⁹ *Hemphill*, *id.* at 690. Subsequently, in *Stephenson v. Dunford*, 2005 WL 1692703 at *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.

⁴⁴⁰ *Jenkins v. Morton*, 148 F.3d 257, 259-60 (3d Cir. 1998); *Mullins v. Smith*, 14 F.Supp.2d 1009, 1012 (E.D.Mich. 1998). 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).

⁴⁴¹ *See, e.g., Edwards v. Balisok*, 520 U.S. 641 (1997).

⁴⁴² *Rumbles v. Hill*, 182 F.3d 1064, 1069-70 (9th Cir. 1999), *cert. denied*, 528 U.S. 1074 (2000); *Garrett v. Hawk*, 127 F.3d 1263, 1266 (10th Cir. 1998) (holding that Federal Tort Claims

exhaustion of that procedure and not the grievance procedure may be required.⁴⁴³

Another variation of the “which remedy” problem involves prisoners who don’t file a grievance because they get their problem straightened out without needing to do so. The Second Circuit has 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;⁴⁴⁴ in effect, informal resolution had been adopted as part of the grievance system.

Act is not “available” to prisoner pursuing *Bivens* claim against individual prison staff); *Gaughan v. U.S. Bureau of Prisons*, 2003 WL 1626674 at *2 (N.D.Ill., Mar. 25, 2003) (stating that Federal Tort Claims Act administrative claim requirement is intended to give the government agency notice so it can investigate and prepare for settlement negotiations; the PLRA requirement is intended to curtail suits by giving prison officials an opportunity to solve the problem first); *Blas v. Endicott*, 31 F.Supp.2d 1131, 1132-34 (E.D.Wis. 1999).

⁴⁴³ *Alvarez v. U.S.*, 2000 WL 679009 (S.D.N.Y., May 24, 2000) (noting that federal grievance procedures exclude tort claims and refer prisoners to the Federal Tort Claims Act administrative claim procedure). *Contra*, *Gaughan v. U.S. Bureau of Prisons*, 2003 WL 1626674 at *2 (N.D.Ill., Mar. 25, 2003).

The court in *Gaughan* does not seem to have considered the rationale of *Alvarez* with respect to the notice given prisoners in the regulations. *Gaughan* is unusual. Most cases involving FTCA claims hold or assume, consistently with *Alvarez*, that those claims require only the exhaustion of the FTCA claim procedure and not the Administrative Remedy Procedure, without much discussion. *See Hartman v. Holder*, 2005 WL 2002455 at *6-8 (E.D.N.Y., Aug. 21, 2005) (allowing FTCA claim to go forward notwithstanding failure to exhaust ARP and dismissal of *Bivens* claims; rejecting argument that FTCA administrative claim exhausted *Bivens* claims, or that prisoner could have reasonably believed it did); *Taveras v. Hasty*, 2005 WL 1594330 at *2-3 (E.D.N.Y., July 7, 2005) (holding prisoner who filed tort claim but not ARP complaint exhausted his FTCA claim but not his *Bivens* claim); *Williams v. U.S.*, 2005 WL 44533 at *1 (D.Kan., Jan. 7, 2005) (“With respect to his FTCA claims, plaintiff must file an administrative tort claim prior to filing suit. . . . With respect to his *Bivens* claims, plaintiff must first complete the administrative grievance process.”); *Bolton v. U.S.*, 347 F.Supp.2d 1218, 1221 (N.D.Fla. 2004) (holding prisoner seeking damages properly followed the “appropriate statutorily-mandated procedure” by filing an FTCA claim); *Baez v. Bureau of Prisons, Warden*, 2004 WL 1777583 at *7 (S.D.N.Y. May 11, 2004) (assuming that FTCA requires only submission of tort claim); *Baez v. Parks*, 2004 WL 1052779 at *7 (S.D.N.Y., May 11, 2004) (same); *Williams v. U.S.*, 2004 WL 906221 (S.D.N.Y., Apr. 28, 2004) (treating FTCA exhaustion as requiring tort claim and *Bivens* exhaustion as requiring Administrative Remedy Procedure filing); *Hylton v. Federal Bureau of Prisons*, 2002 WL 720605 at *2 (E.D.N.Y., March 11, 2002) (holding that the plaintiff could exhaust for Federal Tort Claims Act purposes without exhausting under the PLRA as required for a *Bivens* claim).

⁴⁴⁴ *Marvin v. Goord*, 255 F.3d 40, 43 (2d Cir. 2001); *accord*, *Branch v. Brown*, 2003 WL 21730709 at *10 (S.D.N.Y., July 25, 2003), *judgment granted on other grounds*, 2003 WL 22439780

However, courts have held that a prisoner must succeed in the informal process in order to have exhausted through it.⁴⁴⁵

G. “Available” Remedies

The statute requires exhaustion of remedies that are “available,” and under *Booth v. Churner* a remedy is presumptively available unless it “lacks authority to provide *any* relief or to take *any*

(S.D.N.Y., Oct. 28, 2003); *Fogell v. Ryan*, 2003 WL 21756096 at *5 (D.Del., July 30, 2003); *Stevens v. Goord*, 2003 WL 21396665 at *4 (S.D.N.Y., June 16, 2003), *adhered to on reargument*, 2003 WL 22052978 (S.D.N.Y., Sept. 3, 2003); *McGrath v. Johnson*, 67 F.Supp.2d 499, 510 (E.D.Pa. 1999), *aff’d*, 35 Fed.Appx. 357, 2002 WL 1271713 (3rd Cir.2002).

In *Braham v. Clancy*, 425 F.3d 177(2d Cir. 2005), 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. 425 F.3d 183. However, the court also held that the plaintiff’s informal requests might have given prison officials sufficient notice of the problems “‘to allow them to take appropriate responsive measures,’ thereby satisfying the exhaustion of administrative remedies requirement,” *id.*, *citing* *Johnson v. Testman*, 380 F.3d 691, 697 (2d Cir. 2004), and that the prisoner might reasonably have concluded that receiving the cell change meant he had prevailed and need not proceed further administratively. 425 F.3d 184. *See* *Allah v. Greiner*, 2006 WL 357824 at *5 (S.D.N.Y., Feb. 15, 2006) (stating that plaintiff’s allegations in his disciplinary appeal were likely sufficient to place officials on notice so they could address his complaint; *citing* *Braham*).

⁴⁴⁵ *See* *Thomas v. Cassleberry*, 315 F.Supp.2d 301, 304 (W.D.N.Y. 2004) (holding a complaint to the Inspector General exhausts informally only if the resolution is favorable); *Curry v. Fischer*, 2004 WL 766433 at *6 (S.D.N.Y., Apr. 12, 2004), *dismissed on other grounds*, 2004 WL 2368013 (S.D.N.Y., Oct. 22, 2004); *Rivera v. Goord*, 2003 WL 1700518 at *11 (S.D.N.Y., Mar. 28, 2003) (holding that a prisoner who initiated an investigation of his claim, but did not show that he obtained a favorable resolution informally or that he sought administrative review of an unfavorable resolution, had not exhausted informally). *But see* *Gibson v. Brooks*, 335 F.Supp.2d 325, 333 (D.Conn. 2004) (holding that a prisoner who confronted one of the defendants and received an apology had informally exhausted).

In *Stephenson v. Dunford*, 320 F.Supp.2d 44, 51 (W.D.N.Y. 2004), *vacated and remanded*, 2005 WL 1692703 (2d Cir., July 13, 2005), the district court held that a prisoner who did not succeed in “informal” exhaustion and did not appeal failed to exhaust. The State agreed that the case must be remanded to determine whether special circumstances such as the prisoner’s reasonable belief justified the prisoner’s failure to follow the rules. That case, however, did not actually involve “informal” exhaustion, but the “expedited procedure” explicitly provided for in the grievance rules.

action whatsoever in response to a complaint.”⁴⁴⁶ No particular structure or degree of formality is required of a grievance system for exhaustion purposes.⁴⁴⁷ However, remedies may be deemed unavailable if there is no “clear route” for challenging the conduct in question.⁴⁴⁸

The Second Circuit has suggested that in considering whether an unexhausted claim should nevertheless be allowed to go forward, any issue of availability of remedies should be considered

⁴⁴⁶ 532 U.S. at 736 (emphasis supplied); *accord*, *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.”) In *Braham v. Clancy*, 425 F.3d 177 (2d Cir. 2005), the court held that a prisoner who sought a change of cellmate to avoid being assaulted, was assaulted after no action was taken, and was moved after the assault still had an available remedy via the grievance system; even though the action he had been seeking had been accomplished, the prison system could still have provided other relief, such as changing policies and procedures or disciplining staff. However, the court also held that receiving the cell change could be a “special circumstance” that might lead an uncounselled prisoner reasonably to conclude that he had satisfied the exhaustion requirement. *See also* *Allen v. Hickman*, ___ F.Supp.2d ___, 2005 WL 3610666 at *4 (N.D.Cal., Dec. 15, 2005) (dismissing 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).

⁴⁴⁷ *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. Louisiana Dept. of Corrections*, 315 F.3d 529, 531-32 (5th Cir. 2002) (holding a grievance system that had been ruled 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).

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*. It further held that a process that prison officials assert is optional and not mandatory and is not intended to modify or restrict access to the judicial process need not be exhausted. In *re Bayside Prison Litigation*, 190 F.Supp.2d 755, 771-72 (D.N.J. 2002) (ruling on prison complaint and Ombudsman procedures). 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 at *1, *3 (E.D.Ky., June 22, 2005).

⁴⁴⁸ *Westefer v. Snyder*, 422 F.3d 570, 580 (7th Cir. 2005) (finding record “hopelessly unclear” whether particular decisions could be challenged through the grievance process).

first.⁴⁴⁹ 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.⁴⁵⁰

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.⁴⁵¹ It is common for some issues not to be “grievable” in a particular grievance system because the system explicitly excludes them from coverage,⁴⁵² or because the informal practices of staff have the same effect.⁴⁵³

⁴⁴⁹ *Abney v. McGinnis*, 380 F.3d 663, 667 (2d Cir. 2004).

⁴⁵⁰ *See* nn. 308-18 and § IVG.3, above.

⁴⁵¹ *Marvin v. Goord*, 255 F.3d 40, 43 (2d Cir. 2001); *accord*, *Rahim v. Sheahan*, 2001 WL 1263493 at *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.”)

⁴⁵² *See Figel v. Bochard*, 89 Fed.Appx. 970, 971, 2004 WL 326231 at *1 (6th Cir. 2004) (unpublished) (noting that Michigan system makes non-grievable issues that “involve a significant number of prisoners”); *Clark v. Mason*, 2005 WL 1189577 at *5 (W.D.Wash., May 19, 2005) (listing non-grievable issues in Washington prison system); *Cordero v. Bureau of Prisons*, 2005 WL 1205808 at *1 (M.D.Pa., Apr. 27, 2005) (noting that Privacy Act and Freedom of Information Act matters are excluded from the federal Administrative Remedy Program); *Richards v. Massachusetts Dept. of Correction*, 2005 WL 283203 at *1 (D.Mass., Feb. 7, 2005) (noting that Massachusetts system allows grievances about “matters concerning access to medical or mental health care” but not “medical or clinical decisions related to an inmate's physical or mental condition”); *Murphy v. Martin*, 2004 WL 1658489 at *3 (E.D.Mich., May 28, 2004) (noting that Michigan system makes non-grievable “the content of policy or procedure”); *see Appendix A for additional authority on this point.*

⁴⁵³ *See Kendall v. Kittles*, 2004 WL 1752818 at *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); *Scott v. Gardner*, 287 F.Supp.2d 477, 491 (S.D.N.Y.2003) (holding that allegations that grievance staff refused to process and file grievances about occurrences at other prisons, claiming they were not grievable, sufficiently alleged lack of an available remedy), *on reconsideration*, 344 F.Supp.2d 421 (S.D.N.Y. 2004) *and* 2005 WL 984117 (S.D.N.Y., Apr. 28, 2005); *Casanova v. Dubois*, 2002 WL 1613715 at *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*

For example, the New York City jail grievance directive lists the following “non-grievable issues”:

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.⁴⁵⁴

Unfortunately some district courts have failed to examine the actual City policy and have dismissed non-grievable claims for failure to grieve, an error recently condemned by the Second

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).

In *Davis v. Frazier*, 1999 WL 395414 at *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 at *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).

⁴⁵⁴ DOC Directive 3375R, <http://www.nyc.gov/html/doc/pdf/3375R.pdf>, at § II.B; *see Rizzuto v. City of New York*, 2003 WL 1212758 at *4 (S.D.N.Y., Mar. 17, 2003) (noting that claims of assault, verbal harassment, or matters under Inspector General investigation are non-grievable); *Handberry v. Thompson*, 2003 WL 194205 at *8-10 (S.D.N.Y., Jan. 28, 2003) (holding issues concerning education in jail non-grievable based on defendants’ prior statements that they were non-grievable because not under the sole control of the Department of Correction), *aff’d in part, vacated in part, and remanded on other grounds*, 436 F.3d 52 (2d Cir. 2006) (noting failure 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 at *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).

Circuit.⁴⁵⁵ Several other courts have dismissed New York City cases while erroneously citing the New York State prison grievance procedure.⁴⁵⁶

As to New York City medical care claims, matters remain in some confusion because of the City's inconsistent positions. In one recent case, the City conceded that claims against employees of the jails' private medical contractor were "outside the jurisdiction of the Department of Correction" and hence non-grievable, since jail health care is committed to the City Department of Health rather than Correction. However, it claimed without elaboration that there was a separate Health and Hospitals Corporation complaint procedure that prisoners should exhaust, an assertion not yet tested on remand.⁴⁵⁷ In another recent case, it simply asserted that medical care claims are grievable, without addressing the "outside the jurisdiction" language in the grievance directive.⁴⁵⁸ 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."⁴⁵⁹

The fact that grievance systems may vary in the issues for which they provide redress underscores the importance of the Second Circuit's holding that courts must "establish the availability of an administrative remedy from a legally sufficient source."⁴⁶⁰ Courts should require

⁴⁵⁵ See *Mojias v. Johnson*, 351 F.3d 606, 608-10 (2d Cir. 2003) (reversing dismissal of assault claim for non-exhaustion in a system that does not hear assault claims); see also *Timmons v. Pereiro*, 88 Fed.Appx. 447, 2004 WL 322702 at *1 (2d Cir. 2004) (unpublished) (same).

⁴⁵⁶ See *Goldenberg v. St. Barnabas Hosp.*, 2005 WL 426701 at *3 n.5 (S.D.N.Y., Feb. 23, 2005); *Kearsey v. Williams*, 2002 WL 1268014 (S.D.N.Y., June 6, 2002); *John v. N.Y.C. Dept. of Corrections*, 183 F.Supp.2d 619, 624-25 (S.D.N.Y. 2002); *Harris v. N.Y.C. Dept. of Corrections*, 2001 WL 845448 at *2-3 (S.D.N.Y., July 25, 2001). A recent decision makes the same error in a case arising at another county jail. *Ruggiero v. County of Orange*, 386 F.Supp.2d 434, 436 (S.D.N.Y. 2005).

⁴⁵⁷ *Timmons v. Pereiro*, 88 Fed.Appx. 447, 448, 2004 WL 322702 at *2 (2d Cir. 2004) (unpublished).

⁴⁵⁸ *Oates v. City of New York*, 2004 WL 1752832 at *3 (S.D.N.Y., Aug. 4, 2004) (noting City's inconsistent positions). In *Leacock v. New York City Health Hosp. Corp.*, 2005 WL 1027152 (S.D.N.Y. May 4, 2005), adopted, 2005 WL 1639329 (S.D.N.Y., July 12, 2005), the City initially sought dismissal for non-exhaustion of the grievance process in a suit against medical staff, then acknowledged (citing *Timmons*) that that remedy was inapplicable to such claims.

⁴⁵⁹ *Kendall v. Kittles*, 2004 WL 1752818 at *2 (S.D.N.Y., Aug. 4, 2004).

⁴⁶⁰ *Snider v. Melindez*, 199 F.3d 108, 114 (2d Cir. 1999); accord, *Rahim v. Sheahan*, 2001 WL 1263493 at *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

substantiation that an administrative procedure in fact affords relief for a particular type of complaint before dismissing a prisoner's claim for non-exhaustion. In some cases the face of the grievance policy may suffice. In others, some further demonstration, by affidavit from grievance personnel or by exemplary grievances and their resolutions, may be necessary, as when the grievance policy is not explicit, or when there is an allegation that the actual administration of the grievance system diverges from the written policy.⁴⁶¹ If prisoners cannot tell what if any remedy is available for their problems, they cannot be held responsible for exhausting.⁴⁶²

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.⁴⁶³ 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*.⁴⁶⁴

specific] complaints—action, that is, other than saying, “Sorry, we can't do anything about it.”)

⁴⁶¹ See n. 453, above.

⁴⁶² *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.

⁴⁶³ See § IV.F, nn. 418-421, 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. 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).

⁴⁶⁴ See *Stevens v. Goord*, 2003 WL 21396665 at *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*, 436 F.3d 52 (2d Cir. 2006). The *Handberry* appeals court did not reach that issue. 436 F.3d at 59.

In *Arsberry v. Illinois*, 244 F.3d 558 (7th Cir.), *cert. denied*, 534 U.S. 1062 (7th Cir. 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.

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.⁴⁶⁵ Interestingly, courts have only begun to acknowledge the question whether administrative remedies are “available” to prisoners who may lack the capacity to use them, by reason of mental illness or developmental disability,⁴⁶⁶ impaired literacy or lack of education,⁴⁶⁷

⁴⁶⁵ *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”). Compare *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).

In *Goldenberg v. St. Barnabas Hosp.*, 2005 WL 426701 at *5 (S.D.N.Y., Feb. 23, 2005), the court held that a prisoner who said he was physically and mentally incapable of filing a grievance after the challenged conduct failed to explain why he didn’t exhaust later. One answer is that by then his grievance would likely have been time-barred.

⁴⁶⁶ See *Ullrich v. Idaho*, 2006 WL 288384 at *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 at *3 (D.N.H., Nov. 8, 2005) (acknowledging that evidence of mental illness might support argument that late grievance should be deemed effective). But see *Williams v. Kennedy*, 2006 WL 18314 at *2 (S.D.Tex., Jan. 4, 2006) (dismissing despite prisoner’s claim he didn’t know of the exhaustion requirement and a prior brain injury made it difficult for him to remember things); *Bakker v. Kuhnes*, 2004 WL 1092287 (N.D.Iowa, May 14, 2004) (rejecting plaintiff’s argument that his medication doses were so high they “prohibited him from being of sound mind to draft a grievance”; noting that he failed to submit a grievance after his medication was corrected, and he filed other grievances during the relevant period).

⁴⁶⁷ In the unreported decision in *Davis v. Corrections Corp. of America*, 2005 WL 880892 (10th Cir., Apr. 18, 2005) (unpublished), the court rejected the argument that the plaintiff’s educational deficiencies (he said he was a “slow learner and thinker” still working to obtain a G.E.D.) should excuse his failure to exhaust, noting that his papers “did not describe insurmountable barriers to his filing of grievances and did not show that prison officials had effectively foreclosed his efforts.” *Id.* at *1; see also *Georgacarakos v. Watts*, 2005 WL 1984451 (10th Cir., Aug. 18, 2005) (unpublished) (ignoring litigant’s plea to appoint counsel if his exhaustion presentation was inadequate, in light of his lack of “means and sophistication”).

language barrier,⁴⁶⁸ or youth.⁴⁶⁹

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.⁴⁷⁰ However, transfer or absence will not automatically excuse exhaustion; courts have

⁴⁶⁸ See *Gonzalez v. Lantz*, 2005 WL 1711968 at *3 (D.Conn., July 20, 2005) (declining to dismiss for non-exhaustion in view of allegations that plaintiff could not properly exhaust because he did not speak or understand English and did not have a copy of the rules in Spanish).

⁴⁶⁹ 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 at *4 (6th Cir., Mar. 23, 2004) (unpublished); see also *Minix v. Pazera*, 2005 WL 1799538 at *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.

