CHAPTER 14

THE PRISON LITIGATION REFORM ACT*

A. Introduction

The Prison Litigation Reform Act ("PLRA") changes various parts of the United States Code that address civil rights litigation and "*in forma pauperis*" ("IFP") proceedings. IFP proceedings are where you file a lawsuit as a poor person and thereby avoid paying many of the normal fees and costs. Overall, the PLRA is designed to make it harder for prisoners to file complaints in federal court.

This Chapter will tell you about the parts of court decisions applying the PLRA, offer some practical advice, and suggest ways to defend yourself in *pro se* litigation if prison officials argue that you have filed a frivolous (not serious) claim under the PLRA. There are important questions about the PLRA that the courts have not yet settled, so some of this advice might need to be changed in the future.[1]

The PLRA makes it extremely important to be sure your legal claim is strong before you file it. Under the PLRA, even if you proceed *in forma pauperis*, you have to pay the full $350 filing fee (and another $450 if you wish to appeal the court's decision) in installments. You also run the risk of getting a "strike" under the PLRA's "three strikes" provision. Under this provision, if you have three cases dismissed as frivolous, malicious, or for failing to state a valid legal claim, you can no longer use the IFP procedure for future suits,[2] and you will have to pay the entire filing fee in advance without the option of paying in installments.[3] A lawsuit is considered frivolous when there can be no dispute that it is not supported either by law or fact,[4] and it is considered malicious when it is abusive of the judicial process.[5]

The PLRA also requires that you first try all of the procedures available to you in prison to address your problem before filing suit. This is called "exhausting" your administrative remedies. This requirement means that you *must* file a grievance or complaint or any other appropriate administrative remedy, such as a disciplinary appeal. You must also pursue all available appeals within the prison system before you can file a suit in federal court. You have to do this even if you are suing for money damages and the grievance system does not provide damages. These are only a few of the obstacles and restrictions the PLRA imposes.

Part B of this Chapter talks about the PLRA's effect on your responsibility for paying filing fees. Part C provides an overview of the PLRA's "three strikes" provision. Part D explains the new requirement that forces a court to dismiss any prisoner's case that it believes is frivolous or malicious, or that fails to state a legal claim, or seeks damages from a defendant who is immune from such claims. Part E explains in detail one of the most important aspects of the PLRA: the requirement that you exhaust all administrative remedies before you will be allowed into court. Part F describes the physical injury requirement of the PLRA, which says you cannot bring a suit in federal court for mental or emotional injury without first showing a physical injury. Parts G through L briefly discuss the parts of the PLRA that (1) limit the attorneys' fees prisoners can recover in a successful suit; (2) allow defendants in a prisoner suit not to respond to the prisoner's complaint unless the court tells them to do so; (3) allow for proceedings that happen before the trial to be conducted by telephone or video; (4) allow the court to order the loss of earned good-time credit if it finds that your claim was filed for a malicious or harassing purpose; (5) require that any damages awarded to a prisoner for a loss or injury he

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1. Unfortunately, many significant decisions interpreting the PLRA are unreported, which means they do not appear in the Federal Reporter and Federal Supplement volumes available in prison law libraries. They are available on the Lexis and Westlaw computer services. Citations like "1999 WL 12345" are Westlaw citations. Citations like "1999 U.S. App. LEXIS 19764" are Lexis citations. Some jurisdictions do not allow you to cite to these decisions, that is, use them to support your legal argument. For additional important information about unpublished cases, see Chapter 2 of the *JLM*, "Introduction to Legal Research."
2. 28 U.S.C. § 1915(g) (2012).
3. *See* In re Tyler, 110 F.3d 528, 529 (8th Cir. 1997).
4. Sun v. Forrester, 939 F.2d 924, 925 (11th Cir. 1991); *see also* Crayton v. Kaiser, 242 F.3d 388 (10th Cir. 2000).
5. Johnson v. Edlow, 37 F. Supp. 2d 775, 776 (E.D. Va. 1999).

suffered be paid directly to satisfy any restitution orders (money owed by a prisoner for any damages to a victim); and (6) change how injunctions can be issued and maintained.

B. Filing Fees

The PLRA requires all prisoners, including poor or needy prisoners who are granted IFP status in federal court, to pay all of their court filing fees. Payments may be made in installments based on the amount of money in their prison accounts. You may wonder why you should bother seeking IFP status if you are going to have to pay the filing fees anyway. The reason is that if you do not have IFP status, you will have to pay the entire fee before you can file the case. Also, IFP litigants can have their summons and complaints served by the U.S. Marshals Service[6] and can be excused from payment of some costs (though not fees) on appeal.[7] Without IFP status, you will have to take care of service and pay appeal costs yourself.[8]

If you are seeking IFP status, you must submit certified statements[9] of your prison accounts for the six months before you filed the complaint or notice of appeal.[10] If these submissions are delayed because prison authorities do not respond to your requests, your case will not be dismissed.[11] If prison officials fail or refuse to provide a certified statement, the court can order them to do so.[12] District courts in various states have different procedures for acquiring the certified statements.[13] You should obtain the necessary forms and instructions from the clerk of the court in which you plan to bring suit.[14]

If you are granted IFP status, you must pay the *entire* fee for filing either a complaint or an appeal[15] according to the following formula:

(1) " . . . 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

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6. 28 U.S.C. § 1915(d) (2012).
7. 28 U.S.C. § 1915(c) (2012).
8. See *JLM*, Chapter 6, "An Introduction to Legal Documents" for information on necessary documents.
9. 28 U.S.C. § 1915(a)(2) (2012).
10. *See* Spaight v. Makowski, 252 F.3d 78, 79 (2d Cir. 2001) (holding that the relevant time period on appeal is six months before filing the notice of appeal, not six months before moving for *in forma pauperis* status). As a practical matter, courts have accepted information supplied by prison officials that was a little out of date. *See* Jackson v. Wright, No. 99 C 1294, 1999 U.S. Dist. LEXIS 3487, at *1 n.2 (N.D. Ill. Mar. 10, 1999) (*unpublished*) (accepting statement ending the month before the complaint was filed in light of the small amounts involved); Lam v. Clark, No. 99 C 558, U.S. Dist. LEXIS 1573, at *2–3 (N.D. Ill. Feb. 10, 1999) (*unpublished*) (accepting account information ending three and a half weeks before the filing of the complaint, since there was a consistent pattern for the six months covered).
11. *See* Lawton v. Ortiz, No. 06-1167 (FSH), 2006 U.S. Dist. LEXIS 66905, at *2 (D.N.J. Sept. 19, 2006) (*unpublished*) (granting IFP status where prisoner said officials did not respond to his requests for an account statement and other evidence showed he was indigent). In addition, a delay in submitting the financial information will not cause you to miss the statute of limitations as long as the complaint itself is submitted in time. *See* Garrett v. Clarke, 147 F.3d 745, 746 (8th Cir. 1998) ("[T]he prisoner should be allowed to file the complaint, and then supply a prison account statement within a reasonable time.") (citations omitted); *but see* Murray v. Dosal, 150 F.3d 814, 816 n.4 (8th Cir. 1998) (applying *Garrett* but noting strong disagreement).
12. *See* Stinnett v. Cook County Med. Staff, No. 99 C 1696, U.S. Dist. LEXIS 4605, at *2 (N.D. Ill. Mar. 19, 1999) (*unpublished*) (requiring prison officials to send a certified copy of prisoner's financial statement to the court).
13. In the New York federal courts, for example, three of the four district courts (the Southern, Eastern, and Northern Districts) get the certified statement directly from prison officials; prisoner plaintiffs must submit a form to the court authorizing the disclosure of this information and the payment of the fee from their prison accounts. In the Western District of New York, prisoners must sign such an authorization and must also get certification from the prison of their funds. In the certification, the prison should include the average balances for the preceding six months.
14. The addresses of the federal district courts (organized by Circuit) are provided in Appendix I of the *JLM*.
15. The fee for filing a federal court civil complaint is $350.00. 28 U.S.C. § 1914(a) (2012). For appeals, there is a $500.00 filing fee. *See* U.S. Courts, Federal Court Fees, *available at* http://www.uscourts.gov/FormsAndFees/Fees/CourtOfAppealsMiscellaneousFeeSchedule.aspx (last visited Jan. 17, 2017).

> 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."[16]

Your case should not be dismissed if you cannot pay the initial fee.[17] The statute says that the initial fee is to be collected "when funds exist,"[18] and that prisoners should not be stopped from bringing suit or appealing a judgment simply because they cannot pay.[19] A case should not be dismissed for nonpayment without a court first determining if the prisoner has had the opportunity to pay.[20] However, if you do not pay on purpose, or if you do not take the necessary steps to pay, your case is likely to be dismissed.[21] Prisoners generally may not be stopped from filing suit simply because they owe fees from a prior action.[22] However, one federal circuit has held that prisoners who try to avoid paying filing fees by lying or who fail to pay fees because they are subject to the "three strikes" provision of the PLRA[23] can be denied IFP status or stopped completely from filing suit.[24]

If you lose a case, a federal court may decide to charge you with the costs of the lawsuit.[25] Courts are free to choose whether they will make you pay the costs.[26] If a court decides to charge you with costs, you cannot appeal that decision.[27]

There are no exceptions to the fee requirement. Once your case is filed, you owe the fee. The court cannot delay payment until after your release.[28] You usually must pay these filing fees even if your case is dismissed immediately, if you fail to submit the necessary financial information,[29] or if you paid a fee in connection with

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16. 28 U.S.C. §§ 1915(b)(1)–(2) (2012).

17. 28 U.S.C. § 1915(b)(4) (2012).

18. 28 U.S.C. §§ 1915(b)(1)–(2) (2012).

19. 28 U.S.C. § 1915(b)(4) (2012); *see* Taylor v. Delatoor, 281 F.3d 844, 850–51 (9th Cir. 2002) (holding that a prisoner who cannot pay the initial fee must be allowed to proceed with his case and not merely be granted more time to pay).

20. Redmond v. Gill, 352 F.3d 801, 804 (3d Cir. 2003) (holding that the district court abused its discretion in dismissing a case when the plaintiff failed to return an authorization form for payment of fees within 20 days, and requiring that the plaintiff be given more time); Hatchett v. Unknown Nettles, 201 F.3d 651, 652 (5th Cir. 2000) ("[I]t is an abuse of discretion for a district court to dismiss an action for failure to comply with an initial partial filing fee order without making some inquiry regarding whether the prisoner has complied with the order by submitting any required consent forms within the time allowed for compliance."); Beyer v. Cormier, 235 F.3d 1039, 1041 (7th Cir. 2000) (holding that the court should have communicated with prison officials or granted an extension of payment deadline). *But see* Cosby v. Meadors, 351 F.3d. 1324, 1332–33 (10th Cir. 2003) (holding that a court that issued repeated orders for the plaintiff to show cause could dismiss where the plaintiff did not document any reasons for his failure to pay).

21. *See* Cosby v. Meadors, 351 F.3d. 1324, 1332–33 (10th Cir. 2003) (affirming dismissal of case where plaintiff said he could not pay the fees but had spent his money on other items); Jackson v. N.P. Dodge Realty Co., 173 F. Supp. 2d 951, 952 (D. Neb. 2001) (rejecting prisoner's claim where he was clearly able to pay).

22. *See* Walp v. Scott, 115 F.3d 308, 309 (5th Cir. 1997) (reversing a dismissal based on a pending action and stating that there is no requirement that a prisoner complete payment of fees before beginning another action).

23. 28 U.S.C. § 1915(g) (2012). For more information on the "three strikes" provision, see the next section.

24. *See* Campbell v. Clarke, 481 F.3d 967, 969–70 (7th Cir. 2007) (reasoning that a judge's discretion allows for the rejection of an action filed without fees when there is evidence of manipulation by the filing prisoner); Sloan v. Lesza, 181 F.3d 857, 859 (7th Cir. 1999) (barring a prisoner who had "struck out" under 28 U.S.C. § 1915(g) from filing further litigation until he paid the past-due filing fees). However, a recent decision held that a prisoner who is subject to the "three strikes" provision of the PLRA and who has not paid filing fees owed from prior suits cannot be barred from filing under the "imminent danger of serious physical injury" exception to that provision. Miller v. Donald, 541 F.3d 1091, 1096–97 (11th Cir. 2008).

25. 28 U.S.C. § 1915(f)(2) (2012). In one recent case, a prisoner was assessed $7,989.90 in costs and $15,750 in attorneys' fees. *See* Sanders v. Seabold, 188 F.3d 509, 509 (6th Cir. 1999).

26. Feliciano v. Selsky, 205 F.3d 568, 572 (2d Cir. 2000) (noting "the ability of a court to require, as a matter of discretion, that the indigent [(poor/needy)] prisoner pay the costs, or some part of them").

27. Whitfield v. Scully, 241 F.3d 264, 273 (2d Cir. 2001) ("[T]he 1996 amendments to § 1915 have undercut the ability of prisoners to appeal an award of costs on the ground of indigency").

28. Ippolito v. Buss, 293 F. Supp. 2d 881, 883 (N.D. Ind. 2003) (denying a prisoner's request to defer payments).

29. *See* McGore v. Wrigglesworth, 114 F.3d 601, 605 (6th Cir. 1997) (warning that failure to pay fees or to provide necessary affidavit of indigency or trust account statement may eventually result in dismissal of case); Leonard v. Lacy, 88 F.3d 181, 186 (2d Cir. 1996) ("[W]e will apply the PLRA to impose any required obligation for filing fees (subject to installment payments) upon all prisoners who seek to appeal civil judgments without prepayment of fees"); *but see* Smith v. District of Columbia, 182 F.3d 25, 29 (D.C. Cir. 1999) (not requiring prisoners to pay the full filing fee whenever their *in forma pauperis* application is denied).

a previous appeal.[30] You cannot get the fee back by choosing to withdraw the complaint or appeal.[31] Prison officials must keep collecting fees from your account if you remain within their legal custody, even if you are transferred to another jurisdiction.[32] They are required to make these fees more important and collect them before any other deductions can be taken out of your account.[33]

Filing fee payments are based on all money the prisoner receives (not just prison wages), and deductions from the fee may not be made for money spent on legal copies and postage.[34] The 20% monthly payment is to be made separately for each case. The Second Circuit has held that only one fee and one award of costs are to be collected at a time, so in New York a prisoner will never be required to pay more than forty percent of his monthly income.[35] Other courts in different parts of the country have held that all fees are to be collected at the same time.[36]

In class actions, only the prisoners who signed the complaint or notice of appeal are responsible for payment of fees.[37] In cases involving more than one plaintiff, the courts have disagreed about payment of filing fees. One federal appeals court held that each plaintiff must pay an equal amount of the fee saying that, "each prisoner should be proportionally liable for any fees and costs that may be assessed."[38] Another appeals court held that multiple prisoners joining similar claims in a single suit must each pay a filing fee, but also have to file separate complaints.[39] More recently, other federal appeals courts agreed that each prisoner plaintiff must pay the full filing fee, but need not file a separate complaint.[40]

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30. Lebron v. Russo, 263 F.3d 38, 42 (2d Cir. 2001) (refusing to grant an exception to filing fee requirement even where plaintiff filed a second appeal that arose out of the same district court action).

31. Goins v. Decaro, 241 F.3d 260, 261 (2d Cir. 2001) ("The PLRA makes no provision for return of fees partially paid or for cancellation of the remaining indebtedness in the event that an appeal is withdrawn.").

32. Beese v. Liebe, 153 F. Supp. 2d 967, 970 (E.D. Wis. 2001) (holding that state officials are obligated "to put into place procedures for continuing the collection of the filing fees . . . The payments *do not stop*, nor are they even temporarily placed on hold, just because the Secretary has chosen to send [the prisoners] out-of-state.") (citation omitted).

33. Smith v. Huibregtse, 151 F. Supp. 2d 1040, 1043 (E.D. Wis. 2001) (finding "funds exist within the meaning of the PLRA whenever a prisoner has funds or receives income and prison officials must give payment of federal court filing fees priority").

34. Rutledge v. Romero, No. 99 C 3453, 1999 U.S. Dist. LEXIS 9021, at *2–5 (N.D. Ill. June 3, 1999) (*unpublished*) (establishing that funds calculation is based on all money in the account, including money from third parties and money intended for legal communication). Courts have disagreed about whether money that is withheld from a prisoner's income and held until release should be counted in calculating the fees or used to pay the fees. *Compare* Cardew v. Gord, 26 F. App'x 48, 50 (2d Cir. 2001) (upholding a district court decision that "lag pay" should not be used for filing fees), *with* Spence v. McCaughtrey, 46 F. Supp. 2d 861, 862–63 (E.D. Wis. 1999) (holding prisoner's "release account" was a "prisoner's account" under the statute and should be used for filing fees purposes).

35. Whitfield v. Scully, 241 F.3d 264, 278 (2d Cir. 2001) ("28 U.S.C. § 1915(b)(2) permits the recoupment of up to 40 percent of a prisoner's monthly income at any given time—20 percent for filing fees under § 1915(b) and an additional 20 percent for costs under § 1915(f).").

36. Lefkowitz v. Citi-Equity Group, 146 F.3d 609, 612 (8th Cir. 1998) (holding that the 20 percent assessment rate applies in every case); Miller v. Lincoln County, 171 F.3d 595, 596 (8th Cir. 1999) (declining to reduce the monthly payments for a prisoner with multiple cases); Atchison v. Collins, 286 F.3d 177, 180 (5th Cir. 2002) (holding that the PLRA "mandates that prisoners pay twenty percent of their monthly income for each case filed").

37. Talley-Bey v. Knebl, 168 F.3d 884, 887 (6th Cir. 1999) ("[I]n cases involving class actions, . . . the responsibility of paying the required fees and costs rests with the prisoner or prisoners who signed the complaint . . . [O]n appeal, the prisoner or prisoners signing the notice of appeal are obligated to pay all appellate fees and costs.").

38. *In re* Prison Litigation Reform Act, 105 F.3d 1131, 1138 (6th Cir. 1997). One lower court has taken a different approach to dividing the filing fee, holding that the parties can divide the fee as they like. Every person is responsible if the fee goes unpaid, even if they have already paid more than their share. *See* Alcala v. Woodford, No. C 02-0072 TEH (pr), 2002 U.S. Dist. LEXIS 9504, at *2–3 (N.D. Cal. May 21, 2002) (*unpublished*) (holding that all parties are responsible for seeing that the fee is paid in full, and that all may be penalized for a failure to pay).

39. Hubbard v. Haley, 262 F.3d 1194, 1197 (11th Cir. 2001) (holding that the clear language of the PLRA requires each prisoner to bring a separate suit). A number of other courts have adopted *Hubbard*. *See* Caputo v. Belmar Municipality & County, No. 08-1975 (MLC), 2008 U.S. Dist. LEXIS 36883, at *5–6 (D.N.J. May 2, 2008) (*unpublished*); Kron v. Cook, No. H-07-4054, 2008 U.S. Dist. LEXIS 4687, at *1 (S.D. Tex. Jan. 23, 2008) (*unpublished*); Osterloth v. Hopwood, No. CV 06-152-M-JCL, 2006 U.S. Dist. LEXIS 83461, at *2–3 (D. Mont. Nov. 15, 2006) (*unpublished*); Sharif v. Dallas County, No. 3:06-CV-0143-K ECF, 2006 U.S. Dist. LEXIS 73756, at *1 (N.D. Tex. Oct. 5, 2006) (*unpublished*).

40. Boriboune v. Berge, 391 F.3d 852, 854–56 (7th Cir. 2004); *see also* Hagan v. Rogers, 570 F.3d 146, 155 (3d Cir. 2009) (endorsing the Seventh Circuit's approach in Boriboune v. Berge); Suarez v. A1, No. 06-2782 (JBS), U.S. Dist. LEXIS

The joinder rules, which lay out the process of combining two or more legal issues into one court case, also allow plaintiffs to sue multiple defendants ("joinder of parties") and bring multiple claims at the same time ("joinder of claims"). But, plaintiffs can only do this if the injuries all come from the same "transaction, occurrence, or series of transactions or occurrences" *and* when there is "any question of law or fact common to all defendants."[41] This means that plaintiffs can only combine claims against people who were involved in one event or a series of events that are connected. Such rules have sometimes been enforced loosely to allow plaintiffs to combine more claims and parties together. However, some courts are now strongly enforcing the joinder rules against prisoners. This is to prevent prisoners from paying one filing fee to bring claims that should be brought as separate complaints and fees.[42]

Many constitutional challenges to the filing fees provisions have failed.[43] Courts have said that the filing fees rules do not stop anyone from bringing suit.[44]

The filing fees rules of the PLRA are used in federal court, and probably do not apply in state court. We are aware of no decisions on the issue.

The filing fees rules only apply to civil actions. Habeas corpus petitions and other post-judgment proceedings are generally *not* considered civil actions.[45] Motions to vacate a criminal sentence under 28 U.S.C. § 2255 are also generally not considered civil actions.[46]

On the other hand, some courts have found that certain types of writs (motions) are considered civil actions. In those cases, the motions are subject to the PLRA, including the filing fee requirement. Writs are considered civil when they ask for relief that is similar to what you would ask for in a civil action, as opposed

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93720, at *11–13 (D.N.J. Dec. 13, 2006) (*unpublished*) (acknowledging the difficulties of joint litigation, but holding different plaintiffs who sought the same remedy could proceed jointly though they each had to pay a separate filing fee).

41. Fed. R. Civ. P. 20(a)(2) (joinder of defendants). Fed. R. Civ. P. 18 (joinder of claims).

42. *See* George v. Smith, 507 F.3d 605, 607–08 (7th Cir. 2007). An example of how this works is *Vasquez v. Schueler*, No. 06-cv-00743-bbc, 2007 U.S. Dist. LEXIS 88193, at *1–2 (W.D. Wis. Nov. 29, 2007) (*unpublished*). The plaintiff in that case raised several different claims that arose at four different times. The court said that the plaintiff had to pursue his claims in four separate lawsuits, one for each different time. The only claims that could be combined in the same lawsuit were those of excessive force and of denial of medical care following the use of force, since they involved the same series of transactions or events.

43. Lefkowitz v. Citi-Equity Group, 146 F.3d 609, 612 (8th Cir. 1998) (rejecting an equal protection claim and holding the filing fee provision does not unconstitutionally restrict access to the courts); Lucien v. DeTella, 141 F.3d 773, 775–76 (7th Cir. 1998) (finding the statute does not violate prisoners' due process rights); Mitchell v. Farcass, 112 F.3d 1483, 1490 (11th Cir. 1997) (finding no equal protection violation); Nicholas v. Tucker, 114 F.3d 17, 21 (2d Cir. 1997) (holding the provisions constitutional both generally and as applied to the prisoner); Hampton v. Hobbs, 106 F.3d 1281, 1288 (6th Cir. 1997) ("[W]e find that the fee provisions of the Prison Litigation Reform Act violate neither a prisoner's constitutional right of access to the courts, nor his rights under the First Amendment, the Due Process Clause, the Equal Protection Clause, or the Double Jeopardy Clause of the United States Constitution.").

44. *See, e.g.*, Nicholas v. Tucker, 114 F.3d 17, 21 (2d Cir. 1997) (upholding 28 U.S.C. § 1915(b)(4) (1996)).

45. *See* Skinner v. Wiley, 355 F.3d 1293, 1294 (11th Cir. 2004) (holding PLRA inapplicable to habeas petitions arising from prison disciplinary proceeding); Malave v. Hedrick, 271 F.3d 1139, 1140 (8th Cir. 2001) (holding that PLRA does not apply when challenging a delayed parole revocation hearing); Walker v. O'Brien, 216 F.3d 626, 633–36 (7th Cir. 2000) (holding that proper habeas actions are not civil actions governed by PLRA, regardless of subject matter); Blair-Bey v. Quick, 151 F.3d 1036, 1039–41 (D.C. Cir. 1998) (holding that PLRA does not apply to challenges to parole procedures), *on reh'g,* 159 F.3d 591 (D.C. Cir. 1998); Anderson v. Singletary, 111 F.3d 801, 805 (11th Cir. 1997) (holding that the filing fee requirement of PLRA does not apply to IFP habeas petitions or appeals). *But see* Kincade v. Sparkman, 117 F.3d 949, 952 (6th Cir. 1997) (stating that prisoners may not "cloak" civil actions as habeas/post-conviction cases).

A habeas petition challenges your custody in some fashion. Most courts hold you cannot challenge prison conditions in a federal habeas corpus claim. *See*, *e.g.*, Beardslee v. Woodford, 395 F.3d 1064, 1068–69 (9th Cir. 2005), *cert. denied*, 543 U.S. 1096 (2005). The main exceptions to this rule involve confinement, segregation, and disciplinary proceedings. Some courts have held that getting out of segregation, like getting out of prison entirely, may be pursued by a habeas petition. *See*, *e.g.*, Medberry v. Crosby, 351 F.3d 1049, 1053 (11th Cir. 2003). Others have held that it cannot. *See*, *e.g.*, Montgomery v. Anderson, 262 F.3d 641, 643–44 (7th Cir. 2001). Disciplinary proceedings resulting in loss of good time instead of or in addition to placement in segregation must be challenged by petitioning for habeas corpus. *See* Edwards v. Balisok, 520 U.S. 641, 643–44, 117 S. Ct. 1584, 1587, 137 L. Ed. 2d 906, 911 (1997).

46. Kincade v. Sparkman, 117 F.3d 949, 950 (6th Cir. 1997) (examining the history and purpose of the Prison Litigation Reform Act); United States v. Cole, 101 F.3d 1076, 1077 (5th Cir. 1996) (determining that the absence of filing fees in the Antiterrorism and Effective Death Penalty Act shows that the PLRA was not meant to apply to motions to vacate under § 2255).

to writs that are directed to criminal matters. For example, some courts consider writs of mandamus (motions commanding a public official to perform his or her duty) and other special writs to be civil actions.[47]

Bankruptcy cases and challenges to seizures of property have been treated as civil actions. This means they are subject to the filing fees rules.[48] Courts disagree about whether motions can be civil actions if they are made within criminal prosecutions to address prison problems related to the prosecution.[49]

The filing fees provisions apply only to "prisoners." Under the PLRA, 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."[50] This definition includes pretrial detainees as well as military prisoners,[51] and prisoners in privately operated prisons and jails,[52] juvenile facilities,[53] and "halfway houses" (drug treatment programs), if the prisoner is in the program because of a criminal charge or conviction.[54] If you are in jail because of civil proceedings, you are not a prisoner under the PLRA,[55] unless you are civilly committed in connection with

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47. *In re* Smith, 114 F.3d 1247, 1250 (D.C. Cir. 1997) (holding writ of prohibition in question was within the scope of PLRA because it contained "underlying claims that are civil in nature"); *In re* Tyler, 110 F.3d 528, 529 (8th Cir. 1997) ("[A] mandamus petition arising from an ongoing civil rights lawsuit falls within the scope of the PLRA."); *In re* Washington, 122 F.3d 1345, 1345 (10th Cir. 1997) (determining that writs for mandamus are civil actions under PLRA). *Contra* Madden v. Myers, 102 F.3d 74, 76 (3d Cir. 1996) (finding "a writ of mandamus is by its very nature outside the ambit of [PLRA] taxonomy"); Martin v. United States, 96 F.3d 853, 854 (7th Cir. 1996) (holding "a petition for mandamus in a criminal proceeding is not a form of prisoner litigation" and thus is not covered by PLRA); *In re* Nagy, 89 F.3d 115, 116 (2d Cir. 1996) (denying PLRA coverage "to writs directed at judges conducting criminal trials").

48. *See* United States v. Howell, 354 F.3d 693, 695–96 (7th Cir. 2004) (holding that prisoners challenging administrative forfeiture are required to abide by the limitations imposed by PLRA); United States v. Jones, 215 F.3d 467, 469 (4th Cir. 2000) (holding that a motion under the Federal Rule of Criminal Procedure 41(e) for the return of seized property is a civil action); Lefkowitz v. Citi-Equity Group, 146 F.3d 609, 612 (8th Cir. 1998) (concluding that "under the plain language of [PLRA], the phrase 'civil action or appeal' is not limited to challenges to conditions of confinement, and encompasses the instant commercial litigation."); Pena v. United States, 122 F.3d 3, 4 (5th Cir. 1997) (holding that a motion under Federal Rule of Criminal Procedure 41(e) for the return of seized property is a "civil action" subject to the PLRA filing fee requirements).

49. *See* United States v. Lopez, 327 F. Supp. 2d 138, 140–42 (D.P.R. 2004) (finding 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); United States v. Hashmi, 621 F. Supp. 2d 76, 85–86 (S.D.N.Y. Jan. 16, 2008) (holding that a motion in a criminal case contesting "Special Administrative Measures" ("SAM"s) affecting communication between the defendant and his counsel was not governed by PLRA). *But see also* United States v. Antonelli, 371 F.3d 360, 361 (7th Cir. 2004) (holding that a motion in a long-completed criminal case challenging a prison policy forbidding prisoners from retaining possession of pre-sentence reports should have been treated as a separate civil action); United States v. Khan, 540 F. Supp. 2d 344, 349–52 (E.D.N.Y. 2007) (finding PLRA applies to motion challenging SAMs and other pretrial jail restrictions).

50. 28 U.S.C. § 1915(b) (2012) (requiring prisoners to pay a filing fee). *See also* 28 U.S.C. § 1915(h) (2012) (defining "prisoner").

51. *See* Marrie v. Nickels, 70 F. Supp. 2d 1252, 1262 (D. Kan. 1999) (finding PLRA applies to military prisoners).

52. *See, e.g.*, Roles v. Maddox, 439 F.3d 1016, 1017–18 (9th Cir. 2006) (holding the PLRA applicable to persons held in private prisons); Boyd v. Corr. Corp. of Am., 380 F.3d 989, 993–94 (6th Cir. 2004) (same).

53. *See* Lewis v. Gagne, 281 F. Supp. 2d 429, 433 (N.D.N.Y. 2003) (holding exhaustion requirement applies to juveniles); Alexander S. v. Boyd, 113 F.3d 1373, 1385 (4th Cir. 1997) (holding that the attorney fee limitations apply to counsel representing juvenile prisoners);

54. *See* Jackson v. Johnson, 475 F.3d 261, 266–67 (5th Cir. 2007) (holding that parolee in a halfway house, which he could not leave without permission as a result of his criminal conviction, was a prisoner); Ruggiero v. County of Orange, 467 F.3d 170, 174–75 (2d Cir. 2006) (holding that, despite state law, a "drug treatment campus" was a "jail, prison, or other correctional facility" under 42 U.S.C. § 1997e(a), even though state law said it was not a correctional facility, because that term "includes within its ambit all facilities in which prisoners are held involuntarily as a result of violating the criminal law"); Witzke v. Femal, 376 F.3d 744, 752–53 (7th Cir. 2004) (holding that an "intensive drug rehabilitation halfway house" was the equivalent of a "correctional facility" under PLRA).

55. *See* Michau v. Charleston County, S.C., 434 F.3d 725, 727–28 (4th Cir. 2006) (holding that a person was civilly detained pursuant to sexually violent predator statute); Perkins v. Hedricks, 340 F.3d 582, 583 (8th Cir. 2003) (holding that a person was civilly detained in prison Federal Medical Center); Kolocotronis v. Morgan, 247 F.3d 726, 728 (8th Cir. 2001) (holding person committed after finding of not guilty by reason of insanity is not a "prisoner" under the PLRA); LaFontant v. INS, 135 F.3d 158, 165 (D.C. Cir. 1998) (finding immigration detainees not "prisoners" subject to fee provisions of PLRA).

pending criminal charges. If you are civilly committed in connection with pending criminal charges, you are subject to the PLRA as a pretrial detainee.[56]

Ex-prisoners, including parolees,[57] who file complaints or notices of appeal after they are released are not considered prisoners under the PLRA. They are not bound by the PLRA filing fees provisions.[58] Ex-prisoners who are poor can proceed without any prepayment or installment payment of fees, like any other poor person. In addition, courts have disagreed about prisoners released *after* filing a complaint or notice. Some courts (including the Second Circuit) say that the need to pay ends on the prisoner's release.[59] Other courts say that a released prisoner must pay any fees that were due before release.[60] One court has said that a released prisoner must pay the full filing fee regardless of release, but does not explain what fees are owed by a released prisoner.[61]

C. The "Three Strikes" Provision

Filing fees are also addressed by the "three strikes" provision. This is one of the harshest parts of the PLRA. It provides:

> In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section [*in forma pauperis*] 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.[62]

This provision means that if you have had three complaints or appeals dismissed as wasteful, intended to hurt, or that fail to state a legitimate legal basis, you cannot file a new complaint or appeal *in forma pauperis* ("IFP"). The only exception is that you can file IFP if you can show that you are in imminent danger of serious injury (the serious injury is about to happen). If you cannot file IFP, you have to pay the entire filing fee *up*

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56. *See* Kalinowski v. Bond, 358 F.3d 978, 979 (7th Cir. 2004) (holding that persons committed under the Illinois Sexually Dangerous Persons Act are prisoners); Gibson v. Comm'r of Mental Health, No. 04 Civ. 4350 (SAS), 2006 U.S. Dist. LEXIS 27428, at *10–11 (S.D.N.Y. May 8, 2006) (*unpublished*) (holding a person held civilly as incompetent to stand trial was a prisoner).

57. As pointed out above, persons who are paroled to institutions and are not free to leave such institutions, may remain prisoners under PLRA. However, normal parole restrictions do not make you a prisoner. *See* Bisgeier v. Michigan Dep't of Corr., No. 07-13625, 2008 U.S. Dist. LEXIS 5460, at *4 (E.D. Mich. Jan. 25, 2008) (*unpublished*) ("While there may be certain conditions imposed upon Plaintiff as a parolee, there can be no doubt that he is neither 'confined,' 'incarcerated,' nor 'detained in' any jail, prison, or other correctional facility.").

58. *See, e.g.*, Cox v. Mayer, 332 F.3d 422, 425 (6th Cir. 2003); Dixon v. Page, 291 F.3d 485, 488-89 (7th Cir. 2002); Robbins v. Switzer, 104 F.3d 895, 897 (7th Cir. 1997); Gibson v. Comm'r of Mental Health, No. 04 Civ. 4350 (SAS), 2006 U.S. Dist. LEXIS 27428, at *10–11 (S.D.N.Y. May 8, 2006) (*unpublished*) ("[C]ourts have determined that the PLRA does apply to a prisoner who filed a suit during his confinement and thereafter was released from prison.").

59. *See*, *e.g.*, DeBlasio v. Gilmore, 315 F.3d 396, 398–99 (4th Cir. 2003) (holding released prisoner need not pay fees due before release because "[a] released prisoner should not have to shoulder a more difficult financial burden than the average indigent [poor] plaintiff in order to continue his lawsuit") (citations omitted); McGann v. Comm'r, Soc. Sec. Admin., 96 F.3d 28, 29–30 (2d Cir. 1996) (holding that the PLRA fee requirements do not apply to a released prisoner, but dismissing the suit as frivolous).

60. *See*, *e.g.*, *In re* Smith, 114 F.3d 1247, 1251–52 (D.C. Cir. 1997) (holding that the PLRA merely excuses the pre-payment of fees and not the payment of fees at all); Robbins v. Switzer, 104 F.3d 895, 898–99 (7th Cir. 1997) (denying that release from prison eliminates the obligation that would have been met while the imprisonment continued).

61. *See* Gay v. Tex. Dep't of Corr. State Jail Div., 117 F.3d 240, 242 (5th Cir. 1997).

62. 28 U.S.C. § 1915(g) (2012). As with the filing fees provisions discussed in the previous Section, this provision does not apply to a person who is not a prisoner when he or she files suit. *See* Kolocotronis v. Morgan, 247 F.3d 726, 728 (8th Cir. 2001) (holding provision does not apply to person committed after finding of not guilty by reason of insanity).

front, or your case will probably be dismissed,[63] and you will still have to pay the fee in installments.[64] If you have not paid the fee, and the court rules that you are subject to the three strikes provision, most courts say you should still be able to pay in order to avoid dismissal.[65] One court, however, has said that a prisoner who sought IFP status, even though he had already been found to have three strikes, had committed "a fraud on the federal judiciary," and so his appeal was dismissed.[66] That same court has also held that a litigant with three strikes can be barred from filing any more papers in court until all previously incurred fees have been paid.[67] However, that rule cannot be extended to bar IFP filings by prisoners who fit into the "imminent danger of serious physical injury" exception to § 1915(g).[68]

The three strikes rule makes it important to be sure that the facts in any complaint you file describe a specific violation of law. If you file lawsuits based just on your general feeling that someone has mistreated you, you will probably be given strikes and may not be able to proceed IFP in the future.

The three strikes provision, like the filing fees provisions, only applies to prisoners who are incarcerated when they file suit.[69] It applies only to civil actions or appeals, and does not normally apply to habeas corpus or other challenges to criminal convictions or sentences.[70]

Rule 60(b) of the Federal Rules of Civil Procedure can sometimes be used to remove a strike from your record. However, courts only do this in unusual situations.[71]

The three strikes provision of the PLRA governs actions brought in federal court, and is not binding on state courts,[72] so a poor prisoner with three strikes may prefer to file in state court if the state law permits. However, some federal courts have suggested that it is inappropriate for prisoners to bring suit in state court

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63. *See* Jones v. Federal Bureau of Prisons, No. 5:07cv158, 2008 U.S. Dist. LEXIS 47775, at *3 (E.D. Tex. June 19, 2008) (*unpublished*) (rejecting request for a "payment plan," since that would amount to proceeding IFP). On the other hand, one decision does state that district courts have the discretion to allow a litigant with three strikes to pay fees over time. Dudley v. United States, 61 Fed. Cl. 685, 688, 2004 U.S. Claims LEXIS 221, at *10–11 (Fed. Cl. Aug. 12, 2004). In addition, a timely notice of appeal confers appellate jurisdiction even if the filing fee is not tendered on time. Daly v. United States, No. 03-1445, 109 F. App'x 210, 212, 2004 U.S. App. LEXIS 15794, at *4 (10th Cir. July 30, 2004) (*unpublished*). This might mean that if you have not paid the filing fee within the 30 days during which a notice of appeal must be filed, you will have some additional time to pay the fee. This question has not been answered to our knowledge.

64. Jerelds v. Smith, No. 1:07-cv-00111-MP-AK, 2008 U.S. Dist. LEXIS 21562, at *1 (N.D. Fla. Mar. 6, 2008) (*unpublished*) (stating that a plaintiff whose suit was dismissed for three strikes could not get a refund of his partial fee payment, "since by filing an action he agreed to a full payment of the filing fees").

65. *See* Smith v. District of Columbia, 182 F.3d 25, 29–30 (D.C. Cir. 1999) (stating that a person barred from filing as a poor person has 14 days to pay the filing fee so his suit may proceed); Craig v. Cory, No. 98-1128, 1998 U.S. App. LEXIS 26602, at *4, 1998 Colo. J. C.A.R. 5453, 5453 (10th Cir. Oct. 20, 1998) (*unpublished*) (holding that PLRA does not bar a prisoner with three strikes from suing, provided he pays the filing fee). *But see* Dupree v. Palmer, 284 F.3d 1234, 1236 (11th Cir. 2002) (holding a suit must be dismissed without prejudice and refiled, since the statute says fees must be paid when the suit begins).

66. Sloan v. Lesza, 181 F.3d 857, 859 (7th Cir. 1999) ("Litigants to whom [the three strikes provision] applies take heed! An effort to bamboozle the court by seeking permission to proceed *in forma pauperis* after a federal judge has held that § 1915(g) applies to a particular litigant will lead to immediate termination of the suit.").

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

68. Miller v. Donald, 541 F.3d 1091, 1098–99 (11th Cir. 2008). Subsection C(1)(a) below discusses that exception.

69. Jackson v. Johnson, 475 F.3d 261, 266–67 (5th Cir. 2007) (noting that persons released on parole into the general public are not "prisoners" under PLRA, but holding that a person confined to a halfway house remained a prisoner subject to the three strikes provision).

70. *See* Jennings v. Natrona County Det. Ctr. Med. Facility, 175 F.3d 775, 779 (10th Cir. 1999) (finding habeas corpus petitions are not "civil actions" for purposes of 28 U.S.C. § 1915); *In re* Crittendom, 143 F.3d 919, 920 (5th Cir. 1998) (deciding the character of a writ of mandamus depends on the underlying suit; here, because it was a civil action, the three strikes rule required the prisoner to pay the filing fee first). *See* Part B of this Chapter for the definition of civil actions.

71. *See* Fed. R. Civ. P. 60(b) (stating that there are certain grounds where a court may "relieve a party or its legal representative from a final judgment, order, or proceeding"); *see also* Dalvin v. Beshears, 943 F. Supp. 578, 578–79 (D. Md. 1996) (holding plaintiff's suit to obtain a standing order of the court was not frivolous for PLRA purposes because he believed it was the only way he could get it). Prisoners who have been charged with a strike for failure to exhaust administrative remedies may wish to pursue this remedy in light of the Supreme Court's decision that failure to exhaust is not a failure to state a claim. *See* Jones v. Bock, 549 U.S. 199, 213–15, 127 S. Ct. 910, 920–21, 166 L. Ed. 2d 798, 812–13 (2007). For more information on exhaustion, see Part E of this Chapter.

72. *See* Lakes v. State, 333 S.C. 382, 385–86, 510 S.E.2d 228, 230–31 (S.C. Ct. App. 1998) (holding that a prisoner could proceed IFP, since South Carolina has no analogy to PLRA's three strikes provision).

when the *defendants* can remove the case to federal court.[73] This view does not seem sound. Section 1915(g) applies only to persons with three strikes who "bring" an action under the federal IFP statute. Prisoner plaintiffs should not be punished for the actions of defendants. In addition, the Supreme Court warns that courts should not expand the PLRA's requirements according to their policy views.[74]

1. What is a Strike?

The PLRA is very specific about which dismissals count as strikes: dismissals for failure to state a claim, frivolousness, or maliciousness. "Failure to state a claim" means that even if all facts in your complaint are true, they still do not show a violation of law that the court could remedy or fix.[75] A legally "frivolous" suit is one that fails to raise an question of law,[76] a suit based on a baseless legal theory,[77] or one in which the complaint identifies a perfect defense, like the statute of limitations or the immunity doctrines.[78] A suit can also be factually frivolous if it alleges "fantastic or delusional scenarios."[79] A malicious suit is one filed for an improper purpose or one that is an abuse of the legal system.[80]

A case dismissed on grounds other than frivolousness, maliciousness, or failure to state a claim is *not* a strike.[81] Dismissals on grounds such as lack of prosecution,[82] lack of jurisdiction,[83] or expiration of the statute of limitations[84] are not automatically strikes. They might be strikes if the court finds that the suit was frivolous or malicious.

A case that is dismissed on summary judgment—partly based on the absence of material issues of fact—is generally not a strike.[85] It is important to know that government lawyers often improperly file motions to

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73. Crooker v. Burns, 544 F. Supp. 2d 59, 62 (D. Mass. Apr. 10, 2008) (citing prior unpublished opinion where the court said it was inappropriate for the prisoner to file in state court when he knew the case would be removed to federal court).

74. *See* Jones v. Bock, 549 U.S. 199, 212–13, 220–24, 127 S. Ct. 910, 919–20, 924–26, 66 L. Ed. 2d 798, 810–12, 816–18 (2007); Miller v. Donald, 541 F.3d 1091, 1099 (11th Cir. 2008) (applying *Jones* prohibition on judicial supplementation of PLRA to three strikes provision).

75. *See* Jones v. Bock, 549 U.S. 199, 215, 127 S. Ct. 910, 920–21, 66 L. Ed. 2d 798, 812–13 (2007); Conley v. Gibson, 355 U.S. 41, 45–46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80, 84 (1957) (holding that a case should not be dismissed for failure to state a claim unless it is "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief").

