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. Proceeding IFP means that 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 incarcerated people to file complaints in federal court.

This Chapter will tell you about the PLRA's various provisions and court decisions applying them. It will also suggest ways you might be able to defend yourself in *pro se* litigation if prison officials argue that the PLRA bars or limits your lawsuit. There are important questions about the PLRA that the courts have not yet settled, so some of the information in this Chapter may need to be changed in the future.[1] As with every legal issue described in the *JLM*, it is important that you do your own research to make sure you have the most up-to-date information about how the PLRA affects your particular case. To learn more about how to do legal research, read Chapter 2 of the *JLM*, "Introduction to Legal Research."

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 (or question) that it has no basis in either law or fact,[4] and it is considered malicious when it is abusive of the judicial process.[5]

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 requirement that directs a court to dismiss any incarcerated person'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 protected 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

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* This Chapter was written by John Boston of The Legal Aid Society and over time has been revised and updated by *JLM* staff and by John Boston. If you would like to learn more or have questions about the PLRA, you are encouraged to write to The Legal Aid Society, Prisoners' Rights Project, 199 Water Street, New York, NY 10038.

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).

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* Black v. Warren, 134 F.3d 732, 734 (5th Cir. 1998).

5. Johnson v. Edlow, 37 F. Supp. 2d 775, 776 (E.D. Va. 1999).

or emotional injury without showing a physical injury.[6] Parts G through L briefly discuss the parts of the PLRA that (1) limit the "attorney's fees" incarcerated people can recover in a successful suit; (2) allow defendants in a suit not to respond to the incarcerated person'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 an incarcerated person for a loss or injury he suffered be paid directly to satisfy any restitution orders (money owed by an incarcerated person for any damages to a victim); and (6) change how injunctions can be issued and maintained.

B. Filing Fees

The PLRA requires all incarcerated people to pay court filing fees, including poor incarcerated people who haven't been granted IFP status by a federal court. Payments may be made in installments based on the amount of money in your prison account. 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 summonses and complaints served by officers of the court, such as the U.S. Marshals Service[7] and can be excused from payment of some costs (though not fees) on appeal.[8] Without IFP status, you will have to take care of service and pay appeal costs yourself.[9]

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

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6. Please note that although the statute states that you cannot bring a suit without first showing a physical injury, in practice this is impossible. You will have to show your injury after you have filed your suit.

7. 28 U.S.C. § 1915(d).

8. 28 U.S.C. § 1915(c)).

9. See *JLM*, Chapter 6, "An Introduction to Legal Documents" for information on necessary documents.

10. 28 U.S.C. § 1915(a)(2).

11. *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 *2 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, 1999 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).

12. *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).

13. *See* Stinnett v. Cook Cnty. Med. Staff, No. 99 C 1696, 1999 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).

14. In the New York federal courts, for example, three of the four district courts (the Southern, Western, 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 Eastern District of New York, prisoners must sign such an authorization and must also get

obtain the necessary forms and instructions from the clerk of the court in which you plan to bring suit.[15]

If you are granted IFP status, you must pay the *entire* fee for filing either a complaint or an appeal[16] 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 incarcerated person's account; or (B) the average monthly balance in the incarcerated person's account for the 6-month period immediately preceding the filing of the complaint or notice of appeal.
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> (2) After payment of the initial partial filing fee, the incarcerated person shall be required to make monthly payments of 20 percent of the preceding month's income credited to the incarcerated person's account. The agency having custody of the incarcerated person shall forward payments from the incarcerated person's account to the clerk of the court each time the amount in the account exceeds $10 until the filing fees are paid.[17]

Your case should not be dismissed if you cannot pay the initial fee.[18] The statute says that the initial fee is to be collected "when funds exist,"[19] and that incarcerated people should not be stopped from bringing suit or appealing a judgment simply because they cannot pay.[20] A case should not be dismissed for nonpayment without a court first determining if the incarcerated person has had the opportunity to pay.[21] 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.[22] Incarcerated people generally may not be stopped from filing suit simply because they owe fees from a prior action.[23] However, one federal circuit has held that incarcerated people who try to avoid paying filing fees by lying or who fail to pay fees because

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certification from the prison of their funds. In the certification, the prison should include the average balances for the preceding six months.

15. The addresses of the federal district courts (organized by Circuit) are provided in Appendix I of the *JLM*.

16. The fee for filing a federal court civil complaint is $350.00. 28 U.S.C. § 1914(a). For appeals, there is a $500.00 filing fee, plus an additional $5 fee for filing your notice to appeal. *See* U.S. Courts, Federal Court Fees, *available at* https://www.uscourts.gov/services-forms/fees/court-appeals-miscellaneous-fee-schedule (last visited Oct. 15, 2020). The fee for filing for habeas corpus is $5. *See* 28 U.S.C. § 1914, *available at* https://www.law.cornell.edu/uscode/text/28/1914 (last visited Oct. 15, 2020).

17. 28 U.S.C. § 1915(b)(1)–(2).

18. 28 U.S.C. § 1915(b)(4); *see* Taylor v. Delatoor, 281 F.3d 844, 850–851 (9th Cir. 2002) (holding that an incarcerated person who cannot pay the initial fee must be allowed to proceed with his case and not merely be granted more time to pay).

19. 28 U.S.C. § 1915(b)(1).

20. 28 U.S.C. § 1915(b)(4).

21. 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, 1332–1333 (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).

22. *See* Cosby v. Meadors, 351 F.3d. 1324, 1332–1333 (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) (affirming dismissal incarcerated person's claim when he refused to pay the initial payment by the court's deadline, despite paying other fees associated with the lawsuit).

23. *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 an incarcerated person complete payment of fees before beginning another action).

they are subject to the "three strikes" provision of the PLRA[24] can be denied IFP status or stopped completely from filing suit.[25]

If you lose a case, a federal court may decide to charge you with the costs of the lawsuit.[26] Courts are free to choose whether they will make you pay the costs.[27] If a court decides to charge you with costs, you cannot appeal that decision.[28]

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.[29] You usually must pay these filing fees even if your case is dismissed immediately, you fail to submit the necessary financial information,[30] or you paid a fee in connection with a previous appeal.[31] You cannot get the fee back by choosing to withdraw the complaint or appeal.[32] Prison officials must keep collecting fees from your account if you remain within their legal custody, even if you are transferred to another jurisdiction.[33] They are required to treat these fees as more important and collect them before any other deductions can be taken out of your account.[34]

Filing fee payments are based on all money the incarcerated person receives, not just prison wages. Deductions from the fee may not be made for money you spent on legal copies and postage.[35] Filing

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24. 28 U.S.C. § 1915(g). For more information on the "three strikes" provision, see the next section.

25. *See* Campbell v. Clarke, 481 F.3d 967, 969–970 (7th Cir. 2007) (reasoning that a judge's discretion allows for the rejection of an action filed without fees when the filing incarcerated person still owes fees from previous actions and has struck out under 28 U.S.C. § 1915(g)); Sloan v. Lesza, 181 F.3d 857, 859 (7th Cir. 1999) (barring an incarcerated person who had "struck out" under 28 U.S.C. § 1915(g) from filing further litigation, especially considering evidence that at least one of the incarcerated person's IFP applications contained fraud). However, a recent decision held that an incarcerated person 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, 1096–1097 (11th Cir. 2008).

26. 28 U.S.C. § 1915(f)(2). In one case, an incarcerated person was assessed $7,989.90 in costs and $15,750 in attorneys' fees. *See* Sanders v. Seabold, No. 98-5470, 1999 U.S. App. LEXIS 19764 at *2 (6th Cir. Aug. 13, 1999) (*unpublished*).

27. 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").

28. 28 U.S.C. § 1915(f)(2)(A); Whitfield v. Scully, 241 F.3d 264, 273 (2d Cir. 2001) (holding that § 1915 forbids incarcerated people from appealing an award of costs on the ground of indigency).

29. Ippolito v. Buss, 293 F. Supp. 2d 881, 883 (N.D. Ind. 2003) (denying an incarcerated person's request to defer payments).

30. *See* Todd v. Acevedo, No. 16-CV-2741 (JNE/SER), 2016 U.S. Dist. LEXIS 162291, at *2–4 (D. Minn. Oct. 13, 2016) (*unpublished*) ("[W]ithout financial information from Todd's prison trust account, the Court had no basis to conclude that he lacks the assets….to pay an initial partial filing fee."); 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," even if the action is later deemed frivolous); *but see* Smith v. District of Columbia, 182 F.3d 25, 29 (D.C. Cir. 1999) (not requiring incarcerated people to pay the full filing fee whenever their *in forma pauperis* application is denied and they decide to no longer pursue their lawsuit).

31. 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).

32. 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.").

33. 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 incarcerated people] out-of-state.")
(citation omitted).

34. 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").

35. Rutledge v. Romero, No. 99 C 3453, 1999 U.S. Dist. LEXIS 9021, at *2–5 (N.D. Ill. June 2, 1999)

fees may be assessed and collected from "release accounts" or "gate savings," money intended to be provided to the prisoner upon release from prison, at least when doing so is consistent with state law.[36]

The 20% monthly payment is to be made separately for each case. The Supreme Court has held that if you have more than one case on which you owe fees, you must pay on all the fees at the same time.[37]

In class actions, only the incarcerated people who signed the complaint or notice of appeal are responsible for payment of fees.[38] 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."[39] Another appeals court held that multiple incarcerated people joining similar claims in a single suit must each pay a filing fee, but also have to file separate complaints.[40] More recently, other federal appeals courts agreed that each incarcerated plaintiff must pay the full filing fee, but they do not need to file a separate complaint.[41] However, a number of district courts have held that incarcerated people proceeding IFP must file separate complaints, often citing the practical difficulties involved in multiple-plaintiff litigation.[42]

(*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 an incarcerated person's income and held until release should be counted in calculating the fees or used to pay the fees.

36. Kennedy v. Huibregtse, 831 F.3d 441, 442 (7th Cir. 2016) (noting that state law permits release account's use to pay filing fees upon judicial order and that federal courts in the state had so used them (citing State *ex rel.* Coleman v. Sullivan, 229 Wis.2d 804, 601 N.W.2d 335, 337–38 (Wis. App. 1999), and Spence v. McCaughtry, 46 F.Supp.2d 861, 863 (E.D. Wis. 1999))); Jackson v. Kallas, 17-cv-350-bbc, 2017 U.S. Dist. LEXIS 145331, *4–5 (W.D. Wis., Sept. 8, 2017) (*unpublished*) (noting state law governs use of release account funds and authorizes courts only to order the payment of initial filing fee from them); Dean v. King, Civil No. 09–1745 (RHK/SRN), 2009 U.S. Dist. LEXIS 76195, *5–6 (D. Minn., Aug. 26, 2009) (holding "gate savings" appropriately considered in initial fee calculation). It is not clear why state law limits on the use of these funds are not pre-empted by the PLRA under the Supremacy Clause, U.S. CONST., art. VI.

37. Bruce v. Samuels, 577 U.S. 82, 84, 89–90, 136 S. Ct. 627, 629, 632–633, 193 L. Ed. 2d 496, 499, 502–503 (2016).

38. 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.").

39. *In re* Prison Litigation Reform Act, 105 F.3d 1131, 1138 (6th Cir. 1997) (holding that any fees the district court or appeals court may impose should be equally divided among the plaintiffs). 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 20, 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).

40. Hubbard v. Haley, 262 F.3d 1194, 1197 (11th Cir. 2001) (holding that the clear language of the PLRA requires each incarcerated person to bring a separate suit).

41. Boriboune v. Berge, 391 F.3d 852, 854–856 (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), 2006 U.S. Dist. LEXIS 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).

42. *See, e.g.*, Sutcliffe v. S.C. Supreme Court, No. 0:16-992-TMC-PJG, 2016 U.S. Dist. LEXIS 59180 (D.S.C. May 4, 2016) (citing cases); Lebon v. Mo. State Pub. Def. Sys., No. 4:13-CV-1834-SPM, 2013 U.S. Dist. LEXIS 153911 (E.D. Mo. Oct. 28, 2013) (*unpublished*); Benford v. Madison Cty. Bd. of Supervisors, No. 3:09-cv-785-WHB-LRA, 2010 U.S. Dist. LEXIS 7212 (S.D. Miss. Jan. 15, 2010) (*unpublished*); Proctor v. Applegate, 661 F. Supp. 2d 743, 780 (E.D. Mich. 2009); Caputo v. Belmar Municipality & County, No. 08-1975 (MLC), 2008 U.S. Dist. LEXIS 36883, at *5–7 (D.N.J. May 2, 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*); Horton v. Evercom, Inc., No. 07-3183-SAC, 2008 U.S. Dist. LEXIS 299, at *3 (D. Kan. Jan. 2, 2008) (*unpublished*).

The joinder rules lay out the process of combining two or more legal issues into one court case. Joinder of parties allows a plaintiff to sue multiple defendants. Joinder of claims allows a plaintiff to bring multiple claims at the same time. However, plaintiffs can only use joinder if their 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."[43] This means that plaintiffs can only combine claims against people who were involved in one event or a series of events that are connected. These 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 incarcerated people. This is to prevent incarcerated people from paying one filing fee to bring claims that should be brought as separate complaints and fees.[44]

Many constitutional challenges to the filing fees provisions have failed.[45] Courts have said that the filing fees rules are constitutional because they do not stop anyone from bringing suit.[46]

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 this issue in state courts.

43. FED. R. CIV. P. 20(a)(1) (joinder of plaintiffs). FED. R. CIV. P. 18 (joinder of claims).

44. *See* George v. Smith, 507 F.3d 605, 607–608 (7th Cir. 2007) (rejecting plaintiff's lawsuit because "unrelated claims against different defendants belong in different suits"). 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. *But see* Griggs v. Holt, No. CV 117-089, 2018 U.S. Dist. LEXIS 182592, at *11 (S.D. Ga. Oct. 24, 2018) (*unpublished*) (holding claims of excessive force against multiple defendants in different incidents were properly joined where plaintiff alleged "the use of excessive force is a routine practice at ASMP and prison administrators are aware of this practice but refuse to take reasonable steps to prevent further assaults"), *appeal filed*, No. 19-12048 (11th Cir., May 28, 2019); Gates v. Gomez, No. 17-cv-00901-WQH-BGS, 2018 U.S. Dist. LEXIS 128417, at *12 (S.D. Cal. July 30, 2018) (*unpublished*) (holding claim of excessive force by one defendant followed by denial of medical care by another were properly joined where the claims were "logically related and provide context for one another" and where the plaintiff alleged a shared motivation between those defendants (footnote omitted)), *report and recommendation adopted*, No. 17CV901-WQH-BGS, 2018 U.S. Dist. LEXIS 147520 (S.D. Cal. Aug. 28, 2018); Alford v. Mohr, No. 1:15-cv-645, 2018 U.S. Dist. LEXIS 33680, at *22 (S.D. Ohio Mar. 1, 2018) (*unpublished*) (holding joinder was proper where claims against multiple defendants were "part of a campaign of retaliation or harassment in response to plaintiff's filing of complaints, grievances and complaints originally stemming from [one defendant's] actions"), *report and recommendation adopted*, No. 1:15cv645, 2018 U.S. Dist. LEXIS 229616 (S.D. Ohio July 26, 2018) (*unpublished*).

45. 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, 775–776 (7th Cir. 1998) (finding the statute does not violate incarcerated people's due process rights); Mitchell v. Farcass, 112 F.3d 1483, 1489 (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 incarcerated person); 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.").

46. *See, e.g.*, Nicholas v. Tucker, 114 F.3d 17, 21 (2d Cir. 1997) (upholding 28 U.S.C. §§ 1915(b)(1)–(4)).

The filing fees rules only apply to civil (not criminal) actions. Habeas corpus petitions and other post-judgment proceedings are generally *not* considered civil actions for this purpose.[47] Motions to vacate a criminal sentence under 28 U.S.C. § 2255 are also generally not considered civil actions.[48]

Writs of mandamus and other "extraordinary writs" are considered civil actions and are subject to the PLRA, including the filing fee requirement, when they ask the court for relief that is similar to what you would ask for in a civil action.[49]

Bankruptcy cases and challenges to seizures of property have been treated as civil actions. This means they are subject to the filing fees rules.[50]

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47. *See* Skinner v. Wiley, 355 F.3d 1293, 1294 (11th Cir. 2004) (holding that the PLRA does not apply to habeas petitions about prison disciplinary proceeding); Malave v. Hedrick, 271 F.3d 1139, 1140 (8th Cir. 2001) (holding that the PLRA does not apply when challenging a delayed parole revocation hearing); Walker v. O'Brien, 216 F.3d 626, 634 (7th Cir. 2000) (holding that proper habeas actions are not civil actions governed by PLRA, no matter the subject matter); Blair-Bey v. Quick, 151 F.3d 1036, 1039–1041 (D.C. Cir. 1998) (holding that PLRA does not apply to challenges to parole procedures or other habeas actions), *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. Most courts hold you cannot challenge prison conditions in a federal habeas corpus claim. *See*, *e.g.*, Beardslee v. Woodford, 395 F.3d 1064, 1068–1069 (9th Cir. 2005), *cert. denied*, 543 U.S. 1096 (2005) (holding that a challenge to the *conditions* of the incarcerated person's confinement is more appropriately brought under 42 U.S.C. § 1983, not as a federal habeas claim). 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 sought by a habeas petition. *See*, *e.g.*, Medberry v. Crosby, 351 F.3d 1049, 1053 (11th Cir. 2003) (finding that administrative segregation may be challenged through habeas action). Others have held that it cannot. *See*, *e.g.*, Montgomery v. Anderson, 262 F.3d 641, 643–644 (7th Cir. 2001) (holding that habeas is improper because "segregation affects the severity rather than the duration of custody"). 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, 643–644, 117 S. Ct. 1584, 1587, 137 L. Ed. 2d 906, 911 (1997) ("[T]he sole remedy in federal court for a prisoner seeking restoration of good-time credits is a writ of habeas corpus").

48. 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).

49. Washington v. Los Angeles County Sheriff's Department, 833 F.3d 1048, 1058–1059 (9th Cir. 2016) (adopting view of other circuits that mandamus is civil where the underlying action it is concerned with is civil but not where it is criminal); *In re* Grant, 635 F.3d 1227, 1230 (D.C.Cir. 2011) (holding "the filing-fee requirements of the PLRA apply to a petition for a writ of mandamus filed in connection with a civil proceeding in the district court," though not addressing mandamus petitions about a criminal or habeas matter); In re Steele, 251 F. App'x 772, 772–773 (3d Cir. 2007) (per curiam) (*unpublished*) (holding "if a prisoner files a 'mandamus petition' that actually would initiate an appeal or a civil action, the PLRA applies"); *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").

50. *See* United States v. Howell, 354 F.3d 693, 695–696 (7th Cir. 2004) (holding that incarcerated people challenging administrative forfeiture are required to follow the limitations set 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 includes 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).

Courts disagree about whether motions made within criminal prosecutions to address prison problems related to the prosecution are civil actions subject to PLRA provisions.[51]

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."[52] This definition applies to all PLRA provisions concerning litigation brought by "prisoners," and it includes pretrial detainees,[53] military prisoners,[54] people in privately operated prisons and jails,[55]in juvenile facilities,[56] and in "halfway houses" (drug treatment programs), if the "prisoner" is in the program because of a criminal charge or conviction.[57] If you are in jail because of civil proceedings, you are not a "prisoner" under the PLRA,[58] unless you are civilly committed in

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51. *See* United States v. Mohamed, 103 F.Supp.3d 281, 285–287 (E.D.N.Y. 2015) (holding district court in a criminal cases has jurisdiction despite the PLRA to consider a challenge to Special Administrative Measures ("SAMs") affecting access to counsel and imposing isolation); United States v. Savage, NO.07-550-03, 2010 U.S. Dist. LEXIS, at *7–12 (E.D.Pa., Oct. 21, 2010) (*unpublished*); United States v. Hashmi, 621 F. Supp. 2d 76, 84–85 (S.D.N.Y. 2008); United States v. Lopez, 327 F. Supp. 2d 138, 140–142 (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). *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 incarcerated people from keeping their pre-sentence reports should have been treated as a separate civil action); United States v. Morales, No. 4:13-CR-00200-MAC-CAN, 2017 WL 1457168, *2 (E.D.Tex., Mar. 20, 2017) (*unpublished*) (holding that a challenge to a separation order barring a criminal defendant from communicating with his brothers must be exhausted because it is about prison conditions, even though it was imposed by the Department of Justice and not the Bureau of Prisons), *report and recommendation adopted*, United States v. Morales, No. 4:13–CR–200, 2017 WL 1435222 (E.D.Tex., Apr. 20, 2017) (*unpublished*); U.S. v. Schrenko, No. 1:04-CR-568-CC-1, 2011 WL 13315132, *2 (N.D.Ga., Sept. 29, 2011) (*unpublished*) (vacating prior order requiring medical attention for detained defendant; holding defendant must exhaust before seeking relief in an "action" challenging the quality of her medical care); United States v. Khan, 540 F. Supp. 2d 344, 349–352 (E.D.N.Y. 2007) (finding PLRA and the PLRA's exhaustion requirement applies to motion challenging SAMs and other pretrial jail restrictions).

52. 28 U.S.C. § 1915(b) (requiring prisoner to pay a filing fee)*; see also* 28 U.S.C. § 1915(h) (defining "prisoner").

53. Kingsley v. Hendrickson, 576 U.S. 389, 402 (2015) (noting "the Prison Litigation Reform Act of 1995, 42 U.S.C. § 1997e, which is designed to deter the filing of frivolous litigation against prison officials, applies to both pretrial detainees and convicted prisoners"); Rodriguez v. Cty. of Los Angeles, 891 F.3d 776, 792 (9th Cir. 2018).

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

55. *See, e.g.*, Roles v. Maddox, 439 F.3d 1016, 1017–1018 (9th Cir. 2006) (holding the PLRA applicable to people held in private prisons); Boyd v. Corr. Corp. of Am., 380 F.3d 989, 993–994 (6th Cir. 2004) (also holding the PLRA applicable to people held in private prisons).

56. *See* Troy D. v. Mickens, 806 F.Supp.2d 758, 767 (D.N.J., Aug. 25, 2011) (holding the exhaustion requirement applies to juveniles who are incarcerated); 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 limits apply to counsel representing juveniles who are incarcerated).

57. *See* Jackson v. Johnson, 475 F.3d 261, 266–267 (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, 174–175 (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, 753 (7th Cir. 2004) (holding that an "intensive drug rehabilitation halfway house" was the equivalent of a "correctional facility" under PLRA).

58. *See* Merryfield v. Jordan, 584 F.3d 923, 927 (8th Cir. 2009) (holding a person civilly detained under a sexually violent predator statute was not subject to the PLRA); Michau v. Charleston County, S.C., 434 F.3d 725, 727–728 (4th Cir. 2006) (same as *Merryfield*); Andrews v. King, 398 F.3d 1113, 1121–1122 (9th Cir. 2005) (stating that PLRA "three strikes" provision did not apply to dismissals of actions brought while a plaintiff was in INS custody "so long as the detainee did not also face criminal charges"); Perkins v. Hedricks, 340 F.3d 582, 583 (8th Cir. 2003) (holding that a person who was civilly detained in prison Federal Medical Center was not subject to the

connection with pending criminal charges. If you are civilly committed in connection with pending criminal charges, you are subject to the PLRA as a pretrial detainee.[59]

Formerly incarcerated people who file complaints or notices of appeal after they are released are not considered "prisoners" under the PLRA and are not subject to PLRA rules in those proceedings.[60] People released on parole are not "prisoners,"[61] unless they are paroled to a restrictive institutional setting where they continue to be "incarcerated or detained in [a] facility" during their period of parole for criminal violations.[62] They are not bound by the PLRA's filing fees and can apply for *in forma* pauperis status like any other free poor person. And if it is granted, they may move forward without any prepayment or installment payment of fees.

Incarcerated people who are released *after* they have filed suit generally remain subject to PLRA rules in that litigation, since those cases were brought by incarcerated people.[63] The filing fees provisions are different. They call for fees to be collected from an incarcerated persons' institutional accounts, and an incarcerated person who is released no longer has an institutional account.

Some courts have therefore held that the formerly incarcerated person must move for IFP status like any other poor person.[64] Several others have held that any amount due from the period of

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PLRA); Kolocotronis v. Morgan, 247 F.3d 726, 728 (8th Cir. 2001) (holding that a person committed after a 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).

59. *See* Kalinowski v. Bond, 358 F.3d 978, 979 (7th Cir. 2004) (holding that persons committed under the Illinois Sexually Dangerous Persons Act while they wait their felony trials are pretrial detainees are subject to the PLRA).

60. Olivas v. Nevada ex rel. Department of Corrections, 856 F.3d 1281, 1283–1284 (9th Cir. 2017); Lesesne v. Doe, 712 F.3d 584, 586, 588 (D.C.Cir. 2013) (pretrial release); Talamantes v. Leyva, 575 F.3d 1021, 1023–1024 (9th Cir. 2009); Cofield v. Bowser, 247 F. App'x 413, 414 (4th Cir. 2007) (per curiam) (*unpublished*); Norton v. The City of Marietta, OK, 432 F.3d 1145, 1150 (10th Cir. 2005) (per curiam); Nerness v. Johnson, 401 F.3d 874, 876 (8th Cir. 2005) (per curiam).

61. Greig v. Goord, 169 F.3d 165, 167 (2d Cir. 1999) (per curiam) (noting that a parolee is not "incarcerated or detained"); Kerr v. Puckett, 138 F.3d 321, 322-23 (7th Cir. 1998); Robinson v. Sheppard, NO. H-11-3397, 2012 U.S. Dist. LEXIS 85245, *1 n.2 (S.D.Tex., June 20, 2012) (*unpublished*); Connor v. California, 1:10-cv-01967-AWI-GSA, 2011 U.S. Dist. LEXIS 45504, *3 (E.D.Cal., Apr. 27, 2011) (*unpublished*), *report and recommendation adopted*, Connor v. California, 1:10-cv-01967-AWI-GSA, 2011 U.S. Dist. LEXIS 77071 (E.D.Cal., July 15, 2011) (*unpublished*).

62. Jackson v. Johnson, 475 F.3d 261, 265–267 (5th Cir. 2007) (holding that parolee in a halfway house, which he could not leave without permission, was a prisoner, since his placement was pursuant to his criminal conviction); Clemens v. SCI Albion, No. 05-325 Erie, 2006 U.S. Dist. LEXIS 91543, at *5 (W.D. Pa., Dec. 19, 2006) (*unpublished*) (holding halfway house with random urine tests and limited visiting was an "other correctional facility"); Fernandez v. Morris, No. 08-CV-0601 H (PCL), 2008 U.S. Dist. LEXIS 54298, *2 (S.D. Cal., July 16, 2008) (*unpublished*) (holding plaintiff involuntarily confined in a drug program was a prisoner under the PLRA); Clemens v. SCI Albion, No. 05-325 Erie, 2006 U.S. Dist. LEXIS 91543, at *5 (W.D. Pa., Dec. 19, 2006) (*unpublished*) (holding prisoner confined to a "residential community corrections program" which was also a "minimum security work release facility" was a prisoner).

63. Perez v. Westchester Cnty. Dept. of Corrections, 587 F.3d 143, 154–155 (2d Cir. 2009) (discussing attorney's fees provisions); Harris v. City of New York, 607 F.3d 18, 21–22 (2d Cir. 2010) (detailing three strikes provision); Cox v. Mayer, 332 F.3d 422, 425 (6th Cir. 2003) (explaining exhaustion requirement); Harris v. Garner, 216 F.3d 970, 973–976 (11th Cir. 2000) (en banc) (describing physical injury requirement); Banos v. O'Guin, 144 F.3d 883, 885 (5th Cir.1998) (describing "imminent danger" exception to three strikes provision).

64. Brown v. Eppler, 725 F.3d 1221, 1231 & n.7 (10th Cir. 2013).

incarceration must be paid first.[65] Some have held that the need to pay ends on the prisoner's release.[66] Some have said that released prisoners must still pay the full filing fee, though they have differed about how to accomplish this.[67]

C. The "Three Strikes" Provision

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

> 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.[68]

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65. Robbins v. Switzer, 104 F.3d 895, 899 (7th Cir. 1997) (holding that a formerly incarcerated person must provide an account statement as of release and pay any part of the filing fee that they could have paid before release. Afterwards, continuation under IFP provisions can be considered); *accord*, *In Re* Smith, 114 F.3d 1247, 1251-52 (D.C. Cir. 1997) (following *Robbins*; requiring incarcerated people who failed to submit account information or make payments before release to do so after release; stating plaintiff can rely on IFP provisions after satisfying pre-release obligation); *see* Smalls v. State Bd. of Pardons and Paroles, No. CV414-031, 2014 U.S. Dist. LEXIS 67133, *15–17 (S.D. Ga., May 15, 2014) (*unpublished*) (holding a formerly incarcerated person must ordinarily make all payments due up to release, holding this plaintiff didn't need to because his short incarceration made the amount de minimis; directing plaintiff to file a new IFP motion).

66. *See*, *e.g.*, DeBlasio v. Gilmore, 315 F.3d 396, 398–399 (4th Cir. 2003) (holding that a formerly incarcerated person doesn't need to 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 formerly incarcerated person, but dismissing the suit as frivolous).

67. *See* Gay v. Tex. Dept. of Corr. State Jail Div., 117 F.3d 240, 242 (5th Cir. 1997) (holding that a formerly incarcerated person who filed a "notice to appeal" before his release from prison was required to pay the filing fees for the appeal, without explaining how it was to be collected without a prison account); Vaughn v. Griesbach, No. 17-cv-437-pp, 2018 U.S. Dist. LEXIS 39925, at*1 (E.D. Wis., Mar. 12, 2018) (*unpublished*) ("Because it appears that the plaintiff is now out of custody, however, the court cannot direct the institution to collect the filing fee according to 28 U.S.C. § 1915(b)(2). The court will require the plaintiff to make payments to the court as he is able."); Kilgore v. Kendrick, No. 5:17-cv-144-MTT-TQL, 2017 U.S. Dist. LEXIS 214413, at *2 (M.D. Ga., Oct. 17, 2017) (*unpublished*) (holding that after release, "plaintiff remains obligated to continue making monthly payments to the clerk toward the balance due until said amount has been paid in full"; authorizing collection "by any means permitted by law"), *report and recommendation adopted*, Kilgore v. Kendrick, No. 5:17-CV-144(MTT), 2018 U.S. Dist. LEXIS 2584 (M.D. Ga., Jan. 8, 2018) (*unpublished*); Flynn v. Canlas, No. 15-cv-2115 WQH (PCL), 2015 U.S. Dist. LEXIS 166493, *3–4 (S.D. Cal., Dec. 10, 2015) (*unpublished*) (holding that a released IFP incarcerated person must pay the full unpaid amount of the filing fee in installments "dependent on Plaintiff's post-release ability to pay"; directing plaintiff to file a supplemental IFP motion within 30 days since court lacks information about plaintiff's post-incarceration finances); McColm v. California, No. 1:14-cv-00580-RRB, 2015 U.S. Dist. LEXIS 23564, *3 (E.D. Cal., Feb. 26, 2015) (*unpublished*) (holding that released IFP incarcerated person must pay the full unpaid amount of the fee in order to proceed, without explaining why she can't seek new IFP status); Murphy v. Maricopa County Sheriff's Office, No. CV-05-2553-PHX-DGC (DKD), 2005 U.S. Dist. LEXIS 34828, at *1 (D. Ariz., Dec. 1, 2005) (*unpublished*) (holding a person who was released from prison must pay the entire filing fee within 30 days or show cause why they cannot).

68. 28 U.S.C. § 1915(g). As with the filing fees provisions discussed in the previous Section, this provision only applies to people who are incarcerated when they file suit. *See* Brown v. Taylor, 677 F. App'x 924, 931 (5th Cir. 2017) (*unpublished*) and cases cited (holding provision does not apply to person who was a civil detainee when they filed suit); 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).

This provision means that if you have had three actions or appeals dismissed as frivolous (lacking "an arguable basis either in law or fact"),[69] or malicious (filed for an improper purpose,[70] repetitive of other litigation,[71] or otherwise abusive of the judicial process[72]), 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 physical injury." If you cannot file IFP, you have to pay the entire filing fee *up front*. If you can't pay up front, your case will almost certainly be dismissed,[73] and you will still have to pay the fee in installments.[74] If you have not paid the fee, and the court rules that

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69. Neitzke v. Williams, 490 U.S. 319, 325, 109 S. Ct. 1827, 1832, 104 L. Ed. 2d 338, 347 (1989), *superseded by statute*, 28 U.S.C. §1915A(b). A claim may be legally frivolous if it fails to raise an "arguable question of law" or is based on an "indisputably meritless legal theory," Neitzke v. Williams, 490 U.S. 319, 325, 328, 109 S. Ct. 1827, 1833, 104 L. Ed. 2d 338, 349 (1989), *superseded by statute*, 28 U.S.C. §1915A(b); or if the factual allegations in the complaint make it absolutely clear that the case is barred by a defense— for example, the statute of limitations has run, *see* Street v. Vose, 936 F.2d 38, 39 (1st Cir. 1991), or that the claim is barred by immunity, Neitzke v. Williams, 490 U.S. 319, 325, 327, 109 S. Ct. 1827, 1833, 104 L. Ed. 2d 338, 348 (1989), *superseded by statute*, 28 U.S.C. §1915A(b), or by *res judicata*, Magee v. Hamline University, 775 F.3d 1057, 1058–1059 (8th Cir. 2015). A complaint is factually frivolous only if the "claims describ[e] fantastic or delusional scenarios," Neitzke v. Williams, 490 U.S. 319, 325, 328, 109 S. Ct. 1827, 1833 104 L. Ed. 2d 338, 349 (1989), *superseded by statute*, 28 U.S.C. §1915A(b), which means that "the facts alleged rise to the level of the irrational or the wholly incredible, whether or not there are judicially noticeable facts available to contradict them." Denton v. Hernandez, 504 U.S. 25, 33, 112 S. Ct. 1728, 1734, 118 L. Ed. 2d 340, 350 (1992), *superseded by statute on other grounds,* 28 U.S.C. §1915(A)(b)(1).

70. Knapp v. Hogan, 738 F.3d 1106, 1109 (9th Cir. 2013) (stating a claim is malicious when "filed with the intention or desire to harm another" (citing Andrews v. King, 398 F.3d 1113, 1121 (9th Cir. 2005))); Crisafi v. Holland, 655 F.2d 1305, 1309 (D.C. Cir. 1981) (per curiam) (complaint filed for purposes of vengeance and not to redress a legal wrong was malicious).

71. Crisafi v. Holland, 655 F.2d 1305, 1309 (D.C. Cir. 1981) (per curiam) ("A complaint plainly abusive of the judicial process is properly typed malicious. . . . A complaint that merely repeats pending or previously litigated claims may be considered abusive, and a court may look to its own records to determine whether a pleading repeats prior claims."). Repetitive litigation is not malicious in every instance, depending on the circumstances of each case. *See, e.g.*, Washington v. Los Angeles County Sheriff's Dept., 833 F.3d 1048, 1060 (9th Cir. 2016) (holding a repetitive complaint "was not frivolous or malicious by virtue of being repetitive. . . . Rather, it reflects a *pro se* litigant's inartful attempt to amend the first pleading, . . . by revising his requested relief and causes of action. . . .").

72. Rivera v. Allin, 144 F.3d 719, 731 (11th Cir. 1998) (describing plaintiff's misrepresentation of his prior litigation history on a complaint form as abusive), *abrogated on other grounds*, Jones v. Bock, 549 U.S. 199, 215, 127 S. Ct. 910, 921, 166 L. Ed. 2d 798, 813 (2007); Arango v. Butler, 14-61706-CIV-MORENO, 2014 U.S. Dist. LEXIS 129319, at *2 (S.D. Fla., Sept. 16, 2014) (holding failure to obey court orders to be abusive) (*unpublished*).

73. *See* Flemming v. Fischer, No. 9:09-CV-0005 (LEK), 2009 U.S. Dist. LEXIS 134065, at *1 (N.D.N.Y., July 15, 2009) (*unpublished*) (noting rejection of offer to pay in seven installments of $50; granting final three-week extension to pay the entire fee); 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). One court has said that district courts have the ability to let a litigant with three strikes to pay fees over time, though the court did not exercise that ability. *See* Dudley v. United States, 61 Fed. Cl. 685, 688 (Fed. Cl. 2004). Some courts have granted incarcerated people some extra time to pay the fee. *See* Watts v. Pickett, No. 5:17-CV-38-DCB-MTP, 2018 U.S. Dist. LEXIS 193737, at *1 (S.D. Miss., Nov. 14, 2018) (*unpublished*) (after ordering payment of fee within 60 days and accepting two installment payments, the court granted another 30 days to pay the remaining $150); Wilkins v. Gonzalez, No. 2: 16-cv-347 KJM KJN P, 2018 U.S. Dist. LEXIS 44048, at *1 (E.D. Cal., Mar. 14, 2018) (*unpublished*) (granting a one-time 30-day extension for an incarcerated person who had made a partial payment to pay the full balance of the fee). In addition, a notice of appeal filed on time grants appellate jurisdiction even if the filing fee is not paid on time, *see* Daly v. United States, 109 F. App'x 210, 212 (10th Cir. 2004) (*unpublished*), which may allow you additional time to pay the fee if you can't do so within the 30 days allowed for a notice of appeal. One recent federal circuit decision holds that the court has ability to decide an appeal even if the filing fee has not been paid; Isby v. Brown, 856 F.3d 508, 520 (7th Cir. 2017). But do not count on getting an extension. Most likely, if you have received three strikes and cannot pay the fee quickly, your appeal will be dismissed.

74. 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").

you are subject to the three strikes provision, most courts say you should still be given time to pay in order to avoid dismissal.[75] One court, however, has said that an incarcerated person 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.[76] 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.[77] However, that rule cannot be extended to block IFP filings by incarcerated people who fit into the "imminent danger of serious physical injury" exception.[78]

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 incarcerated people who are incarcerated when they file suit,[79] or when they file a notice of appeal.[80] It applies only to civil actions or appeals, and does not normally apply to habeas corpus or other challenges to criminal convictions or sentences.[81]

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.[82]

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75. *See In re* Alea, 286 F.3d 378, 382 (6th Cir. 2002) (allowing 30 days to pay the filing fee); Smith v. District of Columbia, 182 F.3d 25, 29–30 (D.C. Cir. 1999) (stating that a person stopped from filing as a poor person has 14 days to pay the filing fee so his suit may continue); Craig v. Cory, No. 98-1128, 1998 U.S. App. LEXIS 26602, at *4 (10th Cir. Oct. 20, 1998) (*unpublished*) (holding that PLRA does not bar an incarcerated person with three strikes from suing, so long as they pay the filing fee); Windham v. Franklin, No. CV 16-5888-SVW (JEM), 2018 U.S. Dist. LEXIS 53503, at *4 n.1 (C.D.Cal., Jan. 25, 2018) (allowing 30 days to pay the filing fee)(*unpublished*), *report and recommendation adopted*, Windham v. Franklin, No. CV 16-5888-SVW (JEM), 2018 U.S. Dist. LEXIS 53503 (C.D.Cal., Mar. 22, 2018) (*unpublished*);. *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 starts).

76. 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.").

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

78. Miller v. Donald, 541 F.3d 1091, 1098–1099 (11th Cir. 2008). Subsection C(1)(a) below discusses that exception.

79. Jackson v. Johnson, 475 F.3d 261, 266–267 (5th Cir. 2007) (noting that people 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 rule); Andrews v. King, 398 F.3d 1113, 1121–1122 (9th Cir. 2005) (stating that PLRA "three strikes" rule did not apply to dismissals of actions brought while a plaintiff was in INS custody "so long as the detainee did not also face criminal charges")

80. Schuhaiber v. Illinois Dept. of Corrections, --- F.3d ----, 2020 U.S. App. LEXIS 36389, *1–6 (7th Cir., Nov. 19, 2020) (holding a person who was incarcerated when he filed suit, but was no longer incarcerated when he appealed, was not subject to the three strikes provision on appeal).

81. *See* Al-Pine v. Richerson, 763 F. App'x 717, 718 (10th Cir. 2019) (*unpublished*) (holding habeas corpus petitions are not "civil actions" for purposes of 28 U.S.C. § 1915); Jennings v. Natrona Cty. Det. Ctr. Med. Facility, 175 F.3d 775, 779 (10th Cir. 1999); *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 incarcerated person to pay the filing fee first). *See* Part B of this Chapter for the definition of civil actions.

82. *See* FED. R. CIV. P. 60(b) (stating that there are some instances where a court may "relieve a party or its legal representative from a final judgment, order, or proceeding"); *see also* Ceara v. Clark-Dirusso, No. 1:13-CV-3041-LAP, 2019 U.S. Dist. LEXIS 130620, at *4 (S.D.N.Y., Aug. 5, 2019) (*unpublished*) (changing a judgment of dismissal under Rule 60 where the incorrect citation of statute suggested it should be treated as a strike despite the lack of a finding the action was frivolous or malicious); Dalvin v. Beshears, 943 F. Supp. 578, 578–579 (D. Md. 1996) (holding plaintiff's suit to get 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 under the PLRA is not a failure to state a claim. *See* Jones v. Bock, 549 U.S. 199, 213–215, 127 S. Ct.

The three strikes provision of the PLRA governs actions brought in federal court, but state courts don't necessarily have to follow it.[83] A poor person who is incarcerated with three strikes may prefer to file in state court if the state law permits. Most courts have held that if you file in state court, and the defendants remove the case to federal court, the case is not affected by Section 1915(g).[84] Section 1915(g) applies to those who "bring a civil action or appeal a judgment in a civil action or proceeding *under this section*," *i.e.*, litigants who invoked the federal IFP provisions when the case was "brought." A case brought in state court is not "brought under" those provisions, but rather under the state court's rules, whatever they may be.[85] When the defendants remove your case from state court to federal court, they are responsible for paying the federal court filing fee, and you are not asking for IFP status at that point, so Section 1915(g) is irrelevant. Most courts have also held that a removed case cannot be remanded to state court on the ground that the plaintiff has three strikes.[86] Some courts have resisted these conclusions because they believe prisoners are evading their obligations under Section 1915(g) by filing in state court,[87] ignoring the fact that as Section 1915(g) is written, it has no application to cases brought in state courts.[88]

910, 920–921, 166 L. Ed. 2d 798, 812–813 (2007). For more information on exhaustion, see Part E of this Chapter.

83. *See* Woodson v. McColllum, 875 F.3d 1304, 1307 (10th Cir. 2017) (noting States may have less restrictive rules than § 1915(g)); Abdul-Akbar v. McKelvie, 239 F.3d 307, 314–315 (3d Cir. 2001) (en banc) (same); Abreu v. Kooi, No. 9:14-CV-1529 (GLS/DJS), 2016 U.S. Dist. LEXIS 120681, at *4 (N.D.N.Y., Aug. 4, 2016) (*unpublished*) (noting the absence of a § 1915(g)-type provision in New York State law), *report and recommendation adopted*, Abreu v. Kooi, No. 9:14-cv-1529 (GLS/DJS), 2016 U.S. Dist. LEXIS 120463 (N.D.N.Y., Sept. 7, 2016) (*unpublished*); Crooker v. U.S., No. 3:2009-206, 2009 U.S. Dist. LEXIS 126460, at *4 (W.D.Pa., Nov. 20, 2009) (*unpublished*) (noting lack of three strikes rule in Pennsylvania law); Lakes v. State, 333 S.C. 382, 386, n.2, 510 S.E.2d 228, 230, n.2 (S.C. Ct. App. 1998) (noting that South Carolina has no equivalent to PLRA's three strikes rule).

84. Woodson v. McCollum, 875 F.3d 1304, 1305 (10th Cir. 2017); Harris v. Mangum, 863 F.3d 1133, 1140–1141 (9th Cir. 2017).

85. Woodson v. McCollum, 875 F.3d at 1306; Blevins v. O'Malley, 2010 LEXIS 127589, at *1 n.2 (N.D .Ind., Dec. 2, 2010) (*unpublished*) (noting three-strike plaintiff had obtained a leave to proceed without payment of fees before removal); Pickett v. Hardy, No. 09–1116, 2010 U.S. Dist. LEXIS 110619, *4–9 (C.D. Ill., Oct. 18, 2010) (*unpublished*) (noting there was "no cause to consider the *in forma pauperis* statute" in removed case); Carrea v. California, No. EDCV 07-1148-CAS (MAN), 2010 U.S. Dist. LEXIS 1007902, at *8 (C.D. Cal., Aug. 25, 2010) (*unpublished*) (noting that state court IFP decision was governed by state law and federal court lacked power to revoke or change it after removal), *report and recommendation adopted*, Carrea v. California, No. EDCV 07-1148-CAS (MAN), 2011 U.S. Dist. LEXIS 68546 (C.D.Cal., June 23, 2011) (*unpublished*), *affirmed in part, vacated in part, remanded on other grounds*, Carrea v. California, 551 F. App'x 368 (9th Cir. 2014) (*unpublished*).

86. Lloyd v. Benton, 686 F.3d 1225, 1227–1228 (11th Cir. 2012); Lisenby v. Lear, 674 F.3d 259, 262–263 (4th Cir. 2012); *accord*, Johnson v. Rock, No. 9:14-CV-815 (DNH/ATB), 2014 U.S. Dist. LEXIS 178637, at *6–7 (N.D.N.Y., Dec. 31, 2014) (*unpublished*); Dotson v. Shelby County, No. 13-2766-JDT-tmp, 2014 U.S. Dist. LEXIS 95953, *19–23 (W.D. Tenn., July 15, 2014) (*unpublished*); Hartley v. Comerford, No. 3:13cv488/MCR/EMT, 2014 WL 241759, *5–6 (N.D. Fla., Jan. 22, 2014) (*unpublished*) (declining to remand on grounds not specified in the removal statute; § 1915(g) does not defeat removal jurisdiction).

87. *See, e.g.*, Crooker v. Global Tel Link, No. C.A. 11-229L, 2012 U.S. Dist. LEXIS 25183, *2 (D.R.I., Jan. 6, 2012) (dismissing removed case subject to the plaintiff's paying the filing fee and reinstating it, ignoring the statutory rule that *defendants* pay filing fee in removed cases), *report and recommendation adopted*, Crooker v. Global Tel Link, No. C.A. 11-229L, 2012 LEXIS 25185 (D.R.I., Feb. 28, 2012) (*unpublished*), *appeal dismissed*, No. 12-1318 (1st Cir., June 14, 2012); Mitchell v. Dallas County Sheriff Dept., No. 3:12-CV-1960-O-BK, 2012 U.S. Dist. LEXIS 186320, *4 (N.D. Tex., July 12, 2012) (*unpublished*) (punishing incarcerated person for filing in state court to avoid three strikes order), *supplemented*, Mitchell v. Dallas County Sheriff Dept., No. 3:12-CV-1960-O-BK, 2013 U.S. Dist. LEXIS 24609 (N.D. Tex., Jan. 7, 2013) (*unpublished*), *report and recommendation adopted*, Mitchell v. Dallas County Sheriff Dept., No. 3:12-CV-1960-O-BK, 2013 U.S. Dist. LEXIS 23420 (N.D. Tex., Feb. 20, 2013).

88. Abreu v. Kooi, No. 9:14-CV-1529 (GLS/DJS), 2016 U.S. Dist. LEXIS 120681, at *4 (N.D.N.Y., Aug. 4, 2016) (*unpublished*) ("Even if removal is foreseeable, a three strikes prisoner who files an action in state court is not thereby 'circumventing' the PLRA because the PLRA does not address prisoner filings in state court."), *report and recommendation adopted*, Abreu v. Kooi, No. 9:14-CV-1529 (GLS/DJS), 2016 U.S. Dist. LEXIS 120681 (N.D.N.Y., Sept. 7, 2016) (*unpublished*).

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 fix.[89] A legally "frivolous" suit is one that fails to raise an arguable question of law,[90] a suit based on an unsupported legal theory,[91] or one that alleges as fact "fantastic or delusional scenarios."[92] A malicious suit is one filed for an improper purpose or one that is an abuse of the legal system.[93]

A case dismissed on grounds other than frivolousness, maliciousness, or failure to state a claim is *not* a strike.[94] Dismissals on grounds such as lack of prosecution,[95] lack of jurisdiction,[96] or expiration of the statute of limitations[97] are not automatically strikes. They might be strikes if the court finds that the suit was frivolous or malicious, for example, if the claim of jurisdiction was so unfounded as to be frivolous, or the failure to prosecute had an improper purpose.

A case that is dismissed on summary judgment—which means there are no material disputes of fact—is generally not a strike.[98] It is important to know that lawyers who represent the government

89. *See* Jones v. Bock, 549 U.S. 199, 215, 127 S. Ct. 910, 920–921, 66 L. Ed. 2d 798, 812–813 (2007); Ashcroft v. Iqbal, 556 U.S. 662, 663, 129 S. Ct. 1937, 1940, 173 L. Ed. 2d 868, 874 (1957) (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929) (holding that a claim does not require "detailed factual allegations," but does require facial plausibility).

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

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

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

93. *See* Pittman v. Moore, 980 F.2d 994, 994–995 (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 started out of desire for vengeance and not to remedy a violation of legal rights was malicious), *aff'd*, Spencer v. Rhodes, 826 F.2d 1061 (4th Cir. 1987). Please see footnote 70 in Part C of this Chapter for the definition of maliciousness.

94. *See* Harris v. Harris, 935 F.3d 670, 674 (9th Cir. 2019) (holding policy concerns, however warranted, cannot justify expanding the statute's reach beyond its plain language); Daker v. Commissioner, Georgia Department of Corrections, 820 F.3d 1278, 1283–1284 (11th Cir. 2016) ("Three specific grounds render a dismissal a strike: . . . . Under the negative-implication canon, these three grounds are the only grounds that can render a dismissal a strike." (citing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW 107–111 (2012))), *cert. denied*, Daker v. Commissioner, Georgia Department of Corrections, 137 S. Ct. 1227 (2017); 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).

95. Butler v. Dept. of Justice, 492 F.3d 440, 443–445 (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).

96. Thompson v. Drug Enforcement Admin., 492 F.3d 428, 440 (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 resulting from premature filing does not warrant a strike).