⁴⁷⁰ *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); *Lofton v. Sheahan*, 2004 WL 2032100 at *2 (N.D.Ill., Aug. 31, 2004) (holding remedies were likely unavailable where the prisoner was transferred two days after his medical problem appeared); *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 at *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 at *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 at *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

held exhaustion required if the grievance system makes provision for grievances to be filed and processed under such circumstances.⁴⁷¹ 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,⁴⁷² rather than “establish[ing its] availability . . . from a legally sufficient source.”⁴⁷³ Thus, New York City has represented to the federal courts that its grievance system cannot be used by persons out of City custody,⁴⁷⁴ but in at least one case a federal court has simply declared without support that the

frequently he had never had time to exhaust).

⁴⁷¹ *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 at *3 (S.D.N.Y., June 13, 2003); *Timmons v. Pereiro*, 2003 WL 179769 at *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).

⁴⁷² *See Paulino v. Amicucci*, Warden Westchester County Jail, 2003 WL 174303 (S.D.N.Y., Jan. 27, 2003) (holding that transfer soon after the incident “does not relieve plaintiff of the obligation to exhaust his administrative remedies in the facility where the incident occurred”); *Rodriguez v. Senkowski*, 103 F.Supp.2d 131, 134 (N.D.N.Y. 2000) (holding that transferred inmate was obliged to exhaust about incident at prior facility); *see also Mobley v. O’Gara*, 2006 WL 197185 at *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).

In one recent decision, the court dismissed for non-exhaustion because the plaintiff's grievance had been rejected as untimely as a result of his having been out of the prison when the decision he had to appeal was issued. The court said that “being moved from one facility to another is not an uncommon aspect of prison life. This circumstance does not by itself automatically toll applicable regulatory filing deadlines, nor relieve the inmate of his obligation to keep informed of the status of any administrative proceeding he may have pending prior to transfer and to make diligent efforts to protect and preserve his rights from the new location to which he is moved or from the original facility promptly upon his return there.” *Long v. Lafko*, 254 F.Supp.2d 444, 448 (S.D.N.Y. 2003). 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.

⁴⁷³ *Snider v. Melindez*, 199 F.3d at 114.

⁴⁷⁴ *Burns v. Moore*, 2002 WL 91607 at *6 (S.D.N.Y., Jan. 24, 2002).

prisoner should have exhausted by mail.⁴⁷⁵

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 and complaints.⁴⁷⁶ The Second Circuit, among others,⁴⁷⁷ has held that threats

⁴⁷⁵ *Thomas v. Henry*, 2002 WL 922388 at *2 (S.D.N.Y., May 7, 2002). This decision appears to have been overruled by a more recent decision, which stated: “As long as [the prisoner] was *within the custody of the agency against which he had grievances, the NYCDOC*, he was required to use available grievance procedures.” *Berry v. Kerik*, 366 F.3d 85, 88 (2d Cir. 2004) (emphasis supplied). The court added: “We have no occasion to consider the exhaustion requirement in situations where only a brief interval elapses between the episode giving rise to the prisoner’s complaint and the prisoner’s transfer to the custody of another jurisdiction.” *Id.* at n.3.

⁴⁷⁶ *See, e.g., Dannenberg v. Valadez*, 338 F.3d 1070, 1071-72 (9th Cir. 2003) (noting jury verdict for plaintiff on claim of retaliation for assisting another prisoner with litigation); *Walker v. Bain*, 257 F.3d 660, 663-64 (6th Cir. 2001) (noting jury verdict for plaintiff whose legal papers were confiscated in retaliation for filing grievances), *cert. denied*, 535 U.S. 1095 (2002); *Gomez v. Vernon*, 255 F.3d 1118 (9th Cir.) (affirming injunction protecting prisoners who were the subject of retaliation for filing grievances and for litigation), *cert. denied*, 534 U.S. 1066 (2001); *Trobaugh v. Hall*, 176 F.3d 1087 (8th Cir. 1999) (directing award of compensatory damages to prisoner placed in isolation for filing grievances); *Hines v. Gomez*, 108 F.3d 265 (9th Cir. 1997) (affirming jury verdict for plaintiff subjected to retaliation for filing grievances), *cert. denied*, 524 U.S. 936 (1998); *Cassels v. Stalder*, 342 F.Supp.2d 555, 564-67 (M.D.La. 2004) (striking down disciplinary conviction for “spreading rumors” of prisoner whose mother had publicized his medical care complaint on the Internet); *Atkinson v. Way*, 2004 WL 1631377 (D.Del., July 19, 2004) (upholding jury verdict for plaintiff subjected to retaliation for filing lawsuit); *Tate v. Dragovich*, 2003 WL 21978141 (E.D.Pa., Aug. 14, 2003) (upholding jury verdict against prison official who retaliated against plaintiff for filing grievances); *Hunter v. Heath*, 95 F.Supp.2d 1140 (D.Or. 2000) (noting prisoner’s acknowledged firing from legal assistant job for sending “kyte” (officially sanctioned informal complaint) to the Superintendent of Security concerning the confiscation of a prisoner’s legal papers), *rev’d on other grounds*, 26 Fed.Appx. 754, 2002 WL 112564 (9th Cir. 2002); *Maurer v. Patterson*, 197 F.R.D. 244 (S.D.N.Y. 2000) (upholding jury verdict for plaintiff who was subjected to retaliatory disciplinary charge for complaining about operation of grievance program); *Gaston v. Coughlin*, 81 F.Supp.2d 381 (N.D.N.Y. 1999) (awarding damages for trumped-up disciplinary charge made in retaliation for prisoner’s complaining about state law violations in mess hall work hours), *on reconsideration*, 102 F.Supp.2d 81 (N.D.N.Y. 2000); *Alnutt v. Cleary*, 27 F.Supp.2d 395, 397-98 (W.D.N.Y. 1998) (noting jury verdict for plaintiff who was subject to verbal harassment, assault, and false disciplinary charges in retaliation for his work as an Inmate Grievance Resolution Committee representative).

⁴⁷⁷ *See Ealey v. Schriro*, 208 F.3d 217, 2000 WL 235048 at *1 (8th Cir., Mar. 2, 2000) (unpublished) (allegation that authorities threatened prisoner with retaliation “may” support claim

or assaults directed at preventing prisoners from complaining may make remedies unavailable in fact, even if they are nominally available. The governing standard is the same as that applied to allegations of retaliation for First Amendment-protected activity: “would ‘a similarly situated individual of ordinary firmness’ have deemed [the remedy] available.”⁴⁷⁸

Remedies may be made unavailable by other forms of obstruction by prison staff or their representatives, purposeful⁴⁷⁹ or otherwise,⁴⁸⁰ though courts are unlikely to credit vague or

remedies are unavailable), *cert. denied*, 531 U.S. 901 (2000); *Osborne v. Coleman*, 2002 WL 32818913 at *4 (E.D.Va. Sept. 9, 2002) (holding that an allegation that the plaintiff was threatened to dissuade him from pursuing grievances created a factual issue barring summary judgment as to failure to exhaust). *But see Patterson v. Goord*, 2002 WL 31640585 at *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).

The Sixth Circuit, which requires plaintiffs to plead exhaustion, has recently declined to decide whether fear of retaliation can excuse exhaustion, holding that the plaintiff’s failure to “describe with specificity” the factual basis for his fear required dismissal of his claim. *Boyd v. Corrections Corporation of America*, 380 F.3d 989, 998 (6th Cir. 2004), *cert. denied*, 125 S.Ct. 1639 (2005); *see Broom v. Engler*, 2005 WL 3454657 at *3 (W.D.Mich., Dec 16, 2005) (stating, where plaintiff recounted threats he received, “[t]he PLRA does not excuse exhaustion for a prisoner . . . who is afraid to complain”); *Umstead v. McKee*, 2005 WL 1189605 at *2 (W.D.Mich. May 19, 2005) (stating “it is highly questionable whether threats of retaliation could in any circumstances excuse the failure to exhaust administrative remedies”).

⁴⁷⁸ *Hemphill v. New York*, 380 F.3d 680, 688 (2d Cir. 2004); *accord*, *Holiday v. Giusto*, 2005 WL 3244329 at *2-3 (D.Or., Nov. 30, 2005) (adopting *Hemphill* analysis); *McCullough v. Burroughs*, 2005 WL 3164248 at *4 (E.D.N.Y., Nov. 29, 2005) (applying *Hemphill*; holding that a prior instance of assault for filing a grievance could make the grievance process unavailable for purposes of the current case). *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.” *Id.* 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. *See Ortiz v. Skinner*, 2004 WL 2091994 at *5 (W.D.N.Y., Sept. 16, 2004) (holding that allegations of threats designed to deter grievances might constitute “special circumstances” justifying letters to Superintendent rather than formal grievances).

⁴⁷⁹ *Dole v. Chandler*, ___ F.3d ___, 2006 WL 435418 at *4, 7 (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”; prisoner whose properly filed grievance simply vanished, and who received no instructions what to do about it, did “all that was reasonable to exhaust”); *Howard v. Hill*, 2005 WL 3105832 at *1 (9th Cir., Nov 21, 2005)

conclusory claims of obstruction.⁴⁸¹ Numerous decisions hold that the failure or refusal to provide

(unpublished) (holding that a prisoner who had been told he would not receive responses to his grievances had no remedy available); *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). . .”); *Smith v. Briley*, 2005 WL 2007230 at *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); *Martin v. Sizemore*, 2005 WL 1491210 at *1 (E.D.Ky., June 22, 2005) (holding allegation that “[t]here is no grievance committee here, your grievances are simply turned over to the person you file on and you get threatened” may excuse non-exhaustion); *Rollins v. Magnusson*, 2004 WL 3007090 at *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); *see Appendix A for additional authority on this point*; *see 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).

⁴⁸⁰ *Frost v. McCaughtry*, 215 F.3d 1329, 2000 WL 767841 at *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); *Warren v. Purcell*, 2004 WL 1970642 at *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); *Williams v. Hagen*, 2005 WL 1204324 at *2 (D.Neb., May 11, 2005) (declining to dismiss in light of plaintiff’s allegation of “total disarray . . . with regard to the grievance process”); *Labounty v. Johnson*, 253 F.Supp.2d 496, 504-06 (W.D.N.Y. 2003) (holding that prisoner’s factually supported claim that his grievance was consolidated with another prisoner’s, and the decision did not mention the issue he was concerned about, presented a factual issue whether it was “reasonable for plaintiff to be confused under such circumstances”). In *Ouellette v. Maine State Prison*, 2006 WL 173639 at *3-4 (D.Me., Jan. 23, 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.

⁴⁸¹ That is particularly true under the rigorous pleading standards of the Sixth Circuit, where district courts have held that allegations of obstruction of grievance efforts or of the prisoner’s ability to demonstrate exhaustion must be pled with the same specificity as exhaustion itself. *See, e.g., Smiley v. Smith*, 2005 WL 2417070 at *3-5 (E.D.Mich., Sept. 30, 2005).

necessary forms makes the remedy unavailable or otherwise excuses failure to exhaust.⁴⁸² A remedy may be deemed unavailable if prisoners are misinformed about its operation or availability.⁴⁸³ Thus,

⁴⁸² 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); Smith v. Briley, 2005 WL 2007230 at *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 at *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 at *1 (W.D.Wis., May 18, 2004); Arreola v. Choudry, 2004 WL 868374 at *3 (N.D.Ill., Apr. 22, 2004) (same); Kendall v. Kittles, 2003 WL 22127135 at *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).

⁴⁸³ 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 informing 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); 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 at *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 at *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); *see Appendix A for additional authority on this point. But 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

a number of decisions have refused to dismiss for non-exhaustion where prisoners had relied on prison personnel's representations that an issue was non-grievable.⁴⁸⁴ The failure to inform prisoners of remedies' existence, or to make clear what remedy is applicable, may make remedies unavailable.⁴⁸⁵ However, prisoners' ignorance of the remedy does not excuse them from using it if

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); *Mendez v. Herring*, 2005 WL 3273555 at *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); *U.S. v. Ali*, 396 F.Supp.2d 703, 707 (E.D.Va. 2005) (holding that a prisoner who received a response that "[a]s these issues are addressed by your attys [sic] and the government you will be informed" and did not appeal failed to exhaust); *Thomas v. New York State Dep't of Correctional Services*, 2003 WL 22671540 at *3-4 (S.D.N.Y., Nov. 10, 2003) (dismissing case where prison staff told the prisoner a grievance was not necessary; this was "bad advice, not prevention or obstruction," and the prisoner did not make sufficient efforts to exhaust).

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." *But see* *Trevino v. Whitten*, 2005 WL 2655741 at *3 (E.D.Cal., Oct. 17, 2005) (holding that an allegation of interference with the grievance process does not give rise to a cognizable access to courts claim until and unless the plaintiff suffers actual injury from dismissal for non-exhaustion), *report and recommendation adopted*, 2005 WL 3284167 (E.D.Cal., Nov. 29, 2005).

⁴⁸⁴ *Kounelis v. Sherrer*, 2005 WL 2175442 at *7-8 (D.N.J., Sept. 6, 2005) (declining to dismiss for not appealing a grievance where prisoner was told he could not file a grievance because the issue belonged in the disciplinary process or in court); *Martin v. Gold*, 2005 WL 1862116 at *8 (D.Vt., Aug. 4, 2005) ("an inmate who is told that a claim is not grievable is not required to appeal the investigator's determination"); *Lane v. Doan*, 287 F.Supp.2d 210, 212 (W.D.N.Y. 2003); *Boomer v. Lanigan*, 2002 WL 31413804 at *8 (S.D.N.Y., Oct. 25, 2002); *Simpson v. Gallant*, 231 F.Supp.2d 341, 350 (D.Me. 2002); *Simpson v. Gallant*, 2002 WL 1380049 (D.Me., June 26, 2002); *Boomer v. Lanigan*, 2001 WL 1646725 (S.D.N.Y., Dec. 17, 2000); *Freeman v. Snyder*, 2001 WL 515258 at *7-8 (D.Del., Apr. 10, 2001). *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).

⁴⁸⁵ *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); *Russell v. Unknown Cook County, Sheriff's Officers*, 2004 WL 2997503 at *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 at *7 (D.Conn., Sept. 13, 2004) (refusing to dismiss claim of Connecticut prisoner transferred to Virginia who attempted to grieve

it has been made known, *e.g.*, in an inmate orientation handbook.⁴⁸⁶

Some courts have held that prisoners must “make some affirmative effort to comply with the

in Virginia and was not told to file separate grievances in Connecticut); *Burgess v. Garvin*, 2004 WL 527053 at *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 at *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 at *2 (N.D.Ill., Feb 2, 2001) (“An institution cannot keep inmates in ignorance of the grievance procedure and then fault them for not using it. A grievance procedure that is not made known to inmates is not an ‘available’ administrative remedy.”); *Alvarez v. U.S.*, 2000 WL 557328 at *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). *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.”).

In *Davis v. Milwaukee County*, 225 F.Supp.2d 967, 975-76 (E.D.Wis. 2002), the court held that the plaintiff had been denied access to courts by defendants’ hindering his ability to exhaust, *inter alia*, by failing to make available materials concerning the grievance procedure. *But see* *Trevino v. Whitten*, 2005 WL 2655741 at *3 (E.D.Cal., Oct. 17, 2005) (holding that an allegation of interference with the grievance process does not give rise to a cognizable access to courts claim until and unless the plaintiff suffers actual injury from dismissal for non-exhaustion), *report and recommendation adopted*, 2005 WL 3284167 (E.D.Cal., Nov. 29, 2005).

⁴⁸⁶ *Gibson v. Weber*, 431 F.3d 339, 341 (8th Cir. 2005) (holding that prisoners who admitted receiving guide that explained the grievance procedure were not excused from using it by their allegations that prison personnel had “made it clear” that they should instead voice complaints informally to medical personnel); *Boyd v. Corrections Corporation of America*, 380 F.3d 989, 999 (6th Cir. 2004), *cert. denied*, 125 S.Ct. 1639 (2005); *Russell v. Unknown Cook County, Sheriff’s Officers*, 2004 WL 2997503 at *4 & n.4 (N.D.Ill., Dec. 27, 2004) (stating that defendants must establish such a handbook exists and is distributed); *Rizzuto v. City of New York*, 2003 WL 1212758 at *5 (S.D.N.Y., Mar. 17, 2003); *Carter v. Woodbury County Jail*, 2003 WL 1342934 (N.D.Iowa, Mar. 18, 2003); *Edwards v. Alabama Dep’t of Corrections*, 81 F.Supp.2d 1242, 1256-57 (M.D.Ala. 2000); *Andrews v. Maryland*, 2004 WL 3262745 at *2 (D.Md., June 3, 2004) .

In a recent unreported case, the Second Circuit held that a prisoner would not be held to have constructive notice of the grievance procedures based on receiving an inmate manual describing them when the manual was taken away a few days later. The court declined to hold the plaintiff had a duty to ask for another one, since state law gave prison officials the duty of apprising prisoners of the procedures. *Aponte v. Armstrong*, 2005 WL 1527701 at *2 (2^d Cir., June 27, 2005) (unpublished).

administrative procedures” before claiming that prison staff’s actions have made them unavailable.⁴⁸⁷ 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.⁴⁸⁸ 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.⁴⁸⁹ Such decisions do not always address whether a grievance would still have been timely at that point.

There is an open question whether a remedy that is too slow to prevent irreparable harm is “available” for PLRA purposes.⁴⁹⁰

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,⁴⁹¹ or misleading of prisoners about the availability of remedies.⁴⁹² The Second Circuit has

⁴⁸⁷ *Washington v. Proffit*, 2005 WL 1176587 at *3 (W.D.Va., May 17, 2005), *report and recommendation adopted*, 2005 WL 1429312 (W.D.Va., June 17, 2005); *accord*, *Veloz v. State of N.Y.*, 339 F.Supp.2d 505, 516 (S.D.N.Y. 2004) (“An inmate seeking to be relieved from technically exhausting his administrative remedies must allege facts showing that he made reasonable attempts to exhaust his remedies.”)

⁴⁸⁸ *See Hemphill v. New York*, 380 F.3d 680, 688 (2d Cir. 2004).

⁴⁸⁹ *See, e.g., Ming Ching Jin v. Hense*, 2005 WL 3080969 at *3 (E.D.Cal., Nov 15, 2005) (holding a prisoner informed that there was no record of his appeal was obliged to take steps to pursue the appeal), *report and recommendation adopted*, 2006 WL 177424 (E.D.Cal., Jan. 20, 2006); *Ellis v. Cambra*, 2005 WL 2105039 at *4-5 (E.D.Cal., Aug. 30, 2005) (holding prisoner failed to exhaust where he filed two grievances which disappeared, and was told he could proceed to the next level but did not); *Winstead v. Castellaw*, 2005 WL 1081353 at *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). In an unreported case in which the prisoner alleged that an unidentified prison official had discarded his grievance, the Second Circuit affirmed dismissal for non-exhaustion where he failed to explain why he did not pursue the matter when he realized his grievance had not been filed. *Williams v. LeClair*, 128 Fed.Appx. 792, 793 (2d Cir. 2005).

⁴⁹⁰ *See* § IV.H, below.

⁴⁹¹ *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); *Ziembra v. Wezner*, 366 F.3d 161, 163-64 (2d Cir. 2003); *Martin v. Sizemore*, 2005 WL 1491210 at *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

suggested that it is better to consider unavailability first,⁴⁹³ which makes sense because it is simpler and the effect of an estoppel argument in this context remains a bit murky. Initially, the Second Circuit held that defendants' actions “may . . . estop[] *the State* from asserting the exhaustion defense.”⁴⁹⁴ 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.”⁴⁹⁵ Some district courts nevertheless have held defendants estopped to claim non-exhaustion where the grievance system (as opposed to the named defendants) has unjustifiably

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”).

One court has held that, since exhaustion is not an affirmative defense and cannot be waived in the Tenth Circuit (unlike most), estoppel cannot bar a defense of non-exhaustion. *Rutherford v. Cabiling*, 2005 WL 2240355 at *2 (D.Colo., Sept. 14, 2005).