76. Neitzke v. Williams, 490 U.S. 319, 328, 109 S. Ct. 1827, 1833, 104 L. Ed. 2d 338, 349 (1989).

77. Neitzke v. Williams, 490 U.S. 319, 327, 109 S. Ct. 1827, 1833, 104 L. Ed. 2d 338, 348 (1989).

78. *See* Neitzke v. Williams, 490 U.S. 319, 327–28, 109 S. Ct. 1827, 1833, 104 L. Ed. 2d 338, 348–49 (1989); Street v. Vose, 936 F.2d 38, 39 (1st Cir. 1991) (holding that it is appropriate to dismiss a claim for frivolousness when the statute of limitations had expired).

79. Neitzke v. Williams, 490 U.S. 319, 328, 109 S. Ct. 1827, 1833, 104 L. Ed. 2d 338, 348 (1989).

80. *See* Pittman v. Moore, 980 F.2d 994, 994–95 (5th Cir. 1993) (stating that repetitive litigation is malicious); Spencer v. Rhodes, 656 F. Supp. 458, 464 (E.D.N.C. 1987) (holding that a case filed out of desire for vengeance and not to remedy a violation of legal rights was malicious), *aff'd*, 826 F.2d 1061 (4th Cir. 1987).

81. *See* Tafari v. Hues, 473 F.3d 440, 443 (2d Cir. 2007) (refusing to treat an appeal dismissed as premature as a strike, stating the PLRA "was designed to stem the tide of egregiously meritless lawsuits, not those temporarily infected with remediable procedural or jurisdictional flaws"); Fortson v. Kern, No. 05-CV-73223-DT, 2005 U.S. Dist. LEXIS 38466, at *4–5 (E.D. Mich. Dec. 19, 2005) (*unpublished*) (holding dismissal for failure to pay initial filing fee is not a strike); Maree-Bey v. Williams, No. 04-1759 (RCL), 2005 U.S. Dist. LEXIS 35722, at *7 (D.D.C. Aug. 1, 2005) (*unpublished*) (holding that dismissal under Rule 8 of the Federal Rules of Civil Procedure is not a strike).

82. Butler v. Dept. of Justice, 492 F.3d 440, 443–45 (D.C. Cir. 2007) (holding that dismissal for lack of prosecution is not a strike); Harden v. Harden, No. 8:07CV68, 2007 U.S. Dist. LEXIS 56922, at *3 (D. Neb. Aug. 3, 2007) (*unpublished*) (holding that dismissals for lack of jurisdiction or failure to prosecute are not strikes).

83. Thompson v. Drug Enforcement Admin., 492 F.3d 428, 440, 377 U.S. App. D.C. 129, 141 (D.C. Cir. 2007) (holding that "[d]ismissals for lack of jurisdiction do not count as strikes unless the court expressly states that the action or appeal was frivolous or malicious."); *see also* Tafari v. Hues, 473 F.3d 440, 443 (2d Cir. 2007) (holding that dismissal for a jurisdictional flaw does not warrant a strike).

84. Myles v. United States, 416 F.3d 551, 553 (7th Cir. 2005) (noting that dismissal based on statute of limitations is not a strike since it is based on an affirmative defense).

85. *See* Stallings v. Kempker, No. 04–1585, 109 F. App'x 832, 832–33, 2004 U.S. App. LEXIS 19312, at *4 (8th Cir. Sep. 24, 2004) (*unpublished*) (modifying a judgment to remove the strike from a case ended by summary judgment); Chappell v. Pliler, No. CIV S–04–1183 LKK DAD P, 2006 U.S. Dist. LEXIS 92538, at *9 (E.D. Cal. Dec. 21, 2006) (*unpublished*) (stating that "[t]he granting of summary judgment on some claims precludes a determination that the case

dismiss claims that raise *disputed facts* and call them "motions to dismiss for failure to state a claim." However, the court should treat them as summary judgment motions.[86] If this happens to you, it is very important that you tell the court that your claim raises a disputed factual issue. That way, even if you lose, you will lose by summary judgment, and it will not count as a strike. If, however, your suit is dismissed for failure to state a claim, you will get a strike.

The failure to exhaust administrative remedies is not a failure to state a claim unless it is clear from the complaint that the suit is invalid.[87] This means that if your suit is dismissed for non-exhaustion it should generally not be a strike.[88] Most courts have held a partial dismissal—an order throwing out some claims or some defendants, but letting the rest of the case go forward—is not a strike.[89] A case is also not a strike if some claims are dismissed on grounds specified in Section 1915(g) (failure to state a claim, frivolousness, or maliciousness) but other claims are dismissed on other grounds.[90] However, one court held that a prisoner can be charged a strike even when some claims are dismissed on non "three strikes grounds" if he has joined many mostly frivolous complaints.[91] Other courts have held that a dismissal can be a strike if part of the case is dismissed on "three strikes grounds," and the rest of it is dismissed for failure to exhaust administrative remedies.[92]

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was dismissed for failure to state a claim on which relief could be granted"), *recommendation adopted*, 2007 U.S. Dist. LEXIS 5984 (E.D. Cal. Jan. 26, 2007).

86. Motions to dismiss for failure to state a claim are distinct from motions for summary judgment as a matter of law. *Compare* Fed. R. Civ. P. 12(b)(6) (motion to dismiss for failure to state a claim upon which relief can be granted) *with* Fed. R. Civ. P. 56 (summary judgment).

87. Jones v. Bock, 549 U.S. 199, 212–13, 127 S. Ct. 910, 920–21, 166 L. Ed. 2d 798, 812–13 (2007) ("[T]he usual practice under the Federal Rules is to regard exhaustion as an affirmative defense."). *But see* Strope v. Cummings, 653 F.3d 1271, 1274 (10th Cir. 2011) (holding that *Jones v. Bock* does not apply retroactively and that past claims which have been dismissed for failure to state a claim based on non-exhaustion are still strikes).

88. Some courts have held a case dismissed for non-exhaustion is a strike because it seeks "relief to which [the plaintiff] is not entitled" and is therefore frivolous. *See*, *e.g.*, Wallmark v. Johnson, No. 2:03-CV-0060, 2003 U.S. Dist. LEXIS 7088, at *4 (N.D. Tex. Apr. 28, 2003) (*unpublished*). You can argue that these courts are wrong because an unexhausted case does not necessarily fail to raise "an arguable question of law" or rest on an "indisputably meritless legal theory," which, as discussed above, is what "frivolous" means. Further, as the Second Circuit has said, PLRA "was designed to stem the tide of egregiously meritless lawsuits, not those temporarily infected with remediable procedural or jurisdictional flaws." Tafari v. Hues, 473 F.3d 440, 443 (2d Cir. 2007). Of course, if you have an argument that what you did should have satisfied the exhaustion requirement or that no administrative remedy was really available to you, that case should not be seen as frivolous and should not be treated as a strike.

89. Thompson v. Drug Enforcement Admin., 492 F.3d 428, 432 (D.C. Cir. 2007) (statute does not apply to actions "containing at least one claim falling within none of the three strike categories"); Tafari v. Hues, 539 F. Supp. 2d 694, 701–02 (S.D.N.Y. 2008) (extensive discussion and review of case law).

90. *See* Turley v. Gaetz, 625 F.3d 1005, 1013 (7th Cir. 2010) (holding that a case is not a strike when some claims are dismissed for failure to state a claim but others are resolved on the merits); Juarez v. Frank, No. 05–C–738–C, 2006 U.S. Dist. LEXIS 571, at *14 (W.D. Wis. Jan. 6, 2006) (*unpublished*) (holding that where state law claim was dismissed because court declined to exercise supplemental jurisdiction, case was not a strike); Fortson v. Kern, No. 05–CV–73223–DT, 2005 U.S. Dist. LEXIS 38466, at *4–5 (E.D. Mich. Dec. 19, 2005) (*unpublished*) (holding that a case deemed frivolous as to one defendant and otherwise dismissed for failure to pay filing fee was not a strike); Barela v. Variz, 36 F. Supp. 2d 1254, 1259 (S.D. Cal. 1999) (holding that a case was not a strike where some claims were dismissed for failure to state a claim and defendants were granted summary judgment in others). *But see* Jones v. Cimarron Corr. Facility, No. CIV–04–1361–F, 2005 U.S. Dist. LEXIS 21982, at *4 (W.D. Okla. Aug. 25, 2005) (*unpublished*) (holding that a case was a strike even though one claim was dismissed without prejudice for failure to exhaust).

91. George v. Smith, 507 F.3d 605, 607 (7th Cir. 2007) (holding that one non-frivolous complaint in an improperly joined "blunderbuss complaint" does not mean the prisoner cannot be assessed a strike). *But see* Turley v. Gaetz, 625 F.3d 1005, 1010 (7th Cir. 2010) (limiting the holding in *George v. Smith* to instances in which an inmate has joined multiple claims against several defendants).

92. Thomas v. Parker, 672 F.3d 1182, 1184 (10th Cir. 2012); Pointer v. Wilkinson, 502 F.3d 369, 376 (6th Cir. 2007); Banks v. U.S. Marshal, 274 Fed. App'x 631, 635 (10th Cir. Apr. 16, 2008) (*unpublished*).

A case that you voluntarily withdraw is not a strike.[93] An action that was never accepted for filing cannot be a strike.[94] Only *federal* court dismissals count as strikes, since a state court is not a "court of the United States" under the statute.[95] At least one court has called a case a strike if the plaintiff originally filed it in state court and the defendants removed the case to federal court.[96] It could be argued that this appears to be wrong, since § 1915(g) applies to those who on three occasions brought suit or filed an appeal "in a court of the United States" that was dismissed as frivolous, malicious, or failing to state a claim.

A motion filed in an existing case is not a strike.[97] A dismissal without prejudice is a strike if it is on the grounds stated in the three strikes provision.[98] A dismissal without prejudice under Rule 8, meaning the complaint was not understandable, is not a strike.[99] If the case is re-filed (for example, with an amended complaint designed to correct the problems that led to dismissal) and is then dismissed again, you will receive a second strike.[100]

A dismissal is not a strike if there is no explanation for what caused the dismissal.[101] Some courts have held that prisoners should not be given a strike based on law that was unclear or that changed after they filed.[102] Dismissals may be strikes even if they were not IFP cases.[103] Courts have counted cases filed or dismissed before the enactment of the PLRA as strikes.[104] A dismissal in a habeas corpus action is not a strike.[105] Courts disagree over whether actions dismissed because they were mistakenly filed as civil rights

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93. Armentrout v. Tyra, No. 98-3161, 1999 U.S. App LEXIS 1769, at *1 (8th Cir. Feb. 9, 1999) (*unpublished*). However, one court has held that a prisoner who receives a magistrate judge's recommendation for dismissal cannot avoid a strike by dismissing voluntarily. *See* Johnson v. Edlow, 37 F. Supp. 2d 775, 776–78 (E.D. Va. 1999) (citing prior pattern of seeking voluntary dismissal after court and defendants had expended substantial resources on the case; dismissing as malicious); Sumner v. Tucker, 9 F. Supp. 2d 641, 644 (E.D. Va. 1998) (holding that an action may be dismissed, without prejudice, by the plaintiff without order of the court at any time before service by the adverse party of an answer or a motion for summary judgment).

94. Wilson v. Yaklich, 148 F.3d 596, 603 (6th Cir. 1998) (finding cases never filed do not count as strikes).

95. Freeman v. Lee, 30 F. Supp. 2d 52, 54 (D.D.C. 1998); Miller v. John Doe, 2005 WL 1308408 at *1 (E.D. Wis. May 31, 2005) (*unpublished*) (holding that actions dismissed from state and local courts cannot be strikes).

96. *See* Olmsted v. Sherman, No. 08-cv-439-bbc, 2008 U.S. Dist. LEXIS 61368, at *1 (W.D. Wis. Aug. 12, 2008) (*unpublished*). You can argue that this is wrong because § 1915(g) applies to those who on three occasions brought suit or filed an appeal "in a court of the United States" that was dismissed as frivolous, malicious, or failing to state a claim. However, the court in *Olmstead* found: "Section 1915A does not distinguish between cases filed by prisoners and cases removed by defendants. The statute requires screening of all complaints "in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity," without regard to how the complaint came before the court." Olmsted v. Sherman, No. 08-cv-439-bbc, 2008 U.S. Dist. LEXIS 61368, at *2–3 (W.D. Wis. Aug. 12, 2008) (*unpublished*).

97. Belton v. United States, No. 07–C–925, 2008 U.S. Dist. LEXIS 68964, at *34–35 (E.D. Wis. June 2, 2008) (*unpublished*) (motion under Rule 60(b) is not a strike as the statute "does not apply to motions, only 'actions' or 'appeals'").

98. Childs v. Miller, 713 F.3d 1262 (10th Cir. 2013); Day v. Maynard, 200 F.3d 665, 667 (10th Cir. 1999) (*per curiam*) ("Moreover, a dismissal without prejudice counts as a strike, so long as the dismissal is made because the action is frivolous, malicious, or fails to state a claim."); O'Neal v. Price, 531 F.3d 1146, 1154–56 (9th Cir. 2008) (declining to read a with-prejudice requirement into the PLRA); *but see* McLean v. United States, 566 F.3d 391, 396–97 (4th Cir. 2009) (holding that since a dismissal without prejudice is not an adjudication on the merits, it does not count as a strike under 1915(g)).

99. *See* Paul v. Marberry, 658 F.3d 702, 705–06 (7th Cir. 2011) (suggesting that a decision which doesn't name one of the three grounds for a strike under Section 1915(g) should not be considered a strike since plaintiff could assume that he had not received a strike).

100. *See* Orr v. Clements, 688 F.3d 463, 465–66 (8th Cir. 2012).

101. *See* Andrews v. King, 398 F.3d 1113, 1120 (9th Cir. 2005) (holding that defendants must produce court records or documentation to allow district courts to determine whether a prior case was dismissed because it was "frivolous, malicious, or failed to state a claim"); Freeman v. Lee, 30 F. Supp. 2d 52, 54 (D.D.C. 1998) (finding no strike when order dismissing prisoner's action did not explain the reason for dismissal, because "[the court] is unaware of any principle that would permit [it] to presume that the dismissal was on one of the grounds referenced in § 1915(g).").

102. *See* Clemente v. Allen, 120 F.3d 703, 705 n.1 (7th Cir. 1997) (holding appeal was not a strike in the absence of published law on the question before the court ruled); Hairston v. Falano, No. 99–C–2750, 1999 U.S. Dist. LEXIS 9027, at *3–4 (N.D. Ill. May 28, 1999) (*unpublished*) (holding dismissal was not a strike where plaintiff's claim, valid when filed, was dismissed based on a later Supreme Court decision).

103. Duvall v. Miller, 122 F.3d 489, 490 (7th Cir. 1997) (holding dismissals that were not brought IFP still count for strikes).

104. *See, e.g.*, Welch v. Galie, 207 F.3d 130, 131 (2d Cir. 2000) (holding strikes provision can apply retroactively).

105. Andrews v. King, 398 F.3d 1113, 1122–23 & n.12 (9th Cir. 2005).

actions under 42 U.S.C. § 1983 but should have been filed as habeas petitions, count as strikes.[106] Similarly, if you have a case that should fall under Section 1983 but file it as a habeas petition to avoid a strike, courts may count it as a strike.[107] Courts have sometimes treated such incorrectly filed habeas petitions as Section 1983 cases and gone forward with them.[108] One court has warned that this should not be done automatically.[109] That same court has stated that since prisoners could be charged with a strike, they should have a chance to think it over before continuing.[110] In a class action, only named plaintiffs are subject to the three strikes provision.[111]

If an ex-prisoner files a case and later returns to prison, one court has held that a dismissal counts as a strike.[112] However, this holding seems contrary to the statute's language. The statute refers only to previous actions brought "while incarcerated or detained" as claims which can result in a strike.[113]

Appeals count as strikes under Section 1915(g) only if they are "dismissed . . . [as] frivolous, malicious, or fail[ing] to state a claim upon which relief may be granted."[114] It is usually not enough for an appeals court to simply affirm a district court decision that dismissed under Section 1915(g).[115] The appeals court itself must dismiss under Section 1915(g). An appeal dismissed on grounds beyond Section 1915(g) does not count as an additional strike. Even if the district court decision that you appealed counts as a strike, if the appeals court dimisses the appeal on any grounds other than Section 1915(g), the appeals court decision will not count as a strike.[116]

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106. *See* Bure v. Miami-Dade Police Dept., No. 08-20483-CV-UNGARO, 2008 WL 2374149, at *3 (S.D. Fla. June 6, 2008) (*unpublished*) (holding that case mistakenly filed under Section 1983 is a strike), *report adopted,* 2008 U.S. Dist. LEXIS 44726 (S.D. Fla. June 6, 2008) (*unpublished*); Grant v. Sotelo, No. 2:98-CV-0347, 1998 U.S. Dist. LEXIS 16798, at *3–5 (N.D. Tex. Oct. 17, 1998) (*unpublished*) (holding Section 1983 case that should have been filed under habeas corpus is frivolous); Rogers v. Wis. Dept. of Corr., No. 04-C-980, 2005 U.S. Dist. LEXIS 1864, at *6 (W.D. Wis. Feb. 3, 2005) (*unpublished*) (holding that dismissal of a Section 1983 action that should have been filed as a habeas petition is not a strike because "dismissal . . . for failure to use the proper avenue for relief" is not a ground listed in the statute). *See also* Patton v. Jefferson Corr. Ctr., 136 F.3d 458, 464 (5th Cir. 1998) (holding that Section 1983 actions that should have been filed as habeas petitions but would have been frivolous as such were strikes).

107. Andrews v. King, 398 F.3d 1113, 1123 n. 12 (9th Cir. 2005).

108. *See* Carson v. Johnson, 112 F.3d 818, 819 (5th Cir. 1997) (construing habeas corpus petition as a Section 1983 case).

109. Pischke v. Litscher, 178 F.3d 497, 497 (7th Cir. 1999) (dismissing habeas corpus actions and indicating plaintiffs may re-file complaints as civil rights claims).

110. Pischke v. Litscher, 178 F.3d 497, 500 (7th Cir. 1999).

111. Meisberger v. Donahue, 245 F.R.D. 627, 630 (S.D. Ind. 2007) (finding no authority for the argument that unnamed class members can receive strikes).

112. *See, e.g.,* McGrew v. Cain, 2010 U.S. App.WL 5185548, at *888 (5th Cir. 2010) (*unpublished*) ("The dismissal of this appeal counts as one strike under 28 U.S.C. § 1915(g)"); Robbins v. Switzer, 104 F.3d 895, 897 (7th Cir. 1997) (holding dismissal would count as strike if ex-prisoner ever returns to prison).

113. 28 U.S.C. § 1915(g) (2012). *See* Arvie v. Lastrapes, 106 F.3d 1230, 1232 (5th Cir. 1997) (*per curiam*) (remanding to determine whether the plaintiff was a prisoner when he filed his previous actions).

114. 28 U.S.C. § 1915(g) (2012). *Compare* Newlin v. Helman, 123 F.3d 429, 433 (7th Cir. 1997) (holding that a frivolous appeal of a dismissed claim counts as a second strike), *with* 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).

115. *See, e.g.*, Jennings v. Natrona County Det. Ctr. Med. Facility, 175 F.3d 775, 780 (10th Cir. 1999) ("Under the plain language of the statute, only a dismissal may count as strike, not the affirmance of an earlier decision to dismiss."); Adepegba v. Hammons, 103 F.3d 383, 387 (5th Cir. 1996)("It is straightforward that affirmance of a district court dismissal as frivolous counts as a single 'strike.'"). Courts are not always careful in dealing with this issue. *See, e.g.*, Montanez v. DeTella, No. 97-3698, 1999 U.S. App. LEXIS 628, at *6 (7th Cir. Jan. 14, 1999) (*unpublished*) (stating affirmance of appeal from dismissal is itself a second strike, without discussing contrary authority); Rice v. Christopher, No. 98-1295, 1999 U.S. App. LEXIS 2040, at *5–6 (10th Cir. Feb. 9, 1999) (*unpublished*) ("Because a complaint dismissed under § 1915(e)(2)(B)(i) and affirmed on appeal counts as two prior occasions for purposes of § 1915(g), two 'strikes' are recorded against Mr. Rice."). If you get a decision like this, be sure to ask the court to reconsider charging you with the second strike.

116. *See, e.g.*, Perkins v. Lora, 2011 E.D. Mich.WL 1790460, at *1 (E.D. Mich. 2011) (*unpublished*) ("Such a dismissal does not address the merits of the complaint; instead it tells the plaintiff that the action is premature and does not bar refiling a complaint containing the same allegations after exhaustion of administrative remedies."); Tafari v. Hues, 473 F.3d 440, 442–44 (2d Cir. 2007) (holding an appeal dismissed as premature was not a strike); Cosby v. Knowles, No. 97-1400, 145 F.3d 1345, 1998 U.S. App. LEXIS 7845, at *4–5 (10th Cir. Apr. 23, 1998) (*unpublished*) (noting that dismissal based on denial of IFP status, not the merits, is not a strike even though merits were frivolous).

Most courts have held that "[a] dismissal should not count against a petitioner until he has exhausted or waived his appeals."[117] For example, suppose you receive a third strike in a district court decision. The three strikes provision will not prevent you from appealing that decision IFP.[118] If an appeals court finds that your claim was not frivolous, it will remove the strike.[119]

The defendants have the burden of providing evidence to show that you have three strikes. If they do, the burden shifts to you to show that you do not have three strikes.[120] Defendants do not meet their burden just by showing dismissals. They must also show that the reason for each dismissal was a failure to state a claim, frivolousness, or maliciousness.[121] When applying the three strikes rule, a court must identify each ground it relied on.[122]

The three strikes rule cannot remove IFP status in a case filed before you had three strikes. The statute is a limit on your ability to "bring" suit, not on your ability to maintain or continue suits already brought.[123] A case is "brought" when you submit the complaint to the court.[124] The three strikes provision also does not stop you from amending your complaint in a suit filed before you had three strikes.[125]

(a) The "Imminent Danger of Serious Physical Injury" Exception

The three strikes provision does not keep you from proceeding IFP if you are in "imminent danger of serious physical injury."[126] "Imminent" means you must be in danger at the time you file the suit or when you make an IFP application in the district court or on appeal.[127]

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117. Thompson v. Drug Enforcement Admin., 492 F.3d 428, 432 (D.C. Cir. 2007) ("A contrary rule would, within those narrow set of cases in which the third strike is appealed, effectively eliminate our appellate function. Had Congress intended such an unusual result, we expect it would have clearly said so."). *See also* Campbell v. Davenport Police Dept., 471 F.3d 952, 953 (8th Cir. 2006) ("The three section 1915A(b) dismissals could not be counted as strikes when the district court cited them (or when this appeal was filed), because Campbell had not yet exhausted or waived his appeals in those cases."). Once the time for appeal has passed, filing a late notice of appeal will not keep the dismissal from being a strike. Smith v. District of Columbia, 182 F.3d 25, 27–28 (D.C. Cir. 1999).

118. *See, e.g.*, Jennings v. Natrona County Det. Ctr. Med. Facility, 175 F.3d 775, 780 (10th Cir. 1999); Adepegba v. Hammons, 103 F.3d 383, 387 (5th Cir. 1996)(holding that counting strikes before the litigant can appeal would be "inadvertently punishing nonculpable conduct"). However, the Seventh Circuit Court of Appeals has complicated matters by holding that a prisoner cannot directly appeal a decision that counts as a third strike. Instead, the prisoner must first apply to the appeals court for IFP status. Then, the appeals court will decide whether the lower court was correct in issuing the third strike to the prisoner. In other words, the appeals court will decide the merits of the appeal in the course of determining whether the prisoner can proceed IFP. Robinson v. Powell, 297 F.3d 540, 541 (7th Cir. 2002).

119. *See, e.g.*, Jennings v. Natrona County Det. Ctr. Med. Facility, 175 F.3d 775, 780 (10th Cir. 1999) ("If we reverse a district court dismissal under 28 U.S.C. § 1915(e)(2)(B), the district court dismissal does not count as a strike."); Adepegba v. Hammons, 103 F.3d 383, 387 (5th Cir. 1996)("[W]e find it plain that reversal of a dismissal as frivolous nullifies the 'strike.'").

120. Andrews v. King, 398 F.3d 1113, 1116, 1120 (9th Cir. 2005) (holding that defendant bears the burden of establishing that Section 1915(g) bars the plaintiff's IFP status). *See also* Thompson v. Drug Enforcement Admin., 492 F.3d 428, 435–36 (D.C. Cir. 2007); Green v. Morse, No. 00-CV-6533-CJS, 2006 U.S. Dist. LEXIS 52085, at *7–9 (W.D.N.Y. May 26, 2006) (*unpublished*). In practice, courts often raise three strikes on their own at initial screening.

121. Andrews v. King, 398 F.3d 1113, 1120 (9th Cir. 2005). *See also* Thompson v. Drug Enforcement Admin., 492 F.3d 428, 436(D.C. Cir. 2007) (holding that once the burden of evidence shifts to the prisoner, he must "explain *why* the past dismissals should not count as strikes") (*emphasis added*).

122. *See* Evans v. Ill. Dept. of Corr., 150 F.3d 810, 812 (7th Cir. 1998) ("[I]n the order denying leave to proceed *in forma pauperis* [IFP] the district court must cite specifically the case names, case docket numbers, districts in which the actions were filed, and the dates of the orders dismissing the actions."). *See also* Jennings v. Dist. Ct. for Seventh Judicial Dist., No. 98-8068, 172 F.3d 879, 1999 U.S. App. LEXIS 2386, at *2–3 (10th Cir. Feb. 16, 1999) (*unpublished*) (remanding because district court did not specify which prior actions or appeals were frivolous).

123. *See, e.g.*, Nicholas v. Am. Detective Agency, No. 07-2018, 254 F. App'x 116, 2007 U.S. App. LEXIS 26185, at *1–3 (3d Cir. Nov. 9, 2007) (*unpublished*); Cruz v. Marcial, No. 3:01cv406, 2002 U.S. Dist. LEXIS 7307, at *3–4 (D. Conn. Apr. 18, 2002) (*unpublished*) (finding that dismissal was improper because the plaintiff did not have three strikes at the time of filing). *But see also* Nichols v. Rich, No. 2:01-CV-0369, 2004 U.S. Dist. LEXIS 5766, at *2 (N.D. Tex. Apr. 7, 2004) (*unpublished*) (citing goals of the statute but not addressing its actual language).

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

125. Elkins v. Schrubbe, No. 04-C-85, 2005 WL 1154273, at *1 (E.D. Wis. Apr. 20, 2005) (*unpublished*) (allowing submission of an amended complaint after a third strike because the new claims related back to the original complaint).

126. 28 U.S.C. § 1915(g) (2012).

127. *See, e.g.*, Polanco v. Hopkins, 510 F.3d 152, 156 (2d Cir. 2007) (rejecting argument that time-of-filing rule

All credible, or believable, claims of imminent danger of serious physical injury must meet the statutory requirement.[128] However, the court will dismiss claims if they are not supported by evidence or are not serious enough.[129] If claims are disputed, the court may hold a hearing or review depositions and affidavits to determine whether you are in enough danger to meet the requirement.[130] Some courts, however, may make *ad hoc* ("*ad hoc*" means "unique to your particular case") judgments about your credibility based on no more than the *pro se* complaint's allegations.[131] The more specific you can be about the danger you are in, the more likely you are to qualify for the exception. The risk of future injury can be enough to invoke the imminent danger exception.[132] One court held the "imminent danger" requirement was satisfied by allegations (claims) that prison staff refused protective custody to a prisoner targeted by gangs.[133] Another court found imminent danger when a prisoner faced threats and assaults after his history as an informant was revealed.[134] Repeatedly placing a prisoner near known enemies can also satisfy the requirement.[135] Other courts have found imminent danger when a prisoner was denied treatment for an ongoing serious medical problem[136] or

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denies court access to those who cannot get their claims in during the time they are in danger); Ibrahim v. District of Columbia, 463 F.3d 3, 6–7 (D.C. Cir. 2006); Heimermann v. Litscher, 337 F.3d 781, 782 (7th Cir. 2003); Martin v. Shelton, 319 F.3d 1048, 1050 (8th Cir. 2003); Abdul-Akbar v. McKelvie, 239 F.3d 307, 312–16 (3d Cir. 2001) (*en banc*); Ashley v. Dilworth, 147 F.3d 715, 717 (8th Cir. 1998) (all holding danger must exist at the time of filing the complaint). Some courts have said that an ongoing danger that arose *after* the case was filed did not fit the exception. Trice v. Vazquez, No. CV206-185, 2006 U.S. Dist. LEXIS 79700, at *1 (S.D. Ga. Nov. 1, 2006) (*unpublished*).

128. *See* 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; disapproving extensive inquiry into seriousness of allegations at pleading stage). *See also* Gibbs v. Cross, 160 F.3d 962, 964 (3d Cir. 1998) (holding allegation that plaintiff was subjected to "dust, lint and shower odor" via cell vent, resulting in severe headaches, change in voice, mucus full of dust and lint, and watery eyes sufficiently alleged imminent danger of serious injury).

129. *See*, *e.g.*, Merriweather v. Reynolds, No. 2:07-3418-PMD-RSC, 2008 U.S. Dist. LEXIS 38175, at *9 (D.S.C. May 11, 2008) (*unpublished*) (rejecting allegations of threats, enemies, danger from prison gangs, etc., stating that "unsupported, vague, self-serving, conclusory speculation" does not establish imminent danger); Althouse v. Roe, 542 F. Supp. 2d 543, 546 (E.D. Tex. 2008) (holding claim that attention deficit hyperactivity disorder might lead the plaintiff to put himself in danger was too speculative to show imminent danger); Burghart v. Corr. Corp. of Am., No. CIV-08-62-C, 2008 U.S. Dist. LEXIS 16732, at *2–3 (W.D. Okla. Mar. 4, 2008) (*unpublished*) (finding that complaints of migraine headaches, fatigue, depression, weight gain, and sleeping disorders did not meet imminent danger standard); Johnson v. Ala. Dept. of Corr., No. 2:07-cv-0767-WKW (WO), 2008 U.S. Dist. LEXIS 6669, at *2–3 (M.D. Ala. Jan. 29, 2008) (*unpublished*) (pleading the discontinuance of hormone treatment for gender identity disorder, allegedly causing "excessive weight gain, complete body fat redistribution, dizzy spells, fainting spells, headaches, hot-flashes, anxiety, severe depression, more depression than usual, . . . [and] the growth of first time facial hair," did not meet the imminent danger standard).

130. Gibbs v. Roman, 116 F.3d 83, 86 (3d Cir. 1997) (instructing the district court to explore allegations and the state's response before dismissal).

131. *See, e.g.*, Pruden v. Mayer, No. 3:CV-08-0559, 2008 U.S. Dist. LEXIS 26700, at *3–4 (M.D. Pa. Apr. 2, 2008) (*unpublished*) (concluding that prisoner's medical care claims did not pose imminent danger because they had occurred over a long period of time).

132. Gibbs v. Cross, 160 F.3d 962, 966–67 (3rd Cir. 1998) (relying on alleged environmental hazards in prison); *see also* Ibrahim v. District of Columbia, 463 F.3d 3, 6–7 (D.C. Cir. 2006) (holding that deterioration from lack of treatment for hepatitis C sufficiently pled imminent danger of serious physical injury).

133. Cain v. Jackson, No. C-07-354, 2007 U.S. Dist. LEXIS 70495, at *2 (S.D. Tex. Sept. 24, 2007) (*unpublished*) (alleging that plaintiff had been assaulted repeatedly by gang members and denied protective custody).

134. *See* Malik v. McGinnis, 293 F.3d 559, 562 (2d Cir. 2002). *See also* Gibbs v. Roman, 116 F.3d 83, 84–86 (3d. Cir. 1997).

135. *See* Ashley v. Dilworth, 147 F.3d 715, 717 (8th Cir. 1998) (finding that enduring repeated attacks from a prisoner housed nearby and filing only days after an attack proved imminent danger).

136. *See, e.g.*, Ibrahim v. District of Columbia, 463 F.3d 3, 6–7 (D.C. Cir. 2006) (holding that deterioration from lack of treatment for hepatitis C sufficiently pleaded imminent danger of serious physical injury); Brown v. Johnson, 387 F.3d 1344, 1350 (11th Cir. 2004) (holding that a prisoner who alleged that lack of treatment was worsening his illnesses sufficiently pleaded imminent danger of serious physical injury); McAlphin v. Toney, 281 F.3d 709, 711 (8th Cir. 2002) (prisoner's complaint alleging that denial of treatment for medical/dental condition posed an imminent danger was sufficient to permit him to proceed *in forma pauperis* even though he had three strikes).

disability.[137] Placing a prisoner in an environment that causes or worsens medical problems can also create imminent danger.[138]

If your claim meets the imminent danger standard, you can file the entire complaint, even if portions of it are not related to the specific allegations and defendants currently responsible for the danger.[139] However, the danger you are in must be related to the allegations in the complaint.[140] A claim of imminent danger does not excuse you from meeting the PLRA's administrative exhaustion requirement.[141]

One court has held that self-inflicted injury cannot meet the imminent danger standard because "[e]very prisoner would then avoid the three strikes provision by threatening suicide."[142] However, many prison suicides and attempted suicides are a result of serious mental illness.[143] Therefore, there are strong arguments that mentally ill prisoners should be able to go to court to get treatment for their mental illnesses.

The federal circuit courts have upheld the three strikes provision as constitutional.[144] No circuit court has held the three strikes provision unconstitutional on First Amendment grounds. Still, some prisoners' advocates have argued that the rule does violate the First Amendment because it limits your right to access and petition the courts.[145]

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137. Fuller v. Wilcox, No. 08-3077, 2008 U.S. App. LEXIS 16581, at *3 (10th Cir. Aug. 4, 2008) (*unpublished*) (finding that denying plaintiff access to a wheelchair "could result in a number of serious physical injuries" because he was forced to crawl and was unable to reach the shower or lift himself to his bed).

138. Smith v. Ozmint, No.:0:07-3644-PMD-BM, 2008 U.S. Dist. LEXIS 33608, at *10–12 (D.S.C. Apr. 23, 2008) (*unpublished*) (finding imminent danger standard met by allegations of use of hazardous Chinese products, 24-hour illumination in cells, exposure to deranged behavior and unsanitary conditions from mentally ill prisoners in the segregation unit, deprivation of sunlight, and exposure to mold).

139. *See* Andrews v. Cervantes, 493 F.3d 1047, 1052 (9th Cir. 2007) ("[Q]ualifying prisoners can file their entire complaint IFP; the exception does not operate on a claim-by-claim basis or apply to only certain types of relief."). *See also* 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). *But see* McAlphin v. Toney, 375 F.3d 753, 755–56 (8th Cir. 2004) (holding that a complaint that satisfies the imminent danger exception cannot be amended to include claims that do not involve imminent danger).

140. Fuller v. Johnson County Bd. of County Comm'rs, No. 07-3001-SAC, 2007 U.S. Dist. LEXIS 12179, at *2 (D. Kan. Aug. 8, 2007) (*unpublished*) (complaints about the ventilation system did not meet the imminent danger standard where the plaintiff's claim addressed accessibility for the disabled).

141. McAlphin v. Toney, 375 F.3d 753, 755 (8th Cir. 2004) (upholding the rule that prisoners must fulfill the administrative exhaustion requirement); see Section E of this chapter for more on the exhaustion requirement.

142. Wallace v. Cockrell, No. 3:02-CV-1807-M, 2003 U.S. Dist. LEXIS 3602, at *10 (N.D. Tex. Mar. 10, 2003) (*unpublished*), *approved as supplemented*, No. 3:02-CV-1807-M, 2003 U.S. Dist. LEXIS 4897, at *1–4 (N.D. Tex. Mar. 27, 2003) (*unpublished*). This case appears to be on the edge/outer limit of the law, and can perhaps be limited to its facts.

143. *See, e.g.*, Sanville v. McCaughtry, 266 F.3d 724, 728 (7th Cir. 2001) (alleging prison officials' failure to medicate mentally ill prisoner resulted in prisoner's suicide); Eng v. Smith, 849 F.2d 80 (2d Cir. 1988) (affirming injunction based on findings that state prison's policies did not adequately protect mentally ill prisoners).

144. *See, e.g.*, Polanco v. Hopkins, 510 F.3d 152, 156 (2d Cir. 2007) (rejecting claims of unconstitutionality); Lewis v. Sullivan, 279 F.3d 526, 528 (7th Cir. 2002) (rejecting access to courts claim); Higgins v. Carpenter, 258 F.3d 797, 799–801 (8th Cir. 2001) (rejecting equal protection and access to courts claims); Medberry v. Butler, 185 F.3d 1189, 1192 (11th Cir. 1999) (rejecting *Ex Post Facto* Clause argument); Rodriguez v. Cook, 169 F.3d 1176, 1178–82 (9th Cir. 1999) (rejecting due process, equal protection, access to courts, *Ex Post Facto* Clause, and separation of powers arguments); White v. Colorado, 157 F.3d 1226, 1233–34 (10th Cir. 1998) (rejecting access to courts and equal protection challenges); Wilson v. Yaklich, 148 F.3d 596, 604–06 (6th Cir. 1998) (rejecting equal protection, due process, and other claims); Rivera v. Allin, 144 F.3d 719, 723–29 (11th Cir. 1998) (stating IFP status is "a privilege, not a right"; upholding provision against 1st Amendment, access to courts, separation of powers, due process, and equal protection challenges), *repealed/gotten rid of/done awat with by* Jones v. Bock, 549 U.S. 199, 214–15 , 127 S. Ct. 910, 919–20 (2007).

145. In other contexts, the Supreme Court has found that the right to court access "is part of the right of petition protected by the First Amendment." Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 513, 92 S. Ct. 609, 612, 30 L. Ed. 2d 642, 648 (1972). *See also* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 542–43, 121 S. Ct. 1043, 1049–50, 149 L. Ed. 2d 63, 72–73 (2001) (stating that advocacy in litigation *is* speech); Thornburgh v. Abbott, 490 U.S. 401, 403, 109 S. Ct. 1874, 1876, 104 L. Ed. 2d 459, 466 (1989) (arguing the three strikes provision addresses the conduct of litigation in court and not the internal operations of prisons; it is governed by the same 1st Amendment standards as other "free world" free speech claims); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 272, 84 S. Ct. 710, 721, 11 L. Ed. 2d 686, 701 (1964) (finding that the 1st Amendment requires "breathing space" and a margin for error for inadvertent false speech so that true speech will not be deterred). This principle has been applied in other areas of law. *See, e.g.*, Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 511, 92 S. Ct. 609, 611, 30 L. Ed. 2d 642, 646 (1972) (applying rule in antitrust context); Bill Johnson's Rests., Inc. v. NLRB, 461 U.S. 731, 741, 103 S. Ct. 2161, 2169, 76 L. Ed. 2d 277, 287 (1983) (applying rule in

D. Screening and Dismissal of Prisoner Cases

The PLRA requires federal courts to examine all suits by prisoners against government employees *and* all IFP cases at the start of litigation. The PLRA requires that a court must dismiss cases that are frivolous or malicious, that fail to state a claim on which relief may be granted, or that seek damages from a defendant immune from damage claims.

The court must dismiss these claims as soon as the court sees them. *All* prisoner cases may be dismissed *sua sponte* ("*sua sponte*" means "without a motion by the defendant").[146] Additionally, all cases that are frivolous and malicious, all cases that fail to state a claim, and all cases involving immune defendants may also be dismissed *sua sponte*.[147] The Second and Tenth Circuits have held that these dismissals may be done without prior notice or an opportunity to respond.[148] But the Second Circuit has said this should only be done where "it is unmistakably clear that the court lacks jurisdiction, or that the complaint lacks merit or is otherwise defective."[149]

Many federal courts have held that *pro se* litigants, or plaintiffs without an attorney, are allowed to fix complaints that are badly written before the court dismisses them under the PLRA.[150] A complaint is usually considered badly written if it fails to state a claim well enough. For a complaint not to state a claim adequately means that it does not state all the facts that are needed under the law to make the legal claim. While the Sixth Circuit held in *McGore v. Wrigglesworth* that the PLRA does not allow fixing complaints,[151] the *Jones v. Bock* case may overturn that court's holding.[152] In *Jones v. Bock*, the Supreme Court held that the screening requirement in the PLRA "does not—explicitly or implicitly—justify using different rules beyond the changes specified by the PLRA itself."[153] Since a plaintiff's right to fix badly written complaints—without even asking the court's permission, if an answer has not been filed—is part of the "usual procedural practice," the Sixth Circuit's holding probably does not apply anymore.[154] What this all means is that prisoners will be allowed to

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labor context). Under the principle, sanctions may not be imposed against plaintiffs unless the litigation is both objectively and subjectively baseless. *See* Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 60–61, 113 S. Ct. 1920, 1929, 123 L. Ed. 2d 611, 624–25 (1993) (requiring both subjective and objective intent). Applied to the three strikes provision, the "breathing space" principle would mean that prisoners could only be punished for knowing falsehood or intentional abuse of the judicial system—a category far narrower than the scope of the provision.

146. Plunk v. Givens, 234 F.3d 1128, 1129 (10th Cir. 2000) (holding that the power to dismiss "applies to all prison litigants, without regard to their fee status, who bring civil suits against a governmental entity, officer, or employee"); Carr v. Dvorin, 171 F.3d 115, 116 (2d Cir. 1999); Rowe v. Shake, 196 F.3d 778, 781 (7th Cir. 1999); Martin v. Scott, 156 F.3d 578, 579–80 (5th Cir. 1998); Collier v. Bryan, 2012 WL 2602828, at *1 (D. Kansas 2012) (*unpublished*).

147. These requirements appear in three related statutes: 28 U.S.C. § 1915(e)(2) (2012), 28 U.S.C. § 1915A (2012), and 42 U.S.C. § 1997e(c)(1) (2012).

148. Plunk v. Givens, 234 F.3d 1128, 1129 (10th Cir. 2000) (upholding lower court *sua sponte* dismissal where no hearing was provided); Carr v. Dvorin, 171 F.3d 115, 116 (2d Cir. 1999) (*per curiam*) ("The statute clearly does not require that process be served or that the plaintiff be provided an opportunity to respond before dismissal."); Allen v. Zavaras, 430 F.App'x 709, 712 (10th Cir. 2011).

149. Giano v. Goord, 250 F.3d 146, 151 (2d Cir. 2001) (quoting Carr v. Dvorin, 171 F.3d 115, 116 (2d Cir. 1999)) (noting that where a colorable (plausible; not unreasonable) claim is filed, the court should not dismiss the claim if the defendant did not move for the dismissal).

150. Gomez v. USAA Fed. Sav. Bank, 171 F.3d 794, 795–96 (2d Cir. 1999) (holding dismissal of a *pro se* complaint under Section 1915(e)(2)(B) should be done with leave to amend "unless the court can rule out any possibility, however unlikely it might be, that an amended complaint would succeed in stating a claim"); Brown v. Johnson, 387 F.3d 1344, 1348–49 (11th Cir. 2004); Grayson v. Mayview State Hosp., 293 F.3d 103, 111 (3d Cir. 2002); Razzoli v. Fed. Bureau of Prisons, 230 F.3d 371, 377 (D.C. Cir. 2000); Perkins v. Kansas Dep't of Corr., 165 F.3d 803, 806 (10th Cir. 1999). *Compare* McGore v. Wrigglesworth, 114 F.3d 601, 612 (6th Cir. 1997) (holding that, under the PLRA, courts do not have the discretion to allow an opportunity to amend deficient complaints); Murphy v. City of Stamford, 2013 WL 5776903 at *4 (D. Conn. 2013) (*unpublished*).

151. In McGore v. Wrigglesworth, 114 F.3d 601, 612 (6th Cir. 1997)("Under the Prison Litigation Act, courts have no discretion in permitting a plaintiff to amend a complaint to avoid a *sua sponte* [(raised by the judge/court rather than by the parties)] dismissal."). Jones v. Bock, 549 U.S. 199, 206, 127 S. Ct. 910, 916, 166 L. Ed. 2d 798, 807 (2007). Since a plaintiff's right to fix badly written complaints—without even asking the court's permission, if an answer has not been filed—is part of the "usual procedural practice," the Sixth Circuit's holding probably does not apply anymore. *See* Fed. R. Civ. P. 15(a). However, the Supreme Court has held that the screening requirement "does not—explicitly or implicitly—justify deviating from the usual procedural practice beyond the departures specified by the PLRA itself."