97. 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). If a statute of limitations defense, or other defense, is evident on the face of the complaint, the complaint may fail to state a claim. Jones v. Bock, 549 U.S. 199, 215, 127 S. Ct. 910, 920, 166 L. Ed. 2d 798, 812 (2007).

98. *See* Stallings v. Kempker, No. 04–1585, 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 was dismissed for failure to state a claim on which relief could be granted"), *recommendation adopted*, Chappell v. Pliler, No. CIV S–04–1183 LKK DAD P, 2007 U.S. Dist. LEXIS 5984 (E.D. Cal. Jan. 26, 2007)

often improperly file motions to dismiss for failure to state a claim in cases that raise disputed material. In such a case you must show that the case raises material factual disputes and that defendants may only pursue dismissal by way of a motion for summary judgment.[99] That way, even if you lose, you will lose by summary judgment, and it will usually 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 itself that you did not exhaust.[100] This means that if your suit is dismissed for non-exhaustion it should not be a strike unless the dismissal is based solely on what you wrote in your complaint about exhaustion.[101] Courts have differed over whether a dismissal for non-exhaustion that was a strike under the law at the time of the dismissal should still continue to be a strike.[102] 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.[103] A case is also not a strike if some of the claims are dismissed on grounds specified in Section 1915(g) (failure to state a claim, frivolousness, or maliciousness) but other claims in the lawsuit are dismissed on other grounds.[104] Two circuits have

(*unpublished*).

99. 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). In deciding a motion to dismiss, a judge will only look at the plaintiff's complaint to determine if the plaintiff stated a legal claim. In deciding a motion for summary judgment, a judge may look at any facts provided by either the plaintiff or the defendant. For more information on the difference between a motion to dismiss for failure to state a claim and a motion for summary judgment, see *JLM* Chapter 6, "An Introduction to Legal Documents."

100. Jones v. Bock, 549 U.S. 199, 212–213, 127 S. Ct. 910, 920–921, 166 L. Ed. 2d 798, 812–813 (2007) ("[T]he usual practice under the Federal Rules is to regard exhaustion as an affirmative defense.").

101. 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.

102. *Compare* 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) *with* Hale v. Collier, 690 F. App'x 247, 248 (5th Cir. 2017) (per curiam) (*unpublished*) (holding a partial dismissal which would have been a strike under prior law should not be treated as one since the law had changed); Richey v. Dahne, 807 F.3d 1202, 1207–1208 (9th Cir. 2015) (holding dismissal that was formerly a strike should no longer be treated as one because the law had changed); Feathers v. McFaul, 274 F. App'x 467, 468–469 (6th Cir. 2008) (*unpublished*) (holding dismissals for failure to plead exhaustion, previously treated as strikes, should no longer be so treated because the law had changed so plaintiffs were not required to plead exhaustion).

103. Escalera v. Samaritan Vill., 938 F.3d 380, 381–382 (2d Cir. 2019) (per curiam) ("The plain language of § 1915(g) defines a strike as 'an action or appeal' that was dismissed on an enumerated ground, not as an individual claim that was dismissed as frivolous, malicious, or for failure to state a claim."); Taylor v. First Medical Management, 508 F. App'x 488 (10th Cir. 2012) (*unpublished*) ("Even if an action only has one meritorious claim amidst a sea of frivolous ones, the case cannot count as a § 1915(g) strike."); Tolbert v. Stevenson, 635 F.3d 646, 651 (4th Cir. 2011); Thompson v. Drug Enforcement Admin., 492 F.3d 428, 432 (D.C. Cir. 2007) (noting that statute does not apply to actions "containing at least one claim falling within none of the three strike categories,").

104. *See* Harris v. Harris, 935 F.3d 670, 675 (9th Cir. 2019) ("But we evaluate the 'case as a whole' and dismissal of even one claim for an unenumerated reason saves the entire case from counting as a strike."); 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

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,[105] though there is no discernible basis in the statute for treating exhaustion-related dismissals differently from other dismissals not set out in Section 1915(g).

A case that you voluntarily withdraw is not a strike.[106] An action that was never accepted for filing cannot be a strike.[107] Only *federal* court dismissals count as strikes, since a state court is not a "court of the United States" under the statute.[108]

A motion filed in an existing case and then denied is not a strike.[109] The Supreme Court has held that dismissals on the enumerated § 1915(g) grounds are strikes even if they are without prejudice.[110] A dismissal under Rule 8 of the Federal Rules of Civil Procedure, meaning the complaint was not understandable, may be a strike if the plaintiff repeatedly fails to correct it.[111] If a dismissed case is re-filed in a separate action (for example, with a new complaint used to correct the problems that led

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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).

105. Thomas v. Parker, 672 F.3d 1182, 1184 (10th Cir. 2012); Pointer v. Wilkinson, 502 F.3d 369, 376 (6th Cir. 2007).

106. Carbajal v. McCann, 808 F. App'x 620, 630 (10th Cir. 2020) (*unpublished*); Andrews v. Persley, 669 F. App'x 529, 530 (11th Cir. 2016); Tiedemann v. Church of Jesus Christ of Latter Day Saints, 631 F. App'x 629, 631 (10th Cir. 2015) (*unpublished*); Tolbert v. Stevenson, 635 F.3d 646, 654 (4th Cir. 2011). Some courts have held that an incarcarted person who receives a magistrate judge's recommendation for dismissal cannot avoid a strike by dismissing voluntarily. *See, e.g.*, Johnson v. Edlow, 37 F. Supp. 2d 775, 776–778 (E.D. Va. 1999 Sumner v. Tucker, 9 F. Supp. 2d 641, 644 (E.D. Va. 1998). More recent decisions have rejected this idea. Andrews v. Persley, 669 F. App'x at 530; Aldrich v. United States, No. 13-12085-NMG, 2015 U.S. Dist. LEXIS 94098, at *3–*4 (D. Mass. July 17, 2015) (*unpublished*).

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

108. Harris v. Mangum, 863 F.3d 1133, 1140–1141 (9th Cir. 2017); Rambert v. Krasner, No. 19-CV-5249, 2020 U.S. Dist. LEXIS 3346 at *13 (E.D. Pa. Jan. 9, 2020) (*unpublished*); Moffit v. Fagerman, No. 1:18-cv-916, 2018 U.S. Dist. LEXIS 154168 at *12 (W.D. Mich. Sept. 11, 2018) (*unpublished*); D'Amico v. Montoya, No. 4:14cv127-MW/CAS, 2016 U.S. Dist. LEXIS 91785 at *6 (N.D. Fla. June 13, 2016) (*unpublished*), *report and recommendation adopted*, D'Amico v. Montoya, No. 4:14cv127-MW/CAS, 2016 U.S. Dist. LEXIS 91776 (N.D. Fla., July 14, 2016) (*unpublished*); Townsel v. Washington State Dept. of Corrections, No. 12-CV-5095-JTR 2013 U.S. Dist. LEXIS 150281 at *5 (E.D. Wash. Oct. 11, 2013) (*unpublished*) ("Because this case was originally filed in Walla Walla County Superior Court, the dismissal of Plaintiff's claims does not result in a strike under § 1915(g).").; Miller v. John Doe, No. 05-C-185, 2005 WL 1308408 at *1 (E.D. Wis. May 31, 2005) (*unpublished*) (holding that actions dismissed from state and local courts cannot be strikes); Freeman v. Lee, 30 F. Supp. 2d 52, 54 (D.D.C. 1998).

109. Ortiz v. Kelly, No. 3:05-CV-00113-LRH-VPC, 2010 U.S. Dist. LEXIS 100328 at *4–5 (D. Nev., Sept. 20, 2010) (*unpublished*) (holding denial of a temporary restraining order was not a strike); Belton v. U.S., No. 07-C-925, 2008 U.S. Dist. LEXIS 68964 at *33 (E.D. Wis. June 2, 2008) (*unpublished*) (holding a decision on a motion under Rule 60(b) is not a strike; statute "does not apply to motions, only 'actions' or 'appeals'").

110. Lomax v. Ortiz-Marquez, 140 S. Ct. 1721, 207 L. Ed.2d 132 (2020).

111. Knapp v. Hogan, 738 F.3d 1106, 1110 (9th Cir. 2013) ("We hold that dismissals following the repeated violation of Rule 8(a)'s 'short and plain statement' requirement, following leave to amend, are dismissals for failure to state a claim under § 1915(g). . . . When a litigant knowingly and repeatedly refuses to conform his pleadings to the requirements of the Federal Rules, it is reasonable to conclude that the litigant simply cannot state a claim."); Paul v. Marberry, 658 F.3d 702, 705 (7th Cir. 2011) (holding that a complaint that is "irremediably unintelligible" and is not corrected gives rise to an inference that the plaintiff cannot state a claim). *Contra*, Carbajal v McCann, 808 F. App'x 620, 629 (10th Cir. 2020) (*unpublished*) (declining to find a strike where an action was dismissed for failure to prosecute for failing to correct a Rule 8 violation); Maree Bey v. Williams, No. 04-1759 (RCL), 2005 U.S. Dist. LEXIS 35722 at *5 (D.D.C. Aug. 1, 2005) (*unpublished*) (holding a Rule 8 violation is not a strike because § 1915(g) does not list such dismissals as strikes).

to dismissal), rather than by amending the original complaint, and is then dismissed again, you will receive a second strike.[112]

A dismissal is not a strike if the reason for it cannot be determined.[113] Some older decisions have held that incarcerated people should not be given a strike based on law that was unclear or that changed after they filed.[114]

Dismissals may be strikes even if they were not IFP cases.[115] Courts have also counted as strikes cases filed or dismissed before the enactment of the PLRA.[116] A dismissal in a habeas corpus action is not a strike, unless it is a "mislabeled" 42 U.S.C. § 1983 action (that is, a civil rights claim, and not a habeas corpus action).[117] Courts have sometimes treated these incorrectly filed habeas petitions as Section 1983 cases and gone forward with them in adjudication as if they were Section 1983 cases.[118] But courts have warned that this should not be done automatically since there may be significant consequences (like being charged a strike and having to pay the higher civil action filing fee) and incarcerated people ought to have a chance to think over whether they want to proceed.[119] Most courts

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112. *See* Orr v. Clements, 688 F.3d 463, 465–466 (8th Cir. 2012) (finding that two strikes was appropriate since there were two separate actions with separate complaints and separate case numbers).

113. *See* Williams v. PA Department of Corrections, 695 F. App'x 654, 656–657 (3d Cir. 2017) (per curiam) (*unpublished*) (noting that no case of the plaintiff's could be identified that "conclusively qualifies as a strike"); Andrews v. King, 398 F.3d 1113, 1120 (9th Cir. 2005) (holding that, where defendants want to show a plaintiff had three strikes, they 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," and where docket records do not reflect "the basis for dismissal ... the defendants may not simply [rely] on the fact of dismissal [alone]."); Lyons v. Beard, No. 1:13-CV-2952, 2014 U.S. Dist. LEXIS 71123 at *13 (M.D.Pa., May 23, 2014) (*unpublished*) (holding ambiguous docket records did not establish that dismissals were strikes); Deen-Mitchell v. Lappin, NO. 1:09-cv-02069-RJL, 2010 U.S. Dist. LEXIS 59355, at *2–*3 (D.D.C., June 8, 2010) *(unpublished)* (holding docket summary which did not rule out non-§ 1915(g) reasons for dismissal did not establish a strike); Freeman v. Lee, 30 F. Supp. 2d 52, 54 (D.D.C. 1998) (finding there was no strike because since the order dismissing the prisoner's action did not explain the reason for dismissal, the court refused to assume it was eligible for a strike, stating that "[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).").

114. *See, e.g.,* 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); 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 of plaintiff's claim based on a later Supreme Court decision was not a strike since it had stated a valid civil rights claim *at the time it was filed*).

115. *See* Belanus v. Clark, 796 F.3d 1021, 1028–1030 (9th Cir. 2015); Byrd v. Shannon, 715 F.3d 117, 122–124 (3d Cir. 2013); Burghart v. Corrections Corp. of America, 350 F. App'x 278, 279 (10th Cir. 2009) (*unpublished*); Hyland v. Clinton, 3 F. App'x 478, 479 (6th Cir. 2001) (*unpublished*); Duvall v. Miller, 122 F.3d 489, 490 (7th Cir. 1997) (holding that "a dismissal need not, to qualify as a strike, be of an action or appeal filed [IFP]."). *Contra*, Jones v. Moorjani, No. 13 Civ. 2247 (PAC) (JLC), 2013 U.S. Dist. LEXIS 175290 at *26–36 (S.D.N.Y. Dec. 13, 2013) (*unpublished*), *report and recommendation adopted*, Jones v. Moorjani, No. 13 Civ. 2247 (PAC) (JLC) 2014 U.S. Dist. LEXIS 12664 (S.D.N.Y. Jan. 31, 2014) (*unpublished*).

116. *See, e.g.*, Ibrahim v. District of Columbia, 208 F.3d 1032, 1036 (D.C. Cir. 2000); Welch v. Galie, 207 F.3d 130, 131 (2d Cir. 2000) (holding that lawsuits filed before Section 1915(g) was enacted can still count as strikes); Wilson v. Yaklich, 148 F.3d 596, 602–604 (6th Cir. 1998) (rejecting retroactivity-based challenge to counting pre-PLRA dismissals as strikes); Rivera v. Allin, 144 F.3d 719, 730-31 (11th Cir. 1998).

117. El-Shaddai v. Zamora, 833 F.3d 1036, 1047 (9th Cir. 2016); Jones v. Smith, 720 F.3d 142, 147–148 (2d Cir. 2013) (holding dismissal of habeas petition or of appeal in a habeas proceeding is not a strike; expressing no view as to habeas petitions directed to conditions of confinement); Andrews v. King, 398 F.3d 1113, 1122–1123, 1123 n.12 (9th Cir. 2005).

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

119. Pischke v. Litscher, 178 F.3d 497, 500 (7th Cir. 1999) (dismissing habeas corpus actions and indicating plaintiffs may re-file complaints as civil rights claims); Reed v. Paramo, No. 1:17-cv-01347-AWI-MJS (HC), 2017 U.S. Dist. LEXIS 192949, at *5 (E.D. Cal. Nov. 21, 2017) (*unpublished*); Raia v. Aviles, No. 11-3374 (WJM), 2011 U.S. Dist. LEXIS 74940, at *4 (D.N.J. July 6, 2011) (*unpublished*); Brock v. White, No. 2:09-CV-14005, 2011 U.S. Dist. LEXIS 44145, at *9 (E.D. Mich. Apr. 25, 2011) (*unpublished*).

have held that civil rights actions dismissed because they should have been filed as habeas corpus petitions ("*Heck*-barred" cases) are strikes,[120] but some have disagreed.[121] One federal circuit has taken a more analytical approach, noting that *Heck*-barred cases are not all frivolous; some incarcerated people may have claims that are valid even if they have been brought prematurely. A *Heck*-barred action may be a strike only "when the pleadings present an 'obvious bar to securing relief' under *Heck*," and only if the entire case can be dismissed under *Heck*.[122]

In a class action, only named plaintiffs, and not unnamed class members, are subject to the three strikes provision.[123]

The statute refers only to previous actions brought "while [the plaintiff is] incarcerated or detained" as claims which can result in a strike.[124]

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."[125] It is usually not enough for an appeals court to simply affirm a district court decision that dismissed under Section 1915(g).[126]

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120. *Heck*-barred refers to the Supreme Court decision in Heck v. Humphrey, 512 U.S. 477, 114 S.Ct. 2364, 129 L. Ed. 2d 383 (1994). *See, e.g.*, *In re* Jones, 652 F.3d 36, 38–39 (D.C. Cir. 2011) (per curiam) (holding *Heck*-barred claim fails to state a claim and is therefore a strike); Smith v. Veterans Admin., 636 F.3d 1306, 1312 (10th Cir. 2011) (citing Davis v. Kan. Dept. of Corr., 507 F.3d 1246, 1248, 1249 (10th Cir. 2007)); Hamilton v. Lyons, 74 F.3d 99, 103 (5th Cir. 1996) (holding *Heck*-barred claim was frivolous); Schafer v. Moore, 46 F.3d 43, 45 (8th Cir. 1995) ("[I]n light of *Heck*, the complaint was properly dismissed for failure to state a claim."); Wright v. East Point Police Dept., No. 1:12–CV–2062–TWT, 2014 WL 1908648, *2 n.4 (N.D. Ga. May 12, 2014) (*unpublished*) ("A dismissal based on the prematurity of a civil rights action counts as a strike."); Sharp v. Montana, No. CV 13–88–GF–DWM, 2014 WL 824820, *6 (D. Mont. Mar. 3, 2014) (*unpublished*) (noting "the Supreme Court in *Heck* stated its ruling was based on a denial of 'the existence of a cause of action'"); Berner v. Hill, No. 1:11-cv-1373, 2012 U.S. Dist. LEXIS 29349, at *4 (W.D.Mich., Mar. 6, 2012) (*unpublished*).

121. *See, e.g.*, Mejia v. Harrington, 541 F. App'x 709, 710 (7th Cir. 2013) (*unpublished*) (stating "*Heck* and *Edwards* [*v. Balisok*] deal with timing rather than the merits of litigation" so dismissal under them is not a strike); McCotter v. Repischak, No. 12-CV-314-JPS, 2012 U.S. Dist. LEXIS 81701, at *8 (E.D. Wis., June 13, 2012) (*unpublished*) (holding "because the plaintiff may pursue a separate petition for a writ of habeas corpus, . . . the plaintiff will not incur a strike under 28 U.S.C. § 1915(g),"); *see also* Lomax v. Ortiz-Marquez, 140 S. Ct. 1721, 1724 n.2, 207 L.Ed.2d 132, 136 n.2 (2020) (acknowledging circuit split over whether dismissals as *Heck*-barred are for failure to state a claim).

122. Washington v. Los Angeles Cty. Sheriff's Dept., 833 F.3d 1048, 1055–1057 (9th Cir. 2016).

123. Spotts v. Jones, No. 1:18-CV-41, 2018 U.S. Dist. LEXIS 141168, at *1 (E.D. Tex. Aug. 20, 2018) (*unpublished*); Meisberger v. Donahue, 245 F.R.D. 627, 630 (S.D. Ind. 2007).

124. 28 U.S.C. § 1915(g). *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 such that he would have three strikes under Section 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, but his appeals outside of his time in prison did not count).

125. 28 U.S.C. § 1915(g). *Compare* Newlin v. Helman, 123 F.3d 429, 433 (7th Cir. 1997), *overruled on other grounds by* Walker v. O'Brien, 216 F.3d 626 (7th Cir. 2000) (holding that a frivolous appeal of a dismissed claim counts as a second strike, since "bringing an action and filing an appeal are separate acts."), *with* Andrews v. King, 398 F.3d 1113, 1120–1121 (9th Cir. 2005) (holding that an appeal dismissed for lack of jurisdiction was not necessarily a strike, since the lower court did not perform an independent assessment to determine if it was frivolous or malicious as required under Section 1915(g)).

126. *See, e.g.*, Ladeairous v Sessions, 884 F.3d 1172, 1175–1176 (D.C. Cir. 2018); El-Shaddai v. Zamora, 833 F.3d 1036, 1045 (9th Cir. 2016); Ball v. Famiglio, 726 F.3d 448, 464 (3d Cir. 2013); Thompson v. Drug Enforcement Admin., 492 F.3d 428, 436 (D.C. Cir. 2007) ("[Congress's] choice of the word 'dismiss' rather than 'affirm' in relation to appeals was unlikely an act of careless draftsmanship."); Jennings v. Natrona County Det. Ctr. Med. Facility, 175 F.3d 775, 780 (10th Cir. 1999), *overruled on other grounds by* Coleman v. Tollefson 135 S. Ct. 1759, 191 L. Ed. 2d 803 (2015) ("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), *abrogated in part on other grounds by* Coleman v. Tollefson, 135 S. Ct. 1759, 191 L. Ed. 2d 803 (2015) ("It is straightforward that affirmance of a district court dismissal as frivolous counts as a single 'strike.'"). One federal appeals court has taken a different view. The Seventh Circuit has held that "the appeal following a frivolous complaint is yet another 'strike,'" Kalinowski v. Bond, 358 F.3d 978, 979 (7th Cir. 2004), without distinguishing between affirmance and dismissal of the appeal. The court in *Kalinowski* noted its view that the appeal too was

The appeals court itself must dismiss under Section 1915(g). An appeal dismissed on grounds not related to 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 dismisses the appeal on any grounds other than Section 1915(g), the appeals court decision should not count as a strike.[127]

A dismissal on the grounds enumerated in § 1915(g) takes effect as a strike immediately. Many courts held that dismissals only become strikes when all appeals are exhausted or waived, but the Supreme Court rejected that position.[128] The Supreme Court left open the question whether its decision means that an incarcerated person who receives a third strike in the district court is barred from IFP status in appealing that district court decision. Lower court decisions on the point are divided.[129] The Seventh Circuit had previously said this problem is a non-problem, since incarcerated people have "a perfectly good remedy" in the appeals court itself: seek IFP status from the appeals court, which in the course of deciding whether the incarcerated person actually does have three strikes will review the correctness of the district court's determination, at least to the extent of determining whether the appeal should be allowed to go forward.[130]

The defendants (or the court) 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.[131] 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.[132] This may be done with docket entries *if* those entries actually show that cases were dismissed on Section 1915(g) grounds.[133]

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frivolous. Id. However, it affirmed the decision below, rather than dismissing the appeal. The practice in the Seventh Circuit is to treat appellate affirmances of district court dismissals on the § 1915(g) grounds as strikes. *See, e.g.*, Ealy v. Griffin, 803 F. App'x 41, 43 (7th Cir. 2020) (*unpublished*) (affirming dismissal for failure to state a claim, declaring affirmance a strike); Kupsky v. Outagamie Cty., 747 F. App'x 431, 432 (7th Cir. 2019) (*unpublished*) (same). This practice contradicts the statutory language, which counts as strikes only an action or appeal "*dismissed* on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted." 28 U.S.C. § 1915(g) (emphasis supplied).

127. *See, e.g.*, Tafari v. Hues, 473 F.3d 440, 442–444 (2d Cir. 2007) (holding an appeal dismissed as premature does not count as a strike); Cosby v. Knowles, No. 97-1400, 1998 U.S. App. LEXIS 7845, at *4–5, 145 F.3d 1345 (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); Perkins v. Lora, No. 11-10794, 2011 U.S. Dist. LEXIS 49730, at *7 (E.D. Mich. 2011) (*unpublished*) (finding that dismissal based on a failure to exhaust administrative remedies does not count as a strike under Section 1915(g));.

128. Coleman v. Tollefson, 135 S. Ct. 1759, 1761–1762, 191 L. Ed. 2d 803, 808–809 (2015).

129. Richey v. Dahne, 807 F.3d 1202, 1209 (9th Cir. 2015) (holding the district court third strike does not bar IFP status on appeal in that same case); Taylor v. Grubbs, 930 F.3d 611, 615-20 (4th Cir. 2019) (same); Dawson v. Coffman, 651 F. App'x 840, 842 n.2 (10th Cir. 2016) (*unpublished*) (same). *Contra* Parker v. Montgomery County Correctional Facility/Business Office Manager, 870 F.3d 144, 151–154 (3rd Cir. 2017).

130. Robinson v. Powell, 297 F.3d 540, 541 (7th Cir. 2002).

131. Thompson v. Drug Enforcement Admin., 492 F.3d 428, 435–436 (D.C. Cir. 2007); 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* 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*) (affirming the burden shifting framework). In practice, courts often raise three strikes on their own at initial screening.

132. 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).

133. Harris v. City of New York, 607 F.3d 18, 23–24 (2d Cir. 2010) (holding docket entries may be used if they show clearly the nature of the disposition); Thompson v. Drug Enforcement Admin., 492 F.3d 428, 433–435 (D.C. Cir. 2007); Andrews v. King, 398 F.3d 1113, 1119–1120 (9th Cir. 2005)

Otherwise, more complete information must be obtained.[134] Courts have reached different conclusions about how specific they must be in identifying each case they consider to be a strike.[135]

The three strikes rule cannot revoke 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.[136] A case is "brought" when you submit the complaint to the court.[137] The three strikes provision also does not stop you from amending your complaint in a suit filed before you had three strikes.[138]

(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."[139] "Imminent" means you must be in danger at the time you file the suit[140] or when you file a notice of appeal and seek IFP status on appeal.[141]

Most courts have held that claims of imminent danger are to be assessed on the basis of the allegations in the complaint, which are to be assumed true for purposes of the imminent danger decision.[142] Courts may also look to allegations in other documents submitted by the plaintiff that

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134. *See, e.g.*, Lewis v. Healy, No. 9:08-CV-148 (LEK/DEP), 2008 U.S. Dist. LEXIS 124378, at *9 (N.D.N.Y. Oct. 29, 2008) (*unpublished*) (noting that since "determination of whether a prior dismissal does in fact constitute a strike is dependent upon the precise nature of the dismissal and the grounds supporting it," court obtained copies of actual orders of dismissal rather than relying on docket entries).

135. *See* Parks v. Samuels, 540 F. App'x 146, 149 n.1 (3d Cir. 2014) (*unpublished*) (noting that the "preferred practice" is for the district court to "make a record" of the prisoner's strikes for appellate review, but that the court could review the prisoner's strikes regardless); Gibson v. City Municipality of New York, 692 F.3d 198, 200 n.2 (2d Cir. 2012) (per curiam) (holding district courts need not specify the dismissals they deem to be strikes, but the case may need to be remanded if they don't); Muhammad v. Workman, 479 F. App'x 871, 872 (10th Cir. 2012) (*unpublished*) (vacating and remanding three strikes finding where district court did not include opinions and judgments in the record for appellate review); 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. Court for Seventh Judicial Dist., No. 98-8068, 1999 U.S. App. LEXIS 2386, at *2–3 (10th Cir. Feb. 16, 1999) (*unpublished*) (remanding because the district court did not specify which prior actions or appeals were frivolous).

136. *See, e.g.*, Nicholas v. American Detective Agency, 254 F. App'x 116, 117 (3d Cir. 2007) (per curiam) (*unpublished*); Mills v. White, 182 F. App'x 615 (8th Cir. 2006) (per curiam) (*unpublished*); Abdul-Wadood v. Nathan, 91 F.3d 1023, 1025 (7th Cir. 1996) ("Section 1915(g) governs bringing new actions or filing new appeals—the events that trigger an obligation to pay a docket fee—rather than the disposition of existing cases.").

137. O'Neal v. Price, 531 F.3d 1146, 1151–1152 (9th Cir. 2008).

138. 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).

139. 28 U.S.C. § 1915(g).

140. Williams v. Paramo, 775 F.3d 1182, 1190 (9th Cir. 2015); Pinson v. Samuels, 761 F.3d 1, 4–5 (D.C. Cir. 2014), *aff'd on other grounds sub nom.* Bruce v. Samuels, 577 U.S. 82, 136 S. Ct. 627 (2016); Hafed v. Fed. Bureau of Prisons, 635 F.3d 1172, 1179 (10th Cir. 2011); Vandiver v. Vasbinder, 416 F. App'x. 560, 560 (6th Cir. 2011) (*unpublished*); Andrews v. Cervantes, 493 F.3d 1047, 1052–1053 (9th Cir. 2007); Ciarpaglini v. Saini, 352 F.3d 328, 330 (7th Cir.2003).

141. Pinson v. United States Dept. of Justice, 964 F.3d 65, 69 (D.C. Cir. 2020); Williams v. Paramo, 775 F.3d 1182, 1187–1188 (9th Cir. 2015). *But see* Williams v. Paramo, 775 F.3d 1182, 1190 (9th Cir. 2015) (holding "a prisoner who was found by the district court to sufficiently allege an imminent danger is entitled to a presumption that the danger continues at the time of the filing of the notice of appeal.").

142. Vandiver v. Vasbinder, 416 F. App'x 560, 562–563 (6th Cir. 2011) (*unpublished*) (holding that plaintiff "sufficiently alleged [imminent danger], and that is all that is required by § 1915(g)"); Jackson v. Jackson, No. 08-13009, 335 F. App'x. 14, 14–15 (11th Cir. 2009) (per curiam) (*unpublished*) ("Based on these allegations, which we must construe liberally, accept as true, and view as a whole, . . . we conclude that Jackson has sufficiently demonstrated that he was in imminent danger of serious physical injury when he filed suit."); Andrews v. Cervantes, 493 F.3d 1047, 1050 (9th Cir. 2007) (holding that courts must rely on complaint's allegations and that "the three-strikes rule is a screening device that does not judge the merits of prisoners' lawsuits"); Martin v.

address conditions around the time of the complaint.[143] On appeal, where there is no new complaint, allegations of imminent danger tend to be made (and will be considered) when the incarcerated person submits a request for *in forma pauperis* status on appeal, or may be made in other documents filed in the same time period.[144]

Even when courts credit the plaintiff's allegations of imminent danger of serious physical harm, they may reject them as alleging harm that is not imminent enough,[145] not serious enough,[146] or too vague, speculative, or conclusory to be credited.[147] Past danger is not imminent danger.[148] Conditions that are generally dangerous do not satisfy the imminent danger standard unless they are shown to be personally dangerous to the plaintiff.[149]

Shelton, 319 F.3d 1048, 1050 (8th Cir. 2003) (requiring "specific fact allegations of ongoing serious physical injury, or of a pattern of misconduct evidencing the likelihood of imminent serious physical injury"); Ciarpiaglini v. Saini, 352 F.3d 328, 330–331 (7th Cir. 2003) (describing standard as "amorphous," disapproving extensive inquiry into seriousness of allegations at pleading stage).

143. Barber v. Krepp, 680 F. App'x 819, 820–822 (11th Cir. 2017) (*unpublished*) (quoting Asemani v. U.S. Citizenship and Immigration Servs., 797 F.3d 1069, 1074–1075 (D.C. Cir. 2015)) (referring to plaintiff's "various filings in the district court" in assessing imminent danger); Miller v. United States, No. 15-646C, 2015 U.S. Claims LEXIS 1015, at *2 (Fed. Cl. Aug. 7, 2015) (*unpublished*) (relying on allegations in a "separate filing"). In *Asemani*, the relevant facts appeared in plaintiff's response to a motion to vacate IFP status. Asemani v. U.S. Citizenship and Immigration Servs., 797 F.3d 1069, 1075 (D.C. Cir. 2015).

144. Dopp v. Larimer, 731 F. App'x. 748, 750–752 (10th Cir. 2018) (*unpublished*) (noting plaintiff had sufficiently alleged imminent danger in his complaint, and alleged that his untreated medical condition was worsening in response to the appeals court's order to show cause why the appeal should not be dismissed for nonpayment of the fee); Hafed v. Fed. Bureau of Prisons, 635 F.3d 1172, 1180 (10th Cir. 2011) (stating "[a]n appellant should make his allegations of imminent danger in his motion for leave to proceed ifp"[sic] and acknowledging that a litigant may "point[] to other papers to establish his allegations of imminent harm"); Williams v. Paramo, 775 F.3d 1182, 1190 (9th Cir. 2015) (citing imminent danger allegations in response to order to show cause why IFP should not be revoked).

145. For example, courts have said exposure to second-hand smoke can be dangerous but not imminent enough. Hart v. Sec'y, Fla. Dept. of Corr., No. 4:18cv322-RH/CAS, 2018 U.S. Dist. LEXIS 158621, at *1 (N.D. Fla. Sept. 18, 2018) (noting that "exposure to tobacco smoke can cause serious physical injury, even death. Most tobacco-caused serious physical injuries result from long-term exposure and cannot fairly be characterized as imminent" and holding plaintiff did not explain how his exposure presented a danger that was imminent.); Johnson v. Mercer, No. 4:13cv321-RH/CAS, 2013 U.S. Dist. LEXIS 122564, at *1 (N.D. Fla. Aug. 28, 2013) ("Second-hand smoke does pose a risk of serious physical injury, but the risk is not sufficiently imminent to qualify under § 1915(g).").

146. Gresham v. Meden, 938 F.3d 847, 850 (6th Cir. 2019) ("A physical injury is 'serious' for purposes of § 1915(g) if it has potentially dangerous consequences such as death or severe bodily harm. Minor harms or fleeting discomfort don't count.") In *Gresham*, the Court held that being forced to take an antipsychotic drug against your will does not count as imminent danger.

147. *See, e.g.*, Fourstar v. United States, 950 F.3d 856, 859 (Fed. Cir. 2020) (holding claim of imminent injury to plaintiff incarcerated in Montana from possible breakage or leakage of Keystone XL Pipeline in the Dakotas was "too speculative and attenuated" to satisfy imminent danger standard); Asemani v. U.S. Citizenship and Immigration Servs., 797 F.3d 1069, 1076 (D.C. Cir. 2015) (holding that allegations that plaintiff might face danger because he has "inmate enemies" and there is a generic threat in a maximum security prison population did not establish imminent danger to him).

148. Vandiver v. Prison Health Servs., Inc., 727 F.3d 580, 585 (6th Cir. 2013) (quoting Percival v. Gerth, 443 F. App'x 944, 946 (6th Cir. 2011) (*unpublished*) (explaining that the threat or prison condition must exist at the time the complaint is filed, and that "assertions of past danger will not satisfy the 'imminent danger' exception"); Brown v. Johnson, 387 F.3d 1344, 1349 (11th Cir. 2004) (holding that incarcerated person faced imminent danger when the prison's medical staff stopped treating his HIV and hepatitis, and his medical condition declined).

149. Hart v. Jones, No. 4:18-cv-51-RH-GRJ, 2018 U.S. Dist. LEXIS 63630, at *2 (N.D. Fla. Feb. 9, 2018) (*unpublished*) (holding allegation of placement in a high custody dormitory where plaintiff "was threatened by gang violence and where there were four 'eruptions' of gang violence" in one month before suit was filed, done in retaliation for filing lawsuits against prison officials, did not sufficiently allege that he personally faced imminent danger), *report and recommendation adopted*, Hart v. Jones, No. 4:18-cv-51-RH-GRJ, 2018 U.S. Dist. LEXIS 63329 (N.D. Fla. Apr. 16, 2018); Harris v. Nink, No. 2:13-cv-304, 2013 U.S. Dist. LEXIS 126747, at *1 (S.D. Ohio Sept. 5, 2013) (holding that allegations of understaffing, overcrowding, medical care and violence do not show

If claims of imminent danger 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.[150] Some courts, however, may make *ad hoc* ("*ad hoc*" means "unique to your particular case") judgments about the credibility or seriousness of your *pro se* complaint's allegations.[151] The more specific you can be about the danger you are in, the more likely you are to qualify for the exception.

Allegations of failure to protect from the risk of assault from other incarcerated people may constitute imminent danger of serious injury.[152] The same is true for assault by staff members.[153] As

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imminent danger without allegations of specific risk to the plaintiff); Jemison v. Thomas, Civ. Action No, 12-0557-CG-M, 2012 U.S. Dist. LEXIS 171208, at *2 (S.D. Ala. Nov. 1, 2012) (holding that allegations of health-threatening heat and unsanitary food service and living conditions did not establish imminent danger where the plaintiff did not specifically allege current or future injury to himself), *report and recommendation adopted*, Jemison v. Thomas, Civ. Action No, 12-0557-CG-M, 2012 U.S. Dist. LEXIS 170282 (S.D. Ala. Nov. 29, 2012).

150. McLeod v. Sec'y, Fla. Dept of Corr., 778 F. App'x 663, 665 (11th Cir. 2019) (*unpublished*) ("Once a district court has made an initial finding of imminent danger, it retains the authority to revisit that determination and revoke IFP status when new evidence bearing on the IFP determination comes to light.") Shepherd v. Annucci, 921 F.3d 89, 95 (2d Cir. 2019) (approving "limited probe into the plausibility of a prisoner-litigant's claim of imminent danger," by resorting to outside evidence and holding that "a narrow evidentiary challenge to a provisional determination that a prisoner is in imminent danger of serious physical injury should not metastasize into 'a full-scale merits review.' " (citation omitted)); Sanders v. Melvin, 873 F.3d 957, 961–962 (7th Cir. 2017) (stating "if a claim [of imminent danger] is challenged by the defense, or seems fishy to the judge, it must be supported by facts presented in affidavits or, if appropriate, hearings"); Stine v. U.S. Fed. Bureau of Prisons, 465 F. App'x 790, 794 (10th Cir. 2012) (*unpublished*) (noting that if defendants contest imminent danger after a grant of IFP status, they may "mount a facial challenge, based on full development of the facts" (citation omitted)); Taylor v. Watkins, 623 F.3d 483, 485–86 (7th Cir. 2010) (holding that "when a defendant contests a plaintiff's claims of imminent danger, a court must act to resolve the conflict" by having a hearing of limited scope on the issue of limited danger); Gibbs v. Roman, 116 F.3d 83, 86–87 (3d Cir. 1997), *overruled on other grounds by* Abdul-Akbar v. McKelvie, 239 F.3d 307 (3d Cir. 2001) (instructing the district court to explore allegations and the state's response before dismissal).

151. *See, e.g.*, Davis v. Stephens, 589 F. App'x. 295, 296 (5th Cir. 2015) (per curiam) (*unpublished*) (holding plaintiff's "allegation that he might be seriously injured at an indefinite point in the future because he has been required to wear shoes that are the wrong size and are damaged is insufficient to establish that he was in imminent danger of serious physical injury at the relevant times"); Senator v. Cates, No. 2:11-cv-2029 DAD P, 2012 U.S. Dist. LEXIS 78067, at *2 (E.D. Cal., June 5, 2012) (*unpublished*) (finding no imminent danger based on court's lay reading of medical records attached to the complaint, relying on boilerplate phrases like "not in 'acute distress'" and "alert and oriented"), *reconsideration denied*, Senator v. Cates, No. 2:11-cv-2029 DAD P, 2012 U.S. Dist. LEXIS 34229 (E.D. Cal., Mar. 12, 2013); Pruden v. Mayer, No. 3:CV-08-0559, No. 3:CV-08-0560, No. 3:CV-08-0561, No. 3:CV-08-0562, No. 3:CV-08-0571, 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).

152. Smith v. Dewberry, 741 F. App'x 683, 686–687 (11th Cir. 2018) (per curiam) (*unpublished*) (holding prisoner assaulted and then subjected to ongoing threats of assault showed imminent danger even though his housing unit was on lockdown when he filed, since a lockdown can end "any time"); Valenzuela v. Monts, 731 F. App'x 693, 693 (9th Cir. 2018) (*unpublished*) (holding plaintiff's allegation that "one or more inmates had sexually assaulted her and threatened her life, that these threats and assaults were ongoing, and that she had reported these matters and nothing had been done" satisfied the imminent danger requirement); Williams v. Buenostrome, 764 F. App'x 573, 574 (9th Cir. 2019) (*unpublished*) (holding allegations "that defendant . . . repeatedly assaulted him without justification, encouraged other inmates to attack him, and threatened his life" and that even after he was moved to a different building, [the defendant] continued to have access to him and threaten him with physical harm" . . . are sufficient to plausibly allege imminent danger of serious physical injury"); Lindsey v. Hoem, 799 F. App'x 410, 412–413 (7th Cir. 2020) (*unpublished*) (finding imminent danger where plaintiff's requests for separation from prisoners who had threatened or attacked him were denied, and where after one attack, staff members had "threatened to make sure that he "get[s] [his] ass beat again"); Ashley v. Dilworth, 147 F.3d 715, 717 (8th Cir. 1998) (*unpublished*) (finding that enduring repeated attacks from a prisoner housed nearby and filing only days after an attack proved imminent danger).

153. Williams v. Ortega, 757 F. App'x 636, 636 (9th Cir. 2019) (*unpublished*) (holding allegation that plaintiff was physically assaulted by one defendant causing serious injury and that he and another defendant threatened plaintiff with further attacks and worse injuries if he were to report the assaults or file any grievances or lawsuits about it are sufficient to plausibly allege imminent danger of serious physical injury); Newkirk v. Kiser, 812 F.

the cited cases illustrate, the plaintiff must show not only that he was attacked, but that there is reason to believe there will be more attacks. Ongoing failure to treat serious medical[154] or dental[155] problems is often held to satisfy the imminent danger standard, as is the failure to accommodate disabilities if it creates an actual risk of physical injury.[156] Exposure to dangerous living conditions

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App'x 159, 160 (4th Cir. 2020) (per curiam) (*unpublished*) (directing grant of IFP where the plaintiff "described one incident in which he was allegedly subjected to excessive force and asserted that this was not an isolated occurrence. To the contrary, he claimed that prison staff members regularly assault inmates without cause and threaten inmates who complain."); Ball v. Hummel, 577 F. App'x 96, 96 (3d Cir. 2014) (per curiam) (*unpublished*) (motion that "describes being beaten and sexually assaulted by guards, with threats to harm her further the next time" in a case that alleged physical abuse by staff satisfied the imminent danger standard); Mendez v. Ariz. Dept. of Corr., 478 F. App'x 437, 437 (9th Cir. 2012) (*unpublished*) (holding allegation of recent brutal beating and threats of death if plaintiff sought legal redress met the imminent danger standard); Tucker v. Pentrich, 483 F. App'x 28, 29–30 (6th Cir. 2012) (per curiam) (*unpublished*) (holding allegations of an assault, followed by five explicit threats related to plaintiff's complaints about the assault, within two months of the complaint's filing met the imminent danger standard); Smith v. Clemons, 465 F. App'x 835, 837 (11th Cir. 2012) (per curiam) (*unpublished*) (holding incident of physical abuse followed by recent threats of more violence from the same officers in retaliation for plaintiff's filing suit satisfied imminent danger standard); Prall v. Bocchini, 421 F. App'x 143, 145 (3d Cir. 2011) (per curiam) (*unpublished*) (holding allegation of ongoing physical abuse "at least once a week" clearly stated an ongoing danger that was imminent when the complaint was filed); Chavis v. Chappius, 618 F.3d 162, 170 (2d Cir. 2010) ("An allegation of a recent brutal beating, combined with three separate threatening incidents, some of which involved officers who purportedly participated in that beating, is clearly the sort of ongoing pattern of acts that satisfies the imminent danger exception.").

154. *See, e.g.*, McFadden v. Koenigsmann, 798 F. App'x 699, 700 (2d Cir. 2020) (*unpublished*) (holding allegation that plaintiff "had ongoing heart disease, that his pacemaker battery had expired, and that the defendants refused to replace the battery" met imminent danger requirement); Boles v. Colo. Dept. of Corr., 794 F. App'x 767, 771 (10th Cir. 2019) (*unpublished*) (holding allegation that failure to provide a fresh food diet for a prisoner with irritable bowel syndrome, resulting in severe pain and aggravation of a degenerative bone condition, met imminent danger requirement); O'Connor v. Backman, 743 F. App'x 373, 376 (11th Cir. 2018) (per curiam) (*unpublished*) (holding ongoing gastrointestinal issues involving "severe cramping, causing him to curl up in the fetal position with clenched fists and teeth and forcing him to crawl to and from the toilet; bloody stools; acid reflux; heartburn; and significant weight loss, resulting in a weight of 137 pounds on his six-foot tall frame" satisfied the imminent danger requirement, as does allegation of a two-year delay in surgery for gallstones that "could lead to an infection of his gallbladder, the eruption of which, like appendicitis, could be fatal"); Mitchell v. Nobles, 873 F.3d 869, 874 (11th Cir. 2017) (holding allegation of total lack of treatment for symptomatic Hepatitis C satisfies imminent danger requirement); Brown v. Wolf, 705 F. App'x 63, 66–67 (3d Cir. 2017) (*unpublished*) (holding plaintiff's allegations of defendants' refusal to treat him for Hepatitis C despite his symptoms sufficiently alleged imminent danger); Reberger v. Koehn, 683 F. App'x 607, 607 (9th Cir. 2017) (*unpublished*) (holding plaintiff plausibly alleged imminent danger "because defendants continue to refuse to give him his HIV and seizure medications regularly").

155. Stine v. Oliver, 644 F. App'x 857, 859 (10th Cir. 2016) (*unpublished*) (holding allegations of failure to provide dental care for infected and abscessed teeth showed imminent danger); Tierney v. Unknown Dentist, 596 F. App'x 576, 577 (9th Cir. 2015) (*unpublished*) (holding plaintiff's allegation of "extreme and continuing pain, inability to sleep, and infection of his gums" sufficiently alleged imminent danger notwithstanding offer of tooth extraction); McAlphin v. Toney, 281 F.3d 709, 710–711 (8th Cir. 2002) (holding allegations of a spreading mouth infection and a need for two tooth extractions showed imminent danger); McAlphin v. Correct Care Sols., LLC, No. 2:17CV00093-KGB-JTK, 2018 U.S. Dist. LEXIS 84028, at *2 (E.D. Ark. Mar. 29, 2018) (*unpublished*) (holding refusal to extract five rotten teeth, which caused infection, abscesses, swollen lymph nodes, fever blisters, and other medical problems, established imminent danger), *report and recommendation adopted*, McAlphin v. Correct Care Sols., LLC, No. 2:17-cv-00093-KGB, 2018 U.S. Dist. LEXIS 83206 (E.D. Ark. May 17, 2018) (*unpublished*); Thomas v. Cate, No. C 13-04052 DMR (PR), 2014 U.S. Dist. LEXIS 65169, at *2 (N.D. Cal. May 12, 2014) (*unpublished*) (holding allegations of "severe gingival inflammation and palpation and severe periodontitis" could satisfy standard).

156. *See, e.g.*, Fuller v. Wilcox, 288 F. App'x 509, 511 (10th Cir. 2008) (*unpublished*) (holding denial of a wheelchair, meaning that plaintiff must crawl, and could not walk to the shower or lift himself to his bed, "could result in a number of serious physical injuries" and sufficiently alleged imminent danger); Dye v. Bartow, No. 13-cv-284-bbc, 2013 U.S. Dist. LEXIS 134000, at *2 (W.D. Wis. Sept. 19, 2013) (*unpublished*) (holding requirement that prisoner with malformed thumb and degenerative arthritis use a short-handled toothbrush, causing pain, meets the "low bar" of imminent danger); McDonald v. Maue, No. 12-cv-1183-JPG, 2012 U.S. Dist. LEXIS 170801, at *1–*2 (S.D. Ill. Dec. 3, 2012) (*unpublished*) (holding failure to heed plaintiff's post-surgery medical restrictions

may constitute imminent danger,[157] though in such cases courts often look closely at whether the allegations describe a specific risk to the plaintiff him- or herself.[158]

Most federal appeals courts that have considered the question have held that if you sufficiently allege imminent danger, your whole complaint should go forward, even if portions of it are not related to the specific allegations and defendants currently responsible for the danger.[159] However, many district courts only allow the specific claims related to the imminent danger to proceed.[160]

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satisfied imminent danger standard), *reconsideration denied*, McDonald v. Maue, No. 12-cv-1183-JPG-PMF, 2013 U.S. Dist. LEXIS 5685 (S.D. Ill. Jan. 15, 2013) (*unpublished*) (S.D. Ill. Jan. 15, 2013); Dye v. Grisdale, No. 11-cv-443-slc, 2011 U.S. Dist. LEXIS 123748, at *2 (W.D. Wis. Oct. 25, 2011) (*unpublished*) (holding rescission of single-cell feed-in status to prisoner with eating disorder/phobia that prevented him from eating around others, resulting in "serious hunger pains, lack of bowel movements for days at a time, headaches, weakness," constituted imminent danger); Claiborne v. Blauser, No. CIV. S-10-2427 LKK EFB P, 2011 U.S. Dist. Lexis 68876, at *2 (E.D. Cal. June 27, 2011) (*unpublished*) (holding policy of rear-handcuffing mobility-impaired prisoners despite medical recommendations and taking their crutches and canes when moving them satisfied imminent danger standard); Williams v. Walker, No. CIV S-11-0805 DAD P, 2011 U.S. Dist. LEXIS 55925, at *1 (E.D. Cal. May 9, 2011) (*unpublished*) (stating prisoner with multiple mobility disabilities creating a risk of further injury unless he is placed in a bottom bunk sufficiently pled imminent danger)

157. *See, e.g.*, Brown v. Sec'y, Penn. Dept. of Corr., 486 F. App'x 299, at *301–*302 (3d Cir. June 21, 2012) (per curiam) (*unpublished*) (holding allegations of lack of open windows, no air conditioning, a ventilation system that is faulty and dirty, excessive heat, and polluted air sufficiently pled imminent danger); Smith v. Wang, 370 F. App'x 377, 378 (4th Cir. 2010) (per curiam) (*unpublished*) (citing exposure to environmental tobacco smoke allegedly causing nosebleeds and headaches in finding imminent danger adequately pled); Jackson v. Heyns, No. 1:13cv636, 2014 U.S. Dist. LEXIS 100632, at *5–*6 (W.D. Mich. July 24, 2014) (*unpublished*) (holding allegations concerning the effect of chemical sprays and mold on plaintiff's asthma rise to the level of imminent danger, as do another plaintiff's allegations of nausea, vomiting, and coughing up blood as a result of unsanitary conditions); Cochran v. Geit, No. 11-cv-134-wmc, 2011 U.S. Dist. LEXIS 81720, at *2 (W.D. Wis. July 26, 2011) (*unpublished*) (holding risk of having to climb to a top bunk without a ladder met imminent danger standard); Cole v. Ellis, No. 5:10-cv-00316-RS-GRJ, 2010 U.S. Dist. LEXIS 139420, at *2 (N.D. Fla. Dec. 28, 2010) (*unpublished*) (holding "the continuing harm of sleeping without heat during the winter months without additional clothing or blankets, could constitute an ongoing threat of serious physical harm" showing imminent danger), *report and recommendation adopted*, Cole v. McNeil, No. 5:10cv316/RS-GRJ, 2011 U.S. Dist. LEXIS 2521 (N.D. Fla. Jan. 11, 2011), *aff'd*, Cole v. Sec'y Dept of Corr., 451 F. App'x. 827 (11th Cir. 2011) (per curiam) (*unpublished*); Williams v. Lopez, No. 1:10-cv-00952-DLB PC, 2010 U.S. Dist. LEXIS 61622, at *1 (E.D. Cal. May 28, 2010) (allegation inter alia that defendants were about to transfer HIV-positive prisoner to prison where he would be exposed to potentially fatal Valley Fever met imminent danger standard). Note the difference between *Smith v Wang*, cited above, and the cases about second-hand tobacco smoke cited in footnote 145, above: *Smith* cited current symptoms the plaintiff alleged he personally experienced, while the others relied more on potential future harm.