⁴⁹² See *Rivera v. Goord*, 2003 WL 1700518 at *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 at *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 at *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 at * 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* *Lewis v. Washington*, 300 F.3d 829, 834-35 (7th Cir. 2002) (declining to apply equitable estoppel where the defendants did not affirmatively mislead the plaintiff but merely failed to respond to grievances); *Berry v. City of New York*, 2002 WL 31045943 at *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).

⁴⁹³ *Abney v. McGinnis*, 380 F.3d 663, 667 (2d Cir. 2004).

⁴⁹⁴ *Ziemba v. Wezner*, 366 F.3d 161, 163 (2d Cir.2004) (emphasis supplied); *see* *Giano v. Goord*, 380 F.3d 670, 675 (2d Cir. 2004) (stating *Hemphill v. State of New York* reads *Ziemba* to mean that threats may “estop *the government* from asserting the affirmative defense of non-exhaustion”) (emphasis supplied).

⁴⁹⁵ *Hemphill v. New York*, 380 F.3d 680, 689 (2d Cir. 2004).

prevented the prisoner from exhaustion.⁴⁹⁶ This result makes sense. Though estoppel is usually considered a defense personal to the defendants, PLRA exhaustion is intended to protect the institutional interests of the prison system and not the personal interests of individual prison personnel,⁴⁹⁷ even if it is the latter who assert it.

H. What If the Problem Is Too Urgent To Exhaust?

Suppose a remedy will take so long that the prisoner will suffer serious harm waiting for its completion? The Second Circuit has suggested there may be an irreparable harm exception to the

⁴⁹⁶ See *Rivera v. Pataki*, 2005 WL 407710 at *11 (S.D.N.Y., Feb. 7, 2005) (holding that rejection of grievances as untimely after the court had dismissed on condition that exhaustion would be allowed estopped the defendants from claiming non-exhaustion); *Warren v. Purcell*, 2004 WL 1970642 at *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). (The courts in those cases also found special circumstances justifying failure to exhaust. *Rivera* at *11-13; *Warren* at *6.); see also *Shaheed-Muhammad v. Dipaolo*, 393 F.Supp.2d 80, 97 (D.Mass. 2005) (noting defendants’ failure to answer the plaintiff’s grievances; stating “[h]aving failed to abide by the strictures of their own regulations, defendants should not be allowed to claim plaintiff’s noncompliance as a bar.”) *But see McCullough v. Burroughs*, 2005 WL 3164248 at *4 (E.D.N.Y., Nov. 29, 2005) (engaging in individualized inquiry whether defendants could be estopped); *Barad v. Comstock*, 2005 WL 1579794 at *7 (W.D.N.Y., June 30, 2005) (declining to find estoppel because persons who misled the plaintiff about the grievance system were not defendants).

The only district court decision actually to discuss the legal issue, rather than relying on assumptions, held that “[n]othing in *Ziamba*, however, requires that the action or inaction which is the basis for the estoppel be that of the particular defendant in the prisoner’s case.” *Brown v. Koenigsmann*, 2005 WL 1925649 at *2 (S.D.N.Y., Aug. 10, 2005). However, it went on to say that if it was wrong about *Ziamba* (“*cf. Hemphill v. New York*”), 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. *Id.* That will probably be the case in most cases where estoppel is raised.

⁴⁹⁷ See *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.”). As one court put it: “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 at *3 (W.D.Wis. Jul 28, 2004); accord, *Johnson v. Johnson*, 385 F.3d 503, 522 (5th Cir. 2004).

exhaustion requirement,⁴⁹⁸ and several decisions have applied such a rationale,⁴⁹⁹ though not within the Second Circuit.⁵⁰⁰

Another appeals court has held that there is no irreparable harm exception, but that courts retain their traditional equitable discretion to grant temporary relief to maintain the status quo pending exhaustion,⁵⁰¹ which in practice amounts to the same thing. That view has been endorsed in one case that jail officials hastily mooted between magistrate judge's recommendation of a grant of injunctive relief and the district court's review.⁵⁰² This question may also be framed in terms of

⁴⁹⁸ *Marvin v. Goord*, 255 F.3d 40, 43 (2d Cir. 2001).

⁴⁹⁹ These decisions generally are *ad hoc* and fact-based and do not address the general question of a PLRA exception. *See Evans v. Saar*, ___ F.Supp.2d ___, 2006 WL 274476 at *7 (D.Md., Feb. 1, 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 at *2 n.2 (N.D.Ill., Feb. 14, 2003) (holding that "the court's jurisdiction is secure" to decide a case in which the prisoner sought immediate injunctive relief and exhaustion would almost certainly take longer than the remainder of his sentence). *But see Jones v. Oaks Correctional Facility Health Services*, 2005 WL 3312562 at *2 (W.D.Mich., Dec. 7, 2005) (stating even a case that presents imminent danger of serious physical harm must be exhausted); *Calderon v. Anderson*, 2005 WL 2277398 at *5 (S.D.W.Va., Sept. 19, 2005) (stating exhaustion was required despite the prisoner's claim of "life-or-death situation"); *Drabovskiy v. U.S.*, 2005 WL 1322550 at *2 (E.D.Ky., June 2, 2005) ("To the extent the plaintiff's motion for emergency appeal is intended to be a request for the Court to forgive the exhaustion requirement necessary [sic], he provides no factual or legal grounds therefor."); *Joseph v. Jocson*, 2004 WL 2203298 at *1 (D.Or., Sept. 29, 2004) ("Plaintiff contends he should not be required to exhaust available remedies because delay may result in irreparable harm. Exhaustion is mandatory."); *Kane v. Winn*, 319 F.Supp.2d 162, 223 (D.Mass. 2004) (rejecting "grave harm" argument concerning a process that takes less than four months as applied to treatment for a slowly progressing case of Hepatitis C); *see also Jones v. Sandy*, 2006 WL 355136 at *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).

⁵⁰⁰ *See Rivera v. Pataki*, 2003 WL 21511939 at *6 (S.D.N.Y., July 1, 2003) (noting that no cases have relied on *Marvin*'s suggestion, questioning its consistency with *Booth* and *Porter*).

⁵⁰¹ *Jackson v. District of Columbia*, 254 F.3d 262, 267-68 (D.C.Cir. 2001).

⁵⁰² *See Tvelia v. Department of Corrections*, 2004 WL 298100 *2 (D.N.H., Feb. 13, 2004) (citing *Jackson*).

the statutory language: arguably a remedy that cannot be exhausted in time to prevent irreparable harm is not “available” for purposes of such a claim. In one recent decision involving a prisoner with serious medical problems, the court initially stayed the action for slightly less than two months, rather than dismissing it, and directing 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.⁵⁰³

I. Statutes of Limitations

Decisions to date indicate that the statute of limitations is tolled during exhaustion, though it is not certain whether that conclusion holds independent of state tolling rules.⁵⁰⁴ One court has

⁵⁰³ *McCaffery v. Winn*, 2005 WL 2994370 at *1 (D.Mass., Nov. 8, 2005), *on reconsideration*, 2006 WL 233961 at *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. 110-113, above.*

⁵⁰⁴ One recent decision states that “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.” *Brown v. Valoff*, 422 F.3d 926, 943 (9th Cir. 2005). However, the first such decision relied explicitly on state tolling law. *Harris v. Hegmann*, 198 F.3d 153, 157-58 (5th Cir. 1999); *Leal v. Georgia Dep’t of Corrections*, 254 F.3d 1276, 1280 (11th Cir. 2001) (assuming that state law provides the tolling rule); *Wisembaker v. Farwell*, 341 F.Supp.2d 1160, 1164-65 (D.Nev., Sept. 29, 2004) (applying “best judgment” about application of state equitable tolling law); *Howard v. Mendez*, 304 F.Supp.2d 632, 636 (M.D.Pa. 2004) (applying state tolling rules to a case involving a federal prisoner); *McCoy v. Goord*, 255 F.Supp.2d 233, 253 (S.D.N.Y. 2003) (noting in dictum that time spent exhausting appears to be tolled under New York law); *Roberts v. Saunders*, 2003 WL 23678921 at *1 (W.D.Va., Jan. 10, 2003); *see generally* *Board of Regents v. Tomanio*, 446 U.S. 478, 483-86 (1980) (holding that state tolling rules are applicable in § 1983 actions). Other decisions have been unclear or equivocal on the point. *See Johnson v. Rivera*, 272 F.3d 519, 521 (7th Cir. 2001); *Brown v. Morgan*, 209 F.3d 595, 596 (6th Cir. 2000) (not referring to state law, but relying on *Harris v. Hegmann*, which did); *Brown v. Olivencia-Font*, 2006 WL 212188 at *3 (D.S.C., Jan 27, 2006) (“Filing a mandatory administrative grievance typically tolls the statute of limitations for a § 1983 action”). *But see Wright v. O’Hara*, 2004 WL 1793018 at *6 (E.D.Pa., Aug. 11, 2004) (holding exhaustion time tolled based on the PLRA itself). *Cf. Johnson v. Rivera*, 2002 WL 31012161 at *4 (N.D.Ill., Sept. 6, 2002) (holding that even if limitations on federal claims are tolled pending exhaustion, they are not tolled on state claims that could have been brought in state court without delay).

One contrary case, *Thomas v. Henry*, 2002 WL 922388 at *2 (S.D.N.Y., May 7, 2002), relies on a statement in a Supreme Court case that “the pendency of a grievance . . . does not toll the running of the limitations periods.” *Delaware State College v. Ricks*, 449 U.S. 250, 261 (1980). But the employment grievance at issue in *Ricks* was not one which had to be exhausted before suit could

held that the limitations period begins to run again when the prisoner is released, since the exhaustion requirement no longer applies, and is not tolled again upon reincarceration since the exhaustion requirement presumably is not reinstated for issues from previous periods of incarceration.⁵⁰⁵

In cases that are dismissed for non-exhaustion, the claim will often be presumptively time-barred because of the delay in litigating exhaustion.⁵⁰⁶ 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.⁵⁰⁷

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.⁵⁰⁸ 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,⁵⁰⁹ and state

be brought, so *Ricks* is not relevant to the question of tolling during exhaustion under the PLRA.

One court has stated that tolling should be applied to protect defendants against stale claims, and therefore that 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. *Juresic v. Cook County Medical Services Director*, 2002 WL 1424564 (N.D.Ill., June 28, 2002).

⁵⁰⁵ *Pettiford v. Sheahan*, 2002 WL 1433503 at *2 and n.3 (N.D.Ill., July 2, 2002).

⁵⁰⁶ *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).

⁵⁰⁷ 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.

⁵⁰⁸ *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 n. 74, above; nn. 511-514, 519, below, concerning equitable tolling.*

⁵⁰⁹ This assertion appears in *Villante v. Vandyke*, 2004 WL 605290 at *2 (2d Cir., Mar. 29, 2004); some district courts have made similar observations. *See Rivera v. Pataki*, 2003 WL 21511939 at *9 and n.13 (S.D.N.Y., July 1, 2003); *Richardson v. Romano*, 2003 WL 1877955 at *2

law may further toll that six-month period during the pendency of administrative proceedings.⁵¹⁰

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.⁵¹¹ 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,⁵¹² but others have held or suggested that equitable tolling may be applicable more generally.⁵¹³ 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

n.1 (N.D.N.Y., Mar. 31, 2003). The state statute, N.Y.C.P.L.R. § 205(a), provides that if an action timely commenced “is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits,” a new action may be filed within six months on the same transaction or occurrence or series of them.

This statute also requires that service be completed within the six-month period, which may limit its utility for *pro se* prisoner litigants given their difficulties in arranging for service. However, courts have held that even if the plaintiff relies on § 205(a), the service requirement need not be met, since state law governing the method or timing of service of process is not borrowed along with the statute of limitations for federal claims. *Allaway v. McGinnis*, 362 F.Supp.2d 390, 395 (W.D.N.Y. 2005); *Gashi v. County of Westchester*, 2005 WL 195517 at *9 (S.D.N.Y., Jan. 27, 2005).

⁵¹⁰ The relevant statute provides: “Where the commencement of an action has been stayed by a court or by statutory prohibition, the duration of the stay is not a part of the time within which the action must be commenced.” N.Y.C.P.L.R. § 204(a). The *Villante* defendants' argument, then—which appears correct—is that the PLRA exhaustion requirement is a “statutory prohibition” for purposes of § 204(a).

⁵¹¹ *Wright v. Hollingsworth*, 260 F.3d 357, 359 (5th Cir. 2001); *accord*, *Clifford v. Gibbs*, 298 F.3d 328, 333 (5th Cir. 2002); *see* § nn. 74, 508, above; nn. 512-514, 519, below, concerning equitable tolling.

⁵¹² *See Booth v. Churner*, 532 U.S. 731 (2001).

⁵¹³ *See Wisenbaker v. Farwell*, 341 F.Supp.2d 1160, 1166-68 (D.Nev. 2004) (applying equitable tolling where prisoner's first suit was filed before he finished exhausting; citing his diligence in pursuing his claim, his *pro se* status, and his probable lack of understanding of exhaustion law); *McCoy v. Goord*, 255 F.Supp.2d 233, 253 (S.D.N.Y. 2003) (“Courts may combine a dismissal without prejudice with equitable tolling, when a judicial stay is not available, to extend the statute of limitations ‘as a matter of fairness where a plaintiff has . . . asserted his rights in the wrong forum.’”; suggesting in dictum that time spent in federal court may also be tolled) (citation omitted).

unavailable.⁵¹⁴ It would seem logical that equitable tolling as well should be applied in those circumstances, if not in all cases of dismissal followed by re-filing.

An alternative approach is for the court to decline to dismiss a case that would be time-barred and instead to grant a stay pending exhaustion. That option may be foreclosed by case law holding that stays are no longer permitted under the PLRA and that unexhausted claims must be dismissed.⁵¹⁵ 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 been victimized by a change in the law.⁵¹⁶ 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.⁵¹⁷

A fourth approach is for the plaintiff, after dismissal and subsequent exhaustion, to file a motion for relief from the judgment of dismissal under Rule 60(b) of the Federal Rules of Civil Procedure, rather than to file a new complaint. That Rule permits relief based *inter alia* upon "mistake, inadvertence, surprise, or excusable neglect," an argument that it "is no longer equitable that the judgment should have prospective application," or "any other reason justifying relief from the operation of the judgment."⁵¹⁸ 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

⁵¹⁴ *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).

⁵¹⁵ *See* *Neal v. Goord*, 267 F.3d 116, 122 (2d Cir. 2001); *see* nn. 110-111, above.

⁵¹⁶ *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).

⁵¹⁷ *Compare* *Spruill v. Gillis*, 372 F.3d 218, 230 (3rd Cir. 2004) ("Congress wanted to erect *any barrier it could* to suits by prisoners in federal court, and a procedural default rule surely reduces caseloads (even though it may be a blunt instrument for doing so.)" (emphasis supplied) *with* *Kane v. Winn*, 319 F.Supp.2d 162, 220-21 (D.Mass. 2004) ("There is nothing in the PLRA's legislative history to suggest that Congress intended to keep meritorious claims out of court. . . . Courts cannot lightly presume that Congress has an intent hostile to our legal system's firmly embedded commitments to providing access to the courts to vindicate valid human rights claims, and interpreting the PLRA as a deliberate attempt to thwart such claims would obviously raise serious constitutional questions.")

⁵¹⁸ Rule 60(b)(1),(5),(6), Fed.R.Civ.P.

that had become time-barred after dismissal. These circumstances include cases in which the plaintiff was victimized by a change or ambiguity in the law⁵¹⁹ as well as cases where the plaintiff made an error of law.⁵²⁰ The fact that a case has not yet been heard on the merits weighs heavily in favor of granting such relief.⁵²¹ A prisoner who has relied on exhaustion law that was overruled in *Booth v. Churner* or *Porter v. Nussle*, or who did not anticipate them in a circuit where the question had not been decided when his or her complaint was filed, and whose claim may never be tried without relief, would seem to have a persuasive case under this body of law, as would a prisoner whose failure to exhaust was otherwise justified under the Second Circuit's decisions.

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.⁵²²

J. Retroactivity of the Statute⁵²³

The PLRA exhaustion requirement does not apply to actions or appeals filed before its

⁵¹⁹ 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.")

⁵²⁰ See *Scott v. U.S. Environmental Protection Agency*, 185 F.R.D. 202, 204-06 (E.D.Pa. 1999) (relieving plaintiff from voluntary dismissal based on erroneous belief that she could pursue her Federal Tort Claims Act claim with other claims in state court; citing excusable neglect provision of rule), *reconsideration denied*, 1999 WL 358918 (E.D.Pa., June 2, 1999); *Balik v. Apfel*, 37 F.Supp.2d 1009, 1010 (S.D. Ohio 1999) (granting relief under excusable neglect and "catchall" provisions to re-enter judgment so mentally impaired plaintiff could appeal timely), *aff'd*, 210 F.3d 371 (6th Cir. 2000) (unpublished).

⁵²¹ See *Bridgeway Corp. v. Citibank, N.A.*, 132 F.Supp.2d at 301; *Scott v. U.S. Environmental Protection Agency*, 185 F.R.D. at 206.

⁵²² See § IV.E.8.b, above.

⁵²³ Consequences of the retroactive application of Supreme Court decisions interpreting the PLRA are addressed in nn. 314, 389, 394, above.

enactment.⁵²⁴ It does apply to suits filed after enactment even if the events complained about occurred before enactment.⁵²⁵ However, if the time limit on the administrative remedy had passed when the exhaustion requirement was enacted, so the prisoner never had a chance to comply with it, exhaustion is not required.⁵²⁶

K. Exhaustion and Class Actions

In class actions,⁵²⁷ most decisions to date state that the PLRA requires only the named plaintiffs (and often a single named plaintiff) to exhaust.⁵²⁸ That is the general practice in class

⁵²⁴ *Scott v. Coughlin*, 344 F.3d 282, 290 (2d Cir. 2003); *Salahuddin v. Mead*, 174 F.3d 271, 274 (2d Cir. 1999).

⁵²⁵ *White v. McGinnis*, 131 F.3d 593, 595 (6th Cir. 1997); *Garrett v. Hawk*, 127 F.3d 1263, 1266 (10th Cir. 1998); *Polite v. Barbarin*, 1998 WL 146687 at *2 (S.D.N.Y., Mar. 25, 1998).

⁵²⁶ *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 at *2 (N.D.Ill., July 28, 1997) (same).

⁵²⁷ 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*, 436 F.3d 52 (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).

⁵²⁸ *See* *Chandler v. Crosby*, 379 F.3d 1278, 1287 (11th Cir. 2004) (holding exhaustion by one class member is sufficient); *Gates v. Cook*, 376 F.3d 323, 329 (5th Cir. 2004) (same); *Jackson v. District of Columbia*, 254 F.3d 262, 268-69 (D.C.Cir. 2001), *quoting* *Foster v. Gueory*, 655 F.2d 1319, 1321-22 (D.C.Cir. 1981) (stating that exhaustion by a single class member is sufficient); *Orafan v. Goord*, 2003 WL 21972735 at *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 at *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)). These cases all cite Title VII exhaustion doctrine; *see* nn.172, 233-38, 269-70, 321-22, 366-71, above, and 546-48, below, concerning reliance on Title VII exhaustion rules in PLRA cases. *But see* *Ellis v. Cambra*, 2005 WL 2105039 at *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

actions,⁵²⁹ which the PLRA does not purport to displace.⁵³⁰ There may be exceptions for exhaustion requirements that are jurisdictional,⁵³¹ 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.⁵³² 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.⁵³³

One decision points out that prior authority involves Rule 23(b)(2) class actions, and declines to apply the "vicarious" exhaustion approach of Title VII law relied on in those cases in a

exhausted).

One court has suggested that the absence of information about whether unnamed class members have exhausted weighs against a finding of typicality for class certification purposes. *Amador v. Superintendents of Dept. of Correctional Services*, 2005 WL 2234050 at *9 n.10 (S.D.N.Y., Sept. 13, 2005). The court does not explain why the exhaustion status of unnamed class members makes a difference.