152. *But see* Coleman v. Tollefson, 733 F.3d 175, 177 (6th Cir. 2013) ("Under the PLRA, a court must dismiss an action that it finds "frivolous or malicious" *sua sponte*, without permitting the plaintiff to amend the complaint.").

153. Jones v. Bock, 549 U.S. 199, 206, 127 S. Ct. 910, 916, 166 L. Ed. 2d 798, 807 (2007).

154. *See* Fed. R. Civ. P. 15(a).

change their complaints if the court finds that they could be enough to state a claim if they are corrected.

The way in which appeals courts review PLRA dismissals is not the same everywhere. Some courts have held that dismissal under the PLRA is subject to *de novo* review, which means that the appeals court can decide the issue how it thinks is best.[155] However, some courts only use *de novo* review with dismissals for failure to state a claim. Those courts have held that dismissals that are frivolous or malicious are still reviewed under an "abuse of discretion" standard (which means that the appeals court will not overrule the district court's decision unless it thinks the district court made a very big mistake).[156] Other courts have not fully addressed the question.[157] The Second Circuit has held that the *de novo* standard applies under 28 U.S.C. § 1915A and 42 U.S.C. § 1997e(c)(2),[158] but has not addressed dismissal under 28 U.S.C. § 1915(e).[159]

PLRA screening does not change the rule that a court reviewing a motion for summary judgment must accept all allegations of material fact as true. In general, courts must read complaints in a light favorable to the plaintiff on motions for summary judgment. For *pro se* complaints facing summary judgment, courts must read *pro se* pleadings in an even more favorable light and accept all alleged facts as true in order to figure out if the plaintiff has stated a claim.[160]

The screening provisions have been held not to violate due process,[161] equal protection,[162] or the right of access to the courts.[163]

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155. *See* Barren v. Harrington, 152 F.3d 1193, 1194 (9th Cir. 1998) (holding that dismissals for failure to state a claim are reviewed *de novo*); Black v. Warren, 134 F.3d 732, 733 (5th Cir. 1998) (same); Mitchell v. Farcass, 112 F.3d 1483, 1489–90 (11th Cir. 1997) (same); McGore v. Wrigglesworth, 114 F.3d 601, 604 (6th Cir. 1997) (same); Atkinson v. Bohn, 91 F.3d 1127, 1128 (8th Cir. 1996) (same).

156. *See* Bilal v. Driver, 251 F.3d 1346, 1348–49 (11th Cir. 2001) (holding that abuse of discretion standard was proper for review of dismissal based on frivolity); Harper v. Showers, 174 F.3d 716, 718 n.3 (5th Cir. 1998) (stating that *de novo* review is only appropriate for dismissals for failure to state a claim on which relief may be granted). In practice, the "abuse of discretion" standard makes it very unlikely that an appellate court will overturn the district court's ruling.

157. *See* Jackson v. Ward, No. 98-7181, 185 F.3d 874, 1999 U.S. App. LEXIS 25909, at *1 (10th Cir. July 15, 1999) (*unpublished*) (holding that dismissals under Section 1915(e)(2)(B)(i) as frivolous or malicious are reviewed for abuse of discretion, but the court should "consider, inter alia, whether the plaintiff is proceeding pro se and whether the district court inappropriately resolved genuine issues of material fact").

158. Liner v. Goord, 196 F.3d 132, 134 (2d Cir. 1999) (holding that "28 U.S.C. § 1915A and 42 U.S.C. § 1997e(c)(2) dismissals are subject to de novo review").

159. Fitzgerald v. First E. Seventh St. Tenants Corp., 221 F.3d 362, 364 n.2 (2d Cir. 2000) (indicating that the standard of review for Section 1915(e) is unsettled law).

160. "In reviewing a district court's decision to dismiss for failure to state a claim, we take as true all factual allegations in the complaint and draw all reasonable inferences in the plaintiff's favor. See Resnick v. Hayes, 213 F.3d 443, 447 (9th Cir.2000). We construe pro se complaints liberally and may only dismiss a pro se complaint for failure to state a claim if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Weilburg v. Shapiro, 488 F.3d 1202, 1205 (9th Cir. 2007) (quoting Franklin v. Murphy, 745 F.2d 1221, 1228 (9th Cir.1984)); see also Ramirez v. Galaza, 334 F.3d 850, 854 (9th Cir.2003) (noting that pro se pleadings must be construed liberally)." Silva v. Di Vittorio, 658 F.3d 1090, 1101 (9th Cir. 2011). In addition, "'[a] document filed pro se is 'to be liberally construed,' and 'a pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.' " Erickson v. Pardus, 551 U.S. 89, 94, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007) (citation omitted) (quoting Estelle v. Gamble, 429 U.S. 97, 106, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976)). "This is particularly so when the pro se plaintiff alleges that h[is] civil rights have been violated." Sealed Plaintiff v. Sealed Defendant, 537 F.3d 185, 191 (2d Cir.2008)." Ahlers v. Rabinowitz, 684 F.3d 53, 60 (2d Cir. 2012) cert. denied, 133 S. Ct. 466, 184 L. Ed. 2d 261 (U.S. 2012).

161. "Section 1915(e)(2)(B)(i), which only addresses procedures to be followed by the district court once a claim is presented before the court, did not impede or restrict Johnson's ability to prepare, file, and bring to the court's attention his complaint. See Vanderberg v. Donaldson, 259 F.3d 1321, 1323 (11th Cir.2001) (addressing a dismissal for failure to state a claim under § 1915(e)(2)(B)(ii)). Similarly, there is no due process violation where Johnson filed objections to the magistrate's report and recommendation, and the district court conducted a de novo review before dismissing his complaint under § 1915(e)(2)(B). *Id.* at 1324." Johnson v. Patterson, 519 F. App'x 610, 612 (11th Cir. 2013). Curley v. Perry, 246 F.3d 1278, 1283–84 (10th Cir. 2001) (finding no due process violation).

162. Vanderberg v. Donaldson, 259 F.3d 1321, 1324 (11th Cir. 2001) (holding that section 1915(e)(2)(B)(ii) does not violate the Equal Protection Clause); Curley v. Perry, 246 F.3d 1278, 1285 (10th Cir. 2001) (finding no equal protection violation).

163. Martin v. Scott, 156 F.3d 578, 580 n.2 (5th Cir. 1998) (finding provision does not unconstitutionally restrict access to federal courts).

E. Exhaustion of Administrative Remedies

The PLRA exhaustion requirement says:

> No action shall be brought with respect to prison conditions under [42 U.S.C. § 1983] ... 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.[164]

More prisoners lose their cases because of failure to exhaust administrative remedies than from any other part of the PLRA.

The PLRA makes exhaustion of the prison grievance system *mandatory* before you can file suit.[165] This is true even if you are suing for damages and the grievance system does not provide damages.[166] If you do not exhaust your administrative remedies, your case will be *dismissed* instead of stayed (held pending exhaustion).[167] But you can make an argument for your case being stayed, based on a recent Supreme Court case, *Jones v. Bock*.[168] You must exhaust *before* you file suit, not afterward, or your case will be dismissed.[169] Dismissal for non-exhaustion is supposed to be "without prejudice."[170] Dismissal without prejudice means that you can come back to court after you pursue your grievance. However, dismissal without prejudice may also mean that you do not have much time to pursue your grievance. See Part E(6) of this Chapter for more information about time limits. If the statute of limitations (time limit) has run out on your claim when it is dismissed, your case may be permanently barred for that reason too.[171] So, it is very important to exhaust your administrative remedies within the prison correctly the first time, since you may not get a second chance.

The bottom line is, if something happens to you that you may want to bring suit about:

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164. 42 U.S.C. § 1997e(a) (2012).

165. Porter v. Nussle, 534 U.S. 516, 524, 122 S. Ct. 983, 988, 152 L. Ed. 2d 12, 21 (2002) (requiring "exhaustion in cases covered by [U.S.C.] § 1997e(a)"). Though mandatory, exhaustion is not jurisdictional. Woodford v. Ngo, 548 U.S. 81, 101, 126 S. Ct. 2378, 2392, 165 L. Ed. 2d 368, 385 (2012). That means if you didn't exhaust and you think you have a good enough reason, the court at least has the power to consider your argument—but these arguments rarely work, as discussed throughout this Chapter.

166. Booth v. Churner, 532 U.S. 731, 738–39, 121 S. Ct. 1819, 1823–24, 149 L .Ed. 2d 958, 964–65 (2001).

167. Neal v. Goord, 267 F.3d 116, 121–23 (2d Cir. 2001); Perez v. Wis. Dep't of Corr., 182 F.3d 532, 534–35 (7th Cir. 1999). A few decisions have granted stays pending exhaustion under very unusual circumstances. *See* Kennedy v. Mendez, No. 3:CV-03-1366, 2004 U.S. Dist. LEXIS 20170, at *5–6 (M.D. Pa. Oct. 7, 2004) (*unpublished*) (stating that a stay was appropriate because the defendants argued the plaintiff had not exhausted his remedies when the litigation had already been going on for a long time, and claims that were *not* exhausted were closely related to those that *had* been exhausted); Campbell v. Chaves, 402 F. Supp. 2d 1101, 1108–09 (D. Ariz. 2005) (telling the prison system to consider a grievance where a staff member had told the prisoner to file a tort claim instead of a grievance. The tort claim was rejected for jurisdictional reasons, and the grievance system rules had been changed so the matter would have been grievable).

168. In Jones v. Bock, 549 U.S. 199, 214, 127 S. Ct. 910, 920, 166 L. Ed. 2d 798, 812 (2007), the Supreme Court held that the PLRA did not overturn normal litigation practices except when the law said so very clearly. Giving courts the option to grant a stay is part of normal litigation practice. Congress did not say anything in the PLRA about stays pending exhaustion—so it can be argued that courts still have their normal discretion to stay cases. *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."). But even if a court agreed with this argument, it would probably grant a stay only if the prisoner had a very good reason for not having exhausted before filing, as in the cases in footnote 163.

169. Neal v. Goord, 267 F.3d 116, 122 (2d Cir. 2001); Jackson v. District of Columbia, 254 F.3d 262, 269 (D.C. Cir. 2001).

170. Giano v. Goord, 380 F.3d 670, 679–80 (2d Cir. 2004) (holding that a prisoner's claim should be dismissed without prejudice if administrative remedies were still available to him); Gayle v. Benware, 716 F. Supp. 2d 293 (S.D.N.Y. 2010). Some courts have held that dismissal may be *with* prejudice if you could have exhausted administrative remedies but did not do so and did not have any special circumstances that justified not acting. *See*, *e.g.*, Berry v. Kerik, 366 F.3d 85, 88 (2d Cir. 2004). One federal appeals court has held that all dismissals for non-exhaustion should be without prejudice, since states can allow litigants to fix their failure to exhaust, or plaintiffs may be able to go ahead without exhaustion in state court, and defenses to a new suit should be addressed in that suit. Ford v. Johnson, 362 F.3d 395, 401 (7th Cir. 2004).

171. There may be "tolling" provisions of state law suspending the operation of the statute of limitations in situations where you bring a suit, the suit is dismissed, and you have to re-file the suit. See Part E(6) of this Chapter for more information about tolling.

(1) Find out what remedies are available within the prison administrative system right away, because time deadlines are often very short. If you wait until you have definitely decided to sue, it may be too late to exhaust your administrative remedies.
(2) Always use the prison grievance system or any other available remedy, such as a disciplinary appeal.
(3) If you think there is a reason why you should not have to exhaust your administrative remedies, forget it. Exhaust them anyway.
(4) Take all the available appeals, even if you get what you think is a good decision.
(5) If you do not get an answer to a grievance, try to appeal anyway. Many grievance systems say that if a certain amount of time passes and there's no decision, you can treat the non-response as a denial of the grievance, and appeal.
(6) If you're not sure which remedy to use, try all available remedies.
(7) If prison employees tell you an issue is not grievable but you think it is, request that they process your grievance anyway so you will have a record. And, if there is a way to appeal or grieve a decision which says that something is not grievable, do that too!
(8) If prison employees tell you something will be taken care of and you do not need to file a grievance, exhaust your remedies anyway if you think there is any chance you might want to file suit.
(9) Follow the rules of the grievance system or other remedy as best you can.
(10) If the people running the grievance system or in charge of the remedy tell you that you filed your grievance incorrectly and you need to do something differently to fix it, follow their instructions and make a record of what you were told.
(11) If you make a mistake, like missing a time deadline, do not give up. File the grievance anyway, explain the reasons, and ask that your grievance be considered despite your mistake, and appeal as far as you can if you lose.

Always remember that once you file suit, prison officials and their lawyers will use anything they can find to get your case thrown out of court, and they will look for any possible basis to say that you filed incorrectly and should not be allowed to sue. You want to show the court that you did everything you could to follow the exhaustion requirement, including following the prison's rules for grievances and other complaints or appeals.[172]

If your suit is dismissed and you manage to then exhaust your administrative remedies, you *may* have to pay a new fee to re-file your case (but not all courts agree about whether this payment is necessary).[173] You could also be charged a "strike," which could affect your ability to proceed *in forma pauperis* in the future.[174] (See Part C above for more information on the PLRA's "three strikes" provision.)

The exhaustion provision of the PLRA applies to any case brought by "a prisoner confined in any jail, prison, or other correctional facility" about prison conditions under federal law.[175] A case is "brought by a prisoner" if the plaintiff is a prisoner at the time he files the complaint. If you are no longer a prisoner when

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

173. Courts have generally said that a new case must be filed after dismissal for non-exhaustion, instead of reopening the dismissed case. *See* Williams v. Ramirez, No. CIV S-06-1882 MCE DAD P, 2006 U.S. Dist. LEXIS 61617, at *3–4 (E.D. Cal. Aug. 28, 2006) (*unpublished*) (advising plaintiff that a new post-exhaustion complaint should not have the docket number of the dismissed action; the plaintiff has to file a new *in forma pauperis* application). Some courts, however, may allow prisoners to reopen their cases after exhaustion of administrative remedies. *See* Roberts v. Taminga, 20 Fed. Appx. 455, 456–57, 2001 U.S. App. LEXIS 21287, *at *5* (6th Cir. 2001) (*unpublished*) (discussing the District Court's order that the prisoner be able to reopen his case but finding that the prisoner had still not exhausted administrative remedies in the six months the court had given him). Ordinarily, filing a new case would require a new filing fee. However, the only federal circuit to actually focus on the filing fee question has held that a plaintiff does not need to pay a new filing fee when re-filing a claim that was previously dismissed for non-exhaustion. Owens v. Keeling, 461 F.3d 763, 772–74 (6th Cir. 2006). Other courts have suggested that prisoners will still have to pay a filing fee if the complaints were not *exactly* the same. *See* Barrett v. Pearson, 2008 U.S. Dist. LEXIS 9156, at *3–4 (E.D. Okla. 2008) (*unpublished*) (holding, in part, that because the prisoner sued different people in each complaint, he had to pay a second filing fee); Ellis v. Kitchin, 2010 WL 4071874 (E.D.Va 2010) (*unpublished*) (declining to follow Sixth Circuit's holding from *Owens v. Keeling*).

174. For more information about this issue, see Part C(1) of this Chapter. As explained there, if your complaint is dismissed because non-exhaustion is obvious on the face of the complaint, the dismissal may be a strike. Otherwise, it should not be a strike, but some courts have used weaker justifications for charging prisoners a strike for exhaustion-related dismissals.

175. 42 U.S.C. § 1997e(a) (2012). For more discussion of when a person is a prisoner for PLRA purposes, see footnotes 48–59 and the related text.

the suit is filed, you do not need to have exhausted your administrative remedies.[176] PLRA exhaustion does not apply to petitions for habeas corpus—habeas has its own slightly different exhaustion requirement.[177] The PLRA exhaustion requirement, however, has been applied in Section 1983 actions filed in state court, including those that later were moved to federal court.[178]

Most courts have held there is no emergency exception to the exhaustion requirement.[179] There are a few decisions that have allowed cases to go forward without exhaustion to avoid irreparable harm,[180] but these cases do not provide much legal justification for not following the exhaustion requirement. The strongest basis for requesting court intervention without waiting for exhaustion is to appeal to a court's traditional powers of discretion.[181] No one seems to have obtained relief on that basis yet (but in one case a court threatened to grant it, and jail officials very quickly addressed the problem).[182] The argument may have been strengthened by the *Jones v. Bock* decision, which held that courts should not deviate from the normal practices of litigation unless the PLRA specifically says the courts should do that.[183] But this argument is only likely to succeed in extreme cases. If you are arguing for relief "pending" exhaustion, you should have the grievance process underway when you make the argument.

For information about the New York State prison grievance system, see *JLM* Chapter 15, "Inmate Grievance Procedures."

1. What Is Exhaustion?

Exhaustion under the PLRA means "proper exhaustion," which is "compliance with an agency's deadlines and other critical procedural rules."[184] Part E(5) of this Chapter discusses this point in detail.

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176. "Once a prisoner is released from detention, the prisoner is no longer subject to the PLRA. Ahmed v. Dragovich, 297 F.3d 201, 210 (3d Cir.2002)." Troy D. v. Mickens, 806 F. Supp. 2d 758, 766 (D.N.J. 2011). *See* Ahmed v. Dragovich, 297 F.3d 201, 210 n.10 (3d Cir. 2002); Greig v. Goord, 169 F.3d 165, 167–68 (2d Cir. 1999); *see also* Jasperson v. Fed. Bureau of Prisons, 460 F. Supp. 2d 76, 87 (D.D.C. 2006) (plaintiff who filed a challenge to restrictions on placement in halfway house *before* he surrendered to the Bureau of Prisons did not have to exhaust because he was not confined yet, even if he was legally in the Bureau's custody). PLRA's administrative exhaustion requirement, discussed in Part E of this Chapter, applies to "a prisoner confined in any jail, prison, or other correctional facility." 42 U.S.C. § 1997e(a) (2012). The difference in phrasing does not seem to be important.

177. United States v. McGriff, 468 F. Supp. 2d 445, 447 (E.D.N.Y. 2007) (noting plaintiffs can get rid of habeas exhaustion requirement on grounds of futility or prevention of irreparable harm, unlike the PLRA requirement). For more information on habeas corpus claims, see Chapter 13 of the *JLM*.

178. *See*, *e.g.*, Johnson v. State of La. *ex rel.* Dep't of Public Safety & Corr., 468 F.3d 278, 280 (5th Cir. 2006) ("The PLRA's exhaustion requirement applies to all Section 1983 claims regardless of whether the inmate files his claim in state or federal court.").

179. *See*, *e.g.*, Bovarie v. Giurbino, 421 F. Supp. 2d 1309, 1314 (S.D. Cal. 2006) (holding as "irrelevant" prisoner's claim that the litigation limited his time and did not let him complete grievance process concerning law library access).

180. *See* Evans v. Saar, 412 F. Supp. 2d 519, 527 (D. Md. 2006) (declining to dismiss the case for non-exhaustion, because "given the shortness of time, [the] Court [was] unprepared to decide whether [plaintiff's] failure to exhaust [was] attributable to his delay in filing his administrative claim or the State's delay in deciding it."); 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 did not have to exhaust where it was clear that her claim would be rejected, her appeal would take months, and that prison officials wanted to transfer her despite her pending appeal); Salesky v. Balicki, Civil No. 10–5158, 2010 WL 4973626, at *2–3 (D.N.J. Nov. 29, 2010) (*unpublished*) (holding that a case could go forward despite non-exhaustion to avoid irreparable harm when prisoner alleged that his cancer had gone untreated for six months).

181. Jackson v. District of Columbia, 254 F.3d 262, 267–68 (D.C. Cir. 2001) (stating that the PLRA does not specifically prevent the courts from exercising their traditional equitable power to grant injunctions preventing irreparable harm while the exhaustion of administrative remedies is pending, but that the lower court did not have to recognize an irreparable injury exception to the PLRA's exhaustion requirement).

182. Tvelia v. Dep't of Corr., No. Civ. 03-537-M, U.S. Dist. LEXIS 2227, at *5 (D.N.H. Feb. 13, 2004) (*unpublished*) (stating that despite the exhaustion requirements of the PLRA, federal courts have the equitable power to stop ongoing conduct that violates an inmate's constitutional rights, but also holding that in this case the constitutional violations were already addressed). Several courts have rejected the idea of granting relief pending exhaustion. *See*, *e.g.*, Blain v. Bassett, No. 7:07-cv-00552, 2007 U.S. Dist. LEXIS 86167, at *6–7 (W.D. Va. Nov. 21, 2007) (*unpublished*) (refusing to order delay of new prison rule pending plaintiff's exhaustion and dismissing action).

183. Jones v. Bock, 549 U.S. 199, 212–14, 127 S. Ct. 910, 919–20, 166 L. Ed. 798, 810–12 (2007) (stating that courts should generally not depart from the usual practice under the Federal Rules of Civil Procedure on the basis of perceived policy concerns). Injunctions, including preliminary injunctions, are governed by Fed. R. Civ. P. 65.

184. Woodford v. Ngo, 548 U.S. 81, 90–91, 126 S. Ct. 2378, 2385–86, 165 L. Ed. 2d. 368, 378 (2006).

Exhaustion also means taking your complaint all the way to the end of the internal prison complaint process that applies to your problem. Your internal prison complaint process is usually the prison's grievance system. You must use every appeal available to you[185] and complete the process *before* you file suit.[186] Once the deadline for the final decision of your last appeal has passed, you can file suit even if you have not heard the decision.[187] As long as you file suit after the time limit for a decision has passed, you have exhausted your internal administrative remedies, even if the authorities then issue a late decision.[188] It is not clear how long you have to wait if the system has no deadline for deciding your final appeal.[189] A number of courts have said that if you do not get a response to your initial grievance, you have exhausted your available interal remedies.[190] However, other courts have said that if the grievance system allows you to treat a non-response as a denial and appeal it, you must do so.[191] When in doubt, try to appeal, even if officials have failed to

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185. *See* Wright v. Hollingsworth, 260 F.3d 357, 358 (5th Cir. 2001) (holding that PRLA required inmate to make use of all the administrative remedies available to him and that his failure to do so prevented him from going forth with his lawsuit); White v. McGinnis, 131 F.3d 593, 595 (6th Cir. 1997) (affirming dismissal for failing to appeal denial of grievance). *See also* Lopez v. Smiley, No. 3:02CV1020 (RNC), 2003 U.S. Dist. LEXIS 16724, at *4 (D. Conn. Sept. 22, 2003) (*unpublished*) (holding that a prisoner who appealed, but whose appeal was not received and was told it was too late to file another, had exhausted).

186. Johnson v. Jones, 340 F.3d 624, 627–28 (8th Cir. 2003) (stating that by the time of the filing of the lawsuit, inmates must have exhausted their administrative remedies); Neal v. Goord, 267 F.3d 116, 122 (2d Cir. 2001) (stating that you must exhaust administrative remedies before suing). Some courts have held that prisoners cannot add additional claims by amending their complaints unless the new claims were exhausted before the initial complaint was filed. *See*, *e.g.*, Harbin-Bey v. Rutter, 420 F.3d 571, 580 (6th Cir. 2005) (holding that an inmate could not add claims that were filed after the original complaint and for which the administrative remedies had been exhausted after the filing of the original complaint). Most courts, however, have said that as long as the new issues were exhausted before you try to add them to the case, you can amend your complaint to add them. *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 the administrative remedies had been exhausted). That view is consistent with Jones v. Bock, 549 U.S. 199, 210–12, 127 S. Ct. 910, 918–19, 166 L. Ed. 2d. 798, 810–11 (2007) (endorsing the view of the majority of courts that the failure to exhaust is an affirmative defense). The amendment of complaints is part of normal federal procedural practice. *See* Fed. R. Civ. P. 15(a).

187. Whitington v. Ortiz, 472 F.3d 804, 807–08 (10th Cir. 2007) (finding that when prison officials fail to timely respond to a grievance, the prisoner has exhausted "available" administrative remedies under the PLRA), *dismissed on other grounds*, Whittington v. Ortiz, 2007 U.S. Dist. LEXIS 30561 (D. Colo. Apr. 25, 2007) (*unpublished*); Powe v. Ennis, 177 F.3d 393, 394 (5th Cir. 1999) (per curiam) ("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.").

188. *See*, *e.g.*, Magee v. Chavez, 2008 U.S. Dist. LEXIS 42869, at *6–9 (E.D. Cal. May 30, 2008) (*unpublished*) (holding that prisoner had exhausted his administrative remedies even though he had not received a response to his administrative grievance because the period to respond had lapsed), *dismissed on other grounds,* Magee v. Chavez, 2009 U.S. Dist. LEXIS 17972, at *1–2 (E.D. Cal. Mar. 10, 2009) (*unpublished*) (adopting the magistrate's recommendation to dismiss without prejudice upon finding that inmate had indeed filed the lawsuit prior to the expiration of the 30-day period allowed for a response). *But see* Sergent v. Norris, 330 F.3d 1084, 1085–86 (8th Cir. 2003) (affirming dismissal for non-exhaustion where time for response had passed before suit was filed, and prisoner had not made that clear to the district court).

189. *See* McNeal v. Cook County Sheriff's Dep't, 282 F.Supp. 2d 865, 868 n.3 (N.D. Ill. 2003) (holding 11 months is long enough to wait and citing cases holding that seven months is long enough but one month is not). However, the Seventh Circuit said, in connection with a grievance system that called for appeal decisions within 60 days "whenever possible," that the remedy did not become "unavailable" because it took six months to get a decision. Ford v. Johnson, 362 F.3d 395, 400 (7th Cir. 2004).

190. *See*, *e.g.*, Brengettcy v. Horton, 423 F.3d 674, 682 (7th Cir. 2005) (holding prisoner who received no decision regarding his initial grievance had exhausted his remedies where the grievance policy does not tell the prisoner what to do when there is no decision); Boyd v. Corr. Corp. of Am., 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.").

191. *See* Turner v. Burnside, 541 F.3d 1077, 1083–85 (11th Cir. 2008) (finding that where prisoner alleged that the warden tore up his grievance, he would have been obliged to file an appeal from the lack of a decision, except that the warden also threatened him); Cox v. Mayer, 332 F.3d 422, 425 n.2 (6th Cir. 2003) (finding that prisoner, who sued after not receiving a response to a grievance form, had not exhausted administrative remedies because the prison grievance procedure required prisoners to pursue grievances to the next level even without a response from the prison); Clarke v. Thornton, 515 F. Supp. 2d 435, 438–41 (S.D.N.Y. 2007) (holding that prisoner had not exhausted when prisoner filed suit after receiving no response from levels one and two of a three-tiered grievance policy). The New York State grievance rules provide that issues not decided within the prescribed time limits can be appealed unless the prisoner has consented to an extension of time. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.6(g)(2).

respond. Once you bring suit, prison officials may argue that you did not try hard enough to exhaust your remedies, but prison officials cannot keep you out of court by ignoring your grievances.[192]

Courts have said that if you *win* your grievance before the final stage and do not appeal, you have exhausted, since it makes no sense to appeal if you win.[193] You are best advised not to rely on that statement, however, because some courts have also held that if you do not win all possible relief in the grievance, then you have not technically exhausted all available remedies.[194] Prison officials and their lawyers will almost always be able to think of some relief you could possibly have obtained, and the court may accept their arguments.[195] Courts have held that if you have been "reliably informed by an administrator that no remedies are available," you do not have to keep appealing.[196] If you do not have such an assurance and you want to bring suit, you should probably appeal any decision all the way up, no matter what. If you have to explain why you are appealing a positive decision, you could respond by saying something like "to exhaust my administrative remedies by calling this problem to the attention of high-level officials so they can take whatever action is necessary to make sure it never happens again."[197]

"Exhaustion" generally means using whatever formal complaint process is available (usually a grievance system or administrative appeal). "Proper Exhaustion" requires that you follow all of the rules of the prison process.[198] Courts cannot require you to do more than proper exhaustion.[199] Letters and other informal means of complaint, such as participating in an internal affairs or inspector general investigation, generally will not

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192. *See* Duke v. Hardin County, 2008 U.S. Dist. LEXIS 25701, at *4–5 (W.D. Ky. Mar. 31, 2008) (*unpublished*) (holding that prisoner exhausted remedies where he received a response stating the matter had been investigated and turned over to the Jailer, and the Jailer never responded); John v. N.Y.C. Dep't of Corr., 183 F. Supp. 2d 619, 625 (S.D.N.Y. 2002) (rejecting argument that after about one year, prisoner must continue waiting for a decision). In Dole v. Chandler, 438 F.3d 804, 811–12 (7th Cir. 2006), the court held a prisoner had exhausted remedies 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.

193. *See* 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"); Abney v. McGinnis, 380 F.3d 663, 669 (2d Cir. 2004) (holding a prisoner who repeatedly got favorable decisions that later were not carried out had exhausted despite failure to appeal the favorable decisions); Sulton v. Wright, 265 F. Supp. 2d 292, 298–99 (S.D.N.Y. 2003) (prisoner not required to complain after his grievance has been addressed but not corrected).

194. Jones v. Bock, 549 U.S. 199, 218, 127 S. Ct. 910, 922–23, 166 L. Ed. 2d 798, 815 (2007) ("Compliance with prison grievance procedures, therefore, is all that is required by the PLRA to 'properly exhaust.' The level of detail necessary . . . to comply with the grievance procedures will vary . . . but it is the prison's requirements, and not the PLRA, that define the boundaries of proper exhaustion."); *see also* Rivera v. Pataki, 2003 U.S. Dist. LEXIS 11266, at *27 (S.D.N.Y. Feb. 14, 2005) (noting it "made sense" for a prisoner to appeal when prisoner had been granted partial relief but the relief did not change the challenged policy).

195. *See*, *e.g.*, Macias v. Zenk, 495 F.3d 37, 44 (2d Cir. 2007) (holding that putting prison officials on notice is not enough because "[t]he benefits of exhaustion can be realized only if the prison grievance system is given a fair opportunity to consider the grievance" and "[t]he prison grievance system will not have such an opportunity unless the grievant complies with the system's critical procedural rules" (citations omitted)); Ruggiero v. County of Orange, 467 F.3d 170, 177–78 (2d Cir. 2006) (holding prisoner who prevailed informally needed to exhaust grievances because of "the larger interests at stake"). However, the Seventh Circuit has rejected this idea, stating that "we do not think it [is the prisoner's] responsibility to notify persons higher in the chain when this notification would be solely for the benefit of the prison administration." Thornton v. Snyder, 428 F.3d 690, 696–97 (7th Cir. 2005).

196. Brown v. Valoff, 422 F.3d 926, 935 (9th Cir. 2005); Cahill v. Arpaio, No. CV 05-0741-PHX-MHM (JCG), 2006 U.S. Dist. LEXIS 80772, at *7–8 (D. Ariz. Nov. 2, 2006) (*unpublished*) (holding plaintiff reasonably relied on grievance hearing officer telling him that "(1) the matter was under investigation and he would not be notified of the results, (2) he could not appeal and would not be given a form, and (3) he should proceed to federal court," even though the preprinted decision form said an appeal was available). Similarly, courts have held that if a prisoner's grievance is rejected on the ground that the prisoner has already received the relief sought, he has exhausted. Elkins v. Schrubbe, No. 04-C-85, 2006 U.S. Dist. LEXIS 43157, at *154–55 (E.D. Wis. June 15, 2006) (*unpublished*) (holding prisoner had no remaining available remedy where grievances were "rejected as moot because the issue had already been resolved in his favor in that he received the requested relief").

197. *See* Ruggiero v. County of Orange, 467 F.3d 170, 177 (2d Cir. 2006) (holding prisoner who obtained what he wanted informally was still required to exhaust because a grievance "still would have allowed prison officials to reconsider their policies and discipline any officer who had failed to follow existing policies").

198. Woodford v. Ngo, 548 U.S. 81, 93, 126 S. Ct. 2378, 2387, 165 L. Ed. 2d 368, 380 (2006) ("[T]he PLRA exhaustion requirement requires proper exhaustion").

199. Jones v. Bock, 549 U.S. 199, 218, 127 S. Ct. 910, 922–23, 166 L. Ed. 2d 798, 815 (2007) ("Compliance with prison grievance procedures . . . is all that is required by the PLRA to 'properly exhaust.'")

be considered proper exhaustion[200] unless the prison rules specifically identify them as an alternative means of complaint[201] or there are "special circumstances" justifying your failure to exhaust properly.[202] In a few cases, courts have said that non-grievance complaints that were actually reviewed at the highest levels of authority in the prison system satisfied the exhaustion requirement,[203] but this result is less likely after the Supreme Court's "proper exhaustion" holding in *Woodford v. Ngo*.

The Second Circuit has questioned the idea of informal exhaustion. It has ruled that a prisoner who got what he asked for in an informal process should have filed a formal grievance anyway because that process could have provided for other relief, such as changes in policy or discipline of staff.[204] As a result, it is best in all circuits to file a grievance and pursue it all the way to the top if you want to try to solve your problem informally but still want to be able to sue about what happened.

The Second Circuit has held that if a prisoner uses the wrong prison administrative procedure through a "reasonable misunderstanding" of the rules, that prisoner has an excuse for failing to exhaust correctly. If the correct administrative remedy is still available, the prisoner must try to use it, but if it is no longer available, the prisoner's case may go forward without exhaustion.[205] A prisoner may also be justified in failing to exhaust the correct procedures because of threats or intimidation by prison staff.[206] These rules appear to still be good law after the *Woodford* "proper exhaustion" ruling, since they address fact situations different than those before the Supreme Court in *Woodford*. But the Second Circuit has not yet ruled on that question.[207]

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200. *See* Ruggiero v. County of Orange, 467 F.3d 170, 177 (2d Cir. 2006) (holding that talking with Sheriff's Department investigators rather than filing a jail grievance did not satisfy the exhaustion requirement); Panaro v. City of N. Las Vegas, 432 F.3d 949, 953 (9th Cir. 2005) (holding that participation in an internal affairs investigation did not amount to exhaustion because it did not provide a remedy for the prisoner, even though the officer was disciplined); Scott v. Gardner, 287 F. Supp. 2d 477, 488 (S.D.N.Y. 2003) (holding that letters of complaint are not part of the grievance process).

201. In Pavey v. Conley, 170 F. Appx 4, 8 (7th Cir. 2006), the plaintiff alleged that prison staff had broken his arm and he could not write, and the grievance rules said that prisoners who could not write could be assisted by staff. The court held that any memorialization of his complaint by investigating prison staff might qualify as a grievance—and even if they did not write it down, he might have "reasonably believed that he had done all that was necessary to comply with" the policy. *See also* Carter v. Symmes, No. 06-10273-PBS, 2008 U.S. Dist. LEXIS 7680, at *8 (D. Mass. Feb. 4, 2008) (*unpublished*) (holding that a timely letter from the prisoner's lawyer served to exhaust remedies where grievance rules did not specify use of a form, and stating that the letter could be considered as part of prisoner's grievance); Shaheed-Muhammad v. Dipaolo, 393 F. Supp. 2d 80, 96–97 (D. Mass. 2005) (concluding that letters to officials are considered grievances under state law).

202. For information about what counts as a "special circumstance," see Part E(2) of this Chapter, "What if You Make a Mistake Trying to Exhaust?"

203. *See* Camp v. Brennan, 219 F.3d 279, 280 (3d Cir. 2000) (holding that use of force allegation reportedly investigated and rejected by Secretary of Correction's office needed no further exhaustion). If you are in the position where you must argue that another kind of complaint meets the exhaustion requirement, be sure to remind the court that it is not as if Congress allowed every prisoner to go straight to court without pursuing other grievance processes first. The Supreme Court even expressed this sentiment, noting that "Congress afforded corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case." Porter v. Nussle, 534 U.S. 516, 525, 122 S. Ct. 983, 988, L. Ed. 2d. 12, 22 (2002). You can then argue that if prison officials actually reviewed your complaint, they had the opportunity to address the complaint internally, and exhaustion was therefore satisfied. The likelihood of success with this argument is not good and you should not bypass normal exhaustion procedures. *See*, *e.g.*, Macias v. Zenk, 495 F.3d 37, 43–44 (2d Cir. 2007) (holding "after Woodford, notice alone is insufficient"; the PLRA requires both "substantive exhaustion" (notice to officials) and "procedural exhaustion" (following the rules)).

204. Ruggiero v. County of Orange, 467 F.3d 170, 177 (2d Cir. 2006) (holding that a prisoner who was beaten in jail, who talked to Sheriff's Department investigators, and who then was transferred, did not exhaust).

205. Giano v. Goord, 380 F.3d 670, 678–80 (2d Cir. 2004) (holding that prisoner who used a disciplinary appeal rather than a grievance for his issues did so reasonably, and had therefore exhausted).

206. Hemphill v. New York, 380 F.3d 680, 688, 690 (2d Cir. 2004) (noting that a prisoner afraid to file an internal grievance but not to appeal "directly to individuals in positions of greater authority within the prison system, or to external structures of authority such as state or federal courts" might have been justified in failing to exhaust).

207. Other courts, however, have endorsed the *Hemphill* holding in post-*Woodford* decisions. *See* Kaba v. Stepp, 458 F.3d 678, 684–85 (7th Cir. 2006) (adopting *Hemphill* analysis); Stanley v. Rich, 2006 U.S. Dist. LEXIS 35916, at *5 (S.D. Ga. June 1, 2006) (*unpublished*) (stating "threats of violent reprisal may, in some circumstances, render administrative remedies 'unavailable' or otherwise justify an inmate's failure to pursue them").

The exhaustion requirement refers only to administrative remedies. You do not need to exhaust judicial remedies (go to state court, in other words) before you go to federal court.[208] The administrative remedies Congress had in mind when it passed the PLRA are internal prison grievance procedures.[209] A prisoner is not required to exhaust state or federal tort claim procedures, unless he wishes to make a tort claim.[210] Several New York federal courts have held that prisoners making disability-related complaints must exhaust the U.S. Department of Justice's disability complaint procedure in addition to the prison grievance procedure.[211] At least one court has disagreed.[212] The New York state prison system has rejected that additional requirement,[213] but other state agencies continue to support it.[214]

2. What Are Prison Conditions?

The exhaustion requirement applies only to cases filed by prisoners about "prison conditions." The Supreme Court has said the 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."[215] In other words, if something happened to you in prison, it is probably covered by the exhaustion requirement.[216]

What anyone does outside the prison system generally will not be considered as relating to "prison conditions."[217] What happened while you were in police custody generally will also not be considered as relating

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208. *See* Jenkins v. Morton, 148 F.3d 257, 259–60 (3d Cir. 1998) (finding prisoner was not required to exhaust his state judicial remedies prior to bringing an action covered by PLRA). New York does not have that kind of judicial review procedure. Instead, New York permits review of administrative decisions by Article 78 proceedings. For more information on Article 78 proceedings, see *JLM* Chapter 22.

209. *See* Jones v. Bock, 549 U.S. 199, 218, 127 S. Ct. 910, 922–23, 166 L. Ed. 2d 798, 815 (2007) ("Compliance with prison grievance procedures, therefore, is all that is required by the PLRA to 'properly exhaust.'"); Porter v. Nussle, 534 U.S. 516, 524–25, 122 S. Ct. 983, 988, 152 L. Ed. 2d 12, 21 (2002) (stating that the exhaustion requirement was intended to give corrections officials the opportunity to solve problems before suit was filed).

210. *See, e.g.*, Rumbles v. Hill, 182 F.3d 1064, 1070 (9th Cir. 1999) (stating that under the PLRA, "there is no indication that [Congress] intended prisoners also to exhaust state tort claim procedures"), *overruled on other grounds* by Booth v. Churner, 532 U.S. 731, 741 (2001). For information on tort claims generally, review Chapter 17 of the *JLM*, "The State's Duty to Protect You and Your Property: Tort Actions."

211. William G. v. Pataki, 2005 U.S. Dist. LEXIS 16716, at *20 (S.D.N.Y. Aug. 12, 2005) (*unpublished*) (Congress did not intend in the PLRA to 'overrule the well-established principle that exchaustion of state tort remedies is not required before bringing a section 1983 action") (citation omitted); Burgess v. Garvin, 2003 U.S. Dist. LEXIS 14419, at *8–9 (S.D.N.Y. Aug. 19, 2003) (*unpublished*) (dismissing prisoner's claim because he did not exhaust his disability claim), *on reconsideration*, 2004 U.S. Dist. LEXIS 4122, at *2–3 (S.D.N.Y. March 16, 2004) (*unpublished*).

212. Veloz v. State of New York, 339 F. Supp. 2d 505, 517–519 (S.D.N.Y. Sept. 30, 2004) (holding that ADA grievance procedure is voluntary and holding that such prisoners "need not exhaust with the DOJ prior to filing a federal claim.").

213. Rosario v. Goord, 400 F.3d 108 (2d Cir. 2005) (per curiam) (The State of New York withdrew its defense and stated that the "defense will be withdrawn in any pending litigation in which liability . . . is asserted under the ADA.").

214. William G. v. Pataki, 2005 U.S. Dist. LEXIS 16716, at *20 (S.D.N.Y. Aug. 12, 2005) (*unpublished*) (accepting argument in action defended by New York State Division of Parole and Office of Mental Health).

215. Porter v. Nussle, 534 U.S. 516, 532, 122 S. Ct. 983, 992, 152 L. Ed. 2d 12, 26 (2002).

216. *See* Krilich v. Fed. 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"); United States v. Carmichael, 343 F.3d 756, 761 (5th Cir. 2003) (holding that statutorily required DNA collection is a prison condition); Castano v. Neb. Dep't of Corr., 201 F.3d 1023, 1024 (8th Cir. 2000) (failure to provide interpreters for Spanish-speaking prisoners is a prison condition). *But see* Ayyad v. Gonzales, 2008 U.S. Dist. LEXIS 62863 (D. Colo. July 31, 2008) (*unpublished*) (holding that denial of a prisoner's ability to meet with clinical law students was not a matter of prison conditions because the administrative dictates were made by the Attorney General, not the Bureau of Prisons).

217. For example, one court held that the Department of Homeland Security's placement of a prisoner on a "watch list" was not a prison condition requiring exhaustion; however, the prison's actions in placing him in segregation or depriving him of telephone privileges required exhaustion. Almahdi v. Ridge, 201 F. App'x 865, 868 (3d Cir. 2006). *See also* Johnson v. O'Malley, No. 96 C 6598, 1998 U.S. Dist. LEXIS 7955, at *11 (N.D. Ill. May 15, 1998) (*unpublished*) (holding that prisoner who alleged that prosecutors and investigators were conspiring to harm him in jail because he had information about official corruption did not have to exhaust because claim was not about prison conditions).

to "prison conditions."[218] The same *might* be true of medical facilities outside the prison.[219] Disputes over whether you should be in prison at all are not about "prison conditions."[220] Whether parole release or revocation relate to "prison conditions" is not entirely clear.[221] Complaints from halfway houses or residential treatment programs are likely to be considered as being about "prison conditions" as long as (1) you are there because of a criminal conviction or charge and (2) you are not free to leave.[222] For example, prisoners' complaining about not receiving psychiatric medication and referrals for their mental illness before being released state a claim about prison conditions.[223] However, placement in or removal from these programs might not be about "prison conditions."[224]

3. What Are "Available" Remedies?

The PLRA says you must exhaust all "available" remedies inside the prison before you can file a suit in federal court. A remedy, or the fix/solution to a problem, is "available" if it can "provide any relief" or "take any action whatsoever in response to a complaint."[225] You may believe that the complaint system in your prison is unfair or a complete waste of time, but you still must use and go through all of the steps and give the prison a chance to fix the problem first.[226]

The "available" remedy that you must exhaust will usually be the prison grievance procedure, or complaint system.[227] However, if an issue is not "grievable," meaning you are not allowed to bring a complaint under the prison's complaint system, you will not be required to go through those steps because they are not available

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218. *See* Bowers v. City of Philadelphia, No. 06-CV-3229, 2007 U.S. Dist. LEXIS 5804, at *116 n.40 (E.D. Pa. Jan. 25, 2007) (*unpublished*) (holding police holding cells were not prisons for purpose of prisoner release provisions of PLRA).