158. *See, e.g.*, Frazier v. Fla. Dept. of Corr., No. 1:18-cv-186-MW-GRJ, 2018 U.S. Dist. LEXIS 205166, at *2 (N.D. Fla. Sept. 26, 2018) (holding allegation that plaintiff and others are "forced to drink contaminated water" causing "headaches, sore throat, chest pain, stomach pain, kidney pain, side pain, fever, diarrhea, and infection" to be "too vague and generalized" to show imminent danger without details as to the plaintiff's being " 'forced' to drink the contaminated water, or what, if any, of the alleged physical side effects he has personally suffered"), *report and recommendation adopted*, Frazier v. Fla. Dept. of Corr., No. 1:18-cv-186-MW-GRJ, 2018 U.S. Dist, LEXIS 204049 (N.D. Fla. Dec. 3, 2018).

159. *See* Boles v. Colo. Dept. of Corr., 794 F. App'x 767, 772 (10th Cir. 2019) (*unpublished*); Chavis v. Chappius, 618 F.3d 162, 171–172 (2d Cir. 2010) ("Nothing in the text of § 1915 provides any justification for dividing an action into individual claims and requiring a filing fee for those that do not relate to imminent danger."); Andrews v. Cervantes, 493 F.3d 1047, 1052 (9th Cir. 2007) (holding "qualifying prisoners can file their entire complaint IFP; the exception does not operate on a claim-by-claim basis or apply to only certain types of relief"); Ibrahim v. District of Columbia, 463 F.3d 3, 5–7 (D.C. Cir. 2006); 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 and stating § 1915(g) "only limits when frequent filers can proceed IFP, and says nothing about limiting the substance of their claims"); Gibbs v. Roman, 116 F.3d 83, 87 n.7 (3d Cir. 1997), *overruled on other grounds*, Abdul-Akbar v. McKelvie, 239 F.3d 307 (3rd Cir. 2001) (en banc). *But see* McAlphin v. Toney, 375 F.3d 753, 755–756 (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).

160. *See, e.g.*, Bostic v. Tenn. Dept. of Corr., No. 3:18-cv-00562, 2018 U.S. Dist. LEXIS 122597, at *10 (M.D. Tenn. July 23, 2018) (*unpublished*); Rivera v. Stirling, No. 8:17-cv-02087-JMC, 2018 U.S. Dist. LEXIS 101906, at

Mental health conditions generally do not satisfy the imminent danger requirement because they generally do not involve physical injury.[161] If they do involve physical harm in some fashion, then they may constitute imminent danger.[162] Many courts have held that the risk of self-inflicted physical injury resulting from mental illness may establish imminent danger,[163] That makes sense because many prison suicides and attempted suicides are a result of serious mental illness aggravated by prison conditions and practices.[164] However, some courts maintain that self-inflicted injury cannot meet the

*3 (D.S.C. June 19, 2018) (*unpublished*); Gorbey v. Bowles, No. 7:17cv00091, No. 7:17cv00192, 2018 U.S. Dist. LEXIS 14402, at *11 (W.D. Va. Jan. 30, 2018), *report and recommendation adopted sub nom.* Gorbey v. Avery, No. 7:17-cv-00192, 2018 U.S. Dist. LEXIS 106547 (W.D. Va., June 26, 2018) (*unpublished*); White v. Jindal, No. 13-15073, 2014 U.S. Dist. LEXIS 85506, at *4 (E.D. Mich. June 24, 2014) (*unpublished*); Buhl v. Sproul, No. 14-cv-00302-BNB, 2014 U.S. Dist. LEXIS 59010, at *1 (D. Colo. Apr. 25, 2014) (*unpublished*); Custard v. Allred, No. 13-cv-02296-BNB, 2013 U.S. Dist. LEXIS 171662, at *2 (D. Colo. Dec. 4, 2013) (*unpublished*) (dismissing two of eight claims because they did not allege imminent danger), *order clarified*, Custard v. Allred, No. 13-cv-02296-BNB, 2013 U.S. Dist. LEXIS 180997 (D. Colo. Dec. 23, 2013); Redmond v. Univ. of Tex. Med. Branch Hosp. Galveston, No. 2:13-CV-268, 2013 U.S. Dist. LEXIS 126258, at *2 (S.D. Tex. Sept. 4, 2013) (*unpublished*) (holding claim for injunction re medical care should be "explored" under imminent danger exception but claims of past mistreatment causing the problem would not be cognizable).

161. Sanders v. Melvin, 873 F.3d 957, 959–960 (7th Cir. 2017) ("Mental deterioration, however, is a psychological rather than a physical problem. Physical problems can cause psychological ones, and the reverse, but the statute supposes that it is possible to distinguish them. A claim of long-term psychological deterioration is on the psychological side of the line. Prisoners facing long-term psychological problems can save up during that long term and pay the filing fee.").

162. In *Custard v. Allred*, No. 13-cv-02296-BNB, 2013 U.S. Dist. LEXIS 171662, at *2 (D. Colo. Dec. 4, 2013), *order clarified*, *Custard v. Allred*, No. 13-cv-02296-BNB, 2013 U.S. Dist. LEXIS 180997, at *2 (D. Colo. Dec. 23, 2013) (*unpublished*), the court first observed: "An untreated psychological condition does not meet the imminent danger exception." However, it held that the plaintiff's condition did meet that standard in light of his additional allegation that the defendants' practice of pounding on his cell door at night caused him to wake in a terrified state and harm himself. Similarly, in *Annabel v. Michigan Dept. of Corrections*, No. 1:14-cv-756, 2014 U.S. Dist. LEXIS 116440, at *1 n.1 & *5 (W.D. Mich. Aug. 21, 2014) (*unpublished*), the court held that the plaintiff "alleges facts that, if believed, are sufficient to show that he is in imminent danger of serious bodily injury" where he alleged in connection with claims of retaliation, discrimination, religious rights violation, and unhygienic conditions that "his post-traumatic stress disorder has been aggravated to the point that he experiences frequent nightmares, severe paranoia, thoughts of suicide and self-injury, weight loss, extreme depression, anger, rage and fear."

163. *See, e.g.*, Lindsey v. Hoem, 799 F. App'x 410, 412 (7th Cir. 2020) (*unpublished*) ("Suicidal ideation and a risk of self-harm, particularly for a mentally ill prisoner like Lindsey in prolonged segregation, satisfy the statutory imminent-danger exception. . . ."); Sanders v. Melvin, 873 F.3d 957, 959–960 (7th Cir. 2017); Irby v. Gilbert, No. 16-35373, 2016 U.S. App LEXIS 23591, at *1 (9th Cir. Nov. 14, 2016) (*unpublished*) (rejecting district court holding that "a prisoner's allegations that he may harm himself or commit suicide are insufficient to constitute imminent danger"); Walker v. Scott, No. 10-56970, 472 F. App'x 514, 515 (9th Cir. 2012) (*unpublished*) (holding allegation that "repeated placement in double-cell housing without first completing treatment for coping in that environment caused his mental health to deteriorate such that he became suicidal and violent towards others" satisfied imminent danger standard); Hairston v. Maria, No. 2:18-cv-378, 2018 U.S. Dist. LEXIS 213586, at *5 (S.D. Ohio Dec. 19, 2018) (*unpublished*) (holding plaintiff whose mental health problems resulted in a suicide attempt causing dizzy spells, migraines, and coughing up blood satisfied imminent danger requirement); Cassady v. Dozier, No. 5:17-CV-495 (MTT), 2018 U.S. Dist. LEXIS 43216, at *2 (M.D. Ga. Mar. 16, 2018) (*unpublished*) (holding risk of further self-injury resulting from ongoing gender dysphoria after defendants refused to provide gender reassignment surgery satisfied imminent danger requirement); Marshall v. Weber, No. RWT-11-2755, 2012 U.S. Dist. LEXIS 178169, at *1 (D. Md. Dec. 17, 2012) (*unpublished*) (noting plaintiff was allowed to proceed IFP based on allegations he "felt suicidal" and had previously swallowed razor blades and had bitten his tongue during a panic attack), *appeal dismissed*, No. 13-6096 (4th Cir. Apr. 3, 2013).

164. *See, e.g.*, Lindsey v. Hoem, 790 F. App'x 410, 412 (7th Cir. 2020) (*unpublished*) (noting enhanced risk of self-harm for prisoner with mental illness held in long-term segregation); 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, 81–83 (2d Cir. 1988) (affirming injunction based on findings that state prison's policies did not adequately protect mentally ill prisoners).

imminent danger standard because "[e]very prisoner would then avoid the three strikes provision by threatening suicide."[165]

The danger you are in must have some "nexus" (be related) to the allegations in the complaint to satisfy the imminent danger exception.[166]

A claim of imminent danger does not excuse you from meeting the PLRA's administrative exhaustion requirement.[167]

The federal circuit (appeals) courts have upheld the three strikes provision as constitutional.[168] No circuit court has held the three strikes provision unconstitutional on First Amendment grounds. Still, some incarcerated people advocates have argued that the rule does violate the First Amendment because it limits your right to access and petition the courts.[169]

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165. 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*, Wallace v. Cockrell, No. 3:02-CV-1807-M, 2003 U.S. Dist. LEXIS 4897, at *1–4 (N.D. Tex. Mar. 27, 2003) (*unpublished*); *accord, e.g.,* Morrill v. Holmes Cty. Jail, No. 5:15-cv-324-WTH-GRJ, 2018 U.S. Dist. LEXIS 219853, at *9 (N.D. Fla. Jan. 30, 2018) (*unpublished*), *report and recommendation adopted*, Morrill v. Holmes Cty. Jail, No. 5:15cv324/MCR/GRJ, 2019 U.S. Dist LEXIS 9944 (N.D. Fla. Jan. 22, 2019) (*unpublished*); Ochoa v. Nakashima, No. 3:12-cv-00239-RCJ-VPC, 2012 U.S. Dist. LEXIS 177538, at *2 (D. Nev. Oct. 22, 2012) (*unpublished*) (holding plaintiff with fanciful food complaint who had stopped eating in order to meet the imminent-harm standard at the time of the complaint was not allowed to proceed IFP), *report and recommendation adopted*, Ochoa v. Nakashima, No. 3:12-cv-00239-RCJ-VPC, 2012 U.S. Dist. LEXIS 176068 (D. Nev. Dec. 12, 2012) (*unpublished*); Cash v. Bernstein, No. 09 Civ.1922(BSJ)(HBP), 2010 U.S. Dist. LEXIS 134948, at *1–*2 (S.D.N.Y. Dec. 20, 2010) (*unpublished*) (declining to find imminent danger where plaintiff thwarted defendants' efforts to treat his medical problem (citing Nelson v. Scoggy, No. 9:06-CV-1146 (NAM/DRH), 2009 U.S. Dist. LEXIS 121257, at *4 (N.D.N.Y. Dec. 30, 2009) (*unpublished*)).

166. Pinson v. U.S. Dept. of Justice, 964 F.3d 65, 71 (D.C. Cir. 2020); Meyers v. Comm'r of Soc. Sec. Admin., 801 F. App'x 90, 96 (4th Cir. 2020) (per curiam) (*unpublished*); Fourstar v. United States, 950 F.3d 856, 859 (Fed. Cir. 2020) (holding complaint of imminent danger from denial of prison medical care lacked a nexus to Tucker Act assertions concerning management of Indian properties and resources); Lomax v. Ortiz-Marquez, 754 F. App'x 756, 759 (10th Cir. 2018) (adopting Pettus nexus test), *aff'd*, Lomax v. Ortiz-Marquez, 140 S. Ct. 1721, 207 L. Ed. 2d 132 (2020); Ball v. Hummel, 577 F. App'x 96, 96 n.1 (3d Cir. 2014) (per curiam) (*unpublished*); Pettus v. Morgenthau, 554 F.3d 293, 298–299 (2d Cir. 2009).

167. Fletcher v. Menard Corr. Ctr., 623 F.3d 1171, 1173 (7th Cir. 2010); McAlphin v. Toney, 375 F.3d 753, 755 (8th Cir. 2004) (upholding the rule that prisoners must fulfill the administrative exhaustion requirement); see Part E of this Chapter for more on the exhaustion requirement.

168. *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, 1178–1182 (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, 1233–1234 (10th Cir. 1998) (rejecting access to courts and equal protection challenges); Wilson v. Yaklich, 148 F.3d 596, 604–606 (6th Cir. 1998) (rejecting equal protection, due process, and other claims); Rivera v. Allin, 144 F.3d 719, 723–729 (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/ by* Jones v. Bock, 549 U.S. 199, 214–215, 127 S. Ct. 910, 920–921 (2007).

169. 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, 613 (1972). *See also* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 542–543, 121 S. Ct. 1043, 1049–1050 (2001) (stating that advocacy in litigation *is* speech); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 272, 84 S. Ct. 710, 721 (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 "breathing space" 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, 612 (1972) (applying rule in antitrust context); Bill Johnson's Rests., Inc. v. NLRB, 461 U.S. 731, 741, 103 S. Ct. 2161, 2169 (1983) (applying rule in 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, 1928 (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

D. Screening and Dismissal of Incarcerated People's Cases

The PLRA requires federal courts to examine all suits by incarcerated people against government employees *and* all IFP cases at the start of litigation, and to 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.[170] These dismissals may be done without prior notice or an opportunity to respond,[171] though one court has cautioned that 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."[172]

Incarcerated people are entitled to try to amend complaints that do not state a claim before they are finally dismissed unless the court is certain that they cannot be saved.[173] Courts may dismiss the case with leave to amend,[174] or may dismiss the *complaint*, which keeps the case alive;[175] if the plaintiff does not amend the complaint, or does not do so adequately, a separate order dismissing the case may be entered. Complaints the court has deemed frivolous or malicious need not be afforded an opportunity for amendment.[176]

Dismissal under these screening statutes is reviewed on appeal *de novo* (granting no deference to the district court's ruling), at least with respect to dismissals for failure to state a claim.[177] Some courts

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the scope of the provision. A few courts have rejected the "breathing space" argument, but have not addressed the Supreme Court decisions cited above. Daker v. Jackson, 942 F.3d 1252, 1258 (11th Cir. 2019), *pet. for cert. filed*, No. 19-1387 (June 18, 2020); see Daker v. Bryson, 784 F. App'x 690 (11th Cir. 2019) (per curiam) (*unpublished*) (ruling similarly); Clardy v. Byerly, No. 6:18-cv-01200-CL, 2018 U.S. Dist. LEXIS 222735, at *2 (D. Or. Oct. 15, 2018) *(unpublished)* (rejecting argument "that the 'breathing space' principle of the First Amendment affords this Court the discretion to grant IFP status to a prisoner litigant with three strikes if the case is deemed to have factual and legal merit"), *report and recommendation adopted*, Clardy v. Byerly, No. 6:18-cv-01200-CL, 2018 U.S. Dist. LEXIS 43010 (D. Or. Mar. 15, 2018) *(unpublished)*, aff'd, Clardy v. Byerly, 800 F. App'x 594 (9th Cir. 2020) *(unpublished)*.

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

171. 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) *(unpublished)*.

172. 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).

173. Gomez v. USAA Fed. Sav. Bank, 171 F.3d 794, 795–796 (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"); *accord*, LaFountain v. Harry, 716 F.3d 944, 951 (6th Cir. 2013); Brown v. Johnson, 387 F.3d 1344, 1348–1349 (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), *overruled by* Davis v. U.S. Sentencing Comm'n, 405 U.S. App. D.C. 93, 98, 716 F.3d 660, 665 (2013); Perkins v. Kansas Dept. of Corr., 165 F.3d 803, 806 (10th Cir. 1999); Murphy v. City of Stamford, CIVIL ACTION NO. 3:13-CV-00942 (JCH), 2013 U.S. Dist. LEXIS 153441 at *12–*13 (D. Conn. Oct. 25, 2013) (*unpublished*), *amended by* Murphy v. City of Stamford, CIVIL ACTION NO. 3:13-CV-00942 (JCH), 2014 U.S. Dist. LEXIS at *5 (D. Conn. Apr. 14, 2014).

174. Lomax v. Ortiz-Marquez, 140 S. Ct. 1721, 1724, 207 L. Ed. 2d 132, 136 (2020).

175. Lira v. Herrera, 427 F.3d 1164, 1169 (9th Cir. 2005); *accord*, Paul v. Marberry, 658 F.3d 702, 705 (7th Cir. 2011).

176. Coleman v. Tollefson, 733 F.3d 175, 177 (6th Cir. 2013) ("Under the PLRA, a court may dismiss an action that it finds 'frivolous or malicious', without permitting the plaintiff to amend the complaint."), *aff'd*, 575 U.S. 532 (2015).

177. *See* Hutchinson v. Watson, 607 F. App'x 116, 116 (2d Cir. 2015) (*unpublished*) (28 U.S.C. § 1915(e)(2); citing Giano v. Goord, 250 F.3d 146, 149–150 (2d Cir. 2001)); Douglas v. Yates, 535 F.3d 1316, 1319–1320 (11th Cir. 2008) (28 U.S.C. § 1915(e)(2)(B)(ii)); Brown v. Bargery, 207 F.3d 863, 866–867 (6th Cir. 2000) (28 U.S.C. §§ 1915(e)(2) and 1915A(b)); Moore v. Sims, 200 F.3d 1170, 1171 (8th Cir. 2000) (per curiam) (28 U.S.C. § 1915(e)(2)(B)(ii)); Liner v. Goord, 196 F.3d 132, 134 (2d Cir. 1999) (28 U.S.C. § 1915A and 42 U.S.C. § 1999e(c)(2)); Barren v. Harrington, 152 F.3d 1193, 1194 (9th Cir. 1998); Black v. Warren, 134 F.3d 732, 734 (5th Cir. 1998);

have held that dismissals as frivolous or malicious are 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.[178]

The PLRA screening provisions do not change the standards for assessing complaints to determine whether they state a claim upon which relief can be granted. The court must take as true all factual allegations in the complaint and draw all reasonable inferences in the plaintiff's favor.[179] It is still the case that "[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.'"[180]

The screening provisions have been held not to violate due process,[181] equal protection,[182] or the right of access to the courts.[183]

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.[184]

More incarcerated people lose their cases because they fail to exhaust administrative remedies than from any other part of the PLRA.

Mitchell v. Farcass, 112 F.3d 1483, 1489–1490 (11th Cir. 1997); Atkinson v. Bohn, 91 F.3d 1127, 1128 (8th Cir. 1996).

178. *See* Ejikeme v. Dir., Fed. Bureau of Intelligence., 639 F. App'x 75, 75 (3d Cir. 2016) (per curiam) (*unpublished*); Johnson v. Darr, 368 F. App'x 822 (9th Cir. 2010) (*unpublished*); Mosely v. Highsmith, 311 F. App'x 932, 933 (8th Cir. 2009) (per curiam) (*unpublished*); Hughes v. Lott, 350 F.3d 1157, 1160 (11th Cir. 2003); Gladney v. Pendleton Corr. Facility, 302 F.3d 773, 775 (7th Cir. 2002); Bilal v. Driver, 251 F.3d 1346, 1348–1349 (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. 1999) (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.

179. Resnick v. Hayes, 213 F.3d 443, 447 (9th Cir. 2000); Gomez v. USAA Federal Savings Bank, 171 F.3d 794, 795–796 (2d Cir. 1999).

180. Erickson v. Pardus, 551 U.S. 89, 94, 127 S. Ct. 2197, 2200 (2007) (citation omitted) (quoting Estelle v. Gamble, 429 U.S. 97, 106, 97 S. Ct. 285 (1976)).

181. 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 the prisoner'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) (*unpublished*). Curley v. Perry, 246 F.3d 1278, 1283–1284 (10th Cir. 2001) (finding no due process violation).

182. 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).

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

184. 42 U.S.C. § 1997e(a).

The PLRA makes exhaustion of prison remedies required before you can file suit.[185] This is true even if you are suing for money damages and the grievance system does not provide them.[186] If you do not exhaust your administrative remedies, your case will be *dismissed* instead of stayed (held pending exhaustion).[187] For this reason, you should use all of your administrative remedies before filing. You must exhaust *before* you file suit, not afterward, or your case will be dismissed.[188] Most courts have said that dismissal for non-exhaustion should be "without prejudice,"[189] meaning the case could be refiled if you were able to exhaust after the dismissal, though a few have said it can be dismissed with prejudice if there are reasons to believe the case can't be brought again, for example if the statute of limitations or the deadline to file a grievance has passed.[190] See Part E(6) of this Chapter for more information about time limits.

So, it is very important to exhaust your administrative remedies within the prison correctly the first time. You may not get a second chance. You need to be careful to get it right because some prison remedies are complicated or they may not be administered according to the rules. Also, any mistake may be used against you. If something happens to you that you may want to bring suit about, here is what you should do:

(1) Find out what remedies are available within the prison administrative system right away. Many times, deadlines are 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.

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185. 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 (206). 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

186. Booth v. Churner, 532 U.S. 731, 738–739, 121 S. Ct. 1819, 1823–1824, 149 L. Ed. 2d 958, 964–965 (2001).

187. McKinney v. Carey, 311 F.3d 1198, 1199–1200 (9th Cir. 2002) (per curiam); Medina-Claudio v. Rodriguez-Mateo, 292 F.3d 31, 36 (1st Cir. 2002); Neal v. Goord, 267 F.3d 116, 121–123 (2d Cir. 2001); Perez v. Wis. Dept. of Corr., 182 F.3d 532, 534–535 (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, 1108–1109 (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).

188. Gonzalez v. Seal, 702 F.3d 785, 787–788 (5th Cir. 2012) (per curiam); Johnson v. Jones, 340 F.3d 624, 627–628 (8th Cir. 2003); 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).

189. Pelino v. Sec'y, Penn. Dept. of Corr., 791 F..App'x 371, 373 (3d Cir. 2020) (per curiam) (*unpublished*) (citing Nyhuis v. Reno, 204 F.3d 65, 78 (3d Cir. 2000)); Bargher v. White, 928 F.3d 439, 447 (5th Cir. 2019); Porter v. Sturm, 781 F.3d 448, 452 (8th Cir. 2015); French v. Warden, 442 F. App'x 845, 846 (4th Cir. 2011) (per curiam) (*unpublished*); Gallagher v. Shelton, 587 F.3d 1063, 1068 (10th Cir. 2009); Bryant v. Rich, 530 F.3d 1368, 1379 (11th Cir. 2008); O'Guinn v. Lovelock Corr. Ctr., 502 F.3d 1056, 1059 (9th Cir. 2007); Boyd v. Corr. Corp. of Am., 380 F.3d 989, 994 (6th Cir. 2004); Ford v. Johnson, 362 F.3d 395, 401 (7th Cir. 2004); *see, e.g.*, Berry v. Kerik, 366 F.3d 85, 88 (2d Cir. 2003).

190. *See, e.g.*, Thompson v. Coulter, 680 F. App'x 707, 712 (10th Cir. 2017) (*unpublished*), *cert. denied*, Thompson v. Coulter, 138 S. Ct. 180 (2017); Bryant v. Rich, 530 F.3d 1368, 1375 n.11 (11th Cir. 2008) (dicta); Berry v. Kerik, 366 F.3d 85, 88 (2d Cir. 2003). To the contrary, one federal appeals court has explained 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).

(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. If there is a way to appeal or grieve a decision which says that something is not grievable, do that too! As long as there is another step you can take, take it.
(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, ask them how to fix it and follow their instructions. 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 for your mistakes, and ask that your grievance be considered despite your mistake. 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 to get your case thrown out of court. 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.

If your suit is dismissed and then you manage to 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 is necessary).[191] You could also be charged a "strike," which could affect your ability to proceed *in forma pauperis* in the future.[192] (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.[193] 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 the suit is filed, you do not need to have exhausted your administrative remedies.[194] PLRA exhaustion does not apply to petitions for habeas corpus—habeas has its own

191. The only federal appeals court to have ruled on this point held that a new filing fee is not necessary to re-file the same case. Owens v. Keeling, 461 F.3d 763, 772–774 (6th Cir. 2006). Some courts have declined to follow that holding. *See, e.g.*, Ellis v. Kitchin, No. 2:07cv367, 2010 U.S. Dist. LEXIS 113248, at *1 (E.D. Va. 2010) (*unpublished*) (declining to follow *Owens v. Keeling*). Others have interpreted *Owens* narrowly. *See* Barrett v. Pearson, No. CIV 06-299-RAW-SPS, 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). 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 F. App'x 455, 456–457 (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).

192. 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.

193. 42 U.S.C. § 1997e(a). For more discussion of when a person is a "prisoner" for PLRA purposes, see footnotes 52–63 and the related text.

194. Olivas v. Nevada ex rel. Dept. of Corr., 856 F.3d 1281, 1283–1284 (9th Cir. 2017); Lesesne v. Doe, 712

exhaustion requirement.[195] The PLRA exhaustion requirement, has been applied in Section 1983 actions filed in state court, including those that were later removed to federal court.[196]

Most courts have held there is no emergency exception to the exhaustion requirement.[197] There are a few decisions that have allowed cases to go forward without exhaustion to avoid irreversible harm.[198] However these cases do not provide much legal justification for not following the exhaustion requirement. One federal appeals court has held that district courts retain their usual discretion to grant relief to maintain the status quo *pending* exhaustion,[199] which probably means you'd better have a grievance filed if you ask the court for relief pending exhaustion. Another court has said: "If a prisoner has been placed in imminent danger of serious physical injury by an act that violates his constitutional rights, administrative remedies that offer no possible relief in time to prevent the imminent danger from becoming an actual harm can't be thought available."[200] However, if the prison makes available an emergency grievance procedure that could provide timely relief, the prisoner is obliged to use it before bringing suit.[201]

The only exception to the exhaustion requirement that the courts recognize is the one "baked into its text,", *i.e.,* the requirement that remedies be "available."[202] The meaning of that exception is discussed further in part E(3) of this Chapter.

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

F.3d 584, 586, 588 (D.C. Cir. 2013); Greig v. Goord, 169 F.3d 165, 167–168 (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). The difference in phrasing does not seem to be important.

195. Carmona v. U.S. Bureau of Prisons, 243 F.3d 629, 633–634 (2d Cir. 2001). For more information on habeas corpus claims, see Chapter 13 of the *JLM*, "Federal Habeas Corpus."

196. *See*, *e.g.*, Jennings v. Dowling, 642 F. App'x 908, 913 (10th Cir. 2016) (*unpublished*) (citing Marziale v. Silas, No. 4:15CV00655-JLH-JJV, 2015 U.S. Dist. LEXIS 164879, at *2 (E.D. Ark. Nov. 10, 2015) (*unpublished*) (collecting cases), *report and recommendation adopted*, 2015 U.S. Dist. LEXIS 164878 (E.D. Ark. Dec. 8, 2015) (*unpublished*)); Johnson v. Louisiana *ex rel.* Dept. 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."); Chapman v. Wyo. Dept. of Corr., 366 P.3d 499, 508 (Wyo. 2016); Berry v. Feil, 357 P.3d 344, 346 & n.3 (Nev. App. 2015) (citing cases).

197. *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).

198. *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, 533–534 (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).

199. Jackson v. District of Columbia, 254 F.3d 262, 267–268 (D.C. Cir. 2001). This holding has not been cited much in litigation brought by incarcerated people. In one case where it was, the court threatened to grant relief, and jail officials very quickly addressed the problem. Tvelia v. Dept. of Corr., No. Civ. 03-537-M, 2004 U.S. Dist. LEXIS 2227, at *5 (D.N.H. Feb. 13, 2004) (*unpublished*). Other courts have declined to grant relief under the *Jackson v. D.C.* theory. *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).

200. Fletcher v. Menard Corr. Ctr., 623 F.3d 1171, 1173 (7th Cir. 2010).

201. Fletcher v. Menard Corr. Ctr., 623 F.3d 1171, 1174 (7th Cir. 2010); *accord*, Smith v. Moon, No. 1:12-cv-01153-GBC (PC), 2012 U.S. Dist. LEXIS 159195, at *4–*7 (E.D. Cal. Nov. 6, 2012) (*unpublished*); Nowell v. Hickey, No. 11-CV-00027-KSF, 2011 U.S. Dist. LEXIS 10799, at *8–*13 (E.D. Ky. Feb. 1, 2011) (*unpublished*).

202. Ross v. Blake, 136 S. Ct. 1850, 1862, 195 L.Ed.2d 117, 124 (2016).

1. What Is Exhaustion?

Exhaustion under the PLRA means "proper exhaustion," which is "compliance with an agency's deadlines and other critical procedural rules."[203] Part E(5) of this Chapter discusses this point in detail. Exhaustion also means taking your complaint all the way to the end of the internal prison complaint process that applies to your problem. That is usually the prison's grievance system. You must use every appeal available to you[204] and complete the process *before* you file suit.[205] Some courts have held that incarcerated people cannot add additional claims by amending their complaints unless the new claims were exhausted before the initial complaint was filed.[206] 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.[207] That view is consistent with the Supreme Court's decision in *Jones v. Bock*,[208] which held that the exhaustion requirement should be interpreted consistently with the usual practices of litigation under the Federal Rules of Civil Procedure. The ability to amend complaints freely is part of normal federal procedural practice under those Rules.[209]

Most courts have held that once the deadline for the final decision of your last appeal has passed, you can file suit even if you have not received the decision,[210] even if the authorities then issue a late decision after you file.[211] It is not clear how long you have to wait if the system has no deadline for deciding your final appeal.[212]

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203. Woodford v. Ngo, 548 U.S. 81, 90–91, 126 S. Ct. 2378, 2385–2386, 165 L. Ed. 2d. 368, 378 (2006).

204. *See* Wright v. Hollingsworth, 260 F.3d 357, 358 (5th Cir. 2001) (holding that PLRA required incarcerated person 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 an incarcerated person who appealed, but whose appeal was not received and was told it was too late to file another, had exhausted).

205. Johnson v. Jones, 340 F.3d 624, 627–628 (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).

206. *See, e.g.*, Miller v. Hall, Civil Action No.: 4:18CV77-RP, 2018 U.S. Dist. LEXIS 134135, *17 (N.D.Miss., Aug. 9, 2018) (*unpublished*) (noting claims added by amended complaint "occurred subsequent to the filing of this lawsuit in March 2018. . . . Accordingly, it is impossible that Miller achieved pre-filing exhaustion with regard to these claims, and therefore, any claim presented that could not have been exhausted prior to March 2018"); Lee v. Urieta, No. 5:13-CT-3155-F, 2014 U.S. Dist. LEXIS 86602, *6 (E.D.N.C., June 24, 2014) ("Because these amended claims arose after the filing of the complaint, Plaintiff could not have exhausted his administrative remedies for these claims prior to the filing of this action.").

207. *See* Mattox v. Edelman, 851 F.3d 583, 591–595 (6th Cir. 2017); Cano v. Taylor, 739 F.3d 1214, 1220–1221 (9th Cir. 2014); Cannon v. Washington, 418 F.3d 714, 719–720 (7th Cir. 2005) (rejecting defendants' argument that new claims could not be added by amendment even if the administrative remedies had been exhausted).

208. Jones v. Bock, 549 U.S. 199, 210–212, 127 S. Ct. 910, 918–919, 166 L. Ed. 2d. 798, 810–811 (2007)
209; *see* FED. R. CIV. P. 15(a).

210. Hayes v. T. Dahlke, 976 F.3d 259, 266 (2d Cir. 2020); Smith v. U.S., 432 F. App'x 113, 117 (3rd Cir. 2011) (per curiam) (*unpublished*) (citing federal regulation providing prisoners may treat the absence of a timely response as a denial); Whitington v. Ortiz, 472 F.3d 804, 807–808 (10th Cir. 2007); Jernigan v.Stuchell, 304 F.3d 1030, 1032 (10th Cir. 2002); 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."); Underwood v. Wilson, 151 F.3d 292, 295 (5th Cir. 1998); *see* Lewis v. Washington, 300 F.3d 829, 833 (7th Cir. 2002) (rejecting interpretations that would "permit [prison officials] to exploit the exhaustion requirement through indefinite delay in responding to grievances,").

211. *See*, *e.g.*, Robinson v. Superintendent Rockview SCI, 831 F.3d 148, 154 & n.4 (3d Cir. 2016) ("Robinson's decision to accept that response in good faith and pursue his claim through the remainder of a belated administrative process does not rectify the prison's errors. . . . We reject the prison's invitation to hold Robinson's diligence against him.").

212. *See* McNeal v. Cook Cnty. Sheriff's Dept., 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).

Some courts have said that if you do not get a response to your initial grievance, you have exhausted your available internal remedies.[213] However, most have said that if the grievance system allows you to treat a non-response as a denial and appeal it, you must do so.[214] When in doubt, try to appeal, even if officials have failed to respond. You should do this even if your grievance just "disappears" and never shows up in the records even at the first step of the process.[215] Technically you are only required to follow up on unanswered grievances if the grievance policy provides instructions for doing so.[216] However, sometimes courts hold that failure to follow up on a non-response is a failure to exhaust regardless of whether the policy so requires.[217] Also, if you make a record of following up, you are more likely to win if the defendants claim that you never really filed the grievance.[218]

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.[219] You are best advised not to rely on that

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213. *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.").

214. *See* Bargher v. White, 928 F.3d 439, 447 (5th Cir. 2019); Mitchell v. Warden, Baldwin State Prison, 777 F. App'x 472, 473 (11th Cir. 2019) (per curiam) (*unpublished*); Cicio v. Wenderlich, 714 F. App'x 96, 97–98 (2d Cir. 2018) (*unpublished*); Wilson v. Epps, 776 F.3d 296, 300–301 (5th Cir. 2015) (holding an incarcerated person who did not receive a grievance decision must follow policy provision that "expiration of response time limits without receipt of a written response shall entitle the offender to move on to the next step in the process"); Jolliff v. Corr. Corp. of Am., 626 F. App'x 783, 784 (10th Cir. 2015) (*unpublished*); Risher v. Lappin, 639 F.3d 236, 241 (6th Cir. 2011) (holding an incarcerated person who did not receive a response timely was entitled under the rules to appeal and was not obliged to track down the errant response; "When pro se inmates are required to follow agency procedures to the letter in order to preserve their federal claims, we see no reason to exempt the agency from similar compliance with its own rules."); Turner v. Burnside, 541 F.3d 1077, 1083–1085 (11th Cir. 2008) (finding that where an incarcerated person 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 an incarcerated person 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, 438–441 (S.D.N.Y. 2007) (holding that an incarcerated person had not exhausted when that individual 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 incarcerated person has consented to an extension of time. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.6(g)(2) (2012).

215. Dole v. Chandler, 438 F.3d 804, 809, 809–812 (7th Cir. 2006).

216. Jones v. Bock, 549 U.S. 199, 218 (2007) (holding "it is the prison's requirements, and not the PLRA, that define the boundaries of proper exhaustion"); Williams v. Priatno, 829 F.3d 118, 124 (2d Cir. 2016) (holding remedy unavailable where incarcerated person's grievance submitted per policy never got filed, and the policy had no instruction for appealing grievances that were never acknowledged).

217. *See* Lockett v. Bonson, 937 F.3d 1016, 1026 (7th Cir. 2019) (holding prisoner who alleged he filed a grievance appeal and got no response, in a system that provided after 45 days without a response the plaintiff was free to go to court, the regulations "in their totality" required the plaintiff to regard the failure to provide a receipt as a "red flag" and file a new grievance about the fate of his prior grievance, despite lack of such a requirement in the rules); Williams v. LaClair, 128 Fed.App'x. 792, 793 (2d Cir. 2005) (*unpublished*) (affirming dismissal for non-exhaustion where the plaintiff alleged that an unidentified prison official had discarded his grievance, but failed to explain why he did not pursue the matter when he realized his grievance had not been filed).

218. *See, e.g.*, Mojica v. Murphy, No. 9:17-CV-0324 (DNH/ML), 2020 U.S. Dist. LEXIS 11857, at *47 n. 26 (N.D.N.Y., Jan. 23, 2020) (*unpublished*), *report and recommendation adopted*, Mojica v. Murphy, No. 9:17-CV-0324 (DNH/ML), 2020 U.S. Dist. LEXIS 40175 (N.D.N.Y., Mar. 9, 2020) (*unpublished*), and cases cited.

219. *See* Williams v. Dept. of Corr., 678 F. App'x 877, 880–881 (11th Cir. 2017) (per curiam) (*unpublished*) (holding incarcerated person whose "informal grievance" requesting a transfer for safety reasons resulted in his transfer had exhausted without further proceedings), *cert. denied sub nom.*, Williams v. Fla. Dept. of Corr., 138 S. Ct. 1586, 200 L.Ed.2d 751 (2018); Patterson v. Stanley, 547 F. App'x 510, 512–513 (5th Cir. 2013) (per curiam) (*unpublished*) (holding plaintiff whose disciplinary conviction was reversed at Step 1, with no indication he could

statement. 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.[220] 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.[221] 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.[222] If you have not been told this 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 or decision that you have won, you can 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."[223]

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have gotten more relief at Step 2, had exhausted); Toomer v. BCDC, 537 F. App'x 204, 206 (4th Cir. 2013) (per curiam) (*unpublished*) ("After receiving a favorable outcome on the merits of his grievance at a lower step in the process, Toomer was not obligated to pursue an administrative appeal to Step III in order to exhaust his administrative remedies."); Diaz v. Palakovich, 448 F. App'x 211, 216 (3rd Cir. 2011) (*unpublished*) (holding there is no need to appeal outcomes of "grievance resolved" or "uphold inmate"); Brown v. Valoff, 422 F.3d 926, 935 (9th Cir. 2005) (holding "a prisoner need not press on to exhaust further levels of review once he has either received all 'available' remedies at an intermediate level of review or been reliably informed by an administrator that no remedies are available"); Abney v. McGinnis, 380 F.3d 663, 669 (2d Cir. 2004) (holding an incarcerated person 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, 298–299 (S.D.N.Y. 2003) (noting that an incarcerated person is not required to complain after his grievance has been addressed but not corrected).

220. Rozenberg v. Knight, 542 F. App'x 711, 713 (10th Cir. 2013) *(unpublished)* (holding that an incarcerated person removed by Inspector General from job he complained about did not thereby exhaust because he did not also get relief on his grievance requests seeking reprimand of staff and reform of kitchen supervision); Johnson v. Thyng, 369 F. App'x 144, 148–149 (1st Cir. 2010) (per curiam) (*unpublished*) (holding that an incarcerated person who sought protective custody did not exhaust where his assailant was transferred as a result of his initial grievance, he did not appeal, but he continued to complain that other people who were incarcerated were threatening him, and other relief could have been granted); Carter v. Rojas, No. 1:06-cv-00251-OWW-DLB (PC), 2009 U.S. Dist. LEXIS 10758, *8–*10 (E.D. Cal., Feb. 4, 2009) (*unpublished*) (holding that plaintiff who did not take his final appeal because his problem had been solved did not exhaust, since he had also asked for a detailed description of the offending employee's conduct, and he could also have received an apology or a change in rules and regulations), *report and recommendation adopted*, Carter v. Rojas, No. 1:06-cv-00251-OWW-DLB (PC), 2009 U.S. Dist. LEXIS 25559 (E.D. Cal. Mar. 27, 2009) (*unpublished*); *see also* Rivera v. Pataki, 01 Civ. 5179 (MBM), 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).

221. *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, 177–17878 (2d Cir. 2006) (holding that an incarcerated person 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, 696–69797 (7th Cir. 2005).

222. 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 *154–155 (E.D. Wis. June 15, 2006) (*unpublished*) (holding that an incarcerated person who 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").

223. *See* Ruggiero v. County of Orange, 467 F.3d 170, 177 (2d Cir. 2006) (holding that an incarcerated person 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").

"Exhaustion" generally means using whatever formal complaint process is available (usually a grievance system or administrative appeal). The PLRA requires "Proper Exhaustion," meaning that you follow all of the rules of the prison process.[224] If you do that, you cannot be required to do more.[225] Letters and other informal means of complaint, like participating in an internal affairs or inspector general investigation, generally will not be considered proper exhaustion.[226] They might be if the prison rules specifically identify them as an alternative means of complaint.[227] 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,[228] but this result is less likely after the Supreme Court's "proper exhaustion" holding in *Woodford v. Ngo*.

The exhaustion requirement refers only to administrative remedies. You do not need to go to court and exhaust judicial remedies before you go to federal court.[229] The administrative remedies Congress

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224. 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").

225. Jones v. Bock, 549 U.S. 199, 218, 127 S. Ct. 910, 922–923, 166 L. Ed. 2d 798, 815 (2007) ("Compliance with prison grievance procedures . . . is all that is required by the PLRA to 'properly exhaust.'")

226. *See* 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." (emphasis supplied)); 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 incarcerated person, 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).

227. In *Pavey v. Conley*, 170 F. App'x 4, 8 (7th Cir. 2006) *(unpublished)*, 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* Amador v. Andrews, 655 F.3d 89, 103–104 (2d Cir. 2011) (holding that an incarcerated person exhausted where her letter was treated as a grievance and she completed the grievance process); Ruffin v. Knowlton, No. 2:17-cv-00152-LEW, 2019 U.S. Dist. LEXIS 6867, at *6 (D. Me. Jan. 15, 2019) (*unpublished*) (holding prisoner's letter to State Jail Inspector appeared to satisfy the final appeal requirement of the jail); Kocsis v. Cty. of Sedgwick, No. 14-2167-CM, 2014 U.S. Dist. LEXIS 161882, at *3–4 (D. Kan. Nov. 19, 2014) (*unpublished*) (declining to dismiss where investigation followed plaintiff's verbal (sic) complaint, since defendants' policy provided for acceptance of and response to such complaints); 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).

228. *See* Camp v. Brennan, 219 F.3d 279, 280–281 (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)).

229. *See* Minter v. Bartruff, 939 F.3d 925, 927–928 (8th Cir. 2019) (holding state postconviction judicial remedies are not administrative remedies to be exhausted under § 1997e(a)); Pozo v. McCaughtry, 286 F.3d 1022, 1024 (7th Cir. 2002); Jenkins v. Morton, 148 F.3d 257, 259–260 (3d Cir. 1998) (finding that an incarcerated person 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, "How to Challenge

had in mind when it passed the PLRA are internal prison grievance procedures.[230] An incarcerated person is not required to exhaust state or federal tort claim procedures, unless he wishes to make a tort claim under state law or the Federal Tort Claims Act.[231]

The United States Department of Justice ("DOJ") maintains complaint procedures for incarcerated people alleging disability discrimination in violation of the Americans with Disabilities Act or the Rehabilitation Act. There are separate procedures for incarcerated people complaining about state and local facilities and those complaining about the Federal Bureau of Prisons.[232] Some courts have held that resort to the DOJ procedures is not a substitute for exhaustion of prison grievance remedies, but a number of courts have held that the DOJ procedures must be exhausted in addition to the prison grievance process.[233] As to people incarcerated in federal custody, most recent decisions hold that exhausting the DOJ process is required, and federal regulations now specify that incarcerated people must complete the federal Administrative Remedy Procedure (the grievance system) before using the DOJ disability complaint procedures.[234] The DOJ procedures have been amended in recent years to provide a more elaborate process which may lead to a judicial-like hearing and where participation of counsel is allowed, though the agency does not provide counsel.[235] The procedures for people

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Administrative Decisions Using Article 78 of the New York Civil Practice Law and Rules."

230. Rumbles v. Hill, 182 F.3d 1064, 1069 (9th Cir. 1999). *See* Jones v. Bock, 549 U.S. 199, 218, 127 S. Ct. 910, 922–923, 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, 524–525, 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).

231. *See, e.g.*, Rumbles v. Hill, 182 F.3d 1064, 1069–1070 (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."

232. 28 C.F.R. § 35.170 (2019).

233. O'Guinn v. Lovelock Corr. Ctr., 502 F.3d 1056, 1062–1063 (9th Cir. 2007) (relying on the Supreme Court's characterization of the exhaustion requirement as addressing internal prison remedies); Lavista v. Beeler, 195 F.3d 254, 257 (6th Cir. 1999) (holding that resort to the ADA procedures did not suffice to exhaust, stating: "Congress intended the exhaustion requirement to apply to the *prison's* grievance procedures, regardless of what other administrative remedies might also be available.").

234. Brown v. Cooper, No. 18-219 (DSD/BRT), 2018 U.S. Dist. LEXIS 218544 (D. Minn. Dec. 11, 2018) (*unpublished) report and recommendation adopted*, 2019 U.S. Dist. LEXIS 2159 (D. Minn. Jan. 7, 2019) (*unpublished*), *aff'd*, 787 F. App'x 366 (8th Cir. 2019) (per curiam) (*unpublished*); Elliott v. Wilson, No. 15-CV-1908, 2017 U.S. Dist. LEXIS 48348 (D. Minn. Jan. 17, 2017) (*unpublished*), *report and recommendation adopted*, 2017 U.S. Dist. LEXIS 47952 (D. Minn. Mar. 29, 2017)(*unpublished*); Cardenas-Uriarte v. USA, No. 14-cv-00747-JPG-PMF, 2015 U.S. Dist. LEXIS 116193 (S.D. Ill. Sept. 1, 2015) (*unpublished*); Zoukis v. Wilson, No. 1:14cv1041 (LMB/IDD), 2015 U.S. Dist. LEXIS 86788 (E.D.Va. July 2, 2015) (*unpublished*); Brown v. Cantrell, Civil Action No. 11-cv-00200-PAB-MEH, 2012 U.S. Dist. LEXIS 131188 (D. Colo. Sept. 14, 2012) (*unpublished*) ("Although certain courts have looked to the purpose of the PLRA and to the requirements imposed on non-prisoners asserting ADA claims in determining that the § 39.170 remedy need not be exhausted, . . . the Court finds that the PLRA's clear textual mandate should control this issue." (footnote omitted)); Haley v. Haynes, No. CV210-122, 2012 U.S. Dist. LEXIS 3754 (S.D. Ga. Jan. 12, 2012) (*unpublished*), *appeal dismissed*, No. 12-11339 (11th Cir. Apr. 22, 2013) (*unpublished*); Bryant v. U.S. Bureau of Prisons, No. CV11-254 CAS (DTBx), 2011 U.S. Dist. LEXIS 86374 (C.D. Cal. July 11, 2011) (*unpublished*) (holding plaintiff required by 28 C.F.R. § 39.170 to exhaust that procedure, in addition to the federal Administrative Remedy Procedure, before proceeding with his Rehabilitation Act claim). *See* Gambino v. Hershberger, Civil Action No. TDC-17-1701, 2019 U.S. Dist. LEXIS 47521 (D. Md. Mar. 20, 2019) (*unpublished*) (citing 28 C.F.R. § 39.170(d) (2019)).

235. The procedures have been conveniently summarized by one district court:

> To exhaust the additional two step grievance process for disability discrimination issues, the prisoner must file a complaint within 180 days of the BOP general counsel's final administrative decision. 28 C.F.R. § 39.170(d)(3) (2019). The complaints are processed by the Director of Equal Employment Opportunity at the Department of Justice ("DOJ"). 28 C.F.R. § 39.170(d)(4) (2019). The Director of Equal Employment Opportunity will attempt informal resolution of the issue and if informal resolution is

incarcerated in state or local custody remain basic. DOJ is generally required to investigate disability complaints, but they are not required to investigate *each* complaint. The regulations provide that "designated agencies may exercise discretion in selecting title II complaints for resolution," reflecting DOJ's experience that "the Department has received many more complaints alleging violations of title II than its resources permit it to resolve."[236] If the complaint is not resolved, DOJ is required to issue findings only "[w]here appropriate." whatever that means. Though at least one recent decision has held that state and local incarcerated people are required to exhaust this process, we are not sure why a remedy that does not even guarantee an investigation or a meaningful decision to the incarcerated person can be considered an available remedy under the PLRA, and we have not seen cases addressing that question.[237]

Some courts have held that exhaustion of the DOJ process was not required where there was no evidence that the procedure had been made known to the incarcerated people.[238]

In New York, the prison system has agreed not to argue that the DOJ procedures must be exhausted in litigation against it.[239]

2. What Are "Prison Conditions"?

The exhaustion requirement applies only to cases filed by incarcerated people about "prison conditions." The Supreme Court has said that phrase applies "to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive

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> unsuccessful, the Director will issue a letter of findings within 180 days of receipt of the complaint. 28 C.F.R. §§ 39.170(f)–(h) (2019). The prisoner may then request a hearing and appeal the letter of findings. 28 C.F.R. § 39.170(i) (2019). The administrative remedies process will then be finished after the Complaint Adjudication Officer issues a ruling on the appeal. 28 C.F.R. §§ 39.170(i)–(l).

Cardenas-Uriarte v. United States, No. 14-cv-00747-JPG-PMF, 2015 U.S. Dist. LEXIS 116194, at *9 (S.D. Ill. July 27, 2015) (*unpublished*).

236. 28 C.F.R. Pt. 35, App. A, Guidance to Revisions to ADA Regulation on Nondiscrimination on the Basis of Disability in State and Local Government Services, comment on § 35.172 (2011).

237. 28 C.F.R. § 35.172(c) (2019). Trevino v. Woodbury Cty. Jail, No. C14-4051-MWB, 2015 U.S. Dist. LEXIS 7423 (N.D. Iowa Jan. 22, 2015 (*unpublished*)) (holding plaintiff was required to exhaust the DOJ procedures under 28 C.F.R. § 35.170; noting statutory language did not restrict exhaustion requirement to in-prison remedies), *report and recommendation adopted*, 2015 U.S. Dist. LEXIS 62609 (N.D. Iowa May 13, 2015), *aff'd*, 623 F. App'x 824 (8th Cir. 2015) (per curiam) (*unpublished*). Some older decisions held similarly under the prior regulations. *See* William G. v. Pataki, No. 03 Civ. 8331 (RCC), 2005 U.S. Dist. LEXIS 16716, at *16 (S.D.N.Y. Aug. 11, 2005)(*unpublished*); Scott v. Goord, No. 01 Civ. 0847 (LTS) (AJP), 2004 U.S. Dist. LEXIS 21663 (S.D.N.Y. Oct. 25, 2004) (*unpublished*); Burgess v. Garvin, No. 01 Civ. 10994 (GEL), 2003 U.S. Dist. LEXIS 14419 (S.D.N.Y. Aug. 18, 2003), *on reconsideration*, 2004 U.S. Dist. LEXIS 4122 (S.D.N.Y. March 16, 2004) (*unpublished*); Rosario v. N.Y. State Dept. of Corr. Servs., No. 03 Civ. 859, 2003 U.S. Dist. LEXIS 18032 (S.D.N.Y. Sept. 24, 2003) (*unpublished*), *vacated and remanded*, 400 F.3d 108 (2d Cir. 2005) (per curiam).