Other courts have simply certified classes without inquiring into exhaustion by anyone but the named plaintiffs, without commenting on the theoretical issue. *See, e.g., Aiello v. Litscher*, 104 F.Supp.2d 1068, 1073 (W.D.Wis. 2000); *Edwards v. Alabama Dept. of Corrections*, 81 F.Supp.2d 1242 (M.D.Ala. 2000); *Gomez v. Spalding*, No. Civ 91-0299-S-LMB, Order at 2 (D.Idaho, Feb. 5, 1998); *Clark v. California*, 1998 WL 242688 at *3 (N.D.Cal., May 11, 1998). *Cf. Hattie v. Hallock*, 8 F.Supp.2d 685, 689 (N.D.Ohio 1998) (stating that prisoners must personally exhaust and that there is no "vicarious" exhaustion *except* in class actions), *judgment amended*, 16 F.Supp.2d 834 (N.D.Ohio 1998).

⁵²⁹ 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).

⁵³⁰ *Cf. Anderson v. Garner*, 22 F.Supp.2d 1379, 1383 (N.D.Ga. 1997) (stating that the PLRA does not "in any way affect[]" the consideration of class certification, leaving courts to apply "existing law governing class certification"); *accord, Shook v. El Paso County*, 386 F.3d 963, 969-71 (10th Cir. 2004), *cert. denied*, 125 S.Ct. 1869 (2005);

⁵³¹ *See* § IV.A, n. 73, above.

⁵³² *Jones'El v. Berge*, 172 F.Supp.2d at 1132.

⁵³³ *Amador v. Superintendents of Dept. of Correctional Services*, 2005 WL 2234050 at *8-9 (S.D.N.Y., Sept. 13, 2005).

Rule 23(b)(3) class action seeking damages for all class members.⁵³⁴ The court does 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 avoids 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.⁵³⁵

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.”⁵³⁶ That holding remains applicable when plaintiffs in a class action seek preliminary relief benefiting individual unnamed class members.⁵³⁷ The PLRA does not disturb pre-existing principles of notice pleading and liberal construction, especially of *pro se* pleadings,⁵³⁸ and those principles are equally applicable in class actions.⁵³⁹

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 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.⁵⁴⁰ Any doubt on that score has been dispelled by the Second

⁵³⁴ *Sanchez v. Becher*, 2003 WL 1563941 at *4 (S.D.Ind., Jan. 31, 2003).

⁵³⁵ *Sanchez, id.* at *3-4.

⁵³⁶ *Jones’El v. Berge*, 172 F.Supp.2d at 1132.

⁵³⁷ *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 at *2 (W.D.Wis., Nov. 4, 2002), *aff’d*, 94 Fed.Appx. 350, 2004 WL 635263 (7th Cir. 2004).

⁵³⁸ *See* § IV.E.3, above.

⁵³⁹ *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).

⁵⁴⁰ *See* §§ IV.G, IV.G.1, above.

Circuit's adoption of the view that the grievant need not "demand particular relief."⁵⁴¹ 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.⁵⁴²

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.⁵⁴³ It makes no sense to apply what is, in effect, an exacting pleading standard to complaints filed at this informal administrative level, and then use it as a constraint on the remedies that may be sought and the bases for liability that may be alleged in a subsequent judicial challenge, after counsel has been obtained,⁵⁴⁴ to the underlying conduct that was grieved.⁵⁴⁵

⁵⁴¹ 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. But see Amador v. Superintendents of Dept. of Correctional Services, 2005 WL 2234050 at *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).

⁵⁴² 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.

⁵⁴³ 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 Department 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.

⁵⁴⁴ *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 (3rd Cir. 1993).

⁵⁴⁵ 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).

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.⁵⁴⁶ 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,⁵⁴⁷ 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.⁵⁴⁸

In cases filed before the PLRA, the post-PLRA joinder of new plaintiffs relates back to the

⁵⁴⁶ See *Schnellbaecher v. Baskin Clothing Co.*, 887 F.2d 124, 128 (7th Cir. 1989); *Miller v. Baltimore Gas & Elec. Co.*, 202 F.R.D. 195, 206 (D.Md. 2001); see nn.172, 233-38, 269-70, 321-22, 366-71, above, concerning Title VII.

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).

⁵⁴⁷ See §IV. E.8.a, n. 376, above.

⁵⁴⁸ For example, the Michigan grievance system formerly made issues non-grievable if they "involve a significant number of prisoners." *Figel v. Bochard*, 89 Fed.Appx. 970, 971, 2004 WL 326231 at *1 (6th Cir. 2004) (unpublished); see *Hernandez v. Caruso*, 2005 WL 2077474 at *3 (W.D.Mich. Aug 26, 2005) (noting later elimination of that provision). The New York State grievance regulations, though less extreme, provide:

B. *Grievances Must Be Personal* - An inmate must be personally affected by the policy or issue he/she is grieving, or must show that he/she will be personally affected by that policy or issue unless some relief is granted or changes made. All grievances must be filed in an individual capacity.

* * *

D. *Class Actions Not Accepted* - Although there are issues which affect a class of people, they are not grievable as class actions. Class actions are not to be instituted through the grievance procedure. Grievances which are raised in terms of class actions should be referred to the Inmate Liaison Committee. However, individuals personally affected by a matter which affects a class of inmates may file a grievance on their own behalf to effect a change with regard to the written or unwritten policy, regulation, procedure or rule.

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.

filing of the original complaint, so exhaustion is not required,⁵⁴⁹ even if class certification was not sought until after enactment.⁵⁵⁰

When prison officials move to terminate a judgment under the PLRA,⁵⁵¹ 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.”⁵⁵²

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.”⁵⁵³ There is a similar provision amending the Federal Tort Claims Act.⁵⁵⁴

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) applies to them notwithstanding its language.⁵⁵⁵

One circuit has held that the statute applies to a claim that arose before, and was unrelated

⁵⁴⁹ Gomez v. Spalding, No. Civ 91-0299-S-LMB, Order at 2-3; Clark v. California, 1998 WL 242688 at *3.

⁵⁵⁰ Jones v. Goord, 2000 WL 290290 at *3 (S.D.N.Y., Mar. 20, 2000).

⁵⁵¹ See 18 U.S.C. § 3626(b); nn. 59-64, above.

⁵⁵² Green v. Peters, 2000 WL 1230246 at *5 (N.D.Ill., Aug. 24, 2000).

⁵⁵³ 42 U.S.C. § 1997e(e).

⁵⁵⁴ 28 U.S.C. § 1346(b)(2); see Mitchell v. U.S., 2005 WL 3445607 at *4 (S.D.Tex., Dec 15, 2005) (applying statute to claim of emotional injury from withdrawal of funds from account).

⁵⁵⁵ See § II, n. 13, above.

to, the plaintiff's present incarceration.⁵⁵⁶ 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.⁵⁵⁷ However, the statute says that “no Federal civil action *may be brought*”⁵⁵⁸ 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.⁵⁵⁹ 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.

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*,⁵⁶⁰ 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.⁵⁶¹

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

⁵⁵⁶ *Napier v. Preslicka*, 314 F.3d 528, 532-34 (11th Cir. 2002), *rehearing denied*, 331 F.3d 1189 (11th Cir. 2003), *cert. denied*, 540 U.S. 1112 (2004). This interpretation sharply divided both the panel and the court as a whole. *Id.*, 314 F.3d at 534-37; 331 F.3d at 1190-96.

⁵⁵⁷ *Mitchell v. Brown & Williamson Tobacco Corp.*, 294 F.3d 1309, 1315 (11th Cir. 2002).

⁵⁵⁸ 42 U.S.C. § 1997e(e) (emphasis supplied).

⁵⁵⁹ *See Craig v. Eberly*, 164 F.3d 490, 494-95 (10th Cir. 1998); *Swan v. Banks*, 160 F.3d 1258, 1259 (9th Cir. 1998).

⁵⁶⁰ 284 F.3d 411 (2^d Cir. 2002).

⁵⁶¹ *Id.*, 284 F.3d at 417.

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 cannot 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.⁵⁶²

The court goes on to adopt the so far unanimous view that § 1997e(e) does not bar injunctive or declaratory relief,⁵⁶³ 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.”⁵⁶⁴ The court

⁵⁶² *Id.* 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)).

⁵⁶³ *Id.* 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).

⁵⁶⁴ *Thompson*, 284 F.3d at 418 (citing cases); *accord*, *Royal v. Kautzky*, 375 F.3d 720, 723 (8th Cir. 2004), *cert. denied*, 125 S.Ct. 2528 (2005); *Donovan v. Magnusson*, 2005 WL 757585 at *16 (D.Me., Mar. 11, 2005); see *Calhoun v. DeTella*, 319 F.3d 936, 943 (7th Cir. 2003) (noting that nominal damages “are awarded to vindicate rights, not to compensate for resulting injuries,” and that punitive damages “are designed to punish and deter wrongdoers for deprivations of constitutional rights, they are not compensation ‘for’ emotional and mental injury”). Some courts have held that punitive damages are subject to the mental or emotional injury prohibition. See *Davis v. District of Columbia*, 158 F.3d 1342, 1348 (D.C. Cir. 1998); *Page v. Kirby*, 314 F.Supp.2d 619, 622 (N.D.W.Va. 2004).

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 at *9 (E.D.Pa., Aug. 14,

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.⁵⁶⁵

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.⁵⁶⁶

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.”⁵⁶⁷ Courts have also

2003); *see Williams v. Kaufman County*, 352 F.3d 994, 1012 (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).

⁵⁶⁵ *Id.* at 419.

⁵⁶⁶ 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.”); *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 at *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).

⁵⁶⁷ *Amaker v. Haponik*, 1999 WL 76798 at *7 (S.D.N.Y., Feb. 17, 1999) (also noting that requiring physical injury in all cases would make the term “mental or emotional injury” superfluous); *accord, Robinson v. Page*, 170 F.3d 747, 748 (7th Cir. 1999) (“The domain of the statute is limited to suits in which mental or emotional injury is claimed.”); *see Webber v. Federal Bureau of Prisons*, 2005 WL 176122 at *7 (N.D.Tex., Jan. 27, 2005) (applying statute to claim of inadequate psychiatric care).

recognized a variety of constitutional injuries that are neither physical nor mental or emotional, and therefore are not affected by the statute.⁵⁶⁸

There remains in my view a deep confusion about the term 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 the injury.⁵⁶⁹ (Admittedly, the failure of litigants even to frame the issue properly has no doubt contributed to this

⁵⁶⁸ *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). *But see* *Patterson v. Stovall*, 2005 WL 2589182 at *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 courts have acknowledged are neither physical nor emotional in nature include First Amendment rights, *see n.* 322, *below*; a claim of exclusion from an alcohol treatment program in violation of the disability statutes, *Parker v. Michigan Dept. of Corrections*, 2001 WL 1736637 at *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 at *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 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 v. Fauver*, 6 F.Supp.2d 292, 310 (D.N.J. 1998); *see also Aldridge v. 4 John Does*, 2005 WL 2428761 at *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 at *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 at *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.

⁵⁶⁹ Worse, there is a persistent tendency in some courts simply to declare, *e.g.*: “Pursuant to 42 U.S.C. § 1997e(e), there must be a physical injury in order for a prisoner to obtain monetary damages under 42 U.S.C. § 1983.” *Dingler v. Bowles*, 2003 WL 22964269 (N.D.Tex., Dec 12, 2003), *appeal dismissed*, 101 Fed.Appx. 441, 2004 WL 1386303 (5th Cir. 2004) (unpublished); *accord, e.g.*, *Rodriguez v. Basse*, 2004 WL 893586 (N.D.Tex., Apr. 27, 2004). In other cases, courts seem to use § 1997e(e) as a handy means of disposing of cases whose allegations they consider insubstantial. *See, e.g.*, *Taylor v. Howards*, 2001 WL 34368927 (N.D.Tex., Jan. 29, 2001), *appeal dismissed*, 268 F.3d 1063 (5th Cir.) (unpublished), *cert. denied*, 534 U.S. 1061 (2001).

failure.⁵⁷⁰) For example, in *Allah v. Al-Hafeez*,⁵⁷¹ cited with apparent approval in *Thompson v. Carter*,⁵⁷² 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.⁵⁷³ 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. Several courts have recognized that deprivations of First Amendment rights may be cognizable and compensable independent of any mental or emotional effects that they may have;⁵⁷⁴ however, most of them have not done much to explain why.⁵⁷⁵

⁵⁷⁰ 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).”)

⁵⁷¹ 226 F.3d 247 (3d Cir. 2000).

⁵⁷² 284 F.3d at 417.

⁵⁷³ *Allah*, 226 F.3d at 250 (“Allah seeks substantial damages for the harm he suffered as a result of defendants' alleged violation of his First Amendment right to free exercise of religion. As we read his complaint, the only actual injury that could form the basis for the award he seeks would be mental and/or emotional injury.”); see *Caudell v. Rose*, 2005 WL 1278543 at * 3 (W.D.Va., May 27, 2005) (holding claim for seizure of legal papers was governed by the mental/emotional injury provision), *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).

⁵⁷⁴ See *Rowe v. Shake*, 196 F.3d 778, 781-82 (7th Cir. 1999) (“A prisoner is entitled to judicial relief for a violation of his First Amendment rights aside from any physical, mental, or emotional injury he may have sustained.”); *Canell v. Lightner*, 143 F.3d 1210, 1213 (9th Cir.1998) (“[T]he deprivation of First Amendment rights entitles a plaintiff to judicial relief wholly aside from any physical injury he can show, or any mental or emotional injury he may have incurred. Therefore, § 1997e(e) does not apply to First Amendment [c]laims regardless of the form of relief sought.”); *Shabazz v. Martin*, 2006 WL 305673 at *6 (E.D.Mich., Feb. 9, 2006) (following *Canell*); *Percial v. Rowley*, 2005 WL 2572034 at *2 (W.D.Mich., Oct. 12, 2005) (following *Canell*); *Lipton v. County of Orange, NY*, 315 F.Supp.2d 434, 457 (S.D.N.Y. 2004) (“Although § 1997e(e) applies to plaintiff's First Amendment retaliation claim, a First Amendment deprivation presents a cognizable injury

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”⁵⁷⁶—are barred by § 1997e(e) absent allegations of physical injury.⁵⁷⁷ Such holdings appear inconsistent with Eighth Amendment doctrine

standing alone and the PLRA “does not bar a separate award of damages to compensate the plaintiff for the First Amendment violation in and of itself.”), quoting *Ford v. McGinnis*, 198 F.Supp.2d 363, 366 (S.D.N.Y.2001); *Cancel v. Mazzuca*, 205 F.Supp.2d 128, 138 (S.D.N.Y. 2002) (noting that plaintiff “brought this action, *inter alia*, for alleged violations of his First Amendment rights, rather than ‘for mental or emotional injury.’”). *Contra*, *Meade v. Plummer*, 344 F.Supp.2d 569, 573 (E.D.Mich. 2004) (denying that First Amendment claims have compensable value absent physical 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.

⁵⁷⁵ One court, after accepting the Ninth Circuit’s holding in *Canell v. Lightner*, stated:

The Court is also mindful that seldom is the case when a prisoner will actually sustain a physical injury from a First Amendment deprivation. Rather, “the harms proscribed by the First Amendment, Due Process, or Equal Protection are assaults on individual freedom and personal liberty, even on spiritual autonomy, and not physical well being.” *Shaheed-Muhammad v. Dipaolo*, 138 F.Supp.2d 99, 101 (D.Mass.2001). To allow section 1997e(e) to effectively foreclose a prisoner’s First Amendment action would put that section on shaky constitutional ground.

Furthermore, a reading of section 1997e(e) in a way that prohibits First Amendment claims does not comport with the Act’s legislative history. Nothing in the legislative history of section 1997e(e) suggests Congress’ intent was “to prevent legitimate constitutional claims simply because the prisoner suffered no physical injury.” *Royal*, 375 F.3d at 729 (Heaney, J., dissenting) (observing the Act was designed to limit non-meritorious or frivolous litigation to assure that legitimate claims receive due consideration). This Court is convinced that allowing prison officials to violate inmate First Amendment rights with impunity, resolute in the knowledge that a First Amendment physical injury will virtually never manifest itself within the meaning of section 1997e(e), is not what Congress intended when it passed the Act. “Prison walls do not form a barrier separating prison inmates from the protections of the Constitution.” *Turner v. Safley*, 482 U.S. 78, 84 (1987).

Percial v. Rowley, 2005 WL 2572034 at *2 (W.D.Mich., Oct. 12, 2005).

⁵⁷⁶ *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981).

⁵⁷⁷ *See, e.g.*, *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

set forth by the Supreme Court, under which it is the objective seriousness of the conditions, and not their effect on the prisoner, that determines their lawfulness.⁵⁷⁸ It is questionable whether a claim alleging conditions that are *objectively* intolerable is an “action for mental or emotional injury,” even if such injury (not surprisingly) results from them.⁵⁷⁹

behavior of those patients); Vega v. Hill, 2005 WL 3147862 at *3 (N.D.Tex., Oct. 14, 2005) (holding allegations of “exposure to mold, mildew, dead bugs, dirty showers, and spoiled food” failed to establish required physical injury); Stames v. Gillespie, 2004 WL 1003358 at *9 (D.Kan., Mar. 29, 2004) (holding allegation that segregated prisoner was denied showers, drinking water, and water for cleaning and personal hygiene and prevented from communicating with lawyer and family barred by § 1997e(e)); Gibson v. Ramsey, 2004 WL 407025 (N.D.Ill., Jan. 29, 2004) (holding allegations of crowding, noise, bad water and lack of ventilation, unsupported by evidence of physical injury, not to meet the requirements of the mental/emotional injury provision); Hammond v. Briley, 2004 WL 413293 at *5 (N.D.Ill., Jan. 29, 2004) (holding that lack of a working light in plaintiff’s cell required proof of physical injury to be actionable); Adnan v. Santa Clara County Dept. of Corrections, 2002 WL 32058464 at *3 (N.D.Cal., Aug. 15, 2002) (holding that prisoner who complained that he was kept in solitary confinement, his hands and feet were shackled, and he was subjected to body cavity strip searches and allowed out of his cell only three hours a week could not seek compensatory damages because he did not allege physical injury); Lynch v. Robinson, 2002 WL 1949731 at *2 (N.D.Ill., Aug. 22, 2002) (holding restrictions of segregated confinement not actionable without allegation of physical injury). 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).

⁵⁷⁸ 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 Armstrong v. Drahos, 2002 WL 187502 at *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.”)

⁵⁷⁹ A few decisions make this sort of distinction. In *Nelson v. CA Dept of Corrections*, 2004 WL 569529 (N.D.Cal., Mar. 18, 2004), *aff’d*, 131 Fed.Appx. 549 (9th Cir. 2005), the plaintiff complained of being provided only boxer shorts and a T-shirt for outdoor exercise in cold weather. The court said: “Even if Nelson’s complaint does include a request for damages for mental and emotional injury, it also includes a claim for an Eighth Amendment violation as to which the § 1997e(e) requirement does not apply. In other words, damages would be available for a violation of his Eighth Amendment rights without regard to his ability to show physical injury.” *Id.* at *7; see Pippin v. Frank, 2005 WL 756155 at *1 (W.D.Wis., Mar. 30, 2005) (stating that § 1997e(e) precludes claims for mental or emotional injury but not a claim that plaintiff was “falsely confined” in segregation as a result of constitutional violations); see also Aldridge v. 4 John Does, 2005 WL 2428761 at *3 (W.D.Ky., Sept. 30, 2005) (stating generally that “damages resulting from

In my view, the proper approach to analyzing such damage questions under § 1997e(e) is exemplified by a pre-PLRA case which involved a prisoner wrongfully transferred to a higher-security prison. The Seventh Circuit held that “[t]he loss of amenities within prison is a recoverable item of damages,” provable by testimony concerning differences in physical conditions, daily routine, etc.; the court does not mention mental or emotional injury as part of the analysis.⁵⁸⁰ Under this approach, fact-finders would separate the objective consequences of the claimed deprivation from any psychological or emotional trauma that they might cause. Thus, in one pre-PLRA disciplinary due process case, the court found that the plaintiff had been unconstitutionally placed in punitive segregation 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 in the absence of record proof of the distress claim.⁵⁸¹ Under § 1997e(e), a plaintiff could not recover compensatory damages for the latter type of injury regardless of the record, but the award for the objective deprivations themselves—the “loss of amenities”—would remain appropriate if the plaintiff showed conditions sufficiently bad to violate the Eighth Amendment or other constitutional provisions, or restrictions sufficiently severe to constitute a deprivation of liberty under the Due Process Clause.