219. In Borges v. Adm'r for Strong Mem. Hosp., No. 99-CV-6351Fe, 2002 U.S. Dist. LEXIS 18596, at *11 (W.D.N.Y. Sept. 30, 2002) (*unpublished*), the court expressed doubt that a claim made by prisoners injured by dentists at an outside hospital involved prison conditions, since the grievance system probably could not take any action against defendants. However, the same court reached the opposite conclusion in Abdur-Raqiyb v. Erie County Med. Ctr., 536 F. Supp. 2d 299, 304 (W.D.N.Y. 2008), reasoning that the statute is supposed to be read broadly and that the plaintiff was still a prisoner while being treated at an outside medical facility.

220. *See* Fuller v. Kansas, No. 04-2457-CM, 2005 U.S. Dist. LEXIS 18977, at *5 (D. Kan. Aug. 8, 2005) (*unpublished*) (holding claims of false arrest and imprisonment are not prison conditions claims under the statute), *aff'd*, 175 F. App'x 234 (10th Cir. 2006); Wishom v. Hill, No. 02-2291-KHV, 2004 U.S. Dist. LEXIS 2172, at *34 (D. Kan. Feb. 13, 2004) (*unpublished*) (holding detention without probable cause not a prison condition); Monahan v. Winn, 276 F. Supp. 2d 196, 204 (D. Mass. 2003) (holding a Bureau of Prisons rule revision abolishing its discretion to designate some offenders to community confinement facilities did not involve prison conditions).

221. *Compare* L.H. v. Schwarzenegger, 519 F. Supp. 2d 1072, 1081 n.9 (E.D. Cal. Sept. 19, 2007) (holding parole violation procedures are not prison conditions), *with* Morgan v. Messenger, No. 02-319-M, 2003 U.S. Dist. LEXIS 14892, at *8 (D.N.H. Aug. 27, 2003) (*unpublished*) (holding 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 plaintiff's prison confinement).

222. *See* Ruggiero v. County of Orange, 467 F.3d 170, 174–75 (2d Cir. 2006) (holding that a "drug treatment campus" was a "jail, prison, or other correctional facility" and that term "includes within its ambit all facilities in which prisoners are held involuntarily as a result of violating the criminal law"); William G. v. Pataki, No. 03 Civ. 8331 (RCC), 2005 U.S. Dist. LEXIS 16716, at *11–14 (S.D.N.Y. Aug. 12, 2005) (*unpublished*) (holding that the question of whether persons incarcerated pending parole revocation proceedings were entitled to be placed in less restrictive residential treatment programs for mental illness and drug addiction involved prison conditions).

223. *See* Bolden v. Stroger, No. 03 C 5617, 2005 U.S. Dist. LEXIS 7473, at *5 (N.D. Ill. Feb. 1, 2005) (*unpublished*) (holding that a claim of exclusion of persons with mental illness from pre-release programs was about conditions).

224. *See* Monahan v. Winn, 276 F. Supp. 2d 196, 204 (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); Bost v. Adams, 2006 WL 1674485, at *5 (S.D. W. V. June 12, 2006) (*unpublished*) (explaining that BOP's decision about placement in a halfway house, affecting duration of the sentence, does not go to the "conditions of her confinement as the term "conditions" is commonly understood.").

225. Booth v. Churner, 532 U.S. 731, 736, 121 S. Ct. 1819, 1823, 149 L. Ed. 2d 958, 963 (2001).

226. Booth v. Churner, 532 U.S. 731, 741 n.6, 1825 n.6, 966 n.6 (2001) ("[W]e will not read futility or other exceptions into statutory exhaustion requirements where Congress has provided otherwise."). This means, for example, that if another prisoner has just grieved the same issue and lost, you still need to grieve it yourself, even though you are certain that you will get the same ruling. *See* Hattie v. Hallock, 16 F. Supp. 2d 834, 836 (N.D. Ohio June 23, 1998) (dismissing prisoner's action because he had not exhausted his remedies before filing).

227. Acosta v. United States Marshals Serv., 445 F.3d 509, 512–14 (1st Cir. 2006) (prisoner must use the administrative procedure of the institution or system where his or her problem arose).

for your issue.[228] (However, as will be discussed below, there may be other ways of complaining to the prison or appealing a decision that you have to exhaust even if the issue is non-grievable.) Different prison systems have different rules about what kinds of complaints can be brought under their grievance systems. For example, the New York State grievance rule says:

(1) An individual decision or disposition of any current or subsequent program or procedure having a written appeal mechanism which extends review to outside the facility shall be considered non-grievable.
(2) An individual decision or disposition of the temporary release committee, time allowance committee, family reunion program or media review committee is not grievable. Likewise, an individual decision or disposition resulting from a disciplinary proceeding, inmate property claim (of any amount), central monitoring case review or records review (freedom of information request, expunction) is not grievable. In addition, an individual decision or disposition of the Commissioner, or his designee, on a foreign national prisoner application for international transfer is not grievable.
(3) The policies, rules, and procedures of any program or procedure, including those above, are grievable.[229]

This means when some committees make their decisions, the decisions themselves cannot be challenged through the complaint system. However, the rules and procedures that these committees followed when they made that decision can be challenged. So, for example, you cannot challenge the denial of temporary release (under article 2), but your complaint that the Temporary Release Committee followed unfair procedures can be challenged (under article 3).

If there is no way for you to complain or challenge a problem through the prison system, then the PLRA will not require you to go through the prison complaint system before you can file suit in federal court.[230] This is more complicated than it sounds.

If you want to sue for money damages (and the prison complaint system does not offer money damages), you may still have to use the prison complaint system first.[231] Unfortunately, a problem may seem grievable at first but in reality it turns out that it is not because of how the grievance system operates.[232]

Often, a prison will have a separate, specialized solution only for "non-grievable" issues, that is, issues you cannot complain about through the grievance system. If a separate solution exists, you must use it before filing suit.[233] This happens frequently in disciplinary proceedings. To satisfy the "proper exhaustion" requirement

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228. *See* Owens v. Keeling, 461 F.3d 763, 772 (6th Cir. 2006) (holding grievance system was not an available remedy for classification complaint where prison required use of a separate classification appeal procedure); Mojias v. Johnson, 351 F.3d 606, 610 (2d Cir. 2003) (courts must establish that the prisoner's claim does not fall into an exception to the administrative remedy). However, if you think that you do not have to exhaust, but you turn out to be wrong, your case will likely be dismissed for lack of exhaustion. So, if you have any doubts whatsoever that your issue is grievable, you should file the appropriate grievance. *See* Steele v. Fed. Bureau of Prisons, 355 F.3d 1204, 1214 (10th Cir. 2003) (quoting Beaudry v. Corr. Corp. of Am., 331 F.3d 1164, 1166 (10th Cir. 2003)).

229. State of New York, Dep't of Corr. Servs., Directive No. 4040 § 701.3(e), Inmate Grievance Program (2016), *available at* http://www.doccs.ny.gov/Directives/4040.pdf (last visited Jan. 28, 2017). The state regulations say the same thing. *See* N.Y. Comp. Codes R. & Regs. tit. 7, § 701.3. This directive notes, "if an inmate is unsure whether an issue is grievable, he or she should file a grievance and the question will be decided through the grievance process…"

230. *See* Farnworth v. Craven, No. CV05-493-S-MHW, 2007 U.S. Dist. LEXIS 19412, at *14 (D. Idaho Mar. 14, 2007) (*unpublished*) (holding prisoner seeking a new parole hearing need not exhaust the grievance system because it had no authority over the Parole Commission); Bumgarden v. Wackenhut Corrs. Corp., 645 So. 2d 655, 657–58 (3d Cir. 1994) (holding the exhaustion of grievance procedures is only required when the procedures have a realistic chance of resolving the dispute); Handberry v. Thompson, 92 F. Supp. 2d 244, 247–48 (S.D.N.Y. 2000) (holding that prisoners need not grieve failure to deliver educational services).

231. Booth v. Churner, 532 U.S. 731, 736, 121 S. Ct. 1819, 1823, 149 L. Ed. 2d 958, 963 (2001).

232. *See* Marshall v. Knight, No. 3:03-CV-460 RM, 2006 U.S. Dist. LEXIS 84040, at *7 (N.D. Ind. Nov. 17, 2006) (*unpublished*) (holding that instructions to grievance personnel to respond to grievances about law library hours only by sending prisoners a copy of a memo deprived grievance staff of authority to act on those grievances and made the remedy unavailable); 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).

233. *See* Owens v. Keeling, 461 F.3d 763, 769–72 (6th Cir. 2006) (holding prisoner who filed classification appeal exhausted his claim, despite his failure to complete an inapplicable grievance procedure); Timley v. Nelson, No. 99-3038-JWL, 2001 U.S. Dist. LEXIS 10117, at *4–5 (D. Kan. Feb. 16, 2001) (*unpublished*) (prisoner's failure to pursue

(to prove to the court that you have tried every grievance process inside the prison system first),[234] you must choose correctly between appealing a disciplinary action, complaining about a mistake that resulted in a wrong decision and filing a separate grievance, and complaining about something brand new—and sometimes you may need to do both.

Generally, if you want to sue over what happened in the disciplinary hearing itself, you must first meet the exhaustion requirement by filing a disciplinary appeal.[235] This means you must first complain within the prison system about the mistake before you're allowed to go outside the prison system to a court. However, if you're suing about the events that resulted in the disciplinary hearing in the first place, you can't complain about it within the system. In this case, you will have to file a whole new complaint.[236] In order to prove that you have meet the exhaustion requirement, that is, that you have done everything you can within the system, you have to check the prison's rules.[237] The problem is that prison rules are often so messy that even prison officials cannot keep them straight. For example, in one New York State case, a prisoner complained that evidence used against him at a disciplinary hearing was made-up. The state argued that the prisoner should have filed a brand new separate grievance (or complaint) and not a disciplinary appeal (just complaining about the mistake in the hearing) to exhaust that issue. The Second Circuit Court held that the prisoner was right because of special circumstances.[238] This was because the rule was unclear and the prisoner was reasonable in believing that he could only complain by appealing.[239] New York State not only never fixed the confusion,[240] but also in another case made exactly the opposite argument. In the other case, the prisoner *had* filed a separate grievance about retaliatory discipline. The state now argued that he should have filed a disciplinary appeal.[241] In some cases, prison officials appear to have stretched the rules to reject grievances that were

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"religious accommodation" exception procedure meant that administrative remedies were not exhausted); Wallace v. Burbury 305 F. Supp. 2d 801, (N.D. Ohio 2003) (holding where a prisoner is notified that a document relating to his grievance has been lost or misfiled, failure to refile is considered a failure to exhaust the administrative remedy).

234. This rule is discussed in Part E(5), "What If You Make a Mistake Trying To Exhaust?".

235. Jenkins v. Haubert, 179 F.3d 19, 23 n.1 (2d Cir. 1999) (holding that disciplinary appeals exhausted plaintiff's challenge to the resulting disciplinary sanctions); Portley-El v. Steinbeck, No. 06-cv-02096-MSK-MJW, 2008 U.S. Dist. LEXIS 20236, at *2 (D. Colo. Mar. 14, 2008) (*unpublished*) (holding that a disciplinary appeal exhausted due process claims under rule stating that grievance procedure may not be used to seek review of disciplinary convictions).

236. Rodney v. Goord, 00 Civ. 3724 (WK), 2003 U.S. Dist. LEXIS 8176, at *19 (S.D.N.Y. May 15, 2003) (*unpublished*) (holding an allegation of false disciplinary charges had to be grieved in addition to appealing the disciplinary conviction); *but see* Mitchell v. Horn, 318 F.3d 523, 531 (3d Cir. 2003) (holding that a prisoner who claimed retaliatory discipline exhausted if he was not provided the proper grievance forms).

237. Woodford v. Ngo, 548 U.S. 81, 90, 126 S. Ct. 2378, 2385, 165 L. Ed. 2d 368, 378 (2006) (holding that under the Prison Litigation Reform Act, prisoners must exhaust all available remedies, even if the relief sought cannot be granted by the administrative process). If the designated remedy is a disciplinary appeal, but the prisoner cannot appeal because he pled guilty to the offense, the remedy is not available. Marr v. Fields, No. 1:07-cv-494, 2008 U.S. Dist. LEXIS 24993, at *1 (W.D. Mich. Mar. 27, 2008) (*unpublished*) (holding that compliance with prison procedures is the PLRA requirement for proper exhaustion).

238. In the Second Circuit, such a finding means the prisoner has not exhausted, but must seek to exhaust remedies if they remain available. If the remedies are no longer available, the prisoner may proceed with the litigation. Giano v. Goord, 380 F.3d 670, 680 (2d Cir. 2004) (holding that special circumstances may excuse a prisoner's failure to exhaust, but in the absence of any justification for not pursuing available remedies, dismissal with prejudice is required); Hemphill v. New York, 380 F.3d 680, 690–91 (2d Cir. 2004) (holding that where a prisoner lacked available administrative remedies, the exhaustion requirement of Prison Litigation Reform Act (PLRA) does not apply).

239. 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"); *see also* Johnson v. Testman, 380 F.3d 691, 696–97 (2d Cir. 2004) (remanding claim when "[plaintiff] reasonably believed that raising his complaints during his disciplinary appeal sufficed to exhaust his available administrative remedies," since it "cannot be dismissed out of hand, especially since the district court has not had the opportunity to examine it").

240. New York has, seemingly, attempted to shift the cost of unclear rules to the prisoners. Its grievance policy states: "Note: If an inmate is unsure whether an issue is grievable, he/she should file a grievance and the question will be decided through the grievance process in accordance with section 701.5, below." N.Y. Comp. Codes R. & Regs. tit. 7 §701.3(e)(3). This provision, however, does not deal with the situation addressed in *Giano* where the prisoner reasonably believes the issue is *not* grievable.

241. Larkins v. Selsky, No. 04 Civ. 5900 (RMB) (DF), 2006 U.S. Dist. LEXIS 89057, at *24 (S.D.N.Y. Dec. 6, 2006) (*unpublished*) (stating that *Giano* "nearly mirrors this [case]").

related to disciplinary proceedings even though it was against the rules.[242] In some prison systems, the rules *do not* allow grievances that have any relationship to a disciplinary incident.[243] The bottom line is that you must read the prison system rules very carefully to figure out whether a problem calls for a grievance or a disciplinary appeal. In some cases both will be required if you wish to raise many different issues in your lawsuit.[244] If the rules are not absolutely clear, it may be a good idea to file both a grievance and a disciplinary appeal to protect yourself. If prison officials reject your complaint, it is harder for them to say later that you should have used it one or the other.

Finally, there are many reasons why there are no solutions, or remedies, to your problem.

A remedy may not exist if there are no clear standards to apply to what happened in your specific case. For example, courts have made many decisions about mental illness or retardation. In some cases, the prisoner won.[245] In some cases, prison officials won.[246] There are no clear standards to guide these cases. Likewise, there are no clear standards for cases involving prisoners who couldn't use the prison complaint system properly because of disabilities,[247] illiteracy or lack of education,[248] inability to speak or write English,[249] or because they were too young.[250]

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242. Woods v. Lozer, No. 3:05-1080, 2007 WL 173704, at *3 (M.D. Tenn. Jan. 18, 2007) (*unpublished*) (holding a prisoner exhausted when he appealed a decision that his use of force claim was not grievable because it was mistakenly said to seek review of disciplinary procedures and punishments); Livingston v. Piskor, 215 F.R.D. 84, 86–87 (W.D.N.Y. 2003) (holding that evidence of grievance personnel refusal to process grievances where a disciplinary report had been filed covering the same events created a factual issue preventing summary judgment). The above cited cases involved misapplication of prison policy, or prison staff making up an unauthorized rule. In some prison systems, any overlap with a disciplinary proceeding makes the matter non-grievable or not immediately grievable.

243. *See* Vasquez v. Hilbert, No. 07-cv-00723-bbc, 2008 U.S. Dist. LEXIS 42011, at *9 (W.D. Wis. May 28, 2008) (*unpublished*) (citing rule that a grievance raising "any issue related to the conduct report" must await completion of the disciplinary process).

244. For example, in some prison systems, appealing a disciplinary conviction and challenging the rule under which you were convicted require, respectively, a disciplinary appeal *and* separate grievance. *See* Singh v. Goord, 520 F. Supp. 2d 487, 497–98 (S.D.N.Y. 2007) (holding successful disciplinary appeal challenging discipline for refusing work contrary to religious beliefs did not exhaust plaintiff's challenge to the underlying disciplinary rule; a separate grievance was required).

245. *See, e.g.*, Braswell v. Corrections Corp. of America, 419 Fed.Appx. 622, 625–26 (6th Cir. 2011) (refusing to dismiss for non-exhaustion because there was "substantial doubt as to whether [the prisoner] was capable of filing a[n administrative] grievance); Whitington v. Sokol, 491 F. Supp. 2d 1012, 1019–20 (D. Colo. 2007) (refusing to dismiss for non-exhaustion where plaintiff alleged he had no remedies because he was mentally incapacitated and was transferred to a mental institution shortly after the incident he sued about).

246. *See* Johnson v. District of Columbia, 869 F. Supp. 2d 34 (D.D.C. 2012) (finding that a prisoner's alleged mental retardation and illiteracy did not prevent him from using the administrative grievance process); Fleming v. Dettloff, No. 07-12511, 2008 U.S. Dist. LEXIS 48258, at *4–5 (E.D. Mich. June 24, 2008) (*unpublished*) (dismissing for non-exhaustion despite plaintiff's allegation of mental incompetence and his participation in the prison Mental Health Program, since he presented "no evidence of mental incompetency beyond allegations and conclusory statements in the pleadings").

247. *See* Elliott v. Monroe Corr. Complex, No. C06-0474RSL, 2007 U.S. Dist. LEXIS 5242, at *10–11 (W.D. Wash. Jan. 23, 2007) (dismissing for non-exhaustion where plaintiff with cerebral palsy was provided with assistance and had filed numerous grievances, though none were exhausted).

248. *Compare* Johnson v. District of Columbia, 869 F. Supp. 2d 34 (D.D.C. 2012) (finding that a prinsoner's inability to read did not prevent him from exhausting administrative remedies), *with* Langford v. Ifediora, No. 5:05CV00216WRW/HLJ, 2007 LEXIS 34915, at *1 (E.D. Ark. May 11, 2007) (holding plaintiff's age, deteriorating health, and lack of general education, combined with failure to provide him assistance in preparing grievances, raised a factual issue concerning the availability of the remedy to him). *See also* Ramos v. Smith, No. 05-5278, 187 F. App'x 152, 154 (3d Cir. June 5, 2006)) (rejecting claim of illiteracy, since federal regulations require assistance to illiterate prisoners, and he did not allege that he asked for such assistance).

249. Several courts have denied summary judgment to prison officials where a monolingual Spanish-speaking plaintiff alleged he could not understand or follow the grievance procedures because he could not get them, or get help with them, in Spanish. *See* Aleman v. Dart, No. 08 C 6322, 2012 U.S. Dist. LEXIS 197974, at *17–18 (stating that a prisoner's lack of English skills can sometimes excuse his failure to exhaust administrative remedies, but not when the prison makes assistance available to him and he fails to take advantage of it).

250. One appeals court has rejected the argument that a juvenile prisoner 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., 93 Fed. App'x 793, 797 (6th Cir. Mar. 23, 2004). By contrast, in Lewis ex rel. 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

A remedy may not be available because you are transferred out of your prison or jail system before you can file a grievance,[251] unless the system gives you a way to complain after you are transferred.[252] Also, if you had time to file a grievance before being transferred but did not, the court will probably decide that you did not do everything you could to solve your problem within the system.[253] Be careful with this issue. Courts sometimes just assume that you have a solution inside the prison system after you were transferred even if that is not true.[254] If you get transferred before you can file a grievance, or if you are waiting for a grievance to be resolved, you should do your best to keep going with the grievance. Maybe you will succeed. If you do not succeed, you will be able to show that there was not a solution for you. In any case, you will need to show the court that you tried everything first (that is, you tried to use all of the grievance procedures available to you) and that you have good reasons to explain why you were not successful.[255]

The court might decide that a solution does not exist to your problem, or was not available to you, so you did not have to pursue it, because of what prison employees did or did not do. The Second Circuit, along with other courts, have decided that if prison employees threaten or assault you so you will not complain, the court will consider the ability to complain unavailable, even if procedures do technically exist.[256] To show that a remedy did not exist for you, you must show that the threat or intimidation of the prison official actually did prevent you from making or pursuing your grievance and that "a similarly situated individual of ordinary firmness" would have been prevented from making or pursuing a grievance.[257] This means you must show that an ordinary person in your position would not have made or pursued the complaint because of the threats, intimidation, or assaults of the prison officials.[258]

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director and agency counsel, had made sufficient "reasonable efforts" to exhaust his remedies.

251. Rodriguez v. Westchester Cnty. Jail Corr. Dep't, 372 F.3d 485, 488 (2d Cir. 2004) (holding that failure to exhaust may sometimes be excused, such as when remedies are made unavailable); Ammouri v. ADAPPT House, Inc., No. 05-3867, 2008 U.S. Dist. LEXIS 47129, at *10–12 (E.D. Pa. June 13, 2008) (noting that plaintiff was repeatedly told he could not file a grievance about matters from his previous institution).

252. *See* Soto v. Belcher, 339 F. Supp. 2d 592, 595 (S.D.N.Y. 2004) (holding that the transfer of a prisoner did not excuse need for remedy exhaustion since regulations permit grievances after transfer). *But see* Brownell v. Krom, 446 F.3d 305, 312–13 (2d Cir. 2006), where the court found special circumstances justifying the plaintiff's failure to exhaust remedies because the prison staff did not follow the rules that allowed for the handling of grievances following a transfer.

253. James v. Williams, No. 1:04CV69-1-MU, 2005 U.S. Dist. LEXIS 10076, at *6 (W.D.N.C. May 24, 2005) (noting prisoner had 11 days to file a new grievance after his first grievance was rejected and that under the grievance policy he could have filed it at the new prison too).

254. Blakey v. Beckstrom, No. 06-163-HRW, 2007 U.S. Dist. LEXIS 5181, at *4 (E.D. Ky. Jan. 24, 2007) (holding that transfer alone did not make grievance procedures unavailable); Mills v. United States, No. CV-02-5597 (SJF)(LB), 2006 U.S. Dist. LEXIS 82903, at *7 (E.D.N.Y. Nov. 14, 2006) (holding transfer "does not relieve [prisoner] of the obligation to pursue the grievance procedures available in the facility where the conduct occurred").

255. *See* Mellender v. Dane County, No. 06-C-298-C, 2006 U.S. Dist. LEXIS 80103, at *7–12 (W.D. Wis. Oct. 27, 2006) (finding that a prisoner's attempts to mail a grievance from prison after his transfer and to use the prison's grievance system to complain about an incident that occurred at another facility, combined with the prison's refusal to cooperate were good reasons for prisoner being unable to exhaust remedies).

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

257. Hemphill v. New York, 380 F.3d 680, 688 (2d Cir. 2004) (stating that it is possible for the threat of retaliation to make administrative remedies unavailable); *accord* Kaba v. Stepp, 458 F.3d 678, 684–85 (7th Cir. 2006) (adopting *Hemphill* analysis and stating that if administrative remedies are not available to a prisoner, then the prisoner cannot be required to exhaust them); Turner v. Burnside, 541 F.3d 1077, 1084 (11th Cir. 2008) (following *Hemphill* and *Kaba,* "[r]emedies that rational inmates cannot be expected to use are not capable of accomplishing their purposes, and so are not available"). Furthermore, courts have recognized that mere contact between a prisoner and a senior prison official is not proof that there were no threats or intimidation from the lower officials to the prisoner in the grievance process. 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." Hemphill v. New York, 380 F.3d 680, 688 (2d Cir. 2004); *accord* Turner v. Burnside, 541 F.3d 1077, 1084–85 (11th Cir. 2008). Thus, the fact that a prisoner has, for example, written a letter of complaint to the Superintendent (as in *Hemphill*) does not establish that he was not deterred from filing an ordinary grievance.

258. Tuckel v. Grover, 660 F.3d 1249, 1254 (10th Cir. 2011) ("Only threats that are sufficiently serious and retaliatory acts that are severe enough to deter a reasonable inmate will result in an administrative remedy becoming unavailable for PLRA purposes.")

Remedies may be made unavailable because of something else the prison staff did, even if the prison staff is not deliberately trying to make it hard for you to access a remedy.[259] For example, the court might consider a solution unavailable for a rule that will not give postage stamps to prisoners who cannot afford them.[260] This may also be the case for prison officials refusing to give writing materials or documents to prisoners in a segregation unit.[261] Sometimes prisoners in a particular status or situation are simply not allowed to use the grievance system.[262] Rules specifically designed to limit prisoners' use of the grievance system may make the remedy unavailable for some prisoners, depending on the severity of the limit.[263] In a system of "modified grievance access," in which the prisoner must be granted permission to file a grievance, the remedy is still available even if permission is not granted.[264] Remedies may also not be available because of actions by supervisors or grievance staff towards particular grievances or individuals who want to bring a grievance,[265]

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259. Dole v. Chandler, 438 F.3d 804, 809, 812 (7th Cir. 2006) ("Prison officials may not take unfair advantage of the exhaustion requirement . . . and a remedy becomes 'unavailable' if prison employees do not respond to a properly filed grievance or otherwise use affirmative misconduct to prevent a prisoner from exhausting"; prisoner whose properly filed grievance simply vanished, and who received no instructions regarding what to do about it, did "all that was reasonable to exhaust"); Flores v. Wall, No. CA 11-69 M, 2012 U.S. Dist. LEXIS 136668, at *15–16 (D. R.I. Aug. 31, 2012) (*unpublished*) (citing Miller v. Norris, 247 F.3d 736, 740 (8th Cir. 2001) ("We believe that a remedy that prison officials prevent a prisoner from 'utilizing' is not an 'available' remedy under § 1997e(a) . . . .")); Frost v. McCaughtry, No. 99-2061, 2000 U.S. App. LEXIS 14702, at *2–4 (7th Cir. June 12, 2000) (*unpublished*) (holding allegation that no grievance appeal was available to plaintiff because ongoing administrative changes during the relevant time period raised a factual question as to availability); Brookins v. Vogel, No. 1:05-CV-0413-0WW-DLB-P, 2006 U.S. Dist. LEXIS 86252, at *7–9 (E.D. Cal. Nov. 28, 2006) (*unpublished*) (holding that defendants prevented plaintiff from exhausting the administrative remedies and therefore the situation was an exception to the exhaustion rule).

260. Cordova v. Frank, No. 07-C-172-C, 2007 U.S. Dist. LEXIS 54789, at *16 (W.D. Wis. July 26, 2007) (*unpublished*) (noting that "insofar as defendants have devised a grievance system that prevents indigent prisoners from filing appeals of their inmate grievances, they have made the grievance process unavailable to those inmates and may not use failure to file timely appeals as a ground for dismissing subsequent lawsuits.").

261. Woods v. Carey, No. CIV S-04-1225 LKK GGH P, 2007 U.S. Dist. LEXIS 69832, at *1–2, 4–5 (E.D. Cal. Sept. 13, 2007) (*unpublished*) (vacating recommendation for dismissal because of failure to exhaust and demanding an inquiry into plaintiff's access to his legal property, which he claims he did not have, thereby preventing his timely appeal).

262. Daker v. Ferrero, No. 1:03-CV-2526-RWS, 2004 U.S. Dist. LEXIS 30591, at *6–8 (N.D. Ga. Nov. 24, 2004) (*unpublished*) (holding that a prisoner placed in "sleeper" status, meaning he remained officially assigned to another prison and was not allowed to file grievances where he was actually located, lacked an available remedy); *see also* Sease v. Phillips, No. 06 Civ. 3663 (PKC), 2008 U.S. Dist. LEXIS 60994, at *15–16 (S.D.N.Y. July 25, 2008) (*unpublished*) (summary judgment denied where prisoner in "transient" status was told his grievance could not be processed, and when he filed one it was never processed); Marr v. Fields, No. 1:07-CV-494, 2008 U.S. Dist. LEXIS 123524, at *14 (W.D. Mich. Mar. 3, 2008) (*unpublished*) (holding that a remedy which is not actually available cannot be considered a remedy necessary for exhaustion; here, where the alleged remedy is a disciplinary appeal, but the prisoner is not allowed to make the appeal, the remedy is not available.); Flory v. Claussen, No. C06-1046-RSL-JPD, 2006 WL 3404779, at *4 (W.D. Wash. Nov. 21, 2006) (denying prison official's claim that plaintiff failed to exhaust remedies, when plaintiff tried to exhaust remedies but did it with the wrong "entity" or part of the prison).

263. Rules limiting prisoners to a certain number of grievances may make the remedy unavailable for prisoners who are over the limit. Rhodan v. Schofield, No. 1:04-CV-2158-TWT, 2007 U.S. Dist. LEXIS 44593, at *19–20 (N.D. Ga. June 19, 2007) (*unpublished*) (holding that prisoner who said he was told he could not have two grievances pending at once raised a factual issue as to availability of remedies; "an inmate has complied with the PLRA's exhaustion requirement where prison officials have prevented an inmate from filing an administrative grievance."); Wood v. Idaho Dep't of Corr., No. CV-04-99-C-BLW, 2006 U.S. Dist. LEXIS 14711, at *19 (D. Idaho Mar. 16, 2006) (*unpublished*) (holding that a prisoner whose grievance was returned because he was only allowed to have three pending at one time had exhausted his remedies).

264. Dawson v. Norwood, No. 1:06-CV-914, 2007 U.S. Dist. LEXIS 82205, at *9 (W.D. Mich. Nov. 6, 2007) (*unpublished*) (holding that a prisoner placed on modified access to the grievance procedure, who then attempts to file a grievance later deemed to be non-meritorious, has not exhausted his 'available' administrative remedies as required by § 1997e(a)). A rule requiring prisoners on modified grievance status to submit a notarized affidavit with a grievance may make the remedy unavailable if the prisoner cannot get access to a notary. Thomas v. Guffy, No. CIV-07-823-W, 2008 U.S. Dist. LEXIS 56901, at *7 (W.D. Okla. July 25, 2008) (*unpublished*).

265. Howard v. Hill, 156 F. App'x 886, 886 (9th Cir. Nov. 21, 2005) (*unpublished*) (holding that a prisoner who had been told he would not receive responses to his grievances had no remedy available); Baylis v. Taylor, 475 F. Supp. 2d 484, 488 (D. Del. 2007) (holding officials' withdrawal of plaintiff's grievances because of litigation meant that he had exhausted, since no further remedies were available).

purposeful misconduct by prison officials,[266] neglect or accident,[267] or events that are merely unexplained.[268] However, courts are unlikely to be persuaded by claims that your grievance was prevented unless they are clearly supported by facts.[269] If you are claiming your grievance was prevented you should lay out all the facts of how it was prevented in your complaint.

In complaints where you complain that you were denied necessary grievance forms, many courts will not throw out the case because you had not done everything you could.[270] Still, courts are suspicious of such claims. You will lose if your case is not supported by facts, if there is no evidence that you tried to get the grievance forms,[271] or if you filed other grievances around the same time.[272]

A remedy is unavailable, and you cannot be penalized for not exhausting that remedy, if prison officials failed to tell you that the remedy or rules exist.[273] If you were misinformed about the availability or operation of a remedy by a prison official, that may make the remedy unavailable as well.[274] Some courts have allowed claims to proceed when a prisoner relied on a statement by a prison official that his issue was not one for which he could file a complaint.[275] However, if you had some way to know about the remedy (for example, like in an

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266. Smith v. Westchester Cnty. Dep't of Corr., No. 07 Civ. 1803 (SAS), 2008 U.S. Dist. LEXIS 11049, at *10 (S.D.N.Y. Feb. 7, 2008) (*unpublished*) (holding that remedies were unavailable if supervisors refused to accept plaintiff's grievance); Collins v. Goord, 438 F. Supp. 2d 399, 414–15 (S.D.N.Y. 2006) (holding allegations that facility personnel invented a screening procedure and did not allow him to file his grievance raised a material issue under "an exception to the PLRA's exhaustion requirement where prison authorities actively obstruct an inmate's ability to 'properly' file a prison grievance").

267. Pavey v. Conley, 170 F. App'x 4, 9 (7th Cir. 2006) (*unpublished*) (holding that isolating and failing to assist a prisoner who couldn't write could render the remedy unavailable); Warren v. Purcell, No. 03 Civ. 8736 (GEL), 2004 U.S. Dist. LEXIS 17792, at *20 (S.D.N.Y. Sept. 3, 2004) (*unpublished*) (holding "baffling" grievance response that left prisoner with no clue what to do next barred defendants from claiming the non-exhaustion defense).

268. Dole v. Chandler, 438 F.3d 804, 812 (7th Cir. 2006) (holding prisoner whose properly filed grievance simply vanished, and who received no instructions about what else to do, did "all that was reasonable to exhaust").

269. *See, e.g.*, Stine v. Wiley, No. 06-CV-02105-BNB, 2007 U.S. Dist. LEXIS 2113, at *3–4 (D. Colo. Jan. 10, 2007) (*unpublished*) (requiring further information regarding complainant's failure to exhaust administrative remedies); Djukic v. Arpaio, No. CV 05-4042-PHX-MHM (MEA), 2006 U.S. Dist. LEXIS 72239, at *6–7 (D. Ariz. Sept. 26, 2006) (*unpublished*) (dismissing for lack of evidence that the grievance system was unavailable).

270. Pavey v. Conley, 170 F. App'x 4, 9 (7th Cir. 2006) (denying dismissal where plaintiff, who could not write, reasonably relied on assurances that his oral complaint would be investigated); Dale v. Lappin, 376 F.3d 652, 654–56 (7th Cir. 2004) (per curiam) (not dismissing for failure to exhaust when prison officials "made administrative remedies so unavailable as to deprive Dale of his rightful access to the grievance process"); Mitchell v. Horn, 318 F.3d 523, 529 (3d Cir. 2003) (noting that a claim was improperly dismissed where allegations that the plaintiff was denied grievance forms had not been considered); Franklin v. Mosley, No. 4:11-CV-1606(CEJ), 2012 U.S. Dist. LEXIS 114095, at *4 (E.D. Mo. Aug. 14, 2012) (*unpublished*) (citing Miller v. Norris, 247 F.3d 736, 740 (8th Cir. 2001) (holding that a remedy is unavailable if a prisoner is prevented from using it)).

271. *See, e.g.*, Beasley v. Kontek, No. 3:05CV7262, 2007 U.S. Dist. LEXIS 96302, at *4 (N.D. Ohio Nov. 5, 2007) (*unpublished*) (*quoting* Jones v. Smith, 266 F.3d 399, 400 (6th Cir. 2001)) ("A prisoner may not be excused from exhausting internal remedies if his failure resulted from a form not being provided to him, unless he alleges that there was no other source for the form or that he can prove that he made other attempts to 'obtain a form or file a grievance.'").

272. *See, e.g.*, Aguado-Guel v. Larkin, No. 06-5091, 2008 U.S. Dist. LEXIS 37145, at *13–14 (W.D. Ark. May 6, 2008) (*unpublished*) (rejecting a defense that plaintiff was denied a grievance form when he had filed other grievances one and two days after the incident in question).

273. Goebert v. Lee County, 510 F.3d 1312, 1322–23 (11th Cir. 2007) (holding that an appeal procedure not described in the inmate handbook but only in the operating procedures, to which the inmates did not have access, was not an available remedy); Westefer v. Snyder, 422 F.3d 570, 580 (7th Cir. 2005) (holding that defendants did not show remedies were available where there was no "clear route" for challenging certain decisions); Jackson v. Ivens, 244 F. App'x 508, 514 (3d Cir. 2007) (*unpublished*) (citing Spruill v. Gillis, 372 F.3d 218, 234 (3d Cir. 2004)) (denying a defense that plaintiff failed to exhaust remedies when those remedies were "unwritten or 'implied' requirements.").

274. Pavey v. Conley, 170 F. App'x 4, 8–9 (7th Cir. 2006) (holding that plaintiff, who could not write, reasonably relied on assurances that his oral complaint would be investigated; "inmates may rely on the assurances of prison officials when they are led to believe that satisfactory steps have been taken to exhaust administrative remedies. . . . [P]rison officials will be bound by their oral representations to inmates concerning compliance with the grievance process"); Brown v. Croak, 312 F.3d 109, 112–13 (3d Cir. 2002) (holding that if security officials told the plaintiff to wait for completion of an investigation before grieving, and then never informed him of its completion, the grievance system was unavailable to him).

275. Flory v. Claussen, No. C06-1046-RSL-JPD, 2006 WL 3404779, at *4 (W.D. Wash. Nov. 21, 2006) (prisoner's efforts to exhaust with the wrong entity deemed to be proper exhaustion where prison policy was unclear and prisoner

inmate handbook), you cannot say that you did not know the remedy existed.[276] Unless prison officials directly lied to you about how the grievance system works, you can't use what they told you about the system to prove that you did everything you could, even if you made decisions based on what they told you.[277]

Even if prison officials investigate your incident, do not assume that you have exhausted your claim. You need to follow the entire prison grievance procedure. In one recent case, a court held that a prisoner had not exhausted his claim because he did not file a grievance, even though he was interviewed as part of an internal affairs investigation.[278] You may find yourself unable to exhaust your prison remedies in a timely and procedurally correct manner due to reasons beyond your control. You might think this difficulty in obtaining the remedy means that the remedy is not available to you, and therefore you do not have to exhaust by trying to seek the remedy. *Do not* assume this. A number of courts have held, for example, that if prisoners are prevented from filing grievances on time, they must file them whenever they can, even if the grievances will be denied for being late.[279] This might not make sense under the "proper exhaustion" rule, but courts do it anyway. Some courts have held that if your grievance or appeal just "disappears," you must take some action to follow up on the grievance that has gone missing.[280] It's not enough to just tell the court that it disappeared. One federal appeals court has held that if a prisoner's failure to exhaust was "innocent," such as when prison officials prevent the prisoner from filing his grievance, the prisoner "must be given another chance to exhaust" the remedies available in the prison system.[281]

Courts are not likely to believe a claim that you have exhausted your remedies, or a claim that you were not informed or were misinformed about the grievance process, without further evidence.[282] You should therefore do everything you can to exhaust even if you know the effort is going to fail, and also keep records

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relied on defendants' advice); 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). *But see* Gibson v. Weber, 431 F.3d 339, 341 (8th Cir. 2005) (holding that even if prison personnel "made it clear" that prisoners should make medical complaints informally to medical personnel, this did not excuse the prisoners from failing to exhaust a grievance procedure they admitted having been informed of); Singh v. Goord, 520 F. Supp. 2d 487, 496 (S.D.N.Y. 2007) (denying plaintiff's claim that the designation of a particular staff member to deal with his concerns established an "'idiosyncratic' grievance system" that excused non-exhaustion when plaintiff was not instructed otherwise).

276. Gibson v. Weber, 431 F.3d 339, 341 (8th Cir. 2005) (holding that prisoners who admitted receiving a guidebook that explained a grievance procedure were not excused from following the procedure even if prison personnel had "made it clear" that they should instead voice complaints informally to medical personnel); Boyd v. Corr. Corp. of Am., 380 F.3d 989, 999 (6th Cir. 2004) (rejecting a plaintiff's argument that he was unaware of the appropriate grievance procedure when it was set forth in the inmate handbook).

277. Overton v. Davis, 460 F. Supp. 2d 1008, 1009–10 (S.D. Iowa 2006) (holding that a grievance officer's declaration that a matter was non-grievable did not excuse failure to exhaust the grievance process); 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 prisoners' 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).

278. Pavey v. Conley, 663 F.3d 899, 905 (7th Cir. 2011) ("The benefits of exhaustion can be realized only if the prison grievance system is given a fair opportunity to consider the grievance."). *See also* Panaro v. City of N. Las Vegas, 432 F.3d 949, 953 (9th Cir. 2005) ("[W]e adopt the rule that participating in an internal affairs investigation does not by itself satisfy the exhaustion requirement of the PLRA."); Thomas v. Woolum, 337 F.3d 720, 734 (6th Cir. 2003) ("In determining whether the inmate has exhausted his or her remedies, we thus look to the inmate's grievance, not to other information compiled in other investigations.").

279. For more information about time limits, see Part E(6) of this Chapter.

280. Boyer v. Farlin, No. 04-1042, 2006 U.S. Dist. LEXIS 88940, at *10–12 (C.D. Ill. Dec. 8, 2006) (*unpublished*) (holding that a prisoner didn't exhaust because he didn't explain why he took no action for two months when he had no notice that his appeal had been received). However, the Seventh Circuit has held that a remedy becomes "unavailable" if prison employees take unfair advantage of the exhaustion requirement by not responding to a grievance or otherwise preventing a prisoner from exhausting. Dole v. Chandler, 438 F.3d 804, 809, 812 (7th Cir. 2006).

281. Pavey v. Conley, 544 F.3d 739, 742 (7th Cir. 2008).

282. *See*, *e.g.*, Gaughan v. U.S. Bureau of Prisons, No. 02-C-0740, 2003 U.S. Dist. LEXIS 23297, at *3–5 (N.D. Ill. Dec 30, 2003) (*unpublished*) (rejecting claim that prisoner had exhausted where defendants had not made a record of it); Thomas v. N.Y. State Dep't of Corr. Servs., No. 00 Civ. 7163 (NRB), 2003 U.S. Dist. LEXIS 20286, at *13 (S.D.N.Y. Nov. 10, 2003) (*unpublished*) (dismissing case for failure to exhaust remedies where prison staff told the prisoner a grievance was unnecessary, but did not tell him he could not file a grievance).

so you can prove you tried. In other words, file a grievance no matter what. For example, if prison staff refuses to provide you with grievance forms, write your grievance on a sheet of paper, explain that you cannot get the forms, and appeal if they reject the grievance for not being on the right form.[283] If prison staff tells you that you do not need to file a grievance, file a grievance anyway; if they tell you that the issue is not "grievable"—that is, if the grievance system is not available to you for that issue—file the grievance anyway, so that you will get a decision in writing telling you that it isn't grievable.[284] If they refuse to accept your grievance, write to the Warden or Superintendent and tell him that you were not allowed to file your grievance. Ask him for it either to be investigated as a non-grievance complaint or treated as a grievance in case you were misinformed by the lower-level staff. You should also file a grievance about a refusal to accept your grievance. It is extremely important to keep copies of everything that you file so that you can later prove that you did in fact file those documents.

4. What Must You Put in Your Grievance or Administrative Appeal?

Exhausting means you must raise all of the issues that you intend to raise in your lawsuit in your grievance or appeal. Issues you do not include in your grievance or appeal cannot be brought up later in a lawsuit.[285] Sometimes, most often in connection with disciplinary proceedings, you have to use more than one remedy to exhaust all your issues. For example, if you are challenging a disciplinary decision to revoke your visitation privileges, you must both appeal the sentence through your prison's disciplinary proceedings and file an administrative grievance about the loss of your visitation privileges.

How specific and detailed must you be in a grievance or appeal to satisfy the exhaustion requirement? The Supreme Court recently held that courts could not require that prisoners name all the defendants in their grievances that they later named in their court complaints if the grievance system itself did not have such a requirement.[286] The Court said: "The level of detail necessary in a grievance to comply with the grievance procedures will vary from system to system and claim to claim, but it is the prison's requirements, and not the PLRA, that define the boundaries of proper exhaustion."[287] For example, if the prison grievance system *does* require you to name the responsible employees in your grievance, and you have that information, then you have to name them. Anyone that you didn't name in the grievance could not be named as a defendant in a later lawsuit.[288]

Currently, most grievance systems do not have such specific requirements. Either they say nothing about the level of detail required in your grievances, or the requirements are very general.[289] One court has said that if the prison grievance policy does not have more specific requirements, then a grievance counts as exhausting

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283. Kendall v. Kittles, No. 03 Civ. 628 (GEL), 2003 U.S. Dist. LEXIS 16129, at *10–13 (S.D.N.Y. Sept. 15, 2003) (*unpublished*) (declining to dismiss where prisoner said he could not get grievance forms; the fact that he filed grievances at other times showed only that forms were available on the dates those grievances were filed, and not that such forms were always available). This is not an issue in the New York State grievance system. The directive states that if forms are not available, the grievance can be submitted on plain paper. *See* N.Y. Correct. Law § 701.5(a)(1) (McKinney 2003). New York state grievance procedures are available in the state regulations. *See* N.Y. Correct. Law §§ 701–02 (McKinney 2003).