238. Woody v. U.S. Bureau of Prisons, No. 16-862 (DWF/BRT), 2016 U.S. Dist. Lexis 182036 (D. Minn. Nov. 22, 2016) (*unpublished*) (holding DOJ procedures unavailable to people incarcerated in federal prison where they were not mentioned in the inmate handbook or in the Bureau of Prisons' grievance policy and incarcerated people were not otherwise informed of them), *report and recommendation adopted*, 2017 U.S. Dist. LEXIS 5636 (D. Minn. Jan. 13, 2017) (*unpublished*); Burgess v. Garvin, No. 01 Civ 10994 (GEL), 2004 U.S. Dist. LEXIS 4122 (S.D.N.Y. March 16, 2004) (*unpublished*) (discussing procedural requirements for people incarcerated in state prison); *see also* Payne v. United States Marshals Serv., No. 15 C 5970, 2018 U.S. Dist. LEXIS 122015 (N.D. Ill. July 20, 2018) (*unpublished*) (declining to dismiss for non-exhaustion where a quadriplegic incarcerated person's disability was not accommodated in a federal courthouse, and no information about administrative remedies was provided in response to his inquiries; stating the plaintiff had exercised "reasonable diligence" and "did not need to scour the Code of Federal Regulations." Payne v. United States Marshals Serv., No. 15 C 5970, 1028 U.S. Dist. LEXIS 122015 (N.D. Ill. July 20, 2018) (*unpublished*).

239. Rosario v. Goord, 400 F.3d 108 (2d Cir. 2005) (per curiam). *But see* William G. v. Pataki, No. 03 Civ. 8331 (RCC), 2005 U.S. Dist. LEXIS 16716 (S.D.N.Y. Aug. 11, 2005) (*unpublished*) (holding DOJ process must be exhausted in action against by state Division of Parole and Office of Mental Health).

force or some other wrong."[240] In other words, if something happened to you in prison, it is probably covered by the exhaustion requirement.[241]

What anyone does outside the prison system generally will not be considered as relating to "prison conditions."[242] What happened while you were in police custody generally will also not be considered as relating to "prison conditions," though in many cases concerning events immediately after arrest, it is difficult to tell from court decisions whose custody the incarcerated person was in or where the line was drawn between being an arrestee and being an incarcerated person.[243] The same *might* be true of medical facilities outside the prison.[244] Disputes over whether you should be in prison at all are not about "prison conditions."[245] Whether parole release or revocation relate to "prison conditions" is

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

241. *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. Dept. of Corr., 201 F.3d 1023, 1024 (8th Cir. 2000) (failure to provide interpreters for Spanish-speaking prisoners is a prison condition). *But see* United States v. Hashmi, 621 F. Supp. 2d 76, 79, 84–85 (S.D.N.Y. 2008) (holding that security clearances for prisoners' attorneys put in place by the Attorney General were not "conditions" as the PLRA contemplated).

242. 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 based on that placement required exhaustion. Almahdi v. Ridge, 201 F. App'x 865, 868 (3d Cir. 2006) (*unpublished*). *See also* Singh v. U.S. Dept. of Homeland Sec., No. 1:12-cv-00498-AWI-SKO, 2013 U.S. Dist. LEXIS 56664 (E.D. Cal. Apr. 18, 2013) (*unpublished*) (holding Privacy Act suit about Department of Homeland Security misinformation concerning an immigration detainer was not about prison conditions and need not be exhausted within Bureau of Prisons), *report and recommendation adopted*, 2013 U.S. Dist. LEXIS 80599 (E.D. Cal. June 6, 2013) (*unpublished*); Johnson v. O'Malley, No. 96 C 6598, 1998 U.S. Dist. LEXIS 7955, at *10–11 (N.D. Ill. May 15, 1998) (*unpublished*) (holding that incarcerated person 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).

243. *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). *See* Carbajal v. McCann, 808 F. App'x 620, 639 (10th Cir. 2020) (*unpublished*) (holding § 1997e(a) applied to use of force in a court holding cell because "the PLRA applies to all claims of excessive force pressed by prisoners"; not addressing the statutory term "prison conditions"); Voss v. Kauer, No. 18-cv-848-jdp, 2019 U.S. Dist. LEXIS 136215 (W.D. Wis. Aug. 13, 2019) (*unpublished*) (holding denial of medical care while plaintiff was in a holding cell in jail was about prison conditions, regardless of whether he had been booked); Jackson v. Dart, No. 13-CV-7713, 2016 U.S. Dist. LEXIS 132582 (N.D. Ill. Sept. 26, 2016) (*unpublished*) (stating it is unclear "whether, during the booking and bond-setting process, he was "confined in any jail, prison, or other correctional facility"); Vasquez v. Williams, No. 13 Civ. 9127 (LGS), 2015 U.S. Dist. LEXIS 105913 (S.D.N.Y. Aug. 11, 2015) (*unpublished*) (noting it is "unclear" whether court holding facilities outside the prison are covered by the exhaustion requirement); *see also* Khatib v. County of Orange, 639 F.3d 898, 902–905 (9th Cir. 2011) (holding court holding cells were "jails" and "detention facilities" under 42 U.S.C. § 1997(1), which is not a part of the PLRA).

244. 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 incarcerated people 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 an incarcerated person while being treated at an outside medical facility.

245. *See* Cantu v. Bexar Cty., No. SA-17-CA-306-XR, 2018 U.S. Dist. LEXIS 47095 (W.D. Tex. Mar. 22, 2018) (*unpublished*) (noting challenges to fact or duration of confinement are not about "prison conditions"); Hampton v. Johnson, No. 12-CV-1103, 2014 U.S. Dist. LEXIS 43357 (W.D. Ark. Mar. 31, 2014) (*unpublished*) (holding unlawful arrest claim "would not be covered under Section 1997e(a)" and need not be exhausted); Regelman v. Weber, Civil Action No. 10 - 675, 2011 U.S. Dist. LEXIS 29117 (W.D. Pa. Mar. 21, 2011) (*unpublished*) (holding false arrest plaintiff "is complaining about the very fact of confinement, not the conditions of confinement, and the PLRA does not apply to such claims"); 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

not clear.[246] Complaints from halfway houses or residential treatment programs are likely to be considered "prison conditions" as long as (1) you are there because of a criminal conviction or charge and (2) you are not free to leave.[247] However, placement in or removal from these programs might not be about "prison conditions."[248] Incarcerated people complaining about not receiving psychiatric medication and referrals for their mental illness before being released are complaining about prison conditions.[249]

3. What Are "Available" Remedies?

The PLRA says you must exhaust all "available" administrative remedies before you can file a suit in federal court. The Supreme Court has said that the only exception to the exhaustion requirement is that incarcerated people need not exhaust remedies that are not "available."[250]

An administrative remedy is "available" if it can "provide any relief" or "take any action whatsoever in response to a complaint," even if it cannot provide the relief you prefer, such a money damages.[251]

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prison conditions claims under the statute), *aff'd*, 175 F. App'x 234 (10th Cir. 2006) (*unpublished*); 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).

246. *Compare* Smalls v. State Bd. of Pardons and Paroles, No. CV414-031, 2014 U.S. Dist. LEXIS 67133 (S.D. Ga. May 14, 2014) (*unpublished*) (holding challenge to parole condition is not about prison conditions even if it was imposed, and the incarcerated person filed suit, before release); Coleman v. Dumeng, No. 10 Civ. 8766 (JGK), 2012 U.S. Dist. LEXIS 18449 (S.D.N.Y. Feb. 13, 2012) (*unpublished*) (holding challenge to parole condition is not about prison conditions), *appeal dismissed*, No. 12-1168 (2d Cir. Aug. 20, 2012); Hernandez-Vazquez v. Ortiz-Martinez, No. CIVIL 09-01743 (JA), 2010 U.S. Dist. LEXIS 1621 (D.P.R. Jan. 8, 2010) (*unpublished*) (holding delayed parole hearing is not a prison condition); L.H. v. Schwarzenegger, 519 F. Supp. 2d 1072, 1081 n.9 (E.D. Cal. 2007) (holding parole violation procedures are not prison conditions), *with* Martin v. Iowa, 752 F.3d 725, 727 (8th Cir. 2014) (holding challenge to lack of in-person parole interviews must be exhausted since it was a "civil action with respect to prison conditions," citing the definition from 18 U.S.C. § 3626(g), governing another part of the PLRA); Castano v. Neb. Dept of Corr., 201 F.3d 1023, 1024–1025 (8th Cir. 2000) (holding a § 1983 action alleging defendants' failure to provide qualified interpreters at disciplinary hearings and institutional programs bearing on eligibility of parole concerned prison conditions); Ondek v. Ranatza, No. 16-725-JWD-RLB, 2018 U.S. Dist. LEXIS 43116 (M.D. La. Mar. 16, 2018) (*unpublished*) (holding claims alleging defendants inadequately supervised and trained Parole Board with respect to the Board's consideration of plaintiff's pardon application concerned prison conditions); Morgan v. Messenger, No. 02-319-M, 2003 U.S. Dist. LEXIS 14892, at *8–9 (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).

247. *See* Ruggiero v. County of Orange, 467 F.3d 170, 174–175 (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).

248. *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, No. 1:04-0446, 2006 U.S. Dist. LEXIS 38919, at *5 (S.D. W. Va. 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.").

249. *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).

250. Ross v. Blake, 136 S. Ct. 1850, 1862, 195 L. Ed. 2d 117, 126–127 (2016).

251. Booth v. Churner, 532 U.S. 731, 736, 740–741, 121 S. Ct. 1819, 1823, 149 L. Ed. 2d 958, 963 (2001).

You may believe that the complaint system in your prison is unfair or a waste of time, but you must use it and go through all of the steps and give the prison a chance to fix the problem first.[252]

Step one in finding out if there is an available remedy for your problem is to read the prison grievance procedure to see if addresses your problem. Often there are certain issues that are "non-grievable" in a particular grievance system, and you are not required to pursue a grievance about those issues that the grievance system does not address.[253] If you have any doubt about whether your issue is grievable, you should try to pursue a grievance about it. In reviewing the prison grievance policy, you should see whether an issue that is non-grievable is directed to another administrative procedure, such as a disciplinary appeal, a special medical complaint procedure, a classification review system, or a separate system for reviewing denial of correspondence of publications.[254] If there is a specialized procedure that addresses your problem, you must use it in order to exhaust the procedures available to you.[255] If it is not clear which one is right, it is worth it to try all relevant procedures.

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.[256]

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 use the grievance system to challenge the denial of temporary release (under article 2), but your complaint

252. 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 1998) (dismissing incarcerated person's action because he had not exhausted his remedies before filing).

253. Owens v. Keeling, 461 F.3d 763, 769–770 (6th Cir. 2006) (noting exclusion of classification disputes from grievance system); Taylor v. Swift, 21 F. Supp. 3d 237, 241–242 (E.D.N.Y. May 21, 2014) (holding exclusion of "inmate allegations of assault or harassment" means prisoners may rely on that language and refrain from exhausting such allegations, notwithstanding defendants' construction of the phrase to mean something else), *appeal dismissed*, No. 14-3382 (2d Cir., Mar 10, 2015) (*unpublished*).

254. The relationship between disciplinary appeals and grievance procedures has been a particular source of confusion. Please see discussion between footnotes 291 and 294 of Part E(3) of this Chapter for more information regarding the relationship between disciplinary appeals and grievance procedures.

255. *See, e.g.*, Owens v. Keeling, 461 F.3d 763, 769–772 (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*) (holding incarcerated person's failure to pursue "religious accommodation" exception procedure meant that administrative remedies were not exhausted).

256. State of New York, Dept. 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 Nov. 3, 2019). The state regulations say the same thing. *See* N.Y. COMP. CODES R. & REGS. tit. 7, § 701.3 (2020). 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…"

that the Temporary Release Committee followed unfair procedures can be pursued through the grievance system (under article 3).

Sometimes issues that are grievable on paper are not actually grievable, either because of informal practice[257] or just because grievance personnel decline to process a particular grievance.[258] In those situations you should appeal the rejection all the way to the end of the process so officials cannot claim after you bring suit that the remedy was really available but you just didn't complete the process.

The Supreme Court has acknowledged that sometimes an administrative procedure "though officially on the books, is not capable of use to obtain relief" and is therefore not an available remedy.[259] It described, "[a]s relevant here," three kinds of situations where that may be the case.[260] One of these is "when (despite what regulations or guidance materials may promise) it operates as a simple dead end—with officers unable or consistently unwilling to provide any relief to aggrieved inmates. . . . When the facts on the ground demonstrate that no such potential [for relief] exists, the inmate has no obligation to exhaust the remedy."[261] The situation described above, where there is an informal policy not to process certain kinds of grievances, fits this "dead end" category because you cannot get relief. In several cases lower courts have found a grievance procedure to be such a "dead end" or have otherwise found that there is no potential for relief, usually because of some identifiable breakdown in the system.[262] Courts will require a lot of persuasion and factual support, and not just your say-so, to find that a grievance system is a "dead end" or that no relief is available.

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257. *See, e.g.*, Marr v. Fields, No. 1:07-cv-494, 2008 U.S. Dist. LEXIS 24993 (W.D. Mich. Mar. 27, 2008) (*unpublished*) (holding evidence that hearing officers interpreted grievance policy exclusion broadly to exclude all grievances with any relationship to a disciplinary charge could excuse failure to exhaust); Casanova v. Dubois, Civil Action No. 98-11277-RGS, 2002 U.S. Dist. LEXIS 13264 (D. Mass. July 22, 2002) (*unpublished*) (finding that, contrary to written policy, practice was "to treat complaints of alleged civil rights abuses by staff as 'not grievable'"), *remanded on other grounds*, 304 F.3d 75 (1st Cir. 2002).

258. *See, e.g.*, Williams v. Strout, No. 1:17-cv-03520-WTL-TAB, 2018 U.S. Dist. LEXIS 154435 (S.D. Ind. Sept. 11, 2018) (*unpublished*) (holding the remedy unavailable where plaintiff's grievance was rejected because "a tort claim is not a grievable issue," which is not supported by the grievance policy); Mooney v. Beard, No. 2:13-cv-2290 KJN P, 2014 U.S. Dist. LEXIS 82535 (E.D. Cal. June 17, 2014) (*unpublished*) (holding incarcerated person whose grievance was cancelled because it was "outside the scope of the Inmate Appeals process" was not required to exhaust); Jackson v. Phelps, No. 10-919-SLR, 2013 U.S. Dist. LEXIS 169490 (D. Del. Nov. 19, 2013) (*unpublished*) (holding plaintiff had exhausted because he filed a grievance but it was returned as non-grievable), *aff'd*, 575 F. App'x 79 (3d Cir. 2014) (*unpublished*).

259. Ross v. Blake, 139 S. Ct. at 1859.

260. Ross v. Blake, 136 S. Ct. at 1859. The phrase "as relevant here" means that the Court was not claiming to describe all the possible situations in which a remedy could be unavailable, just those that seemed relevant to the facts in the *Ross* case. *See* Ramirez v. Young, 906 F.3d 530, 538 (7th Cir. 2018); Andres v. Marshall, 867 F.3d 1076, 1078 (9th Cir. 2017) (per curiam); Williams v. Corr. Officer Priatno, 829 F.3d 118, 123 n. 2 (2d Cir. 2016) (all holding that the three categories do not exclude the possibility that a remedy might be unavailable for other reasons).

261. Ross v. Blake, 136 S. Ct. 1850, 1859, 195 L. Ed. 2d 117, 126–127 (2016).

262. *See, e.g.*, Brant v. Reddish, No. 3:13-cv-412-J-34MCR, 2019 U.S. Dist. LEXIS 161899 (M.D. Fla. Sept. 23, 2019) (*unpublished*) (finding "systemic dead end" where four different incarcerated people challenging state execution protocols had received "identical, boilerplate responses" showing a "general practice of denying these types of requests for administrative relief," and that the agency "does not intend to consider any challenge to its lethal injection protocol based on Plaintiffs' grievances"); McArdle v. Ponte, No. 17cv2806, 2018 U.S. Dist. LEXIS 178661 (S.D.N.Y, Oct. 17, 2018) (*unpublished*) (holding incarcerated person who alleged he "never received any response to his grievances and that he 'observed hundreds of inmates' grievances in the grievance box . . . for days without being processed by the . . . committee' " sufficiently alleged defendants were "consistently unwilling" to provide relief, supporting a "dead-end" argument); Battle v. S.C. Dept. of Corr., No. 2:18-cv-00719-TMC-MGB, 2018 U.S. Dist. LEXIS 224921 (D.S.C. Oct. 2, 2018) (*unpublished*) (rejecting argument that plaintiff's grievance was limited to a complaint about doorknobs where he complained of violent assault made possible by the absence of doorknobs; describing system as a "dead end" in failing to address the assault), *report and recommendation adopted in part, rejected in part on other grounds,* No. 2:18-cv-719-TMC, 2019 U.S. Dist. LEXIS 29997) (D.S.C. Feb. 26, 2019) (*unpublished*); V.W. by and through Williams v. Conway, 236 F. Supp. 3d 554, 585 (N.D.N.Y. Feb. 22, 2017) (finding officials "consistently unwilling to provide any relief" where defendants did not contest allegations that "administrative remedies were unavailable to the plaintiff class, with Justice Center staff

A second "on the books, but not capable of use" situation is a grievance system that incarcerated people cannot understand, or as *Ross* put it, is "so opaque that it becomes, practically speaking, incapable of use. In this situation, some mechanism exists to provide relief, but no ordinary prisoner can discern or navigate it. . . . [W]hen a remedy is . . . essentially 'unknowable'—so that no ordinary prisoner can make sense of what it demands—then it is also unavailable."[263] Courts have found a number of grievance systems too opaque or unknowable to be considered available, and there have been a number of cases where the prison authorities did not even seem to understand how their systems worked.[264]

Part of making a remedy available, and not opaque, is telling the incarcerated people about it.[265] Prison officials must take "reasonable steps to inform the inmates about the required procedures. . .

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consistently refusing to provide grievance forms, ignoring grievances, and in some cases throwing grievances in the trash"); Dunn v. Dunn, 219 F. Supp. 3d 1100, 1116 (M.D. Ala. 2016) (finding mental health grievance system "so full of blind alleys and dead ends that even those who run it cannot manage to accurately and consistently describe how it works"; prisoners received no instructions in how to file and pursue a grievance, and what instructions did exist were incomprehensible and contradictory); Apodaca v. Raemisch, Civil Action No. 15-cv-00845-REB-MJW, 2015 U.S. Dist. LEXIS 148308 (D. Colo. Sept. 8, 2015) (*unpublished*) (holding evidence that defendants "prevented [plaintiff] from timely filing his grievances by creating an institution-wide hostile environment of retaliation and of routinely thwarting grievances," and supported his claim with 33 non-hearsay affidavits from other incarcerated people, "each alleging frustration or fear arising from the grievance process," was cognizable on summary judgment and created a factual dispute barring summary judgment as to whether the prison agency actively thwarted the administrative-grievance process), *report and recommendation adopted*, 2015 Dist. LEXIS 148307 (D. Colo. Oct. 30, 2015) (*unpublished*), *rev'd and remanded on other grounds*, 864 F.3d 1071 (10th Cir. 2017), *cert. denied*, 139 S. Ct. 5 (2019); Maxwell v. Wilcher, No. CV419-018, 2019 U.S. Dist. LEXIS 35032 (S.D. Ga. Mar. 5, 2019) (*unpublished*) (holding allegation that his "grievance slot on the facilities [sic] kiosk machine has been full and unable to accept any grievance . . . since 2016" sufficiently alleged that the remedy was unavailable), *report and recommendation adopted in part, rejected in part on other grounds*, 2019 U.S. Dist. LEXIS 49492 (S.D. Ga, Mar. 25, 2019) (*unpublished*); *see also* Smith v. Lagana, 574 F. App'x 130, 132–133 (3d Cir. 2014) (*unpublished*) (per curiam) (pre-*Ross* case holding allegations of a "culture of not processing, nor responding to . . . complaints against correctional guards" combined with evidence of the plaintiff's fruitless attempts to exhaust raised a factual question of unavailability barring summary judgment); Scott v. Clarke, 64 F. Supp. 3d 813, 829 n. 9 (W.D. Va. 2014) (pre-*Ross* case holding evidence that the grievance coordinator was on leave and grievances were not answered, and upon her return plaintiff's grievance could not be found, supported plaintiff's claim of non-exhaustion); Meador v. Hammer, No. 2:11-cv-3342 LKK AC P, 2013 U.S. Dist. Lexis 27203 (E.D. Cal. Feb. 26, 2013) (*unpublished*) (pre-*Ross* case holding the remedy unavailable to the plaintiff because the prison's internal mail system "was effectively broken at the time he was attempting to exhaust his remedies, *report and recommendation adopted*, 2013 U.S. Dist. LEXIS 50495 (E.D. Cal. Apr. 8, 2013) (*unpublished*).

263. *See* Ross v. Blake, 136 S. Ct. 1850, 1860, 195 L. Ed. 2d 117, 127 (2016).

264. *See* Does 8-10 v. Snyder, 945 F.3d 951, 963–965 (6th Cir. 2019) (describing administration of sexual abuse complaint system as too opaque and dysfunctional to be enforceable under *Ross*) Moore v. Lamas, No. 3:12-CV-233, 2017 U.S. Dist. LEXIS 153964 (M.D. Pa. Sept. 21, 2017) (*unpublished*) (noting prison system's witnesses were "not able to provide answers to key questions and [one] could not clarify the interaction between" two separate remedies, "did not elucidate certain areas of confusion," and gave testimony that was "at best, difficult to decipher" on a fundamental point that was not clarified in written policy either"); Springer v. Unknown Rekoff, No. 3:14-CV-300, 2017 U.S. Dist. LEXIS 73005 (S.D. Tex. May 12, 2017) (*unpublished*) ("At best, there is a loose collection of amorphous ad hoc policies that are not memorialized anywhere (not even in the employees' handbook) and the origin of which is uncertain."); Dunn v. Dunn, 219 F. Supp. 3d 1100, 1116 (M.D. Ala. 2016) (describing system as "so full of blind alleys and dead ends that even those who run it cannot manage to accurately and consistently describe how it works").

265. Hernandez v. Dart, 814 F.3d 836, 842 (7th Cir. 2016) ("It is not incumbent on the prisoner 'to divine the availability' of grievance procedures. . . . Rather, prison officials must inform the prisoner about the grievance process. . . . The prison cannot shroud the prisoner in a veil of ignorance and then hide behind a failure to exhaust defense to avoid liability." The incarcerated person had never been provided with the grievance policy or had an opportunity to learn about it.); Goebert v. Lee County, 510 F.3d 1312, 1322–1323 (11th Cir. 2007) (holding an appeal procedure not described in the inmate handbook, but only in the operating procedures the inmates did not have access to, was not an available remedy); Brown v. Valoff, 422 F.3d 926, 936–937 (9th Cir. 2005) (stating "information provided [to] the prisoner is pertinent because it informs our determination of whether relief was, as a practical matter, 'available.' ").

."[266] This obligation can generally be satisfied by providing the prisoners with the grievance policy, describing it accurately in a handbook that is given to incarcerated people, or similar measures.[267] The remedy may be unavailable to incarcerated people who do not get the benefit of these measures.[268] Courts have held that prisons must inform incarcerated people of the procedures in a language that they can understand.[269] Some courts have made statements that seemingly reject any obligation to inform incarcerated people of grievance procedures. For example, "A plaintiff's failure to exhaust cannot be excused by his ignorance of the law or the grievance policy."[270] We do not think those statements accurately state the law. A more accurate statement is: "The PLRA does not excuse a failure to exhaust based on a prisoner's ignorance of administrative remedies, *so long as the prison has taken reasonable steps to inform the inmates about the required procedures*."[271] Once a policy is made known, courts will hold prison officials to it, and "will not condition exhaustion on unwritten or 'implied' requirements."[272] Such requirements unfortunately appear rather frequently in prison

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266. Ramirez v. Young, 906 F.3d 530, 538 (7th Cir. 2018); *accord*, Small v. Camden County, 728 F.3d 265, 271 (3d Cir. 2013) ("Remedies that are not reasonably communicated to inmates may be considered unavailable for exhaustion purposes.").

267. *See* Davis v. Fernandez, 798 F.3d 290, 295 (5th Cir. 2015) (stating "courts may not deem grievance procedures unavailable merely because an inmate was ignorant of them, so long as the inmate had a fair, reasonable opportunity to apprise himself of the procedures"; holding that standard satisfied where "the jail's grievance procedures are published in an inmate handbook, which is in the record, and explained on jail television, and Davis does not contend that any circumstances precluded him from accessing either source"); Gibson v. Weber, 431 F.3d 339, 341 (8th Cir. 2005) (holding that incarcerated people who admitted receiving guidance that explained the grievance procedure were not excused from using it to prove their allegations even when prison personnel had "made it clear" that they should instead voice complaints informally to medical personnel); Valerio v. Wrenn, Civil No. 15-cv-248-LM, 2019 U.S. Dist. LEXIS 48847 (D.N.H. Mar. 25, 2019) (*unpublished*) (holding policy sufficiently communicated where it was explained in an Inmate Manual and the manual referred incarcerated people to the policy, available in prison libraries); Kelly v. Peterson, No. 13-cv-651-bbc, 2014 U.S. Dist. LEXIS 94291 (W.D. Wis. July 11, 2014) (*unpublished*) (barring summary judgment for non-exhaustion where the plaintiff said that he never received the inmate handbook containing instructions for grievance appeals); Smith v. City of New York, No. 12 Civ. 3303, 2013 U.S. Dist. LEXIS 144122 (S.D.N.Y. Sept. 26, 2013) (*unpublished*) (holding provision of an Inmate Handbook describing the grievance process satisfied defendants' obligation); Minor v. Brown, No. CV 111-070, 2012 U.S. Dist. LEXIS 162920 (S.D. Ga. Oct. 16, 2012) (rejecting argument that prisoner did not know retaliatory transfers were grievable where it was clear in the policy to which incarcerated people had access; distinguishing *Goebert v. Lee*), *report and recommendation adopted*, 2012 U.S. Dist. LEXIS 162780 (S.D. Ga. Nov. 13, 2012); *see also* Watson v. Fisher, 558 F. App'x 141, 144 (3d Cir. 2014) (per curiam) (*unpublished*) (holding the failure to provide a handbook did not make appeal procedure unavailable where grievance appeal rejection contained instructions for how to file properly).

268. Presley v. Scott, 679 F. App'x 910, 912 (11th Cir. 2017) (per curiam) (*unpublished*) (holding remedy unavailable where the grievance policy was omitted from the list of regulations available on the law library computer, and defendants provided no evidence that anyone informed the plaintiff of it); Hernandez v. Dart, 814 F.3d 836, 842 (7th Cir. 2016) (holding remedy unavailable to injured incarcerated person who was first hospitalized, then brought to the jail but hospitalized again in another facility, shackled all the while, and who did not receive the jail handbook or information about the grievance procedure during the 15-day period for filing a grievance); Albino v. Baca, 747 F.3d 1162, 1175–1176 (9th Cir. 2014) (en banc) (granting summary judgment to plaintiff who declared without contradiction that he was never given any orientation; had never seen the jail's personnel manual, a complaint box, or a complaint form; and that when he repeatedly sought and was denied help from prison staff he was not provided complaint forms or told how to file a grievance, but was just referred to his criminal defense attorney; manual detailing procedures was not provided to incarcerated people).

269. Ramirez v. Young, 906 F.3d 530, 533 (7th Cir. 2018); Martinez v. Fields, 627 F. App'x 573, 574 (8th Cir. 2015) (per curiam) (*unpublished*) (noting that the grievance rules and forms were not shown to be available in Spanish).

270. Napier v. Laurel Cty., Ky., 636 F.3d 218, 222 n.2 (6th Cir. 2011) (citing cases). In that case, the court acknowledged after its sweeping statement that the grievance policy was distributed to all incarcerated people in the institution in the inmate orientation manual, 636 F.3d at 222 n.2, which generally satisfies officials' obligation to make the procedures known.

271. Ramirez v. Young, 906 F.3d 530, 538 (7th Cir. 2018) (emphasis supplied).

272. Jackson v. Ivens, 244 F. App'x 508, 514 (3d Cir. 2007) (per curiam) (*unpublished*) (citing Spruill v. Gillis, 372 F.3d 218, 234 (3d Cir. 2004)); *accord*, West v. Emig, 787 F. App'x 812, 816 (3d Cir. 2019) (*unpublished*)

exhaustion litigation.[273] Since *Ross v. Blake* was decided, courts determining whether incarcerated people were adequately informed of the procedures have focused on the materials provided to the incarcerated people, and have often declined to hold incarcerated people to requirements that appeared in some other place.[274]

A remedy is also unavailable "when prison administrators thwart incarcerated people from taking advantage of a grievance process through machination, misrepresentation, or intimidation. . . . [W]e [have] recognized that officials might devise procedural systems (including the blind alleys and quagmires just discussed) in order to 'trip[ ] up all but the most skillful prisoners.' And appellate courts have addressed a variety of instances in which officials misled or threatened individual incarcerated people so as to prevent their use of otherwise proper procedures. As all those courts have recognized, such interference with an incarcerated person's pursuit of relief renders the administrative process unavailable."[275]

The Court in *Ross* did not explain what it meant by "machinations," but it probably includes failing to treat incarcerated people's grievances consistently with the prison's own grievance rules.[276] One

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(stating "regardless of whether West could have availed himself of an unofficial verbal grievance policy, his obligation to exhaust extended only to the then-existing on-the-books administrative remedies").

273. Banks v. Patton, 743 F. App'x 690, 695–696 (7th Cir. 2018) (*unpublished*) (holding plaintiff could not be held to a rule that incarcerated people must cite in their grievances any prior grievances on the same subject because it did not appear in the inmate handbook); Hill v. Snyder, 817 F.3d 1037, 1040 (7th Cir. 2016) (noting that under the grievance policy, an error in time or date of the events at issue did not justify declining to decide a grievance; "Because the prison refused to process Hill's grievance based on his deviation from an unannounced rule, no further administrative remedies were available to Hill."); Williams v. Wilkinson, 659 F. App'x 512, 520–521 (10th Cir. 2016) (*unpublished*) (declining to credit claim that under "facility practice" the incarcerated person must have obtained a receipt for his Request to Staff; "the prison's regulations, not 'facility practice,' define proper exhaustion" (citing Jones v. Bock, 549 U.S. 199, 218 (2007)); holding that rule requiring submission of Request to Staff was too vague to dismiss for non-exhaustion for submitting it to the warden, notwithstanding defendants' argument that as a "knowledgeable inmate" the plaintiff surely knew better); Conley v. Anglin, 513 F. App'x 598, 601–602 (7th Cir. 2013) (*unpublished*) (declining to enforce regulation requiring name or description of persons involved where the grievance form still called only for "Brief Summary of Grievance"; refusing to credit claim that adding additional facts to grievance appeal violated rules absent some evidence that such a rule existed); Hurst v. Hantke, 634 F.3d 409, 411 (7th Cir. 2011) (refusing to find non-exhaustion where incarcerated person violated apparent "secret supplement to the state's administrative code, requiring that claims of good cause for an untimely filing be accompanied by evidence"); Glick v. Walker, 385 F. App'x. 579, 583 (7th Cir. 2010) (*unpublished*) (declining to hold incarcerated person to a supposed grievance rule not found in the Administrative Code); Miller v. Tanner, 196 F.3d 1190, 1194 (11th Cir. 1999) (holding that failing to sign and date a grievance was not a failure to exhaust since no rule required it); Apodaca v. Franco, No. CIV 15-61 JP/LF, 2017 U.S. Dist. LEXIS 213433 (D.N.M. Dec. 29, 2017) (*unpublished*) (holding incarcerated person could rely on policy statement that a grievance not timely disposed of could be deemed exhausted, and rejecting claim that an appeal of a non-decision was available in the absence of support in the grievance policy), *aff'd*, 737 F. App'x 428 (10th Cir. 2018) (*unpublished*); Lewis v. Carswell, No. 5:15-CV-254-DPM-BD, 2016 U.S. Dist. LEXIS 201705 (E.D. Ark. May 26, 2016) (*unpublished*) (rejecting officials' claim that plaintiff was obliged to send the original grievance, and not a photocopy, with his appeal, where no such rule appeared in the grievance policy), *report and recommendation adopted,* 2016 U.S. Dist. LEXIS 112839 (E.D .Ark. Aug. 24, 2016).

274. *See, e.g.*, Lanaghan v.Koch, 902 F.3d 683, 689–690 (7th Cir. 2018) (declining to hold an incarcerated person to a procedure for late grievances that was in the state Administrative Code but not in the handbook provided to prisoners); West v. Rakers, No. 3:16-cv-984-NJR-DGW, 2018 U.S. Dist. LEXIS 37386 (S.D. Ill. Feb. 9, 2018) (*unpublished*) (holding state regulation requiring grievances to be filed where the incarcerated person is "assigned," which defendants claimed means the incarcerated person's "parent institution," could not be enforced where the grievance form asked for the prisoner's "present facility" and the one where the grievance arose, and did not use the word "assigned"); Daniel v. Harper, No. 5:17-CV-19-TBR, 2017 U.S. Dist. LEXIS 208235 (W.D. Ky. Dec. 19, 2017) (declining to hold incarcerated person to an appeal procedure described in a Policy and Procedure Manual but not mentioned in the handbook provided to inmates).

275. Ross v. Blake, 136 S. Ct. 1850, 1860, 195 L. Ed. 2d 117, 127 (2016) (internal citations and footnote omitted).

276. *See, e.g.*, Mills v. Mitchell, 792 F. App'x 511, 512 (9th Cir. 2020) ("CDCR's repeated failure to meet the statutorily required deadlines and failure to provide proper notice made remedies effectively unavailable"); Carr v. Higgins, 700 F. App'x. 598, 600–601 (9th Cir. 2017) (holding defendants not entitled to summary judgment for

variety of this conduct is to treat a grievance as some other kind of request so it is not processed correctly and the plaintiff is unable to appeal and complete exhaustion.[277] Others include making impossible demands on the person filing the grievance, such as requiring them to produce documents that the incarcerated person has no access to,[278] placing incarcerated people in procedural impasses that prevent exhaustion,[279] and refusing to provide necessary forms in those grievance systems that require use of a specified form.[280] Courts are sometimes suspicious of incarcerated people's claims that they couldn't get forms, holding that they should have tried harder or should have asked more staff members.[281]

As to misrepresentation, *Ross* was more explicit, citing with approval cases holding that "[g]rievance procedures are unavailable . . . if the correctional facility's staff misled the inmate as to the existence or rules of the grievance process so as to cause the inmate to fail to exhaust such process," and "if prison officials misled [a prisoner] into thinking that . . . he had done all he needed to initiate the grievance process," then "[a]n administrative remedy is not 'available.' "[282] There are many other lower court cases finding staff misrepresentations made remedies unavailable.[283] However, statements

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non-exhaustion where plaintiff "timely submitted a 'concern form' . . . but IDOC officials did not respond, and subsequently refused to collect his grievance forms"); Michel v. Fed. Bureau of Prisons FCI, No. 7:16-cv-00863-RDP-HNJ, 2018 U.S. Dist. LEXIS 23004, *4–5 (N.D. Ala. Feb. 13, 2018) (noting apparent random assignment of plaintiff's grievances to initial and appellate levels, causing erroneous rejections for procedural defects).

277. *See, e.g.*, Coleman v. Dart, No. 17 C 2460, 2019 U.S. Dist. LEXIS 25817, at *7–8 (N.D. Ill., Feb. 19, 2019) (noting grievance was treated as a "request for services" that could not be exhausted); Thompson v. Clarke, No. 7:17cv00010, 2018 U.S. Dist. LEXIS 70508, at *21 (W.D. Va. Apr. 25, 2018) (similar to Coleman); Lewis v. Garcia, No. CV 15-9736-FMO (PLA), 2016 WL 6603997, at *8–10 (C.D. Cal. Sept. 26, 2016) (noting incarcerated person's grievance about conduct of a disciplinary proceeding was repeatedly rejected with instructions to pursue a disciplinary appeal, even though he had already prevailed on appeal and was now grieving misconduct during the proceedings), *report and recommendation adopted*, 2016 WL 6602554 (C.D. Cal. Nov. 7, 2016).

278. *See* DeBrew v. Atwood, 792 F.3d 118, 126–129 (D.C. Cir. 2015) (noting repeated rejection of incarcerated person's appeal for failure to attach a prior decision despite his showing he did not have it and could not get it).

279. *See, e.g.*, Jamison v. Varano, No. 1:12-CV-1500, 2015 U.S. Dist. LEXIS 103325, at *4 (M.D. Pa. Aug. 6, 2015) (holding the remedy unavailable where prison officials provided illegible photocopies of required documents and the plaintiff's grievance was then dismissed because of the documents' illegibility); Lee v. Sorrels, No. CIV-12-1061-C, 2013 U.S. Dist. LEXIS 166847, at *9 (W.D. Okla. Nov. 25, 2013) (noting grievance official's direction to resubmit complaint about deprivation of wheelchair to the medical office and medical officer's direction that it should be treated as a property grievance).

280. Almy v. Davis, 726 F. App'x. 553, 556–557 (9th Cir. 2018) (*unpublished*) (vacating summary judgment for non-exhaustion where plaintiff declared under penalty of perjury that defendants provided too few grievance forms to exhaust all of his claims); Stine v. U.S. Fed. Bureau of Prisons, 508 F. App'x. 727, 729–730 (10th Cir. 2013) (*unpublished*) (holding affidavits confirming plaintiff's claim he had been denied forms raised an issue of material fact).

281. *See, e.g.*, Watson v. Hughes, 439 F. App'x 300, 302 (5th Cir. 2011) (per curiam) (*unpublished*) (holding allegation plaintiff was told grievance forms were unavailable did not excuse his non-exhaustion since he did not make the same allegation about the remaining 14 days of the period for submitting a grievance); Lowery v. Strode, No. 1:11CV-P171-M, 2012 U.S. Dist. LEXIS 137184, at *4 (W.D. Ky. Sept. 25, 2012) (granting summary judgment against incarcerated person who said he was refused grievance forms but "fails . . . to describe the attempts, if any, he made to obtain a grievance form from Defendants or other officers within 48 hours of the incident and the circumstances surrounding their alleged denial/refusal"). The Seventh Circuit made an appropriate response to this sort of argument, rejecting the claim that incarcerated person must pursue *all* alternatives to obtain a form and holding "[u]nder defendants' proposed rule, there would be no way for a prisoner to know when he had truly tried all available alternatives at the very first step—just obtaining the right form. The exhaustion requirement would invite prison staff to require prisoners to go on scavenger hunts just to take the first step toward filing a grievance. The PLRA does not impose such a requirement." Hill v. Snyder, 817 F.3d 1037, 1041 (7th Cir. 2016).

282. Ross v. Blake, 136 S. Ct. 1850, 1860 n.3, 195 L. Ed. 2d 117, 127 (2016) (quoting Davis v. Hernandez, 798 F.3d 290, 295 (5th Cir. 2015) and Pavey v. Conley, 663 F.3d 899, 906 (7th Cir. 2011)).

283. *See, e.g.*, Hardy v. Shaikh, 959 F.3d 578, 587–588 (3d Cir. 2020) (holding misleading or deceptive instructions from officials can make the remedy unavailable; "clear misrepresentation" is not needed; incarcerated people must show that they were actually misled); Townsend v. Murphy, 898 F.3d 780, 783–784 (8th Cir. 2018)

that are merely ambiguous (unclear in their meaning) and do not directly mislead a prisoner about using the grievance system may not be held to make the remedy unavailable.[284] Your best course of action is to pursue the grievance process or other available administrative remedy, and do it according to the written rules, regardless of what anybody tells you.

With respect to intimidation, there is a large amount of case law, some of it cited in *Ross v. Blake*.[285] Most circuits agree that threats or assaults directed at preventing prisoners from complaining may make available remedies unavailable in fact if "'a similarly situated individual of ordinary firmness' [would] have deemed [the remedy] available."[286] Some circuits hold that the incarcerated person must also show that the threat or intimidation actually did deter the plaintiff from pursuing administrative remedies.[287] Intimidation from exhaustion cannot be shown by "general and unsubstantiated fears about possible retaliation" but instead requires "factual statements supporting an actual and objectively reasonable fear of retaliation for filing grievances."[288] However, threats of retaliation need not be graphically explicit in order to support a claim of unavailability of the remedy.[289] Threats short of physical violence may make the remedy unavailable.[290]

There are a number of situations that frequently raise questions whether a remedy is available or what the proper available remedy is.

(reversing summary judgment for non-exhaustion where the plaintiff declared that his formal grievance was late because a sergeant wrongly advised him not to file it until he had received a response to his informal grievance—misinformation whose effect was "magnified" by lack of access to the library, which held the only available copy of the grievance directive); Brown v. Valoff, 422 F.3d 926, 935 (9th Cir. 2005) (holding "a prisoner need not press on to exhaust further levels of review once he has . . . been reliably informed by an administrator that no remedies are available").

284. *See, e.g.*, 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 incarcerated people's subjective beliefs in determining whether procedures are "available"); Gibson v. Weber, 431 F.3d 339, 341 (8th Cir. 2005) (holding that incarcerated people 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); Jackson v. District of Columbia, 254 F.3d 262, 269–270 (D.C. Cir. 2001) (holding that a plaintiff who complained to three prison officials and was told by the warden to "file it in the court" had not exhausted); Yousef v. Reno, 254 F.3d 1214, 1221–1222 (10th Cir. 2001) (holding that plaintiff who was confused by prison officials' erroneous representations that the grievance system could not address "legality and fairness" of restrictive Special Administrative Measures failed to exhaust, since in fact it could address their fairness if not their legality).

285. Ross v. Blake, 136 S. Ct. 1850, 1860 n.3, 195 L. Ed. 2d 117, 127 (2016) (citing Schultz v. Pugh, 728 F.3d 619, 620 (7th Cir. 2013); Tuckel v. Grover, 660 F.3d 1249, 1252–1253 (10th Cir. 2011)).

286. Hemphill v. New York, 380 F.3d 680, 688 (2d Cir. 2004) (citation omitted); *accord*, Rinaldi v. United States, 904 F.3d 257, 269 (3d Cir. 2018); McBride v. Lopez, 807 F.3d 982, 987–988 (9th Cir. 2015); Himmelreich v. Federal Bureau of Prisons, 766 F.3d 576, 578 (6th Cir. 2014), *aff'd and remanded on other grounds sub nom.* Simmons v. Himmelreich, 136 S. Ct. 1843 (2016); Tuckel v. Grover, 660 F.3d 1249, 1252-54 (10th Cir. 2011); Verbanik v. Harlow, 441 F. App'x 931, 933 (3d Cir. 2011) (per curiam) (*unpublished*); Turner v. Burnside, 541 F.3d 1077, 1084 (11th Cir. 2008); Kaba v. Stepp, 458 F.3d 678, 684–686 (7th Cir. 2006).

287. Rinaldi v. United States, 904 F.3d 257, 268–269 (3d Cir. 2018); McBride v. Lopez, 807 F.3d 982, 987–988 (9th Cir. 2015); Turner v. Burnside, 541 F.3d 1077, 1085 (11th Cir. 2008).

288. Rodriguez v. Cty. of Los Angeles, 891 F.3d 776, 794 (9th Cir. 2018).

289. Kincaid v. Sangamon County, 435 F. App'x 533, 536–537 (7th Cir. 2011) (holding "[a] threat from the superintendent that [plaintiff] and his family needed to 'shut the fuck up' may have intimidated [plaintiff] and rendered the grievance process unavailable to him").

290. Handy v. Varner, Civil Action No. 12-1091, 2013 U.S. Dist. LEXIS 53121, at *1, 6 (W.D. Pa. Apr. 12, 2013) (finding threat to issue disciplinary charges and a negative recommendation to prevent plaintiff's release on parole if he didn't stop seeking a transfer deterred plaintiff from grieving and would have deterred a person of ordinary firmness); Ward v. Rabideau, 732 F. Supp. 2d 162, 165, 171–172 (W.D.N.Y. 2010) (holding plaintiffs' fears of retaliatory conduct such as "unnecessary and harassing frisk searches, urine testing, misbehavior tickets and reports," some of which they alleged had already occurred, raised a factual issue barring summary judgment for non-exhaustion).

For example, it can be confusing to determine how to satisfy exhaustion for discipline-related claims. There is usually a procedure for disciplinary appeals that is separate from the grievance procedure, and exhausting it will usually exhaust your discipline-related claim.[291] However, it is not always clear which procedure to use for which claim. The prison's rules should govern this question, but sometimes they do not address it, and sometimes officials do not apply their rules consistently.[292] The best rule of thumb is that if the rules don't spell things out, a claim that attacks the disciplinary proceeding itself requires a disciplinary appeal for exhaustion, while claims about other issues related to the proceeding—such as challenges to prison policies underlying the proceeding or claims about the conduct that led to the disciplinary proceeding—must be exhausted by grievance. This second category includes disputes about who assaulted whom in a use of force case that resulted in disciplinary charges, claims of falsification of evidence or improper motives such as retaliation for the charges, or claims that conditions of punitive confinement are unlawful.[293] If you wish to challenge both the disciplinary proceeding itself as well as one of these other issues, both remedies may be required under the rules, and if there is any doubt about what the rules require, you should probably pursue both routes to be safe. [294]

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291. Jenkins v. Haubert, 179 F.3d 19, 23 n.1 (2d Cir. 1999) (holding that plaintiff's exhaustion of administrative remedies meant plaintiff was not barred by the PLRA exhaustion requirement); Murray v. Palmer, No. 9:03-CV-1010, 2010 U.S. Dist. LEXIS 32014, at *42 (N.D.N.Y. Mar. 31, 2010) (dismissing a complaint for failure to exhaust administrative remedies, including a disciplinary appeal).

292. For example, New York's rules did not say whether a claim that evidence for a disciplinary charge was fabricated should be raised by disciplinary appeal or a separate grievance, and courts have made contradictory arguments on the point. *Compare* Giano v. Goord, 380 F.3d 670, 679 (2d Cir. 2004) (noting defendants' argument that the plaintiff, who pursued a disciplinary appeal, should have filed a grievance to exhaust) with Larkins v. Selsky, No. 04 Civ. 5900 (RMB) (DF), 2006 U.S. Dist. LEXIS 89057, at *9 (S.D.N.Y. Dec. 6, 2006) (noting defendants' contrary argument that a prisoner who filed a grievance should have pursued a disciplinary appeal) *and* Washington v. Chaboty, No. 09 Civ. 9199 (PGG), 2015 U.S. Dist. LEXIS 40245, at *8 (S.D.N.Y., Mar. 30, 2015) (noting defendants' argument that plaintiff should have raised his First Amendment claim arising from a grievance in the grievance appeal, where he had filed a grievance about it and the grievance body declined to hear it because it said the plaintiff's disciplinary appeal had exhausted his claim). New York has never clarified its rule. *See also* Siggers v. Campbell, No. 07-12495, 2008 U.S. Dist. LEXIS 107407, at *4 (E.D. Mich. Dec. 10, 2008) (*unpublished*) (noting officials' argument that an incarcerated person who had tried to seek review within the disciplinary process should have pursued a grievance, even though he *had* pursued a grievance and it was rejected), *aff'd*, 652 F.3d 681 (6th Cir. 2011); Woods v. Lozer, No. 3:05-1080, 2007 U.S. Dist. LEXIS 4923, at *3 (M.D. Tenn. Jan. 18, 2007) (*unpublished*) (holding that an incarcerated person exhausted his administrative remedies 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).

293. Mayo v. Lavis, 689 F. App'x 23, 25 (2d Cir. 2017) (*unpublished*) (holding a disciplinary appeal did not exhaust a claim of excessive force arising from the same incident); Howard v. Chatcavage, 570 F. App'x 117, 118–119 (3d Cir. 2014) (per curiam) (unpublished) (holding disciplinary appeal of fighting charge did not exhaust Eighth Amendment claim of failure to protect from assault); Farid v. Ellen, 593 F.3d 233, 248 (2d Cir. 2010) (holding disciplinary appeal of contraband and smuggling charges did not exhaust claim of confiscation of papers and personal effects where confiscation was not a "constituent element of the disciplinary hearing"); Ortiz v. McBride, 380 F.3d 649, 654 (2d Cir. 2004) (holding challenge to conditions of segregation required grievance exhaustion and not a disciplinary appeal); Hamilton v. Edwards, No. 14-CV-6308 CJS, 2019 U.S. Dist. LEXIS 69931, at *4 (W.D.N.Y., Apr. 25, 2019) (holding disciplinary appeal exhausted plaintiff's due process claim but not his retaliation claim); Singh v. Goord, 520 F.Supp.2d 487, 497–498 (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); Hattie v. Hallock, 8 F. Supp. 2d 685, 689 (N.D. Ohio 1998) (holding that in order to challenge a prison rule, the incarcerated person must not only appeal from the disciplinary conviction for breaking it, but must also grieve the validity of the rule), *judgment amended*, 16 F. Supp. 2d 834 (N.D. Ohio 1998).

294. *See, e.g.*, Singh v. Goord, 520 F. Supp. 2d 487, 497–498 (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).

If you are transferred out of your prison or jail before you can file a grievance, or while your grievance is pending, that does not automatically end your exhaustion obligation or make the remedy unavailable.[295] There may be a way to file and pursue a grievance even after you are transferred. If there is, you must try to use it to satisfy the exhaustion requirement. There is more likely to be a way to exhaust after transfer if you are transferred within the same jail or prison system. Read the grievance policy for instructions, and if there are none, ask the grievance personnel at your new institution how to proceed.[296]

If you are transferred to another jail or prison system (for example, from a county jail to a state prison after sentencing), you should also read the grievance policy from the facility where your problem arose, if you have access to it. There may be instructions you should follow for how to pursue a grievance from outside the facility, which you should follow. There may also be a statement about who may pursue grievances. If the policy says that the system is for people *in* the institution, or has no instruction for how people no longer in the institution can use it, then you have a good argument that the system is not available to you once you are transferred.[297] If you can't get any information about what to do or whether you are even allowed to exhaust after transfer, it's a good idea to write to the grievance program at the previous prison and ask them to send you information about how to pursue a grievance and any necessary forms.