The foregoing approach is consistent with the general background of tort law, the basis of the law of damages under 42 U.S.C. § 1983,⁵⁸² 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.⁵⁸³ 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.⁵⁸⁴ 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

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).

⁵⁸⁰ See *Ustrak v. Fairman*, 781 F.2d 573, 578 (7th Cir.), *cert. denied*, 479 U.S. 824 (1986).

⁵⁸¹ *Soto v. Lord*, 693 F.Supp. 8, 22-23 (S.D.N.Y. 1988). *But see* *Royal v. Kautzky*, 375 F.3d 720, 724 (8th Cir. 2004) (declining to award a prisoner who spent 60 days in segregation “some indescribable and indefinite damage allegedly arising from a violation of his constitutional rights”), *cert. denied*, 125 S.Ct. 2528 (2005).

⁵⁸² *Smith v. Wade*, 461 U.S. 30, 34 (1983); *Carey v. Piphus*, 435 U.S. 247, 257-58 (1978).

⁵⁸³ The following discussion is based on research by Prof. Margo Schlanger of Washington University Law School.

⁵⁸⁴ Arthur G. Sedgwick & Joseph H. Beale, Jr., 1 *Sedgwick’s Treatise on Damages* 50-51 (8th ed. 1891).

of associates, which are separately cognizable.⁵⁸⁵ 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.⁵⁸⁶ The Second Circuit has acknowledged this distinction in a recent decision in which the plaintiff prevailed both on his Fourth Amendment claims for unlawful seizure and his state law claims for false imprisonment.⁵⁸⁷ 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 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.”⁵⁸⁸

⁵⁸⁵ 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 . . .”).

⁵⁸⁶ 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).

⁵⁸⁷ *Kerman v. City of New York*, 374 F.3d 93, 121 (2d Cir. 2004).

⁵⁸⁸ *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*

Applying this approach to the impact of 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,"⁵⁸⁹ should be viewed in the first instance as claims of deprivation of personal liberty and not primarily as inflictions of mental or emotional injury.⁵⁹⁰ 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. There will also 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.⁵⁹¹

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.⁵⁹² The concerns behind this rule include the view that mental suffering is relatively trivial in most cases, and that evidence of it is "easy to fabricate, hard to controvert."⁵⁹³ Courts have recognized similar concerns underlying § 1997e(e).⁵⁹⁴ At common law, and in cases where the PLRA's physical injury

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.

⁵⁸⁹ *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981).

⁵⁹⁰ As noted above at nn. 574-75, 579, some federal courts applying § 1997e(e) have reached essentially this conclusion, though they have not grounded it in tort principles.

⁵⁹¹ *See, e.g.*, *Hunnicut v. Armstrong*, 305 F.Supp.2d 175, 186 (D.Conn. 2004).

⁵⁹² *See, e.g.*, *Metro-North Commuter R.Co. v. Buckley*, 521 U.S. 424, 430 (1997) (allowing recovery only if the impact "caused, or might have caused, immediate traumatic harm"); *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 546-547 (1994); *Lee v. State Farm Mutual Insurance Co.*, 272 Ga. 583, 533 S.E.2d 82, 84 (2000) ("In a claim concerning negligent conduct, a recovery for emotional distress is allowed only where there is some impact on the plaintiff, and that impact must be a physical injury.").

⁵⁹³ Francis H. Bohlen, *Right to Recover for Injury Resulting from Negligence Without Impact*, 50 Am. L. Reg. 141, 142, 143, 146 (1902).

⁵⁹⁴ *See, e.g.*, *Dawes v. Walker* 239 F.3d 489, 496 (2nd 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

provision applies, the physical injury “in essence, vouch[es] for the asserted emotional injury.”⁵⁹⁵ 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.⁵⁹⁶

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.”⁵⁹⁷ 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 conditions cases involving “loss of amenity.” That is because the Eighth Amendment right to medical care is primarily concerned with protecting prisoners from the infliction of needless physical pain and injury.⁵⁹⁸

It follows that *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,”⁵⁹⁹ 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

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).

⁵⁹⁵ *Dawes v. Walker* 239 F.3d at 496 (Walker, J., special statement).

⁵⁹⁶ This approach is illustrated by the decision in *Soto v. Lord*, discussed in n. 581, 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 Department of Corrections*, cited in n. 579, above.

⁵⁹⁷ 284 F.3d at 419.

⁵⁹⁸ *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

⁵⁹⁹ 284 F.3d at 417 (emphasis supplied).

emotional, such as deprivation of religious or other First Amendment rights,⁶⁰⁰ or the “loss of amenity” of 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.⁶⁰¹

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,⁶⁰² and the Supreme Court has cautioned that damage awards cannot be based on the “abstract ‘importance’ of a constitutional right.”⁶⁰³ 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.⁶⁰⁴

⁶⁰⁰ 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.

⁶⁰¹ 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.

⁶⁰² *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).

⁶⁰³ *Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 312-13 (1986).

⁶⁰⁴ *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,

C. What Is Physical Injury?

The Second Circuit has adopted the view that physical injury, to meet the PLRA threshold, “must be more than *de minimis*, but need not be significant”⁶⁰⁵ to overcome the bar of § 1997e(e), and has held that “alleged sexual assaults,” also described as “intrusive body searches,” “qualify as physical injuries as a matter of common sense” and “would constitute more than *de minimis* injury.”⁶⁰⁶ However, it, like most courts, has failed to state general criteria for assessing whether a variety of types of borderline cases meet the statutory threshold.

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.⁶⁰⁷ Several courts have held that the physical manifestations of emotional distress are not physical injury for purposes of this provision,⁶⁰⁸ a result that seems unsupported by the statutory language, which directly implies that

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).

⁶⁰⁵ Although a *de minimis* standard has been widely adopted, courts don’t entirely agree on its meaning. 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).

⁶⁰⁶ *Liner v. Goord*, 196 F.3d 132, 135 (2d Cir. 1999); *accord*, *Kemner v. Hemphill*, 199 F.Supp.2d 1264, 1270 (N.D.Fla.2002) (holding that sexual assault, “even if considered to be *de minimis* from a purely physical perspective, is plainly ‘repugnant to the conscience of mankind.’ Surely Congress intended the concept of ‘physical injury’ in § 1997e(e) to cover such a repugnant use of physical force.”); *Nunn v. Michigan Dept. of Corrections*, 1997 WL 33559323 at *4 (E.D.Mich. 1997); *see also* *Ogden v. Chesney*, 2003 WL 22225763 (E.D.Pa., Sept. 17, 2003) (holding plaintiff’s allegation that “prison officials allowed a drug dog to sniff and lick his genitals during a strip search” was sufficient to withstand summary judgment). *But see* *Smith v. Shady*, 2006 WL 314514 at *2 (M.D.Pa., Feb. 9, 2006) (holding allegation that officer grabbed prisoner’s penis and held it in her hand was *de minimis* under § 1997e(e)).

⁶⁰⁷ *Oliver v. Keller*, 289 F.3d 623, 628 (9th Cir. 2002); *accord*, *Mansoori v. Shaw*, 2002 WL 1400300 at *4 (N.D.Ill., June 28, 2002) (stating that injury need not be shown by objective evidence).

⁶⁰⁸ *Davis v. District of Columbia*, 158 F.3d 1342, 1349 (D.C.Cir. 1998); *Martin v. Vermont Dept. of Corrections*, 2005 WL 1278119 (D.Vt., May 25, 2005) (stating that “physical manifestations of stress are insufficient to establish physical injury under the PLRA.”); *Minifield v. Butikofer*, 298 F.Supp.2d 900, 905 (N.D.Cal. 2004) (“Physical symptoms that are not sufficiently distinct from a

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.⁶⁰⁹ A variety of injuries short of visible traumatic tissue damage have been held to satisfy § 1997e(e), including physiological disturbances resulting from medication withdrawal⁶¹⁰ or overdose⁶¹¹; the consequences of failure to treat illness or injury, both immediate⁶¹² and longer-term or prospective⁶¹³; denial of the means to

plaintiff's allegations of emotional distress do not qualify as a prior showing of physical injury.”); *Todd v. Graves*, 217 F.Supp.2d 958, 960 (S.D.Iowa 2002) (holding that allegations of stress-related aggravation of hypertension, dizziness, insomnia and loss of appetite were not actionable); *Cannon v. Burkybile*, 2002 WL 448988 at *4 (N.D.Ill., Mar. 22, 2002); *McGrath v. Johnson*, 67 F.Supp.2d 499, 508 (E.D.Pa. 1999). *But see* *Montemayor v. Federal Bureau of Prisons*, 2005 WL 3274508 at *5 (D.D.C., Aug 25, 2005) (holding that a heart attack resulting from physical and emotional stress caused by treatment in prison would meet the physical injury requirement); *Perkins v. Arkansas Dept. of Corrections*, 165 F.3d 803, 807-08 (8th Cir. 1999) (remanding question whether an allegation of mental anguish so severe that it caused physical deterioration and would shorten plaintiff's life was sufficient under § 1997e(e).)

⁶⁰⁹ *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) *with* *Pack v. Artuz*, 348 F.Supp.2d 63, 74 n.12 (S.D.N.Y. 2004) (holding proof of asbestos exposure posing a serious risk of harm would establish an Eighth Amendment violation entitling the plaintiff to nominal damages 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.”).

⁶¹⁰ *Ziemba v. Armstrong*, 2004 WL 78063 at *3 (D.Conn., Jan. 14, 2004) (holding that allegation of withdrawal, panic attacks, pain similar to a heart attack, difficulty breathing and profuse sweating, resulting from withdrawal of psychiatric medication, met the physical injury requirement); *Wolfe v. Horn*, 2001 WL 76332 at *10 (E.D.Pa., Jan. 29, 2001) (holding physical consequences of withdrawal of hormone treatment to a pre-operative transsexual met physical injury requirement).

⁶¹¹ *Scarver v. Litscher*, 371 F.Supp.2d 986, 997-98 (W.D.Wis. 2005) (citing self-inflicted overdose of Thorazine as well as self-inflicted razor cut in holding prisoner with mental illness had alleged physical injury).

⁶¹² *See* *Munn v. Toney*, 433 F.3d 1087 (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”); *Fleming v. Clarke*, 2005 WL 2170093 at *2 (D.Neb., Sept. 6, 2005) (holding swelling, pain, and deterioration resulting from denial of prescribed knee brace met physical injury requirement); *Martin v. Gold*, 2005 WL 1862116 at *9 (D.Vt., Aug. 4, 2005) (holding pain resulting from lack of dentures met physical injury requirement, though resulting headaches and

remain healthy⁶¹⁴; exposure to harmful substances;⁶¹⁵ infliction of pain or illness through extreme conditions of confinement⁶¹⁶ or physical abuse.⁶¹⁷ However, there is plenty of contrary authority, on facts hard to distinguish from cases where physical injury was found, and it is difficult to discern a basis for these different outcomes other than judicial sympathy or lack of it.⁶¹⁸ (There is a

hunger pains might not).

⁶¹³ *Mejia v. Goord*, 2005 WL 2179422 at *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 at *4 n.2 (D.Kan., Mar. 29, 2004) (holding allegation of progression of HIV infection met physical injury standard).

⁶¹⁴ *Williams v. Goord*, 2000 WL 1051874 at *8 n.4 (S.D.N.Y., July 28, 2000) (holding allegation of 28-day denial of exercise sufficiently alleged physical injury).

⁶¹⁵ *Gil v. U.S.*, 2006 WL 385088 at *3 (M.D.Fla., Feb. 17, 2006) (awarding “intangible damages for pain and suffering, inconvenience, and loss of capacity for enjoyment of life” to prisoner who suffered food poisoning from tainted food); *Caldwell v. District of Columbia*, 201 F.Supp.2d 27, 34 (D.D.C. 2001) (holding that evidence of heat exhaustion, skin rash, and bronchial irritation from smoke inhalation met the PLRA standard; injury need not be serious or lasting). *But see* cases cited in n. 609, above, concerning asbestos exposure.

⁶¹⁶ *Rinehart v. Alford*, 2003 WL 23473098 at *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 at *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).

⁶¹⁷ *Mansoori v. Shaw*, 2002 WL 1400300 at *3 (N.D.Ill., June 28, 2002) (holding alleged “tenderness and soreness,” for which plaintiff was taken to a hospital for treatment and received a diagnosis of “chest wall injury,” met the standard); *Romaine v. Rawson*, 140 F.Supp.2d 204, 214 (N.D.N.Y. 2001) (holding “minor” injuries—three slaps in the face—met the PLRA standard).

⁶¹⁸ A particularly extreme recent example is *Jarriett v. Wilson*, 414 F.3d 634 (6th Cir. 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

remarkable concentration of these cases in the Northern District of Texas.) Moreover, some courts have dismissed identifiable traumatic injuries as *de minimis*.⁶¹⁹ Such decisions are generally from

of the total time, in acute pain, with clear, visible swelling in a portion of his leg that had previously injured in a motorcycle accident, during which time he repeatedly asked to see a doctor, 414 F.3d at 644 (dissenting opinion), was dismissed as *de minimis* on the ground that he did not complain about his leg upon release or shortly thereafter when he saw medical staff. *Id.* at 641. *See* Olivas v. Corrections Corp. of America, ___ F.Supp.2d ___, 2006 WL 66464 at *2, *7 n.4 (N.D.Tex. 2006) (holding pain reported as 10 on a scale of 1 to 10, resulting from delay in treatment of broken teeth with exposed nerve, did not meet physical injury requirement); Trevino v. Johnson, 2005 WL 3360252 at *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); Myers v. Valdez, 2005 WL 3147869 at *2 (N.D.Tex., Nov. 17, 2005) (holding "pain, numbness in extremities, loss of mobility, lack of sleep, extreme tension in neck and back, extreme rash [and] discomfort" to be *de minimis*); Abney v. Valdez, 2005 WL 3147863 at *2 (N.D.Tex., Oct. 27, 2005) (holding more frequent urination, near-daily migraine headaches, and itchiness and watery eyes did not meet the physical injury requirement); Vega v. Hill, 2005 WL 3147862 at *3 (N.D.Tex., Oct. 14, 2005) (holding "bad headaches, sleeplessness, dizziness," and "feel[ing] like a 'zombie'" to be *de minimis*); Reeves v. Jensen, 2005 WL 2090896 at *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); Mitchell v. Horn, 2005 WL 1060658 at *1 (E.D.Pa., May 5, 2005) (dismissing complaint of "severe stomach aches, severe headaches, severe dehydration, loss of weight, severe itching, due to the inability to take his prescribed medication, nausea, physical weakness and blurred vision," stating that such "transitory" injuries were not contemplated by the PLRA); Hogg v. Johnson, 2005 WL 139103 at *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); Morgan v. Dallas County Sheriff Dept., 2005 WL 57282 at *2 (N.D.Tex., Jan. 11, 2005) (holding that a complaint of "undue pain . . . on a regular basis" resulting from denial of medication is insufficient to establish physical injury); Davis v. Bowles, 2004 WL 1205182 at *2 (N.D.Tex., June 1, 2004) (holding an increase in blood pressure to 180/108 and headaches resulting from withholding of prescribed medication did not meet the physical injury threshold), *report and recommendation adopted*, 2004 WL 1381045 (N.D.Tex., June 18, 2004).

⁶¹⁹ *See, e.g.,* Cuciak v. Hutler, 2005 WL 1140690 at *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.).

outside the Second Circuit, and the above discussed decision in *Liner v. Goord*⁶²⁰ suggests that the Second Circuit will take a more inclusive approach to defining physical injury under § 1997e(e).

What is missing from these decisions is any attempt to state general principles, other than the relatively contentless “more than *de minimis*” rule, as to what the statutory term “physical injury” means. One exception is a district court decision 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).⁶²¹ This expansive approach outruns the rest of the case law, but other courts have so far failed to put forward any alternative approach that is helpful in assessing cases of physiological disturbances, disease processes, infliction of pain without visible trauma, etc.

Courts have disagreed over how closely physical injury must be connected to mental or emotional injury for the latter to be actionable.⁶²²

VI. Attorneys’ Fees

In actions brought by prisoners,⁶²³ the PLRA restricts fees awarded pursuant to 42 U.S.C. §

⁶²⁰ See n. 606, above.

⁶²¹ *Waters v. Andrews*, 2000 WL 1611126 at *7 (W.D.N.Y., Oct. 16, 2000). *But see Alexander v. Tippah County, Miss.*, 351 F.3d 626, 631 (5th Cir. 2003) (holding that prisoner who vomited as a result of exposure to noxious odors in a filthy holding cell full of raw sewage suffered only a *de minimis* injury, if any), *cert. denied*, 541 U.S. 1012 (2004); *Jarrell v. Seal*, 2004 WL 241712 (E.D.La., Feb. 10, 2004) (holding that a prisoner who alleged he soiled himself after not being allowed to use a toilet was complaining of humiliation and had suffered no physical injury), *aff’d*, 110 Fed.Appx. 455 (5th Cir. 2004). *Cf. Glaspy v. Malicoat*, 134 F.Supp.2d 890, 894-95 (W.D.Mich. 2001) (treating denial of toilet access to a non-prisoner, with predictable results, as a deprivation of liberty).

⁶²² *Compare 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).

⁶²³ 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*, _____

1988 to 150% of the Criminal Justice Act rates.⁶²⁴ The attorneys' fees restrictions are not limited to cases involving prison conditions.⁶²⁵ They apply to cases about juvenile institutions.⁶²⁶

Courts have disagreed whether the relevant rate is 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.⁶²⁷ The restrictions do not apply to fees sought on any basis other than 42 U.S.C. § 1988.⁶²⁸

F.3d ___, 2006 WL 172357 (10th Cir. 2006) (en banc), *rev'g* Robbins v. Chronister, 2002 WL 356331 (D.Kan., Mar. 31, 2002).

⁶²⁴ 42 U.S.C. § 1997e(d)(3); 18 U.S.C. § 3006A; *see* Reynolds v. Goord, 2001 WL 118564 at *2 (S.D.N.Y., Feb. 13, 2001) (holding less experienced counsel need not be paid less than the statutory rate).

⁶²⁵ 42 U.S.C. § 1997e(d)(1); *see* Jackson v. State Bd. of Pardons and Paroles, 331 F.3d 790, 794-95 (11th Cir.) (applying PLRA restrictions to prisoner who won a challenge to a new policy concerning parole eligibility hearings), *cert. denied*, 540 U.S. 880 (2003).

⁶²⁶ Christina A. ex rel. Jennifer A. v. Bloomberg, 315 F.3d 990, 994 (8th Cir. 2003).

⁶²⁷ The difference is described in *Johnson v. Daley*, 339 F.3d 582, 584 and n.‡ (7th Cir. 2003) (en banc), *cert. denied*, 541 U.S. 935 (2004). The most recent appellate decision on the subject holds that the rate adjusted by the Judicial Conference governs. *See* Hadix v. Johnson, 398 F.3d 863 (6th Cir. 2005).

⁶²⁸ *See, e.g.*, *Armstrong v. Davis*, 318 F.3d 965, 973-74 (9th Cir. 2003) (holding that fees in suits enforcing the Americans with Disabilities Act and the Rehabilitation Act are not limited by the PLRA because these statutes have fee provisions separate from § 1988); *Edwin G. v. Washington*, 2001 WL 196760 (C.D.Ill., Jan. 26, 2001) (holding that fees sought as discovery sanctions were not subject to PLRA); *Beckford v. Irvin*, 60 F.Supp.2d 85 (W.D.N.Y. 1999) (holding that Americans with Disabilities Act fee provisions are not limited by PLRA).