284. Some courts have refused to accept prisoners' statements that an unidentified person told them that their issues were not grievable. *See*, *e.g.*, Perez v. Arpaio, No. CV 06-0038-PHX-SMM (ECV), 2006 U.S. Dist. LEXIS 86559, at *5–6 (D. Ariz. Nov. 21, 2006) (*unpublished*) (dismissing claim for failure to exhaust, even though an unnamed official told plaintiff he did not have to file).

285. *See* Jones v. Bock, 549 U.S. 199, 211, 127 S. Ct. 910, 919, 166 L. Ed. 2d 798, 810 (2007) (noting that "unexhausted claims cannot be brought in court"); Johnson v. Johnson, 385 F.3d 503, 517–19 (5th Cir. 2004) (holding a prisoner who complained of sexual assault and referred to his sexual orientation in his grievance, but said nothing about his race, did not exhaust his racial discrimination claim).

286. *See* Jones v. Bock, 549 U.S. 199, 218, 127 S. Ct. 910, 922, 166 L. Ed. 2d 798, 815 (2007).

287. *See* Jones v. Bock, 549 U.S. 199, 218, 127 S. Ct. 910, 923, 166 L. Ed. 2d 798, 815 (2007).

288. Garrison v. Dutcher, 1:07-CV-642, 2008 U.S. Dist. LEXIS 90504, at *4 (W.D. Mich. Sept. 30, 2008) (holding that "[the Michigan Department of Corrections] requires prisoners to include the 'names of all those involved'. . . . Plaintiff's failure to name [a prison supervisor] as a responsible party in his grievances thus constitutes failure to exhaust").

289. For example, the New York State grievance system requires only that prisoners include a "concise, specific description of the problem and the action requested and indicate what actions the grievant has taken to resolve the complaint, [that is], specific persons/areas contacted and responses received." N.Y. Correct. Law, § 701.5(a)(2) (McKinney 2003).

"if it alerts the prison to the nature of the wrong for which redress is sought."[290] In making your grievance, normally you do not need to "lay out the facts, articulate legal theories, or demand particular relief. All the grievance need do is object intelligibly to some asserted shortcoming."[291] This makes sense because the purpose of the PLRA exhaustion requirement is to give prison officials time and opportunity to resolve problems before they turn into lawsuits.[292] An example of a grievance that satisfied the "object intelligibly" standard (though just barely) is found in a sexual assault case where the prisoner said only: "[T]he administration don't [sic] do there [sic] job. [A sexual assault] should've never [sic] happen again," and requested that the assailant be criminally prosecuted.[293]

Even courts that do not cite the "object intelligibly" standard generally do not require grievances to be very specific or detailed.[294] Courts also tend to reject prison officials' overly technical arguments about the adequacy of a grievance.[295] Courts have usually only held grievances inadequate when they were so vague that prison officials could not reasonably have been expected to understand what the prisoner was complaining about.[296]

There are exceptions. Some courts have required much greater detail and specificity in grievances even if the prison grievance policy did not require that type of detail. For example, one recent decision said it was not sufficient for the prisoner to have claimed that he was denied treatment for his injured finger at every prison where he had been.[297] The court said he should have written that he was denied access to an orthopedic surgeon around a particular date, then transferred two months later and denied medical care.[298] In particular, a number of courts have held grievances inadequate because they failed to specifically mention prisoners' legal

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290. Strong v. David, 297 F.3d 646, 650 (7th Cir. 2002); *accord* Kikumura v. Osagie, 461 F.3d 1269, 1283 (10th Cir. 2006); Johnson v. Testman, 380 F.3d 691, 697 (2d Cir. 2004), overruled on other grounds.

291. Strong v. David, 297 F.3d 646, 650 (7th Cir. 2002); *accord* Kikumura v. Osagie, 461 F.3d 1269, 1283 (10th Cir. 2006); Johnson v. Testman, 380 F.3d 691, 697 (2d Cir. 2004).

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

293. Riccardo v. Rausch, 375 F.3d 521, 524 (7th Cir. 2004). *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).

294. *See, e.g.*, McAlphin v. Toney, 375 F.3d 753, 755 (8th Cir. 2004) (per curiam) (treating two claims that: (1) two defendants failed to treat plaintiff's dental grievances as emergency matters, and (2) others refused to escort him to the infirmary for emergency treatment, as just a single exhausted claim of denial of emergency dental treatment for exhaustion purposes); 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 included elements of both the Buddhist and Christian religions); Carter v. Symmes, No. 06-10273-PBS, 2008 U.S. Dist. LEXIS 7680, at *9 (D.Mass. Feb. 4, 2008) (*unpublished*) (adopting administrative law rule that "claims not enumerated in an initial grievance are allowed notwithstanding the exhaustion requirement if they 'are like or reasonably related to the substance of charges timely brought before [the agency]'").

295. *See, e.g.*, Johnson v. Johnson, 385 F.3d 503, 517–18 (5th Cir. 2004) (agreeing legal theories need not be presented in grievances); 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").

296. *See, e.g.*, 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); Aguirre v. Feinerman, No. 3:02 cv 60 JPG, 2005 U.S. Dist. LEXIS 45520, at *20 (S.D. Ill. May 10, 2005) (*unpublished*) (holding that a grievance that specifically mentioned physical therapy, but mentioned other medical care only generally, did not exhaust a claim concerning failure to diagnose the plaintiff's congestive heart failure; "[w]hile specifically identifying the ailment would not be required, there must be some indication as to what medical issues the plaintiff was complaining about.").

297. *See, e.g.*, 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); Aguirre v. Feinerman, No. 3:02 cv 60 JPG, 2005 U.S. Dist. LEXIS 45520, at *20 (S.D. Ill. May 10, 2005) (*unpublished*) (holding that a grievance that specifically mentioned physical therapy, but mentioned other medical care only generally, did not exhaust a claim concerning failure to diagnose the plaintiff's congestive heart failure; "[w]hile specifically identifying the ailment would not be required, there must be some indication as to what medical issues the plaintiff was complaining about").

298. Davis v. Knowles, No. CIV S-04-0821 LKK KJM P, 2007 U.S. Dist. LEXIS 6159, at *7–8 (E.D. Cal. Jan. 25, 2007) (*unpublished*), *adopted by* 2007 U.S. Dist. LEXIS 28294 (E.D. Cal. Apr. 16, 2007).

claims that the prisoners later included in their lawsuits, including denial of First Amendment rights,[299] unlawful retaliation,[300] discrimination contrary to the Equal Protection Clause,[301] and conspiracy.[302] This was the case even if the prisoners stated the underlying facts of these claims in their grievances.[303] It is difficult to explain these decisions in light of the rule that prisoners do not have to plead legal theories in their grievances. To be safe, you should outline your legal theory in your grievance.

If the grievance system actually investigates and addresses the substance of your complaint, and does not throw it out for lack of detail, a court will generally deem it exhausted. This will be the case even if the defendants' lawyers later claim that you should have said more in the grievance.[304]

You can expect prison officials to attack your claim for failure to exhaust. There are some things you can do to protect yourself. If the prison grievance system requires you to name all the individuals involved, you may not necessarily know who they all are. Make it clear in your grievance that you do not know their names. For example, if you were beaten by several officers while others looked on, you might write in your grievance: "Officers Smith and Jones beat me, along with the other officers present who beat me or who stood by and did not intervene to stop the beating, and whose names I do not know." If you think there is a practice of beating prisoners that higher-ups in the prison are responsible for, you might add something like: "Sergeant Black, Lieutenant White, Deputy Superintendent Green and Superintendent Red, and any other supervisors unknown to me who fail to train and supervise the security staff and keep them from using excessive and unnecessary force." Or, if the mail room officer denies you a book you have ordered by telling you only "it's not allowed," you might say your grievance was against "Officer Jones in the mail room, and any other person unknown to me who made the policy resulting in this book being denied to me, or if there is no such policy, the supervisor of the mail room operation, unknown to me, who allows mail room staff to deny books to prisoners in the absence of a policy permitting such denial."

Even if your prison's grievance policy does not require the naming of all individuals involved, you should still think about the different events and policies that might be involved in the problem you are filing a grievance about, and mention them. For instance, in the use of force example above, if the grievance policy requires only a "concise, specific statement of the problem," you might say: "I was beaten without justification by Officers Smith and Jones and others, while other officers stood by and did not intervene. I am also complaining about the lack of training and supervision that allows security staff to use excessive and unnecessary force and get away with it."[305] In the book seizure example, you might say: "I was denied the book A Time to Die about the 1971 Attica disturbance. I am also complaining about the policies and practices that allow the denial to prisoners of books without good reason and without clear written criteria and procedures."

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299. *See* Dye v. Kingston, 130 F. App'x 52, 56 (7th Cir. Apr. 26, 2005) (*unpublished*) (holding that a prisoner who complained in his grievance of missing property items, including his Bibles, failed to exhaust his 1st Amendment claim by failing to state that the Bibles' loss was "infringing on his religious practice").

300. *See, e.g.*, Griffin v. Miner, No. 1:06 CV 1889, 2006 U.S. Dist. LEXIS 79764, at *2–3, *5 (N.D. Ohio Oct. 31, 2006) (*unpublished*) (plaintiff did not exhaust with respect to retaliation because he did not mention his retaliation theory in his grievance).

301. Johnson v. Johnson, 385 F.3d 503, 518 (5th Cir. 2004) (holding that a prisoner who complained of sexual assault and 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).

302. Lindell v. Frank, No. 05-C-003-C, 2005 U.S. Dist. LEXIS 21300, at *4 (W.D. Wis. Sep. 23, 2005) (*unpublished*) (holding failure to mention conspiracy allegations in a grievance appeal meant that the claim was not exhausted).

303. Brownell v. Krom, 446 F.3d 305, 310–11 (2d Cir. 2006) (holding a grievance inadequate for failing to mention the allegation that loss of property was intentional); Lindell v. Frank, No. 05-C-003-C, 2005 U.S. Dist. LEXIS 21300, at *4 (W.D. Wis. Sep. 23, 2005) (*unpublished*) (holding failure to mention conspiracy allegations in a grievance appeal meant that the claim was not exhausted).

304. *See, e.g.*, Freeman v. Salopek, No. 2:06-cv-496-FtM-34SPC, 2008 U.S. Dist. LEXIS 21452, at *10–11 (M.D. Fla. Mar. 19, 2008) (*unpublished*) (rejecting claim that grievance was "undated, unclear, and vague" where final decisionmaker gave response addressing the precise issue raised in the grievance); Carter v. Symmes, No. 06-10273-PBS, 2008 U.S. Dist. LEXIS 7680, at *8–9 (D. Mass. Feb. 4, 2008) (*unpublished*) (holding that an issue not raised in the grievance, but spelled out in a timely letter from counsel, and addressed on its merits by the defendants, was exhausted).

305. *See* Kozohorsky v. Harmon, 332 F.3d 1141, 1143 (8th Cir. 2003) (holding that a grievance complaining of excessive force by line staff did not exhaust plaintiff's claim that a supervisor failed to supervise and take action against them).

(Or, if they do have clear criteria and procedures that you wish to challenge, mention those in the grievance, too.)

Similarly, if you get more information about a problem after you have filed a grievance about it (or more information about the people responsible), you should consider filing a separate grievance including the new information.[306] If you discover new information after the grievance deadline has passed, file a grievance anyway and explain that you couldn't file it within the deadline because you didn't have the information. For example, if you file a grievance stating that you have been denied certain medical care by the prison's medical director, and then later on learn that your care was denied by the prison system's central office through a "utilization review," you might wish to file and exhaust a new grievance about the utilization review decision. Courts have disagreed about whether these sorts of grievances are enough to exhaust, but it is the best way to protect yourself when you learn new information after filing an initial grievance.[307]

Prison officials and their lawyers want to try to get your case thrown out for non-exhaustion so they can avoid facing the merits of your lawsuit. You should do your best to make your grievance reflect all aspects of the problem that you may wish to bring suit about, so the judge will see that you did your best to bring everything to prison officials' attention before suing.

5. What If You Make a Mistake Trying to Exhaust?

Prisoners not only must exhaust, they must do it correctly. The Supreme Court has held that the PLRA exhaustion requirement requires compliance with an agency's deadlines and other critical procedural rules because no decision-making system can work well without having an orderly structure.[308] If your grievance or other complaint is rejected because you did not follow the required procedures, the court will find that you failed to exhaust and will not allow your lawsuit to go forward.[309]

This does *not* mean that you should just give up if you fail to follow a procedural rule. You should pursue your grievance, request that your error be excused or that you be permitted to re-file your grievance and start over, and explain any circumstances that might have caused you to make a mistake. Sometimes grievance systems allow correction and re-filing (in fact, sometimes they instruct prisoners to do so).[310] If prison officials decide the merits of a grievance and don't reject it for procedural mistakes, your procedural error will not count against you for exhaustion purposes.[311] Courts have disagreed over whether a grievance is exhausted if

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306. If the grievance system contains a "name all responsible persons" rule, courts might require you to file a new grievance including newly identified defendants or other new information. In *Brownell v. Krom*, 446 F.3d 305, 312–13 (2d Cir. 2006), the court rejected the argument that the plaintiff should have filed a new grievance reflecting new information, but only because the system did not seem to provide for supplementing or re-filing existing grievances to reflect new information.

307. *Compare* Sullivan v. Caruso, No. 1:07cv367, 2008 W.L. 356878 (W.D. Mich. Feb. 7, 2008) (*unpublished*) (holding defendants improperly rejected a grievance as duplicative where it named a defendant not named in a previous grievance) *with* Laster v. Pramstaller, No. 06-13508, 2008 U.S. Dist. LEXIS 11435 (E.D. Mich. Feb. 15, 2008) (*unpublished*) (holding that a grievance naming a defendant that is dismissed because it duplicates an earlier grievance that did not name that defendant fails to exhaust).

In Dunbar v. Jones, No. 1:05-CV-1594, 2007 U.S. Dist. LEXIS 49278, at *21–22 (M.D. Pa. July 9, 2007) (*unpublished*), the court rejected the argument that the plaintiff should have amended his grievance to name a defendant whose identity he did not initially know since the rules did not provide for such amended grievances. The court nonetheless dismissed the claim against that particular defendant because the plaintiff didn't add her name in his grievance appeals. The court did not, however, cite anything in the grievance policy that permits adding new material in grievance appeals. Another district court *accepted* the argument that the plaintiff was obliged to file a late and duplicative grievance upon learning who was responsible for the action he complained of, without any discussion of whether the rules provided for such a grievance. Fulgham v. Snyder, No. 2:07-CV-88, 2008 U.S. Dist. LEXIS 117867, at *9–10 (W.D. Mich. Feb. 26, 2008) (*unpublished*), adopted by 2008 U.S. Dist. LEXIS 22590 (W.D. Mich. Mar. 21, 2008) (*unpublished*).

308. Woodford v. Ngo, 548 U.S. 81, 90–91, 93, 126 S. Ct. 2378, 2386–87 , 165 L. Ed. 2d 368, 378, 380 (2006); *see also* Jones v. Bock, 549 U.S. 199, 218, 127 S. Ct. 910, 922–23, 166 L. Ed. 2d 798, 815 (2007) (holding that "[c]ompliance with prison grievance procedures . . . is all that is required by the PLRA to properly exhaust").

309. Woodford v. Ngo, 548 U.S. 81, 83–84, 126 S. Ct. 2378, 2382, 165 L. Ed. 2d 368, 374 (2006).

310. If they do allow you to re-file, you should follow the directions even if you disagree with them.

311. *See*, *e.g.*, Gates v. Cook, 376 F.3d 323, 331 (5th Cir. 2004) (noting that the plaintiff sent a form to the Commissioner rather than the Legal Adjudicator, but that defendants did not reject it for noncompliance; in addition, the grievance was submitted by the prisoner's lawyer and not by the prisoner, as the rules specify); Spruill v. Gillis, 372 F.3d 218, 234 (3d Cir. 2004).

it is rejected both on the merits and for procedural reasons.[312] The purpose of the "proper exhaustion" rule is to preserve the prison system's ability to "function effectively."[313] If prison officials make a decision on the merits of your grievance, you should argue that the system *has* functioned effectively because prison officials were able to consider your claim before you filed a lawsuit. In any event, the harder you have tried to exhaust, the more likely the court is to rule in your favor in a close case.

There is a potential trap in the proper exhaustion rule. Sometimes you might not be able to follow the rules for reasons outside your control. An example might be you miss a deadline because you are out of the institution and have no access to the grievance process. You might think that such circumstances mean that the administrative remedy was not available for you. However, a number of courts have held that prisoners who are prevented from exhausting properly must try to exhaust improperly. For example, even if you cannot file a grievance on time, you should file a late grievance as soon as you can. Otherwise, a court could dismiss your claim for non-exhaustion. You should protect yourself against such a dismissal by filing and pursuing the late or otherwise improper grievance.

There may be a few exceptions to the proper exhaustion requirement. In 2006 in the case of *Woodford v. Ngo*, the Supreme Court refused to look at the possibility that prisons might intentionally try to trip up prisoners. The court avoided this question because the prisoner in the case did not argue that the prison's procedural rules were designed to make it difficult for prisoners to exhaust.[314] Since then, several other courts have cited this statement from *Woodford*. These courts have held that prisoners should not have their cases dismissed for non-exhaustion when they failed to comply with procedural requirements because they were arguably "tripped up" by them.[315] In *Woodford*, the Supreme Court also said that exhaustion law is based on administrative law and habeas corpus. However, one of the justices noted this kind of law "contains well established exceptions to exhaustion."[316] Several decisions have cited these observations and allowed claims to go forward in some instances, even when a prisoner had not completely followed prison grievance rules while trying to exhaust.[317]

Before the *Woodford* decision, the Second Circuit Court had set out circumstances in which a prisoner's failure to exhaust would not bar litigation. In their decision, which likely is still a good argument after

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312. *Compare* Cobb v. Berghuis, No. 1:06-CV-773, 2007 U.S. Dist. LEXIS 93890, at *3–4 (W.D. Mich. Dec. 21, 2007) (*unpublished*) (holding that a grievance rejected for both reasons does not exhaust), *with* McCarroll v. Sigman, No. 1:07-cv-513, 2008 U.S. Dist. LEXIS 17254, at *10 (W.D. Mich. Mar. 6, 2008) (*unpublished*) (finding exhaustion on those facts), *reconsideration granted on other grounds*, No. 1:07-CV-513, 2008 U.S. Dist. LEXIS 38710 (W.D. Mich. May 13, 2008) (*unpublished*).

313. Woodford v. Ngo, 548 U.S. 81, 90, 126 S. Ct. 2378, 2386, 165 L. Ed. 2d 368, 387 (2006).

314. Woodford v. Ngo, 548 U.S. 81, 102, 126 S. Ct. 2378, 2392, 165 L. Ed. 2d 368, 385 (2006). Other courts have expressed the same concern. *See*, *e.g.*, Hooks v. Rich, No. CV 605-065, 2006 U.S. Dist. LEXIS 12951, at *18–19 (S.D. Ga. Jan. 17, 2006) (*unpublished*) (holding that "[t]he exhaustion requirement is a gatekeeper, not a 'gotcha' meant to trap unsophisticated prisoners who must navigate the administrative process *pro se*"); Campbell v. Chaves, 402 F. Supp. 2d 1101, 1106 (D. Ariz. 2005) (voicing concern that grievance systems might become "a series of stalling tactics, and dead-ends without resolution").

315. Timberlake v. Buss, No. 1:06-cv-1859-RLY-WTL, 2007 U.S. Dist. LEXIS 32306, at *8 (S.D. Ind. May 1, 2007) (*unpublished*) (declining to dismiss challenge to execution rules where they were not disclosed to plaintiff and he had no reason to have known about them), *vacated as moot*, No. 07-1086, No. 07-3228, 2007 U.S. App. LEXIS 28412 (7th Cir. 2007) (*unpublished*); Lampkins v. Roberts, No. 1:06-cv-639-DFH-TAB, 2007 U.S. Dist. LEXIS 22695, at *7 (S.D. Ind. Mar. 27, 2007) (*unpublished*) (declining to dismiss for missing a five-day deadline that was not made known to prisoners).

316. Woodford v. Ngo, 548 U.S. 81, 103–104, 126 S. Ct. 2378, 2393, 165 L. Ed. 2d 368, 386 (2006) (Breyer, J., concurring in judgment). Justice Breyer's assertions partially contradict the Court's earlier observation in *Booth v. Churner* that the PLRA rendered inapplicable "traditional doctrines of administrative exhaustion, under which a litigant need not apply to an agency that has 'no power to decree . . . relief,' or need not exhaust where doing so would otherwise be futile." Booth v. Churner, 532 U.S. 731, 741, 121 S. Ct. 1819, 1825, 149 L. Ed. 2d 958, 967 (2001). On the other hand, the *Woodford* majority's assertion that exhaustion means the same thing under the PLRA as it does in administrative law also appears inconsistent with the *Booth* observation.

317. Parker v. Robinson, No. 04-214-B-W, 2006 U.S. Dist. LEXIS 64107, at *33–34 (D. Me. Oct. 10, 2006) (*unpublished*) (refusing to dismiss where the prisoner sent his appeal to the Commissioner, not to the person who was supposed to forward it to the Commissioner under the rules); Collins v. Goord, 438 F. Supp. 2d 399, 411 n.13 (S.D.N.Y. 2006) (*unpublished*) (applying Breyer's *Woodford* concurrence to state that district courts should consider "'any challenges that [the prisoner may have concerning whether his case falls into a traditional exception that the [PLRA] implicitly incorporates'") (quoting Woodford v. Ngo, 548 U.S. 81, 104, 126 S. Ct. 2378, 2393, 165 L. Ed. 2d 368, 386 (2006) (Breyer, J., concurring in judgment).

Woodford, the court lays out principles that you could use to defend your claim even if you failed to exhaust it:

> First, the court must ask: whether administrative remedies were in fact "available" to the prisoner. [Second], [t]he court should also inquire . . . whether the defendants' own actions inhibiting the inmate's exhaustion of remedies may estop one or more of the defendants from raising the plaintiff's failure to exhaust as a defense. [Third], [i]f the court finds that administrative remedies were available to the plaintiff, and that the defendants are not estopped and have not forfeited their non-exhaustion defense, but that the plaintiff nevertheless did not exhaust available remedies, the court should consider whether special circumstances have been plausibly alleged that justify the prisoner's failure to comply with administrative procedural requirements. . . . What constitutes justification in the PLRA context "must be determined by looking at the circumstances which might understandably lead usually uncounselled prisoners to fail to grieve in the normally required way."[318]

Basically, the Second Circuit says that courts should first consider whether you actually knew of a grievance and had a chance to file it. Next, courts should consider whether the defendant took action to keep you from exhausting your prison grievance. If so, the defendant might not be able to argue that your lawsuit should be dismissed for non-exhaustion. Third, courts should decide whether you have made a believable argument explaining why you weren't able to follow the prison grievance system rules.[319]

The Second Circuit's decision likely remains good law, even after the Supreme Court's decision in *Woodford*. The first district court to address the point stated that *Woodford* left "open the question of whether exhaustion applies in situations such as those identified [by the Second Circuit]. . . ."[320] Other courts also have adopted the *Hemphill* framework for deciding when prison officials' threats or intimidation make remedies "unavailable" after the *Woodford* decision.[321]

A recent New York decision applying the Second Circuit's "special circumstances" rule also set apart the *Woodford* rule, because the prisoner had not "bypass[ed] prison grievance procedures" or "attempt[ed] to circumvent the exhaustion requirements."[322] Rather, the prisoner had tried hard to bring his complaint to the attention of responsible officials.[323]

The Second Circuit has yet to settle the issue completely.[324] It has decided that a prisoner cannot *only* informally complain to give prison officials enough notice to investigate a problem. The Second Circuit instead stated that the PLRA requires both formal *notice* to officials ("substantive exhaustion") and *obedience* to the

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318. Brownell v. Krom, 446 F.3d 305, 311 (2d Cir. 2006) (quoting Hemphill v. New York, 380 F.3d 680, 686 (2d Cir. 2004)).

319. Hemphill v. New York, 380 F.3d 680, 686 (2d Cir. 2004).

320. Collins v. Goord, 438 F. Supp. 2d 399, 411 (S.D.N.Y. 2006). *See also* Bester v. Dixion, No. 9:03-CV-1041, 2007 U.S. Dist. LEXIS 21714, at *10–11 (N.D.N.Y. Mar. 27, 2007) (*unpublished*) (considering if prisoner was relieved of exhaustion requirements under a *Hemphill* analysis).

321. *See, e.g.*, Turner v. Burnside, 541 F.3d 1077, 1084–85 (11th Cir. 2008) (holding that "it is possible for retaliation or the threat of retaliation to make administrative remedies unavailable to an inmate."); Kaba v. Stepp, 458 F.3d 678, 684–86 (7th Cir. 2006) (holding that a remedy becomes unavailable if prison employees do not respond to a properly filed grievance or use other misconduct to prevent a prisoner from exhausting).

322. Hairston v. LaMarche, No. 05 Civ. 6642 (KMW) (AJP), 2006 U.S. Dist. LEXIS 55436, at *30, 40 (S.D.N.Y. Aug. 10, 2006) (*unpublished*).

323. Hairston v. LaMarche, No. 05 Civ. 6642 (KMW) (AJP), 2006 U.S. Dist. LEXIS 55436, at *30, (S.D.N.Y. Aug. 10, 2006) (*unpublished*) (holding that "although each of his efforts, alone, may not have fully complied, together his efforts sufficiently informed prison officials of his grievance and led to a thorough investigation of the grievance as to satisfy the purpose of the PLRA or to constitute 'special circumstances' [to] justify any failure to fully comply with DOCS' exhaustion requirements.").

324. *See* Reynoso v. Swezey, 238 F. App'x 660, 662 (2d Cir. June 25, 2007) (*unpublished*), *cert. denied*, 128 S. Ct. 1278 (2008) (declining to consider effect of *Woodford* on circuit precedent where plaintiff could not prevail under that precedent anyway).

rules ("procedural exhaustion").[325] The Second Circuit did not address its prior decision that a prisoner's reasonable understanding of confusing grievance rules may excuse his failure to follow the procedural rules.[326]

How else might the *Woodford* decision have affected the law? Some possible questions include the following:

- What if procedural requirements are not clear? Before *Woodford*, courts (including the Second Circuit) found special circumstances forgiving failure to exhaust properly. For example, some courts decided that a prisoner who acted reasonably when rules were unclear was excused, even if he turned out to be wrong. Other courts agreed.[327] Therefore, courts have accepted that prisoners' cases can continue, even if a failure to exhaust occurred because rules were unclear.[328] Cases can also continue if officials' actions or instructions (often in violation of their own rules) caused confusion in a particular case,[329] or if both of these situations occurred.[330] However, some courts have decided against prisoners when they simply guessed wrong in a confusing situation.[331] There are times when you might not know enough about a situation to be able to follow grievance rules.[332] Yet in some cases, an unsettled legal situation concerning the exhaustion requirement itself was enough to show special circumstances justifying a failure to exhaust correctly.[333]
- What if you are misled or prison officials obstruct your exhaustion efforts? Numerous cases find that non-exhaustion caused by such actions does not stop you from going on with a later lawsuit. Because the *Woodford* decision did not address this question, there is no good reason to think that this body of law was changed by it.
- What if you are threatened or intimidated by prison staff into not following grievance procedures? The Second Circuit has said that threats or other intimidating conduct may make the usual grievance remedy unavailable to you, it may prevent you from asserting the exhaustion defense, or may

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325. Macias v. Zenk, 495 F.3d 37, 43–44 (2d Cir. 2007) (holding that "after *Woodford* notice alone is insufficient").

326. Macias v. Zenk, 495 F.3d 37, 43 (2d Cir. 2007) *(citing* Hemphill v. New York, 380 F.3d 680, 690 (2d Cir. 2004)).

327. Giano v. Goord, 380 F.3d 670, 679 (2d Cir. 2004) (stating that prison rules "do not differentiate clearly between grievable matters relating to disciplinary proceedings, and non-grievable issues concerning the 'decisions or dispositions' of such proceedings," and that a "learned" district judge had recently interpreted the prison administrative rules in the same way as the plaintiff). *See also* Dole v. Chandler, 438 F.3d 804, 811–12 (7th Cir. 2006) (holding a prisoner exhausted when he did everything necessary to exhaust but his grievance simply disappeared, and he received no instructions as to what to do about it).

328. Bellamy v. Mount Vernon Hosp., No. 07 Civ. 1801 (SAS), 2008 U.S. Dist. LEXIS 59098, at *19–20 (S.D.N.Y. Aug. 5, 2008) (*unpublished*) (finding that where allowance for late grievances was limited to 45 days after an "alleged occurrence," and the plaintiff thought the "occurrence" was his surgery and not his knowledge of its side-effects, he reasonably believed no remedy remained available to him).

329. Lawyer v. Gatto, No. 03 Civ. 7577 (RPP), 2007 U.S. Dist. LEXIS 15406, at *25 (S.D.N.Y. Feb. 21, 2007) (*unpublished*) (holding prisoner whose grievance was referred to the Inspector General's office was not obliged to wait until the IG's investigation was concluded, since the rules did not say otherwise; it was the prison system's responsibility to make such a requirement clear).

330. Turner v. Burnside, 541 F.3d 1077, 1083–84 (11th Cir. 2008) (holding a prisoner whose grievance was torn up by the warden was not required to file another one or grieve the warden's action; "[n]othing in [the rules] requires an inmate to grieve a breakdown in the grievance process"); Bure v. Miami-Dade Corr. Dep't, 507 Fed. Appx. 904, 905–06 (11th Cir. 2013) (noting that if plaintiff's version of events were accepted and that his grievance was simply returned back to him, without a detailed response, he would not be required to file another as the exhaustion requirement would have been met).

331. For example, a prisoner who alleged that he was retaliated against in classification and disciplinary matters did not file a grievance because such matters are excluded from the grievance system. The court held that he had failed to exhaust because retaliation claims might be grievable. Marshall v. Knight, No. 3:03-CV-460 RM, 2006 U.S. Dist. LEXIS 90478, at *1–3 (N.D. Ind. Dec. 14, 2006) (*unpublished*). The decision gave no thought to the reasonableness of Mr. Marshall's interpretation of the rules.

332. Thomas v. Hickman, No. CV F 06-0215 AWI SMS, 2006 U.S. Dist. LEXIS 72988, at *26 (E.D. Cal. Oct. 6, 2006) (*unpublished*) (declining to dismiss where the prisoner's grievance was untimely but the prisoner did not know about the violation until long after the deadline had passed).

333. In Rodriguez v. Westchester County Jail Corr. Dept., 372 F.3d 485, 487 (2d Cir. 2004), the court held that the plaintiff's belief that he did not have to exhaust an excessive force claim was reasonable, since the court had adopted the same view until it was reversed by the Supreme Court in *Porter v. Nussle*, 534 U.S. 516, 122 S. Ct. 983, 152 L. Ed. 2d 12 (2002).

constitute a good reason for not exhausting according to the grievance rules.[334] This body of law should also be viewed as unaffected by *Woodford*. Other courts have adopted the Second Circuit's approach to such circumstances after *Woodford*.[335]

- What, if any, limits are there to the rule that procedural rules must be properly exhausted? The Seventh Circuit stated[336] that sometimes uncritical procedural rules may be broken without threatening the system's operation.[337] This view matches the earlier Third Circuit finding that compliance with exhaustion rules must only be "substantial,"[338] which it said meant that "procedural requirements must . . . not be imposed in a way that offends the Federal Constitution or the federal policy embodied in Section 1997e(a)."[339] The Court in *Woodford* was worried that prison officials would reject prisoner grievances for very slight violations,[340] or would create rules designed to trip them up,[341] or which otherwise had that effect.[342] Another risk is that grievance rules could make it impossible for prisoners to make the claims they could also take to court.[343]

The most thoughtful discussion of this problem is in a recent district court decision. The Supreme Court's had recently stated that "the creation of an additional procedural technicality . . . [is] inappropriate in a statutory scheme in which laymen [or ordinary people], unassisted by trained lawyers, initiate the process."[344]

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334. Hemphill v. New York, 380 F.3d 680, 686–90 (2d Cir. 2004). 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.

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

336. Woodford v. Ngo, 548 U.S. 81, 90–91, 126 S. Ct. 2378, 2386 (2006).

337. The Court does not suggest what these might be or how a lower court is to determine what is "critical." So far there is little development of this issue in the lower courts. One district court has suggested that if the administrative body reaches the merits despite the violation of a procedural rule, it must not have been critical. Jones v. Stewart, 457 F. Supp. 2d 1131, 1136 (D. Nev. 2006).

338. Nyhuis v. Reno, 204 F.3d 65, 77–78 (3d Cir. 2000). However, the Tenth Circuit has found that substantial compliance is not enough, and a prisoner must comply with all grievance procedures in order to exhaust administrative remedies. *See e.g.*, Fields v. Okla. State Penitentiary, 511 F.3d 1109, 1112, (10th Cir. 2007); Jernigan v. Stuchell, 304 F.3d 1030, 1032 (10th Cir. 2002).

339. Spruill v. Gillis, 372 F.3d 218, 232 (3d Cir. 2004).

340. There is no lack of recent examples of prisoners tripped up by trivial rules violations. *See, e.g.*, Whitener v. Buss, 268 F. App'x 477, 478 (7th Cir. Mar. 13, 2008) (*unpublished*) (dismissing claim of prisoner who missed a 48-hour grievance deadline because he needed the relevant officers' names and it took a week to get them, and he didn't ask for waiver of the time limit); Whitney v. Simonson, No. CIV S-06-1488 FCD GGH P, 2007 U.S. Dist. LEXIS 81995, at *5 (E.D. Cal. Nov. 5, 2007) (*unpublished*) (dismissing because plaintiff filed a new grievance rather than seeking reinstatement of his existing grievance; court admitted defendants' approach is "hyper-technical" but held *Woodford* requires dismissal), *report and recommendation adopted*, No. CIV S-06-1488 FCD GGH P, 2007 U.S. Dist. LEXIS 94910 (E.D. Cal. Dec. 28, 2007) (*unpublished*); Cadogan v. Vittitow, No. 06-CV-15235, 2007 U.S. Dist. LEXIS 72999, at *5–9 (E.D. Mich. Sept. 30, 2007) (*unpublished*) (dismissing where grievance was rejected for "including extraneous information, going beyond the scope of the issue being grieved"—by attaching seven pages of information relating to requests for dental care, medical information, and dental care standards, apparently relevant to claim).

341. A recent example of a rule that seems like it is designed to trip prisoners up is Oklahoma's rule that prisoners on "grievance restriction" must list in any grievance all their other grievances within the preceding calendar year, by grievance number, date, description, and disposition at each level. A court rejected one prisoner's complaint that he did not have that information and officials refused to provide him a copy of the grievance log. Tigert v. Jones, No. CIV-07-791-M, 2008 U.S. Dist. LEXIS 55047, at *2 (W.D. Okla. July 21, 2008) (*unpublished*).

342. A recent decision upheld the application of the Bureau of Prisons' regulation defining a grievance appeal as filed when it is logged as received. The decision held that even if the plaintiff's assertion that he mailed his appeal and it never arrived was true, the "prison mailbox" rule does not apply and the prisoner failed to exhaust. Williams v. Burgos, No. CV206-104, 2007 U.S. Dist. LEXIS 58889, at *1–2 (S.D. Ga. Aug. 13, 2007) (*unpublished*).

343. In one case, the court held that the plaintiff had properly exhausted, even though his grievance was rejected for including "more than one issue," because his complaint was about "being punished in various ways for conduct he had never been informed of or charged with. Under these circumstances, requiring the prisoner to grieve each of the alleged components of his punishment separately would have prevented him from fairly presenting his claim in its entirety." The court upheld the dismissal of other claims where his grievance was dismissed for including more than one issue, even though the plaintiff claimed that both issues were examples of a pattern of inadequate medical care. Moore v. Bennette, 517 F.3d 717, 729 (4th Cir. 2008).

344. Lafountain v. Martin, No. 1:07-cv-076, 2008 WL 1923262, at *15 (W.D. Mich. Apr. 28, 2008) (*unpublished*), *quoting* Love v. Pullman Co., 404 U.S. 522, 526–27 (1972).

The court in this recent decision felt that its jurisdiction's very difficult grievance rules might be inappropriate in the way the Supreme Court had described. The court then went on to analyze the issue before it: the rejection of a person's grievances under a rule that disallowed raising "multiple issues" in one claim. The court considered another rule. This rule required any restrictions on prisoners' constitutional rights to be reasonably related to legitimate prison management or rehabilitation purposes.[345] The court ultimately upheld the grievance rule at issue,[346] finding that it was not inappropriate under the Supreme Court's language because it was reasonably related to legitimate rehabilitation purposes. The Sixth Circuit rejected the court's decision. The Sixth Circuit instead stated that "[a]n administrative remedy may not be considered "available" where very technical procedural requirements make compliance difficult for all but the most sophisticated inmate."[347] In other words, if a grievance procedure has very technical elements that are hard to understand, the court may rule for the prisoner, even though he could not follow the procedure correctly due to its difficulty.

Before *Woodford*, courts applied a standard rule when prison officials rejected a grievance claim for a reason other than a merits-based or a procedural failure. Courts did say that officials could not rely on procedural noncompliance to get a dismissal of future litigation.[348] Nothing in *Woodford* affects these rules, and they remain good law.[349] Courts however have disagreed over whether a grievance is exhausted if it is rejected *both* on the merits and for procedural reasons.[350]

- Can federal courts overrule a grievance system's procedural rejection of a grievance? Some courts have said that they don't have the power to look at prison officials' decisions rejecting grievances for procedural reasons. This approach has led to extreme results.[351] Other federal courts have thought that they do have the power to review the prison officials' decisions, both before and after *Woodford*.[352]

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345. *See* Turner v. Safley, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987). Lafountain v. Martin, No. 1:07-cv-076, 2008 WL 1923262, at *15 (W.D. Mich. Apr. 28, 2008) (*unpublished*) (citations omitted), said:

> Rubber-stamping unlimited administrative restrictions would permit state prisons to adopt grievance procedures solely for the purpose of requiring impossible compliance in order to terminate prisoners' access to the courts, in violation of the first prong of the Turner test (requiring the governmental objective to be both legitimate and neutral). Such uncritical acceptance of prison restrictions also would permit prisons to effectively eliminate all means for prisoners to exercise their rights to challenge prison conditions, in violation of the second prong of *Turner* (requiring that prison limitations on constitutional rights leave "alternative means of exercising the right [ ] open to prison inmates.

346. *See* Lafountain v. Martin, No. 1:07-cv-076, 2008 U.S. Dist. LEXIS 34456, at *16 (W.D. Mich. Apr. 28, 2008) (*unpublished*) (finding that a "no multiple issues" rule can be applied to make remedies unavailable).

347. Lafountain v. Martin, 334 Fed. Appx. 738, 741–42, No. 08-1796, 2009 U.S. App. LEXIS 12045, at *7–8 (6th Cir. Jun. 3, 2009) (Where grievance policy was unclear and the prisoner followed a grievance counselor's advice, prisoner's efforts are considered exhaustion even where he filed new grievances instead of re-filing the original grievance).

348. 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; also, the grievance was submitted by the prisoner's lawyer and not by the prisoner, which the rules require); Spruill v. Gillis, 372 F.3d 218, 234 (3d Cir. 2004) (noting that prisoner failed to follow the prison procedures for grievances when the prison policy had nothing about putting money damages in the grievance).

349. Subil v. U.S. Marshal, No. 2:04-CV-0257 PS, 2008 U.S. Dist. LEXIS 23813, at *14 (N.D. Ind. Mar. 24, 2008) (*unpublished*) (deciding not to dismiss for non-exhaustion where grievance was not filed in the normal places, but the final reviewing authority accepted and responded to it); Broder v. Corr. Med. Servs., Inc., No. 03-75106, 2008 U.S. Dist. LEXIS 19949, at *4–6 (E.D. Mich. Mar. 14, 2008) (*unpublished*) (finding that because the Michigan Department of Corrections decided the merits of the grievance, without rejecting them as untimely, the grievances cannot be considered unexhausted).

350. *Compare* Cobb v. Berghuis, No. 1:06-CV-773, 2007 U.S. Dist. LEXIS 93890, at *2–4 (W.D. Mich. Dec. 21, 2007) (*unpublished*) (holding that a grievance rejected for both reasons does not exhaust) *with* Harris v. West, No. 2:06-cv-268, 2008 U.S. Dist. LEXIS 22163, at *3 (W.D. Mich. Mar. 11, 2008) (finding exhaustion where prisoner's step II grievance was rejected as untimely but his final appeal was addressed on the merits).

351. For example, in one case, the plaintiff claimed that he had not gotten notice that a letter had been confiscated until almost a year afterward; when he tried to complain, his grievance was dismissed as time-barred, even though it was impossible for him to file in a timely manner because he did not get notice. The court said that it could not review the administrative determination, and found additional claims defaulted. *See* Lindell v. O'Donnell, No. 05-C-04-C, 2005 U.S. Dist. LEXIS 24767, at *50–51, *62–63, *73 (W.D. Wis. Oct. 21, 2005) (*unpublished*). The appeals court for that circuit stated later: "As long as the state's application of its own procedural rules is not arbitrary or capricious, we will not substitute our judgment for the state's." Hoeft v. Wisher, 181 F. App'x 549, 550 (7th Cir. May 8, 2006) (*unpublished*).

352. In *Moore v. Bennette*, 517 F.3d 717, 722, 729–730 (4th Cir. 2008), the court approved getting rid of some claims

One recent district court decision said "[the contours of the procedural default doctrine would require the Court to consider] whether the last administrative decision maker relied on an established procedural rule and whether a reasonable reviewer could have determined that the prisoner actually violated the established rule."[353] This suggests that the court should make an independent judgment and not rely on the prison system's decision. The court also stated that instructions by grievance officials that go against the relevant state regulations could mean that the prisoner's suit should not be rejected for non-exhaustion.[354] Several courts decided not to dismiss a suit for non-exhaustion where a prisoner's grievance was rejected because it copied an earlier grievance.[355]

- What if the prisoner did not follow directions from prison staff when filing a grievance? Numerous decisions state that a prisoner who does not follow instructions by grievance personnel fails to exhaust his administrative remedies.[356] However, some courts did not find exhaustion where the instructions or the grievance body's dismissal differed from the written grievance policy.[357] On the other hand, some courts did find exhaustion even when instructions or the grievance body's dismissal were unsupported by written policy.[358] Other courts insisted that the prisoner had to follow instructions, even if they were incorrect.[359]
- How does the proper exhaustion/procedural default rule work with the statutory requirement that remedies be "available"? Some courts' decisions create a procedural trap, beyond the procedural default requirement. If a prisoner cannot exhaust timely and properly for some legitimate reason (for example,

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for non-exhaustion because the prisoner violated a rule against complaining about more than one incident in a grievance, but reversed dismissal of another claim where it said that requiring him to file grievances for each incident out of multiple incidents separately "would have prevented him from fairly presenting his claim in its entirety."

For other decisions that do not follow procedural rejections of grievances, *see* Price v. Kozak, 569 F. Supp. 2d 398, 406–07 (D. Del. 2008) (holding plaintiff's grievances timely despite the defendant rejecting them as late); Moton v. Cowart, No. 8:06-CV-2163-T-30EAJ, 2008 U.S. Dist. LEXIS 40419, at *15–18 (M.D. Fla. May 19, 2008) (*unpublished*) (rejecting decision that plaintiff's complaint was not grievable and rejecting an appeal decision that it must be re-filed at the facility, as opposed to the prison system's own policy).