The point is that, unless the system is unavailable to transferred prisoners, you should do as much as you can to exhaust after transfer, because if you don't, you are bound to get an argument that your case should be dismissed for non-exhaustion. You need to be able to describe the things you did or tried to do in order to exhaust. You should also be prepared to describe any obstacles you encountered that prevented you from exhausting. For example, if you are transferred from one prison or jail system to another, you may not have access to the grievance policy of the system you were transferred from or the forms that are required by that system; you may not get your property immediately after transfer and therefore lack access to documents you need; you may not receive a decision timely, or at all, if you filed a grievance just before your transfer, so you may not be able to take a timely appeal.[298] If you

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295. Napier v. Laurel Cty., Ky., 636 F.3d 218, 223 (6th Cir. 2011) ("Generally, the transfer of a prisoner from one facility to another does not render the grievance procedures at the transferor facility 'unavailable' for purposes of exhaustion." (citation and internal quotation marks and brackets omitted); *accord*, Medina-Claudio v. Rodriguez-Mateo, 292 F.3d 31, 35 (1st Cir. 2002); 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").

296. Ammouri v. ADAPPT House, Inc., No. 05-3867, 2008 U.S. Dist. LEXIS 47129, at *10–13 (E.D. Pa. June 13, 2008) (noting that plaintiff was repeatedly told he could not file a grievance about matters from his previous institution).

297. *See* Gonzales v. Lnu, No. 14-484 WJ/KK, 2015 U.S. Dist. LEXIS 196527, at *5 (D.N.M. Sept. 8, 2015) (holding remedy unavailable to an incarcerated person transferred out of the jail four days before his time to file a grievance had expired, where the grievance policy stated it was for use by persons "in the custody" of the jail), *report and recommendation adopted*, 2015 WL 13651117 (D.N.M. Sept. 28, 2015); Huspon v. Rains, No. 1:11-cv-109-TWP-DML, 2013 U.S. Dist. LEXIS 13732, at *4 (S.D. Ind. Feb. 1, 2013) (finding remedy unavailable to incarcerated person removed from prison immediately after injury because policy allowed formerly incarcerated people to grieve only if they had commenced the process before transfer); Rivera v. Mgmt. & Training Corp., No. CV 07-8043-PCT-SMM (MHB), 2008 U.S. Dist. LEXIS 45452, at *3 (D. Ariz. June 10, 2008) (noting grievance policy made no provision for exhaustion by incarcerated person during temporary transfer out of the prison system to a county jail).

298. For cases acknowledging some of these obstacles, *see* Miller v. Norris, 247 F.3d 736, 738, 740 (8th Cir. 2001) (holding allegation that transferred incarcerated person could not get grievance forms for transferring prison system sufficiently alleged exhaustion of available remedies); Carter v. Supnick, No. 2:18-cv-00003, 2019 U.S. Dist. LEXIS 25063, at *4 (W.D. Mich. Jan. 7, 2019) (denying summary judgment for non-exhaustion where plaintiff's untimely appeals were caused by his transfer and delayed delivery of grievance decisions), *report and recommendation adopted*, 2019 U.S. Dist. LEXIS 23244 (W.D. Mich. Feb. 13, 2019); Lawson v. Youngblood, No. 1:09-cv-00992-LJO-MJS (PC), 2014 U.S. Dist. LEXIS 8577, at *3–4 (E.D. Cal. Jan. 23, 2014) (holding remedy unavailable where incarcerated person made a verbal complaint but was immediately transferred, had received no guidance as to post-transfer grievance filing and was out of contact with officers responsible for the process), *report and recommendation adopted*, 2014 U.S. Dist. LEXIS 22203 (E.D. Cal. Feb. 20, 2014); Wright v. Smith, No.

could not exhaust after transfer, you should be prepared to explain why that was, and what you did to try to exhaust.[299]

If you did not realistically have time to file a grievance before transfer, and there is no provision for doing to after transfer, the remedy is unavailable.[300] But if you did have time to file a grievance before being transferred but did not, the court is likely to decide that you failed to exhaust an available remedy.[301] In that situation, you should point out to the court that the statute doesn't require prisoners to file a grievance; it requires them to *exhaust*. So, if you had time enough to file a grievance, but not time to complete the process, and if the policy doesn't provide a way to complete the process after transfer, you may convince the court that the remedy was not available. One thing that courts seldom consider, but should, is that as a practical matter, in most cases the remedy is not really available after you are transferred, because the grievance process can no longer give you any relief after you're gone.[302]

People's individual characteristics and circumstances may make a remedy unavailable in some cases. For example, the grievance system was held unavailable to an incarcerated person with a broken hand who couldn't write, couldn't get assistance writing a grievance, and was not allowed to file a late

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1:10-cv-00011-AWI-GSA-PC, 2013 U.S. Dist. LEXIS 1008158, at *7–8 (E.D. Cal. July 18, 2013) (declining to dismiss for non-exhaustion where person incarcerated in federal prison was transferred to state prison, did not receive federal grievance decision, had no access to federal forms or process, and could not get a response by writing to federal officials; court notes defendants' burden of proof), *report and recommendation adopted,* 2013 U.S. Dist. LEXIS 137871 (E.D. Cal. Sept. 25, 2013); Dubois v. Washoe Cty. Jail, No. 3:12-cv-00415-MMD-VPC, 2013 U.S. Dist. LEXIS 2793, *2 (D. Nev. Jan. 7, 2013) (declining to dismiss for non-exhaustion where plaintiff was extradited the day after his complaint arose, but defendants failed to show he could have exhausted in a day or could have started the process from his new location); Rodriguez v. Mount Vernon Hosp., No. 09 Civ. 5691 (GBD) (JLC), 2010 U.S. Dist. LEXIS 103494, at *12–13 (S.D.N.Y. Sept. 7, 2010) (finding factual dispute with respect to incarcerated person's ability to appeal a grievance during a temporary transfer from state prison to local jail), *report and recommendation adopted,* 2010 U.S. Dist. LEXIS 103539 (S.D.N.Y. Sept. 30, 2010), *order aff'd*, 2010 U.S. Dist. LEXIS 112325 (S.D.N.Y., Oct. 5, 2010); Key v. Toussaint, 660 F. Supp. 2d 518, 524–525 (S.D.N.Y. 2009) (denying summary judgment for non-exhaustion where grievance policy prescribed submitting grievances to the grievance clerk, which a transferred incarcerated person could not do, and using a particular appeal form, which a transferred person had no access to); Green v. Roberts, No. 2:06-CV-667-WKW, 2008 U.S. Dist. LEXIS 87969, at *4 (M.D. Ala. Oct. 29, 2008) (holding incarcerated person who was transferred from jail, wrote to the jail seeking to exhaust, and received no response for almost three months and then filed suit, satisfied the exhaustion requirement); Basham v. Corr. Med. Servs., No. 5:06-cv-00604, 2007 U.S. Dist. LEXIS 66423, at *5 (S.D.W. Va. Aug. 29, 2007) (holding defendants failed to show a grievance appeal was available to a hospitalized prisoner separated from his grievance documents); *see* King v. Coleman, No. CIV S-04-1158 MCE KJM P, 2007 U.S. Dist. LEXIS 58991, at *1–3 (E.D. Cal. Aug. 13, 2007) (holding incarcerated person injured in a jail van who was not incarcerated in that jail was not shown to have access to the jail's orientation handbook, the grievance form, or the grievance process), *report and recommendation adopted*, 2007 U.S. Dist. LEXIS 72641 (E.D. Cal. Sept. 28, 2007).

299. *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 an incarcerated person'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 him being unable to exhaust remedies).

300. *See, e.g.*, Berry v. Kerik, 366 F.3d 85, 88 (2d Cir. 2004) (holding dismissal proper where March and October complaints could have been exhausted before release the following January; also citing, dubiously, subsequent returns to the jail system); Mitchell v. Hammons, No. 5:11-cv-00029, 2013 U.S. Dist. LEXIS 167687, at *3 (S.D.W. Va.,Nov. 26, 2013) (dismissing for non-exhaustion where plaintiff remained at sending facility for almost two months before transfer because he had "more than adequate time to begin and potentially complete the administrative remedy process;" process was supposed to be completed within 60 days, and plaintiff remained in the jail for about 50 days).

301. James v. Williams, No. 1:04CV69-1-MU, 2005 U.S. Dist. LEXIS 10076, at *6 (W.D.N.C. May 24, 2005) (noting incarcerated person 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).

302. *See* White v. Bukowski, 800 F.3d 392, 397 (7th Cir. 2015) (noting that the grievance system at issue did not entertain grievances from persons no longer in the jail, "presumably because the jail could do nothing for such a person unless it awards damages to successful grievants, which the jail in this case does not").

grievance when his hand had recovered.[303] Courts have agreed that other medical conditions can make remedies unavailable, though they look closely at such claims and reject many as unconvincing, and others on the ground that the system made provisions for injured incarcerated people.[304] Decisions are similarly mixed in cases involving other characteristics, including:

a) Physical disability. Courts have acknowledged that some incarcerated people are unable to use grievance systems by reason of disability,[305] though they have rejected such claims in cases where the individual had previously used the system, or where assistance in grieving was available.[306]

b) Illiteracy or lack of education. Some courts have held remedies unavailable to persons unable to use them because of lack of education or literacy, though usually in conjunction

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303. Days v. Johnson, 322 F.3d 863, 867 (5th Cir. 2003) (noting that "one's personal inability to access the grievance system could render the system unavailable").

304. *See, e.g.*, Hurst v. Hantke, 634 F.3d 409, 411–412 (7th Cir. 2011) (holding remedy would be unavailable if incarcerated person were incapacitated by stroke during time when he was required to file grievance, and he was not allowed to file a late grievance); Pavey v. Conley, 170 F. A'ppx 4, 9 (7th Cir. 2006) (*unpublished*) (holding grievance procedure might be unavailable to a prisoner who couldn't write because of injury and was isolated from anyone who could help him); Franklin v. Fewell, No. 3:13-CV-673 JD, 2014 U.S. Dist. LEXIS 15322, at *4 (N.D. Ind. Feb. 7, 2014) (rejecting defendants' argument that plaintiff was capable of filing a grievance upon his return from an outside hospital after emergency surgery, and noting plaintiff spent nine days in the prison infirmary and was taking prescription pain medication. An evidentiary hearing was required to resolve the question); Childers v. Bates, No. C-08-338, 2010 U.S. Dist. LEXIS 71170, *6–7 (S.D. Tex. Jan. 14, 2010) (holding remedy that required identification of defendants was not "personally available" to prisoner who could not do so because of a head injury and memory loss), *report and recommendation rejected on other grounds,* U.S. Dist. LEXIS 29186 (S.D. Tex. Mar. 26, 2010). *See, e.g.*, Wilborn v. Ealey, 881 F.3d 998, 1005–1006 (7th Cir. 2018) (rejecting claim of incapacity from incarcerated person held in the infirmary who failed to show a basis for inability to grieve because "[h]e ha[d] not shown, for example, that he lacked access to the grievance forms or that his injuries prevented him from researching or writing," and he filed a different grievance immediately upon release); Ferrington v. Louisiana Dept. of Corr., 315 F.3d 529, 532 (5th Cir. 2002) (holding plaintiff's near blindness did not exempt him from exhausting because he managed to file suit, as well as other grievances and appeals). *Also see, e.g.*, McCormick v. Corizon Health, Inc., No. 13-11098, 2014 U.S. Dist. LEXIS 28645, *4 (E.D. Mich. Mar. 6, 2014) (holding temporary loss of vision did not excuse non-exhaustion where grievance policy provided for staff assistance filing grievances); Lopez v. Goodman, No. 10-CV-6413, 2013 U.S. Dist. LEXIS 85565, at *3 (W.D.N.Y. June 18, 2013) (holding incarcerated person was not excused from exhaustion by his hospitalization where the grievance system provided for extensions of time for mitigating circumstances), *reconsideration denied*, 2013 U.S. Dist. LEXIS 135046 (W.D.N.Y. Sept. 20, 2013).

305. *See, e.g.*, Lanaghan v. Koch, 902 F.3d 683, 686, 688–689 (7th Cir. 2018) (holding remedy was not available to a incarcerated person with limited use of his hands who was not shown to have been able to complete the grievance form under the circumstances); Johnson-Ester v. Elyea, No. 07-CV-4190, 2009 U.S. Dist. LEXIS 18049, at *6–8 (N.D. Ill. Mar. 9, 2009) (holding incarcerated person who could not write, ambulate, or make himself understood, and may have been irrational or delusional at times, was not capable of pursuing a grievance; letters from his mother and lawyer about his condition put officials on sufficient notice they should have assisted him in filing a grievance; grievance system made no provision for outside persons to use it on a incarcerated person's behalf); Williams v. Hayman, 657 F. Supp. 2d 488, 495–497 (D.N.J. 2008) (holding evidence of the deaf plaintiff's inability to communicate in writing or with his counselor raised a factual issue concerning availability to him of the grievance remedy).

306. Thomas v. Holder, No. PJM-10-246, 2010 U.S. Dist. LEXIS 84764, at *3 (D. Md. Aug. 18, 2010) (dismissing claim of blind incarcerated person for non-exhaustion where he had filed 15 grievances in the preceding several years); Oliver v. Va. Dept of Corr., No. 3:09-CV-00056, 2010 U.S. Dist. LEXIS 33931, at *6 (W.D. Va. Apr. 6, 2010) (dismissing claim of legally blind incarcerated person who had filed numerous complaints and grievances, without inquiry into her access to the system for this grievance); Elliott v. Monroe Corr. Complex, No. C06-0474RSL, 2007 U.S. Dist. LEXIS 5242, at *3 (W.D. Wash. Jan. 23, 2007) (dismissing for non-exhaustion where plaintiff with cerebral palsy was provided with assistance and had filed numerous grievances, though he hadn't actually exhausted any).

with other barriers.[307] Others have rejected such claims, often based on the availability of assistance.[308]

c) Lack of proficiency in English. A number of cases have held that when incarcerated people who do not have access to grievance procedures, or to assistance in filing grievances, in a language that they can understand, the remedy may be unavailable.[309] Others have rejected such claims, either generally[310] or based on the individuals' having used the system previously,[311] or the availability of assistance.[312]

d) Age. Courts have generally rejected claims that being young makes remedies unavailable.[313] However, one court declined to find remedies unavailable without evidence

307. *See, e.g.*, Womack v. Smith, No. 1:06-CV-2348, 2011 U.S. Dist. LEXIS 20750, at *9 (M.D. Pa. Mar. 2, 2011) (holding plaintiff's illiteracy in combination with other factors made the remedy unavailable; illiteracy by itself would not excuse non-exhaustion where prisoner did not ask for assistance as provided in grievance policy); Robertson v. Dart, No. 07 C 4398, 2009 U.S. Dist. LEXIS 66794, at *3 (N.D. Ill. Aug. 3, 2009) (denying summary judgment on exhaustion where the illiterate plaintiff alleged that a staff member gave him wrong information about how to mark a form to appeal his grievance decision); Langford v. Ifediora, No. 5:05CV00216WRW/HLJ, 2007 U.S. Dist. LEXIS 34915, at *3–4 (E.D. Ark. May 11, 2007) (holding plaintiff's age, deteriorating health, and lack of general education, combined with the prison's failure to provide him assistance in preparing grievances, raised a factual issue concerning the availability of the remedy to him); Kuhajda v. Illinois Dept. of Corr., No. 05-cv-3236, 2006 WL 1662941, at *1 (C.D. Ill. June 8, 2006) (holding that an incarcerated who is hearing-impaired and has limited ability to read and write, and who did not have the assistance of a sign language interpreter, raised a factual issue concerning availability of remedies).

308. *See, e.g.*, Ramos v. Smith, 187 F. App'x 152, 154 (3d Cir. 2006) (per curiam) (*unpublished*) (rejecting claim of illiteracy as a defense to non-exhaustion, since federal regulations require assistance to illiterate prisoners, and plaintiff did not allege that he asked for such assistance); Levan v. Thomas, No. CV 10-2278-PHX-GMS (LOA), 2011 U.S. Dist. LEXIS 73532, at *2 (D. Ariz. July 7, 2011) (rejecting claim of illiteracy, since grievance policy provided for assistance to illiterate persons, and defendants said grievance staff would help individuals as needed).

309. *See, e.g.*, Ramirez v. Young, 906 F.3d 530, 533 (7th Cir. 2018); Martinez v. Fields, 627 F. App'x. 573, 574 (8th Cir. 2015) (per curiam) (*unpublished*) (reversing summary judgment for non-exhaustion by Spanish-speaking incarcerated person who did not understand English where grievance rules and forms were only in English); Salcedo-Vazquez v. Nwaobasi, No. 3:13-CV-00606-NJR-DGW, 2014 U.S. Dist. LEXIS 78123, at *4 (S.D. Ill. June 9, 2014) (finding that plaintiff "never was given an Orientation Manual in Spanish and that no person in the jail, especially not his Counselor, made any effort to inform him of the grievance process in a language that he readily understood. Assistance from other inmates cannot be a substitute for assistance from actual jail personnel."); Beltran-Ojeda v. Doe, No. CV 12-1287-PHX-DGC (MEA), 2013 U.S. Dist. LEXIS 163803, at *3 (D. Ariz. Nov. 18, 2013) (holding allegations of failure to provide an interpreter, to accept Spanish grievances, or to reply in a language other than English may support a claim of unavailability), *reconsideration denied,* 2014 U.S. Dist. LEXIS 35076 (D. Ariz. Mar. 18, 2014).

310. Linares-Alcantara v. Longley, No. 3:13-cv-1085-DCB-MTP, 2014 U.S. Dist. LEXIS 124163, at *5 (S.D. Miss. Sept. 5, 2014) ("Inability to fully understand the language does not create a special circumstance justifying departure from the exhaustion requirement.").

311. Figueroa v. Bass, 522 F. App'x. 643, 644 (11th Cir. 2013) (per curiam) (unpublished) (rejecting claim of limited English proficiency because the plaintiff had filed other grievances later and didn't explain why he couldn't have done so at this point); Zarate v. S.C. Dept. of Corr., No. 0:13-cv-3079 DCN, 2014 U.S. Dist. LEXIS 150935, at *4 (D.S.C. Oct. 24, 2014) (noting that plaintiff was able to file pleadings in English and has submitted letters to defendants in English).

312. Mendez v. Sullivan, 488 F. App'x. 566, 568 (3rd Cir. 2012) (per curiam) (*unpublished*) (affirming summary judgment for non-exhaustion based on evidence of bilingual handbook, availability of interpreters and of counselors to assist Spanish-speaking prisoners); Zarate v. S.C. Dept. of Corr., No. 0:13-cv-3079 DCN, 2014 U.S. Dist. LEXIS 150935, at *4 (D.S.C. Oct. 24, 2014) (citing plaintiff's failure "to allege that he requested, or was denied, any assistance from prison officials in relation to filing a prison grievance" in granting summary judgment for non-exhaustion).

313. *See, e.g.*, Brock v. Kenyon County, KY, 93 F. App'x 793, 797–798 (6th Cir. 2004)(*unpublished*); Doe v. Michigan Dept. of Corr., No. 13-14356, 2016 U.S. Dist. LEXIS 14823, at *16–17 (E.D. Mich. Feb. 8, 2016)(*unpublished*) (declining to "relax or create an exception to the PLRA's exhaustion requirement based on a prisoner's status as a youth"), reconsideration denied, 2016 U.S. Dist. LEXIS 59683 (E.D. Mich., May 5, 2016)(*unpublished*). *But see* Moore v. Louisiana Dept. of Pub. Safety and Corr., No. CIV.A. 99-1108, 2002 WL

that "the relevant administrative procedures were explained in terms intelligible to [average] persons, particularly taking into consideration plaintiff's age (14 years old)."[314] Others have interpreted grievance rules especially leniently in cases involving juvenile incarcerated people.[315]

e) Mental illness. Many courts have acknowledged that mental illness or cognitive disabilities may make remedies unavailable.[316] Others have rejected such claims, sometimes because they believed the plaintiff's prior use of the grievance system or the courts disproved the claim of unavailability, others because the plaintiff did not sufficiently plead or provide evidentiary support for the claim.[317]

1791996, at *4 (E.D. La. Aug. 5, 2002) (*unpublished*) (declining to enforce 30-day grievance time limit; declaring 30-day delay in filing complaint "not unreasonable" given that the plaintiff was a juvenile in state custody).

314. Bailey v. Wienandt, No. 17-CV-943-BBC, 2018 U.S. Dist. LEXIS 185808, at *8 (W.D. Wis. Oct. 30, 2018) (*unpublished*) (citing Ramirez v. Young, 906 F.3d 530, 535 (7th Cir. 2018)).

315. *See, e.g.*, Q.F. v. Daniel, 768 F. App'x. 935, 942–943 (11th Cir. 2019) (*unpublished*); Troy D. v. Mickens, 806 F. Supp. 2d 758, 768–769 (D.N.J. 2011) (holding administrative procedure was exhausted by an attorney's letter to juvenile institution superintendent, since it created an opportunity for investigation and resolution at the facility level); Lewis v. Gagne, 281 F. Supp. 2d 429, 433–435 (N.D.N.Y. 2003). *See also* Apkarian v. McAllister, No. 17-CV-309-JDP, 2019 U.S. Dist. LEXIS 12959, at *8–13 (W.D. Wis. Jan. 28, 2019) (*unpublished*) (denying summary judgment for non-exhaustion in youth facility where plaintiffs had to submit their grievances to the staff members they complained about, since the option for submitting directly to the superintendent was omitted from the inmate handbook, and there was no evidence that the underlying regulations permitting that option were made available to the incarcerated people despite a policy requirement to do so).

316. *See, e.g.*, Lynch v. Corizon, Inc., 764 F. App'x 552, 554 (7th Cir. 2019) (*unpublished*) (holding plaintiff's affidavit stating "that the defendants altered his medication, that doing so left him too confused to complete the grievance process, and that they did this for the non-medical reason of creating that disabling confusion" raised factual issues barring summary judgment and requiring an evidentiary hearing); Weiss v. Barribeau, 853 F.3d 873, 875 (7th Cir. 2017)(denying summary judgment for non-exhaustion where defendants failed to show that their procedures could be used by incarcerated person suffering from mental breakdown requiring hospitalization); Beaton v. Tennis, 460 F. App'x 111, 113–114 (3d Cir. 2012) (*unpublished*) (evidence that prison staff took advantage of plaintiff's confused mental state arising from a skull fracture and post-concussion syndrome to make him withdraw his grievance raised a factual issue barring summary judgment for non-exhaustion); Braswell v. Corr. Corp. of America, 419 F. App'x 622, 625–626 (6th Cir. 2011) (*unpublished*) (noting defendants failed to explain how the plaintiff could have exhausted "while suffering a mental breakdown requiring hospitalization"); Adams v. Wexford Health Sources, Inc., No. 15-CV-604-NJR-DGW, 2018 U.S. Dist. LEXIS 168030, at *19 (S.D. Ill. Sept. 28, 2018) (*unpublished*) (concluding on summary judgment that plaintiff "was not mentally or physically capable of filing a grievance regarding the medical treatment he received at Menard while he was incarcerated there, and therefore administrative remedies were not available to him"); Carter v. Paramo, No. 3:17-CV-1833-JAH-AGS, 2018 U.S. Dist. LEXIS 164606, at *17–18 (S.D. Cal. Sept. 25, 2018) (*unpublished*) (holding allegation of head and facial injuries including multiple fractures resulting in cognitive impairment raised a factual issue barring summary judgment as to plaintiff's ability to exhaust properly); Smith v. Singh, No. 3:17-CV-170-NJR-DGW, 2018 U.S. Dist. LEXIS 141811, at *10–11, 4 (S.D. Ill. July 27, 2018) (*unpublished*) (holding incarcerated person with schizoaffective disorder who was hospitalized for lithium toxicity "was incapable of filing a grievance for much of the time … after his release from the hospital. While the record contains instances of lucidity, Plaintiff continued to suffer periods of mental insufficiency, confusion, and lack of memory such that he was incapable of filing a grievance.").

317. Geter v. Baldwin State Prison, 974 F.3d 1348, 1354–1357 (11th Cir. 2020) (affirming rejection of claim that mental disability barred exhaustion based on plaintiff's performance in filing and pursuing the lawsuit); Washington v. Fresno Cty. Sheriff, No. 1:14-CV-00129-SAB, 2018 U.S. Dist. LEXIS 27997, at *27–29 (E.D. Cal. Feb. 21, 2018) (*unpublished*) (holding evidence of lack of competency was stale and there was no current evidence of inability to exhaust for mental health reasons); Wakeley v. Giroux, No. 1:12-CV-2610, 2014 U.S. Dist. LEXIS 52121 (M.D. Pa. Apr. 15, 2014) (*unpublished*) (rejecting claim of inability to file a grievance where mental health records and cooperation with investigators showed plaintiff was capable of filing); Marella v. Terhune, No. 03CV660-BEN MDD, 2011 U.S. Dist. LEXIS 105282, at *21–24 (S.D. Cal. Aug. 16, 2011) (*unpublished*) (rejecting claim that plaintiff was unable to grieve because of medication, shock, and pain, relying on expert opinion based on review of his medical records, and his ability to perform other tasks during the same time period). Jones v. Nelson, 729 F. App'x 467, 469 (7th Cir. 2018) (*unpublished*) (rejecting claim that "mental limitations" prevented plaintiff from grieving where he had filed 23 grievances); Lopez v. Swift, No. 12-CV-4099-TOR, 2014 U.S. Dist. LEXIS 130469, at *9–10 (E.D. Wash. Sept. 16, 2014) (*unpublished*) (rejecting claim that depression prevented

Some courts in mental health cases have gone further than saying the plaintiff's claim was not convincing enough. They have said that under *Ross v. Blake*, claims that a remedy was unavailable because of a characteristic of the incarcerated person are no longer allowed.[318] So far, appellate courts reviewing these decisions have not adopted that view, but have said that the incarcerated people in those cases failed to show that they were mentally disabled enough to make the remedy unavailable.[319] There is no basis for claiming that *Ross* eliminated claims of unavailable remedies based on medical or mental health condition, disability, language barriers, etc.

Prison rules and practices may also make remedies unavailable. Examples include refusing to provide postage and other supplies for indigent (poor) incarcerated people where incarcerated people must use the mail to exhaust, requiring incarcerated people to supply copies of documents but not providing a means to obtain them, or refusing to allow writing materials or documents to incarcerated

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plaintiff from exhausting where he had filed another grievance within the same month); Williams v. Crosby, No. 5:12-CT-3056-F, 2013 U.S. Dist. LEXIS 32769, at *15–19 (E.D.N.C. Mar. 4, 2013) (*unpublished*) (rejecting mental-health related claim as "self-serving and conclusory" since the plaintiff had previously used the grievance system, despite evidence of "paranoid ideation and hallucinatory delusions of conversations with God and sexual threats from inmates and staff" immediately preceding the incident). Brinson v. Kirby Forensic Psychiatric Ctr., No. 16-CV-1625 (VSB), 2018 U.S. Dist. LEXIS 168163, at *19 (S.D.N.Y. Sept. 28, 2018) (*unpublished*) (holding plaintiff in psychiatric facility "failed to provide competent evidence that he was so impaired as to be unable to pursue any of the administrative remedies available to him"); Harvey v. Corr. Officers 1–6, No. 9:09-CV-0517 LEK/TWD, 2014 U.S. Dist. LEXIS 83466, at *7 (N.D.N.Y. June 19, 2014) (*unpublished*) (stating "although Plaintiff's medical records do show a history of mental illness, Plaintiff has not shown that his failure to follow the grievance procedure resulted from this condition"; finding confusion from mental illness or other sources was not the cause of non-exhaustion), *vacated and remanded on other grounds*, 612 F. App'x 35 (2d Cir. 2015) (*unpublished*).

318. The *Ross* case is discussed at the beginning of Part E(3) of this Chapter, "What Are Available Remedies?" For more information on *Ross*, please see the discussion about *Ross*, and subsequent cases, from footnotes 250 through footnote 285. Osborn v. Williams, No. 3:14-CV-1386 (VAB), 2017 U.S. Dist. LEXIS 212954, at *21 (D. Conn. Dec. 29, 2017) (*unpublished*) (holding *Ross*'s elimination of the "special circumstances" exception to exhaustion means that the only question before the court is whether the regulations provide "a procedural route to obtain administrative relief"); Griggs v. Holt, No. CV 117-089, 2018 U.S. Dist. LEXIS, at *16–19 (S.D. Ga. Oct. 24, 2018) (*unpublished*); Geter v. Baldwin State Prison, No. 516CV00444TESCHW, 2018 U.S. Dist. LEXIS 138409, at *17 (M.D. Ga. Aug. 16, 2018) (*unpublished*) (stating "subjective considerations of a prisoner's assumed particular mental deficiencies effectively creates a 'fourth avenue' to show a prison's grievance procedure was unavailable under the PLRA. To do so would effectively carve out a 'special circumstance' for a particular plaintiff that the United States Supreme Court unequivocally rejected in Ross."); Galberth v. Washington, No. 14 CIV. 691 (KPF), 2017 U.S. Dist. LEXIS 120595, at *29 (S.D.N.Y. July 31, 2017) (*unpublished*) (stating in connection with a claim of mental disability that in Ross "the Court seems to have affirmed the outward-looking inquiry focused on what is made available by a prison, and rejected the inward-looking inquiry concerned with [what] is perceived to be available by a prisoner").

319. Geter v. Baldwin State Prison, 974 F.3d 1348, 1354–1357 (11th Cir. 2020); Osborn v. Williams, 792 F. App'x 88, 90–91 (2d Cir. 2019) (*unpublished*); Galberth v. Washington, 743 F. App'x. 479, 480 (2d Cir. 2018) (*unpublished*).

people in restrictive housing units.[320] In some cases, particular categories of incarcerated people are simply excluded from using the grievance system.[321]

Some prisons and jails have rules that are explicitly designed to limit incarcerated people's use of the grievance system, and, depending on their severity, those rules may have the effect of making the remedy unavailable.[322] In a system of "modified access status," which requires some incarcerated

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320. Williams v. Pollard, No. 07-C-1157, 2009 U.S. Dist. LEXIS 86332, at *26–27 (E.D. Wis. Sept. 21, 2009) (*unpublished*) (holding remedies were unavailable to an incarcerated person who could not obtain envelope for an appeal that had to be mailed); Bey v. Caruso, No. 06-14909, U.S. Dist. LEXIS 72462, at *2 (E.D. Mich. Sept. 28, 2007) (*unpublished*) (noting that denial of "postal loan" was based on plaintiff's using his religious name suffix on the relevant form, contrary to the policy he was trying to challenge; "the procedural question of exhaustion is inextricably intertwined with the merits of this case"); Cordova v. Frank, 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 [poor] 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."). Almy v. Davis, 726 F. App'x. 553, 557 (9th Cir. 2018) (*unpublished*) (vacating dismissal for non-exhaustion where grievance was rejected because plaintiff failed to attach a copy of the challenged disciplinary decision because he did not have the funds to pay for it, and prison officials already had the charges anyway); DeMartino v. Zenk, No. 04-CV-3880(SLT)(LB), 2009 U.S. Dist. LEXIS 75600 , (E.D.N.Y. Aug. 21, 2009) (*unpublished*) (holding factual question whether plaintiff had access to a copier in order to comply with the grievance procedure barred summary judgment for non-exhaustion); Iseley v. Beard, No. CIV. 1:CV-02-2006, 2009 U.S. Dist. LEXIS 52014, *19 (M.D. Pa. June 15, 2009) (*unpublished*) (holding remedy unavailable where copies of documents were required to appeal but there was no copier access in Restricted Housing Unit). West v. Emig, 787 F. App'x. 812, 815–816 (3d Cir. 2019) (*unpublished*) (holding plaintiff's assertion that he was denied a pen in "Psychological Close Observation" barred summary judgment for non-exhaustion); Pierce v. Cook County, No. 12 C 5725, 2014 U.S. Dist. LEXIS 122889, at *6–16 (N.D. Ill. Sept. 4, 2014) (*unpublished*) (denying summary judgment for non-exhaustion where the plaintiff averred that he had no access to writing materials while in the hospital during the period for filing a timely grievance); Saenz v. Nickel, No. 13-CV-697-BBC, 2014 U.S. Dist. 93007, at *3–11 (W.D. Wis. July 9, 2014) (*unpublished*) (denying summary judgment where the defendants failed to show the plaintiff had access to necessary grievance forms system in observation unit); 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).

321. Hurtado-Gomez v. McCleary, No. 1:12-CV-00606-BLW, 2014 U.S. Dist. LEXIS 32825, *14–18 (D. Idaho Mar. 12, 2014) (*unpublished*) (declining to dismiss for non-exhaustion in light of plaintiff's allegations that he was told upon conviction that he was no longer a jail inmate and was refused jail grievance forms); Zuege v. Geffers, No. 08-C-1124, 2010 U.S. Dist. LEXIS 102406, at *8–11 (E.D. Wis. Sept. 28, 2010) (*unpublished*) (declining to dismiss where incarcerated person was in program in which right to use the grievance system was suspended); 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 an incarcerated person 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*) (denying summary judgment where incarcerated person in "transient" status was told his grievance could not be processed, and when he filed one it was never processed);

322. Pleasant-Bey v. Luttrell, No. 2:11CV-0218-TLP-TMP, 2018 U.S. Dist. LEXIS 152864, *8 (W.D. Tenn. Sept. 7, 2018) (*unpublished*) (holding plaintiff exhausted where he filed grievances that were rejected for exceeding a limit of five grievances within a 30-day period followed by a restriction to two more grievances within the following six months; he "took advantage of each step that the Jail offered for resolving the claims that he had"), *aff'd in part, rev'd in part, and remanded*, No. 18-6063, Order (6th Cir. Nov. 7, 2019) (*unpublished*); Peck v. Nevada, No. 2:18-CV-00237-APG-VCF, 2018 U.S. Dist. LEXIS 112079, at *15 (D. Nev. July 5, 2018) (*unpublished*) (holding incarcerated person stated a "colorable claim of denial of access to the courts" where his allegations showed "he is unable to grieve all the issues he wishes to pursue in civil rights and habeas litigation due to the restrictions in AR 740 to one grievance per week and one issue per grievance"; allegation that staff are being trained to "fraudulently defeat" exhaustion attempts also states a claim); Lerajjareanra-O-Kel-Ly v. Zmuda, No. 1:10-CV-263-MHW, 2012 U.S. Dist. LEXIS 127806, at *8 (D. Idaho Sept. 7, 2012) (*unpublished*) ("Should a prisoner have four legitimate grievances at roughly the same time, he will be able to pursue only three, and whether he can file the fourth in time is wholly dependent upon whether prison officials process the other three before the time for the filing of the fourth grievance expires. Here, the prison has chosen to make the grievance system unavailable to any prisoner who already has three pending grievances."); Stine v. Fed. Bureau of Prisons, No. 11-CV-00109-WJM-CBS, 2012 U.S. Dist. LEXIS 34836, at *7 (D. Colo. Mar. 15, 2012) (*unpublished*) ("If a

people to obtain prior permission to file a grievance, if permission is not granted for a non-frivolous claim, the remedy is not available.[323] However, some courts have held that rules that limit the number of grievances that will be processed do not make the remedy unavailable, but merely make the incarcerated person "prioritize his grievances."[324] We think that a rule that requires incarcerated people to abandon some valid grievances violates the "unconstitutional conditions" doctrine, which "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up."[325]

Courts may be skeptical of 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.[326] You should therefore do everything you can to exhaust even if you know the effort is going to fail, and also keep records so you can prove you tried. In other words, file a grievance no matter what. For example, if prison staff refuse 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.[327] If prison staff tell you that you do not need to file a grievance, file a grievance anyway; if they

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prisoner is pursuing a case that involves multiple claims, the Court could see how the BOP policy of only issuing one Informal Resolution form at a time could hinder the prisoner's ability to exhaust his administrative remedies. This is especially true given the short time constraints typically associated with the prison grievance system."), *motion to amend denied*, 2012 U.S. Dist. LEXIS 108720 (D. Colo. Aug. 3, 2012) (*unpublished*), *affirmed in part, reversed in part*, 508 F. App'x. 727 (10th Cir. 2013) (*unpublished*);

323. Walker v. Mich. Dept of Corr., 128 F. App'x 441, 446 (6th Cir. 2005) (*unpublished*); Reeves v. Corr. Med. Servs., No. 08-13776, 2009 U.S. Dist. LEXIS 107122, at *1–7 (E.D. Mich. Nov. 17, 2009) (*unpublished*) (holding plaintiff exhausted by asking for a form and being denied); Marr v. Jones, No. 1:07-CV1201, 2009 U.S. Dist. LEXIS 4065, at *5–8 (W.D. Mich. Jan. 22, 2009) (*unpublished*) (holding defendants failed to identify any available remedy where incarcerated person on modified grievance status was denied grievance forms) Marr v. Jones, No. 1:08-CV-1201, 2010 U.S. Dist. LEXIS 50130 (W.D. Mich. Jan. 22, 2009) (*unpublished*); Dawson v. Norwood, No. 1:06-CV-914, 2007 U.S. Dist. LEXIS 82205, at *9 (W.D. Mich. Nov. 6, 2007) (*unpublished*) ("If a prisoner has been placed on modified access to the grievance procedure and attempts to file a grievance which is deemed to be non-meritorious, he has exhausted his 'available' administrative remedies as required by § 1997e(a)." (citation omitted)) Dawson v. Norwood, No. 1:06-CV-914, 2008 U.S. Dist. LEXIS 115088 (W.D. Mich. Sept. 16, 2008) (*unpublished*).

324. Pearson v. Taylor, 665 F. App'x 858, 867–868 (11th Cir. 2016) (*unpublished*) (holding a rule that an incarcerated person could only have two grievances pending at a time did not make the remedy unavailable; stating that incarcerated people must comply with grievance rules, and the two-grievance limit was a grievance rule); Wilson v. Epps, 776 F.3d 296, 300–301 (5th Cir. 2015) (holding "backlogging" system under which only one grievance would be processed at a time is not unconstitutional and does not abrogate the exhaustion requirement); Wilson v. Boise, 252 F.3d 1356, 2001 WL 422621, at *4 (5th Cir. 2001) (*unpublished*) (Table, text in Westlaw) (upholding "backlogging" system under which only one grievance would be processed at a time) Wilson v. Boise, No. 00-30803, 2001 U.S. App. LEXIS 31249 (5th Cir. Mar. 30, 2001); Williams v. Owens, No. 5:13-CV-254 MTT, 2014 U.S. Dist. LEXIS 128476, * (M.D. Ga. Sept. 15, 2014) (*unpublished*) (rejecting claim that plaintiff could not exhaust because of rule that no incarcerated person could have more than two grievances pending; "… Plaintiff must adhere to the procedural rules in the grievance procedure when exhausting his administrative remedies. His inability to file a grievance because he already had two grievances pending is consequently immaterial to whether he exhausted."), *appeal dismissed*, No. 14-14287 (11th Cir. Oct 30, 2014) (*unpublished*) Williams v. Owens, No. 5:13-CV-0254-MTT-MSH, 2014 U.S. Dist. LEXIS 129509 (M.D. Ga. Aug 20, 2014) (*unpublished*). Pearson v. Taylor, 665 F. App'x 858, 868 (11th Cir. 2016) (*unpublished*).

325. Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 604 (2013).

326. *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 incarcerated person had exhausted where defendants had not made a record of it); Thomas v. N.Y. State Dept. of Corr. Servs., No. 00 Civ. 7163 (NRB), 2003 U.S. Dist. LEXIS 20286, at *13–14 (S.D.N.Y. Nov. 10, 2003) (*unpublished*) (dismissing case for failure to exhaust remedies where prison staff told the incarcerated person a grievance was unnecessary, but did not tell him he could not file a grievance).

327. 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 incarcerated person in New York City jails 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 under New York's administrative grievance procedure, if

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.[328] 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 to either investigate it as a non-grievance complaint or treat it 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.[329] You may have to file more than one grievance about a complicated situation if the grievance policy prohibits "multiple issues" in a grievance.[330] Sometimes, most often in connection with disciplinary proceedings, you have to use more than one remedy to exhaust all your issues.[331]

How specific and detailed must you be in a grievance or appeal to satisfy the exhaustion requirement? Read the grievance policy to find out. The best way to determine how specific and detailed you must be in a grievance or appeal to satisfy an exhaustion requirement is by reading the grievance policy of your institution. The Supreme Court has held "[t]he 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."[332] Therefore, it said, courts could not require incarcerated people to have named all their litigation defendants in their earlier grievances if the grievance system itself did not have such a requirement.[333] If the prison grievance system *does* require you to name the responsible employees in

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forms are not available, your grievance can be submitted on plain paper. N.Y. COMP. CODES R. & REGS. tit. 7, § 701.5(a)(1) (2020). New York state grievance procedures are available in the state regulations. *See* N.Y. COMP. CODES R. & REGS. tit. 7, § 701.5 (2020). New York City has now changed its policy as well: the current policy provides that grievances that are not on the prescribed form will be accepted and grievance staff will provide the form and will assist the prisoner in transferring the information to the form. City of New York Department of Correction, Directive 3376R-A, Inmate Grievance Procedures § (V)(F) (2012) (*as revised* Dec. 10, 2018), *available at* https://www1.nyc.gov/assets/doc/downloads/directives/Directive_3376R-A.pdf (last visited Dec. 2, 2020).

328. Some courts have refused to accept incarcerated people's 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).

329. *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"); Tucker v. Collier, 906 F.3d 295, 306 (5th Cir. 2018) (holding a grievance challenging a ban on assembly by Nations of Gods and Earths members did not exhaust claims concerning wearing of Nation headgear, displaying its flag, assistance in finding a cultural representative, and ability to carry lessons to services); Mattox v. Edelman, 851 F.3d 583, 596 (6th Cir. 2017) (holding that grievances requesting cardiac catherization did not exhaust a claim about failure to provide a particular medication); Johnson v. Johnson, 385 F.3d 503, 517–523 (5th Cir. 2004) (holding an incarcerated person 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).

330. Such prohibitions have caused much confusion and some courts have rejected the way prison officials have applied them. *See* Lafountain v. Martin, 334 F. App'x 738, 741 & n.2 (6th Cir. 2009) (*unpublished*) (holding the grievance body was wrong to characterize a claim of multiple retaliatory incidents as involving multiple issues); Moore v. Bennette, 517 F.3d 717, 722, 730 (4th Cir. 2008) (holding plaintiff had properly exhausted despite application of a "no multiple issues" rule to prevent him from pursuing his grievance about repeated instances of punishment without notice or charge).

331. For more information regarding disciplinary hearings and exhaustion, please see discussion in Part E(3) of this Chapter, which begins at the paragraph containing footnote 291 and ends at footnote 294.

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

333. Jones v. Bock, 549 U.S. 199, 218, 127 S. Ct. 910, 922, 166 L. Ed. 2d 798, 814–815 (2007).

your grievance, and you have that information, if you don't name them in your grievance, you can't name them as defendants in a lawsuit.[334]

Grievance policies often say little or nothing about how much detail is required in a grievance.[335] One often-cited decision has said that if the prison grievance policy does not have more specific requirements, then a grievance counts as exhausting "if it alerts the prison to the nature of the wrong for which redress is sought … [T]he grievant need not lay out the facts, articulate legal theories, or demand particular relief. All the grievance need do is object intelligibly to some asserted shortcoming."[336] 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.[337] An example of a grievance that satisfied the "object intelligibly" standard (though just barely) is found in a sexual assault case where the incarcerated person said only: "[T]he administration don't . . . do there . . . job. [A sexual assault] should've never . . . happen again," and requested that the assailant be criminally prosecuted.[338]

Even courts that do not use the *Strong v. David* standard generally do not require grievances to be very specific or detailed where the grievance policy does not have a requirement of greater detail.[339] They generally hold grievances inadequate when they are so vague that prison officials could not reasonably have been expected to understand what the incarcerated person was complaining about.[340]

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334. Garrison v. Dutcher, 1:07-CV-642, 2008 U.S. Dist. LEXIS 90504, at *4 (W.D. Mich. Sept. 30, 2008) (*unpublished*) (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").

335. For example, the New York State grievance system requires only that incarcerated people 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. COMP. CODES R. & REGS. tit. 7, § 701.5(a)(2) (2020).

336. Strong v. David, 297 F.3d 646, 650 (7th Cir. 2002); Wilcox v. Brown, 877 F.3d 161, 167 n.4 (4th Cir. 2017) (stating "grievances generally need only be sufficient to 'alert[ ] the prison to the nature of the wrong for which redress is sought.' " (quoting Strong v. David, 297 F.3d 646 (7th Cir. 2002))); Fennell v. Cambria Cty. Prison, 607 F. App'x 145, 149 (3d Cir. 2015) (*unpublished*) (citing Strong v. David and "object intelligibly" language with approval); Griffin v. Arpaio, 557 F.3d 1117, 1120 (9th Cir. 2009) ("*Strong* held that, when a prison's grievance procedures are silent or incomplete as to factual specificity, 'a grievance suffices if it alerts the prison to the nature of the wrong for which redress is sought.' …We adopt *Strong* as the appropriate standard." (citation omitted)). 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. Woodford v. Ngo, 548 U.S. 81, 90–91, 126 S. Ct. 2378, 2386, 165 L. Ed 2d 368, 378 (2006); Burton v. Jones, 321 F.3d 569, 575 (6th Cir. 2003) (quoting "object intelligibly" language with approval).

337. Porter v. Nussle, 534 U.S. 516, 525, 122 S. Ct. 983, 988, 152 L. Ed. 2d 12 (2002).

338. Riccardo v. Rausch, 375 F.3d 521, 524 (7th Cir. 2004); *see also* Westefer v. Snyder, 422 F.3d 570, 580–581 (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).

339. *See, e.g.*, McAlphin v. Toney, 375 F.3d 753, 755 (8th Cir. 2004) (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]'").

340. *See* Beltran v. O'Mara, 405 F. Supp. 2d 140, 152 (D.N.H. 2005) (holding that allegations the plaintiff was "being punished for no reason" and isolated from other incarcerated people 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

They generally do not require grieving of legal theories.[341] But you should be careful about this last point. There are some issues that some courts say are legal theories, but that other courts require to be exhausted, notably the existence of retaliatory motive,[342] conspiracy,[343] and discriminatory intent,[344] and occasionally other matters.[345] You should probably err on the side of being explicit in such cases.

If the prison grievance system actually investigates and addresses your complaint, and does not throw it out for lack of detail, a court will generally consider it to be exhausted. This will be the case even if the defendants' lawyers later claim that you should have said more in the grievance.[346]

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

congestive heart failure). *Compare* Westefer v. Snyder, 422 F.3d 570, 580–581 (7th Cir. 2005) (holding that incarcerated people who mentioned concern with their transfers to a high-security prison in the course of grievances complaining about the conditions there exhausted their claims about transfer) *with* Shoucair v. Warren, No. 07-12964, 2008 U.S. Dist. LEXIS 37961, at *7–8 (E.D. Mich. May 9, 2008) (*unpublished*) (rejecting grievance body's finding of undue vagueness where incarcerated person provided enough information to investigate his complaint and grievance policy required investigation).

341. Reyes v. Smith, 810 F.3d 654, 659 (9th Cir. 2016) ("A grievance need not include legal terminology or legal theories unless they are in some way needed to provide notice of the harm being grieved." (citing Griffin v. Arpaio, 557 F.3d 1117, 1120 (9th Cir. 2009)); Johnson v. Johnson, 385 F.3d 503, 517–518 (5th Cir. 2004) (agreeing legal theories need not be presented in grievances); Burton v. Jones, 321 F.3d 569, 575 (6th Cir. 2003) (holding grievances need not "allege (state) a specific legal theory or facts that correspond to all the required elements of a particular legal theory").

342. Petzold v. Rostollan, 946 F.3d 242, 254–255 (5th Cir. 2019) (holding retaliation claim was not "sufficiently specific" in grievance to exhaust); Shifflett v. Korszniak, 934 F.3d 356, 366 (3d Cir. 2019) ("Retaliation is a separate claim, . . . and therefore must be separately grieved."). *But see*, Maldonado v. Unnamed Defendant, 648 F. App'x 939, 953 (11th Cir. 2016) (*unpublished*) (holding plaintiff was not required to allege retaliatory motive in a grievance since there is no requirement to exhaust legal theories).

343. Cleveland v. Harvanek, 607 F. App'x 770, 773 (10th Cir. 2015) (*unpublished*); Siggers v. Campbell, 652 F.3d 681, 694–695 (6th Cir. 2011) (holding failure to mention alleged conspiracy in grievance meant claim was not exhausted). *But see*, Espinal v. Goord, 558 F.3d 119, 127–128 (2d Cir. 2009) (holding that conspiracy is a legal theory which incarcerated people need not grieve; it is sufficient to describe the alleged misconduct adequately).

344. Johnson v. Johnson, 385 F.3d 503, 518 (5th Cir. 2004) (holding that an incarcerated person who complained of sexual assault, made repeated reference to his sexual orientation, but said nothing about his race had exhausted his sexual orientation discrimination claim, but not his racial discrimination claim); Waddy v. Sandstrom, No. 7:11CV00320, 2012 U.S. Dist. LEXIS 77937, at *10 (W.D. Va. June 5, 2012) (*unpublished*) (holding racial discrimination claim unexhausted where plaintiff grieved a use of force but did not mention the racial comments on which the claim was based). But see, Gonzalez v. Morris, No. 9:14-cv-1438 (GLS/DEP), 2018 U.S. Dist. LEXIS 42534, at *6–7 (N.D.N.Y. Mar. 15, 2018) (*unpublished*) (holding Santeria follower who complained of denial of privileges accorded to Native American incarcerated people exhausted his discrimination claim, even though he did not mention discrimination until the final stage, since "equal protection is a legal theory" that need not be articulated in grievances).

345. *See* Dye v. Kingston, 130 F. App'x 52, 56 (7th Cir. 2005) (*unpublished*) (holding that an incarcerated person 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").