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. *Compare* *Webb v. Ada County*, 285 F.3d 829, 835 (9th Cir.) (holding contempt and discovery motions governed by PLRA limitations, even though they were authorized by separate statute and rule, because they were “directly related” to the underlying § 1983 claims; Congress’s purpose was to reduce the cost to taxpayers of prisoner litigation), *cert. denied*, 537 U.S. 948 (2002) *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). Courts have also taken different approaches in cases where different claims are governed by different fee statutes. *Compare* *LaPlante v. Superintendent Pepe*, 307 F.Supp.2d 219, 225 (D.Mass. 2004) (holding that where a settlement agreement provided for fees for enforcement under § 1988 (i.e., at market rates), and an enforcement motion also raised an independent § 1983 claim, fees for the “intertwined” claims would be awarded at the higher rate) *with* *Beckford v. Irvin*, 60 F.Supp.2d 85, 88 (W.D.N.Y. 1999) (holding that 50% of fees should be limited to PLRA rates

One court has held that the PLRA rate may be enhanced for excellent results.⁶²⁹

Fees must be “directly and reasonably incurred in proving an actual violation of the plaintiff’s rights” to be awarded under the PLRA.⁶³⁰ This apparently includes all hours spent in the course of litigation where an actual violation is shown as long as they are reasonable.⁶³¹ The question of how this provision affects cases that are settled has not been answered by the court; it may be necessary for an attorney seeking fees to establish an “actual violation” in the course of litigating the fee application.⁶³² Fees are probably not recoverable in cases that are favorably resolved but do not result in an enforceable judgment for the plaintiff.⁶³³

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).

⁶²⁹ *Skinner v. Uphoff*, 324 F.Supp.2d 1278, 1287 (D.Wyo. 2004).

⁶³⁰ 42 U.S.C. § 1997e(d)(1)(A).

⁶³¹ *Riley v. Kurtz*, 361 F.3d 906, 916 (6th Cir.) (holding fees for defending a judgment are compensable as part of “proving or making certain an actual violation of the prisoner’s rights”), *cert. denied*, 125 S.Ct. 169 (2004); *Jackson v. State Bd. of Pardons and Paroles*, 331 F.3d 790, 798-99 (11th Cir.) (holding “fees on fees” available in case governed by PLRA), *cert. denied*, 540 U.S. 880 (2003); *Volk v. Gonzalez*, 262 F.3d 528, 536 (5th Cir. 2001) (holding “fees on fees” available under PLRA); *Hernandez v. Kalinowski*, 146 F.3d 196, 199-201 (3d Cir. 1998) (same); *Sallier v. Scott*, 151 F.Supp.2d 836 (E.D.Mich. 2001) (holding time spent on postjudgment motions compensable); *Morrison v. Davis*, 88 F.Supp.2d 799, 810 (S.D.Ohio 2000) (including all in-court and out-of-court time), *amended in part on other grounds*, 195 F.Supp.2d 1019 (S.D.Ohio 2001).

⁶³² *See Lozeau v. Lake County, Mont.*, 98 F.Supp.2d 1157, 1168 n.1 and 1170 (D.Mont. 2000) (“Defendants cannot settle a case, promise reform or continued compliance, admit the previous existence of illegal conditions, admit that Plaintiffs’ legal action actually brought the illegal conditions to the attention of those in a position to change them and subsequently allege a failure of proof.”); *Ilick v. Miller*, 68 F.Supp.2d 1169, 1173 n. 1 (D.Nev. 1999).

⁶³³ *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 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.Supp. 831, 836 (D.Neb. 1996), *aff’d*, 120 F.3d 852 (8th Cir. 1997), *cert.*

Fees awarded under this provision must be “proportionately related to the court ordered relief for the violation.”⁶³⁴ Alternatively, fees may be awarded if they are “directly and reasonably incurred in enforcing the relief ordered for the violation.”⁶³⁵

Up to 25% of money judgments must be used to satisfy attorneys’ fees claims.⁶³⁶ Defendants

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).

⁶³⁴ 42 U.S.C. § 1997e(d)(1)(B)(i); *see* Dannenberg v. Valadez, 338 F.3d 1070, 1075-76 (9th Cir. 2003) (stating that this standard is equivalent to the analysis of degree of success governing non-prison attorneys’ fees proceedings). Courts have not held anything less than 150% of damages awarded to be disproportionate to the relief. *See* Farella v. Hockaday, 304 F.Supp.2d 1076, 1079 (C.D.Ill. 2004) (awarding \$1500 in fees on a \$1000 judgment; noting that “proportionately related” does not mean fees less than the judgment, and that the PLRA contemplates awards of up to 150% of the damages); Cole v. Lomax, 2001 WL 1906275 at *2 (W.D.Tenn., Sept. 26, 2001) (awarding \$38,000 in fees as proportionate to a \$25,364 judgment, noting (erroneously) that it is within the 150% limit of the PLRA); Sutton v. Smith, 2001 WL 743201 (D.Md., June 26, 2001) (holding \$9400 in fees proportionate to a \$19,000 judgment in a use of force case); Morrison v. Davis, 88 F.Supp.2d 799, 810 (S.D.Ohio 2000) (holding \$54,000 in fees was not disproportionate to a \$15,000 jury award, though noting that the fee award was reduced under the 150% limit).

“Court-ordered relief” may be broadly defined; in one unreported case, the Ninth Circuit held that actions taken by prison officials that were not directly ordered, but were “ultimately required by the district court’s finding” on plaintiff’s legal claim, should be reflected in the attorneys’ fee award. Bruce v. Mueller, 66 Fed.Appx. 721, 2003 WL 21259784 at *1 (9th Cir. 2003) (unreported).

⁶³⁵ 42 U.S.C. § 1997e(d)(1)(B)(ii); *see* Cody v. Hillard, 304 F.3d 767, 776 (8th Cir. 2002); Webb v. Ada County, 285 F.3d 829, 834-35 (9th Cir. 2002) (holding that postjudgment monitoring and enforcement are compensable without necessity of proving a new constitutional violation).

⁶³⁶ 42 U.S.C. § 1997e(d)(2); *see* 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. *Accord*, Surprenant v. Rivas, 2004 WL 1858316 at *5 (D.N.H., Aug. 17, 2004) (requiring plaintiff to pay much less than 25%); Hutchinson v. McCabe, 2001 WL 930842 at *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 at *1

cannot be made to pay fees greater than 150% of a money judgment,⁶³⁷ even if their actions cause the fees to increase.⁶³⁸ When the plaintiff obtains injunctive relief as well as damages, the 150% limit is either inapplicable or applicable only to those hours expended solely for the purpose of obtaining damages.⁶³⁹ One recent decision holds the 150% limit applicable to a case in which the prisoner's claim concerned events that antedated his incarceration.⁶⁴⁰

Courts have rejected arguments that the attorneys' fees restrictions deny equal protection.⁶⁴¹

(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 at *1 (W.D.Wis., Sept. 26, 2003) (on remand, requiring plaintiff to pay only \$200 of a \$40,000 jury award despite appellate dictum).

⁶³⁷ 42 U.S.C. § 1997e(d)(2); *see Boivin v. Black*, 225 F.3d 36 (1st Cir. 2000) (holding fees limited to \$1.50 where plaintiff recovered only \$1.00 in nominal damages). *But see Torres v. Walker*, 356 F.3d 238, 243 (2d Cir. 2004) (holding that the 150% cap does not apply to a case resolved by a “so ordered” stipulation, since there is no “monetary judgment”); *accord, Romaine v. Rawson*, 2004 WL 1013316 at *3 (N.D.N.Y., May 6, 2004).

⁶³⁸ *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*, 125 S.Ct. 169 (2004).

⁶³⁹ 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. *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); *Boivin v. Black*, 225 F.3d 36, 41 n.4 (1st Cir. 2000) (same); *Carbonell v. Acrish*, 154 F.Supp.2d 552, 566 (S.D.N.Y. 2001) (same).

⁶⁴⁰ *Robbins v. Chronister*, ___ F.3d ___, 2006 WL 172357 (10th Cir. 2006) (en banc).

⁶⁴¹ *Johnson v. Daley*, 339 F.3d 582 (7th Cir. 2003) (en banc), *cert. denied*, 541 U.S. 935 (2004); *Jackson v. State Bd. of Pardons and Paroles*, 331 F.3d 790, 796-98 (11th Cir.), *cert. denied*, 540 U.S. 880 (2003); *Foulk v. Charrier*, 262 F.3d 687, 704 (8th Cir. 2001) (upholding cap of 150% of damages); *Walker v. Bain*, 257 F.3d 660 (6th Cir. 2001) (same as *Foulk*), *cert. denied*, 535 U.S. 1095 (2002); *Hadix v. Johnson*, 230 F.3d 840 (6th Cir. 2000) (upholding limit on hourly rates); *Boivin v. Black*, 225 F.3d 36 (1st Cir. 2000) (same as *Foulk*); *Carbonell v. Acrish*, 154 F.Supp.2d 552, 562-64 (S.D.N.Y. 2001) (upholding 150% limit).

VII. Filing Fees and Costs

Prisoners proceeding *in forma pauperis* are now required to pay filing fees in installments according to a statutory formula.⁶⁴² This requirement 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.⁶⁴³ Courts have disagreed about the apportionment of the fee obligation among multiple plaintiffs.⁶⁴⁴ Prisoners proceeding *in forma pauperis* who are released after filing are treated like other litigants and are not required to continue

⁶⁴² 28 U.S.C. § 1915(b)(1-2); *see* *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).

⁶⁴³ *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).

⁶⁴⁴ One court 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.” *In re Prison Litigation Reform Act*, 105 F.3d 1131, 1137-38 (6th Cir.1997); *see Hernandez v. Caruso*, 2005 WL 1610686 at *1 (W.D.Mich., July 5, 2005); *Mitchell v. Michigan Dept. of Corrections*, 2005 WL 1295614 at *1 (W.D.Mich., May 31, 2005) (both applying *In re PLRA* holding). *But see Jones v. Fletcher*, 2005 WL 1175960 at *6 (E.D.Ky., May 5, 2005) (declining to follow *In re PLRA*, holding that each plaintiff must pay a separate filing fee). 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.” *Alcala v. Woodford*, 2002 WL 1034080 at *1 (N.D.Cal., May 21, 2002). A third decision holds that prisoners joining similar claims in a single suit not only must each pay a filing fee, but must each file a separate complaint. *Hubbard v. Haley*, 262 F.3d 1194, 1197 (11th Cir. 2001), *cert. denied*, 534 U.S. 1136 (2002); *accord*, *Swenson v. MacDonald*, 2006 WL 240233 at *3-4 (D.Mont., Jan. 30, 2006); *Clay v. Rice*, 2001 WL 1380526 (N.D.Ill., Nov. 5, 2001). This extraordinary holding that the PLRA overturns the federal joinder rules is unsupported by statutory language or history or, in my view, by any discernible logic. *See Burke v. Helman*, 208 F.R.D. 246, 247 (C.D.Ill. 2002) (rejecting *Hubbard* holding). Most recently, the Seventh Circuit has agreed with *Hubbard* that each prisoner in multiple-plaintiff litigation must pay a full filing fee. *Boriboune v. Berge*, 391 F.3d 852, 855-56 (7th Cir. 2004). However, it rejected *Hubbard’s* holding that the PLRA prohibits multiple-plaintiff suits, stating that there is no reason to believe Congress intended to repeal the joinder rules. *Id.* at 854-55.

paying fees.⁶⁴⁵

Prisoners are required to provide certified statements of their prison accounts.⁶⁴⁶ A complaint should not be dismissed for prison officials' failure to provide the necessary information,⁶⁴⁷ or without determining whether the prisoner has done what he or she can to follow the procedures.⁶⁴⁸ Refusal by prison officials to provide the required information would violate the right of access to courts.⁶⁴⁹ Prisoners may not be prohibited from bringing an action because they owe fees on a prior action.⁶⁵⁰ The Second Circuit has held, contrary to some other courts, that no more than one fee, plus one award of costs, may actually be collected at one time.⁶⁵¹

Assessed costs must be paid in full in the same manner as filing fees.⁶⁵² However, courts retain their pre-PLRA discretion to assess or refrain from assessing costs against indigent

⁶⁴⁵ DeBlasio v. Eggleston, 315 F.3d 396, 399 (4th Cir. 2003) (citing cases); McGann v. Comm'r, Soc. Sec. Admin., 96 F.3d 28, 29-30 (2d Cir.1996). *But see* 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); Murphy v. Maricopa County Sheriff's Office, 2005 WL 3273573 at *1 (D.Ariz., Dec. 1, 2005) (holding a released prisoner must pay the entire filing fee within 30 days or show cause why he cannot).

⁶⁴⁶ Spaight v. Makowki, 252 F.3d 78 (2d Cir. 2001) (holding that account information should be produced for the six months preceding the notice of appeal, not the *in forma pauperis* motion).

⁶⁴⁷ McGore v. Wigglesworth, 114 F.3d 601, 607-08 (6th Cir. 1997).

⁶⁴⁸ Hatchett v. Nettles, 201 F.3d 651 (5th Cir. 2000); *accord*, Redmond v. Gill, 352 F.3d 801, 803-04 (3rd Cir. 2003) (vacating dismissal where prisoner failed to meet a 20-day deadline for authorizing deduction of fees from his prison account; it was not clear whether he received the order, or received it in time to comply); Cosby v. Meadors, 351 F.3d 1324, 1331-32 (10th Cir. 2003) (agreeing that courts must ascertain whether prisoners sought to comply with orders to authorize fee payments before dismissing, rejecting plaintiff's claim on the merits), *cert. denied*, 541 U.S. 1035 (2004).

⁶⁴⁹ Adnan v. Santa Clara County Dept. of Corrections, 2002 WL 32058464 at *12 (N.D.Cal., Aug. 15, 2002).

⁶⁵⁰ Walp v. Scott, 115 F.3d 308 (5th Cir. 1997).

⁶⁵¹ Whitfield v. Scully, 241 F.3d 264, 275-78 (2d Cir. 2001). *Contra*, Atchison v. Collins, 288 F.3d 177, 180-81 (5th Cir. 2002); Lyon v. Kentucky State Penitentiary, 2005 WL 2044955 at *1 (W.D.Ky., Aug. 23, 2005).

⁶⁵² 28 U.S.C. § 1915(f)(2); *see* Whitfield v. Scully, 241 F.3d at 278 (holding that only one award of costs may be collected at one time).

prisoners.⁶⁵³

VIII. Three Strikes Provision

A prisoner who has had three cases dismissed as frivolous, malicious, or failing to state a claim for relief may not proceed *in forma pauperis* in a civil action unless the prisoner is under imminent danger of serious physical injury.⁶⁵⁴ That means a prisoner who can't pay the whole fee up front is out of court⁶⁵⁵—though some courts have held that, having filed the action or appeal, they have to pay the filing fee in installments even if they don't get anything for their fee.⁶⁵⁶

“Strikes” comprise only actions dismissed for the reasons stated in the statute.⁶⁵⁷ Failure to

⁶⁵³ Whitfield v. Scully, 241 F.3d at 273; Feliciano v. Selsky, 205 F.3d 568, 572 (2d Cir. 2000).

⁶⁵⁴ 28 U.S.C. § 1915(g).

⁶⁵⁵ One recent 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 at *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 when they have the money has not been explored.

⁶⁵⁶ See Simmons v. Frank, 2003 WL 23144925 at *1 (W.D.Wis., Aug. 18, 2003); McSwain v. Wallintin, 2003 WL 23138750 (W.D.Wis., Apr. 4, 2003) (holding that the order to that effect can be appealed without prepaying the *appellate* filing fee); see also Tibbs v. Cockrell, 85 Fed.Appx. 385, 2004 WL 57382 (5th Cir., Jan. 13, 2004) (unpublished) (holding appeal of prisoner with three strikes frivolous on merits; he moved for IFP status in the appeals court, was granted it despite having three strikes, and then the court examined the merits).

⁶⁵⁷ Andrews v. King, 398 F.3d 1113, 1120 (9th Cir. 2005); 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); see Fortson v. Kern, 2005 WL 3465843 at *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 at *2 (D.D.C., Aug. 1, 2005) (holding dismissal under Fed.R.Civ.P. 8 is not a strike); Voyles v. State of Alaska, 2005 WL 1172430 at *3 n.39 (D.Alaska, May 11, 2005) (“Filing a voluntary dismissal avoids the risk of a ‘strike’ . . .”)

If the basis of a dismissal cannot be determined, the dismissal cannot be counted as a strike. Andrews v. King, *id.*; Duckett v. District of Columbia, 2005 WL 3276284 at *1 (D.D.C., July 29, 2005); Shaw v. Dodson, 2005 WL 2406154 at *2 (S.D.Ga., Sept. 29, 2005); Freeman v. Lee, 30 F.Supp.2d 52, 54 (D.D.C. 1998).

exhaust administrative remedies is not one of them,⁶⁵⁸ though a number of courts outside the Second Circuit have engaged in strained reasoning to label such dismissals as strikes.⁶⁵⁹ Partial dismissal on the enumerated grounds is not a strike.⁶⁶⁰ Dismissals in state court are not strikes.⁶⁶¹ The grant of summary judgment is not a strike.⁶⁶² 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

⁶⁵⁸ *Snider v. Melindez*, 199 F.3d 108, 111 (2d Cir. 1999) (stating that dismissal for failure to exhaust is not a strike); *Smith v. Duke*, 296 F.Supp.2d 965 (E.D.Ark. 2003) (same).

⁶⁵⁹ *But see Rivera v. Allin*, 144 F.3d 719, 731 (11th Cir. 1998) (stating in dictum that dismissal for non-exhaustion is “tantamount to” dismissal for failure to state a claim), *cert. dismissed*, 524 U.S. 978 (1998); *Ostrander v. Dennis*, 2004 WL 1047642 at *1 (N.D.Tex., May 10, 2004) (“ . . . [T]he Court finds persuasive the reasoning . . . in *Rivera v. Allin*, By filing claims on which administrative remedies had not been exhausted, plaintiff asserted claims that were ‘premature as a matter of law’ and, therefore, subject to being counted as ‘strikes’ under the PLRA.”); *Wallmark v. Johnson*, 2003 WL 21488141 at *1 (N.D.Tex., Apr. 28, 2003) (holding that a prisoner who failed to exhaust sought relief to which he was not entitled and his claim was therefore frivolous); *Cook v. Supt. Hosy*, 2001 WL 293142 (N.D.Ill., Mar. 23, 2001) (directing prisoner to submit documentation of exhaustion on pain of dismissal of unexhausted claims and assessment of a strike); *see also Steele v. Federal Bureau of Prisons*, 355 F.3d 1204, 1213 (10th Cir. 2003) (stating in dictum that a dismissal for non-exhaustion may constitute a strike, without explaining why or when), *cert. denied*, 125 S.Ct. 344 (2004); *Millsap v. Jefferson County*, 85 Fed.Appx. 539, 2003 WL 23021406 at *1 (8th Cir. 2003) (unreported) (holding that a failure to allege exhaustion should count as a strike because it is a failure to state a claim, while actual failure to exhaust contrary to the complaint’s allegations should not); *Jones v. Cimarron Correctional Facility*, 2005 WL 2077363 at *1 (W.D.Okla., Aug. 25, 2005) (stating that summary judgment for non-exhaustion is a strike under *Steele* holding).

⁶⁶⁰ *See Juarez v. Frank*, 2006 WL 47064 at *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 at *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).

⁶⁶¹ *Miller v. John Doe*, 2005 WL 1308408 at *1 (E.D.Wis., May 31, 2005).