In *Vasquez v. Hilbert*, No. 07-cv-00723-bbc, 2008 U.S. Dist. LEXIS 42011, at *6–8 (W.D. Wis. May 27, 2008) (*unpublished*), the defendants agreed that grievance officials had not understood their own rules correctly, but argued that the plaintiff failed to exhaust grievance procedures because he should have done a better job of showing the officials that they were wrong. The court did not agree, holding that the argument was "unreasonable, unfair and inconsistent with circuit precedent."

353. Lafountain v. Martin, No. 1:07-cv-076, 2008 U.S. Dist. LEXIS 34456, at *7 (W.D. Mich. Apr. 28, 2008).

354. Lafountain v. Martin, No. 1:07-cv-076, 2008 U.S. Dist. LEXIS 34456, at *7 (W.D. Mich. Apr. 28, 2008).

355. Some decisions have held that dismissal of a grievance as duplicative (meaning it copies another grievance) did not mean that the plaintiff had exhausted, but meant that he exhausted in an earlier grievance. Broyles v. Corr. Med. Servs., Inc., No. 1:07-CV-690, 2008 U.S. Dist. LEXIS 30214, at *7 (W.D. Mich. Apr. 14, 2008) (*unpublished*), *rev'd on other grounds*, No. 08-1638, 2009 U.S. App. LEXIS 5494 (6th Cir. Jan. 23, 2009) (*unpublished*); Doyle v. Jones, No. 1:06-cv-628, 2007 U.S. Dist. LEXIS 84570, at *8 (W.D. Mich. Nov. 15, 2007) (*unpublished*). In *Gabby v. Luy*, No. 05-C-0188, 2006 U.S. Dist. LEXIS 4167, at *11 (E.D. Wis. Jan. 23, 2006) (*unpublished*), the prisoner had filed one grievance and did not appeal, then filed a second grievance which was rejected on the ground that the same issue had been raised in the first grievance. The defendant argued that if a prisoner tries to exhaust an issue and makes a procedural mistake, he is barred from trying again and doing it right even if the later grievance is otherwise proper. But the court ruled against the defendant and found exhaustion.

356. *See* Cannon v. Washington, 418 F.3d 714, 718 (7th Cir. 2005); Jernigan v. Stuchell, 304 F.3d 1030, 1032–33 (10th Cir. 2002) (holding that a prisoner had failed to exhaust when he got no response to a grievance and refused directions from the appeals body to try to get one).

357. *See* Young v. Hightower, 395 F. Supp. 2d 583, 586–87 (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).

358. *See* Young v. Hightower, 395 F. Supp. 2d 583, 588 (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); Vega v. Alameida, No. S021977MCEKJMPC, 2005 WL 1501531 (E.D. Cal. June 20, 2005) (*unpublished*) (declining to dismiss where a prisoner's grievance and appeal were "cancelled" because he was uncooperative, citing defendants' failure to provide facts supporting the cancellation of the grievance).

359. Starks v. Lewis, No. CIV-06-512-M, 2008 WL 2570960, at *5 (W.D. Okla. June 24, 2008) ("Even when prison authorities are incorrect about the existence of the perceived deficiency, the inmate must follow the prescribed steps to cure it. . . . An inmate's disagreement with prison officials as to the appropriateness of a particular procedure under the circumstances, or his belief that he should not have to correct a procedural deficiency does not excuse his obligation to comply with the available pocess . . . .").

missing a deadline because of absence from the prison and no access to the grievance process), it might seem like the prisoner loses the remedy. But a number of courts have held that prisoners who are prevented from exhausting properly must try to exhaust improperly. This is regardless of the *Woodford* "proper exhaustion" requirement. Therefore, if you cannot file a timely grievance, you should file a late grievance when you can, or the court might not even consider your arguments explaining why you couldn't file in a timely manner.[360]

6. What If You Miss a Time Limit?

The Supreme Court's ruling requiring "proper exhaustion" means that you must follow time limits in the grievance system.[361] It is unclear how strict the *Woodford* rule is for time limits.[362] It is also unclear if federal courts can re-examine whether a grievance was filed on time if the prison administration already decided that the grievance was not filed on time.[363]

In any case, you should learn the rules and meet the deadlines. But if you miss a grievance deadline, do not give up. Proceed with your grievance as quickly as possible. Name any provision in the grievance system for late grievances. Explain why you are filing your grievance late. Take all available appeals if the grievance officials reject your grievance for lateness. If they deal with the merits of your grievance, then its lateness will not matter. If they do not, you can still argue in court that you were justified in failing to file a grievance on time. Or you can argue that circumstances prevented you from filing on time and the remedy was therefore unavailable. You can also argue that your lateness does not matter because prison officials still had the opportunity to look at the merits of your grievance. You should *not* assume that if prison officials' actions or other circumstances beyond your control keep you from bringing your grievance in a timely manner, you can just argue that the remedy was not "available" and you will be excused from exhausting. A number of courts have said that if you are prevented from filing your grievance on time, you must file a grievance as soon as you can,[364] though some courts have disagreed.[365]

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360. *See* Handberry v. Thompson, 446 F.3d 335, 343 (2d Cir. 2006) (noting that plaintiffs could have timely exhausted all administrative proceedings and returned to court had they been mentioned by the defense in a timely manner); Hightower v. Nassau County Sheriff's Dep't, 325 F. Supp. 2d 199, 205 (E.D.N.Y. 2004) (holding defense waived an affirmative defense that came into law after filing their answer by failing to do so with 23 months' delay and resulting in 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). Some circuits have required a showing of prejudice for waiver. *See* Curtis v. Timberlake, 436 F.3d 709, 711 (7th Cir. 2005)(explaining that a delay to assert an affirmative defense waives the defense only if the plaintiff was harmed as result); Panaro v. City of North Las Vegas, 432 F.3d 949, 952 (9th Cir. 2005) (stating that a defendant may raise an affirmative defense at the summary judgment stage as long as the plaintiff does not suffer prejudice).

361. Woodford v. Ngo, 548 U.S. 81, 90–91, 126 S. Ct. 2378, 2389, 165 L. Ed. 2d 368, 381–82 (2006).

362. For discussion of possible exceptions and limits to the "proper exhaustion" rule, see the preceding Section of this Chapter.

363. For an example of a decision where a court refused to re-examine questionable prison timeliness decisions, *see* Wall v. Holt, No. 1:CV-06-0194, 2006 U.S. Dist. LEXIS 94573, at *9–10 (M.D. Pa. Jan. 9, 2007) (*unpublished)* (holding timeliness is measured by when a grievance appeal arrives under Bureau of Prisons' regulation, notwithstanding the "prison mailbox" rule and plaintiff's claim that the appeal was mailed on time). For a decision where a court used its own judgment about timeliness, *see* Price v. Kozak, 569 F. Supp. 2d 398, 407 (D. Del. July 28, 2008) (holding plaintiff's grievances timely despite officials incorrectly rejecting the grievances as late). You should do your best to follow what the grievance policy says, even if the prison only recommends when you should file your grievance and does not provide a strict deadline.

364. Bryant v. Rich, 530 F.3d 1368, 1373 (11th Cir. June 20, 2007) (holding a prisoner who said he could not submit a grievance for fear of assault at his place of detention should have exhausted that ability after transfer to another facility); Green v. McBride, No. 5:04-cv-01181, 2007 U.S. Dist. LEXIS 71189, at *8–9 (S.D. W.Va. Sept. 25, 2007) (*unpublished)* (holding a prisoner who was kept on suicide watch without necessary materials until past the grievance deadline should have grieved as soon as he was released from suicide watch and his failure to do so without justification means he failed to properly exhaust his administrative remedies).

365. *See* Cotton-Schrichte v. Peate, No. 07-4052-CV-C-NKL, 2008 WL 3200775, at *4 (W.D. Mo. Aug. 5, 2008) (holding that a prisoner who was raped by a staff member exercising a position of authority over the prisoner and who had been threatened into silence was not required to file a grievance after the threats were removed becasue she did not have administrative procedures available to her at the appropriate time.); Bellamy v. Mount Vernon Hosp., No. 07 Civ. 1801 (SAS), 2008 U.S. Dist. LEXIS 59098, at *19–20 (S.D.N.Y. Aug. 5, 2008) (*unpublished*) (declining to dismiss where prisoner believed that the "alleged occurrence" was his surgery and not his knowledge of the side-effects, and accordingly, he reasonably, but mistakenly believed that he was time barred because he was not aware of his need to file a grievance).

The Second Circuit has said that a prisoner's failure to follow grievance system time limits can sometimes be justified if he shows "circumstances which might understandably lead usually uncounselled prisoners to fail to grieve in the normally required way."[366] This includes prisoners' misunderstanding of the exhaustion requirement[367] or of the relevant prison regulations,[368] though courts have noted that those were not necessarily the only circumstances that can excuse the failure to exhaust.[369] As noted in Section 5 above, this approach still seems valid after the Supreme Court's *Woodford* decision, since the kinds of fact patterns addressed by Second Circuit law differed from those in the *Woodford* case.[370] In addition, circumstances that prevent a prisoner from filing a grievance in a timely manner could also mean that the grievance system was not an "available" remedy for the prisoner.[371] However, *Woodford* did not address the meaning of the term "available," nor did it change the decisions of lower courts, including the Second Circuit, that under some circumstances prison officials may not be able to claim that a prisoner did not exhaust prison grievance remedies as a defense to that prisoner's lawsuit.[372]

Some grievance systems have a built-in ability to waive time limits. For example, the New York State grievance system allows late grievances if there are "mitigating circumstances,"[373] which include "attempts to resolve informally by the inmate."[374] In order to take advantage of such a provision, a prisoner has to ask for it when he files a grievance—he cannot argue later in court that the grievance was not untimely because the prison system *could* have granted an extension.[375] The next question is whether the court is bound by a prison

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366. Williams v. Comstock, 425 F.3d 175, 176–77 (2d Cir. 2005) (*per curiam*) (holding that while plaintiff's stroke left him physically and mentally unable to file his petition within the deadline, his failure to explain a nearly two year delay in doing so amounts to a "failure to timely file the grievance in accordance with IGP rules amounted to a failure to exhaust administrative remedies in this case").

367. Williams v. Comstock, 425 F.3d 175, 176 (2d Cir. 2005) (*per curiam*) (*citing* Rodriguez v. Westchester County Jail Corr. Dep't, 372 F.3d 485 (2d Cir. 2004)) (explaining that the plaintiff's understanding that exhaustion was not required was a valid justification for not exhausting remedies).

368. Williams v. Comstock, 425 F.3d 175, 176 (2d Cir. 2005) (*per curiam*) (*citing* Giano v Goord, 380 F.3d 670, 677 (2d Cir. 2004)) (explaining that a reasonable interpretation of regulations, even if incorrect, is a valid justification for failing to exhaust administrative remedies); Bellamy v. Mount Vernon Hosp., No. 07 Civ. 1801 (SAS), 2008 U.S. Dist. LEXIS 59098, at *12–14 (S.D.N.Y. Aug. 5, 2008) (*unpublished*) (citing Ruggiero v. Cnty. of Orange, 467 F.3d 170 (2d Cir. 2006)) (explaining that reasonable misunderstanding of grievance procedure justifies failure to comply with the exhaustion requirement). A reasonable if mistaken appreciation of the facts may also justify lack of timely exhaustion or result in a holding that the remedy was unavailable. In Borges v. Piatkowski, 337 F. Supp. 2d 424, 427 (W.D.N.Y. 2004), the prisoner missed the 14-day grievance deadline because he had no reason to know he had a medical problem until after it had expired and he had been transferred to another prison. The court did not dismiss his suit for lack of timely exhaustion; it held that as he had no way to know of the existing condition he could not be said to have had an available remedy, and therefore was justified by special circumstances in not exhausting.

369. Hemphill v. New York, 380 F.3d 680, 690–91 (2d Cir. 2004) (overruled on other grounds) (holding that a prisoner who was deterred from timely exhaustion 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).

370. The court has questioned whether this approach is consistent with *Woodford*, but it has not yet decided on the issue. Amador v. Andrews, 655 F.3d 89, 102 (2d Cir. 2011).

371. Days v. Johnson, 322 F.3d 863, 867–68 (5th Cir. 2003) (narrowly holding that administrative remedies are deemed unavailable when (1) an inmates untimely filing of a grievance is because of a physical injury and (2) the grievance system rejects the inmates subsequent attempt to exhaust his remedies based on the untimely application of his grievance); Thorns v. Ryan, No. 07-CV-0218 H (AJB), 2008 U.S. Dist. LEXIS 14215, at *11–12 (S.D. Cal. Feb. 26, 2008) (*unpublished*) (refusing to dismiss where a grievance appeal was untimely because of delay in receiving the decision; appeal was timely measured from when plaintiff received it). Some courts have held that this rule does not excuse you from having to exhaust when you are prevented from complying with a grievance deadline. However, it means that when you exhaust late, the lateness may be excused if it was for reasons beyond your control. *See* Part D, Section 6, below.

372. *See* above Part D, note 301.

373. Graham v. Perez, 121 F. Supp. 2d 317, 322 (S.D.N.Y. 2000) (quoting N.Y. Comp. Codes R. & Regs. tit. 7, § 701.7(a)(1) (2001)).

374. N.Y. Comp. Codes R. & Regs. tit. 7, § 701.6(g)(1)(i)(a); State of New York, Department of Correctional Services, Directive No. 4040 § 701.6(g)(1)(i)(a), Inmate Grievance Program (2016). It provides: "An exception to the time limit may not be granted if the request was made more than 45 days after an alleged occurrence."

375. Patel v. Fleming, 415 F.3d 1105, 1110–11 (10th Cir. 2005) (holding that the existence of provisions for time extensions did not save the untimely grievance of a prisoner who never officially sought an extension); Harper v. Jenkin, 179 F.3d 1311, 1312 (11th Cir. 1999) (holding that a prisoner whose grievance was dismissed as untimely had to appeal that decision before turning to a court, whether or not the prisoner believed his appeal would be heard, since the system

system's decision on whether to grant such a request. As we have noted earlier, courts are divided on the question of whether they can overrule grievance officials' decisions about whether prisoners have complied with the grievance rules. One New York district court has held that it can decide whether a late grievance is excused by mitigating circumstances such as the prisoner's transfer to another facility or the unavailability of grievance representatives to prisoners in a segregated unit.[376] When a claim is dismissed for non-exhaustion—whether for simple failure to exhaust at all, an error in using the grievance procedures, or reliance on law that has subsequently changed—the deadline for grievance proceedings will almost always have passed. The Second Circuit has held that where a failure to exhaust or to exhaust correctly was justified by special circumstances, the prisoner's claim should be dismissed without prejudice if remedies are still available through the grievance system; but if not, the lawsuit should be allowed to go forward (or if the case is dismissed and later grievance remedies prove unavailable, the lawsuit should be reinstated).[377] In other words, if the prison system will not hear the prisoner's late grievance, then the prisoner does not need to exhaust his remedies. It is unclear whether this rule was overturned by *Woodford*. It is also unclear how often prison systems will accept late grievances under discretionary provisions for late filings, after a prisoner's lawsuit has been dismissed. Some court decisions, however, have said that grievance officials should consider grievances on their merits after a prisoner's lawsuit was dismissed for non-exhaustion.[378]

The legal rule called "equitable tolling,"[379] which is usually applied to statutes of limitations issues,[380] may excuse late grievance filings under some circumstances. In one case, a prisoner had filed a claim after he had been told by prison officials that his grievance had been referred to "the appropriate investigative authority," at a time when his claim was not required to be grieved under that Circuit's law. After the law changed in response to the Supreme Court decision in *Booth v. Churner*, his case was dismissed for non-exhaustion.[381] The prisoner promptly filed a new grievance, which was dismissed as untimely. The court held that the plaintiff was victimized by extraordinary circumstances, and should have the benefit of equitable tolling. The deadline for filing a grievance was thus extended to twenty days (the grievance time limit) after he received the court's decision dismissing his case.[382]

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allowed 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 tried to file a late grievance).

376. Graham v. Perez, 121 F. Supp. 2d 317, 322 (S.D.N.Y. 2000). *See also* O'Connor v. Featherston, No. 01 Civ. 3251 (HB), 2002 U.S. Dist. LEXIS 7570, at *5–8 (S.D.N.Y. Apr. 29, 2002) (*unpublished*) (refusing to be bound by rejection of a 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, 132 (D. Mass. 2001) (holding that the grievance appeal deadline should be extended because the prisoner may have missed it out of "excusable confusion").

377. *See* Brownell v. Krom, 446 F.3d 305, 313 (2d Cir. 2006). The Seventh Circuit has held similarly. Pavey v. Conley, 544 F.3d 739, 742 (7th Cir. 2008) (holding that if failure to exhaust was "innocent," the prisoner "must be given another chance to exhaust (provided that there exist remedies that he will be permitted by the prison authorities to exhaust, so that he's not just being given a runaround)").

378. *See* George v. Morrison-Warden, No. 06 Civ. 3188 (SAS), 2007 U.S. Dist. LEXIS 42640, at *19 (S.D.N.Y. June 4, 2007) (*unpublished*) (dismissing the plaintiff's case for failure to appeal but holding plaintiff's efforts had "earned him a response," thus directing officials to treat a renewed appeal as timely and respond to it); Hill v. Chalanor, 419 F. Supp. 2d 255, 259 (N.D.N.Y. 2006) (finding appeal was "technically available" and failure to appeal resulted from "confusion or miscommunication" and not official misconduct, and therefore directing that plaintiff's renewed grievance appeal "shall be deemed timely" and that prison officials must make sure it reached its destination).

379. Generally, the doctrine of equitable tolling holds that a plaintiff's claim should not be dismissed for being filed late when the plaintiff, despite acting with good faith, could not or did not uncover the facts needed to bring the complaint until after the time period had ended because of some "extraordinary circumstance" that stood in the way. *See* Pace v. DiGuglielmo, 544 U.S. 408, 125 S. Ct. 1807, 161 L. Ed. 2d 669 (2005).

380. *See, e.g.*, Wisenbaker v. Farwell, 341 F.Supp.2d 1160, 1165 (D. Nev. 2004) (holding the limitations period for § 1983 action was equitably tolled while prisoner filed administive grievance against officials).

381. Booth v. Churner, 532 U.S. 731, 121 S. Ct. 1819, 149 L .Ed. 2d 958 (2001).

382. *See* Gambina v. Dever, No. 03-cv-00118-REB-BNB, 2006 U.S. Dist. LEXIS 19371, at *9–10 (D. Colo. Mar. 31, 2006) (*unpublished*); Anthony v. Gilman, No. 1:05-cv-426, 2008 U.S. Dist. LEXIS 2011, at *4–7 (W.D. Mich. Jan. 10, 2008) (*unpublished*) (applying equitable tolling to grievance deadline, but ruling against prisoner on the merits because he was found to have had adequate time to file); Rivera v. Pataki, No. 04 Civ. 1286 (MBM), 2005 U.S. Dist. LEXIS 2747, at *41–42 (S.D.N.Y. Feb. 7, 2005) (*unpublished*) (noting that "Rivera did the best he could to follow DOCS regulations while responding to an evolving legal framework").

Late filings can also be waived by prison officials in the administrative process; if they decide a late grievance on the merits anyway, it satisfies the exhaustion requirement.[383] Time limits that are not made known to the prisoners cannot be enforced to bar their suits either.[384]

If a grievance system has no time limit, delay in filing cannot bar a prisoner's claim for non-exhaustion.[385] In that scenario, an unexhausted claim should be dismissed without prejudice, and the prisoner will then have the opportunity to seek exhaustion.[386]

7. Dealing with Exhaustion in Your Lawsuit

Exhaustion is an "affirmative defense," so you do not have to put it in a complaint—the defendants must raise it.[387] However, if a grievance is properly exhausted, it may be beneficial to put that information in the complaint anyway. Then, if the defendants make a motion to dismiss, you can simply refer to the relevant paragraph of the complaint in response, since the court must assume that the facts alleged in a complaint are true for purposes of a motion to dismiss.[388] If you did *not* properly exhaust but you have a good argument that administrative remedies were not available, or that there are special circumstances that justify the failure to exhaust, you should *not* put that in the complaint.[389] In that case, you should leave exhaustion out of the complaint and let the defendants raise it. If the defendants do raise the defense, you will then have the opportunity to provide a fuller explanation than you would in a complaint. Here is the rule of thumb: If you can truthfully write in your complaint, "Plaintiff has exhausted all available administrative remedies for his claims," you should do it; if it is more complicated than that, you should leave it out.

Since exhaustion is not a pleading requirement, it cannot be addressed at initial screening or by motion under Federal Rules of Civil Procedure Rule 12(b)(6) to dismiss for failure to state a claim, except in cases where non-exhaustion is clear. Motions under Federal Rules of Civil Procedure Rule 12(b)(1) to dismiss for lack of subject matter jurisdiction are equally inappropriate, since failure to exhaust is not jurisdictional.[390]

In most courts, defendants who claim a prisoner did not exhaust will generally have to raise that claim in a motion for summary judgment, which requires the defendant to submit admissible factual evidence showing that a prisoner did not exhaust.[391] Sometimes defendants say they are moving to dismiss the complaint under Rule 12(b)(6), but then also include factual materials like documents or affidavits. These should not be

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383. *See* Harris v. Aidala, No. 03CV467, 2006 U.S. Dist. LEXIS 63443, at *6 (W.D.N.Y. Sept. 6, 2006) (*unpublished*) (finding that "[e]ven though the grievance was filed outside the stated time parameters for the filing of grievances, it appears that the grievance was processed and denied based upon the merits," and therefore, the plaintiff exhausted his administrative remedies); Barnes v. Briley, 420 F.3d 673, 679 (7th Cir. 2005) (holding the claim was not procedurally defaulted where an initial grievance was rejected as untimely, but the plaintiff later "restarted" the grievance process and received a decision on the merits).

384. *See* Sims v. Rewerts, No. 07-12646, 2008 WL 2224132, at *5 (E.D. Mich. Sept. 24, 2009) (*unpublished*) (not dismissing where the plaintiff failed to comply with time limit that had been changed without notice).

385. Schonarth v. Robinson, No. 06-CV-151-JM, 2008 U.S. Dist. LEXIS 13596, at *10–12 (D.N.H., Feb. 22, 2008) (*unpublished*) (finding that a grievance that was filed two years after the jail was demolished, but otherwise in compliance with grievance rules, was exhausted).

386. Alexander v. Dickerson, No. 6:07-CV-423, 2008 U.S. Dist. LEXIS 32866, at *17 (E.D. Tex. Apr. 22, 2008) (*unpublished*) (indicating that when no deadline for filing grievances exists in the jail's policy, the lawsuit does not have to be dismissed with prejudice and the plaintiff can re-file the suit once he exhausts his administrative remedies).

387. Jones v. Bock, 549 U.S. 199, 211–17, 127 S. Ct. 910, 919–22, 166 L. Ed. 2d 798, 811–13 (2007). This could change. The Court suggested there might be reasons to amend the Federal Rules of Civil Procedure to make exhaustion a pleading requirement, so be sure to check the current rules (the pleading rule is Rule 8 of Federal Rules of Civil Procedure).

388. *See* Wright v. Dee, 54 F. Supp. 2d 199, 206 (S.D.N.Y. 1999) (holding claim of exhaustion made in response to the defendants' motion to dismiss was sufficient to survive the motion).

389. *See* Jones v. Bock, 549 U.S. 199, 213–15, 127 S. Ct. 910, 920–21, 166 L. Ed. 2d 798, 812–13 (2007) ("Unlike in the typical civil case, defendants do not have to respond to a complaint covered by the PLRA until required to do so by the court, and waiving the right to reply does not constitute an admission of the allegations in the complaint.").

390. *See* Woodford v. Ngo, 548 U.S. 81, 101, 126 S. Ct. 2378, 2392 (2006) ("[T]he PLRA exhaustion requirement is not jurisdictional.").

391. *See* Rule 56, Federal Rules of Civil Procedure. Most federal courts routinely address exhaustion disputes under the summary judgment rule. *See, e.g.*, Brownell v. Krom, 446 F.3d 305, 310 (2d Cir. 2006); Brown v. Croak, 312 F.3d 109, 111–12 (3d Cir. 2002); Fields v. Oklahoma State Penitentiary, 511 F.3d 1109, 1111–12 (10th Cir. 2007) (upholding the decision to grant summary judgment for the defendant and dismiss the case because Mr. Fields failed to exhaust his remedies, as required under the PLRA before bringing suit).

considered on such a motion to dismiss. The court may then convert the Rule 12(b)(6) motion to a summary judgment motion.[392] Either way, if you are faced with a summary judgment motion, you will have to respond to the defendant's facts with your own admissible evidence. This evidence can include your declaration or sworn affidavit[393] (not just a statement in a brief or a letter) establishing that you exhausted or were unable to exhaust for some legitimate reason, and/or documentary evidence, such as a final grievance decision showing exhaustion. You should also look closely at the defendant's evidence and, if it does not really show that you failed to exhaust, explain why to the court.[394] If the defendant cannot show that it is *undisputed* (accepted) that you have failed to exhaust, and you do not have an adequate excuse or explanation, summary judgment will be denied. That usually means that the issue of exhaustion will be determined at trial.[395]

Courts take different approaches to determining whether a prisoner has exhausted. Some have held evidentiary hearings to determine factual disputes about exhaustion, without much discussion of why it is appropriate to do so.[396] The Ninth Circuit has held that failure to exhaust is something that can be attacked by the defendant in a Rule 12(b) motion, rather than a motion for summary judgment.[397] This means that courts (not juries) can decide disputed issues of fact. Courts may use documents to do this. And, courts can decide without holding a hearing.[398] Recently, the Fifth and Eleventh Circuits began using this approach too.[399] If you see a Rule 12(b) motion in a district court in the Ninth or Eleventh Circuit, you should respond with declarations or sworn affidavits that have the relevant facts. This is the same way you would respond to a summary judgment motion. You can also respond with documents showing relevant facts, such as the prison grievance policy, grievances you filed, and decisions or other documents you received in response.

The Seventh Circuit treats this matter differently. The Seventh Circuit has rejected the "matter in abatement" approach and has held that whenever exhaustion "is contested," the district court should have a hearing on exhaustion, and allow discovery on just the exhaustion question. If the court finds that the plaintiff has exhausted, the case can go on to discovery on the merits.[400] If the plaintiff has not exhausted, the case stops there. The court's reason for doing this was to avoid giving the exhaustion question to the jury because they are not allowed to decide if they should hear a case.[401]

The Seventh Circuit approach may go against the Supreme Court's decision in *Jones v. Bock*, which held that the PLRA exhaustion requirement does not change the usual practices. Usual court practices are found

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392. *See* McCoy v. Goord, 255 F. Supp. 2d 233, 251 (S.D.N.Y. 2003) (discussing why such a conversion may not fit the goals of exhaustion). Courts are not required to convert such motions to summary judgment motions. Perez v. Westchester County Dep't of Corr., No. 05 Civ. 8120(RMB), 2007 U.S. Dist. LEXIS 32638, at *10 n.6 (S.D.N.Y. Apr. 30, 2007) (citing Friedl v. City of New York, 210 F. 3d 79, 83 (2d Cir. 2000), where in a question of exhaustion, the court decided the 12(b)(6) motion on the complaint alone).

393. *See* Chapter 6, "An Introduction to Legal Documents," for more information on affidavits.

396. *See* Terrell v. Benfer, 2010 WL 6762274 (M.D. Pa. Jun. 30, 2010), aff'd, 429 F. App'x 74 (3d Cir. 2011) (finding that the prisoner's receipt of two letters in response to his filing two informal grievances did not exhaust, where letters indicated his grievances were still pending, and even if the letters indicated a denial, prisoner was required to pursue the formal grievance process).

395. Kendall v. Kittles, No. 03 Civ. 628 (GEL), 2004 U.S. Dist. LEXIS 15145, at *14 (S.D.N.Y. Jul. 30, 2004) (*unpublished*) (holding credibility issues about access to grievance forms and whether the plaintiff was told his claim was non-grievable "are properly for a jury."); Maraglia v. Maloney, 499 F. Supp. 2d 93, 97–98, (D. Mass. 2007) (finding that the issue of fact as to whether prisoner exhausted remedies presented a question for the jury, not court, to resolve). *But see* Donahue v. Bennett, No. 02-CV-6430 CJS, 2004 U.S. Dist. LEXIS 17189, at *1, 2004 WL 1875019, at *6 (W.D.N.Y. Aug. 17, 2004) (granting defendants summary judgment in part, finding that the plaintiff failed to exhaust because he did not provide proof that he filed grievances).

396. *See* Peterson v. Roe, No. 05-CV-055-PB, 2007 U.S. Dist. LEXIS 7847, at *4, No. 06-17280, 2007 WL 432962, at *1 (D.N.H. Feb. 2, 2007) (*unpublished*) (finding officials credible as to failing to receive appeal, plaintiff credible as to mailing it and as to the unreliability of the internal mail); 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).

397. Wyatt v. Terhune, 315 F.3d 1108, 1119 (9th Cir. 2003).

398. Ritza v. Int'l Longshoremen's & 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).

399. Bryant v. Rich, 530 F.3d 1368, 1376–77 (11th Cir. 2008); Dillon v. Rogers, 596 F.3d 260, 273 (5th Cir. 2010) ("[T]he judge may resolve disputed facts concerning exhaustion, holding an evidentiary hearing if necessary")..

400. Pavey v. Conley, 544 F.3d 739, 742 (7th Cir. 2008).

401. Pavey v. Conley, 544 F.3d 739, 741 (7th Cir. 2008).

in the Federal Rules of Civil Procedure or come from general practice.[402] A rule that permits only exhaustion-related discovery until the exhaustion question is decided is different from usual practices found in the Federal Rules.[403] Also, the Seventh Circuit court seemingly created a new way of dealing with facts that relate to the exhaustion decision as well as the plaintiff's main claim. The court says that the jury will hear the facts "without being bound by (or even informed of)" the district court's determinations.[404] This idea of having a court make factual findings, and then ignoring them for the rest of the case, does not seem like usual court practice. But, if you are in court in the Seventh Circuit, you will be bound by these rules. In other courts, these arguments may help persuade a court not to adopt the Seventh Circuit approach.

Exhaustion is an affirmative defense. This means that the defendant will have to prove that the plaintiff did not exhaust his prison remedies.[405] That means the defendant will have to show three things:

1) That there actually was an available administrative solution for your problem.[406] The Second Circuit has held that prisoner complaints should not be dismissed for non-exhaustion without the court having "establish[ed] the availability of an administrative remedy from a legally sufficient source."[407] To establish this, the court must decide whether the remedy will help with the kind of claim the prisoner raises. And, the court must look at exceptions to the remedy to be sure the claim does not fall into one of the exceptions.[408] Defendants must also show the court exactly what prisoners were required to do to exhaust.[409]
2) That you were a prisoner, so you were required to exhaust when you filed your complaint. [410]
3) That you did not exhaust. Several courts have found that the documents given by prison officials' saying that a prisoner didn't exhaust were not good enough. Some of the reasons why the documents were not good enough were because they did not prove anything,[411] they did not say

402. Jones v. Bock, 549 U.S. 199, 213, 127 S. Ct. 910, 919–20, 166 L. Ed. 2d 798, 811 (2007).

403. The court qualified this holding by saying "in the ordinary case" discovery on the merits should be put off until exhaustion is resolved, but "there may be exceptional cases in which expeditious resolution of the litigation" calls for some merits-related discovery before exhaustion is decided. Pavey v. Conley, 544 F.3d 739, 742 (7th Cir. 2008).

404. Pavey v. Conley, 544 F.3d 739, 742 (7th Cir. 2008).

405. Roberts v. Barreras, 484 F.3d 1236, 1240–41 (10th Cir. 2007) (citing established rules that the burden of proving affirmative defenses is on the defendant and that burden of proof follows burden of pleading).

406. *See* Brown v. Valoff, 422 F.3d 926, 940 (9th Cir. 2005) ("Establishing, as an affirmative defense, the existence of further 'available' administrative remedies requires evidence, not imagination."); Fernandez v. Morris, No. 08-CV-0601 H (PCL), 2008 U.S. Dist. LEXIS 54298, at *9, 2008 WL 2775638, at *4 (S.D. Cal. Jul. 16, 2008) (*unpublished*) (defendants who failed to show availability of remedies in segregation were not entitled to dismissal for non-exhaustion); Ayala v. C.M.S., No. 05-5184 (RMB), 2008 U.S. Dist. LEXIS 50692, at *7, 2008 WL 2676602, at *3 (D.N.J. Jul. 2, 2008) (*unpublished*) (defendants who failed to specify what the administrative grievance procedure required were not entitled to dismissal for non-exhaustion).

407. Mojias v. Johnson, 351 F.3d 606, 609 (2d Cir. 2003) (quoting Snider v. Melindez, 199 F.3d 108, 114 (2d Cir. 1999) (noting that a party's admission is not a "legally sufficient source")).

408. Mojias v. Johnson, 351 F.3d 606, 610 (2d Cir. 2003); *accord* Anderson v. XYZ Correctional Health Services, 407 F.3d 674, 683 n.5 (4th Cir. 2005). In *Mojias*, the court criticized the lower court for relying on check marks and questionnaire answers on a form complaint to determine exhaustion. Mojias v. Johnson, 351 F.3d 606, 609–10 (2d Cir. 2003). That harmful practice is still alive in some jurisdictions. *See* Winfield v. Soloman, No. CIV S-08-0875 WBS DAD P, 2008 U.S. Dist. LEXIS 46880, at *3, 2008 WL 2169521, at *2 (E.D. Cal. May 23, 2008) (*unpublished*) (finding for the defendant and that the plaintiff did not exhaust where he conceded to nonexhaustion in a questionnaire).

409. Ayala v. C.M.S., No. 05-5184 (RMB), 2008 U.S. Dist. LEXIS 50692, at *7, 2008 WL 2676602, at *3 (D.N.J. July 2, 2008) (*unpublished*) (finding that, where plaintiff said he was unable to pursue administrative remedies, defendants' failure to establish their policy's requirements made it impossible for the court to assess plaintiff's claim).

410. Abner v. County of Saginaw County, 496 F. Supp. 2d 810, 823 (E.D. Mich. 2007) ("There is no clear evidence that this plaintiff was subject to the requirements of the PLRA, and the defendants are not entitled to summary judgment on that ground").

411. *See* Ray v. Kertes, 130 F. App'x 541, 543 (3d Cir. 2005) (*unpublished*) (holding "conclusory statement" that "does not constitute a factual report describing the steps Ray did or did not take to exhaust his grievances" did not meet defendants' burden); Laws v. Walsh, No. 02-CV-6016, 2003 U.S. Dist. LEXIS 12600, at *10 n.3 (W.D.N.Y. Jun. 27, 2003) (*unpublished*) (holding conclusory affidavit about records search and lack of appeals inadmissible).

how records were searched,[412] they rested on hearsay,[413] or they did not establish the prisoner's failure to exhaust.[414] In several cases, prisoners have given documentation of grievances that prison officials claimed did not exist.[415]

Since exhaustion is an affirmative defense, the defendants must raise the defense at the right time. If they do not, it might mean that the defendants have given up their right to use the defense.[416] Your claim that the defendants cannot use exhaustion will be better if you can show that their failure to raise it on time has hurt you.[417] If the exhaustion defense is given up, it may still come back at some point because of procedural reasons[418] or if the court chooses to allow it.[419]

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412. Livingston v. Piskor, 215 F.R.D. 84, 85–86 (W.D.N.Y. 2003) (holding defendants' affidavits stating 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 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").

413. Donahue v. Bennett, No. 02-CV-6430, 2003 U.S. Dist. LEXIS 12601, at *10, 2004 WL 1875019, at *4 (W.D.N.Y. Jun. 23, 2003) (*unpublished*) (holding counsel's hearsay affirmation about a telephone call with grievance officials did not properly support their motion).

414. *See* Wyatt v. Terhune, 315 F.3d 1108, 1120 (9th Cir. 2003) (noting that defendants did not show that the administrative remedies had been exhausted because "[t]he affidavit, although describing the inmate appeals process, does not state whether or not [the plaintiff] has exhausted his appeals"); Thixton v. Berge, No. 05-C-620-C, 2006 U.S. Dist. LEXIS 92193, at *7, 2006 WL 3761342, at *3 (W.D. Wis. Dec. 19, 2006) (*unpublished*) (noting that the absence of an appeal about lack of a working toilet and sink did not establish non-exhaustion, since if he prevailed at the first stage he would not have needed to appeal, and he might have filed an appeal about conditions in general including the sink and toilet issue).

415. Baker v. Schriro, No. CV 07-0353-PHX-SMM (JRI), 2008 U.S. Dist. LEXIS 66284, at *15, 2008 WL 3877973, at *5 (D. Ariz. Aug. 20, 2008) (ruling that prison officials did not meet their burden to demonstrate exhaustion because plaintiff could produce evidence of grievance complaints, even though defendant denied that they existed); Menteer v. Applebee, No. 04-3054-MLB, 2008 U.S. Dist. LEXIS 50207, at *16, 2008 WL 2649504, at *6–7 (D. Kan. Jun. 27, 2008) (*unpublished*) (finding material issue of fact where defendants said plaintiff filed no grievances but plaintiff produced copies of grievances and decisions on them).

416. *See* Handberry v. Thompson, 446 F.3d 335, 342–43 (2d Cir. 2006) (finding waiver); Anderson v. XYZ Correctional Health Services, Inc., 407 F.3d 674, 679–80 (4th Cir. 2005) (finding waiver); Johnson v. Testman, 380 F.3d 691, 695–96 (2d Cir. 2004) (holding the defense was waived by failure to assert it in the district court); Randolph v. Rodgers, 253 F.3d 342, 348 n.11 (8th Cir. 2001) (finding defendants "waived [PLRA exhaustion] argument on appeal" because it was not raised in the district court).

417. *See* Mendez v. Barlow, No. 04-CV-1030S(F), 2008 WL 2039499, at *5 (W.D.N.Y. May 12, 2008) (finding waiver); Handberry v. Thompson, 446 F.3d 335, 343 (2d Cir. 2006) (noting that plaintiffs could have exhausted and returned to court had the defense been timely raised); 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 plaintiff lost opportunity to take discovery), *vacated in part on other grounds*, 343 F. Supp. 2d 191 (E.D.N.Y. Nov. 1, 2004). Some circuits have required a showing of prejudice for waiver. *See* Curtis v. Timberlake, 436 F.3d 709, 711 (7th Cir. 2005) (holding that the plaintiff did not suffer any harm from the defendant's delay in asserting the exhaustion defense); Panaro v. City of North Las Vegas, 432 F.3d 949, 952 (9th Cir. 2005) (holding that the exhaustion defense could be waived because the plaintiff suffered no harm from the delay).

418. *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, 735 (7th Cir. 1999) (holding that the filing of an amended complaint revives defendants' right to raise exhaustion and other defenses). *See also* Rosenberg v. City of New York, No. 09-CV-4016 CBA LB, 2011 WL 4592803, at *14 (E.D.N.Y. Sept. 30, 2011) ("[E]ven where an affirmative defense is not raised in response to the original complaint, generally, the defense is not waived where the party timely raises the defense in response to an amended complaint").

419. *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*, 139 Fed. Appx. 311 (2d Cir. 2005). *But see* Abdullah v. Washington, 530 F. Supp. 2d 112, 115 (D.D.C. 2008) (denying amendment to answer asserting exhaustion defense five years after filing; plaintiff would be prejudiced because discovery was closed and plaintiff might have formulated discovery differently if exhaustion had been asserted). In *Panaro v. City of North Las Vegas*, 432 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 other party is not prejudiced.

If a court refuses to dismiss your case for non-exhaustion, prison officials cannot appeal right away. They have to wait until the end of the case.[420] But, one court has recently said that the defendants could appeal right away on the question of whether discovery must stop until the exhaustion issues are decided.[421]

8. Exhaustion and Statutes of Limitations

Most courts have held that the statute of limitations is tolled (that is, suspended) while you are exhausting administrative remedies.[422] This means that the time does not start to run until you get a final administrative decision. However, not every court may accept this idea. If you can, you should plan on filing your complaint within the usual time limitation.

If your case is dismissed for non-exhaustion and you want to try to exhaust and re-file it,[423] you may be out of time. Ordinarily, your case would be time-barred. However, some states have statutes that toll (suspend) the statute of limitations for various reasons. Some reasons may not even relate to the case merits. For example, federal courts use state tolling rules in civil rights actions.[424] A New York law says that in an action that started on time but was ended for a specific set of reasons, the plaintiff has six months to file a new lawsuit about the subject matter of the dismissed lawsuit.[425] New York state law also stops the time during exhaustion of administrative remedies.[426] Also, some courts have used the rule of equitable tolling so that any time you spend going through an action that is later dismissed for non-exhaustion, and any time you spend in exhausting administrative remedies after the dismissal, will not count against the statute of limitations.[427]

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420. Davis v. Streekstra, 227 F.3d 759, 762–63 (7th Cir. 2000) (holding that the defendant had to wait until the case was decided before appealing on an exhaustion issue).

421. Pavey v. Conley, No. 3:03-CV-662 RM, 2006 U.S. Dist. LEXIS 90523, at *4, 2006 WL 3715019, at *2 (N.D. Ind. Dec. 14, 2006) (*unpublished*), *rev'd*, 544 F.3d 739 (7th Cir. 2008) (granting interlocutory appeal because of the high impact the decision would have).

422. Bohannon v. Doe, 527 Fed. Appx. 283, 294 (5th Cir. 2013) (noting that exhausting administrative remedies tolls the statute of limitations, though only applicable to criminally-committed prisoners); Gonzalez v. Hasty 651 F.3d 318, 323–24 (2d Cir. 2011) (joining the Fifth, Sixth, Seventh, and Ninth Circuits in tolling the statute of limitations while administrative remedies are exhausted); Brown v. Valoff, 422 F.3d 926, 943 (9th Cir. 2005) (noting "we agree with the uniform holdings of the circuits . . . that the applicable statute of limitations must be tolled"); Clifford v. Gibbs 298 F.3d 328, 333 (5th Cir. 2002) (finding that statute of limitations should be tolled during administrative proceedings); Johnson v. Rivera, 272 F.3d 519, 521 (7th Cir. 2001) (following state law that the statue of limitations is tolled); Brown v. Morgan, 209 F.3d 595, 596 (6th Cir. 2000) (remanding a case back to the district court to determine how long the statute of limitations was tolled). Some courts have said or assumed that this question is determined by state tolling law. *See*, *e.g.*, Harris v. Hegmann, 198 F.3d 153, 157 (5th Cir. 1999); Leal v. Ga. Dep't of Corr., 254 F.3d 1276, 1280 (11th Cir. 2001) (remanding a case back to the district court to determine if tolling should apply).

423. You may not be allowed to do this because your grievance, too, may be time-barred, unless you persuade prison officials there is a reason to hear your late grievance. See Part E(5) of this Chapter for more information. OK

424. Wallace v. Kato, 549 U.S. 384, 387 –88, 127 S. Ct. 1091, 1094–95, 166 L. Ed. 2d, 973, 980 (2007) (noting that federal law looks to state law in for the statute of limitations in civil rights claims).

425. N.Y. C.P.L.R. 205(a) (1999). The statute also requires that service of process be completed within the six-month period. However, courts have held that this service requirement is not binding in federal court, 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) (applying state law to tolling, but not to service of process); Gashi v. County of Westchester, 02 Civ. 6934 (GBD), 2005 U.S. Dist. LEXIS 1215, at *27–30 (S.D.N.Y. Jan. 27, 2005) (*unpublished*) (borrowing state tolling laws in a federal case).

Tolling statutes vary from state to state and may not always be helpful. For example, the Indiana statute applies only if the case is dismissed for reasons other than negligence in prosecuting it. One court has held that failure to exhaust constitutes negligence under the Indiana statute. The statute was not tolled and the claim was time-barred in that case. Thomas v. Timko, 428 F. Supp. 2d 855, 857 (N.D. Ind. 2006).

426. N.Y. C.P.L.R. 204(a) (1999) ("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"). The PLRA exhaustion requirement that says you cannot file suit until you have exhausted would appear to be a "statutory prohibition" by the New York statute's standards.