346. Reyes v. Smith, 810 F.3d 654, 659 (9th Cir. 2016) (holding incarcerated person who grieved doctors' failure to provide pain medication exhausted claim about Pain Management Committee's involvement where grievance responses themselves cited the Committee's decision); Patterson v. Stanley, 547 F. App'x 510, 512 (5th Cir. 2013) (*unpublished*) (holding claim exhausted where appeal decision acknowledged it and said it had been referred to Office of Professional Standards and plaintiff was scheduled for an ophthalmology exam); Espinal v. Goord, 558 F.3d 119, 128 (2d Cir. 2009) (holding medical care complaint not raised explicitly in grievance was exhausted where grievance decision addressed it; medical care complaint stated in very general terms was exhausted where grievance decision addressed plaintiff's care with specificity).

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 people, events, and policies that might be involved in the problem you are filing a grievance about, and mention them. That is because some courts require that if you raise claims about policy, training, or supervision in your grievance, you must have explicitly exhausted those claims in addition to describing what happened to you.[347] For instance, in a use of force case, 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." If you were denied a book, 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 of books to incarcerated people without good reason and without clear written criteria and procedures." (Or, if there are clear criteria and procedures, but you wish to challenge them as unlawful, 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.[348] If you discover new information after the grievance deadline has passed that might be important for what you plan to file suit about after exhaustion, 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.[349]

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347. *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), *overruled on other grounds by* Jones v. Bock, 549 U.S. 199, 127 S. Ct. 910, 166 L. Ed. 2d 798 (2007).

348. 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, 312–313 (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.

349. *Compare* Sullivan v. Caruso, No. 1:07cv367, 2008 U.S. Dist. LEXIS 9090 (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, at *3 (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.

Prison officials and their lawyers want to try to get your case thrown out for non-exhaustion so they can avoid facing facts and arguments of your lawsuit. You should do your best to make your grievance reflect all aspects of the problem, 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?

Incarcerated people not only must exhaust, they must do it correctly. The Supreme Court has held that the PLRA exhaustion requirement requires you to obey an agency's deadlines and other important procedural rules because no decision-making system can work well without having an orderly structure.[350] 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.[351]

This does *not* mean that you should just give up if you fail to follow the proper procedure. You should pursue your grievance and all available appeals, and if the grievance is rejected for a procedural mistake, 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 incarcerated people to correct mistakes and re-file (in fact, sometimes they instruct incarcerated people to do so).[352] If prison officials *don't* reject your grievance for procedural mistakes, but decide the merits anyway, they have waived their right to claim your mistakes mean you didn't exhaust.[353] That is because the purpose of the "proper exhaustion" rule is to allow the

350. *See* Woodford v. Ngo, 548 U.S. 81, 90–91, 93, 126 S. Ct. 2378, 2386–2387, 165 L. Ed. 2d 368, 378, 380 (2006) (describing the Court's "proper exhaustion" requirement); *see also* Jones v. Bock, 549 U.S. 199, 218, 127 S. Ct. 910, 922–923, 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").

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

352. If they do allow you to re-file your grievance, and give you instructions, you should follow the directions even if you disagree with them.

353. *See* Does 8-10 v. Snyder, 945 F.3d 951, 962 (6th Cir. 2019); Rinaldi v. United States, 904 F.3d 257, 271 (3d Cir. 2018) ("We simply reaffirm . . . that when an inmate's allegations 'have been fully examined on the merits' and 'at the highest level,' they are, in fact, exhausted." (quoting Camp v. Brennan, 219 F.3d 279, 281 (3d Cir. 2000))); Whatley v. Smith, 898 F.3d 1072, 1083 (11th Cir. 2018) ("[A] prisoner has exhausted his administrative remedies when prison officials decide a procedurally flawed grievance on the merits. . . . [D]istrict courts may not enforce a prison's procedural rule to find a lack of exhaustion after the prison itself declined to enforce the rule." (citation and internal quotation marks omitted)); Reyes v. Smith, 810 F.3d 654, 658 (9th Cir. 2016); Whatley v. Warden, Ware State Prison, 802 F.3d 1205, 1213–14 (11th Cir. 2015) ("We join our sister Circuits in holding that district courts may not find a lack of exhaustion by enforcing procedural bars that the prison declined to enforce."); Spada v. Martinez, 579 F. App'x 82, 85 (3d Cir. 2014) (per curiam) (*unpublished*) (dicta; quoting Hill v. Curcione); Hammett v. Cofield, 681 F.3d 945, 947 (8th Cir. 2012) (per curiam) (stating "all circuits that have addressed it have concluded that the PLRA's exhaustion requirement is satisfied if prison officials decide a procedurally flawed grievance on the merits"); Hill v. Curcione, 657 F.3d 116, 125 (2d Cir. 2011) (holding "the exhaustion requirement of the PLRA is satisfied by an untimely filing of a grievance if it is accepted and decided on the merits by the appropriate prison authority."); Maddox v. Love, 655 F.3d 709, 722 (7th Cir. 2011) ("Where prison officials address an inmate's grievance on the merits without rejecting it on procedural grounds, the grievance has served its function of alerting the state and inviting corrective action, and defendants cannot rely on the failure to exhaust defense."); Reed-Bey v. Pramstaller, 603 F.3d 322, 324–26 (6th Cir. 2010) (declining to dismiss claims against defendants not named in grievance where officials reached the merits despite noncompliance with "name the defendant" grievance rule; "When the State . . . decides to reject the claim on the merits, who are we to second guess its decision to overlook or forgive its own procedural bar?"); Gates v. Cook, 376 F.3d 323, 331–332 (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) (holding that the prison grievance officer's recognition that a particular defendant was involved in the events the prisoner complained of, even though the prisoner had not named the defendant in his grievance, excused the procedural mistake and the case could continue).

grievance system to "function effectively,"[354] and if it decided the merits, obviously it *did* function effectively. Courts have disagreed over whether a grievance is exhausted if it is rejected both on the merits and for procedural reasons.[355] In any event, the harder you have tried to exhaust correctly, the more likely the court is to rule in your favor in a close case. Also, if there is some reason you cannot comply with all the procedural rules of the grievance system, pursue your grievance anyway and explain why you couldn't comply. If your grievance is rejected or denied because you failed to do something you couldn't do, the remedy was unavailable and your suit should go forward.[356] Courts will look very closely at this kind of claim, and you should make every effort to exhaust properly so you will have a convincing explanation of why you were not able to do so

Courts have generally held that to exhaust properly, incarcerated people must follow instructions given by grievance staff, in addition to the grievance rules.[357] However, a number of courts have refused to find non-exhaustion where incarcerated people have failed to follow staff instructions that were not supported by the grievance policy.[358] The best practice is probably to follow staff instructions if you can unless they are contrary to the written policy.

Suppose you follow the grievance rules, but get a grievance decision rejecting your grievance and claiming wrongly that you didn't follow the rules. Courts have generally been willing to examine

354. *See* Woodford v. Ngo, 548 U.S. 81, 90, 126 S. Ct. 2378, 2386, 165 L. Ed. 2d 368, 378 (2006).

355. *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 *10–11, (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*).

356. *See, e.g.*, DeBrew v. Atwood, 792 F.3d 118, 126–29 (D.C. Cir. 2015) (holding remedy was unavailable where the grievance was denied for failure to attach a document that the incarcerated person could not obtain); Risher v. Lappin, 639 F.3d 236, 240 (6th Cir. 2011) (same as *DeBrew*); Jamison v. Varano, No. 1:12-C-1500, 2015 U.S. Dist. LEXIS 103325, at *4 (M.D. Pa. Aug. 6, 2015) (*unpublished*) (holding the remedy unavailable where prison officials provided illegible photocopies of required documents and the plaintiff's grievance was then dismissed because of the documents' illegibility); Lee v. Gulick, No. 2:17-CV-42-PK, 2018 U.S. Dist. LEXIS 106294, at *8 (D. Or. June 26, 2018) (*unpublished*) (holding plaintiff exhausted available remedies where a staff member ordered him to stop placing grievances in the grievance box, he had no other way of filing them, and when he filed his accumulated grievances later when he was able they were rejected as untimely). Please see footnotes 280 and 281 of this Chapter for more information regarding denials of forms and/or greivances.

357. *See* Thomas v. Parker, 609 F.3d 1114, 1118–19 (10th Cir. 2010); Cannon v. Washington, 418 F.3d 714, 718 (7th Cir. 2005); Ford v. Johnson, 362 F.3d 395, 397 (7th Cir. 2004) ("Just as courts may dismiss suits for failure to cooperate, so administrative bodies may dismiss grievances for lack of cooperation; in either case this procedural default blocks later attempts to litigate the merits."); Jernigan v. Stuchell, 304 F.3d 1030, 1032–33 (10th Cir. 2002) (holding that an incarcerated person who received no response to a grievance and refused the appeals body's direction to try to get one had failed to exhaust); Kelley Bey v. Keen, No. 3:13-CV-01942, 2014 U.S. Dist. LEXIS 97649, at *37 (M.D. Pa. May 29, 2014) (*unpublished*) (holding incarcerated person who failed to explain when asked why the Halal diets on offer were unacceptable did not exhaust).

358. *See, e.g.*, Fisher v. Figueroa, No. CIV-12-231-F, 2013 U.S. Dist. LEXIS 26099, *3–4 (W.D. Okla. Jan. 7, 2013) (*unpublished*) (holding remedies unavailable where the incarcerated person followed correct procedure, was erroneously told to re-file his grievance after grievance staff misrouted it; since he had followed the rules, his appeal of the initial grievance should have been processed), *report and recommendation adopted*, Fisher v. Figueroa, No. CIV-12-231-F, 2013 U.S. Dist. LEXIS 24931 (W.D. Okla. Feb. 22, 2013); Chavez v. Granadoz, No. 2:11-cv-1015 WBS CKD P, 2013 U.S. Dist. LEXIS 58282, *2–4 (E.D. Cal. Apr. 23, 2013) (*unpublished*) (declining to dismiss for non-exhaustion where grievance personnel demanded the names of involved staff, which were not required by the rules, and denied plaintiff's request for documentation that would include that information); Andrews v. Cervantes, No. CIV S-03-1218 EFB P, 2009 U.S. Dist. LEXIS 28530, at *6 (E.D. Cal. Mar. 25, 2009) (*unpublished*) (holding incarcerated person exhausted though his grievance was rejected because he refused to resubmit it without the word "moron," since the grievance policy did not support this basis for rejection). *Contra*, Starks v. Lewis, No. CIV-06-512-M, 2008 U.S. Dist. LEXIS 48444, at *5 (W.D. Okla. June 24, 2008) (*unpublished*) ("Even when prison authorities are incorrect about the existence of the perceived deficiency, the inmate must follow the prescribed steps to cure it.…An inmate's disagreement with prison officials as to the appropriateness of a particular procedure under the circumstances, or his belief that he should not have to correct a procedural deficiency does not excuse his obligation to comply with the available process…").

incarcerated people's compliance with the rules independently rather than being bound by what grievance officials say about it.[359]

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.[360] That means you should learn the time limits and meet the deadlines. But if you miss a grievance deadline, do not give up. Continue with your grievance as quickly as possible. If there is a provision allowing late grievances under certain circumstances,[361] request permission to file late if the provision fits your situation. (The fact that late grievances are sometimes allowed won't help you if you don't use the procedure for getting one approved.[362]) Take all available appeals if the grievance officials reject your grievance for lateness. If the appeals body decides the merits of your grievance, then you will have exhausted; the lateness of your grievance will be deemed waived by the grievance body.[363] If they do not decide the merits, you can still argue in court that the remedy was unavailable if something prevented you from filing on time.[364] Most courts have held that if the

359. *See, e.g.*, Pyles v. Nwaobasi, 829 F.3d 860, 865 (7th Cir. 2016) (holding incarcerated person had "good cause" for a late grievance even though grievance officials had said otherwise); Dimanche v. Brown, 783 F.3d 1204, 1211–1214 (11th Cir. 2015) (holding plaintiff's grievance qualified as a "grievance of reprisal" under the state's grievance rules, even though it had been procedurally rejected by grievance authorities); Sapp v. Kimbrell, 623 F.3d 813, 824 (9th Cir. 2010) (holding remedies are unavailable if officials "screened [the plaintiff's] grievance or grievances for reasons inconsistent with or unsupported by applicable regulations"); Little v. Jones, 607 F.3d 1245, 1250 (10th Cir. 2010) (holding dismissal was wrong under a "plain reading" of the grievance rules, and made the remedy unavailable to the plaintiff); Lafountain v. Martin, 334 F. App'x 738, 741, 741 n.2 (6th Cir. 2009) (per curiam) (*unpublished*) (holding officials improperly applied their rule against multiple issues in grievances); Price v. Kozak, 569 F. Supp. 2d 398, 406–407 (D. Del. 2008) (holding the prisoner's grievances timely despite the defendant, a prison employee, 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 the prison's decision that the incarcerated person's complaint was not grievable and rejecting an appeal decision that it must be re-filed at the facility, as contrary to the prison system's own policy).

360. *See* Woodford v. Ngo, 548 U.S. 81, 90–91, 126 S. Ct. 2378, 2389, 165 L. Ed. 2d 368, 381–382 (finding that enforcing strict time limits was necessary to promote an effective adjudicatory system) (2006).

361. For example, the New York State grievance system allows late grievances if there are "mitigating circumstances," which include "attempts to resolve informally by the inmate." N.Y. COMP. CODES R. & REGS. tit. 7, § 701.6(g)(1)(i)(a) (2020); State of New York, Department of Correctional Services, Directive No. 4040 § 701.6(g)(1)(i)(a), Inmate Grievance Program (2016), *available at* http://www.doccs.ny.gov/Directives/4040.pdf (last visited Nov. 4, 2019). 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."

362. *See* Patel v. Fleming, 415 F.3d 1105, 1110–1111 (10th Cir. 2005) (holding that the existence of provisions for time extensions did not save the untimely grievance of an incarcerated person who never officially sought an extension); Harper v. Jenkin, 179 F.3d 1311, 1312 (11th Cir. 1999) (holding that an incarcerated person whose grievance was dismissed as untimely had to appeal that decision before turning to a court, whether or not the incarcerated person believed his appeal would be heard, since the system 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 an incarcerated person who learned of his problem after the deadline passed should have tried to file a late grievance).

363. *See* Spada v. Martinez, 579 F. App'x 82, 85 (3d Cir. 2014) (per curiam) (*unpublished*) (dicta; quoting Hill v. Curcione); Hill v. Curcione, 657 F.3d 116, 125 (2d Cir. 2011); Riccardo v. Rausch, 375 F.3d 521, 524 (7th Cir. 2004); Ross v. County of Bernalillo, 365 F.3d 1181, 1186 (10th Cir. 2004); Cordero v. FNU Ricknauer, Civ. No. 13-2023 (RBK) (AMD), 2014 U.S. Dist. LEXIS 129822, *6 (D.N.J. Sept. 17, 2014) (*unpublished*); Miller v. Coning, 2014 U.S. Dist. LEXIS 25843, *6 (D.Del., Feb. 28, 2014) (*unpublished*), *report and recommendation adopted,* 2014 U.S. Dist. LEXIS 108858, (D.Del., Aug. 7, 2014) (*unpublished*).

364. *See* Green v. Burkhart, 767 F. App'x 342, 346 (3d Cir. 2019) (per curiam) (*unpublished*) (holding grievance appeal unavailable where plaintiff could not appeal without a document he had no access to, and did not obtain until after he had filed suit); Jackson v. Griffin, 762 F. App'x 744, 746 (11th Cir. 2019) (per curiam) (*unpublished*) (holding untimeliness caused by defendants' failure to pick up submitted grievances on their own announced schedule would make the remedy unavailable); Pyles v. Nwaobasi, 829 F.3d 860, 865–869 (7th Cir. 2016) (holding plaintiff had exhausted "such remedies as were available to him" when his grievance was dismissed as untimely after the prison failed to make copies of it timely); Nunez v. Duncan, 591 F.3d 1217, 1225–1226 (9th Cir. 2010) (holding remedy was unavailable and incarcerated person's lack of timely exhaustion excused where

grievance body determines a grievance was late, the court makes its own independent determination if that is correct.[365] If you miss a deadline for some reason outside your control, don't bypass the grievance process and just argue in court that the remedy is unavailable. 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,[366] even though the Supreme Court said in the *Woodford* case that an untimely grievance does not exhaust. Some courts have rejected this idea where there is no instruction to that effect in the grievance policy.[367] Your best strategy is to pursue the grievance regardless.

If a grievance system has no time limit, delay in filing cannot bar an incarcerated person's claim for
non-exhaustion.[368] In that scenario, an unexhausted claim should be dismissed without prejudice, and the incarcerated person will then have the opportunity to try to exhaust.[369]

Warden led plaintiff to believe he had to have a particular document to appeal, and he spent months trying to get it); Days v. Johnson, 322 F.3d 863, 867–868 (5th Cir. 2003) (holding remedy unavailable where incarcerated person was injured and unable to write during the prescribed time period for filing).

365. Pyles v. Nwaobasi, 829 F.3d 860, 865 (7th Cir. 2016) (holding incarcerated person had shown "good cause" for filing an untimely grievance, despite the grievance authorities' contrary decision); Marella v. Terhune, 568 F.3d 1024, 1027 (9th Cir. 2009) (holding district court should have determined whether plaintiff's grievance fell into an exception to the time limits, even though state officials had rejected it as untimely); Williams v. Franklin, 302 F. App'x 830, 832 (10th Cir. 2008) (*unpublished*) (rejecting determination of untimeliness that was obviously wrong); Miller v. Coning, 2014 U.S. Dist. LEXIS 25843, *6 (D. Del. Feb. 28, 2014) (*unpublished*) (holding officials measured timeliness from the wrong date under their own rule); Jaros v. Illinois Department of Corrections, No. 11–cv–168–JPG, 2013 WL 5546189, at *3 (S.D. Ill. Oct. 8, 2013) (*unpublished*) (holding prison officials were "demanding the prisoner do more than the administrative rules require" when they measured timeliness of an appeal by when it was received, and not when it was sent, under a rule that said appeal must be "submitted" within 30 days);

366. Jones v. Nelson, 729 F. App'x 467, 469 (7th Cir. 2018) (*unpublished*) (holding incarcerated person who was physically incapacitated during filing period was obliged to file as soon as reasonably possible thereafter, and appeal if denied); Burnett v. Miller, 738 F. App'x 951, 953 (10th Cir. 2018) (*unpublished*) (holding incarcerated person who was in the hospital and under the influence of incapacitating medications during the grievance-filing period should have pursued an out of time grievance under prison procedure); Lamont-Goldsby v. Kaschmitter, 712 F. App'x 701, 702 (9th Cir. 2018) (*unpublished*) (holding incarcerated person who showed remedy was unavailable during three months in segregation should have pursued an untimely grievance after release from segregation); Bryant v. Rich, 530 F.3d 1368, 1373 (11th Cir. 2008) (holding an incarcerated person 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 an incarcerated person 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).

367. *See* Lanaghan v. Koch, 902 F.3d 683, 689–690 (7th Cir. 2018) (holding incarcerated person unable to file a timely grievance was not obliged to file an untimely one where the provision allowing late grievances did not appear in the handbook provided to incarcerated people); Forde v. Miami Fed. Dept. of Corr., 730 F. App'x 794, 799–800 (11th Cir. 2018) (per curiam) (*unpublished*); Spada v. Martinez, 579 F. App'x 82, 86 (3d Cir. 2014) (per curiam) (*unpublished*) (holding incarcerated person who was denied grievance forms during the period a grievance was timely was not required to file an untimely grievance where the grievance policy did not provide for untimely grievances under the circumstances); Cotton-Schrichte v. Peate, No. 07-4052-CV-C-NKL, 2008 U.S. Dist. LEXIS 59452, at *4 (W.D. Mo. Aug. 5, 2008) (*unpublished*)(holding that an incarcerated person who was raped by a staff member exercising a position of authority over the incarcerated person and who had been threatened into silence was not required to file a grievance after the threats were removed because she did not have administrative procedures available to her at the appropriate time.

368. *See* 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).

369. *See* 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).

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 in order to claim you didn't exhaust.[370] However, if a grievance is properly exhausted, it may be helpful to put that information (and nothing else) in the complaint anyway. Then, if the defendants make a motion to dismiss, you can simply refer to that part 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.[371] If you did *not* properly exhaust but you have a good argument that administrative remedies were not available, you should *not* put that in the complaint.[372] In that case, you should leave exhaustion out of the complaint and let the defendants raise it, probably by motion for summary judgment. If the defendants do raise the defense, you will then have the opportunity to provide a fuller explanation. 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 on the face of the complaint. 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.[373]

In most courts, defendants who claim an incarcerated person did not exhaust will generally have to raise that claim in a motion for summary judgment, which requires the defendant to submit factual evidence showing that an incarcerated person did not exhaust.[374] 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 considered on such a motion to dismiss. The court may decide to convert the Rule 12(b)(6) motion to a summary judgment motion.[375] Courts are not required to convert such motions to summary judgment, and many have declined to do so.[376]

If you are faced with a summary judgment motion claiming you didn't exhaust, you will have to respond to the defendant's facts with your own admissible evidence. This evidence can include your declaration or sworn affidavit[377] (not just a statement in a brief or a letter) establishing that you

370. *See* Jones v. Bock, 549 U.S. 199, 211–217, 127 S. Ct. 910, 919–922, 166 L. Ed. 2d 798, 811–813 (2007).

371. *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).

372. *See* Jones v. Bock, 549 U.S. 199, 213–215, 127 S. Ct. 910, 920–921, 166 L. Ed. 2d 798, 812–813 (2007)

373. *See* Woodford v. Ngo, 548 U.S. 81, 101, 126 S. Ct. 2378, 2392, 165 L. Ed. 2d 368, 384 (2006) ("[T]he PLRA exhaustion requirement is not jurisdictional.").

374. *See* FED. R. CIV. P. 56. *See, e.g.*, Brownell v. Krom, 446 F.3d 305, 310 (2d Cir. 2006); Brown v. Croak, 312 F.3d 109, 111–112 (3d Cir. 2002); Fields v. Oklahoma State Penitentiary, 511 F.3d 1109, 1111–1112 (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).

375. FED. R. CIV. P. 12(d). *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).

376. *See, e.g.*, Escalera v. Harry, NO: 1:15-CV-02132, 2016 U.S. Dist. LEXIS 136010, at *7 (M.D.Pa. Sept. 28, 2016), *report and recommendation adopted*, Escalera v. Harry, NO: 1:15-CV-02132, 2016 U.S. Dist. LEXIS 153924, (M.D.Pa. Nov. 7, 2016) (*unpublished*); Endicott v. Allen, No. 2:17-CV-29-DDN 2019, U.S. Dist. LEXIS 19890, *3 (E.D. Mo. Feb. 7, 2019) (*unpublished*) (citing deficiencies of parties' presentations, plaintiff's incarceration and pro se status, and lack of any discovery); Vailette v. Lindsay, 11-CV-3610 (NGG) (RLM), 2014 U.S. Dist. LEXIS 114701, at *8 (E.D.N.Y. Aug. 18, 2014) (*unpublished*) (citing lack of opportunity for discovery by plaintiff); McNair v. Rivera, 12 Civ. 06212 (ALC) (SN); 12 Civ. 8325 (ALC)(SN); 13 Civ. 0352 (ALC)(SN), 2013 U.S. Dist. LEXIS 127642, at *6–7 (S.D.N.Y, Sept. 6, 2013) (*unpublished*) (declining to convert where defendants had not provided or alluded to any documents that would be dispositive; noting bifurcating discovery between exhaustion and the merits risked complication and delay); Taylor v. Hillis, No. 1:10-cv-94 2011 U.S. Dist. LEXIS 145694, at *4 (W.D. Mich. Nov. 28, 2011), *report and recommendation adopted*, Taylor v. Hillis, No. 1:10-cv-94., 2011 U.S. Dist. LEXIS 145429 (W.D. Mich. Dec. 19, 2011) (*unpublished*).

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

exhausted, or that you were unable to exhaust for some legitimate reason, along with documentary evidence, such as a final grievance decision showing exhaustion, or a statement in the grievance policy or a memo to you from the grievance body telling you your complaint is not grievable. 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.[378] If the defendant cannot show that it is *undisputed* that you have failed to exhaust, and you do not have an adequate excuse or explanation, summary judgment will be denied.

If the court finds disputed issues of fact bearing on whether you exhausted, or on whether the remedy was unavailable so you couldn't exhaust, the court will have to decide the issue before trial. Courts are now agreed that exhaustion is not an issue for the jury at trial.[379] Most but not all have held that disputed facts must be decided at an evidentiary hearing.[380]

Exhaustion is an affirmative defense. This means that the defendant will have the burden of proof that the plaintiff did not exhaust his prison remedies.[381] One often-cited decision has stated that once defendants have produced evidence that there was an available administrative remedy and the plaintiff did not exhaust it, "the prisoner has the burden of *production* . . . to come forward with evidence showing that there is something in his particular case that made the existing and generally available administrative remedies effectively unavailable to him. . . . However, as required by *Jones [v. Bock*], the ultimate burden of *proof* remains with the defendant."[382]

To prove you didn't exhaust, then, the defendant will have to show three things:

1) That there actually was an available administrative solution that would address your problem.[383] Defendants must also show the court exactly what prisoners were required to

378. *See* cases cited in notes in foonotes 375–382, below, for examples of reasons courts have found that defendants' evidence did not really show you didn't exhaust.

379. *See* Lee v. Willey, 789 F.3d 673, 678 (6th Cir. 2015); Small v. Camden County, 728 F.3d 265, 271 (3d Cir. 2013) (holding "judges may resolve factual disputes relevant to the exhaustion issue without the participation of a jury"); Messa v. Goord, 652 F.3d 305, 309–310 (2d Cir. 2011) (holding jury trial right does not extend to "the 'threshold issue[s] that *courts* must address to determine whether litigation is being conducted in the right forum at the right time.' "); Dillon v. Rogers, 596 F.3d 260, 272 (5th Cir. 2010); Pavey v. Conley, 544 F.3d 739, 741–742 (7th Cir. 2008); Turner v. Burnside, 541 F.3d 1077, 1082 (11th Cir. 2008).

380. *Compare* Lee v. Willey, 789 F.3d 673, 678 (6th Cir. 2015) (stating "disputed issues of fact regarding exhaustion under the PLRA presented a matter of judicial administration that could be decided in a bench trial"); Roberts v. Neal, 745 F.3d 232, 234 (7th Cir. 2014) (holding a "swearing contest" cannot be resolved without hearing testimony); Dillon v. Rogers, 596 F.3d 260, 273 (5th Cir. 2010) (stating "the judge may resolve disputed facts concerning exhaustion, holding an evidentiary hearing if necessary") *with* Paladino v. Newsome, 885 F.3d 203, 211 (3d Cir. 2018) (leaving necessity for a hearing to discretion of district courts); Bryant v. Rich, 530 F.3d 1368, 1377 & n.16 (11th Cir. 2008) (holding the court may decide exhaustion disputes without a hearing if no one asks for a hearing).

381. Roberts v. Barreras, 484 F.3d 1236, 1240–1241 (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).

382. Albino v. Baca, 747 F.3d 1162, 1172 (9th Cir. 2014) (en banc) (emphasis supplied); *accord*, Dillon v. Rogers, 596 F.3d 260, 266 (5th Cir. 2010) (stating defendants "must establish beyond peradventure all of the essential elements of the defense of exhaustion to warrant summary judgment in their favor"); Surles v. Andison, 678 F.3d 452, 456 (6th Cir. 2012) (rejecting argument that once defendants come forward on summary judgment with some evidence of non-exhaustion, burden shifts to plaintiff to show exhaustion; defendants must show the absence of factual disputes); Grant v. Kopp, No. 9:17-cv-1224 (GLS/DEP), 2019 U.S. Dist. LEXIS 1758, at *4 (N.D.N.Y. Jan. 3, 2019) (*unpublished*) (same as *Albino*), *report and recommendation adopted*, 2019 U.S. Dist. LEXIS 14368 (N.D.N.Y. Jan. 30, 2019); Sarvey v. Wetzel, C.A.No. 16-157ERIE, 2018 U.S. Dist. LEXIS 51487, at *2 (W.D. Pa. Mar. 28, 2018) (*unpublished*) (citing Njos v. Argueta, No. 2:13-cv-01038, 2017 U.S. Dist. LEXIS 26222, at *2 (M.D. Pa. Feb. 23, 2017)), *report and recommendation* adopted, 2017 U.S. Dist. LEXIS 52906 (M.D. Pa. Apr. 6, 2017)); Widener v. City of Bristol, Va., No. 1:13CV00053, 2014 U.S. Dist. LEXIS 90121, at *2 (W.D. Va. July 2, 2014) (*unpublished*) (stating to obtain summary judgment, "the defendant must adduce evidence which supports the existence of each element of its affirmative defense, and the evidence must be so powerful that no reasonable jury would be free to disbelieve it" (citation omitted)).

383. *See, e.g.*, Hubbs v. Suffolk Cty. Sheriff's Dept., 788 F.3d 54, 59 (2d Cir. 2015) (holding that defendants failed to establish that their grievance procedure provided a remedy for abuses in a court holding pen); Cantwell v. Sterling, 788 F.3d 507, 509 (5th Cir. 2015) (reversing summary judgment for non-exhaustion; stating that "the defendants have not put before the district court or this court the applicable grievance procedures (and we stress

do to exhaust, and failed to do.[384] The Second Circuit has held that complaints by incarcerated people should not be dismissed for non-exhaustion without the court having "establish[ed] the availability of an administrative remedy from a legally sufficient source."[385] This generally means submitting the actual grievance policy that was in effect at the time of the problem you have brought suit about. To establish availability, defendants must also show that the remedy was made known to the incarcerated people.[386]

2) That you were incarcerated when you filed your complaint, so you were required to exhaust.[387]
3) That you did not exhaust. Many courts have found that prison officials' evidence of non-exhaustion was insufficient, because the evidence did not respond to plaintiffs' specific

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applicable—the ones in force at the relevant time, in the relevant place)."); 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."); Chamblis v. Bland, No. 5:17-CV-000254, 2018 U.S. Dist. LEXIS 158103, at *4–5 (E.D. Ark. Mar. 19, 2018) (*unpublished*) (declining to dismiss for non-exhaustion where defendants provided no information explaining their grievance policy), *report and recommendation adopted*, 2018 U.S. Dist. LEXIS 157565 (E.D. Ark. Sept. 17, 2018) (*unpublished*); Fernandez v. Morris, No. 08-CV-0601 H (PCL), 2008 U.S. Dist. LEXIS 54298, at *8–9 (S.D. Cal. Jul. 16, 2008) (*unpublished*) (holding 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 (D.N.J. Jul. 2, 2008) (*unpublished*) (holding defendants who failed to specify what the administrative grievance procedure required were not entitled to dismissal for non-exhaustion).

384. English v. Payne, 720 F. App'x 810, 810–811 (8th Cir. 2018) (per curiam) (*unpublished*) (holding defendants failed to establish non-exhaustion where plaintiff's grievances were "Not Processed" (a designation for grievances that include insufficient information, are incomplete, or which the filer did not attempt informal resolution) when defendants did not submit the grievances or other evidence showing a deficiency in any of those respects); Breeland v. Baker, 439 F. App'x 93, 96 (3d Cir. 2011) (per curiam) (*unpublished*) ("Without any showing concerning the specific policy that Breeland allegedly violated," summary judgment for non-exhaustion was inappropriate); Ayala v. C.M.S., No. 05-5184 (RMB), 2008 U.S. Dist. LEXIS 50692, at *7 (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).

385. 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")); *see* Hubbs v. Suffolk Cty. Sheriff's Dept., 788 F.3d 54, 59 (2d Cir. 2015) (holding "defendants bear the initial burden of establishing, by pointing to 'legally sufficient source[s]' such as statutes, regulations, or grievance procedures, that a grievance process exists and applies to the underlying dispute". 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, 609–610 (2d Cir. 2003); *accord*, Robinson v. Cty. of Riverside, No. ED CV 17-323-DSF (SP), 2018 U.S. Dist. LEXIS 143029, at *11 (C.D. Cal. July 3, 2018) (*unpublished*) (noting difficulty of interpreting checks in boxes, declining to infer non-exhaustion from them, especially in light of allegations suggesting unavailability), *report and recommendation adopted,* 2018 U.S. Dist. LEXIS 143023 (C.D. Cal. Aug. 21, 2018) (*unpublished*); Cole v. Stepp, No. 09-22492-CIV-SEITZ, 2010 U.S. Dist. LEXIS 140285, at *7–8 (S.D. Fla. Nov. 1, 2010) (*unpublished*) ("It cannot be assumed . . . that because the plaintiff checked no for availing himself of grievance procedures, that he did not actually file grievances, nor is it clear what grievances were available to him if he was transferred to another facility. It is apparent that any determination as to whether the operative complaint may be subject to dismissal under § 1997e(a), will require further development of the record."), *report and recommendation adopted*, 2011 U.S. Dist. LEXIS 6261 (S.D. Fla. Jan. 24, 2011) (*unpublished*). 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 (E.D. Cal. May 23, 2008) (*unpublished*) (finding for the defendant and that the plaintiff did not exhaust where he conceded to non-exhaustion in a questionnaire).

386. Please see footnotes 265 through 268 of this Chapter, above, for examples of cases in which defendants were required to prove that they made a remedy known to individuals who were incarcerated.

387. Brown v. Burnett, Civil Action No. 15-284, 2016 U.S. Dist. LEXIS 1671, *10 (W.D. Pa. Jan. 7, 2016) (*unpublished*) (holding plaintiff was not an incarcerated person where her amended complaint stated that she had been released and defendants merely provided evidence of bench warrants and criminal dockets); 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").

allegations concerning exhaustion efforts,[388] or defendants relied on their grievance records but the way they searched their records was inadequate or unexplained,[389] or the records themselves were unreliable,[390] or the records rested on hearsay,[391] or they simply did not establish the incarcerated person's failure to exhaust.[392] In numerous cases,

388. To better understand non-responsiveness to plaintiff's specific allegations concerning exhaustion see Surles v. Andison, 678 F.3d 452, 457 & n.10 (6th Cir. 2012) (holding defendants must negate allegations that defendants interfered with plaintiff's efforts to exhaust); Burns v. Apollo, No. 2:12-CV-158, 2014 U.S. Dist. LEXIS 25038, at *6–7 (N.D. Ind. Feb. 27, 2014) (*unpublished*) (noting defendants did not respond to plaintiff's assertion that he did not file special appeal forms because the forms in use were designed to be used for grievances and appeals, and the appeal form proffered by the defendants was no longer used); 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).

389. To better understand inadequate or unexplained searches of records *see* Boykin v. Sandholm, 801 F. App'x 417, 420–421 (7th Cir. 2020) (*unpublished*) (remanding based on defendants' concession that the grievance log they produced would not have reflected the emergency grievance the plaintiff alleged he filed); Roberts v. Neal, 745 F.3d 232, 236 (7th Cir. 2014) (noting it was unclear whether defendants' records search would have uncovered the emergency grievance the plaintiff said he had submitted); Stout v. North-Williams, 476 F. App'x 763, 765–766 (5th Cir. 2012) (per curiam) (*unpublished*) (noting absence of verified statement that defendants had reviewed plaintiff's grievance history for the relevant time period); Howard v. Gambino, 457 F. App'x 642, 643 (9th Cir. 2011) (*unpublished*) (holding defendants' presentation inadequate where they "relied on a declaration by their attorney stating that she reviewed documents contained in her office file, rather than conducting a complete search of the jail's tracking system for inmate grievances and their dispositions"); White v. Whorton, 430 F. App'x 621 (9th Cir. 2011) (*unpublished*) (holding defendants' submission of unverified grievance report "unaccompanied by a declaration describing its import or completeness, is insufficient to meet the defendants' burden to show nonexhaustion"); Wyatt v. Terhune, 315 F.3d 1108, 1120 (9th Cir. 2003) (noting that defendants' affidavit does not state whether the plaintiff exhausted his appeals; their "Appeal Record" lacks a foundation and is not shown to be complete); 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").

390. To better understand unreliable records, *see* Paladino v. Newsome, 885 F.3d 203, 211 (3d Cir. 2018) (noting "the record is bereft of evidence that the Prison's recordkeeping system is reliable," and holding such evidence is necessary to determine whether the plaintiff exhausted); Banks v. Patton, 743 F. App'x 690, 694 (7th Cir. 2018) (*unpublished*) (noting finding below that that the jail's "informal and disorganized filing system" made it difficult to "track which complaints the [jail] staff responded to, which they ignored, and which, if any, the plaintiff appealed"); Turley v. Cowan, No. 09-CV-829-SCW, 2012 U.S. Dist. LEXIS 39825, at *21–22 (S.D. Ill. Mar. 23, 2012) (*unpublished*) (finding defendants' records sufficiently inaccurate, based on documentation in the record, that the court declines to infer lack of exhaustion from them).

391. To better understand non-responsiveness when defendant's argument rests on hearsay *see* Britt v. Rahana, No. 1:13-CV-01795-WTL-DML, 2014 U.S. Dist. LEXIS 63423, at *6–7 (S.D. Ind. May 8, 2014) (*unpublished*) (holding defendant's affidavit that mailroom clerk delivered grievance response to plaintiff, with no indication of personal knowledge by affiant, was inadmissible to support non-exhaustion finding); Hicks v. Irvin, No. 06-CV-645, 2010 U.S. Dist. LEXIS 68262, at *20–21 (N.D. Ill. July 8, 2010) (*unpublished*) (refusing to consider defendants' "Sentry" records system where they failed to establish its status as business records); Bey v. Williams, No. L-09-2181, 2010 U.S. Dist. LEXIS 42145, at *5–6 (D. Md. Apr. 29, 2010) (*unpublished*) (declining to dismiss for non-exhaustion where defendants cited documents, but did not produce them because they were archived); Donahue v. Bennett, No. 02-CV-6430, 2003 U.S. Dist. LEXIS 12601, at *10 (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).

392. To better understand when cited records fail to establish non-exhaustion simply because they do not stand for that proposition 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); 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 (W.D. Wis. Dec. 19, 2006) (*unpublished*) (noting that the absence of an appeal about lack of a working toilet and sink did not

incarcerated people have produced evidence of grievances that prison officials claimed did not exist.[393] Courts have repeatedly held that they must review plaintiffs' actual grievances to assess exhaustion; prison officials' summaries or characterizations of them are not adequate for that purpose.[394]

Since exhaustion is an affirmative defense, the defendants should raise it in their answer, or in a motion to dismiss filed in lieu of an answer, or in theory it is waived.[395] However, courts are very lenient in allowing defendants to raise the defense at a "pragmatically sufficient time," such as in a summary judgment motion.[396] If you file an amended complaint, defendants can assert exhaustion in the answer to it even if they omitted it from their initial answer.[397] Courts enforce waiver of the

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establish non-exhaustion, since if the plaintiff 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).

393. *See, e.g.*, Whitmore v. Jones, 456 F.App'x 747, 749–750 (10th Cir. 2012) (*unpublished*) (noting plaintiff's production of the grievance defendants denied was filed); Spires v. Harbaugh, 438 F. App'x 185, 187 n.2 (4th Cir. 2011) (per curiam) (*unpublished*) (noting "the State alleged to the district court that Spires availed himself of none of the avenues of administrative relief. This highly material fact is clearly disputed by Spires' submission of copies of dismissals of his administrative remedy requests."); Frazier v. Kelley, No. 4:20-CV-00434-KGB, 2020 U.S. Dist. LEXIS 90821, at *70 (E.D. Ark. May 19, 2020) (*unpublished*) ("Defendants claim to have no record of Mr. Frazier's grievance, yet there is record evidence of a grievance submitted by Mr. Frazier signed for by an ADC staff member."); Williams v. Hesse, No. 9:16-CV-1343 (GTS/TWD), 2020 U.S. Dist. LEXIS 29551, at *10–12 (N.D.N.Y. Feb. 19, 2020) (*unpublished*) (noting plaintiff produced documentation of an exhausted grievance defendants had denied existed, leading to withdrawal of the exhaustion defense), *report and recommendation adopted*, 2020 U.S. Dist. LEXIS 29551 (N.D.N.Y. Mar. 26, 2020) (*unpublished*); Dorlette v. Wu, No. 3:16-CV-318 (VAB), 2019 U.S. Dist. LEXIS 45737, at *18 (D. Conn. Mar. 20 2019) (*unpublished*) (noting defendants claimed they had submitted all of plaintiff's requests seeking administrative relief, but the plaintiff produced a Health Services Review form defendants omitted), *appeal dismissed,* No. 19-1292, 2020 U.S. App. LEXIS 14595 (2d Cir. Jan. 24, 2020) (*unpublished*); *see also* Banks v. Patton, 743 F. App'x 690, 695 (7th Cir. 2018) (*unpublished*) (noting that court found evidence in the record of two grievances defendants had denied existed).

394. Wyatt v. Terhune, 315 F.3d 1108, 1120 (9th Cir. 2003) (noting that "Appeal Record" did not sufficiently establish subject matter of plaintiff's appeal); Almy v. Dzurenda, No. 3:17-CV-00045-MMD-WGC, 2019 U.S. Dist. LEXIS 27654, at *12 (D. Nev. Jan. 18, 2019) (*unpublished*) (admonishing defendants to produce actual grievance documentation rather than summaries in the future), *report and recommendation adopted*, 2019 U.S. Dist. LEXIS 26713 (D. Nev. Feb. 20, 2019) (*unpublished*), *appeal dismissed*, No. 19-15422, 2019 U.S. App. LEXIS 18433 (9th Cir. June 19, 2019) (*unpublished*); Ned v. Rardin, No. 3:16-CV-251-KRG-KAP, 2019 U.S. Dist. LEXIS 16767, at *8 (W.D. Pa. Jan. 31, 2019) (*unpublished*) (noting unreliability of Bureau of Prisons' "foundationless summary of the contents of grievances" where the grievances themselves are not retained), *report and recommendation adopted as modified*, 2019 U.S. Dist. LEXIS 46779 (W.D. Pa. Mar. 21, 2019) (*unpublished*), *aff'd sub nom.* Ned v. Kardin, No. 19-1825, 779 F. App'x 75 (3d Cir. 2019) (per curiam) (*unpublished*); Yahtues v. Dionne, No. 16-cv-174-SM, 2018 U.S. Dist. LEXIS 161751, at *18 (D.N.H. Sept. 21, 2018) (*unpublished*) (noting inaccuracy of defendants' summary list of grievances and their subject matter).

395. FED. R. CIV. P. 12(b).

396. *See, e.g.*, Nottingham v. Finsterwald, No. 13-10398, 582 F. App'x 297, 298 (5th Cir. 2014) (per curiam) (*unpublished*) (holding defense not waived because it was "raised it at a pragmatically sufficient time and Nottingham was not prejudiced in his ability to respond"); Campfield v. Tanner, No. 10-1151 section "S" (5), 2011 U.S. Dist. LEXIS 105584, at *14 (E.D. La. Aug. 16, 2011) (*unpublished*) (allowing exhaustion defense raised for the first time in response to plaintiff's summary judgment motion, since it was raised at a "pragmatically sufficient time" and plaintiff was not prejudiced), *report and recommendation adopted as modified*, 2011 U.S. Dist. LEXIS 105577 (E.D. La. Sept. 19, 2011) (*unpublished*); *see also* Johnson v. Johnson, 385 F.3d 503, 516 n.7 (5th Cir. 2004) (holding unpleaded non-exhaustion defense raised by motion for judgment on the pleadings was raised at a "pragmatically sufficient time" and was not waived). *Contra*, Louis-Charles v. Courtwright, No. 9:11-CV-147 (GLS/TWD), 2014 U.S. Dist. LEXIS 14215, at *12 (N.D.N.Y. Jan. 7, 2014) (*unpublished*) (holding defendants who failed to preserve non-exhaustion defense by pleading it "are not entitled to summary judgment on exhaustion grounds"), *report and recommendation adopted as modified by*, 2014 U.S. Dist. LEXIS 13448 (N.D.N.Y. Feb. 4, 2014) (*unpublished*); Santos v. Delaney, No. 09-3437, 2014 U.S. Dist. LEXIS 6144, at *16–17 (E.D. Pa. Jan. 17, 2014) (*unpublished*) (holding failure to plead non-exhaustion bars defendant from "belatedly" raising it by summary judgment motion).

397. Massey v. Helman, 196 F.3d 727 (7th Cir. 1999); Castillo v. Rodas, No. 09 Civ. 9919 (AJN), 2014 U.S. Dist. LEXIS 41282, at *48–49 (S.D.N.Y. Mar. 25, 2014) (*unpublished*) (holding filing of amended complaints after an initial summary judgment motion meant that the defendants, who pled non-exhaustion in their amended

exhaustion defense only in extreme cases and in those cases where you can show your case was harmed by the delay in raising it.[398]

Ordinarily, 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.[399] However, a district court may grant permission for an interlocutory appeal if it thinks resolving the exhaustion issue is urgent enough.[400]

8. Exhaustion and Statutes of Limitations

Most courts have held that the statute of limitations (the amount of time you have to file your case) is tolled (paused) while you are exhausting administrative remedies.[401] Tolling during exhaustion means that the limitations period does not run while you are exhausting. Some decisions apply state law tolling rules to reach that conclusion.[402] Other decisions in a few jurisdictions say that state law

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answer, could pursue a second summary judgment motion claiming non-exhaustion); Jackson v. Gandy, 877 F. Supp. 2d 159, 176 (D.N.J. 2012). *But see* Carr v. Hazelwood, No. 7:07cv00001, 2008 U.S. Dist. LEXIS 81753, at *4 (W.D. Va. Oct. 8, 2008) (*unpublished*) (holding defendant cannot as a matter of right add a new affirmative defense of exhaustion in response to an amended complaint that does not change the theory of plaintiff's case), *report and recommendation adopted*, 2008 U.S. Dist. LEXIS 88672 (W.D. Va. Nov. 3, 2008) (*unpublished*).

398. Keup v. Hopkins, 596 F.3d 899, 903, 904-05 (8th Cir. 2010) (holding exhaustion defense was waived by failure to raise it at trial after earlier denial of summary judgment); Handberry v. Thompson, 446 F.3d 335, 343 (2d Cir. 2006) (noting that plaintiffs could have exhausted and returned to court had the defense been timely raised); Sutton v. Ghosh, No. 10-C-08137, 2015 U.S. Dist. LEXIS 123352, at *25 n.12 (N.D. Ill. Sept. 16, 2015) (*unpublished*) (holding non-exhaustion defense forfeited by failure to assert it until after fact discovery was completed, in light of circuit precedent directing that exhaustion should be resolved before merits discovery and ruling; Norington v. Poland, No. 1:05-cv-0063-SEB-JMS, 2009 U.S. Dist. LEXIS 117397, at *2–5 (S.D. Ind. Dec. 15, 2009) (*unpublished*) (holding exhaustion defense that was pled, but not pursued for four years until the time of trial, was waived); 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); Hightower v. Nassau County Sheriff's Dept., 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. 2004). *Compare* 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). Norington v. Poland, No. 1:05-cv-0063-SEB-JMS, 2009 U.S. Dist. LEXIS 117397, at *2–5 (S.D. Ind. Dec. 15, 2009) (*unpublished*) (holding exhaustion defense that was pled, but not pursued for four years until the time of trial, was waived).

399. Abu-Jamal v. Kerestes, 779 F. App'x 893, 899 (3d Cir. 2019) (*unpublished*); Henricks v. Pickaway Corr. Inst., 782 F.3d 744, 752 (6th Cir. 2015); Langford v. Norris, 614 F.3d 445, 456–457 (8th Cir. 2010); Davis v. Streekstra, 227 F.3d 759, 762–763 (7th Cir. 2000) (holding that the defendant had to wait until the case was decided before appealing on an exhaustion issue).

400. See 28 U.S.C. § 1292(b) (allowing certification for appeal of "controlling question of law" under specified circumstances, subject to court of appeals' discretion); Pavey v. Conley, No. 3:03-CV-662 RM, 2006 U.S. Dist. LEXIS 90523, at *4 (N.D. Ind. Dec. 14, 2006) (*unpublished*) (certifying question of proper procedural handling of exhaustion for interlocutory appeal), *rev'd*, 544 F.3d 739 (7th Cir. 2008). *But see* Estrada v. White, No. 2:14-CV-149, 2015 U.S. Dist. LEXIS 106172, *6–7 (S.D. Tex. Aug. 12, 2015) (declining to certify for interlocutory appeal the question whether the remedy was available, since it was ultimately factual and not a question of law).

401. Gonzalez v. Hasty, 651 F.3d 318, 322 (2d Cir. 2011) (quoting decisions explaining that equitable tolling is meant to avoid unfairness to persons not at fault for a late filing, and citing earlier decisions holding limitations is tolled for PLRA exhaustion, without clarifying whether it relied on state law or federal common law principles); Brown v. Valoff, 422 F.3d 926, 943 (9th Cir. 2005) (stating "we agree with the uniform holdings of the circuits that have considered the question that the applicable statute of limitations must be tolled while a prisoner completes the mandatory exhaustion process;" citing cases relying on state law, but not referring directly to state law); Brown v. Morgan, 209 F.3d 595, 596 (6th Cir. 2000).

402. Johnson v. Rivera, 272 F.3d 519, 521 (7th Cir. 2001) (following state law that the statue of limitations is tolled); Roberts v. Barreras, 484 F.3d 1236, 1240–1243 (10th Cir. 2007) (holding claim was not tolled by state equitable tolling law but appeared to be tolled under statute providing tolling where filing is delayed for "any . . . lawful proceeding"); *See*, *e.g.*, Harris v. Hegmann, 198 F.3d 153, 157 (5th Cir. 1999) (holding that state

prescribes that the limitations period is *not* tolled for exhaustion.[403] You should be sure you know what rule is applicable in your federal circuit, and if you can't figure it out for sure (since it is not settled in some jurisdictions), it is safest to plan to file early enough that you don't need tolling. That means you should file your case within the limitations period calculated from the date of the occurrence you are suing about. For more information about statutes of limitations, please see Part C(5) of Chapter 16 of the *JLM*, "Using 42 U.S.C. § 1983 to Obtain Relief From Violations of Federal Law."