⁶⁶² *Stallings v. Kempker*, 109 Fed.Appx. 832, 2004 WL 2165363 at *1 (8th Cir. 2004) (unpublished); *Johnson v. Sheahan*, 2005 WL 2739183 at *4 (N.D.Ill., Oct. 24, 2005); *Barela v. Variz*, 36 F.Supp.2d at 1259; *Walker v. Kirschner*, 1997 WL 698190 at *2 (S.D.N.Y., Nov. 7, 1997).

granted.”⁶⁶³ Mere affirmance of the district court’s judgment to such effect is not a strike.⁶⁶⁴ Several courts have held that dismissed habeas petitions do not count as strikes, unless they amount to § 1983 actions mislabeled as habeas petitions to avoid § 1915(g).⁶⁶⁵ At least one court has held that dismissal of a § 1983 action that should have been filed as a habeas petition is not a strike because “dismissal . . . for failure to use the proper avenue for relief” is not a ground listed in the statute.⁶⁶⁶ Other courts, however, have dismissed such claims as frivolous, which would make them strikes.⁶⁶⁷ Strikes include dismissals that antedate the PLRA.⁶⁶⁸

A recent decision holds that when multiple plaintiffs join in one lawsuit, each plaintiff’s claims must be treated as a separate “action,” and each plaintiff must be charged as many strikes as there are plaintiffs whose “actions” are dismissed in their entirety.⁶⁶⁹ This result does not appear to be compelled, or even hinted at, in the language of the statute, and its logic is questionable.⁶⁷⁰

⁶⁶³ 28 U.S.C. § 1915(g); *see* *Andrews v. King*, 398 F.3d 1113, 1120-21 (9th Cir. 2005) (holding that an appeal dismissed for lack of jurisdiction is not a strike); *Newlin v. Helman*, 123 F.3d 429, 433 (7th Cir. 1997), *cert. denied*, 522 U.S. 1054 (1998), *overruled in part on other grounds*, *Walker v. O’Brien*, 216 F.3d 626 (7th Cir. 2000), *cert. denied*, 531 U.S. 1029 (2000).

⁶⁶⁴ *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).

⁶⁶⁵ *Andrews v. King*, 398 F.3d at 1122-23 & n.12 and cases cited.

⁶⁶⁶ *Rogers v. Wisconsin Dept. of Corrections*, 2005 WL 300291 at *3 (W.D.Wis., Feb 3, 2005).

⁶⁶⁷ *See Hanley v. Stewart*, 21 F.Supp.2d 1088, 1092 (D.Ariz. 1998) (dismissing as frivolous on the ground that if appellate representation did not satisfy Constitution, the claim was barred by *Heck v. Humphrey*); *Grant v. Sotelo*, 1998 WL 740826 at *1 (N.D.Tex., Oct. 17, 1998) (citing cases).

⁶⁶⁸ *Welch v. Galie*, 207 F.3d 130 (2^d Cir. 2000).

⁶⁶⁹ *Boriboune v. Berge*, 2005 WL 1320345 at *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 at *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).

⁶⁷⁰ *See Swenson v. MacDonald*, 2006 WL 240233 at *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

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*.⁶⁷¹ The practice in some courts has been to the contrary, without any apparent serious consideration of the question.⁶⁷²

“A dismissal should not count against a petitioner until he has exhausted or waived his appeals.”⁶⁷³ If a finding of frivolousness is reversed on appeal, the strike is eliminated.⁶⁷⁴ Of course, a prisoner who has three strikes cannot proceed *in forma pauperis* on appeal 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.⁶⁷⁵ 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.⁶⁷⁶ 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.

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.

⁶⁷¹ Deleon v. Doe, 361 F.3d 93, 95 (2d Cir. 2004).

⁶⁷² See, e.g., Hill v. Cockrell, 71 Fed.Appx. 390, 2003 WL 21976270 (5th Cir. 2003) (declaring two strikes); Rainey v. Bruce, 74 Fed.Appx. 8, 2003 WL 21907609 (10th Cir. 2003) (declaring two strikes). Sometimes a court’s practice and its prior statements of law are in conflict. Compare Ring v. Knecht, 130 Fed.Appx. 51, 2005 WL 1006285 at *1 (7th Cir., Apr. 27, 2005) (declaring dismissal and appellate affirmance to be two strikes and the plaintiff to have “struck out”); De La Garza v. De La Garza, 91 Fed.Appx. 508, 2004 WL 363353 (7th Cir., Feb. 19, 2004) (unpublished) (declaring dismissal not a strike) with Lucien v. Jockisch, 133 F.3d 464, 469 n. 8 (7th Cir.1998) (“The time to tally up Lucien's previous strikes is when Lucien has an action before the court to which § 1915(g) might apply.”)

⁶⁷³ Adepegba v. Hammons, 103 F.3d 383, 387 (5th Cir. 1996); accord, Jennings v. Natrona County Detention Center, 175 F.3d at 780 n. 3.

⁶⁷⁴ Jennings, 175 F.3d at 780; Adepegba, 103 F.3d at 387.

⁶⁷⁵ Jennings, 175 F.3d at 779-80; Adepegba v. Hammons, 103 F.3d at 387.

⁶⁷⁶ 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).

The only circuit to address the question to date has held that 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.⁶⁷⁷ The court cautioned that 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).⁶⁷⁸

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.⁶⁷⁹ Nor does it prevent a plaintiff from filing an amended complaint in a suit filed before he had three strikes.⁶⁸⁰

A prisoner who is in "imminent danger of serious physical injury" may proceed *in forma pauperis* notwithstanding the three strikes provision.⁶⁸¹ A credible allegation of imminent danger of serious physical injury meets the statutory requirement.⁶⁸² If the allegations are disputed, the court

⁶⁷⁷ *Andrews v. King*, 398 F.3d 1113, 1116, 1120 (9th Cir. 2005).

⁶⁷⁸ *Andrews v. King*, 398 F.3d at 1120.

⁶⁷⁹ *Cruz v. Marcial*, 2002 WL 655520 (D.Conn., Apr. 18, 2002). *Contra*, *Nichols v. Rich*, 2004 WL 743938 at *2 (N.D.Tex., Apr. 7, 2004) (citing goals of the statute but not addressing its actual language), *report and recommendation adopted*, 2004 WL 1119689 (N.D.Tex., May 18, 2004).

⁶⁸⁰ *Elkins v. Schrubbe*, 2005 WL 1154273 at *1 (E.D.Wis. Apr 20, 2005).

⁶⁸¹ 28 U.S.C. § 1915(g).

⁶⁸² *Ciarpiaglini v. Saini*, 352 F.3d 328, 330-31 (7th Cir. 2003) (holding allegations of panic attacks leading to heart palpitations, chest pains, labored breathing, choking sensations, and paralysis meet the imminent danger standard; describing standard as "amorphous," disapproving extensive inquiry into seriousness of allegations at pleading stage); *Voth v. Lytle*, 2005 WL 3358909 at *1 (D.Or., Dec. 8, 2005) (holding plaintiff's claim of severe pain and rectal bleeding and overruling of recommendations for surgery satisfy the "imminent danger of serious physical injury" standard notwithstanding defendants' claim that the condition is "relatively stable and long-standing"); *Miller v. Meadows*, 2005 WL 1983838 at *4 (M.D.Ga., Aug. 11, 2005) (holding paraplegic who alleged he was denied physical therapy and necessary medical devices and/or treatments and that this denial is "resulting in bed sores, serious atrophy, and deterioration of his spinal condition" sufficiently alleged imminent danger of serious physical injury). *But see* *Morrison v. Brady*, 2005 WL 3234300 at *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); *Jones v. Large*, 2005 WL 2218420 at *1 (W.D.Va., Sept. 13, 2005) (holding exception inapplicable despite prisoner's allegation of verbal threats by staff, including to "whupp his ass" and to kill him).

may hold a hearing or rely on affidavits and depositions to resolve the question.⁶⁸³ The danger must exist at the time the complaint is filed.⁶⁸⁴ 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.⁶⁸⁵

To meet the "serious physical injury" requirement, injury need not be so serious as to violate the Eighth Amendment in itself.⁶⁸⁶ The risk of future injury is sufficient to invoke the imminent danger exception.⁶⁸⁷ Actions exposing a prisoner to the risk of assault from other prisoners invoke

⁶⁸³ *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).

⁶⁸⁴ *See 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. *But see Lewis v. Sullivan*, 279 F.3d 526, 531 (7th Cir. 2002) (holding exception available "[w]hen a threat or prison condition is real and proximate, and when the potential consequence is 'serious physical injury'"); *U.S. v. Tokash*, 282 F.3d 962, 971 (7th Cir.) (holding that "imminence" under the PLRA may not be as narrowly defined as in the context of a justification defense to criminal charges), *cert. denied*, 535 U.S. 1119 (2002).

⁶⁸⁵ *Ciarpiaglini v. Saini*, 352 F.3d 328, 330 (7th Cir. 2003) (holding damages claim could go forward even though injunctive claim on which "imminent danger" allegation was based was moot); *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); *Miller v. Meadows*, 2005 WL 1983838 at *5 (M.D.Ga., Aug. 11, 2005) (allowing only those claims to go forward that presented an imminent danger).

⁶⁸⁶ *Gibbs v. Cross*, 160 F.3d 962, 966-67 (3rd Cir. 1998).

⁶⁸⁷ *Id.* (relying on alleged environmental hazards in prison); *see Brown v. Johnson*, 387 F.3d 1344, 1350 (11th Cir. 2004) (holding that a prisoner already suffering from serious illness who alleged that lack of treatment was worsening his illness sufficiently pled imminent danger of serious physical injury); *McAlphin v. Toney*, 281 F.3d 709, 711 (8th Cir. 2002) (holding that a prisoner who alleged that he was transferred to a prison without adequate dental facilities while in the midst of a course of dental treatment, and dental infection was spreading in his mouth, sufficiently pled imminent danger). *But see Johnson v. Barney*, 2005 WL 2173950 at *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" because he might be at that prison again in the future).

the imminent danger exception.⁶⁸⁸ One court has held that self-inflicted injury cannot meet this standard because “[e]very prisoner would then avoid the three strikes provision by threatening suicide.”⁶⁸⁹ This statement is extreme and unwarranted. Many prison suicides and attempted suicides result directly from serious mental illness,⁶⁹⁰ 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.

Challenges to the constitutionality of the three strikes provision have been unsuccessful.⁶⁹¹ District court decisions holding the provision unconstitutional have been reversed or overruled.⁶⁹²

In my view the statute is unconstitutional. The appellate cases have ignored prior authority striking down overbroad restrictions on filing lawsuits, including denial of access to *in forma pauperis* procedures, as violating the right of access to courts.⁶⁹³

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

⁶⁸⁸ *Gibbs v. Roman*, 116 F.3d at 85-86; *Ashley v. Dilworth*, 147 F.3d 715, 717 (8th Cir. 1998) (alleging prison officials placed plaintiff in proximity with known enemies). *But see Pettus v. Mangano*, 2005 WL 1123761 at *1 (E.D.N.Y., May 9, 2005) (holding that placement in a maximum security prison with “anti-social, aggressive, hostile, and violent inmates” did not meet the “imminent danger” standard).

⁶⁸⁹ *Wallace v. Cockrell*, 2003 WL 21418639 at *3 (N.D.Tex., Mar 10, 2003), *approved as supplemented*, 2003 WL 21447831 N.D.Tex., Mar. 27, 2003).

⁶⁹⁰ *See, e.g., Sanville v. McCaughtry*, 266 F.3d 724 (7th Cir. 2001); *Eng v. Smith*, 849 F.2d 80 (2d Cir. 1988).

⁶⁹¹ *See, e.g., Lewis v. Sullivan*, 279 F.3d at 528-31 (7th Cir. 2002); *Higgins v. Carpenter*, 258 F.3d 797, 801 (8th Cir. 2001), *cert. denied*, 535 U.S. 1040 (2002); *Rodriguez v. Cook*, 169 F.3d 1176, 1178-82 (9th Cir. 1999).

⁶⁹² *See Lewis v. Sullivan*, 135 F.Supp.2d 954 (W.D.Wis. 2001), *rev’d*, 279 F.3d 526 (7th Cir. 2002); *Ayers v. Norris*, 43 F.Supp.2d 1039, 1050-51 (E.D.Ark. 1999) (applying equal protection strict scrutiny where prisoner would be barred from court on a claim asserting a fundamental right), *overruled*, *Higgins v. Carpenter*, *supra*; *Lyon v. Krol*, 940 F.Supp. 1433 (S.D.Iowa 1996) (similar rationale), *appeal dismissed and remanded*, 127 F.3d 763, 765 (8th Cir. 1997) (finding lack of standing).

⁶⁹³ *See DeLong v. Hennessey*, 912 F.2d 1144, 1148 (9th Cir. 1990), *cert. denied*, 498 U.S. 1001 (1990); *Abdul-Akbar v. Watson*, 901 F.2d 329, 332 (3d Cir. 1990); *Matter of Davis*, 878 F.2d 211, 212-13 (7th Cir. 1989); *In re Powell*, 851 F.2d 427, 431-34 (D.C.Cir. 1988); *Abdullah v. Gatto*, 773 F.2d 487, 488 (2d Cir. 1988).

Amendment.”⁶⁹⁴ As such, it is “generally subject to the same constitutional analysis” as is the right to free speech.⁶⁹⁵ 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.⁶⁹⁶ This body of law includes a principle of narrow tailoring.⁶⁹⁷

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.⁶⁹⁸ 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.⁶⁹⁹

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

⁶⁹⁴ California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 513 (1972).

⁶⁹⁵ 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).

⁶⁹⁶ *Cf.* Thornburgh v. Abbott, 490 U.S. 401, 403 (1989).

⁶⁹⁷ NAACP v. Button, 371 U.S. 415, 438 (1963).

⁶⁹⁸ New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

⁶⁹⁹ Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49, 60-61 (1993); Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 741 (1983); California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 511 (1972).

from an immune defendant, as well as those that are frivolous or malicious,⁷⁰⁰ regardless of whether they are *in forma pauperis* or fee paid.⁷⁰¹ 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.⁷⁰²

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.⁷⁰³ 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.⁷⁰⁴

The standard of appellate review under the PLRA screening provisions has not been decided in the Second Circuit.⁷⁰⁵

One court has held that the PLRA-dictated screening process is generally good cause for extending the 120-day time period for serving process.⁷⁰⁶

⁷⁰⁰ 28 U.S.C. § 1915(e)(2); 28 U.S.C. § 1915A; 42 U.S.C. § 1997e(c)(1); *see* *Vanderberg v. Donaldson*, 259 F.3d 1321 (11th Cir. 2001), *cert. denied*, 535 U.S. 976 (2002).

⁷⁰¹ *Plunk v. Givens*, 234 F.3d 1128 (10th Cir. 2000).

⁷⁰² *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). Since the standards for dismissal are identical, resolution of this question doesn't much matter.

⁷⁰³ *Gomez v. USAA Federal Savings Bank*, 171 F.3d 794, 795-96 (2d Cir. 1999); *accord*, *Brown v. Johnson*, 387 F.3d 1344, 1348-49 (11th Cir. 2004); *Grayson v. Mayview State Hosp.*, 293 F.3d 103, 109-14 (3d Cir. 2002) (addressing 28 U.S.C. § 1915(e)(2)); *Shane v. Fauver*, 213 F.3d 113, 117 (3d Cir. 2000). *Contra*, *McGore v. Wrigglesworth*, 114 F.3d 601, 612 (6th Cir.1997).

⁷⁰⁴ *See Resnick v. Hayes*, 213 F.3d 443, 446 (9th Cir. 2000); *Gomez v. USAA Federal Savings Bank*, 171 F.3d at 795-96.

⁷⁰⁵ *Fitzgerald v. First East Seventh Street Tenants Corp.*, 221 F.3d 362, 364 n. 2 (2d Cir. 2000); *Cruz v. Gomez*, 202 F.3d 593, 596 n. 4 (2d Cir. 2000) (noting most circuits use *de novo* standard). *But see* *Bilal v. Driver*, 251 F.3d 1346, 1348-49 (11th Cir.) (endorsing *de novo* standard for dismissals that do not state a claim and abuse of discretion standard for dismissals as frivolous), *cert. denied*, 534 U.S. 1044 (2001).

⁷⁰⁶ *Shabazz v. Franklin*, 380 F.Supp.2d 793, 799-800 (N.D.Tex. 2005).

X. Waiver of Reply

The PLRA allows defendants in prisoner cases to “waive the right to reply.” “No relief shall be granted to the plaintiff unless a reply has been filed.” The court may require a reply “if it finds that the plaintiff has a reasonable opportunity to prevail on the merits.”⁷⁰⁷

“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.⁷⁰⁸ The question what if any effect this provision may have on default judgment practice has not been addressed by the courts.

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.⁷⁰⁹ This statute seems mainly to ratify pre-existing practice.⁷¹⁰

It is not clear whether this PLRA provision extends to trials or other evidentiary proceedings. A recent 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.⁷¹¹ This reasoning suggests the statute should not be viewed as extending to trials.⁷¹² Before the PLRA, courts had expressed a strong

⁷⁰⁷ 42 U.S.C. § 1997e(g); *see, e.g.*, Daniel v. Power, 2005 WL 1958350 at *2 (S.D.Ill., July 20, 2005) (after initial screening, “[d]efendants are ORDERED to timely file an appropriate responsive pleading to the Amended Complaint, and shall not waive filing a reply pursuant to 42 U.S.C. § 1997e(g).”)

⁷⁰⁸ *See* Jones v. Bowersox, 2005 WL 1185598 at *1-2 (W.D.Mo., May 18, 2005); Reed v. McBride, 96 F.Supp.2d 845, 849 (N.D.Ind. 2000).

⁷⁰⁹ 42 U.S.C. § 1997e(f).

⁷¹⁰ *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).

⁷¹¹ U.S. v. Baker, 45 F.3d 837 (4th Cir. 1994), *cert. denied*, 516 U.S. 872 (1995).

⁷¹² *But see* Williams v. Forcade, 2004 WL 1698671 at *1-2 (E.D.La., July 28, 2004) (directing that plaintiff participate in trial by telephone).

preference for having prisoner plaintiffs present in court for trial.⁷¹³

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.⁷¹⁴ 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*.⁷¹⁵ 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.⁷¹⁶

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.⁷¹⁷ 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.⁷¹⁸ 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.⁷¹⁹ One very significant question is whether the phrase “compensatory damages

⁷¹³ *Hernandez v. Whiting*, 881 F.2d 768, 770-72 (9th Cir. 1989); *Muhammad v. Warden, Baltimore City Jail*, 849 F.2d 107, 113 (4th Cir. 1988); *Poole v. Lambert*, 819 F.2d 1025, 1029 (11th Cir. 1987).

⁷¹⁴ 28 U.S.C. § 1932.

⁷¹⁵ 512 U.S. 821, 828-34 (1994).

⁷¹⁶ *Rice v. National Security Council*, 244 F.Supp.2d 594, 597, 605 (D.S.C. 2001) (citing cases), *aff'd*, 46 Fed.Appx. 212 (4th Cir. 2002), *cert. denied*, 538 U.S. 951 (2003).

⁷¹⁷ Pub.L.No. 104-134, Stat. 1321 § 807 (April 24, 1996) (not codified; appears after 18 U.S.C.A. § 3626).

⁷¹⁸ Pub.L.No. 104-134, Stat. 1321 § 808 (April 24, 1996) (not codified; appears after 18 U.S.C.A. § 3626).

⁷¹⁹ In *Loucony v. Kupec*, 2000 WL 1050905 (D.Conn., Feb. 17, 2000), defendants sought early in the litigation to require the plaintiff to provide the name of the victim of his crime so he or she could be compensated from any award. However, the court ruled that since the plaintiff did not file suit until he was out of prison, he was not a “prisoner” subject to the statute.

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.⁷²⁰ In addition, as plaintiff’s counsel in that case argued, the statute applies only to compensatory damages, and settlements are not generally characterized as compensatory or punitive, so it cannot be determined what part, if any, of a settlement represents compensatory damages.

Some states, including New York, have passed statutes governing the disposition of damage awards received by prisoners. It is arguable that the PLRA provisions pre-empt such statutes insofar as they affect awards made in federal court in cases brought under federal law.⁷²¹

⁷²⁰ In *Dodd v. Robinson*, Civil Action No. 03-F-571-N, Order at *1 (M.D.Ala., Mar. 26, 2004), in which a district attorney sought to satisfy a restitution order by moving in the court in which a case had been settled, the district court held that the PLRA provision concerning restitution orders “is not applicable in this case because the parties have reached a private settlement agreement.” The court expressed confidence that the District Attorney had ample means in state court to enforce the restitution order. *Cf. Torres v. Walker*, 356 F.3d 238, 243 (2d Cir. 2004) (holding that a “so ordered” stipulation settling a damage claim was not a money judgment).