427. Clifford v. Gibbs, 298 F.3d 328, 333 (5th Cir. 2002) (applying equitable tolling because otherwise the plaintiff would be unable to bring his claim); McCoy v. Goord, 255 F. Supp. 2d 233, 253 (S.D.N.Y. 2003) (extending the statute of limitations as a matter of fairness). Courts are more likely to apply equitable tolling if there is some reason it would be unfair to dismiss your case as time-barred, like if you made a technical mistake the first time you tried to exhaust. *But see* Crump v. Darling, No. 1:06-cv-20, 2007 U.S. Dist LEXIS 20000, at *45–47 (W.D. Mich. Mar. 21, 2007) (*unpublished*)

Instead of dismissing a time-barred case, a court might grant a *stay*, or temporary pause. However, that option may be unavailable because some case law holds that stays are no longer allowed under the PLRA and that unexhausted claims must be dismissed.[428]

After dismissal and exhaustion, you might file a motion for relief from the judgment under Rule 60(b) of the Federal Rules of Civil Procedure instead of filing a new complaint. Rule 60(b) permits relief based upon "mistake, inadvertence, surprise, or excusable neglect;" changed circumstances which establish that "applying [the judgment] prospectively is no longer equitable;" or "any other reason that justifies relief."[429] Rule 60(b) has allowed litigants who timely filed and diligently pursued their cases to revive suits that had become time-barred after dismissal. Although succeeding under Rule 60(b) can be difficult, litigants have been able to use Rule 60(b) when a plaintiff was unfairly affected by a change or ambiguity in the law[430] as well as when the plaintiff made an error of law.[431] The relief is more readily granted when a case has not yet been heard on the merits.[432] Although several courts have held that Rule 60(b) cannot be used to bring back cases after a dismissal for non-exhaustion, these courts have not addressed these specific issues.[433]

If you file an action that will likely be dismissed for failure to exhaust or to exhaust properly, you can file a second action after the claim has been exhausted but before the limitations period has run. After filing the second claim, you can move to voluntarily dismiss the first action.[434]

One court has held that claims may exhaust even if the exhaustion occurred outside the limitations period.[435] However, such exhaustion will only apply if you are challenging a continuing wrong that continues into the limitations period. If the wrong was completed outside the limitations period, the claim will be time-barred.

F. Mental or Emotional Injury

Section 1997e(e) of the PLRA states:

(denying equitable tolling to prisoner whose case was dismissed for non-exhaustion).

428. *See* Garner v. Dwyer, No. 09-5767, 2010 WL 2899392, at *2 (S.D.N.Y. July 19, 2010) (noting courts must generally dismiss unexhausted claims and lack discretion to stay proceedings).

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

430. *See* Barnett v. Roper, 941 F. Supp. 2d 1099, 1116–21 (E.D. Mo. 2013) (finding that a change in law was sufficient to show extraordinary circumstances under Rule 60(b)(6)); Mojica v. Sec'y Health and Hum. Servs. (102 Fed. Cl. 96, 98–101 (Fed. Cl. 2011) (finding change in the law regarding tolling of vaccine claims in addition to delayed delivery by a courier service were sufficient grounds for relief under the Court of Federal Claims's version of Rule 60(b)(6)). *See also* Lender v. Unum Life Ins. Co. of America, 519 F. Supp. 2d 1217, 1224–25 (M.D. Fla. 2007) (finding that the plaintiff was generally diligent in pursuing her claim and that her situation, including lack of familiarity with the law and trust in her lawyer, constituted extraordinary circumstances).

431. *See* Sellers v. Osyka Permian, 263 F.R.D. 372 (S.D. Miss. 2009) (granting defendant's motion to set aside default judgment under Rule 60(b)(1) on account of mistake in misfiling of lawsuit documents).

432. *See* Budget Blinds v. White, 536 F.3d 244, 255 (3d Cir. 2008) (finding that extraordinary circumtsances under Rule 60(b) may be satisfied when a judgment is entered before reaching the merits); U.S. v. Holohan, No. 11-4017, 2012 WL 2339755, at *2 (D.N.J. June 18, 2012) (*unpublished*) (noting that default judgments are generally disfavored and law requires judgments in doubtful cases be set aside in order so cases can be decided on the merits).

433. Strope v. McKune, No. 05-3344, 2006 U.S. App. LEXIS 2750, at *3–5 (10th Cir. Feb. 2, 2006) (*unpublished*) (declining to allow submission of additional evidence of exhaustion), *cert. granted, judgment vacated*, 127 S. Ct. 1215 (2007); Baggett v. Smith, No. 1:05-cv-804, 2006 U.S. Dist LEXIS 44859, at *1–3 (W.D. Mich. June 29, 2006) (*unpublished*) (holding that plaintiff was not entitled to relief from the Court's judgment dismissing his complaint for failure to demonstrate exhaustion of available administrative remedies when he later exhausted his administrative remedies, though he could file a new civil rights action setting forth his exhausted claims).

434. *See* Fed. R. Civ. P. 41(a) concerning voluntary dismissals. While a prisoner would prefer to file an amended or supplemental complaint after exhaustion, most courts have held that exhaustion must be completed before the initial complaint is filed. *See* Johnson v. Jones, 340 F.3d 624, 627–28 (8th Cir. 2003) ("Under the plain language of section 1997e(a), a[ ] [prisoner] must exhaust administrative remedies before filing suit in federal court. Thus, in considering motions to dismiss for failure to exhaust under section 1997e(a), the district court must look to the time of filing, not the time the district court is rendering its decision, to determine if exhaustion has occurred. If exhaustion was not completed at the time of filing, dismissal is mandatory."). Some courts have explicitly held that an initial failure to exhaust cannot be cured by filing a new complaint in the same case after exhaustion. *See* Cox v. Mayer, 332 F.3d 422, 428 (6th Cir. 2003).

435. Harrison v. Stalder, No. 06-2825, 2006 U.S. Dist. LEXIS 88277 (E.D. La. Dec. 5, 2006) (granting defendants' motion to dismiss for failure to exhaust administrative remedies).

> 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.[436]

A similar requirement was added by the PLRA to the Federal Tort Claims Act ("FTCA"):

> 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.[437]

Note that this FTCA section applies only to convicted felons; it does not apply to detainees or those convicted of misdemeanors. However, the PLRA section applies to all prisoners. So far, courts have upheld the constitutionality of the mental/emotional injury provision for damage claims.[438]

The statute refers to actions "brought by a prisoner confined in a jail," so most courts say the rule does not apply to people who sue after they are released from prison.[439] However, a few courts have disagreed.[440] Courts are divided over whether the provision continues to apply to someone who sues while in prison but is later released.[441] If a case is dismissed under this statute, dismissal should be without prejudice. Therefore, you may refile your case once you are no longer in jail.[442]

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436. 42 U.S.C. § 1997e(e) (2012).

437. 28 U.S.C. § 1346(b)(2) (2012).

438. *See* Davis v. District of Columbia, 158 F.3d 1342, 1347 (D.C. Cir. 1998), a case in which a prisoner contended that 1997e(e) violated his right to equal protection and unduly burdened his Fifth Amendment right of access to the courts. The court determined that 1997e(e) had no restrictive effect on claims for declaratory or injunctive relief; it merely limited the availability of damages. After conducting a rational basis review, the court concluded that 1997e(e) did not violate the plaintiff's right to equal protection or his right of access to courts. *See also* Zehner v. Trigg, 133 F.3d 459, 461–63 (7th Cir. 1997) (explaining that immunity doctrines, like restrictions on damage remedies, are constitutional because a remedy of damages does not need to be available for every constitutional violation).

439. Talamante v. Leyva, 575 F.3d 1021, 1023 (9th Cir. 2009) ("[A] person not 'incarcerated or detained . . . at the time the action is filed is not a "prisoner" for purposes of [1997e(e)]."); Harris v. Garner, 216 F.3d 970, 976–80 (11th Cir. 2000) (*en banc*) (holding that 1997e(e) applies to a complaint filed while the plaintiff was detained in a jail, prison, or other correctional facility); Kerr v. Puckett, 138 F.3d 321, 323 (7th Cir. 1998) (holding 1997e(e) did not apply to an ex-prisoner who filed a complaint after he was released from prison).

440. Cox v. Malone, 199 F. Supp. 2d 135, 140 (S.D.N.Y. 2002), *aff'd*, Cox v. Malone, 56 Fed. App'x. 43, 44 (2d Cir. February 20, 2003) (*unpublished*) ("Section 1997e(e), on the other hand, is a substantive limitation on the type of actions that can be brought by prisoners. Its purpose is to weed out frivolous claims where only emotional injuries are alleged. This purpose is accomplished whether section 1997e(e) is applied to suits brought by [prisoners] incarcerated at the time of filing or by former [prisoners] incarcerated at the time of the alleged injury but subsequently released. The fortuity of release on parole does not affect the kind of damages that must be alleged in order to survive the gate-keeping function of section 1997e(e). Because plaintiff's suit alleges only emotional injuries, it is barred by the PLRA irrespective of his status as a parolee at the time of filing."). Several recent decisions have rejected the reasoning of *Cox*. *See* McBean v. City of New York, 2009 U.S. Dist. Lexis 72690, at *76 (S.D.N.Y 2009) ("[B]ecause intervenor-plaintiffs were not incarcerated at the time this action was commenced, the Court finds that § 1997e(e) is inapplicable and does not preclude them from proceeding with this litigation."); Kelsey v. County of Schoharie, No. 04-CV-299 (LEK/DRH), 2005 U.S. Dist. LEXIS 17057, at *1–10 (N.D.N.Y Aug. 5, 2005) (*unpublished*) ("Because plaintiffs were not incarcerated at the time this action was commenced, § 1997e(e) is inapplicable.").

441. *Compare* Harris v. Garner, 216 F.3d 970, 973–76 (11th Cir. 2000) (*en banc*) (holding that released plaintiffs remain prisoners for purposes of § 1997e(e) as long as they brought the lawsuit at the time they were still imprisoned, but dismissing their claims for monetary relief without prejudice so that they may re-file when they are no longer confined), *with* Prendergast v. Janecka, No. 00-CV-3099, 2001 U.S. Dist. LEXIS 9689, at *2–3 (E.D. Pa. July 10, 2001) (*unpublished*) (holding that the provision ceases to apply when a post-release amended complaint is filed).

442. Douglas v. Yates, 535 F.3d 1316, 1320 (11th Cir. 2008) ("We have interpreted this statute to require the dismissal of several prisoners' complaints for emotional injury 'without prejudice to their being re-filed at a time when the plaintiffs are not confined.'") (citing Harris v. Garner, 216 F.3d 970, 985 (11th Cir.2000) (*en banc*)). As explained in the next section, dismissal of the entire action may not be appropriate, since some courts hold that the statute restricts only compensatory damages.

The Eleventh Circuit has held that the statute applies to a claim based on something that happened before a prisoner's incarceration.[443] The same circuit has held that in a case removed to federal court from state court, section 1997e(e) does not apply to claims based solely on state law. The court therefore implied that the statute governs claims under federal law brought in state court;[444] however, this is not certain. The statute says that "no Federal civil action *may be brought*" for mental or emotional injury without physical injury.[445] The phrase "may be brought" suggests that the statute should only apply to the time when the case is filed.[446] If that is correct, a suit filed in state court is not a "[f]ederal civil action" when it was brought. Accordingly, section 1997e(e) should not be applicable to the case under any circumstances, especially not when the case is in federal court only because the other party removed the case to federal court. However, the statute has been applied to state law claims filed in federal courts.[447]

1. What Does the Statute Do?

Section 1997e(e) prohibits "action[s] . . . for mental or emotional injury."[448] If you have one claim for mental or emotional injury and some other claim, such as loss or damage to property, the second claim can go forward.[449] Also, most courts have interpreted the statute to only prohibit compensatory damages for mental or emotional injury. In other words, you could still get an injunction, nominal damages, or punitive damages.[450] Some courts, however, have said that you cannot get punitive damages for emotional injury.[451]

This part of the statute is usually raised in a motion to dismiss or a motion for summary judgment. Some courts have held that the requirement to show physical damage creates an affirmative defense rather than a jurisdictional requirement.[452] In other words, the defendant must raise the issue. You do not have to plead the

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443. Napier v. Preslicka, 314 F.3d 528, 532–34 (11th Cir. 2002), *rehearing denied*, 331 F.3d 1189 (11th Cir. 2003), *cert denied,* 124 S.Ct. 1038 (2004). This interpretation sharply divided both the panel and the court as a whole and produced vigorous dissents.

444. Mitchell v. Brown & Williamson Tobacco Corp., 294 F.3d 1309, 1315 (11th Cir. 2002).

445. 42 U.S.C. § 1997e(e) (emphasis added) (2012).

446. *See* Craig v. Eberly, 164 F.3d 490, 494–95 (10th Cir. 1998) (holding that § 1997e(e) did not apply retroactively to a complaint that was filed before the PLRA was enacted); Swan v. Banks, 160 F.3d 1258, 1259 (9th Cir. 1998) ("[T]he plain meaning of [§ 1997e(e)] is that it applies only to actions that were brought after enactment of the PLRA, and not to actions that had already been filed.").

447. *See* Hines v. Oklahoma, CIV-07-197-R 2007 U.S. Dist. LEXIS 77291, at *16 (W.D. Okla. Oct. 17, 2007) (*unpublished*) ("Plaintiff's claims for compensatory damages for intentional infliction of emotional distress are barred by the Prison Litigation Reform Act (PLRA) because Plaintiff has not alleged that he suffered a physical injury as required by 42 U.S.C. § 1997e(e).").

448. 42 U.S.C. § 1997e(e) (2012).

449. Jones v. Bock, 549 U.S. 199, 222, 127 S. Ct. 910, 925, 166 L. Ed. 2d 798, 814 (2007) ("Section 1997e(e) contains similar language, '[n]o . . . action may be brought . . . for mental or emotional injury suffered while in custody without a prior showing of physical injury,' yet respondents cite no case interpreting this provision to require dismissal of the entire lawsuit if only one claim does not comply, and again we see little reason for such an approach."); Robinson v. Page, 170 F.3d 747, 749 (7th Cir. 1999) ("If the suit contains separate claims, neither involving physical injury, and in one the prisoner claims damages for mental or emotional suffering and in the other damages for some other type of injury, the first claim is barred by the statute but the second is unaffected.").

450. *See, e.g.*, Hutchins v. McDaniels, 512 F.3d 193, 196–98 (5th Cir. 2007) (holding that plaintiff could recover nominal or punitive damages, despite § 1997e(e)); Royal v. Kautzky, 375 F.3d 720, 723 (8th Cir. 2004) (finding that, because plaintiff's claim did not involve mental or emotional injury, the PLRA did not bar him from seeking nominal damages, punitive damages, and injunctive and declaratory relief); Calhoun v. DeTella, 319 F.3d 936, 941 (7th Cir. 2003) (finding that nominal damages "are awarded to vindicate rights, not to compensate for resulting injuries," and punitive damages "are designed to punish and deter wrongdoers for deprivations of constitutional rights, they are not compensation for emotional and mental injury"); Thompson v. Carter, 284 F.3d 411, 418 (2d Cir. 2002) (holding that statute restricting prisoner's recovery for in-custody mental or emotional injury did not prevent prisoner from obtaining injunctive and declaratory relief, nominal damages, punitive damages, compensatory damages for loss of property, or return of seized medications).

451. *See* Smith v. Allen, 502 F.3d 1255, 1271–72 (11th Cir. 2007) (stating that compensatory and punitive damages are precluded by PLRA because the plaintiff did not allege he suffered physical harm; however, nominal damages were available because plaintiff alleged a violation of a statutory right); Davis v. District of Columbia, 158 F.3d 1342, 1348 (D.C. Cir. 1998) (arguing that "much if not all of Congress's evident intent would be thwarted if prisoners could surmount § 1997e(e) simply by adding a claim for punitive damages and an assertion that the defendant acted maliciously," though no physical injury occurred).

452. Douglas v. Yates, 535 F.3d 1316, 1320 (11th Cir. 2008); Smith v. Peters, 631 F.3d 418, 421 (7th Cir. 2011).

existence of a physical injury in your complaint, but the district court may dismiss your case if the complaint clearly shows a lack of injury.[453] However, courts cannot dismiss your complaint simply because you do not describe your injury as a physical one.

2. What Is Mental or Emotional Injury?

The courts have not completely worked out the meaning of "mental or emotional injury." Some courts have interpreted the phrase narrowly. One court said, for example, "[t]he term 'mental or emotional injury' has a well understood meaning as referring to such things as stress, fear, and depression, and other psychological impacts."[454] Some courts have separately recognized a variety of constitutional injuries that are neither physical nor mental or emotional. Section 1997e(e) does not affect such injuries.[455]

Other courts, however, assume that any violation of your constitutional rights that does not result in physical injury is considered a mental or emotional injury.[456] For example, in *Allah v. Al-Hafeez*,[457] the prisoner complained that prison policies violated his constitutional rights by preventing him from attending religious services. In response, the court said he couldn't pursue compensatory damages because his injury was a mental or emotional one.[458] Similarly, many courts have assumed that other constitutional violations cause only mental or emotional injury, including claims of unlawful arrest and confinement,[459] racial discrimination,[460] and many others.[461] However, you should argue that these types of constitutional violations are really injuries to your liberty, and not just a matter of mental or emotional injury.

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453. Douglas v. Yates, 535 F.3d 1316, 1320 (11th Cir. 2008); Smith v. Peters, 631 F.3d 418, 421 (7th Cir. 2011).

454. Amaker v. Haponik, No. 98 Civ. 2663 (JGK), 1999 U.S. Dist. LEXIS 1568, at *22–23 (S.D.N.Y. Feb. 17, 1999) (*unpublished*) (noting that requiring physical injury in all cases would make the term "mental or emotional injury" superfluous); *see also* Robinson v. Page, 170 F.3d 747, 748 (7th Cir. 1999) (restricting the domain of the statute to suits in which mental or emotional injury is claimed).

455. Courts have acknowledged that § 1997e(e) does not bar compensatory damages for loss of property. *See* Thompson v. Carter, 284 F.3d 411, 418 (2d Cir. 2002); Robinson v. Page, 170 F.3d 747, 748 (7th Cir. 1999). Other acknowledged interests that are neither physical nor emotional include 1st Amendment rights, *see* Canell v. Lightner, 143 F.3d 1210, 1213 (9th Cir.1998); Searles v. Van Bebber, 251 F.3d 869, 876 (10th Cir. 2001); claims of exclusion from an alcohol treatment program in violation of the disability statutes, *see* Parker v. Mich. Dep't of Corr., No. 4:01CV11, 2001 U.S. Dist. LEXIS 18931, at *5–6 (W.D. Mich. Nov. 9, 2001) (*unpublished*); 4th Amendment bodily privacy claim and 8th Amendment conditions of confinement and medical care claims, *see* Waters v. Andrews, No. 97-CV-407, 2000 WL 1611126, at *4 (W.D.N.Y. Oct. 16, 2000) (*unpublished*); and freedom from racial discrimination, *see* Mason v. Schriro, 45 F. Supp. 2d 709, 716–20 (W.D. Mo. 1999). *See also* Lewis v. Sheahan, 35 F. Supp. 2d 633, 637 n.3 (N.D. Ill. 1999) (acknowledging right to access the courts).

456. Worse, there is a persistent tendency in some courts simply to declare, for example: "[A] prisoner may not maintain an action for monetary damages against state officials based on an alleged constitutional violation absent some showing of a physical injury." Charles v. Nance, 186 F. App'x 494, 495 (5th Cir. 2006) (*unpublished*); *accord*, *e.g.*, Nelis v. Kingston, No. 06-C-1220, 2007 U.S. Dist. LEXIS 86036, at *18 (E.D. Wis. Nov. 20, 2007) (*unpublished*) ("[U]nder the Prison Litigation Reform Act (PLRA), recovery in prisoner lawsuits is limited where, as here, there is no showing of physical injury.").

457. Allah v. al-Hafeez, 226 F.3d 247, 247–250 (3d Cir. 2000).

458. Allah v. al-Hafeez, 226 F.3d 247, 250 (3d Cir. 2000) ("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."). At this point, there is a very long list of decisions holding that deprivations of religious rights amount only to mental or emotional injury. *See*, *e.g.*, Mayfield v. Tex. Dept. of Criminal Justice, 529 F.3d 599, 605–06 (5th Cir. 2008) (applying § 1997e(e) to claims of restricted religious exercise); Sisney v. Reisch, 533 F. Supp. 2d 952, 973–74 (D.S.D. 2008) (applying § 1997e(e) to various religious deprivations).

459. Brown v. Sudduth, 255 F. App'x 803, 808 (5th Cir. 2007) (applying § 1997e(e) to claim of false arrest; plaintiff "sought compensatory damages for the sole alleged injury of liberty deprivation. Having not alleged a physical injury, the district court correctly concluded that Brown's claim for compensatory damages must fail."); Brumett v. Santa Rosa County, No. 3:07cv448/LAC/EMT, 2007 U.S. Dist. LEXIS 89061, at *4–6 (N.D. Fla. Dec. 4, 2007) (*unpublished*) (holding that claim of six months' illegal detention was not sufficient for relief because it failed to demonstrate a physical injury); Campbell v. Johnson, No. 3:06cv365/RV/EMT, 2006 U.S. Dist. LEXIS 72146, at *2 (N.D. Fla. Oct. 3, 2006) (*unpublished*) (refusing to accept paperwork and collateral for release on bond).

460. Jones v. Pancake, No. 3:06CV-P188-H, 2007 U.S. Dist. LEXIS 84309, at *6–8 (W.D. Ky. Aug. 17, 2007) (*unpublished*) (allowing plaintiff to amend a racial discrimination claim to include relief for nominal and punitive damages).

461. Robinson v. Dep't of Corr., No. 3:07cv5/MCR/EMT, 2007 U.S. Dist. LEXIS 50817, at *10 (N.D. Fla. July 13, 2007) (*unpublished*) (stopping of mail and delaying filing of lawsuits as well as deprivation of religious materials), *report*

Some courts have also held that complaints of exposure to unconstitutional prison living conditions—that is, living conditions that deny the "minimal civilized measure of life's necessities"[462]—are claims of mental or emotional injury and are barred by Section 1997e(e) unless they also include a claim of physical injury.[463] These holdings seem to conflict with the Supreme Court's statements that the objective state of prison conditions, and not their effect on the prisoner, determines whether they are lawful or not.[464] It is questionable whether a claim alleging conditions that are clearly intolerable is really an "action for mental or emotional injury," even if the conditions also lead to such injury.[465]

Some courts have held that "the violation of a constitutional right is an independent injury that is immediately cognizable and outside the purview of [Section] 1997e(e),"[466] completely separate from any mental or emotional injury. Some courts have also found that this same principle applies to cases about unconstitutional conditions of confinement or restrictive confinement without due process.[467]

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and recommendation adopted, 2007 U.S. Dist. LEXIS 75961 (N.D. Fla. Oct. 12, 2007); Ivy v. New Albany City Police Dep't, No. 3:06CV112-P-A, 2006 U.S. Dist. LEXIS 79882, at *1–3 (N.D. Miss. Oct. 31, 2006) (*unpublished*) (being held naked in an isolation cell); Caudell v. Rose, Nos. 7:04CV00557, 7:04CV00558, 2005 U.S. Dist. LEXIS 10251, at *8 (W.D. Va. May 27, 2005) (*unpublished*) (seizure of legal papers), *report and recommendation adopted*, 378 F. Supp. 2d 725 (W.D. Va. 2005); Ashann-Ra v. Virginia, 112 F. Supp. 2d 559, 565–66 (W.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 established to defeat qualified immunity, but was not actionable because of the mental/emotional injury provision).

462. Rhodes v. Chapman, 452 U.S. 337, 347, 101 S. Ct. 2392, 2399, 69 L. Ed. 2d 59, 69 (1981) (holding that the practice of double celling is not cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments).

463. *See*, *e.g.*, Harden-Bey v. Rutter, 524 F.3d 789, 795–96 (6th Cir. 2008) (upholding dismissal of Eighth Amendment and equal-protection claims, but remanding on possibility that the state violated plaintiff's liberty interest by holding him indefinitely in administrative segregation); Merchant v. Hawk-Sawyer, 37 F. App'x 143, 145–46 (6th Cir. 2002) (barring damages because plaintiff did not allege that conditions in a segregated housing unit caused him physical injury); Harper v. Showers, 174 F.3d 716, 719–20 (5th Cir. 1999) (barring damages claims for placement in filthy cells formerly occupied by psychiatric patients and for exposure to deranged behavior of those patients). *But see* 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).

464. Wilson v. Seiter, 501 U.S. 294, 303, 111 S. Ct. 2321, 2326, 115 L. Ed. 2d 271, 282 (1991); *see* Helling v. McKinney, 509 U.S. 25, 35–37, 113 S. Ct. 2475, 2481–82, 125 L. Ed. 2d 22, 33–34 (1993) (instructing as to objective assessment of environmental tobacco smoke exposure); *see also* Fields v. Ruiz, No. 1:03-CV-6364-OWW-DLB-P, 2007 U.S. Dist. LEXIS 45981, at *20 (E.D. Cal. June 25, 2007) (*unpublished*) (holding that for Eighth Amendment claims, "the issue is the nature of the deprivation, not the injury"), *report and recommendation adopted*, 2007 U.S. Dist. LEXIS 66671 (E.D. Cal. Sept. 10, 2007); Armstrong v. Drahos, No. 01 C 2697, 2002 U.S. Dist. LEXIS 1838, at *6 (N.D. Ill. Feb. 6, 2002) (*unpublished*) ("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.").

465. A few decisions make this distinction. In Nelson v. Cal. Dep't of Corr., No. C 02-5476 SI (pr), 2004 U.S. Dist. LEXIS 4521, at *21 (N.D. Cal. Mar. 18, 2004) (*unpublished*), *aff'd*, 131 F. App'x 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: "[e]ven 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." *See* Pippin v. Frank, No. 04-C-582-C, 2005 U.S. Dist. LEXIS 5576, at *4 (W.D. Wis. Mar. 30, 2005) (*unpublished*) (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, No. 5:00-CV-17-J, 2005 U.S. Dist. LEXIS 22113, at *10 (W.D. Ky. Sept. 30, 2005) (*unpublished*) (stating generally that "damages resulting from constitutional violations" are "separate categories of damages" from physical or mental injuries in case where plaintiff alleged medical deprivations, protracted segregation, and denial of access to courts).

466. Shaheed-Muhammad v. DiPaolo, 393 F. Supp. 2d 80, 107 (D. Mass. 2005); *accord* Rowe v. Shake, 196 F.3d 778, 781–82 (7th Cir. 1999) ("A prisoner is entitled to judicial relief for a violation of his First Amendment rights aside from any physical, mental, or emotional injury he may have sustained."); Carr v. Whittenburg, 2006 U.S. Dist. LEXIS 24565 at *7 (S.D. Ill. Apr. 28, 2006) (*unpublished*) (stating that specific First Amendment violations may be compensable through "general damages" or "presumed damages" even without proof of injury, though damages cannot be recovered based on the abstract value or importance of the right); Lipton v. County of Orange, 315 F. Supp. 2d 434, 457 (S.D.N.Y. 2004) ("Although § 1997e(e) applies to plaintiff's First Amendment retaliation claim, a First Amendment deprivation presents a cognizable injury standing alone and the PLRA 'does not bar a separate award of damages to compensate the plaintiff for the First Amendment violation in and of itself.'") (quoting Ford v. McGinnis, 198 F. Supp. 2d 363, 366 (S.D.N.Y. 2001).

467. Aldridge v. 4 John Doe, No. 5:00-CV-17-J, 2005 U.S. Dist. LEXIS 22113, at *10 (W.D. Ky. Sept. 30, 2005) (ruling

That approach is consistent with tort law, which is supposed to be the basis of the law of damages under 42 U.S.C. Section 1983.[468] Historically, tort law divided damages into six categories: injury to property, physical injuries, mental injuries, injuries to family relations, injuries to personal liberty, and injuries to reputation.[469] Under that approach, deprivation of your religious freedom or placement in segregation without due process would injure your personal liberty. Those deprivations might inflict mental or emotional injury too, but that injury would be separate and in addition to the injury to your liberty.

A good example of the proper distinction between mental or emotional injury and deprivation of personal liberty is the Second Circuit decision in *Kerman v. City of New York*.[470] In that case, the plaintiff had been placed in a mental hospital against his will, and he alleged both that he had been seized in violation of the Fourth Amendment and that he had been subjected to the tort of false imprisonment. The court treated the plaintiff's mental and emotional injury as a different type of injury from his loss of liberty, stating: "[t]he damages recoverable for loss of liberty for the period spent in a wrongful confinement are severable 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."[471]

You may not be able to get a court to look at your case this way. Some courts have rejected this approach outright.[472] Others have not settled the issue. If you are bringing a case about something that did not cause you physical injury, you should make it very clear that you are seeking damages for something other than mental or emotional injury. For example, if you are suing for being placed in segregation for a long period without due process, and you were not physically injured as a result, do not write in your complaint that "plaintiff seeks damages for mental anguish and psychological torture." You are better off with something like this:

> Plaintiff seeks compensatory damages for the loss of privileges and quality of life in his prison living conditions, and loss of the limited liberty enjoyed by prisoners, resulting from his segregated confinement, in that he was confined for 23 hours a day in a cell roughly 60 feet square, and deprived of most of his personal property as well as the ability to work, attend educational and vocational programs, watch television, associate with other prisoners, attend outdoor recreation in a congregate setting with the ability to engage in sports and other congregate recreational activities, attend meals with other prisoners, attend religious services [and whatever other privileges you may have lost].

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in case involving medical deprivations, protracted segregation, and denial of access to courts); *accord* Mitchell v. Horn, 318 F.3d 523, 534 n. 10 (3d Cir. 2003) (stating that requests for damages for loss of "status, custody level and any chance at commutation" resulting from a disciplinary hearing were "unrelated to mental injury" and "not affected by § 1997e(e)'s requirements."); Benge v. Scalzo, No. CV 04-1687-PHX-DGC (CRP), 2008 U.S. Dist. LEXIS 40782, at *28 (D. Ariz. May 21, 2008) (*unpublished*) (stating that allegation of psychiatric neglect was not subject to § 1997e(e)); Wittkamper v. Arpaio, No. CV 05-2073-PHX-MHM-MHB, 2008 U.S. Dist. LEXIS 37475, at *5 (D. Ariz. May 6, 2008) (*unpublished*) (holding that allegations of unsanitary conditions were not subject to § 1997e(e)); Davis v. Arpaio, No. CV 07-0424-PHX-DGC (MEA), 2008 U.S. Dist. LEXIS 35288, at *6–7 (D. Ariz. Apr. 23, 2008) (holding allegations of denial of rights with respect to clothing, hygiene, legal calls, recreation, library access, medical problems, sleep deprivation, etc., were not subject to § 1997e(e)); Cockcroft v. Kirkland, 548 F. Supp. 2d 767, 776, at *19 (N.D. Cal. 2008) (stating that "the violation of a constitutional right has a compensatory value regardless of what the physical/emotional injuries are." Plaintiff had alleged exposure to waste from back-flushing toilet.).

468. Smith v. Wade, 461 U.S. 30, 34, 103 S. Ct. 1625, 1628, 75 L. Ed. 2d 632, 637 (1983) ("It was intended to create a 'species of tort liability' in favor of persons deprived of federally secured rights"); Carey v. Piphus, 435 U.S. 247, 253, 98 S. Ct. 1042, 1047, 55 L. Ed. 2d 252, 258 (1978) ("[Section 1983] was intended to '[create] a species of tort liability' in favor of persons who are deprived of 'rights, privileges, or immunities secured' to them by the Constitution.").

469. Arthur G. Sedgwick & Joseph H. Beale, Jr., 1 Sedgwick's Treatise on Damages 50–51 (8th ed. 1891).

470. Kerman v. City of New York, 374 F.3d 93 (2d Cir. 2004).

471. Kerman v. City of New York, 374 F.3d 93, 125 (2d Cir. 2004).

472. Pearson v. Welborn, 471 F.3d 732, 744–45 (7th Cir. 2006) (rejecting plaintiff's claims for damages for conditions experienced during confinement); 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").

> Plaintiff does not seek compensatory damages for mental or emotional distress.
>
> Plaintiff seeks punitive damages against defendant(s) [names] for their willful and malicious conduct in confining the plaintiff to segregation after a hearing in which he was denied basic rights to due process of law.

You would take a similar approach in demanding damages for any other kind of constitutional violation that didn't cause you physical injury, like deprivations of religious freedom, freedom of speech, placement in filthy and disgusting physical conditions, etc.

If you did suffer some physical injury from being segregated, you should still protect yourself (in case the court does not find your physical injury serious enough to satisfy the statute) with a damages demand similar to the one above, distinguishing the injuries you suffered from mental and emotional injury. But remember, if you *did* suffer a physical injury, you can recover not only for damages resulting from that physical injury, but also for the mental or emotional damages you suffered. In this case you should say "Plaintiff also seeks compensatory damages for the mental or emotional distress resulting from his prolonged confinement in segregation without due process of law" instead of the second paragraph in the above example.

There is no guarantee of success if you take the above advice. Also, constitutional rights are very hard to value (meaning that courts will often just award nominal damages),[473] and the Supreme Court has warned that damage awards cannot be based on the "abstract 'importance' of a constitutional right."[474] However, courts have made compensatory awards for violations of First Amendment and other intangible rights based on the plaintiff's circumstances even if the plaintiff did not present evidence of mental or emotional injury.[475] You should call this fact to the court's attention if prison officials argue that you can only recover nominal damages.

3. What is Physical Injury?

Prisoners must show physical injury in order to recover damages for mental or emotional injury under 1997e(e)[476], but courts have not fully explained what it takes to show physical injury. The injury "must be more than *de minimis*, but need not be significant."[477] A "*de minimis*" injury is one where the harm is very small. However, courts disagree over what kinds of injuries exceed the *de minimis* threshold. One appeals court has said that injury does not need to be observable or diagnosable, or require treatment by a medical care professional, to meet the Section 1997e(e) standard.[478] But a much-cited district court decision holds that, under Section 1997e(e):

> A physical injury is an observable or diagnosable medical condition requiring treatment by a medical care professional. It is not a sore muscle, an aching

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473. Williams v. Kaufman Cnty., 352 F.3d 994, 1014–1015 (5th Cir. 2003) (noting frequency of nominal awards under § 1983)*; see also* Carlo v. City of Chino, 105 F.3d 493, 495 (9th Cir. 1997) (noting nominal award for denial of phone access to overnight detainee); Sockwell v. Phelps, 20 F.3d 187, 189 (5th Cir. 1994) (noting nominal award for racial segregation).

474. Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 309–10, 106 S. Ct. 2537, 2544, 91 L. Ed. 2d 249, 260 (1986).

475. *See, e.g.*, Sallier v. Brooks, 343 F.3d 868, 872, 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), *cert. denied*, 512 U.S. 1209, 114 S. Ct. 2684, 129 L. Ed. 2d 817 (2004) (affirming $2250 award at $10 a day for lost privileges because of a vengeful transfer to a higher security prison); Vanscoy v. Hicks, 691 F. Supp. 1336, 1338 (M.D. Ala. 1988) (awarding $50 for unwarranted exclusion from religious service, without evidence of mental anguish or suffering).

476. 42 U.S.C. § 1997e(e) (2012).

477. Siglar v. Hightower, 112 F.3d 191, 193 (5th Cir. 1997).

478. Oliver v. Keller, 289 F.3d 623, 628 (9th Cir. 2002); *see also* Mansoori v. Shaw, No. 99 C 6155, 2002 U.S. Dist. LEXIS 11670, at *11 (N.D. Ill. June 28, 2002) (*unpublished*) (stating that injury does not need to be shown by objective evidence). Another court has rejected an effort to read "long-term" into the physical injury requirement. Glenn v. Copeland, No. 5:02CV158-RS/WCS, 2006 U.S. Dist. LEXIS 38466, at *11 (N.D. Fla. June 9, 2006) (*unpublished*) ("Presumably . . . *any* physical injury, even if short-term, is sufficient" to meet the statutory threshold.).

> back, a scratch, an abrasion, a bruise, etc., which lasts even up to two or three weeks. . . . [It is] more than the types and kinds of bruises and abrasions about which the Plaintiff complains. Injuries treatable at home and with over-the-counter drugs, heating pads, rest, etc., do not fall within the parameters of 1997e(e).[479]

Not surprisingly, several courts have dismissed identifiable painful injuries as *de minimis*.[480] But others have found somewhat small injuries to be actionable under section 1997e(e).[481]

Several courts have held that the physical results of emotional distress do not qualify as physical injuries under this statute.[482] Courts are split on the question of whether the risk of future injury meets the standard.[483] Courts are also split over how closely your physical injury must be connected with a mental or emotional injury for you to recover damages for the mental or emotional injury.[484]

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479. Luong v. Hatt, 979 F. Supp. 481, 486 (N.D. Tex. 1997). *But see* Pierce v. County of Orange, 526 F.3d 1190, 1224 (9th Cir. 2008) (noting that the circuit court had rejected the "overly restrictive" *Luong* standard, and further finding that bedsores and bladder infections resulting from inadequate accommodation of a paraplegic's disabilities qualified as physical injuries even under the restrictive *Luong* standard).

480. *See, e.g.*, Griggs v. Horton, No. 7:05-CV-220-R, 2008 U.S. Dist. LEXIS 24888, at *2–3 (N.D. Tex. Mar. 28, 2008) (*unpublished*) (holding that wrist abrasion and tenderness to rib cage were *de minimis* injuries); Diggs v. Emfinger, No. 07-1807 SECTION P, 2008 U.S. Dist. LEXIS 19140, at *9 (W.D. La. Jan. 10, 2008) (*unpublished*) (holding that allegation of an "open wound" causing "severe pain" was a *de minimis* injury).

481. *See, e.g.*, Sanders v. Day, No. 5:06-CV-280 (HL), 2008 U.S. Dist. LEXIS 21713, at *4 (M.D. Ga. Mar. 19, 2008) (*unpublished*) (holding that the allegation of kicking and using pepper spray on a handcuffed suspect demonstrate more than *de minimis* injury); Edwards v. Miller, No. 06-CV-00933-MSK-MEH, 2007 U.S. Dist. LEXIS 22639, at *4 (D. Colo. Mar. 28, 2007) (*unpublished*) (holding that plaintiff's allegation that she was punched in the face and bitten on the arm over a 10-minute period, causing damage to her forehead, facial injuries, and subsequent severe headaches, demonstrates more than *de minimis* injury); Cotney v. Bowers, No. 2:03-cv-1181-WKW (WO), 2006 U.S. Dist. LEXIS 69523, at *25 (M.D. Ala. Sept. 26, 2006) (*unpublished*) (holding bruised ribs that took weeks to heal could be more than *de minimis*, and thus that such allegations could withstand a motion for summary judgment).

482. Davis v. District of Columbia, 158 F.3d 1342, 1349 (D.C. Cir. 1998) (holding that weight loss, appetite loss, and insomnia that occurred *after* and *because of* the emotional harm could not qualify as "physical injuries" under § 1997e(e) because the statute explicitly requires that the physical injuries predate the emotional harm); Darvie v. Countryman, No. 9:08-CV-0715 (GLS/GHL), 2008 U.S. Dist. LEXIS 52797, at *23 (N.D.N.Y. July 10, 2008) (*unpublished*) (characterizing "anxiety, depression, stress, nausea, hyperventilation, headaches, insomnia, dizziness, appetite loss, weight loss, etc.," as "essentially emotional in nature"); Minifield v. Butikofer, 298 F. Supp. 2d 900, 905 (N.D. Cal. 2004) ("Physical symptoms that are not sufficiently distinct from a plaintiff's allegations of emotional distress do not qualify as a prior showing of physical injury."); Todd v. Graves, 217 F. Supp. 2d 958, 960 (S.D. Iowa 2002) (holding that allegations of stress-related aggravation of hypertension, dizziness, insomnia and loss of appetite were not actionable). *But see* Montemayor v. Fed. Bureau of Prisons, No. 02-1283 (GK), 2005 U.S. Dist. LEXIS 18039, at *17 (D.D.C. Aug. 25, 2005) (*unpublished*) (holding that a heart attack resulting from physical and emotional stress caused by treatment in prison would meet the physical injury requirement).

483. *Compare* Zehner v. Trigg, 133 F.3d 459, 462–63 (7th Cir. 1997) (holding that 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). *See also* Helling v. McKinney, 509 U.S. 25, 35, 113 S. Ct. 2475, 2481, 125 L. Ed. 2d 22, 33 (1993) (recognizing the possibility of an Eighth Amendment claim based on future serious health problems because of a prison smoking policy). *See* Smith v. Carpenter, 316 F.3d 178 (2d Cir. 2003) ("[Plaintiff] correctly argues that an Eighth Amendment claim may be based on a defendant's conduct in exposing an inmate to an unreasonable risk of future harm and that actual physical injury is not necessary in order to demonstrate an Eighth Amendment violation."); Davis v. New York, 316 F.3d 93, 101 (2d Cir. 2002) (allowing *Helling* claim to proceed, after passage of PLRA).

484. *Compare* Noguera v. Hasty, No. 99 Civ. 8786 (KMW)(AJP), 2001 U.S. Dist. LEXIS 2458, at *14–15 (S.D.N.Y. Mar. 12, 2001) (*unpublished*) (holding that allegations of emotional injuries stemming from retaliation for reporting a rape by an officer were closely enough related to the physical injuries from the rape that a separate physical injury need not be shown), *with* Purvis v. Johnson, 78 F. App'x 377, 379-380 (5th Cir. 2003) (*unpublished*) (holding that a prisoner alleging assault by a staff member could not also pursue a claim for emotional injuries stemming from obstruction of the post-assault investigation because the prisoner did not allege a post-assault physical injury), *and* Johnson v. Dallas County Sheriff Dep't, No. 3:08-CV-0423-G, 2008 WL 2378269, at *3 (N.D. Tex. June 6, 2008) (*unpublished*) (alleged sexual assault was a physical injury, but conduct of officials after the assault did not inflict physical injury and was not actionable).

A mixture of injuries short of visible damage to body parts have been held to satisfy Section 1997e(e). Most courts (but not all) have held that sexual assault is a physical injury.[485] Other injuries that at least some courts have held satisfy the physical injury requirement include: physical disturbances resulting from medication withdrawal, overdose, or error;[486] the consequences of failing to treat an illness or injury, both the immediate consequences[487] and longer-term or future issues;[488] denial of enough food;[489] food contamination or poisoning;[490] denial of exercise;[491] physical disturbances resulting from exposure to harmful materials;[492]

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485. *See* Liner v. Goord, 196 F.3d 132, 135 (2d Cir. 1999) (holding 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* [small; negligible] injury"); 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.") (internal citation omitted). *But see* Hancock v. Payne, No. 1:03cv671-JMR-JMR, 2006 U.S. Dist. LEXIS 1648, at *3, 10 (S.D. Miss. Jan. 4, 2006) (*unpublished*) (holding prisoners who alleged they were "sexually battered ... by sodomy" did not satisfy § 1997e(e)). Non-physical sexual harassment is not physical injury. *See* Gillespie v. Smith, No. C07-3033-LRR, 2007 U.S. Dist. LEXIS 48498, at *3, *7–8 (N.D. Iowa July 3, 2007) (*unpublished*).

486. Scarver v. Litscher, 371 F. Supp. 2d 986, 997 (W.D. Wis. 2005) (suggesting that self-inflicted overdose of Thorazine, as well as self-inflicted razor cuts by a mentally ill prisoner being held in isolation may have been physical injury for the purposes of 1997e(e)), *aff'd*, 434 F.3d 972 (7th Cir. 2006); Ziemba v. Armstrong, No. 3:02CV2185(DJS), 2004 U.S. Dist. LEXIS 432, at *7 (D. Conn. Jan. 14, 2004) (*unpublished*) (holding that allegations of withdrawal, panic attacks, pain similar to a heart attack, difficulty breathing and profuse sweating, resulting from withdrawal of psychiatric medication, may have been physical injures for the purposes of 1997e(e)). *But see* Chatham v. Adcock, No. 3:05-CV-0127-JTC, 2007 U.S. Dist. LEXIS 72523, at *48–49 (N.D. Ga. Sept. 28, 2007) (*unpublished*) (holding hallucinations, anxiety, and nightmares resulting from denial of Xanax did not meet the physical injury requirement).