If your case is dismissed for non-exhaustion and you want to try to exhaust and re-file it, or if you completed exhaustion while the now-dismissed case was pending, the limitations period will probably have expired.[404] However, some states have tolling provisions that may apply to such situations, and that will be applied in federal courts, which usually adopt state tolling rules in cases under 42 U.S.C. § 1983.[405] For example, a New York law says that in an action that started on time but was dismissed for any reason *except* for those named in the statute, the plaintiff has six months to file a new lawsuit about the subject matter of the dismissed lawsuit.[406] That six-month period is available in cases dismissed for non-exhaustion.[407]

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administrative proceeding tolled statute of limitations); Leal v. Ga. Dept. of Corr., 254 F.3d 1276, 1280 (11th Cir. 2001) (remanding a case back to the district court to determine if tolling should apply). Two appellate decisions have held that if state law tolls the limitations period for exhaustion, it is tolled under the PLRA, but if state law doesn't toll limitations, then federal law does. Battle v. Ledford, 912 F.3d 708, 713 (4th Cir. 2019); *accord*, Johnson v. Garrison, 805 F. App'x 589, 593 (10th Cir. 2020) (*unpublished*).

403. Pemberton v. Patton, 673 F. App'x 860, 866 (10th Cir. 2016) (*unpublished*) (holding neither § 1997e(a) nor Oklahoma law supports tolling for administrative exhaustion; holding claim time-barred where exhaustion took 21 months and suit was filed after the two-year statute of limitations had expired); Braxton v. Zavaras, 614 F.3d 1156, 1160 (10th Cir. 2010) (holding there is no tolling for exhaustion under Colorado law, and equitable tolling did not apply where plaintiffs were insufficiently diligent in pursuing their claim without tolling); Jackson v. Crawford, No. 12-4018, 2015 U.S. Dist. LEXIS 14222, 2015 WL 506233, *10–11 (W.D. Mo. Feb. 6, 2015) (*unpublished*) (holding limitations was not tolled under Missouri law, which limits tolling to categories specified by the legislature and to instances where a plaintiff was "actively misled" or was "in some extraordinary way prevented [] from asserting his rights"); Adams v. Wiley, No. 09-cv-00612-MSK-KMT, 2010 U.S. Dist. LEXIS 14229, *4–5 (D. Colo. Feb. 10, 2010) (*unpublished*) (similar to Braxton), *aff'd*, 398 F. App'x 372 (10th Cir. 2010); Smith v. Wilson, No. 3:09-CV-133, 2009 U.S. Dist. LEXIS 98594, *6–7 (N.D. Ind. Oct. 22, 2009) (*unpublished*) (denying tolling where state law limited statutory tolling to persons less than eighteen years of age, mentally incompetent, or out of the United States, and plaintiff was not entitled to equitable tolling).

404. You may not be allowed to exhaust after your case is dismissed for non-exhaustion 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(6) of this Chapter for more information. If you have been released in the interim, your release means that a *new* case will not be "brought by a prisoner," so you will no longer be subject to the PLRA and won't have to worry about this problem.

405. Hardin v. Straub, 490 U.S. 536, 538–539 (1989); Board of Regents v. Tomanio, 446 U.S. 478, 483–486 (1980) (holding that state tolling rules are applicable in § 1983 actions).

406. N.Y. C.P.L.R. § 205(a) (1999). The statute provides that an action that "is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits" is entitled to this six-month refiling period. It 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).

407. *See* Villante v. Vandyke, 93 F. App'x 307, 309–310 (2d Cir. 2004) (*unpublished*) (noting Attorney General's office's concession that claims dismissed for non-exhaustion can be reinstated under this statute); Rivera v. Pataki, 01 Civ. 5179 (MBM), 2003 U.S. Dist. LEXIS 11266, at *31, 32 n.13 (S.D.N.Y. July 1, 2003) (*unpublished*) (reading the statute the same way).

In some cases, courts have applied the doctrine of equitable tolling to toll the limitations period for exhaustion, and sometimes for actions brought and then dismissed for non-exhaustion, under circumstances where it would be unfair to dismiss the plaintiff's case based on the statute of limitations.[408]

Claims may be validly exhausted even if the exhaustion occurred outside the limitations period.[409]

F. Physical Injury Requirement: Section 1997e(e) of the PLRA

Section 1997e(e) of the PLRA states:

> 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 or the commission of a sexual act (as defined in section 2246 of title 18).[410]

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 or the commission of a sexual act (as defined in section 2246 of title 18).[411]

Note that this FTCA section applies only to people convicted of felonies; it does not apply to detainees or those convicted of misdemeanors. However, section 1997e(e) applies to all people who are incarcerated. As of the publication of this Manual, courts have not addressed whether § 1997e(e) restricts FTCA cases that are not within the scope of the FTCA provision, though several courts have applied § 1997e(e) in FTCA cases where the differences between the provisions do not make any practical difference. When they conflict—that is, when a federal pre-trial detainee or misdemeanant brings a case under the FTCA—the well-known statutory construction principle that "the specific governs the general" suggests that § 1997e(e), the more general provision, would not apply, and the more specific FTCA provision limiting the physical injury requirement to persons serving time or awaiting sentencing for a felony would apply instead.[412]

Courts have held the physical injury requirement is constitutional since it only applies to damage claims (damages are the money awarded by a court to a person who has suffered injury or harm).[413]

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

409. Beckett v. Dept. of Corr., No. 1:CV-10-0050, 2014 U.S. Dist. LEXIS 100890, at *54 n.9 (M.D. Pa. July 24, 2014) (*unpublished*) (holding claim exhausted where grievance was decided outside the limitations period (action was timely because limitations was tolled during exhaustion)), *aff'd*, 597 F. App'x 665 (3d Cir. 2015) (per curiam) (*unpublished*); Harrison v. Stalder, No. 06-2825, 2006 U.S. Dist. LEXIS 88277, at *2 (E.D. La. Dec. 5, 2006) (*unpublished*) (granting defendants' motion to dismiss for failure to exhaust administrative remedies).

410. 42 U.S.C. § 1997e(e).

411. 28 U.S.C. § 1346(b)(2).

412. *See* RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 566 U.S. 639, 645, 132 S. Ct. 2065, 2071, 182 L. Ed. 2d 967 (2012) (holding that a more specific provision that seems to contradict a more general one should be regarded as an exception to the general provision).

413. See Davis v. District of Columbia, 158 F.3d 1342, 1346–1347 (D.C. Cir. 1998), a case in which an

Section 1997e(e) refers to actions "brought by a prisoner," so the rule does not apply to people who sue after they are released from prison.[414] It does apply to people who file their lawsuits in prison and are later released.[415] If a case is dismissed under this statute, dismissal should be without prejudice. When dismissal is without prejudice, you may refile your case once you are no longer in jail or prison as long as the statute of limitations (the law that says how long you have to bring your case) has not expired.[416]

The physical injury requirement applies to "injury suffered while in custody," which is broader than "prison conditions," the phrase used in the administrative exhaustion requirement.[417] "Injury suffered while in custody" includes injury sustained on arrest,[418] and as one court has said, "any situation in which a reasonable person would feel a restraint on his movement such that he would not feel free to leave."[419] The same court has held that § 1997e(e) applies to injury suffered in custody, even if the custody had nothing to do with the plaintiff's current incarceration.[420]

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incarcerated person argued that 1997e(e) violated his right to equal protection and heavily burdened his Fifth Amendment right of access to the courts. The court determined that 1997e(e) did not restrict claims for declaratory or injunctive relief; it only 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 the courts. *See also* Zehner v. Trigg, 133 F.3d 459, 461–463 (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).

414. Harris v. Garner, 216 F.3d 970, 976–980 (11th Cir. 2000) (*en banc*) (holding that 1997e(e) applies to a complaint filed while the plaintiff was detained in a jail, prison, or another correctional facility); Kerr v. Puckett, 138 F.3d 321, 323 (7th Cir. 1998) (holding that 1997e(e) did not apply to a formerly incarcerated person who filed a complaint after he was released from prison). A conflicting decision, Cox v. Malone, 199 F. Supp. 2d 135, 140 (S.D.N.Y. 2002), *aff'd*, Cox v. Malone, 56 F. App'x. 43, 44 (2d Cir. 2003) (*unpublished*), contradicts the statutory language and has been rejected by subsequent decisions. *See* Hayes v. City of New York, No. 4370 (LAK), 2014 U.S. Dist. LEXIS 133919, at *1–2 (S.D.N.Y. Sept. 15, 2014) (*unpublished*); In re Nassau County Strip Search Cases, No. 99-CV-2844 (DRH), 2010 U.S. Dist. LEXIS 99783, at *19–20 (E.D.N.Y. Sept. 22, 2010) (*unpublished*) (holding that § 1997e(e) only applies when a plaintiff is incarcerated at the beginning of the lawsuit, and stating that *Cox v. Malone* is unpersuasive) ; Mills v. Grant Cnty. Detention Ctr., No. 07-74-DLB, 2009 WL 10675152, at *2 (E.D. Ky. Mar. 17, 2009) (*unpublished*) (stating the court is unpersuaded by *Cox v. Malone*, and noting that several other courts have also rejected the case's reasoning); Sutton v. Hopkins County, No. 4:03CV-003-M, 2005 U.S. Dist. LEXIS 34698, at *12–13 (W.D .Ky. Dec. 19, 2005) (*unpublished*) (rejecting *Cox v. Malone* and holding that § 1997e(e) does not apply to formerly incarcerated people); Rose v. Saginaw County, 232 F.R.D. 267, 277 (E.D. Mich. 2005) (rejecting the reasoning in *Cox v. Malone* because "it ignores the plain language of the statute.").

415. Harris v. Garner, 216 F.3d 970, 985 (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).

416. 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 (money) damages.

417. *See* 42 U.S.C. § 1997e(a) (exhaustion requirement).

418. Napier v. Preslicka, 314 F.3d 528, 533 (11th Cir. 2002) (holding § 1997e(e) applies to "injuries suffered during custodial episodes, even if such custody occurred outside prison walls," and noting arrest "is considered the archetype of a situation that results in *Miranda* custody" (citing Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612, 16 L. Ed. 2d 694, 706 (1966)), *rehearing denied,* Napier v. Preslicka, 331 F.3d 1189 (11th Cir. 2003).

419. *See* Quinlan v. Personal Transport Servs. Co., 329 F. App'x 246, 249 (11th Cir. 2009) (*per curiam*) (*unpublished*) (addressing a plaintiff who was restrained and caged during extradition).

420. Napier v. Preslicka, 314 F.3d 528, 532–534 (11th Cir. 2002) (holding that 42 U.S.C. § 1997e(e) of the Prison Litigation Reform Act applied to claims regarding the arrest of an imprisoned plaintiff and claims unrelated to the current incarceration of that plaintiff), *rehearing denied*, 331 F.3d 1189 (11th Cir. 2003), *cert denied,* 540 U.S. 1112, 124 S. Ct. 1038, 157 L. Ed. 2d 901 (2004). This interpretation sharply divided both the panel and the court as a whole and produced strong dissents.

The Eleventh Circuit has held that in a case removed to federal court from state court (in other words, when a case begins in state court and later is moved to federal court by the defendants), § 1997e(e) does not apply to claims based only on state law.[421] This holding is questionable. A number of lower courts have disagreed, holding the term "Federal civil action" means all "claims brought in federal court, not merely . . . claims founded on federal law."[422] It is also questionable whether § 1997e(e) applies at all to actions originally filed in state court. The statute says that "no Federal civil action *may be brought*" for mental or emotional injury without physical injury.[423] The phrase "no Federal civil action may be brought" suggests that whether § 1997e(e) applies depends on whether the case is a "Federal Civil Action" at the time the case is filed. If a "federal civil action" is a case in federal court, a lawsuit filed in state court is not a "[f]ederal civil action" when it is filed. That reasoning would mean section 1997e(e) of the PLRA should not apply to any part of a case filed in state court under any circumstances, even after the case was removed to federal court. Yet, there are no decisions interpreting § 1997e(e) in this way (and there is one case that interprets §1997e(e) in the opposite way).[424]

1. What Does Section 1997e(e) Do?

Section 1997e(e) prohibits "action[s] . . . for mental or emotional injury."[425] However, courts have interpreted it as prohibiting damages for mental or emotional injury, not prohibiting actions as a whole.[426] Most courts have held that section 1997e(e) prohibits compensatory (money) damages for mental or emotional injury, while allowing punitive damages (damages to punish the defendant when his behavior was very harmful) and nominal damages (very small amounts of money).[427] One circuit

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421. Mitchell v. Brown & Williamson Tobacco Corp., 294 F.3d 1309, 1315 (11th Cir. 2002) (finding that section 1997e(e) did not apply because the action was filed in state court on "solely alleged state-law claims unrelated to prison conditions.")

422. Hood v. Balido, No. 3:02-CV-0669-P, 2002 U.S. Dist. LEXIS 10137, at *1 (N.D. Tex. June 4, 2002) (*unpublished*); *accord*, Wagner v. Texas Dept. of Criminal Justice, No. 1:15-CV-177-BL, 2018 U.S. Dist. LEXIS 75278, at *20 (N.D. Tex. May 3, 2018) (*unpublished*); Jacobs v. Penn. Dept. of Corr., No. 04-1366, 2011 U.S. Dist. LEXIS 60869, at *23 (W.D.Pa. June 7, 2011) (*unpublished*) (holding federal civil action means "an action in which civil claims over which the federal court has jurisdiction are brought, i.e., all claims over which the court has original jurisdiction under 28 U.S.C. § 1331, and supplemental jurisdiction under 28 U.S.C. § 1367"); Schonarth v. Robinson, No. 06-cv-151-JM, 2008 U.S. Dist. LEXIS 13596, at *14 (D.N.H. Feb. 22, 2008) (*unpublished*) ("I agree with the line of cases which conclude that § 1997e(e) applies to all actions that are brought in federal court which seek damages for mental or emotional injury, regardless of whether the underlying cause of action is based on federal or state law."); Hines v. Oklahoma, No. CIV-07-197-R, 2007 U.S. Dist. LEXIS 77291, at *6 (W.D. Okla. Oct. 17, 2007) (*unpublished*). *Contra* Vanvalkenburg v. Oregon Dept. of Corr., No. 3:14-cv-00916-BR, 2016 U.S. Dist. LEXIS 58438, at *36–37 (D. Or. May 2, 2016) (*unpublished*) (concluding that the plaintiff's claim which began in state court and moved to federal court was a "federal civil action").

423. 42 U.S.C. § 1997e(e) (emphasis added).

424. Vanvalkenburg v. Oregon Dept. of Corr., No. 3:14-cv-00916-BR, 2016 U.S. Dist. LEXIS 58438, at *35–36 (D.Or. May 2, 2016) (*unpublished*) (holding that where a plaintiff's claim moved from state to federal court, § 1997e(e) applied and required a showing of physical injury).

425. 42 U.S.C. § 1997e(e).

426. Calhoun v. DeTella, 319 F.3d 936, 940 (7th Cir. 2003) (holding the statute is a limitation on damages for mental or emotional injury, not "a filing prerequisite for the federal action itself"); *accord* Rasho v. Elyea, 856 F.3d 469, 477 (7th Cir. 2017); Munn v. Toney, 433 F.3d 1087, 1089 (8th Cir. 2006).

427. Smith v. Peters, 631 F.3d 418, 421 (7th Cir. 2011)("Prison officials who recklessly expose a prisoner to a substantial risk of a serious physical injury . . . are subject to those remedies that are not barred by section 1997e(e)," which include nominal and punitive damages); Hutchins v. McDaniels, 512 F.3d 193, 196–198 (5th Cir. 2007) ("We hold today that Hutchins may recover nominal or punitive damages, despite § 1997e(e), if he can successfully prove that McDaniels violated his Fourth Amendment rights."); Royal v. Kautzky, 375 F.3d 720, 723 (8th Cir. 2004) (holding that nominal and punitive damages were available to plaintiff); Calhoun v. DeTella, 319 F.3d 936, 943 (7th Cir. 2003) (holding that nominal damages are included in the forms of a relief that a plaintiff is entitled to under § 1997e(e)); Oliver v. Keller, 289 F.3d 623, 629–630 (9th Cir. 2002) (holding that where plaintiff alleged his constitutional rights were violated, his claims for nominal and punitive damages were allowed under § 1997e(e)); Thompson v. Carter, 284 F.3d 411, 418 (2d Cir. 2002) ("both parties and three of our sister circuits

has held that section 1997e(e) prohibits punitive as well as compensatory damages for mental or emotional injury without physical injury,[428] though it along with all other circuits to date holds that nominal damages are not restricted.[429] Declaratory relief (when a court declares the plaintiff's rights) and injunctive relief (when the court orders a person to start or stop doing something) are not affected by section 1997e(e).[430]

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 for all forms of damages.[431]

Most courts assume that section 1997e(e) creates a pleading requirement, even though the statute does not say physical injury must be pled. Many claims for damages are dismissed at initial screening[432] or on a motion to dismiss[433] because the plaintiff does not allege physical injury.[434] One

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agree that Section 1997e(e) does not limit the availability of nominal damages for the violation of a constitutional right or of punitive damages."); Searles v. Van Bebber, 251 F.3d 869, 878–881 (10th Cir. 2001) ("the rule seems to be that an award of nominal damages is mandatory upon a finding of a constitutional violation, as the jury found here."); Allah v. Al-Hafeez, 226 F.3d 247, 251–252 (3d Cir. 2000); *see* Aref v. Lynch, 833 F.3d 242, 266 (D.C. Cir. 2016) (holding plaintiffs who allege "actual harms," including intangible (nonphysical) harms that violate the Constitution, may seek punitive as well as nominal damages).

428. Al-Amin v. Smith, 637 F.3d 1192, 1196–1199 (11th Cir. 2011) (holding the question was decided previously in Smith v. Allen, 502 F.3d 1255, 1271 (11th Cir. 2007) and in Harris v. Garner, 216 F.3d 970 (11th Cir. 2000)).

429. Brooks v. Warden, 800 F.3d 1295, 1308–1309 (11th Cir. 2015) (stating "both the text and purpose of the PLRA support the conclusion that § 1997e(e) does not bar a prisoner from recovering nominal damages without a showing of physical injury").

430. Hutchins v. McDaniels, 512 F.3d 193, 197 (5th Cir. 2007) (noting that § 1997e(e) does not prohibit declaratory or injunctive relief when an incarcerated person's constitutional rights are violated); Royal v. Kautzky, 375 F.3d 720, 723 (8th Cir. 2004) (stating that Congress did not intend for § 1997e(e) to prohibit all relief); Calhoun v. DeTella, 319 F.3d 936, 940 (7th Cir. 2003) (citing Zehner v. Trigg, 133 F.3d 459, 462 (7th Cir. 1997)); Mitchell v. Horn, 318 F.3d 523, 533 (3d Cir. 2003) ("We also agree with several other courts of appeals that § 1997e(e) does not apply to claims seeking injunctive or declaratory relief."); Thompson v. Carter, 284 F.3d 411, 418 (2d Cir. 2004) ("First, we agree with all the circuits to have addressed the issue . . . that Section 1997e(e) does not prevent a prisoner from obtaining injunctive or declaratory relief."); Harper v. Showers, 174 F.3d 716, 719 (5th Cir. 1999) ("Section 1997e(e) prohibits only recovery of the damages Harper seeks absent a physical injury. He also seeks a declaration that his rights have been violated, and he requests injunctive relief to end the allegedly unconstitutional conditions of his confinement; these remedies survive § 1997e(e).") (footnote omitted); Perkins v. Kansas Dept. of Corr., 165 F.3d 803, 808 (10th Cir. 1999) (holding that even if the plaintiff could not receive money damages, he could still receive injunctive relief for restrictions placed on him); Davis v. District of Columbia, 158 F.3d 1342, 1346 (D.C. Cir. 1998) (rejecting the plaintiff's argument that § 1997e(e) prohibits declaratory and injunctive relief); *see* Mann v. Wilkinson, No. C2-00-706, 2009 U.S. Dist. LEXIS 47089, at *1–2 (S.D.Ohio, May 20, 2009) (*unpublished*) (granting injunctive relief while holding damages were prohibited by § 1997e(e)).

431. 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."); *see* 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.").

432. Please see Part D of this Chapter for more information on the initial screening.

433. Please see Part D of this Chapter for more information on Motions to Dismiss.

434. *See, e.g.*, Brooks v. Warden, 800 F.3d 1295, 1298 (11th Cir. 2015) ("Because Brooks has not alleged any physical injury resulting from his hospital stay, under the Prison Litigation Reform Act, 42 U.S.C. § 1997e(e), he cannot recover compensatory or punitive damages."); DeMoss v. Crain, 636 F.3d 145, 151 (5th Cir. 2011) (stating compensatory damages for religious deprivation claim are "barred by 42 U.S.C. § 1997e(e) because [plaintiff] has not alleged any physical injury stemming from the cell restriction policy"); Brazil v. Rice, 308 F. App'x 186, 187 (9th Cir. 2009) (*unpublished*) ("The district court properly dismissed the Eighth Amendment claim because the amended complaint does not allege that Brazil suffered any physical injury."); Harden-Bey v. Rutter, 524 F.3d 789, 795–796 (6th Cir. 2008) ("Even if we read his complaint to allege emotional or mental injuries, Harden-Bey cannot bring an Eighth Amendment claim for such injuries because he did not allege a physical

federal circuit has held that § 1997e(e) creates an affirmative defense (a defense the defendant offers to justify his action, so that even if he committed the act, he should still be found not guilty),[435] like the administrative exhaustion requirement.[436] That would mean the defendants have to raise the physical injury requirement in their answer. A few courts have held that it does not create either a pleading requirement or an affirmative defense, but just a rule about what damages are recoverable.[437] That seems to us the correct approach, but since most courts have held physical injury is a pleading requirement, you should probably describe in your complaint whatever physical injury, if any, that you are claiming.

If your case gets past screening and a motion to dismiss, it may be the subject of a motion for summary judgment, where you will need to provide evidence of any physical injury you claim you suffered (which can include your own affidavit or declaration describing your injury as well as documentary evidence).[438]

2. What Is "Mental or Emotional Injury"?

There is a strong conflict among federal courts about 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."[439] A court taking this view will hold that deprivations of intangible constitutional rights—which are rights like freedom of speech and religion or the due process of law—are not "mental or emotional injury" and incarcerated people can receive damages for constitutional violations regardless of whether they sustained any physical injury. Several federal appeals courts have taken this view.[440]

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injury. See 42 U.S.C. § 1997e(e). . . ."); Allah v. Al-Hafeez, 226 F.3d 247, 250 (3d Cir. 2000) ("Under § 1997e(e), however, in order to bring a claim for mental or emotional injury suffered while in custody, a prisoner must allege physical injury. . . ."); Robinson v. Page, 170 F.3d 747, 748–749 (7th Cir. 1999) (holding that actions or claims asserting mental or emotional injury should be dismissed if physical injury is not pled).

435. Douglas v. Yates, 535 F.3d 1316, 1320 (11th Cir. 2008) ("we conclude that the limitation of complaints by prisoners for emotional injury, 42 U.S.C. § 1997e(e), provides an affirmative defense.").

436. Please see Part E(1) and Part E(3) of this Chapter for more information on the administrative exhaustion requirement.

437. Malik v. City of New York, No. 11 Civ. 6062 (PAC) (FM), 2012 U.S. Dist. LEXIS 118358, at *47 (S.D.N.Y. Aug. 15, 2012) *(unpublished)* ("Furthermore, a plaintiff need not plead physical injury in a complaint covered by the PLRA."), *report and recommendation adopted*, No. 11 Civ. 6062 (PAC) (FM), 2012 U.S. Dist. LEXIS 141305 (S.D.N.Y. Sept. 28, 2012) (*unpublished*); In re Nassau County Strip Search Cases, No. 99-CV-2844 (DRH), 2010 U.S. Dist. LEXIS 99783, at *2 (E.D.N.Y. Sept. 22, 2010) (*unpublished*) ("As § 1997e(e) is a limitation on recovery and not an affirmative defense to liability, it need not be pled [by defendants].").

438. Please see Part E(7) of this Chapter for more information on summary judgment and exhaustion.

439. 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).

440. Aref v. Lynch, 833 F.3d 242 (D.C. Cir. 2016) (holding "not every non-physical injury is by default a mental or emotional injury"); King v. Zamiara, 788 F.3d 207, 212–213 (6th Cir. 2015) (holding "the plain language of the statute does not bar claims for constitutional injury that do not also involve physical injury"); Wilcox v. Brown, 877 F.3d 161, 170 (4th Cir. 2017) (stating court is "squarely in the . . . camp" of circuits holding that First Amendment violations are compensable independently of physical, mental, or emotional injury (citing Piver v. Pender Cty. Bd. of Educ., 835 F.2d 1076, 1082 (4th Cir. 1987) (holding that an "injury to a protected first amendment interest can itself constitute compensable injury wholly apart from any emotional distress, humiliation and personal indignity, emotional pain, embarrassment, fear, anxiety and anguish suffered by plaintiffs" (internal quotation marks omitted))); 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."); Cassidy v. Ind. Dept. of Corr., 199 F.3d 374, 375–377 (7th Cir. 2000) (dismissing claims for mental and emotional harm stemming from an underlying constitutional violation but allowing plaintiff to pursue "all of his other claims for damages"—which included "(2) the loss of the opportunity to enjoy an early discharge from prison or the chance

Other courts have taken a much broader view of mental or emotional injury. In effect, they say any injury that is not physical is either mental or emotional—which means that constitutional violations, like being deprived of your right to due process and religious freedom, are merely mental or emotional and you cannot recover compensatory (money) damages for them unless they somehow caused physical injury.[441]So, for example, an incarcerated person who was held in solitary confinement for a year based on retaliation for exercise of his First Amendment rights was held entitled only to $1.00 in nominal damages because the court thought his injury—a year's loss of the limited liberty of ordinary prison confinement—was only mental or emotional.[442] There are many similar decisions in "broader view" cases holding prisoners cannot recover compensatory damages for injuries such as unlawful arrest and confinement,[443] racial discrimination,[444] abusive conditions of confinement,[445] and many others.[446] 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. Property deprivations are of course not mental or emotional injury,[447] though they may also cause mental or emotional injury for which prisoners cannot recover under the broader interpretation.[448]

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of a pardon or clemency based on efforts to rehabilitate himself; (3) the loss of participation in and advantages of activities to which the non-disabled had access while in prison, and the loss of the freedom of movement and social contact; (4) a diminished quality of life; and (5) the loss of access to programs, services and activities guaranteed by federal law"); Rowe v. Shake, 196 F.3d 778, 781–782 (7th Cir. 1999) ("A prisoner is entitled to judicial relief for a violation of his First Amendment rights aside from any physical, mental, or emotional injury he may have sustained."); Canell v. Lightner, 143 F.3d 1210, 1213 (9th Cir. 1998) ("[T]he deprivation of First Amendment rights entitles a plaintiff to judicial relief wholly aside from any physical injury he can show, or any mental or emotional injury he may have incurred. Therefore, § 1997e(e) does not apply to First Amendment [c]laims regardless of the form of relief sought.").

441. Geiger v. Jowers, 404 F.3d 371, 374 (5th Cir. 2005) (per curiam) (holding claim that plaintiff was deprived of magazines in violation of the First Amendment involved only mental or emotional injury); Allah v. Al-Hafeez, 226 F.3d 247, 250 (3d Cir. 2000) (holding in a religious freedom case "the only actual injury that *could* form the basis for the award he seeks would be mental and/or emotional injury" (emphasis added)).

442. Pearson v. Welborn, 471 F.3d 732, 744–745 (7th Cir. 2006).

443. 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).

444. Jones v. Pancake, No. 3:06CV-P188-H, 2007 U.S. Dist. LEXIS 84309, at *6–8 (W.D. Ky. Nov. 9, 2007) (*unpublished*) (allowing plaintiff to amend a racial discrimination claim to include relief for nominal and punitive damages).

445. Merchant v. Hawk-Sawyer, 37 F. App'x 143, 145–146 (6th Cir. 2002) (*unpublished*) (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, 719–720 (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).

446. Robinson v. Dept. of Corr., No. 3:07cv5/MCR/EMT, 2007 U.S. Dist. LEXIS 50817, at *10 (N.D. Fla. July 13, 2007) (*unpublished*) (stopping mail and delaying filing of lawsuits as well as deprivation of religious materials), *report and recommendation adopted*, 2007 U.S. Dist. LEXIS 75961 (N.D. Fla. Oct. 12, 2007); Ivy v. New Albany City Police Dept., No. 3:06CV112-P-A, 2006 U.S. Dist. LEXIS 79882, at *1–3 (N.D. Miss. Oct. 30, 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, 565–566 (W.D. Va. 2000) (holding that a complaint that an incarcerated person 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).

447. Thompson v. Carter, 284 F.3d 411, 418 (2d Cir. 2002).

448. Robinson v. Page, 170 F.3d 747, 748 (7th Cir. 1999).

Based on the rulingsdiscussed above that adopt the narrow view of what mental or emotional injury means, you could make a legitimate argument that mental or emotional injury means just what it sounds like,[449] and deprivations of constitutional or statutory rights are separate injuries from mental or emotional injuries, regardless of whether they cause mental or emotional injury as well. If "mental or emotional injury" really meant any injury that is not physical, then there would be no need for the phrase "mental or emotional injury" in the statute; it could just say that no prisoner action can be brought without showing physical injury. That is contrary to one of the basic principles of interpreting statutes: they should not be interpreted in a way that makes any part of them superfluous, *i.e.*, useless.[450] Some courts adopting the narrow interpretation of "mental or emotional injury" have relied on that principle in reaching their conclusions.[451]

That argument will probably not help you if you are in a circuit where the court of appeals has committed itself to the broad approach. However, at least one of those courts has expressed some doubt about the correctness of its position.[452] Note, if you make the argument in the district court, then you will be able to argue the point on appeal.

Some circuits have not yet decided whether to adopt the broader or narrower interpretation of § 1997e(e) as of late 2020. These include:

The First Circuit, where there is no relevant appellate decision. Several district courts there have held that intangible violations of constitutional or other rights are distinct from mental or emotional injury (the narrow interpretation).[453]

449. *See* 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).

450. *See* TRW Inc. v. Andrews, 534 U.S. 19, 31, 122 S. Ct. 441, 449, 151 L. Ed. 2d 339, 350 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." (internal quotation marks and citations omitted)).

451. Aref v. Lynch, 833 F.3d 242, 263 (D.C. Cir. 2016); King v. Zamiara, 788 F.3d 207, 213 (6th Cir. 2015) (citing Amaker v. Haponik, No. 98 Civ. 2663 (JGK), 1999 U.S. Dist. LEXIS 1568, at *7 (S.D.N.Y., Feb. 17, 1999) (*unpublished*)).

452. *See* Carter v. Allen, 940 F.3d 1233, 1237 (11th Cir. 2019) (Martin, J., dissenting from the denial of rehearing en banc) (stating court's broad interpretation of § 1997e(e) is wrong); Carter v. Allen, 940 F.3d 1233,1235–1236 (11th Cir. 2019) (W. Pryor, J., respecting the denial of rehearing en banc) (acknowledging that circuit precedent may require reexamination on the interpretation of § 1997e(e)).

453. Cox v. Massachusetts Dept. of Corr., No. 13-10379-FDS, 2018 U.S. Dist. LEXIS 55482, *18 (D. Mass. Mar. 31, 2018) (*unpublished*) (holding in an ADA case, "in accordance with the reasoning of *Aref* [*v. Lynch*], that a prisoner's inability to access prison programs and services is itself an injury, separate and distinct from a mental and emotional injury, for which the prisoner can recover compensatory damages absent any showing of physical injury or sexual assault"), *appeal dismissed*, No. 18-1399 U.S. App. LEXIS 31923 (1st Cir. July 11, 2018) (*unpublished*); Shaheed–Muhammad v. Dipaolo, 393 F.Supp.2d 80, 107 (D.Mass. 2005) (holding "the violation of a constitutional right is an independent injury that is immediately cognizable and outside the purview of [Section] 1997e(e)"; Shaheed–Muhammad v. Dipaolo 138 F.Supp.2d 99, 107 (D. Mass. 2001); *see also* Ford v. Bender, No. 07-11457-JGD, 2012 U.S. Dist. LEXIS 10090, at *13–14 (D.Mass. Jan. 27, 2012) (*unpublished*) (concluding that § 1997e(e) had to be raised as an affirmative defense, and, in any event, that compensatory damages were available for suits alleging deprivation of constitutional rights (citing Gordon v. Pepe, No. 00-10453-RWZ, 2004 U.S. Dist. LEXIS 16707, at *2 (D.Mass. Aug. 24, 2004) (unpublished))), *motion to amend denied*, No. 07-11457-JGD, U.S. Dist. LEXIS 54890 (D.Mass. Apr. 19, 2012) (*unpublished*) (citations omitted).

In the Second Circuit, there is an unpublished decision that adopts the narrow view (but unfortunately there has yet to be a published decision that adopts this view).[454] District court decisions are mixed but tend towards the narrow view as well.[455]

The Seventh Circuit has at times taken the stance that the narrower interpretation of § 1997e(e) is correct, but has also taken opposite stance in other decision.[456] Not surprisingly, so have district court decisions.[457]

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454. Toliver v. City of New York, 530 F. App'x 90, 93 n.2 (2d Cir. 2013) (*unpublished*) (stating "even if [the plaintiff] is unable to establish that any of the injuries complained of in this action stemmed from an incident in which he suffered physical injuries, [he] may still recover damages for injuries to his First Amendment rights."). A published decision stated that "Section 1997e(e) *applies* to claims in which a plaintiff alleges constitutional violations so that the plaintiff cannot recover damages for mental or emotional injury for a constitutional violation in the absence of a showing of actual physical injury," Thompson v. Carter, 284 F.3d 411 (2d Cir. 2002) (emphasis added), but that statement does not establish *how* § 1997e(e) applies—that is, it doesn't say whether First Amendment and other intangible violations are merely "mental or emotional injur[ies]."

455. *See, e.g.*, Jones v. Annucci, No. 16-CV-3516 (KMK), 2018 U.S. LEXIS 24359, at *8 (S.D.N.Y. Feb. 14, 2018) (*unpublished*) (stating §1997e(e) does not bar compensatory damages for First Amendment violations, which "allege intangible violations of liberty and personal rights" (citations and internal quotation marks omitted)); Russell v. Pallito, No. 5:15-cv-126, 2017 U.S. Dist. LEXIS 42009, at *6 (D.Vt. Mar. 23, 2017) (*unpublished*) (relying on *King v. Zamiara*, 788 F.3d 207 (6th Cir. 2015) and *Aref v. Lynch*, 833 F.3d 242 (D.C. Cir. 2016), cited earlier); Valdez v. City of New York, 11 Civ. 05194 (PAC) (DF), 2013 U.S. Dist. LEXIS 188044, at *21–22 (S.D.N.Y. Sept. 3, 2013) (*unpublished*) (holding in First Amendment religious rights case that "deprivations of liberty and personal rights can give rise to damages separate and apart from those recoverable for any physical injury or emotional suffering"), *report and recommendation adopted*, 2014 U.S. Dist. LEXIS 82508 (S.D.N.Y. June 16, 2014) (*unpublished*); Rosado v. Herard, 12 Civ. 8943 (PGG) (FM), 2014 U.S. Dist. LEXIS 40172, at *13 (S.D.N.Y. Mar 25, 2014) (*unpublished*) (stating "courts in this Circuit have concluded that a physical injury is not required for a prisoner to recover compensatory damages for the loss of a constitutional liberty interest."); Mendez v. Amato, 9:12-CV-560)TJM/CFH), 2013 U.S. Dist. LEXIS 132346, at *20 (N.D.N.Y. Sept. 17, 2013) (*unpublished*) (holding claims based on confinement in Involuntary Protective Custody "involve the loss of such intangibles as liberty through a lack of due process and equal protection" and thus "fall outside of the physical harm requirement of the PLRA"; distinguishing between loss of liberty and emotional suffering); 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.'" (citation omitted))). *Contra*, *e.g.*, Kimbrough v. Fischer, 9:13-CV-100 (FJS/TWD), 2017 U.S. Dist. LEXIS 58412, at *4 (N.D.N.Y. Apr. 11, 2017) (*unpublished*) (holding in case involving segregated confinement that deprivations such as loss of recreation, inability to attend religious services, loss of contact visitations, and loss of certain privileges were not sufficiently distinguished from mental or emotional injury); Amaker v. Goord, 06-CV-490A(Sr), 2015 U.S. Dist. LEXIS 73133, at *1 (W.D.N.Y. June 5, 2015) (*unpublished*) (holding § 1997e(e) bars compensatory damages for religious rights violation and confinement in special housing).

456. *Taking the broad view*: Pearson v. Welborn, 471 F.3d 732, 744–745 (7th Cir. 2006) (holding § 1997e(e) bars damages for a year in solitary confinement); Reed v. Kemper, 673 F. App'x 533, 536–537 (7th Cir. 2016) (*unpublished*) (assuming deprivation of right to marry inflicted only emotional injury). *Taking the narrow view:* Cassidy v. Ind. Dept. of Corr., 199 F.3d 374, 375–378 (7th Cir. 2000) (allowing damages claims in a disability case based on "the loss of participation in and advantages of activities to which the non-disabled had access while in prison, and the loss of the freedom of movement and social contact; . . . a diminished quality of life; and . . . the loss of access to programs, services and activities guaranteed by federal law" to go forward); Rowe v. Shake, 196 F.3d 778, 781–782 (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.").

457. *Narrow view*: Baldwin v. Clarke, No. 14-CV-856, 2017 U.S. Dist. LEXIS 20666, at *6 (E.D. Wis. Feb. 14, 2017) (*unpublished*) (in case involving denial of visit with plaintiff's minor child, holding Seventh Circuit "has recognized compensatory damages for non-mental and non-emotional damages in the PLRA context" (citing Aref v. Lynch, 833 F.3d 242, 264 (D.C. Cir. 2016), and its citation to Rowe v. Shake, 196 F.3d 778, 781 (7th Cir. 1999)); Pippin v. Frank, 04-C-582-C, 2005 U.S. Dist. LEXIS 5576, at *1 (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). *Broad view*: Shaw v. Wall, 12-cv-497-wmc, 2015 U.S. Dist. LEXIS 55259, at *1–3 (W.D. Wis. Apr. 28, 2015) (*unpublished*) (holding absence of non-*de minimis* (none minor) physical injury bars compensatory damages for disability discrimination in access to prison canteen; citing Cassidy v. Ind. Dept. of Corr., 199 F.3d 374, (7th Cir. 2000) but ignoring its holding about damages for program

The narrow approach to § 1997e(e) is consistent with tort law, which is supposed to be the basis of the law of damages under 42 U.S.C. § 1983.[458] 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.[459] 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 difference between mental or emotional injury and deprivation of personal liberty is the Second Circuit decision in *Kerman v. City of New York*.[460] In that case, the plaintiff had been placed in a mental hospital against his will, and he claimed 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."[461] A number of courts have relied on the *Kerman* decision in adopting the narrower view of the interpretation of § 1997e(e).[462]

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

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access).

458. 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.").

459. ARTHUR G. SEDGWICK, JOSEPH H. BEALE & THEODORE SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES, 50–51 (8th ed. 1891).

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

461. Kerman v. City of New York, 374 F.3d 93, 125–126 (2d Cir. 2004).

462. Jones v. Annucci, No. 16-CV-3516 (KMK), 2018 U.S. Dist. LEXIS 24359, at *8 (S.D.N.Y. Feb. 14, 2018) (*unpublished*) (stating §1997e(e) does not bar compensatory damages for First Amendment violations, which "allege intangible violations of liberty and personal rights" (citations and internal quotation marks omitted)); Valdez v. City of New York, 11 Civ. 05194 (PAC) (DF), 2013 U.S. Dist. LEXIS 188044, at *21-22 (S.D.N.Y. Sept. 3, 2013) (*unpublished*) (holding in First Amendment religious rights case that "deprivations of liberty and personal rights can give rise to damages separate and apart from those recoverable for any physical injury or emotional suffering"), *report and recommendation adopted*, 2014 U.S. Dist. LEXIS 82508 (S.D.N.Y., June 16, 2014) (*unpublished*); Rosado v. Herard, 12 Civ. 8943 (PGG) (FM), 2014 U.S. Dist. LEXIS 40172, at *10 (S.D.N.Y. Nov. 25, 2013) (*unpublished*) ("Herard's motion mistakenly assumes that, where no physical injury is alleged, the only injury that a plaintiff may suffer as a result of retaliation is mental or emotional harm. The Second Circuit has held, however, that intangible deprivations of liberty and personal rights are distinct from claims for pain and suffering, mental anguish, and mental trauma." (citing Kerman v. City of New York, 374 F.3d 93 (2d Cir. 2004)); claim was for violation of privacy rights by disclosure of HIV status), *report and recommendation adopted as modified*, 2014 U.S. Dist. LEXIS 40172, at *13 (S.D.N.Y. Mar 25, 2014) (*unpublished*) ("Applying *Kerman*, courts in this Circuit have concluded that a physical injury is not required for a prisoner to recover compensatory damages for the loss of a constitutional liberty interest."); Mendez v. Amato, 9:12-CV-560(TJM/CFH), 2013 U.S. Dist. LEXIS 132346, at *20 (N.D.N.Y. Sept. 17, 2013) (*unpublished*) (holding claims based on confinement in Involuntary Protective Custody "involve the loss of such intangibles as liberty through a lack of due process and equal protection" and thus "fall outside of the physical harm requirement of the PLRA"; citing *Kerman*'s distinction between loss of liberty and emotional suffering); Malik v. City of New York, No. 11 Civ. 6062 (PAC) (FM), 2012 U.S. Dist. LEXIS 118358, at *16–17 (S.D.N.Y. Aug. 15, 2012) (*unpublished*) ("The Defendants' motion mistakenly assumes that the only injury that a plaintiff may suffer without a physical injury is mental or emotional harm. The Second Circuit has held, however, that intangible deprivations of liberty and personal rights are distinct from claims for pain and suffering, mental anguish, and mental trauma. *See Kerman* . . . . Malik's religion and retaliation claims allege deprivations of personal rights under the First Amendment which do not fall under the PLRA's physical injury requirement for compensatory damages."), *report and recommendation adopted*, 2012 U.S. Dist. LEXIS 141305 (S.D.N.Y. Sept. 28, 2012) (*unpublished*).

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].
>
> 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 loss 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, making clear that you are seeking damages for the constitutional deprivation separately from any claim of mental or emotional injury. 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 such a case you should say in your complaint "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 follow the suggestions above, since as previously explained some courts are committed to the broad approach to § 1997e(e). Also, even if you win on this point, constitutional rights are very hard to value or give dollar amounts to (meaning that courts will often just award "nominal damages," which are damages in a very low amount).[463] The Supreme Court has warned that non-compensatory damage awards cannot be based on the "abstract 'importance' of a constitutional right."[464] However, courts have made compensatory damage awards for violations of First Amendment and other intangible rights based on the particular circumstances of the violation and not on a claim of mental or emotional injury.[465] You should bring this up to the court if prison officials argue that you can only recover nominal damages.

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463. Williams v. Kaufman Cnty., 352 F.3d 994, 1014–1015 (5th Cir. 2003) (noting the possibility 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).

464. Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 309–310, 106 S. Ct. 2537, 2544, 91 L. Ed. 2d 249, 260 (1986).

465. *See, e.g.*, Sallier v. Brooks, 343 F.3d 868, 880 (6th Cir. 2003) (affirming jury award of $750 in

3. What is "Physical Injury"?

Incarcerated people must show physical injury in order to recover damages for mental or emotional injury under 1997e(e)[466], 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."[467] A "*de minimis*" injury is one where the harm is very small. However, courts disagree over what kinds of injuries go past 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.[468] But a much-cited district court decision says 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 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).[469]

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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 retaliatory 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).

466. 42 U.S.C. § 1997e(e).

467. Siglar v. Hightower, 112 F.3d 191, 193 (5th Cir. 1997); *accord*, Mitchell v. Horn, 318 F.3d 523, 535–536 (3d Cir. 2003); Oliver v. Keller, 289 F.3d 623, 626–627 (9th Cir. 2002); Liner v. Goord, 196 F.3d 132, 135 (2d Cir. 1999); Harris v. Garner, 190 F.3d 1279, 1286 (11th Cir. 1999), *vacated in part and reinstated in part on reh'g*, Harris v. Garner, 216 F.3d 970 (11th Cir. 2000) (en banc).

468. Oliver v. Keller, 289 F.3d 623, 628 (9th Cir. 2002); *accord*, Mengesha v. Stokes, No. 3:16-cv-446-MCR-GRJ, 2017 U.S. Dist. LEXIS 193411, at *7 (N.D. Fla., Nov. 22, 2017) (*unpublished*) (holding that a dislocated shoulder causing severe pain was more than de minimis even though it "popped back into the socket" before plaintiff received medical care and no injury was visible at that time), *report and recommendation adopted*, 2018 U.S. Dist. LEXIS 107160 (N.D.Fla., June 27, 2018) (*unpublished*); Lamb v. Hazel, No. 5:12-CV-00070-TBR, 2013 U.S. Dist. LEXIS 50238, at *9 (W.D.Ky., Apr. 8, 2013) (*unpublished*) (holding injury "can be more than de minimis even though it did not result in a need for medical treatment"). Courts have rejected efforts to read "long-term" into the physical injury requirement. Payne v. Parnell, 246 F. App'x 884, 888 (5th Cir. 2007) (per curiam) (*unpublished*); 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.).

469. Luong v. Hatt, 979 F. Supp. 481, 486 (N.D. Tex. 1997); *see* Jarriett v. Wilson, 162 F. App'x 394, 401 (6th Cir. 2005) (*unpublished*) (citing Luong, holding pain and swelling of previously injured leg while required to stand for hours in "strip cage" were *de minimis*); Johnson v. Correction Corp. of Am., No. 15-cv-2320, 2015 U.S. Dist. LEXIS 165099, at *1 (W.D. La. Nov. 17, 2015) (*unpublished*) (holding plaintiff who alleged an officer stepped on his hand, causing "pain and suffering, swelling, and the loss of use of his hand for some period of time . . . has not alleged an injury that is more than *de minimis*" (citing *Luong* , 979 F. Supp. at 486)), *report and recommendation adopted*, 2015 U.S. Dist. LEXIS 165103 (W.D. La. Dec. 8, 2015) (*unpublished*). *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).

Not surprisingly, several courts have dismissed painful traumatic injuries as *de minimis*.[470] But others have found somewhat minor injuries to be actionable under section 1997e(e).[471]

Several courts have held that the physical results of emotional distress do not qualify as physical injuries under this statute.[472] That view is not supported by the statute's language, and other courts

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470. *See, e.g.*, Dixon v. Toole, 225 F. App'x 797, 799 (11th Cir. 2007) (per curiam) (*unpublished*) (holding "mere bruising" from 17.5 hours in restraints was *de minimis*; incarcerated person actually complained of "welts"); Springer v. Caple, No. 6:15-cv-06026-PKH-BAB, 2017 U.S. Dist. LEXIS 36189, at *5 (W.D. Ark. Jan. 25, 2017) (*unpublished*) (holding sprained ankle treated with over-the-counter pain medication, an ice pack, and an ace bandage was de minimis), *report and recommendation adopted*, 2017 U.S. Dist. LEXIS 35874 (W.D. Ark. Mar. 14, 2017) (*unpublished*), *judgment entered*, 2017 WL 988121 (W.D.Ark., Mar. 14, 2017), *aff'd as modified*, 717 F. App'x 650 (8th Cir. 2018) (per curiam) (*unpublished*), *cert. denied*, 139 S. Ct. 416, (2018); Jeter v. Sample, No. 4:13CV00896, 2015 U.S. Dist. LEXIS 25048, at *14 (N.D. Ohio Feb. 27, 2015) (holding "cut [and] bleeding also slightly swollen" lip to be *de minimis*); Harvard v. Beaudry, No. 3:12cv289/LC/CJK, 2014 U.S. Dist. LEXIS 129402, at *10 (N.D. Fla. Sept. 12, 2014) (holding sore right shoulder and forearm, knot on index finger knuckle, swollen fingers on right hand, scratch on back of right arm were *de minimis* injury); Hollingsworth v. Thomas, No. 13-00480-WS-B, 2014 U.S. Dist. LEXIS 116890, at *4 (S.D. Ala. Aug. 22, 2014) (*unpublished*) (holding plaintiff failed to allege a non-de minimis injury where plaintiff alleged that his hand and fingers were struck with a baton, causing him to scream in severe pain, and resulting in dispensing of pain medication and wrapping of his wrist; "There are no allegations of a broken bone, bruising, swelling, or an abrasion; of the type of medication that he received or the type of wrapping applied; or of the length of time he took pain medication or wore the wrapping."); 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).

471. *See, e.g.*, Moneyham v. United States, No. EDCV 17-329-VBF (KK), 2018 U.S. Dist. LEXIS 133886, at *6 (C.D. Cal., May 31, 2018) (*unpublished*) (holding allegation that plaintiff "suffered bruises and cuts after being slammed into the concrete block and pulled in opposing directions by his restraints satisfies the physical injury requirement"), *report and recommendation adopted*, 2018 U.S. Dist. LEXIS 133887 (C.D. Cal. Aug. 6, 2018) (*unpublished*); Curry v. Johnson, No. 3:16cv483/MCR/EMT, 2017 U.S. Dist. LEXIS 211341, at *5 (N.D. Fla. Nov. 22, 2017) (*unpublished*) ("Curry's allegation of pain and swelling which required pain relievers and diagnostic testing, coupled with his allegations of continuing pain which has persisted during the year between the use of force and the submission of his affidavit and affects use of his hand, appear to allege more than the vague injury or periodic episodes of pain found by the Eleventh Circuit to be de minimis as a matter of law for purposes of § 1997e(e)."), *report and recommendation adopted*, 2017 U.S. Dist. LEXIS 210923 (N.D. Fla. Dec. 22, 2017) (*unpublished*); Young v. Dep't of Corr., No. 1:16-cv-00407-JCN, 2017 U.S. Dist. LEXIS 110178, at *2 (D. Me. July 17, 2017) (*unpublished*) (declining to hold a fractured finger is *de minimis*); McFadden v. Nicholson, No. 1:14CV664, 2017 U.S. Dist. LEXIS 36044, at *4 (M.D.N.C. Mar. 13, 2017) (*unpublished*) (holding in inmate-inmate assault case that a blow to the head causing bleeding and bad headaches satisfied § 1997e(e)); 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).