⁷²¹ *Cf. Felder v. Casey*, 487 U.S. 131 (1988) (holding that a state notice of claim requirement was pre-empted by federal law eschewing such a requirement in § 1983 cases, even when brought in state court); *Hankins v. Finnel*, 964 F.2d 853, 861 (8th Cir.) (holding that § 1983 pre-empts a state Incarceration Reimbursement Act and makes it unenforceable against a § 1983 damage judgment), *cert. denied*, 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 180: Lane v. Doan, 287 F.Supp.2d 210, 212-13 (W.D.N.Y. 2003) (holding a prisoner who made “reasonable attempts” to file and prosecute grievances, but had many of his grievances and inquiries ignored, had exhausted); Barrera v. Acting Executive Director of Cook County Dep’t of Corrections, 2003 WL 21976753 at *2-3 (N.D.Ill., Aug. 18, 2003) (holding that prisoner who received no response for 28 months had exhausted, notwithstanding claim that it was still under investigation after 28 months); Sweet v. Wende Correctional Facility, 253 F.Supp.2d 492, 495 (W.D.N.Y. 2003) (holding that prisoner’s allegation that he commenced the grievance process but prison officials did not act on his complaints was sufficient to avoid summary judgment for non-exhaustion); Smith v. Boyle, 2003 WL 174189 at *3 (N.D.Ill., Jan. 27, 2003) (holding that a plaintiff who waited seven months for a decision in a system that required a decision in order to appeal had no available remedy); Rose v. Garbs, 2003 WL 548384 at *4 n.3 (N.D.Ill., Feb. 26, 2003); Dennis v. Johnson, 2003 WL 102399 (N.D.Tex., Jan. 7, 2003) (holding that plaintiff who filed a step two grievance and did not receive a timely response had exhausted); Martin v. Snyder, 2002 WL 484911 at *3 (N.D.Ill., Mar. 28, 2002) (rejecting claim that plaintiff “should have filed even more grievances about defendants’ failure to respond”); Armstrong v. Drahos, 2002 WL 187502 at *1 (N.D.Ill., Feb. 6, 2002) (“If [plaintiff] received no response, there was nothing to appeal.”); Harmon v. Aroostook County Sheriff’s Dept., 2001 WL 1165406 at *3 (D.Me., Oct. 2, 2001) Long v. Lafko, 2001 WL 863422 at *2 n. 1 (S.D.N.Y., July 31, 2001); Bowers v. Mounet, 2001 WL 826556 at *2 (D.Del., July 18, 2001); Nitz v. French, 2001 WL 747445 at *3 (N.D.Ill., July 2, 2001); Reeder v. Department of Correction, 2001 WL 652021 at *2 (D.Del., Feb. 22, 2001).

Note 185: Branch v. Brown, 2003 WL 21730709 at *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 at *5 (D.Del., July 30, 2003) (holding grievance was “resolved informally” where plaintiff initiated the process and was then told by a prison official that “they had fired the doctor” and she should seek legal representation); Sulton v. Wright, 265 F.Supp.2d 292, 298-99 (S.D.N.Y. 2003); Dixon v. Goord, 224 F.Supp.2d 739, 749 (S.D.N.Y. 2002) (“The exhaustion requirement is satisfied by resolution of the matter, i.e., an inmate is not required to continue to complain after his grievances have been addressed.”); Gomez v. Winslow, 177 F.Supp.2d 977, 984-85 (N.D.Cal. 2001) (allowing damage claim to go forward where the prisoner had stopped pursuing the grievance system when he received all the relief it could give him); Brady v. Attygala, 196 F.Supp.2d 1016, 1020 (C.D.Cal. 2002) (holding plaintiff had exhausted where he

grieved to see an ophthalmologist and was taken to see an ophthalmologist before the grievance process was completed); *McGrath v. Johnson*, 67 F.Supp.2d 499, 510 (E.D.Pa. 1999), *aff'd*, 35 Fed.Appx. 357, 2002 WL 1271713 (3rd 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 at *4 (S.D.N.Y., June 16, 2003) (following *Marvin*), *adhered to on reargument*, 2003 WL 22052978 (S.D.N.Y., Sept. 3, 2003).

Note 231: *Skundor v. Coleman*, 2003 WL 22088342 at *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*, 125 S.Ct. 628 (2004); *Casarez v. Mars*, 2003 WL 21369255 at *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) (adopting holding of *Irvin v. Zamora*, *supra*, that 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”); *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 defendants’ argument that “each claim at each stage [of the grievance process] must parallel each and every claim in the federal complaint”).

Note 333: *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 at *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 at *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 at *4 (N.D. Ohio, June 5, 2003) (“ . . . where a prisoner is notified that a document relating to his grievance has been lost or misfiled, failure to refile constitutes a failure to exhaust. . . .”); *Jeanes v. U.S. Dept.*

of Justice, 231 F.Supp.2d 48, 50-51 (D.D.C. 2002) (holding that a prisoner who bypassed the initial steps of the process, and then ignored instructions to use them because his grievance did not meet the standards for bypassing them, failed to exhaust); Ford v. Page, 2002 WL 31818996 at *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 at *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 at *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 at *6 (W.D.Va., Mar. 7, 2002) (holding that failure to follow instructions and file a separate grievance for each issue was a failure to exhaust), *aff'd*, 2003 WL 22039201 (4th Cir. 2003) (unpublished).

Note 423: Bokin v. Davis, 2003 WL 21920922 at *3 (N.D.Cal., Aug. 7, 2003) (holding that internal affairs investigations are not administrative remedies); Muhammad v. Pico, 2003 WL 21792158 at *23 (S.D.N.Y., Aug. 5, 2003) (holding that letters to Commissioner or Superintendent do not exhaust); Crosswell v. McCoy, 2003 WL 962534 at *4 (N.D.N.Y., Mar. 11, 2003) (holding that a letter to the Superintendent did not exhaust); Moore v. Baca, 2002 WL 31870541 at *2 (C.D.Cal., Dec. 11, 2002) (holding that a letter from counsel to the Sheriff does not exhaust in a jail with a grievance procedure); Sunn v. Cattell, 2002 WL 31455482 (D.N.H., Oct. 31, 2002) (holding that a letter to the Governor forwarded to the prison warden did not exhaust); McNair v. Sgt. Jones, 2002 WL 31082948 at *7 (S.D.N.Y., Sept. 18, 2002) (holding that verbal complaints, complaints to the Legal Aid Society, and letters to the Superintendent do not exhaust), *report and recommendation adopted*, 2003 WL 22097730 (S.D.N.Y., Sept. 10, 2003); Saunders v. Goord, 2002 WL 1751341 at *3 (S.D.N.Y., July 29, 2002) (holding that writing letters to superintendent does not substitute for filing grievances); Nunez v. Goord, 2002 WL 1162905 (S.D.N.Y., June 3, 2002); Skinner v. Cunningham, 2002 WL 337446 at *2 (D.N.H., Feb. 28, 2002).

Note 452: Stevens v. Goord, 2003 WL 21396665 at *5 (S.D.N.Y., June 16, 2003) (holding that private prison medical provider failed to meet its burden of showing that claims against it were grievable), *adhered to on reargument*, 2003 WL 22052978 (S.D.N.Y., Sept. 3, 2003); Borges v. Administrator for Strong Memorial Hosp., 2002 WL 31194558 at *3 (W.D.N.Y., Sept. 30, 2002) (holding defendants did not show that grievance procedure was available to prisoners injured by dentists at an outside hospital, given their policy making non-grievable any action taken by an “outside agency”); Baldwin v. Armstrong, 2002 WL 31433288 at *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 at *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 at *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 at *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 (3rd Cir.2002); *Davis v. Frazier*, 1999 WL 395414 at *3 (S.D.N.Y., June 15, 1999).

Note 479: *Labounty v. Johnson*, 253 F.Supp.2d 496, 502-04 (W.D.N.Y. 2003) (holding that grievance supervisor's alleged failure to follow procedures, preventing plaintiff's appeal, barred summary judgment for non-exhaustion); *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); *Johnson v. True*, 125 F.Supp.2d 186, 188-89 (W.D.Va. 2000) (holding allegation that efforts to exhaust were frustrated by prison officials raised an issue of material fact whether plaintiff exhausted "available" remedies), *appeal dismissed*, 32 Fed.Appx. 692, 2002 WL 596403 (4th Cir. 2002); *Bullock v. Horn*, 2000 WL 1839171 at *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); *Johnson v. Garraghty*, 57 F.Supp.2d 321 (E.D.Va. 1999) (holding that factual conflict over whether the plaintiff had been prevented from exhausting "merits an evidentiary hearing.").

Note 483: *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 at *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 at *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. Saddle mire*, 2002 WL 31242204 at *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 at *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 at *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 at *2 (N.D.Ill., Feb 2, 2001) (holding that a prison officials' statement to the plaintiff that she would have the toilet fixed, and he should stop asking her about it, might estop defendants from claiming non-exhaustion; it "raises the question whether Baker effectively represented (or misrepresented) to Hall that he had done all he needed to do, or that the grievance procedure was useless, i.e., 'available,' but not a 'remedy.'"); *Feliz v. Taylor*, 2000 WL 1923506 at *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).

APPENDIX B

The Prison Litigation Reform Act, as Codified

I. SCOPE AND APPLICABILITY OF THE STATUTE

From the prospective relief provisions:

18 U.S.C. § 3626(h). Definitions.

* * *

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

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

* * *

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

From the prisoner litigation provisions:

42 U.S.C. § 1997e(h). Definition.

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

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

II. PROSPECTIVE RELIEF RESTRICTIONS

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

(a) Requirements for relief.--

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

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

- (i) Federal law requires such relief to be ordered in violation of State or local law;
- (ii) the relief is necessary to correct the violation of a Federal right; and
- (iii) no other relief will correct the violation of the Federal right.

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

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

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

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

(ii) the defendant has had a reasonable amount of time to comply with the previous court orders.

(B) In any civil action in Federal court with respect to prison conditions, a prisoner release order shall be entered only by a three-judge court in accordance with section 2284 of title 28, if the requirements of subparagraph (E) have been met.

(C) A party seeking a prisoner release order in Federal court shall file with any

request for such relief, a request for a three-judge court and materials sufficient to demonstrate that the requirements of subparagraph (A) have been met.

(D) If the requirements under subparagraph (A) have been met, a Federal judge before whom a civil action with respect to prison conditions is pending who believes that a prison release order should be considered may sua sponte request the convening of a three-judge court to determine whether a prisoner release order should be entered.

(E) The three-judge court shall enter a prisoner release order only if the court finds by clear and convincing evidence that--

(i) crowding is the primary cause of the violation of a Federal right; and

(ii) no other relief will remedy the violation of the Federal right.

(F) Any State or local official including a legislator or unit of government whose jurisdiction or function includes the appropriation of funds for the construction, operation, or maintenance of prison facilities, or the prosecution or custody of persons who may be released from, or not admitted to, a prison as a result of a prisoner release order shall have standing to oppose the imposition or continuation in effect of such relief and to seek termination of such relief, and shall have the right to intervene in any proceeding relating to such relief.

(b) Termination of relief.--

(1) Termination of prospective relief.--(A) In any civil action with respect to prison conditions in which prospective relief is ordered, such relief shall be terminable upon the motion of any party or intervener--

(i) 2 years after the date the court granted or approved the prospective relief;

(ii) 1 year after the date the court has entered an order denying termination of prospective relief under this paragraph; or

(iii) in the case of an order issued on or before the date of enactment of the Prison Litigation Reform Act, 2 years after such date of enactment.

(B) Nothing in this section shall prevent the parties from agreeing to terminate or modify relief before the relief is terminated under subparagraph (A).

(2) Immediate termination of prospective relief.--In any civil action with respect to prison conditions, a defendant or intervener shall be entitled to the immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.

(3) Limitation.--Prospective relief shall not terminate if the court makes written findings based on the record that prospective relief remains necessary to correct a current and ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation.

(4) Termination or modification of relief.--Nothing in this section shall prevent any party or intervener from seeking modification or termination before the relief is terminable under paragraph (1) or (2), to the extent that modification or termination would otherwise

be legally permissible.

(c) Settlements.--

(1) Consent decrees.--In any civil action with respect to prison conditions, the court shall not enter or approve a consent decree unless it complies with the limitations on relief set forth in subsection (a).

(2) Private settlement agreements.--(A) Nothing in this section shall preclude parties from entering into a private settlement agreement that does not comply with the limitations on relief set forth in subsection (a), if the terms of that agreement are not subject to court enforcement other than the reinstatement of the civil proceeding that the agreement settled.

(B) Nothing in this section shall preclude any party claiming that a private settlement agreement has been breached from seeking in State court any remedy available under State law.

(d) State law remedies.--The limitations on remedies in this section shall not apply to relief entered by a State court based solely upon claims arising under State law.

(e) Procedure for motions affecting prospective relief.--

(1) Generally.--The court shall promptly rule on any motion to modify or terminate prospective relief in a civil action with respect to prison conditions. Mandamus shall lie to remedy any failure to issue a prompt ruling on such a motion.

(2) Automatic stay.--Any motion to modify or terminate prospective relief made under subsection (b) shall operate as a stay during the period--

(A)(i) beginning on the 30th day after such motion is filed, in the case of a motion made under paragraph (1) or (2) of subsection (b); or

(ii) beginning on the 180th day after such motion is filed, in the case of a motion made under any other law; and

(B) ending on the date the court enters a final order ruling on the motion.

(3) Postponement of automatic stay.--The court may postpone the effective date of an automatic stay specified in subsection (e)(2)(A) for not more than 60 days for good cause. No postponement shall be permissible because of general congestion of the court's calendar.

(4) Order blocking the automatic stay.--Any order staying, suspending, delaying, or barring the operation of the automatic stay described in paragraph (2) (other than an order to postpone the effective date of the automatic stay under paragraph (3)) shall be treated as an order refusing to dissolve or modify an injunction and shall be appealable pursuant to section 1292(a)(1) of title 28, United States Code, regardless of how the order is styled or whether the order is termed a preliminary or a final ruling.

(f) Special masters.--

(1) In general.--(A) In any civil action in a Federal court with respect to prison conditions, the court may appoint a special master who shall be disinterested and objective and who will give due regard to the public safety, to conduct hearings on the record and

prepare proposed findings of fact.

(B) The court shall appoint a special master under this subsection during the remedial phase of the action only upon a finding that the remedial phase will be sufficiently complex to warrant the appointment.

(2) Appointment.--(A) If the court determines that the appointment of a special master is necessary, the court shall request that the defendant institution and the plaintiff each submit a list of not more than 5 persons to serve as a special master.

(B) Each party shall have the opportunity to remove up to 3 persons from the opposing party's list.

(C) The court shall select the master from the persons remaining on the list after the operation of subparagraph (B).

(3) Interlocutory appeal.--Any party shall have the right to an interlocutory appeal of the judge's selection of the special master under this subsection, on the ground of partiality.

(4) Compensation.--The compensation to be allowed to a special master under this section shall be based on an hourly rate not greater than the hourly rate established under section 3006A for payment of court-appointed counsel, plus costs reasonably incurred by the special master. Such compensation and costs shall be paid with funds appropriated to the Judiciary.

(5) Regular review of appointment.--In any civil action with respect to prison conditions in which a special master is appointed under this subsection, the court shall review the appointment of the special master every 6 months to determine whether the services of the special master continue to be required under paragraph (1). In no event shall the appointment of a special master extend beyond the termination of the relief.

(6) Limitations on powers and duties.--A special master appointed under this subsection--

(A) may be authorized by a court to conduct hearings and prepare proposed findings of fact, which shall be made on the record;

(B) shall not make any findings or communications *ex parte*;

(C) may be authorized by a court to assist in the development of remedial plans; and

(D) may be removed at any time, but shall be relieved of the appointment upon the termination of relief.

(g) Definitions.--As used in this section--

(1) the term "consent decree" means any relief entered by the court that is based in whole or in part upon the consent or acquiescence of the parties but does not include private settlements;

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

(3) the term "prisoner" means any person subject to incarceration, detention, or

admission to any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program;

(4) the term "prisoner release order" includes any order, including a temporary restraining order or preliminary injunctive relief, that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or nonadmission of prisoners to a prison;

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

(6) the term "private settlement agreement" means an agreement entered into among the parties that is not subject to judicial enforcement other than the reinstatement of the civil proceeding that the agreement settled;

(7) the term "prospective relief" means all relief other than compensatory monetary damages;

(8) the term "special master" means any person appointed by a Federal court pursuant to Rule 53 of the Federal Rules of Civil Procedure or pursuant to any inherent power of the court to exercise the powers of a master, regardless of the title or description given by the court; and

(9) the term "relief" means all relief in any form that may be granted or approved by the court, and includes consent decrees but does not include private settlement agreements.

Amendment: Special Masters Appointed Prior to Apr. 26, 1996; Prohibition on Use of Funds

Pub.L. 104-208, Div. A, Title I, § 101(a) [Title III, § 306], Sept. 30, 1996, 110 Stat. 3009-45, provided that: "None of the funds available to the Judiciary in fiscal years 1996 and 1997 and hereafter shall be available for expenses authorized pursuant to section 802(a) of title VIII of section 101(a) of title I of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Public Law 104-134 [enacting this section], for costs related to the appointment of Special Masters prior to April 26, 1996."

III. EXHAUSTION OF ADMINISTRATIVE REMEDIES

42 U.S.C. § 1997e(a). Applicability of administrative remedies.

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

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

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

IV. MENTAL OR EMOTIONAL INJURY

42 U.S.C. § 1997e(e). Limitation on recovery.

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

28 U.S.C. § 1346 (b). [from Federal Tort Claims Act]

* * *

(2) No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

V. ATTORNEYS' FEES

42 U.S.C. § 1997e(d). Attorney's fees.

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

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

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

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

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

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

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

VI. FILING FEES AND COSTS/SCREENING AND DISMISSAL

28 U.S.C. § 1915. Proceedings in forma pauperis

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

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

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

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

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

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

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

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

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

(c) Upon the filing of an affidavit in accordance with subsections (a) and (b) and the prepayment of any partial filing fee as may be required under subsection (b), the court may direct payment by the United States of the expenses of (1) printing the record on appeal in any civil or criminal case, if such printing is required by the appellate court; (2) preparing a transcript of proceedings before a United States magistrate in any civil or criminal case, if

such transcript is required by the district court, in the case of proceedings conducted under section 636(b) of this title or under section 3401(b) of title 18, United States Code; and (3) printing the record on appeal if such printing is required by the appellate court, in the case of proceedings conducted pursuant to section 636(c) of this title. Such expenses shall be paid when authorized by the Director of the Administrative Office of the United States Courts.

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

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

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

(A) the allegation of poverty is untrue; or

(B) the action or appeal--

(i) is frivolous or malicious;

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

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

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

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

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

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

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

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

28 U.S.C. § 1915A. Screening

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

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

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

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

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

42 U.S.C. § 1997e(c). Dismissal.

(1) The court shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief.

(2) In the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief, the court may dismiss the underlying claim without first requiring the exhaustion of administrative remedies.

VII. THREE STRIKES PROVISION

28 U.S.C. § 1915(g).

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

18 U.S.C. § 983(h)(3) (from the Civil Asset Forfeiture Reform Act of 2000)

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

IX. WAIVER OF REPLY

42 U.S.C. § 1997e(g).

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

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

X. HEARINGS BY TELECOMMUNICATION AND AT PRISONS

42 U.S.C. §1997e(f). Hearings.

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

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

XI. REVOCATION OF EARNED RELEASE CREDIT

28 U.S.C. § 1932.

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

- (1) the claim was filed for a malicious purpose;
- (2) the claim was filed solely to harass the party against which it was filed; or
- (3) the claimant testifies falsely or otherwise knowingly presents false evidence or information to the court.

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

XII. DIVERSION OF DAMAGE AWARDS (not codified)

A. Notice to Crime Victims of Pending Damage Award

Pub.L. 104-134, Title I, § 101[(a)][Title VIII, § 808], Apr. 26, 1996, 110 Stat. 1321-76; renumbered Title I Pub.L. 104-140, § 1(a), May 2, 1996, 110 Stat. 1327

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

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

Pub.L. 104-134, § 101[(a)][Title VIII, § 807], Apr. 26, 1996, 110 Stat. 1321-75; renumbered Title I Pub.L. 104-140, § 1(a), May 2, 1996, 110 Stat. 1327

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

XIII. BANKRUPTCY

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

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

* * *

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