487. *See* Munn v. Toney, 433 F.3d 1087, 1089, 2006 U.S. App. LEXIS 1073, at *4–5 (8th Cir. 2006) (*unpublished*) (holding that claims of headaches, cramps, nosebleeds, and dizziness resulting from deprivation of blood pressure medication "does not fail . . . for lack of physical injury"); DeRoche v. Funkhouse, No. CV 06-1428-PHX-MHM (MEA), 2008 U.S. Dist LEXIS 31166, at *17–19 (D. Ariz. Mar. 28, 2008) (*unpublished*) (further liver damage and daily pain, swelling, nausea and hypertension from lack of treatment for Hepatitis C satisfied the physical injury requirement); Clifton v. Eubank, 418 F. Supp. 2d 1243, 1248, 2006 U.S. Dist. LEXIS 29710, at *16–18 (D. Colo. 2006) (addressing "prolonged" pain attendant upon labor and stillbirth). *But see* Perez v. U.S., No. 1:04-CV-1944, 2008 U.S. Dist. LEXIS 42906, at *5–7 (M.D. Pa. May 30, 2008) (*unpublished*) (holding that temporary dizziness, headaches, weakness, back pain, and nausea resulting from an asthma attack, which did not require medical attention, were *de minimis*); Tuft v. Chaney, No. H-06-2529, 2007 U.S. Dist. LEXIS 83817, at *7–8 (S.D. Tex. Nov. 9, 2007) (*unpublished*) (holding complaints of "generalized 'fatigue' and 'stress'" resulting from MRSA and Hepatitis C were not physical injuries).

488. Young v. Beard, No. 06-160, 2007 WL 1549453, at *4 (W.D. Pa. May 22, 2007) (*unpublished*) (holding that damages sought for present and future injury from denial of cholesterol medication and testing of blood pressure, blood sugar and cholesterol more often than every six months, sufficed at the pleading stage), *vacated on other grounds*, 2007 WL 2012604 (W.D. Pa. July 3, 2007) (*unpublished*); Young v. Beard, No. CIV.A.06-160, 2008 WL 934436 (W.D. Pa. Apr. 2, 2008); Mejia v. Goord, No. 9:03-CV-124, 2005 U.S. Dist. LEXIS 32394, at *16–17 (N.D.N.Y. Aug. 16, 2005) (*unpublished*) (denying summary judgment for the state where prisoner was denied a low-fat diet for coronary condition). *But see* Cotter v. Dallas County Sheriff, No. 3:05-CV-2225-H, 2006 WL 1652714, at *3–4 (N.D. Tex. June 15, 2006) (*unpublished*) (holding that plaintiff's allegations that he had ben exposed to staphylococcus bacteria and that the bacteria still lay dormant in his blood was not a physical injury).

489. Williams v. Humphreys, 2005 U.S. Dist. LEXIS 44027, at *7 (S.D. Ga. July 27, 2005) (*unpublished*), *adopted by* Williams v. Humphreys, No. CIV A CV504-053, 2005 U.S. Dist. LEXIS 44029 (S.D. Ga. Sept. 13, 2005) (*unpublished*) (holding allegation of 12-pound weight loss, abdominal pain, and nausea resulting from denial of pork substitute at meals sufficiently alleged physical injury). *But see* Linehan v. Crosby, No. 4:06-cv-00225-MP-WCS, 2008 WL 3889604 at *13 (N.D. Fla. Aug. 20, 2008) (*unpublished*) (holding that weight loss from denial of a kosher diet did not meet physical injury requirement); Green v. Padula, No. 9:07-0028-CMC-GCK, 2007 U.S. Dist. LEXIS 87038, at *5–9 (D.S.C., Sept. 25, 2007) (*unpublished*) (holding that a three-day denial of food and several hours' restraint during strip cell placement did not meet the physical injury requirement), *report and recommendation rejected in part on other grounds,* No. 9:07-0028-CMC-GMK, 2007 U.S. Dist. LEXIS 85370 (D.S.C., Nov. 19, 2007) (*unpublished*).

490. Carter v. United States, 3:11-CV-1669, 2012 WL 2115343 (M.D. Pa. June 11, 2012) (*unpublished*) (holding allegations of becoming violently ill and bed-ridden for three days after eating contaminated food sufficient to withstand a motion to dismiss his FTCA claims). *But see* Mayes v. Travis State Jail, No. A-06-CA-709-SS, 2007 U.S. Dist. LEXIS 47317, at *13–14 (W.D. Tex. June 29, 2007) (*unpublished*) (holding diarrhea allegedly caused by spoiled food was *de minimis*).

491. Williams v. Goord, 111 F. Supp. 2d. 280, 291 n.4 (S.D.N.Y. 2000) (holding that allegation of a 28-day denial of exercise might satisfy 1997e(e) standard for physical injury).

492. Smith v. Leonard, 244 F. App'x 583, 584 (5th Cir. 2007) (*unpublished*) (stating headaches, sinus problems, trouble breathing, blurred vision, irritated eyes, and fatigue, allegedly from exposure to toxic mold, might satisfy § 1997e(e)

infliction of pain or illness through extreme conditions of confinement,[493] physical abuse,[494] or denial of medical care;[495] and stillbirth or miscarriage.[496] However, there are many cases that seem to involve similar or equally serious conditions, but that courts have held do not satisfy the PLRA's physical injury requirement.[497] For example, some courts have stated that the alleged infliction of severe physical pain does not satisfy the statute.[498] Even outright torture might not meet the requirement as long as it is done with enough care to leave no marks.[499] In addition, some courts have also dismissed small visible bodily injuries as *de minimis*.[500]

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standard); Enigwe v. Zenk, No. 03-CV-854 (CBA), 2006 U.S. Dist. LEXIS 66022, at *19 (E.D.N.Y. Sept. 15, 2006) (*unpublished*) (finding that allegation of exposure to environmental tobacco smoke resulting in dizziness, uncontrollable coughing, lack of appetite, runny eyes and high blood pressure may meet physical injury requirement). *But see* Thompson v. Joyner, No. 5:06-CT-3013-FL, 2007 U.S. Dist. LEXIS 96515, at *14–15 (E.D.N.C. May 29, 2007) (*unpublished*) (holding that pepper spraying was *de minimis*), *aff'd*, 251 F. App'x 826 (4th Cir. 2007); Hogg v. Johnson, No. 2:04-CV-0024, 2005 U.S. Dist. LEXIS 851, at *3, *7 (N.D. Tex. Jan. 21, 2005) (*unpublished*) (dismissing allegation that plaintiff was "gassed three times for asking for a mattress and standing up for his rights" for lack of physical injury).

493. Rinehart v. Alford, No. 3:02-CV-1565-R, 2003 U.S. Dist. LEXIS 1789, at *4–5 (N.D. Tex. Mar. 3, 2003) (*unpublished*) (holding that severe headaches and back pain, caused by bright 24-hour light and sleeping on a narrow bench, sufficiently alleged physical injury).

494. Payne v. Parnell, 246 F. App'x 884, 887–88 (5th Cir. 2007) (holding that being jabbed with a cattle prod is not *de minimis*); Lawson v. Hall, No. 2:07-0334, 2009 U.S. Dist. LEXIS 60924, at *10–11 (S.D. W.Va. July 16, 2009) (*unpublished*) (finding that the use of force may have been impermissible "even in the absence of severe injuries"); Zamboroski v. Karr, No. 04-73194, 2007 U.S. Dist. LEXIS 11140, at *15–16 (E.D. Mich. Feb. 16, 2007) (*unpublished*) (holding severe pain resulting from lack of moving during nine months in restraints, along with rashes and scarring on his arms, and inability to raise his arms over his head when released, were not *de minimis*). *But see* Dixon v. Toole, 225 F. App'x 797, 799 (11th Cir. 2007) (*per curiam*) (holding "mere bruising" from 17.5 hours in restraints was *de minimis*; prisoner actually complained of "welts").

495. Clifton v. Eubank, 418 F. Supp. 2d 1243, 1248 (D. Colo. 2006) (finding that the delay and insufficiency of medical treatment resulted in actual, physical effects that provide sufficient basis for a recognizable claim); *But see* Leon v. Johnson, 96 F.Supp.2d 244, 248 (W.D.N.Y. 2000) (finding delayed receipt of HIV/AIDS medication did not constitute physical injury when no adverse health effects from delay were shown); Jones v. Sheahan, 2000 U.S. Dist. LEXIS 14130, at *22–23 (N.D.Ill. Sept. 22, 2000) (*unpublished*) (finding *de minimis* physical injury when plaintiff alleged that delay of surgery for removing tumors resulted in "anguish and worry" that the tumors might be malignant, even though there were no physical effects).

496. Clifton v. Eubank, 418 F. Supp. 2d 1243, 1245–51 (D. Colo. 2006) (holding that losing one's child, and the pain caused by labor and stillbirth, both separately meet the physical injury standard).

497. *See* Darvie v. Countryman, No. 9:08-CV-0715, 2008 U.S. Dist. LEXIS 52797, at *23–24 (N.D.N.Y. July 10, 2008) (*unpublished*) (characterizing "anxiety, depression, stress, nausea, hyperventilation, headaches, insomnia, dizziness, appetite loss, weight loss, etc.," as "essentially emotional in nature"); Trevino v. Johnson, No. 9:05cv171, 2005 U.S. Dist. LEXIS 40438, at *13–14 (E.D. Tex. Dec. 8, 2005) (*unpublished*) (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); Abney v. Valdez, No. 3-05-CV-1645-M, 2005 U.S. Dist. LEXIS 44390, at *6–7 (N.D. Tex. Oct. 27, 2005) (*unpublished*) (holding that more frequent urination, near-daily migraine headaches, and itchiness and watery eyes, did not meet the physical injury requirement).

498. Calderon v. Foster, No. 5:05-cv-00696, 2007 U.S. Dist. LEXIS 24505, at *27 (S.D. W.Va. Mar. 30, 2007) (*unpublished*) (pain, standing alone, is *de minimis*), *aff'd*, 264 F. App'x 286 (4th Cir. 2008) (*unpublished*); Ladd v. Dietz, No. 4:06cv3265, 2007 U.S. Dist. LEXIS 3782, at *1–4 (D. Neb. Jan. 17, 2007) (*unpublished*) (holding pain resulting from placing ear medication in plaintiff's eye was "not enough" to constitute physical injury); Clifton v. Eubank, 418 F. Supp. 2d 1243, 1246 (D. Colo. 2006); Olivas v. Corr. Corp. of Am., 408 F. Supp. 2d 251, 254, 259 (N.D. Tex. 2006) (dismissing as *de minimis* extreme pain resulting from delay in treatment of broken teeth with exposed nerve).

499. For example, in Jarriett v. Wilson, 414 F.3d 634 (6th Cir. 2005), a prisoner complained 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 10 hours, unable to sit for more than 30 or 40 minutes of the total time, in severe pain, with clear, visible swelling in a portion of his leg that had previously been injured in a motorcycle accident, during which time he repeatedly asked to see a doctor. Jarriett v. Wilson, 414 F.3d 634, 644 (6th Cir. 2005) (dissenting opinion). The appeals court affirmed the dismissal of his claim as *de minimis* on the ground that the plaintiff did not complain about his leg upon release or shortly thereafter when he saw medical staff. Jarriett v. Wilson, 414 F.3d 634, 643 (6th Cir. 2005). Jarriett conflicts with Payne v. Parnell, 246 F. App'x 884 (5th Cir. 2007) (*unpublished*), in which the court, referring both to § 1997e(e) and the 8th Amendment, held that being jabbed with a cattle prod was not *de minimis*, despite the lack of long-term damage, in part because it was "calculated to produce real physical harm." Payne v. Parnell, No. 05-20687, 246 F. App'x 884, 889 (5th Cir. 2007).

500. *See* Gibson v. Galaza, No. CVF00 5381 AWI WMW P, 2006 U.S. Dist. LEXIS 21679, at *27–28 (E.D. Cal. Mar. 29, 2006) (*unpublished*) (holding multiple abrasions, a small cut on the lip, and a bruised right knee are *de minimis*); *but see* Cotney v. Bowers, No. 2:03-cv-1181-WKW (WO), 2006 U.S. Dist LEXIS 69523, at *25 (M.D. Ala. Sept. 26, 2006)

It is hard to know exactly what satisfies the physical injury requirement of the PLRA because most court decisions do not specifically define what "physical injury" means, other than "more than *de minimis*." One exception is a district court decision that cited dictionary definitions of "physical" and "injury."[501] The district court found "physical" to mean "of or relating to the body," and "injury" to mean "an act that damages, harms, or hurts; an unjust or undeserved infliction of suffering or harm."[502] The court held that a reasonable jury could find that the statute was 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 ogling (staring) by male prison staff and construction workers).[503] This district court case gives a broad interpretation of the language of the statute, and other courts have not given any alternative approach that is helpful in assessing difficult cases. You should note, though, that this opinion was unpublished, which means it may carry less weight.

There may be a solution to the lack of clarity in defining physical injury under the PLRA. Another federal statute, 18 U.S.C. § 242, makes it a crime for someone acting under color of state law to deprive another person of his or her federal civil rights.[504] Section 242 requires a showing of "bodily injury," but the statute does not define "bodily injury."[505] However, several other federal criminal statutes define "bodily injury" as meaning: "(A) a cut, abrasion, bruise, burn, or disfigurement; (B) physical pain; (C) illness; (D) impairment of a function of a bodily member, organ, or mental faculty; or (E) any other injury to the body, no matter how temporary."[506] This definition of "bodily injury," found in other federal statues, could also be applied in Section 1997e(e).[507] As far as we know, no court has yet considered this idea. If you are faced with a claim that your injury isn't severe enough to satisfy the PLRA, but it falls within the statutory definition of bodily injury, you could highlight the definition of "bodily injury" in 18 U.S.C. §§ 831(f)(5), 1365(g)(4), 1515(a)(5), and 1864(d)(2), and argue that there is no difference between "bodily injury" and "physical injury" under the PLRA.

G. Attorneys' Fees

The PLRA limits the attorneys' fees prisoners can recover. These limitations do not directly affect you if you are moving forward *pro se*, but they do affect your ability to get a lawyer.

Recovery of attorneys' fees under 42 U.S.C. § 1988[508] are barred in "any action brought by a prisoner"[509] except when the fees are "directly and reasonably incurred in proving an actual violation of the plaintiff's

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(*unpublished*) (holding bruised ribs that took weeks to heal was not *de minimis*); Hardin v. Fullenkamp, No. 4-99-CV-80723, 2001 U.S. Dist. LEXIS 22335, at *19–21 (S.D. Iowa June 22, 2001) (*unpublished*) (holding evidence prisoner was cut, and bruised, together with affidavits other prisoners wrote that they saw him beaten and limping, met the standard).

501. Waters v. Andrews, No. 97-CV-407, 2000 U.S. Dist. LEXIS 16004, at *25 (W.D.N.Y. Oct. 16, 2000) (*unpublished*).

502. Waters v. Andrews, No. 97-CV-407, 2000 U.S. Dist. LEXIS 16004, at *25 (W.D.N.Y. Oct. 16, 2000) (*unpublished*).

503. Waters v. Andrews, No. 97-CV-407, 2000 U.S. Dist. LEXIS 16004, at *25 (W.D.N.Y. Oct. 16, 2000) (*unpublished*); Glaspy v. Malicoat, 134 F. Supp. 2d 890, 894–95 (W.D. Mich. 2001) (treating denial of toilet access to a non-prisoner as a deprivation of liberty). *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); Parter v. Valone, No. 06-CV-10561, 2006 U.S. Dist. LEXIS 96808, at *7–8 (E.D. Mich. Oct. 3, 2006) (*unpublished*) (holding a prisoner who was denied the use of a bathroom and urinated on himself suffered only mental or emotional injury).

504. 18 U.S.C. § 242 (2012).

505. 18 U.S.C. § 242 (2012) (providing "if bodily injury results from the acts committed in violation of this section ... [the defendant] shall be fined under this title or imprisoned not more than ten years, or both").

506. 18 U.S.C. § 831(f)(5) (2012); *accord* 18 U.S.C. § 1365(g)(4) (2012); 18 U.S.C. § 1515(a)(5) (2012); 18 U.S.C. § 1864(d)(2) (2012).

507. "When Congress uses, but does not define a particular word, it is presumed to have adopted that word's established meaning." United States v. Myers, 972 F.2d 1566, 1572 (11th Cir. 1992) (citing Davis v. Mich. Dep't of Treasury, 489 U.S. 803, 806, 109 S. Ct. 1500, 1503, 103 L. Ed. 2d 891, 899 (1989)). Although § 1997e(e) uses the word "physical" rather than "bodily," it is hard to see what real difference that makes.

508. 42 U.S.C. § 1988 (2012) is the statute that authorizes attorneys' fees for actions filed under 42 U.S.C. § 1983.

509. For purposes of these provisions, ex-prisoners are not prisoners, and a case filed after the plaintiff's release is not governed by the PLRA fees provisions. Greig v. Goord, 169 F.3d 165, 167 (2d Cir. 1999) (dismissing a former inmate's action because he was no longer considered a "prisoner" as required by the relevant provision); Doe v. Washington Cnty, 150 F.3d 920, 924 (8th Cir. 1998) (PLRA provisions about attorney's fees do not apply to a plaintiff who was not a prisoner

rights" under a statute that allows fees to be awarded.[510] It is unclear whether this provision also applies in cases that are settled instead of going to trial. Several courts have held that suits that are settled may allow an award of fees if there are findings of legal violation, or a record that suggests there was a violation of the plaintiff's rights, when the suit is seeking an injunction.[511] Thus, while a plaintiff does not need to win a case to be eligible for fee awards, the case must relate to *proving* a violation of his rights.[512] Fees may also be awarded if they are "directly and reasonably incurred in enforcing the relief ordered for the violation."[513] The statute says that fees must be "proportionately related to the court ordered relief for the violation,"[514] but does not define what "proportionate" means; therefore, the court will determine what fees should be awarded. Defendants may be required to pay fee awards of up to 150 percent of any damages awarded—but no more.[515]

Hourly rates for lawyers' fees are limited to 150 percent of the Criminal Justice Act ("CJA") rates for criminal defense representation set in 18 U.S.C. § 3006A.[516] Unfortunately, this rate is much lower than the market rates most lawyers usually charge, and the amount usually awarded in non-prisoner cases, and it probably discourages many lawyers from taking prisoners' cases.[517]

Prisoners are more directly affected by the provision that says, "up to" twenty-five percent of a monetary judgment can be applied to the fee award. If the fee award is not greater than 150 percent of the judgment, the defendants must pay the rest.[518] Most courts have held that the term "up to" allows the courts some discretion in determining how much of a winning prisoner-plaintiff's damage award may be contributed to attorneys' fees.[519] Several courts have mistakenly assumed that the twenty-five percent figure is mandatory, or have applied it without discussing the question.[520]

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at the time of filing his suit). The attorneys' fees provisions are not limited to cases about prison conditions. Robbins v. Chronister, 435 F.3d 1238, 1241–44 (10th Cir. 2006) (en banc) (applying PLRA attorney's fees restrictions to a case about events before prisoner's incarceration); Jackson v. State Bd. of Pardons and Paroles, 331 F.3d 790, 794–96 (11th Cir. 2003) (applying PLRA restrictions to a case about parole eligibility hearings and the length of confinement, and not restricting it to lawsuits about prison conditions).

510. 42 U.S.C. § 1997e(d)(1)(A) (2012). *See*, *e.g.*, Armstrong v. Davis, 318 F.3d 965, 973–74 (9th Cir. 2003) (holding that fees in Americans with Disabilities Act and Rehabilitation Act suits are not governed by the PLRA fees limitations).

511. *See* Laube v. Allen, 506 F. Supp. 2d 969, 979–80 (M.D. Ala. Aug. 31, 2007) (holding that fees may be awarded for injunctive settlements to the extent they first satisfy the PLRA's "need-narrowness-intrusiveness" requirement 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); Lozeau v. Lake County, Mont., 98 F. Supp. 2d 1157, 1168, 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.").

512. Laube v. Allen, 506 F. Supp. 2d 969, 980 (M.D. Ala. Aug. 31, 2007) ("[T]he PLRA's attorney's-fee language does not require that the fee be incurred in *having proved* an actual violation of the plaintiff's rights, only that the fee be incurred in *proving* a violation.").

513. 42 U.S.C. § 1997e(d)(1)(B)(ii) (2012); *see* Ilick v. Miller, 68 F. Supp. 2d 1169, 1173 n. 1 (D. Nev. 1999) (stating that there was sufficient evidence to demonstrate that the post-PLRA fees were "directly and reasonably" incurred in establishing the violation of the prisoner's rights); West v. Manson, 163 F. Supp. 2d 116, 120 (D. Conn. 2001) (holding fees are recoverable for post-judgment monitoring).

514. 42 U.S.C. § 1997e(d)(1)(B)(i) (2012).

515. 42 U.S.C. § 1997e(d)(2) (2012); *see* Pearson v. Welborn, 471 F.3d 732, 742–44 (7th Cir. 2006) (holding fees limited to $1.50 where the plaintiff recovered only $1.00 in nominal damages); Boivin v. Black, 225 F.3d 36, 40–46 (1st Cir. 2000) (going through an extensive analysis of the constitutional basis for the fee cap and arriving at the same conclusion, that fees are limited to 150 percent of recovered nominal damages). This 150 percent limit does not apply to cases in which the plaintiff seeks and receives an injunction as well as damages. Walker v. Bain, 257 F.3d 660, 667 n.2 (6th Cir. 2001) (noting that §1997e(d)(2) does not apply if non-monetary relief is granted).

516. 42 U.S.C. § 1997e(d)(3) (2012).

519. Although the hourly rate is higher than the Criminal Justice Act rates (up to 150 percent), lawyers defending clients under the CJA get paid for their time whether they win or lose. 42 U.S.C. § 1997e(d)(3) (2012).

518. 42 U.S.C. § 1997e(d)(2) (2012); *see* Torres v. Walker, 356 F.3d 238, 243 (2d Cir. 2004) (holding that a case resolved by the "so ordered" stipulation was not governed by the 150 percent limit, since there was no "money judgment").

519. *See* Boesing v. Hunter, 540 F.3d 886, 892 (8th Cir. 2008) (affirming the district court's application of one percent of $25,000 recovery); Siggers-El v. Barlow, 433 F. Supp. 2d 811, 822–23 (E.D. Mich. 2006) (applying $1.00 of the recovery to attorneys' fees, noting that the jury found that defendants had lied about their conduct and awarded significant damages as a punishment and deterrent).

520. *See* Jackson v. Austin, 267 F. Supp. 2d 1059, 1071 (D. Kan. 2003) (holding that "the Court must automatically

A majority of courts have rejected arguments that attorney fee restrictions deny prisoners equal protection.[521]

H. Waiver of Reply

The PLRA states in 42 U.S.C. § 1997e(g):

> (g) Waiver of Reply.
> (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 [42 U.S.C. § 1983] . . . 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.[522]

This provision means that in prisoners' suits, the defendants do not have to answer the complaint unless the court tells them to answer. Courts can only do this if the plaintiff has a "reasonable opportunity to prevail on the merits."[523] In practice, courts generally direct defendants to answer if the case survives the court's initial screening or a motion to dismiss, which means that the complaint states a claim for which relief can be granted.[524]

If you amend the complaint to add parties after the initial screening, the court might not direct the new defendants to answer. When you move to amend a complaint, always ask the court to direct the defendants to answer and grant your motion to amend. If you amend the complaint as a matter of course (when no motion is required) and the defendants do not answer, then you may need to move to direct them to answer.[525]

The provision that "[n]o relief shall be granted to the plaintiff unless a reply has been filed" describes "default judgments," which are judgments granted in favor of the plaintiff if a defendant fails to respond to the complaint.[526] Although it is possible to read this provision to say that courts cannot grant default judgments if defendants refuse to reply, courts often grant default judgments in prison cases.[527] If the defendants in your case do not respond, and the court does not want to enter a default judgment, try moving to hold the defendants in contempt of the court's order for them to reply to your complaint. Also ask the court for contempt damages equal to what you would get if the case went forward.[528]

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apply plaintiff's fee award against his damages to the extent that it does not exceed 25[%] of the damages"); Beckford v. Irvin, 60 F. Supp. 2d 85, 89–90 (W.D.N.Y. 1999) (applying twenty-five percent without discussion).

521. Johnson v. Daley, 339 F.3d 582, 597 (7th Cir. 2003) (en banc) (finding no constitutional violation of equal protection); Jackson v. State Bd. of Pardons and Paroles, 331 F.3d 790, 796–98 (11th Cir. 2003) (holding that §1997e(d) passed the rational basis test and was therefore constitutional); Carbonell v. Acrish, 154 F. Supp. 2d 552, 561–66 (S.D.N.Y. 2001) (upholding 150 percent limit as a rational means to achieve Congress's end).

522. 42 U.S.C. § 1997e(g) (2012).

523. 42 U.S.C. § 1997e(g) (2012).

524. *See* Daniel v. Power, No. 04-CV-789-DRH, 2005 U.S. Dist. LEXIS 17235, at *6 (S.D. Ill. July 20, 2005) (*unpublished*) (holding that after an initial screening, "[d]efendants [must] 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)").

525. Amendment by motion and as a matter of course are discussed in Fed. R. Civ. P. 15.

526. Fed. R. Civ. P. 55(a) ("When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default.").

527. *See* Cameron v. Myers, 569 F. Supp. 2d 762, 766 (N.D. Ind. 2008) (recommending a default judgment in favor of a *pro se* prisoner plaintiff).

528. On contempt damages, *see* Hutto v. Finney, 437 U.S. 678, 691 (1978) ("If a state agency refuses to adhere to a court order, a financial penalty may be the most effective means of insuring compliance."); Benjamin v. Sielaff, 752 F. Supp. 140, 148–49 (S.D.N.Y. 1990) (holding a prison accountable for compensatory damages to be paid to any member of

I. Hearings by Telecommunication and at Prisons

The PLRA added a new section to the Civil Rights of Institutionalized Persons Act ("CRIPA"):

> (f) Hearings.
> (1) To the extent practicable, in any action brought with respect to prison conditions in Federal court pursuant to section 1979 of the Revised Statutes of the United States (42 U.S.C. § 1983), 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.[529]

For years many federal courts have been using telephones and videos in court proceedings and holding proceedings at prisons.[530] This provision concerning hearings at the prison raises new legal and practical problems. The statute refers to holding "hearings" but not "trials" at the prison, leaving it unclear whether evidentiary proceedings are included.[531] Conducting a trial or evidentiary proceeding by video conferencing raises serious questions of fairness, particularly in jury trials. In *United States v. Baker*,[532] a non-PLRA case, the Fourth Circuit Court of Appeals upheld the constitutionality of holding prisoners' psychiatric commitment hearings by video. However, the court was careful to note that such decisions are generally based on expert testimony and depend neither on the appearance of the witnesses nor the "impression" made by the person being committed, and that the proceeding does not involve fact-finding in the usual sense.[533] That description does not fit most evidentiary proceedings in prisoner cases, and courts have traditionally expressed a strong preference for having prisoner plaintiffs physically present in court for trial.[534]

If the court does hold a hearing by telephone or video in your case, it is your responsibility to subpoena any witnesses you wish to present or cross-examine (or, at the very least, provide contact information to the court), just as in a live hearing in the courtroom.[535]

J. Revocation of Earned Release Credit

The PLRA adds a new section concerning earned release credit:

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the prisoner plaintiff class who, in the future, as a new admission, is held in a non-housing area for more than twenty-four hours; Feliciano v. Colon, 704 F. Supp. 16, 20 (D.P.R. 1988) ("Sanctions in civil contempt proceedings may be employed for either or both of two purposes: to coerce defendants into compliance with the Court's order, and to compensate the complainant for losses sustained.").

529. 42 U.S.C. § 1997e(f) (2012); *see* Moss v. Gomez, No. 97-56234, 1998 U.S. App. LEXIS 27753, at *4 (9th Cir. Oct. 26, 1998) (*unpublished*) (holding district court should have considered teleconferencing as an alternative to producing prisoner witness who was a security risk).

530. *See, e.g.*, Hall v. Bellmon, 935 F.2d 1106, 1109 (10th Cir. 1991) (noting use of telephone evidentiary hearing to assess frivolousness of claim).

531. *But see* Bickham v. Blair, No. Civ.A. 98-881, 1999 U.S. Dist. LEXIS 12773, at *3 (E.D. La. Aug. 16, 1999) (*unpublished*) (noting that an evidentiary hearing was held by telephone); Edwards v. Logan, 38 F. Supp. 2d 463, 466–68 (W.D. Va. 1999) (authorizing video jury trial for Virginia prisoner held in New Mexico; analogizing to PLRA's provisions concerning pretrial proceedings).

532. United States v. Baker, 45 F.3d 837 (4th Cir. 1994).

533. United States v. Baker, 45 F.3d 837, 845 (4th Cir. 1994).

534. Hernandez v. Whiting, 881 F.2d 768, 770–72 (9th Cir. 1989); Muhammad v. Warden, Balt. City Jail, 849 F.2d 107, 113 (4th Cir. 1988); Poole v. Lambert, 819 F.2d 1025, 1029 (11th Cir. 1987).

535. *See* Bickham v. Blair, No. Civ.A. 98-881, 1999 U.S. Dist. LEXIS 12773, at *3 (E.D. La. Aug. 16, 1999) (*unpublished*), *aff'd* 228 F.3d 408 (5th Cir. 2000).

> § 1932. Revocation of earned release credit
>
> In any civil action brought by an adult convicted of a crime and confined in a Federal correctional facility, the court may order the revocation of such earned good time credit under section 3624(b) of title 18, United States Code, that has not yet vested, if, on its own motion or the motion of any party, the court finds that—
>
> (1) the claim was filed for a malicious purpose;
>
> (2) the claim was filed solely to harass the party against which it was filed; or
>
> (3) the claimant testifies falsely or otherwise knowingly presents false evidence or information to the court.[536]

This provision, which applies only to federal prisoners, allows a court to take away good time credit based on what a court thinks about a prisoner's litigation activities. Though the statute raises substantial questions about due process of law, it provides no procedural protections. It is not clear what due process requirements would apply. The only reported decisions applying this provision do not discuss due process.[537]

This provision of the PLRA governs proceedings in federal court and sometimes applies in state court. No courts have decided this issue, however.

K. Diversion of Damage Awards

The PLRA includes two provisions about awarding damages in a successful suit brought by a prisoner:

> 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.
>
> 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 payment of any such compensatory damages.[538]

These provisions say that any compensatory damages won by a prisoner in a lawsuit will be first used to pay any restitution orders or damages that the prisoner has not yet paid. There is very little case law about these statutes.[539] One important question is whether the phrase "compensatory damages awarded" includes settlements of damage claims. As a matter of plain English, it would seem not, but we are not aware of any relevant decisions.

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536. 28 U.S.C. § 1932 (2012). Note that there is another statute with the same Section number—entitled "Judicial Panel on Multidistrict Litigation"—but this citation is correct.

537. *See* Rice v. Nat'l Sec. Council, 244 F. Supp. 2d 594, 597 (D.S.C. 2001) (dismissing the action as frivolous and malicious), *aff'd*, 46 F. App'x 212 (4th Cir. 2002).

538. Prison Litigation Reform Act of 1995, Pub. L. No. 104–134, § 808, 110 Stat. 1321–66, 1321–76 (1996). This provision is not codified, and appears after 18 U.S.C. § 3626 (2012) under the Historical and Statutory Notes heading.

539. *See* Loucony v. Kupec, No. 3:98 CV 61(JGM), 2000 U.S. Dist. LEXIS 6620, at *4–5 (D. Conn. Feb. 17, 2000) (*unpublished*) (holding a person sued after release from prison was not a "prisoner" and the statute did not apply to him).

L. Injunctions

The PLRA contains a number of provisions restricting courts' abilities to enter and to maintain "prospective relief" (mostly injunctions, or court orders) in prison cases.[540]

1. Entry of Prospective Relief

Under the PLRA, courts may not enter prospective relief in prison cases unless:

> [T]he 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.[541]

This standard is not very different from the law in effect before the PLRA,[542] though the requirement that the court make these specific findings is new. The statute also bars injunctive relief which requires state or local officials to exceed their normal local authority, unless 1) federal law requires the relief, 2) the relief is necessary to fix a federal law violation, and 3) no other relief will correct the violation.[543] This provision also appears to be consistent with prior law.[544] The PLRA does limit federal courts to prospective relief which corrects violations of "*federal* rights," which means a court cannot enter an injunction based on a violation of state or local law.[545]

2. Preliminary Injunctions

Preliminary injunctions must meet the same standards that apply to other prospective relief and automatically expire after ninety days unless the court makes the order final.[546] But, a court may grant a new preliminary injunction after the first has expired if the plaintiff shows that the conditions justifying the first injunction still exist.[547]

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540. One federal appeals court has held that under the PLRA's language, punitive damages are "prospective relief" subject to the PLRA's limitations. Johnson v. Breeden, 280 F.3d 1308, 1325 (11th Cir. 2002). Other courts have mostly ignored this decision. One exception is Rieara v. Sweat, CIVA CV205-174, 2007 U.S. Dist. LEXIS 18644 (S.D. Ga. Mar. 16, 2007) (finding that punitive damages are a form of prospective relief under the PLRA). These two cases seem conceptually wrong because the prospective relief provisions are clearly written to deal with injunctions and make very little sense applied to punitive damages. *See, e.g.*, Tate v. Dragovich, No. 96-4495, 2003 U.S. Dist. LEXIS 14353, at *22 (E.D. Pa. Aug. 14, 2003) (stating that the court could find no case applying the prospective relief provision to a punitive damage award).

541. 18 U.S.C. § 3626(a) (2012)*; see* 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"); Gomez v. Vernon, 255 F.3d 1118, 1130–1131 (9th Cir. 2001) (affirming injunction benefiting named individuals; though an unconstitutional policy had been found, it had been directed at those persons); Morrison v. Garraghty, 239 F.3d 648, 661 (4th Cir. 2001) (affirming injunction prohibiting the defendants from "refusing [the plaintiff] a religious exemption from existing property restrictions *solely* on the basis of his lack of membership in the Native American race.").

542. *See* Gilmore v. California, 220 F.3d 987, 998 (9th Cir. 2000) (holding that courts are required to "give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief"); Smith v. Ark. Dep't of Corr., 103 F.3d 637, 647 (8th Cir. 1996) (holding that the PLRA "merely codifies existing law and does not change the standards for determining whether to grant an injunction").

543. 18 U.S.C. § 3626(a)(1)(B) (2012); *see* Perez v. Hickman, No. C 05-05241 JSW, 2007 U.S. Dist. LEXIS 44432, at *6–7, 16–17 (N.D. Cal. June 12, 2007) (ordering increase in salaries paid to prison dentists, contrary to state law, and finding PLRA standards met).

544. *See*, *e.g.*, Stone v. City & County of San Francisco, 968 F.2d 850, 861–65 (9th Cir. 1992) (holding, pre-PLRA, that provisions of consent decree that overrode state law were not the least intrusive option available and were thus prohibited); LaShawn A. v. Barry, 144 F.3d 847, 854 (D.C. Cir. 1998) (stating, pre-PLRA, that "[d]isregarding local law . . . is a grave step and should not be taken unless absolutely necessary").

545. Handberry v. Thompson, 446 F.3d 335, 344–46 (2d Cir. 2006) (holding that in prison cases the PLRA overrides federal courts' "supplemental jurisdiction" to enforce state law).

546. 18 U.S.C. § 3626(a)(2) (2012).

547. *See, e.g.*, Coleman v. Brown, No. CIV. S-90-520 LKK/JFM(PC), 2013 U.S. Dist. LEXIS 50900, at *119–20 (E.D. Cal. Apr. 5, 2013) (upholding an injunction where the violation of the prisoners' federal rights were ongoing); Mayweathers

3. Prisoner Release Orders

The PLRA contains special rules for "prisoner release orders," which it defines as "any order . . . that has the purpose or effect of reducing or limiting the prison population, or that directs the release from or non-admission of prisoners to a prison."[548] Such orders are permitted only if previous, less intrusive relief has failed to fix the federal law violation in a reasonable time.[549] In other words, releasing prisoners to correct the violation will not be the first type of relief tried. A release order must be supported by clear and convincing evidence that "crowding is the primary cause of the violation of a Federal right" and no other relief will remedy the violation.[550] One court has held that these requirements for prison release orders do not apply when the prison is trying to modify an order that existed before the PLRA was enacted.[551]

The PLRA requires three-judge courts to issue prisoner release orders. Either the party asking for the order, or the district court itself, can request these orders.[552] It is not always clear how the three-judge court requirement applies when a person is asking for different kinds of relief.[553] One court refused to hold a three-judge court to consider an individual prisoner's "[m]otion for [his own] Prisoner Release" that failed to allege, except in conclusory terms, how overcrowding violated his constitutional rights.[554] In 2011, the Supreme Court upheld a prisoner release order requiring the State of California to reduce its prison population by 40,000 inmates due to severe overcrowding.[555]

The PLRA permits state and local officials to intervene to oppose prisoner release orders.[556]

4. Termination of Judgments

Under the PLRA, court orders in prison litigation, including consent judgments (a judgment the parties agree to), may be terminated after two years unless the court finds that there is a "current and ongoing violation" of federal law.[557] After this two-year period, orders may be challenged every year.[558] An order may be challenged at any time if it was entered without the court finding that it "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."[559] Orders without these findings may be terminated immediately unless a current and ongoing federal law violation is shown. A "violation of the Federal right" means a violation of the federal Constitution, statutes, or regulations. Violation of the court order itself is not enough.[560]

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v. Newland, 258 F.3d 930, 935–36 (9th Cir. 2001) (upholding an injunction when the defendants were subject to the injunction at the time of appeal, the injunctions were identical, and they raised no new issues unable to be reviewed by the court on appeal).

548. 18 U.S.C. § 3626(g)(4) (2012). Courts disagree on whether a provision that limits the prison population automatically counts as a prisoner release order. *See* Berwanger v. Cottey, 178 F.3d 834, 836 (7th Cir. 1999) (noting that a maximum population provision is a prisoner release order). *But see* Inmates of Suffolk County Jail v. Sheriff of Suffolk County, 952 F. Supp. 869, 883 (D. Mass. 1997) (holding that a population cap by itself is not a prisoner release order without an accompanying order to release), *aff'd as modified and remanded on other grounds*, 129 F.3d 649 (1st Cir. 1997).

549. 18 U.S.C. § 3626(a)(3)(A) (2012).

550. 18 U.S.C. §§ 3626(a)(3)(E)(i)–(ii) (2012).

551. Berwanger v. Cottey, 178 F.3d 834, 836 (7th Cir. 1999) (citing 18 U.S.C. § 3626(a)(3)(A) (2012) and finding that the modification request could not be based on the PLRA because the order existed before the Act; however, the court found that PLRA rules about *terminating* relief could still apply).

552. 18 U.S.C. §§ 3626(a)(3)(B)–(D) (2012).

553. *See* Tyler v. Murphy, 135 F.3d 594, 598 (8th Cir. 1998) (finding that it is unclear under PLRA whether "findings that will avoid termination of an existing injunction must in all cases be made by a three-judge court if the injunction includes a prisoner release order").

554. Pangburn v. Goord, No. 98-CV-0309E(H), 1999 U.S. Dist. LEXIS 5143, at *22–23 (W.D.N.Y. Apr. 12, 1999) (*unpublished*).

555. Brown v. Plata, 131 S. Ct. 1910, 1947; 179 L. Ed. 2d 969, 1008 (2011).

556. 18 U.S.C. § 3626(a)(3)(F) (2012); see Ruiz v. Estelle, 161 F.3d 814, 818–21 (5th Cir. 1998) (holding that PLRA grants individual legislators the right to intervene in prison litigation).

557. 18 U.S.C. § 3626(b)(3) (2012).

558. 18 U.S.C. § 3626(b)(1)(ii).(2012).

559. 18 U.S.C. § 3626(b)(2) (2012); *see* Tyler v. Murphy, 135 F.3d 594, 598 (8th Cir. 1998) (noting that absent the required findings, the immediate termination provision rather than the two-year provision applies).

560. Plyler v. Moore, 100 F.3d 365, 370 (4th Cir. 1996) (holding that a violation of prisoners' rights under the consent decree were not violations of a "federal right" under the PLRA).

Constitutional challenges asserting that the provision violates the separation of powers, the Equal Protection Clause, and the Due Process Clause have all been unsuccessful in the past.[561]

5. Automatic Stay

The PLRA provides that courts must promptly rule on motions to terminate prospective relief. The PLRA also says that the prospective relief is automatically stayed on the thirtieth day after the motion is made. If prospective relief is stayed, it means that the court will no longer enforce a rule or ruling requiring prison officials to remedy the violation.[562] The thirty days can be extended to sixty days if good cause (a good reason) is shown. The "general congestion of the court's calendar" is not considered a good reason.[563] The Supreme Court has held that the automatic stay provision does not violate the principle of separation of powers in the Constitution.[564]

6. Settlements

Under the PLRA, settlements that include prospective relief must meet the same requirements that the PLRA establishes for other court orders.[565] In other words, the court must find that these settlements are narrowly drawn, necessary to correct federal law violations, and the least intrusive way of correcting them. In practice, however, parties who settle agree to these findings, and the court usually approves them. Parties can enter into "private settlement agreements" that do not meet the PLRA standards as long as these agreements cannot be enforced in federal court.[566] In effect, they must be contracts enforceable in state court. The PLRA does not restrict settlements that involve money damages in place of other forms of relief.

M. Conclusion

By passing the PLRA, Congress has made it more difficult for you to have your claims heard in federal court. Although you might feel that some of its provisions are unfair, you cannot ignore the PLRA's strict requirements. To give yourself the best possible chance of getting your claim into federal court and having it resolved favorably, you will have to familiarize yourself with all the portions of the PLRA that are relevant for your case.

In going back through this Chapter, you should pay special attention to the "three strikes" provisions of the PLRA (see Part C) and to the new administrative procedure exhaustion requirements (see Part E). The three strikes rules should encourage you to consider your decision whether to bring suit very carefully, because if a court decides you have brought a frivolous suit, your ability to bring future suits may be jeopardized. You must also be certain you fully understand the exhaustion requirements, since courts *will not* allow your suit to proceed unless you have made every effort to resolve your grievance through administrative procedures.

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561. Court of appeals decisions and district court decisions upholding the statute include Berwanger v. Cottey, 178 F.3d 834 (7th Cir. 1999); Nichols v. Hopper, 173 F.3d 820 (11th Cir. 1999); Benjamin v. Jacobson, 172 F.3d 144 (2d Cir. 1999); Imprisoned Citizens Union v. Ridge, 169 F.3d 178 (3d Cir. 1999); Hadix v. Johnson, 133 F.3d 940 (6th Cir. 1998); Dougan v. Singletary, 129 F.3d 1424 (11th Cir. 1997); Inmates of Suffolk County Jail v. Rouse, 129 F.3d 649 (1st Cir. 1997); Gavin v. Branstad, 122 F.3d 1081 (8th Cir. 1997); Plyler v. Moore, 100 F.3d 365 (4th Cir. 1996).

562. Richard J. Costa, The Prison Litigation Reform Act of 1995: A Legitimate Attempt to Curtail Frivolous Inmate Lawsuits and End Alleged Micromanagement of State Prisons or a Violation of the Separation of Powers?, 63 Brook. L. Rev. 319 (1997).

563. 18 U.S.C. § 3626(e)(3) (2012).

564. New York v. Beretta U.S.A. Corp., 524 F.3d 384, 395 (2d. Cir. 2008) Miller v. French, 530 U.S. 327, 348, 120 S. Ct. 2246, 2259 147 L. Ed. 2d 326, 343 (2012).

565. 18 U.S.C. § 3626(c)(1) (2012).

566. 18 U.S.C. § 3626(c)(2) (2012).