472. 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); Williams v. Roper, No. 4:13-CV-2440 CAS, 2018 U.S. Dist. LEXIS 47147, at *8 (E.D. Mo. Mar. 22, 2018) (*unpublished*) ("Headaches caused by stress, . . . are not a physical injury within the meaning of the PLRA."); Session v. Clements, No. 14-cv-02406-PAB-KLM, 2018 U.S. Dist. LEXIS 15702, at *9 (D. Colo. Jan. 31, 2018) (*unpublished*) (holding that physical injuries among "hearing voices, hallucination, cognitive dysfunction, uncontrollable jumping, severe depression, anxiety, appetite loss, sleep disruption, muscle tightening, panic, traumatic re-enactment of being shot at point blank range, PTSD, continued fear and paranoia, large very painful lump on lower left side rib-cage area" were not distinct from mental/emotional injuries claimed to result from confinement in segregation), *report and recommendation adopted*, 2018 U.S. Dist. LEXIS 53171 (D. Colo. Mar. 29, 2018) (*unpublished*); Clark v. Raemisch, No. 14-cv-01594-RBJ-MJW, 2016 U.S. Dist. LEXIS 47159, at *9 (D.Colo. Feb. 26, 2016) (*unpublished*) ("Plaintiff's only alleged physical harm is weight loss caused by stress and

have rejected it.[473] Courts are also split on the question of whether the risk of future injury meets the standard.[474]

There must be some relationship between the physical injury and the legal claims in the case.[475] The injury does not need to have been caused by the legal violation alleged.[476] There are contrary

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anxiety. This is insufficient."), *report and recommendation adopted*, 2016 U.S. Dist. LEXIS 47166 (D. Colo. Apr. 7, 2016) (*unpublished*); 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).

473. Wilkinson v. Kenneth, No. 12-CIV-80404-RYSKAMP, 2015 U.S. Dist. LEXIS 188974, at *9 (S.D. Fla. Nov. 10, 2015) (*unpublished*) (holding complaint of persistent headaches over a period of two and one-half years, insomnia, dizziness and fainting, weight loss, and vomiting resulting from mental and emotional distress over plaintiff's inability to practice his religion, supported by a variety of medical records, were more than *de minimis* at least at the pleading stage), *report and recommendation adopted sub nom.* Wilkinson v. GEO Grp., Inc., 2015 U.S. Dist. LEXIS 188973 (S.D. Fla. Dec. 11, 2015) (*unpublished*); Peterson v. Burris, No. 14-cv-13000, 2015 U.S. Dist. LEXIS 78229, at *3 (E.D. Mich. June 17, 2015) (*unpublished*) (holding high blood pressure resulting from stress satisfied § 1997e(e) at least at the pleading stage); 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).

474. *Compare* Rahman v. Schriro, 22 F. Supp. 3d 305, 318 (S.D.N.Y. 2014) (holding claim for "a serious risk of future physical harm" caused by radiation exposure was not barred by § 1997e(e)); West v. Walker, No. 06 C 4350, 2007 U.S. Dist. LEXIS 65905, at *6 (N.D. Ill. Sept. 4, 2007) (*unpublished*) (holding incaracerated person may pursue claim of "documentably increased likelihood of future harm" from second-hand smoke); Crawford v. Artuz, 98 Civ. 0425 (DC), 1999 U.S. Dist. LEXIS 9552, at *6 (S.D.N.Y. June 24, 1999) (*unpublished*) (holding § 1997e(e) inapplicable to claim for damages for future injury from asbestos exposure) *with* Brown v. Crews, No. 3:13-cv-36-J-34PDB, 2015 U.S. Dist. LEXIS 20518, at *5 (M.D. Fla. Feb. 20, 2015) (*unpublished*) (stating "the unknown future effects of [plaintiff's] exposure to asbestos" are "insufficient to support a claim for compensatory or punitive damages under the PLRA. Although Brown is correct that he need not prove his injuries at this stage of the proceedings, he must allege facts showing that he suffered an injury."); Smith v. U.S., No. 06-3061-JTM, 2007 U.S. Dist. LEXIS 54488, at *4 (D. Kan. July 26, 2007) (*unpublished*) (holding claim for "future physical health, safety and well being" and "future medical expenses" did not satisfy physical injury requirement), reconsideration denied, 2007 U.S. Dist. LEXIS 94707 (D. Kan. Dec. 27, 2007), motion to amend denied, 2008 U.S. Dist. LEXIS 30210 (D. Kan. Apr. 10, 2008), *aff'd in part and rev'd in part on other grounds*, 561 F.3d 1090 (10th Cir. 2009); 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 non-physical injury); Zehner v. Trigg, 133 F.3d 459, 462–463 (7th Cir. 1997) (holding that exposure to asbestos without claim of damages for physical injury is not actionable). *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, 188 (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).

475. *See, e.g.*, Antrobus v. City of New York, 2014 U.S. Dist. LEXIS 42468, at *6 (S.D.N.Y. Mar. 27, 2014) (*unpublished*) (holding § 1997e(e) limited damages where plaintiff alleged kidney disease and other injuries, but claim was for interference with mail).

476. McAdoo v. Martin, 899 F.3d 521, 526 (8th Cir. 2018) (upholding claim against medical personnel for denial of pain medication for injuries inflicted by correction officers; use of force itself was not challenged); *accord*, Sealock v. Colorado, 218 F.3d 1205, 1210 n.6 (10th Cir. 2000) (holding that a heart attack satisfied the § 1997e(e) requirement of "prior showing of physical injury" allowing plaintiff to recover for the associated pain even if pain were deemed to constitute mental or emotional injury); Karsten v. Davis, No. 12-cv-02107-MSK-KLM, 2013 U.S. Dist. LEXIS 69054, at *10 n.2 (D. Colo. Apr. 26, 2013) (*unpublished*) (holding year's delay in repairing a hernia was compensable since the hernia was a physical injury), *report and recommendation adopted*, 2013 U.S. Dist. LEXIS 69048 (D. Colo. May 15, 2013) (*unpublished*); Al-Turki v. Ballard, No. 10-cv-02404-WJM-CBS, 2013 U.S. Dist. LEXIS 20000, at *15 (D. Colo. Feb. 14, 2013) (*unpublished*) (holding pain caused by failure to treat kidney

decisions,[477] but these are not supported by the language of § 1997e(e). Courts have disagreed over whether mental or emotional injury can be compensated when it is caused by a claim separate from the claim involving physical injury.[478]

Courts initially differed over whether sexual assault, which does not always result in damage to the body, amounted to physical injury under § 1997e(e).[479] However, Congress amended § 1997e(e) to add the phrase "showing of physical injury or the commission of a sexual act (as defined in section 2246 of title 18)." The definition in 18 U.S.C. § is quite specific, defining sexual act as:

> (A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration,

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stones was actionable even though defendants did not cause the stones), *aff'd*, Turki v. Ballard, 762 F.3d 1188 (10th Cir. 2014);

477. *See, e.g.* Banks v. Katzenmeyer, No. 13-cv-02599-KLM, 2015 U.S. Dist. LEXIS 26256, at *13 (D. Colo. Mar. 4, 2015) (*unpublished*) ("Plaintiff fails to include any factual allegations that would demonstrate or even infer that he suffered physical injury caused by conduct attributable to Defendants. This omission is fatal to Plaintiff's claim for compensatory damages."), *aff'd in part, rev'd in part on other grounds*, Banks v. Katzenmeyer, 645 F. App'x 770 (10th Cir. 2016) (*unpublished*).

478. *Compare* Phillips v. Steinbeck, No. 06-cv-02569-WDM-KLM, 2008 U.S. Dist. LEXIS 24537, at *21 (D. Colo. Mar. 26, 2008) (*unpublished*) (plaintiff who alleged he was labelled an informant by staff and assaulted by inmates in retaliation for complaints about staff could seek damages for both Eighth Amendment and access to courts claims (which the court said were "intertwined") based on injuries from assault); Root v. Watkins, No. 04-cv-00977-ZLW-MEH, 2007 U.S. Dist. LEXIS 102238, at *8 (D. Colo. Aug. 28, 2007) (*unpublished*) (plaintiff alleged that one defendant refused to do anything about loud incarcerated persons' conduct, and when he complained to another defendant, he was labelled a snitch and then attacked by other incarcerated people; he could seek damages against both defendants), *objections overruled*, 2008 U.S. Dist. LEXIS 22130 (D. Colo. Mar. 19, 2008) (*unpublished*); Fogle v. Pierson, No. 05-cv-01211-MSK-CBS, 2008 U.S. Dist. LEXIS 24543, at *9 (D. Colo. Mar. 26, 2008) (*unpublished*) (incarcerated person complaining of injury from protracted segregation could seek damages both for due process claim for segregation placement and claim of denial of access to courts which arguably prolonged the confinement); Noguera v. Hasty, 99 Civ. 8786 (KMW)(AJP), 2001 U.S. Dist. LEXIS 2458, at *5 (S.D.N.Y. Mar. 12, 2001) (*unpublished*) (holding that allegations of retaliation for reporting a rape by an officer were closely enough related to the rape that a separate physical injury need not be shown) *with* Purvis v. Johnson, 78 F. App'x 377, 379–380 (5th Cir. 2003) (per curiam) (*unpublished*) (holding that an incarcerated person alleging assault by a staff member could not also pursue a claim for damages for obstruction of the post-assault investigation without a showing of physical injury related to that claim); Wallin v. Dycus, No. 03-cv-00174-CMA-MJW, 2009 U.S. Dist. LEXIS 29099, at *13 (D. Colo. Feb. 25, 2009) (*unpublished*) (holding claim for damages for disclosure of confidential information was barred by § 1997e(e) despite the presence of an excessive force claim; stating physical injury requirement is "claim specific"), *report and recommendation adopted*, Wallin v. Dycus, 2009 U.S. Dist. LEXIS 71834 (D. Colo. Aug. 13, 2009) (*unpublished*), *aff'd*, Wallin v. Dycus, 381 F. App'x 819 (10th Cir. 2010) (*unpublished*).

479. *Compare* Liner v. Goord, 196 F.3d 132, 135 (2d Cir. 1999) (holding alleged sexual assaults "qualify as physical injuries as a matter of common sense," without much explanation); Doe v. United States, No. 12-00640 ACK-RLP, 2014 U.S. Dist. LEXIS 174413, at *8 (D. Haw. Dec. 17, 2014) (holding that "common sense and public policy dictates that Doe should be able to pursue mental and emotional injury claims arising out of [a] sexual assault" despite the absence of physical force or physical injury); Kornagay v. Given, No. 3:11cv428/LAC/EMT, 2014 U.S. Dist. LEXIS 38377, at *19 (N.D. Fla. Mar. 24, 2014) (*unpublished*) (holding injuries from alleged rape—"rectal bleeding, rectal pain, head bruise, etc."—were *de minimis* (very small), but prison staff's disregarding a known risk of rape was actionable under § 1997e(e) for mental or emotional injury because "repugnant to the conscience of mankind . . . ."); Marrie v. Nickels, 70 F. Supp. 2d 1252, 1264 (D. Kan. 1999) ("sexual assaults would qualify as physical injuries under § 1997e(e)"; citing "common sense" holding of *Liner v. Goord,* above) *with* Ashley v. Perry, No. 13-00354-BAJ-RLB, 2015 U.S. Dist. LEXIS 167863, at *1, *5–6 & n.12 (M.D. La. Dec. 15, 2015) (holding an incarcerated person who alleged that a staff member performed oral sex on him until he ejaculated did not satisfy § 1997e(e); rejecting argument that "a sexual assault is a per se physical injury because of its very nature, even when such an assault does not result in any physical pain, temporary or otherwise"); McGregor v. Jarvis, No. 9:08-CV-770 (GLS/RFT), 2010 U.S. Dist. LEXIS 97408, at *1, *4 (N.D.N.Y., Aug. 20, 2010) (*unpublished*) (holding allegations of non-forcible oral and vaginal sex did not establish physical injury), *report and recommendation adopted*, 2010 U.S. Dist. LEXIS 97403 (N.D.N.Y., Sept. 16, 2010); Hancock v. Payne, No. 1:03cv671-JMR-JMR, 2006 U.S. Dist. LEXIS 1648, *1, 3 (S.D. Miss. Jan. 4, 2006) (*unpublished*) (holding incarcerated people who alleged they were "sexually battered . . . by sodomy" did not allege a physical injury for § 1997e(e) purposes).

however slight;
(B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;
(C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or
(D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; . . . [480]

Thus, under the amendment, anal, vaginal and oral sex—including anal or genital penetration by hand, finger, or object with the necessary intent[481]—are actionable for compensatory damages, regardless of the presence of physical injury. Manual and other non-penetrative sexual touching of another person, compelled or otherwise, are not actionable nor are acts involving the touching of breasts. However, intentional, unclothed touching of persons under 16 years old is actionable.[482] The amendment does not include cases in which incarcerated persons are compelled or persuaded to perform sexual acts or displays for the arousal of others.[483] Nor does the amendment include cases where incarcerated persons are subjected to sexual displays by staff,[484] or to certain other kinds of shockingly intrusive but non-injurious actions.[485]

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480. 18 U.S.C. § 2246(2).

481. *See* Bucano v. Austin, No. 15-67ERIE, 2016 U.S. Dist. LEXIS 33144, at *5 (W.D. Pa. Feb. 12, 2016) (*unpublished*) (holding allegation that officer penetrated plaintiff's vagina with his fingers, and that he made sexual comments and demands during a course of such conduct, established sexual acts under § 1997e(e)), *report and recommendation adopted in part, rejected in part on other grounds*, 2016 U.S. Dist. LEXIS 32332 (W.D. Pa. Mar. 14, 2016) (*unpublished*).

482. *See, e.g.*, Graham v. Elliott, No. 1:17-cv-68-MW-GRJ, 2018 U.S. Dist. LEXIS 126886,*1, 3 (N.D. Fla. June 27, 2018) (*unpublished*) (holding grabbing and twisting plaintiff's penis was *de minimis* under § 1997e(e)), *report and recommendation adopted*, 2018 U.S. Dist. LEXIS 126565 (N.D. Fla., July 28, 2018) (*unpublished*); Mengesha v. Stokes, No. 3:16-cv-446-MCR-GRJ, 2017 U.S. Dist. LEXIS 193411, at *9 (N.D. Fla. Nov. 22, 2017) (*unpublished*) (holding evidence that "a hand touched Plaintiff's buttocks, a finger touched—but did not penetrate—Plaintiff's anus, and a hand grabbed his testicles [did not] meet the definition of a 'sexual act' under § 2246. Instead, these actions constitute, at most, 'sexual contact' under § 2246."), *report and recommendation adopted*, 2018 U.S. Dist. LEXIS 107160 (N.D.Fla., June 27, 2018) (*unpublished*); Jamison v. United States, No. 1:15-CV-01678, 2016 U.S. Dist. LEXIS 181549, at *5–6 (W.D. La., Sept. 26, 2016) (holding touching of genitals through clothing during pat search not compensable under 28 U.S.C. § 1346(b)(2)), *report and recommendation adopted*, Jamison v. United States, 2017 U.S. Dist. LEXIS 3046 (W.D. La. Jan. 9, 2017); Holley v. Bossert, No. 3:15cv389/LAC/EMT, 2016 U.S. Dist. LEXIS 19668, at *5 (N.D. Fla. Jan. 19, 2016) (holding allegation of defendant's "kissing [plaintiff], grabbing his buttocks, and touching his chest" was not a "sexual act" or a physical injury under § 1997e(e)), *report and recommendation adopted*, Holley v. Bossert, 2016 U.S. Dist. LEXIS 19667 (N.D. Fla. Feb. 18, 2016); *see also* Jackson v. Schaff, No. 2:17-cv-10492, 2017 U.S. Dist. LEXIS 52653, at *3 (E.D. Mich. Apr. 6, 2017) (*unpublished*) (holding "mere bruises" from a use of force also involving unwanted touching of breast and buttock was *de minimis*; no discussion of incident as sexual abuse).

The decision in *Snow v. List*, No. 11-3411, 2013 U.S. Dist. LEXIS 96078, at *2 (C.D. Ill. July 10, 2013) (*unpublished*), erroneously states that the definition appears to include the "intentional touching . . . of the breast, . . . with an intent to abuse humiliate, harass, degrade, or arouse or gratify the sexual desire of any person." That language appears in the statutory definition of sexual *contact*, 18 U.S.C.A. § 2246(3), rather than the definition of sexual *act*, found in 18 U.S.C.A. § 2246(2). The latter definition is what the VAWA amendment incorporates into § 1997e(e).

483. Johnson v. Perry, No. 2:16-cv-0367 AC P, 2018 U.S. Dist. LEXIS 142041, at *4 (E.D. Cal. Aug. 21, 2018) (*unpublished*) (holding sexually intrusive visual search was not a "sexual act" under VAWA amendment), *report and recommendation adopted*, Johnson v. Perry, 2018 U.S. Dist. LEXIS 157442 (E.D. Cal. Sept. 14, 2018) (*unpublished*).

484. Martin v. Byars, No. 4:12-cv-02100-DCN, 2014 U.S. Dist. LEXIS 10153, at *3 (D.S.C. Jan. 28, 2014) (*unpublished*) (holding allegations that staff members masturbated outside plaintiff's cell did not satisfy § 1997e(e) since they amounted neither to a "sexual act" under the statute nor to physical injury).

485. *See* Lagarde v. Metz, No. 13-805-RLB, 2017 U.S. Dist. LEXIS 14596, at *5–6 (M.D. La. Feb. 2, 2017) (*unpublished*) (holding compensatory damages barred where an officer shoved a broomstick between plaintiff's

A number of injuries short of visible damage to body parts have been held to satisfy Section 1997e(e), though not by all courts. These include:

a) physical disturbances resulting from medication withdrawal, overdose, or error;[486]
b) loss of consciousness;[487]
c) concussion;[488]

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buttocks but did not penetrate his anus or inflict injury; awarding $1,000 in punitive damages after a bench trial).

486. Hinton v. Mark, 544 F. App'x 75, 76 n.2 (3d Cir. 2013) (per curiam) (*unpublished*) (holding plaintiff who attempted suicide by overdose of pills and was hospitalized for two days satisfied § 1997e(e)); Munn v. Toney, 433 F.3d 1087, 1089 (8th Cir. 2006) (holding claim of headaches, cramps, nosebleeds, and dizziness resulting from deprivation of blood pressure medication "does not fail . . . for lack of physical injury"); Cook v. Illinois Dept. of Corr., No. 3:15-cv-83-NJR-DGW, 2018 U.S. Dist. LEXIS 1631, at *4 (S.D. Ill. Jan. 4, 2018) (*unpublished*) (holding claim of physical injury from not being transferred to drug treatment, resulting in being "sick," pain and nightmares, was for a jury); Lynch v. Lewis, U.S. Dist. LEXIS 35561, at *1, 13–14 (M.D. Ga. Mar. 23, 2015) (*unpublished*) (holding "nausea, dizziness, reflux, headaches, vomiting, and leg pain" resulting from hormone withdrawal, as well as self-mutilation injuries, satisfied § 1997e(e) at the pleading stage, subject to further factual development); Campbell v. Gause, No. 10-11371, 2011 U.S. Dist. LEXIS 21870, at *7 (E.D.Mich. Feb. 1, 2011) (*unpublished*) (holding allegations of chest pains, spiked blood pressure, broncospasms, migraine headaches, and dizziness resulting from defendants' confiscation of his prescription medications satisfied § 1997e(e)), *report and recommendation adopted*, 2011 U.S. Dist. LEXIS 21865 (E.D. Mich. Mar. 4, 2011) (*unpublished*); May v. Jones, No. 1:07-CV-1787, 2009 U.S. Dist. LEXIS 113485, at *1, *4–5 (M.D. Pa. Dec. 7, 2009) (citing deprivation of medication for migraine headaches resulting in "pain, vomiting, loss of appetite, light sensitivity and an inability to sleep"); 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 incarcerated person being held in isolation may have been physical injury for the purposes of 1997e(e)), *aff'd*, Scarver v. Litscher, 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, 334 F. App'x 281, 285 (11th Cir. 2009) (per curiam) (*unpublished*) (holding hallucinations, anxiety, and nightmares resulting from denial of Xanax did not meet physical injury requirement); McGathey v. Osinga, No. 2:17-cv-56-FtM-29MRM, 2017 U.S. Dist. LEXIS 86232, at *2–3 (M.D. Fla. June 6, 2017) (*unpublished*) (holding that damages for "horrendous" drug withdrawal in which "[t]he demonic spirits overtook me again. I was truly fearful for my life" were barred by § 1997e(e) absent an allegation of physical injury other than pain); Sparks v. Ingle, No. 5:14-cv-00013-MHH-JHE, 2017 U.S. Dist. LEXIS 36067, at *8 (N.D. Ala. Mar. 14, 2017) (*unpublished*) (holding epileptic seizures occurring when defendants failed to provide his medication and resulting in the plaintiff's "body banging on the walls and door" were de minimis absent other evidence of injury), *aff'd*, 724 F. App'x 692 (11th Cir. 2018) (per curiam) (*unpublished*).

487. Waggoner v. Comanche Cnty. Det. Ctr., No. CIV-06-700-C, 2007 WL 2068661, at *4 (D. Okla. July 17, 2007). (*unpublished*) (holding plaintiff rendered unconscious by a shock shield after being pepper-sprayed, shaken, and punched sufficiently supported a claim of physical injury). *But see* Owens v. U.S., No. 5:09-CT-3167-FL, 2012 U.S. Dist. LEXIS 173093, at *2, 6 (E.D.N.C. Dec. 6, 2012) (*unpublished*) (holding transitory episode of dizziness and general weakness, including loss of consciousness, following deprivation of blood pressure medication, was de minimis where plaintiff resumed normal activities including exercise the next day).

488. Norfleet v. Taylor, No. 3:16cv413/MCR/EMT, 2017 U.S. Dist. LEXIS 216194, at *17 (N.D. Fla. Nov. 27, 2017) (*unpublished*) ("A concussion and migraine headaches may be considered more than de minimis injuries."), *report and recommendation adopted*, 2018 U.S. Dist. LEXIS 12182 (N.D. Fla. Jan. 25, 2018) (*unpublished*); Flanning v. Baker, No. 5:12cv337-MW-CJK, 2016 U.S. Dist. LEXIS 121010, at *6 (N.D. Fla. Aug. 16, 2016) (*unpublished*) ("A concussion and migraine headaches may be considered more than de minimis injuries."), *report and recommendation adopted*, Flanning v. Baker, 2016 U.S. Dist. LEXIS 121007 (N.D. Fla., Sept. 7, 2016). *But see* Buie v. Myers, No. 4:06-81 DCN TER, 2007 U.S. Dist. LEXIS 10929, at *9 (D.S.C. Feb. 13, 2007) (*unpublished*) (stating "other than a report submitted by the defendant which shows plaintiff complained of dizziness and blurred vision as a result of the alleged fall, plaintiff has not shown more than de minimis injury or that any injury was a result of the conditions of his confinement").

d) the consequences of failing to treat an illness or injury, both the immediate consequences[489] and longer-term or future issues;[490]
e) denial of enough food;[491]

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467. *See* Perez v. U.S., 330 F. App'x 388, 389–390 (3d Cir. 2009) (*per curiam*) (*unpublished*) (holding claim of untreated asthma attack resulting in "dizziness, headaches, weakness, back pain, and nausea," which required steroids, prescription medication, and other medical treatment to recover, presented a material issue of fact under the *de minimis standard*); Tatum v. Helder, No. 5:15-cv-05254, 2017 U.S. Dist. LEXIS 25448, at *21 (W.D. Ark. Feb. 1, 2017) (*unpublished*) (holding plaintiff's evidence that he "suffered from sores caused by porphyria [and] was in extreme pain and had pressure sores" established "adverse health effects . . . sufficient to constitute more than a de minimis injury" under § 1997e(e)), *report and recommendation adopted*, Tatum v. Helder, No. 5:15-cv-05254, 2017 U.S. Dist. LEXIS 24470 (W.D. Ark. Feb. 22, 2017) (*unpublished*); Johnson v. Thomas, No. 4:12-cv-1899-KOB-JEO, 2015 U.S. Dist. LEXIS 41058, at *4, *7 (N.D. Ala. Mar. 31, 2015). (*unpublished*) (holding allegation of "continual skin disorder" that caused plaintiff's "skin to peel, bleed, and ooze pus from simply wearing cloth[e]s or showering" sufficiently alleged more than de minimis injury); DeRoche v. Funkhouse, No. CV 06-1428-PHX-MHM (MEA), 2008 U.S. Dist LEXIS 31166, at *18–19 (D. Ariz. Mar. 27, 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 (D. Colo. 2006) (addressing "prolonged" pain attendant upon labor and stillbirth). *But see* Green v. U.S., No. 6: 13–142–DCR, 2014 U.S. Dist. LEXIS 51816, at *10 (E.D. Ky. Apr. 15, 2014) (*unpublished*) (holding inadequately treated eczema constituted no more than de minimis injury); Owens v. U.S., No. 5:09-CT-3167-FL, 2012 U.S. Dist. LEXIS 173093, at *4–6, *16–18 (E.D.N.C., Dec. 6, 2012) (*unpublished*) (holding dizziness, weakness, and loss of consciousness following deprivation of blood pressure medication *de minimis*; emphasizing transitoriness of symptoms); Broadnax v. Escambia Cnty. Main Jail, No. 3:11cv354/LC/CJK, 2012 U.S. Dist. LEXIS 160160, at *2 (N.D. Fla. Oct. 9, 2012). (*unpublished*) (holding allegation of staph infection "without more" does not show more than *de minimis* injury), *report and recommendation adopted*, Broadnax v. Escambia Cnty. Main Jail, No. 3:11cv354/LAC/CJK, 2012 U.S. Dist. LEXIS 160159 (N.D. Fla. Nov. 8, 2012). (*unpublished*); 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); Jones v. Sheahan, No. 99 C 3669, 2000 U.S. Dist. LEXIS 14130, at *22–23 (N.D. Ill. Sept. 22, 2000) (*unpublished*) (finding no 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). *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).

468. Young v. Beard, Civil Action No. 06-160, 2007 WL 1549453, at *4 (W.D. Pa. May 18, 2007) (*unpublished*) (holding claim for damages for "the physical injury he has already sustained or will sustain to his internal organs" from denial of cholesterol medication, and of testing of blood pressure, diabetes, and cholesterol more often than every six months, satisfied § 1997e(e) at the pleading stage), *vacated on other grounds*, Young v. Beard, Civil Action No. 06-160, 2007 U.S. Dist. LEXIS 48283 (W.D. Pa. July 3, 2007) (*unpublished*), *report and recommendation adopted*, Young v. Beard, Civil Action No. 06-160, 2008 U.S. Dist. LEXIS 26767 (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 incarcerated person was denied a low-fat diet for coronary condition). *But see* Cotter v. Dall. Cnty. Sheriff, No. 3:05-CV-2225-H, 2006 WL 1652714, at *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).

469. Avery v. Helder, No. 5:16-CV-5169, 2017 U.S. Dist. LEXIS 28230, at *2, (W.D. Ark. Feb. 28, 2017). (*unpublished*) (allegation that plaintiff was "losing weight and muscle mass" from inadequate food satisfied § 1997e(e) at the pleading stage); Hall v. Klemm, Civil Action No. 15-20 E, 2017 U.S. Dist. LEXIS 14767, at *15, (W.D. Pa. Feb. 1, 2017). (*unpublished*) (holding evidence that lack of a nutritionally adequate religious diet resulted in weight loss, dizziness, fatigue, and headaches was "consistent with the types of physical injuries that other federal courts have recognized to be sufficient under § 1997e(e)"), *report and recommendation adopted*, Hall v. Klemm, Civil Action No. 15-20 E, 2017 U.S. Dist. LEXIS 31654 (W.D. Pa. Mar. 7, 2017) (*unpublished*); Mozden v. Helder, No. 5:13-CV-05160, 2014 U.S. Dist. LEXIS 91295, at *3, (W.D. Ark. July 2, 2014). (*unpublished*) (holding plaintiff's allegation "that as a result of an inadequate diet, he lost substantial weight and felt weak and lacked energy" satisfied § 1997e(e) at the pleading stage); Williams v. Humphreys, No. CV504-053, 2005 U.S. Dist. LEXIS 44027, at *19–21 (S.D. Ga. July 27, 2005) (*unpublished), adopted by* Williams v. Humphreys, No. CV504-053, 2005 U.S. Dist. LEXIS 44029 (S.D. Ga. Sept. 13, 2005) (*unpublished*) (holding that an allegation of 12-pound weight loss, abdominal pain, and nausea resulting from denial of pork substitute at meals sufficiently alleged a physical injury). *But see* Clark v. Raemisch, No. 14-CV-01594-RBJ-MJW, 2016 U.S. Dist. LEXIS 47159, at *9, (D. Colo. Feb. 26, 2016). (*unpublished*) ("Plaintiff's only alleged physical harm is weight loss caused by stress and

f) food contamination or poisoning;[492]
g) denial of exercise;[493]

anxiety. This is insufficient."), report and recommendation adopted, Clark v. Raemisch, No. 14-CV-01594-RBJ, 2016 U.S. Dist. LEXIS 47166 (D. Colo. Apr. 7, 2016) (*unpublished*); Pittman-Bey v. Clay, No. V-10-086, 2012 U.S. Dist. LEXIS 146994, at *8, (S.D. Tex. Sep. 19, 2012) (*unpublished*) (holding allegation of being "weak, tired, and dizzy" and unable to sleep from missing evening meals during Ramadan was de minimis), *report and recommendation adopted in part, rejected in part on other grounds*, Pittman-Bey v. Clay, No. 6:10-CV-86, 2013 U.S. Dist. LEXIS 29668 (S.D. Tex. Mar. 4, 2013). (*unpublished*), aff'd, Pittman-Bey v. Clay, 557 F. App'x. 310 (5th Cir. 2014) (*per curiam*) (*unpublished*); Linehan v. Crosby, No. 4:06-CV-00225-MP-WCS, 2008 U.S. Dist. LEXIS 63738, 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).

470. Carter v. United States, No. 3:11-CV-1669, 2012 U.S. Dist. LEXIS 80849, at *2, (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 *14 (W.D. Tex. June 29, 2007) (*unpublished*) (holding diarrhea allegedly caused by spoiled food was *de minimis*).

471. Doolittle v. Holmes, 306 F. App'x. 133, 134 (5th Cir. 2009) (*per curiam*) (*unpublished*) (holding allegation of muscle atrophy from lack of exercise sufficiently pled physical injury); Anderson v. Colorado, 848, 1298 F. Supp. 2d 1291 (D. Colo. 2012). (holding allegation of muscle weakness from lack of exercise sufficed at summary judgment stage); Williams v. Goord, 111 F. Supp. 2d. 280, 291 (S.D.N.Y. 2000) (holding that allegation of a 28-day denial of exercise by a pro se plaintiff might satisfy 1997e(e) standard for physical injury). *But see* Kuhbander v. Blue, No. 4:15CV-P123-JHM, 2016 U.S. Dist. LEXIS 12027, at *2, (W.D. Ky. Feb. 2, 2016) (*unpublished*) (holding allegation of complete deprivation of exercise was *de minimis* absent an allegation of physical injury and a statement of how long the deprivation existed); Sarno v. Reilly, Civil Action No. 12-cv-00280-REB-KLM, 2013 U.S. Dist. LEXIS 38546, at *11, (D. Colo. Jan. 17, 2013) (*unpublished*) (holding alleged deprivation of exercise resulting in headaches, chest pains, and other physical pain was *de minimis*), *report and recommendation adopted*, Sarno v. Reilly, No. 12-CV-00280-REB-KLM, 2013 U.S. Dist. LEXIS 38544 (D. Colo. Mar. 20, 2013) (*unpublished*).

h) physical disturbances resulting from exposure to harmful materials,[494] including pepper spray and other chemical agents in cases of unusually serious consequences,[495] and in a few cases including exposure to human waste;[496]

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472. Gray v. Hardy, 826 F.3d 1000, 1007 (7th Cir. 2016) (holding allegations of worsened asthma and skin rash caused by exposure to excessive dust and insect dander in unsanitary prison satisfied physical injury requirement at summary judgment stage); 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) standard); Cary v. Hickenlooper, No. 14-CV-00411-PAB-NYW, 2015 U.S. Dist. LEXIS 122134, at *8, (D. Colo. Aug. 3, 2015). (*unpublished*) (holding allegation of physical maladies allegedly connected to exposure to uranium in drinking water, some confirmed in medical records, satisfied § 1997e(e)), *report and recommendation adopted in part, rejected in part on other grounds*, Cary v. Hickenlooper, No. 14-CV-00411-PAB-NYW, 2015 WL 5353847 (D. Colo. Sept. 15, 2015), *aff'd*, Cary v. Hickenlooper, 673 F. App'x. 870 (10th Cir. 2016) (*unpublished*); Rahman v. Schriro, 22 F.Supp.3d 305, 317–318 (S.D.N.Y. 2014) (holding allegations of excessive radiation exposure and associated health risks adequately alleged physical injury at the pleading stage); 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* Glover v. Haynes, No.: CV211-114, 2012 U.S. Dist. LEXIS 50406, *23–24 (S.D. Ga. Mar. 21, 2012) (*unpublished*) (dismissing claim based on respiratory illnesses resulting from mold exposure on the ground that it was "of temporary duration and treatable"), *report and recommendation adopted*, Glover v. Haynes, No.: CV211-114, 2012 U.S. Dist. LEXIS 50407 (S.D. Ga. Apr. 10, 2012); Smith v. Leonard, Civil Action No. G-06-0288, 2008 U.S. Dist. LEXIS 34587, *21 n.7 (S.D.Tex., Apr. 28, 2008) (*unpublished*) (holding headaches, sinus problems, trouble breathing, blurred vision, irritated eyes, and fatigue resulting from exposure to toxic mold were *de minimis*); Thompson v. Joyner, No. 5:06-CT-3013-FL, 2007 U.S. Dist. LEXIS 96515, at *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).

473. Santais v. Corr. Corp. of Am., Civil Action No.: 5:16-cv-80 2017 U.S. Dist. LEXIS 42368, *4 (S.D. Ga. Mar. 23, 2017) (*unpublished*) (holding allegations that plaintiff "developed an abnormality on his left side, and that he has coughed up blood two to three times per week," and these conditions persisted for months, were more than *de minimis*); Taylor v. Wawrzyniak, No. 1:15-CV-104, 2016 U.S. Dist. LEXIS 181359, *14*–15 (W.D. Mich. Dec. 13, 2016) (*unpublished*) (denying summary judgment to defendant under § 1997e(e) where plaintiff alleged he was "unable to breathe" after use of chemical agent, unlike minor "typical" effects), *report and recommendation approved*, Taylor v. Wawrzyniak, No. 1:15-CV-104, 2017 U.S. Dist. LEXIS 2466 (W.D. Mich., Jan. 6, 2017) (*unpublished*); Watson v. Edelen, 76 F. Supp. 3d 1332, 1379 (N.D. Fla. 2015) (holding "intense pain, vomiting, loss of consciousness, a burning sensation for at least one week, and chemicals burns to the skin on his genitals, buttocks, arms, face, back, legs, and stomach, which caused blisters and peeling skin" caused by use of chemical agents were more than *de minimis*). *But see* Kirkland v. Everglades Corr. Inst., NO. 12-22302-CIV-ALTONAGA/White, 2014 U.S. Dist. LEXIS 43681, *19 (S.D. Fla.. Mar. 31, 2014) (*unpublished*) ("If [plaintiff] experienced temporary chemical burns and minor respiratory problems from exposure to a chemical agent, he then sustained only minor, physical injuries from the chemical spray."); Magwood v. Tucker, No. 3:12cv140/RV/CJK, 2012 U.S. Dist. LEXIS 168822, *13–16 (N.D. Fla. Nov. 14, 2012) (*unpublished*) (holding incarcerated person failed to show more than a *de minimis* physical injury resulting from officer's use of chemical agent where he alleged he suffered bloody nose and bloody phlegm), *report and recommendation adopted*, Magwood v. Tucker, No. 3:12cv140/RV/CJK, 2012 U.S. Dist. LEXIS 168819 (N.D.Fla., Nov. 28, 2012) (*unpublished*), *appeal dismissed*, Magwood v. Tucker, No. 12-16262 (11th Cir. Feb. 19, 2013) (*unpublished*).

474. Allen v. Stanislaus Cnty., No.: 1:13–cv–00012–DAD–SAB (PC), 2017 U.S. Dist. LEXIS 15843, *52 (E.D. Cal. Feb. 3, 2017) (*unpublished*) (holding § 1997e(e) permits damages for direct exposure to urine and feces, which "in and of itself, constitutes more than de minimis injury"), *report and recommendation adopted in part, rejected in part on other grounds*, Allen v. Stanislaus Cnty., No. 1:13–cv–00012–DAD–SAB (PC), 2017 U.S. Dist. LEXIS 43607 (E.D.Cal., Mar. 24, 2017)(*unpublished*); Havens v. Clements, No. 13-cv-00452-MSK-MEH, 2014 U.S. Dist. LEXIS 38417, *26–28 (D.Colo., Mar. 24, 2014) (*unpublished*) (holding lying in one's own wastes might constitute physical injury if as alleged it caused a bladder infection); Hawthorne v. Cain, Civil Action No. 10-0528-BAJ-DLD, 2011 U.S. Dist. LEXIS 79681, *17–20 (M.D.La., June 8, 2011) (*unpublished*) (holding allegation of foot ailment, vomiting, and breathing problems resulting from exposure to human waste from overrunning toilet satisfied § 1997e(e)), *report and recommendation adopted,* Hawthorne v. Cain, Civil Action No. 10-0528-BAJ-DLD, 2011 U.S. Dist. LEXIS 79674 (M.D.La., July 21, 2011) (*unpublished*). *But see* Moody v. Shoultes, No. 5:15-cv-325-MTT-CHW, 2018 U.S. Dist. LEXIS 25767, *1, *13–15 (M.D.Ga., Jan. 11, 2018) (*unpublished*) (holding §

i) infliction of pain or illness through extreme conditions of confinement;[497]
j) physical abuse short of blows;[498]
k) stillbirth or miscarriage.[499]

1997e(e) barred damages where officer allegedly sprayed plaintiff with a mixture including human wastes and only other injury was a cut forehead, though court acknowledged a jury could find an Eighth Amendment violation), *report and recommendation adopted*, Moody v. Shoultes, No. 5:15-cv-325-MTT-CHW, 2018 U.S. Dist. LEXIS 25382 (M.D.Ga., Feb. 16, 2018) (*unpublished*); Allen v. Louisville Metro Dept. of Corrections, No. 3:07CV-P296-S, 2007 U.S. Dist. LEXIS 78948, *23–24 (W.D.Ky., Oct. 24, 2007) (*unpublished*) (holding plaintiff who had urine and feces thrown on him by others failed to allege a physical injury under § 1997e(e)).

475. Love v. Godinez, No. 15 C 11549, 2018 U.S. Dist. LEXIS 76438, *13 (N.D. Ill., May 7, 2018) (*unpublished*) (holding allegation of sleep deprivation resulting from cold conditions and cockroaches walking over plaintiff raised a triable issue as to physical injury); Camps v. Nutter, Civil Action NO. 14-01498, 2017 U.S. Dist. LEXIS 98932, *7 n.1 (E.D. Pa., June 27, 2017) (*unpublished*) (holding allegations that overcrowded conditions caused "physical and mental suffering, sickness, loss of sleep, anxiety and emotional distress" and prevented plaintiff from receiving adequate medical care for "high blood pressure, headaches, fatigue, muscle pain, chills and problems with his heart, lung and liver" were consistent with allegations other courts had recognized as sufficient under § 1997e(e)); Ellis v. LeBlanc, 09-222-BAJ-DLD, 2012 U.S. Dist. LEXIS 140192, *8 (M.D.La., Sept. 10, 2012) (*unpublished*) (holding allegation that plaintiff was sent for retaliatory reasons to work in agricultural fields and collapsed, suffering from chest pain, nausea, dizziness and profuse sweating, and was later treated for dehydration, high blood pressure and high blood sugar, satisfied § 1997e(e)), *report and recommendation approved*, Ellis v. LeBlanc, 09-222-BAJ-DLD, 2012 U.S. Dist. LEXIS 140194 (M.D.La., Sept. 28, 2012) (*unpublished*); Rinehart v. Alford, No. 3:02-CV-1565-R, 2003 U.S. Dist. LEXIS 1789, at *4 (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). *But see* Alexander v. Tippah County, Miss., 351 F.3d 626, 631 (5th Cir. 2003) (holding incarcerated person who suffered nausea and vomited as a result of exposure to noxious odors in a filthy holding cell full of raw sewage could not pursue damages since he suffered only a de minimis injury, if any); Vansparrentak v. Hall, No. 3:14cv399/MCR/EMT, 2015 WL 333075, *5 (N.D.Fla., Jan. 26, 2015) (*unpublished*) (holding allegation of six-day transportation with bathroom breaks only every 12 to 15 hours, leading plaintiff to suffer from "neurogenic bladder," alleged only de minimis injury); Beasley v. LeBlanc, Civil Action No. 1:11CV2047, 2012 U.S. Dist. LEXIS 170615, *4–5 (W.D.La., May 23, 2012) (*unpublished*) (holding allegation of athlete's foot contracted from unsanitary floor was *de minimis*), *report and recommendation adopted*, Beasley v. LeBlanc, Civil Action No. 1:11CV2047, 2012 U.S. Dist. LEXIS 170618 (W.D.La., Nov. 30, 2012).

476. Payne v. Parnell, 246 F. App'x 884, 888–889 (5th Cir. 2007) (*unpublished*) (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 *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*) (*unpublished*) (holding "mere bruising" from 17.5 hours in restraints was *de minimis*; incarcerated person actually complained of "welts").

477. Clifton v. Eubank, 418 F. Supp. 2d 1243, 1245 (D. Colo. 2006) (holding that the pain of prolonged labor resulting in a stillbirth and the death and stillbirth of a child, without physical injury, due to improper medical care meet the standard to state a claim under the PLRA).

One question that the courts have not resolved is whether the infliction of significant physical pain alone constitutes physical injury under § 1997e(e),[500] or not.[501] If the answer is "no," then even outright torture might not be compensable in damages as long as it is done with enough care to leave no marks.[502]

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478. Burley v. Abdellatif, No. 16-12256, 2018 U.S. Dist. LEXIS 44187, *6 (E.D. Mich., Mar. 19, 2018) (*unpublished*) ("Plaintiff's repeated allegations of physical pain suffered as a result of Defendant's alleged deliberate indifference constitute more than de minimis physical injuries for purposes of § 1997e(e)."; plaintiff complained of pain from heel spur and acid reflux); Clark v. Price, No. 2:16-cv-00919-KOB-TMP, 2018 U.S. Dist. LEXIS 1479, *15–16 (N.D. Ala., Jan. 4, 2018) (*unpublished*) (stating "the pain associated with [an] assault itself is more than a de minimis injury"); Garcia-Feliciano v. U.S., Civ. No.: 12-1959(SCC), 2014 U.S. Dist. LEXIS 56688, *2–4 & n.2 (D.P.R., Apr. 23, 2014) (*unpublished*) (holding allegation of substantial pain from fall down stairs in restraints was sufficient to defeat summary judgment under § 1997e(e)); Andrade v. Christ, No. 08–cv–01649–WYD–KMT, 2009 WL 3004575, *4 (D.Colo., Sept. 18, 2009) (*unpublished*) (holding failure to treat existing traumatic injury, causing "unwarranted physical pain," satisfied § 1997e(e)); Malone v. Runnels, No. CIV S-06-2046 GEB KJM P, 2009 U.S. Dist. LEXIS 78945, *22 (E.D.Cal., Sept. 2, 2009) (noting that testimony that plaintiff was in pain for three days after a blow to the head "describes an injury that is more than de minimis"), *report and recommendation adopted*, Malone v. Runnels, No. CIV S-06-2046 GEB KJM P, 2009 U.S. Dist. LEXIS 90583 (E.D.Cal., Sept. 29, 2009); Bain v. Cotton, No. 2:06 CV 217, 2009 WL 1660051, *7 (D.Vt., June 12, 2009) (holding "severe chronic pain" from termination of drug regime for incarcerated person who had serious head and spinal injuries from auto accident satisfied § 1997e(e)); Lawson v. Hall, Civil Action No. 2:07-00334, 2008 WL 793635, *5–7 (S.D.W.Va., Mar. 24, 2008) (declining to apply § 1997e(e) to allegation of "severe pain" from being kneed in the genitals); Mansoori v. Shaw, No. 99 C 6155, 2002 U.S. Dist. LEXIS 11670, *9–12 (N.D.Ill., June 28, 2002) (holding alleged "tenderness and soreness," for which plaintiff was taken to a hospital for treatment and received a diagnosis of "chest wall injury," met the standard).

479. McAdoo v. Martin, Civil No. 6:13-cv-06088, 2017 U.S. Dist. LEXIS 40009, *23 (W.D. Ark. Mar. 21, 2017) (*unpublished*) (noting that injury must be "more than de minimis"; "The question is whether suffering pain, only partially relieved by Tylenol and Ibuprofen, from [plaintiff's] shoulder injury constitutes a physical injury sufficient to enable Plaintiff to recover damages for his mental pain and suffering under § 1997e(e). Reluctantly, the Court finds it does not."), *affirmed in part, reversed in part and remanded*, McAdoo v. Martin, 899 F.3d 521, 525 (8th Cir. 2018) (avoiding the question whether pain standing alone is physical injury under § 1997e(e)); Jones v. F.C.I. Beckley Medical Staff Employees, Civil Action No. 5:11-cv-00530, 2014 U.S. Dist. LEXIS 88571, *13 (S.D.W.Va., June 30, 2014) ("Physical pain alone is insufficient to constitute more than a *de minimis* injury."); Hollingsworth v. Thomas, Civil Action No. 13-00480-WS-B, 2014 U.S. Dist. LEXIS 73556, *4, 15–18 (S.D.Ala., May 30, 2014) (holding allegation of baton blows that the plaintiff said inflicted "severe pain" alleged no more than de minimis injury); 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 *3 (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) ("Physical pain, standing alone, is a de minimis injury that may be characterized as a mental or emotional injury and, accordingly, fails to overcome the PLRA's bar"); Olivas v. Corr. Corp. of Am., 408 F. Supp. 2d 251, 254, 259 n. 4 (N.D. Tex. 2006) (dismissing as *de minimis* extreme pain resulting from delay in treatment of broken teeth with exposed nerve); *see also* Al-Turki v. Ballard, No. 10-cv-02404-WJM-CBS, 2013 U.S. Dist. LEXIS 20000, *7, 41–44 (D.Colo., Feb. 14, 2013) (*unpublised*) ("Pain alone may be considered a mental or emotional injury, but physical pain accompanied by physical effects necessitating medical treatment have been held to satisfy the physical injury requirement under the PLRA"; pain resulting from passing kidney stones satisfied § 1997e(e)), *aff'd sub nom*. Al-Turki v. Robinson, 762 F.3d 1188 (10th Cir. 2014).

480. For example, in Jarriett v. Wilson, 414 F.3d 634 (6th Cir. 2005), an incarcerated person 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, 641 (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, 246 F. App'x 884, 888–889 (5th Cir. 2007).

There may be some clarification of the meaning of physical injury under the PLRA in another federal statute, 18 U.S.C. § 242, which makes it a crime for someone acting under color of state law to deprive another person of his or her federal civil rights.[503] Section 242 requires a showing of "bodily injury," but the statute does not define "bodily injury."[504] 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."[505] This definition of "bodily injury," found in other federal statues, could also be applied in Section 1997e(e).[506] 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 (definition provided by law) of bodily injury, you could point out 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. Attorney's Fees

The PLRA limits the attorney's fees incarcerated people can recover. These limitations do not directly affect you if you are proceeding *pro se* (without a lawyer), but they do affect your ability to get a lawyer.

Recovery of attorney's fees under 42 U.S.C. § 1988[507] is barred in "any action brought by a prisoner"[508] except when the fees are "directly and reasonably incurred in proving an actual violation of the plaintiff's rights" under a statute that allows fees to be awarded.[509] Fees cannot be awarded in cases that are settled without findings of an actual violation of rights,[510] though it may be that fees can be awarded when a settlement is accompanied by a finding of violation.[511] Fees may also be

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481. 18 U.S.C. § 242.

482. 18 U.S.C. § 242 (providing "if bodily injury results from the acts committed in violation of this section . . . [the defendant] shall be fined under this title or imprisoned not more than ten years, or both").

483. 18 U.S.C. § 831(f)(5); *accord* 18 U.S.C. § 1365(g)(4); 18 U.S.C. § 1515(a)(5); 18 U.S.C. § 1864(d)(2).

484. "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. Dept. of Treasury, 489 U.S. 803, 806, 109 S. Ct. 1500, 1503, 103 L. Ed. 2d 891, 899 (1989)); *See generally* Leon v. Johnson, 96 F. Supp. 2d 244, 248 (W.D.N.Y 2000) (using the word "physical" in § 1997e(e) interchangeably with the word "bodily" harm).

485. 42 U.S.C. § 1988 authorizes attorneys' fees for actions filed under 42 U.S.C. § 1983.

486. For purposes of these provisions, ex-incarcerated people are not incarcerated people, 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) (holding that a formerly incarcerated person does not need to meet the exhaustion requirement of the PLRA because he does not qualify as a "prisoner" under the relevant provision); Doe v. Washington County, 150 F.3d 920, 924 (8th Cir. 1998) (PLRA provisions about attorney's fees do not apply to a plaintiff who was not an incarcerated person 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, 1241–1244 (10th Cir. 2006) (en banc) (applying PLRA attorney's fees restrictions to a case about events before incarceration); Jackson v. State Bd. of Pardons & Paroles, 331 F.3d 790, 794–796 (11th Cir. 2003) (applying a PLRA provision to a case about parole eligibility hearings and length of confinement, and not restricting the provision to lawsuits about prison conditions).

487. 42 U.S.C. § 1997e(d)(1)(A). *See*, *e.g.*, Armstrong v. Davis, 318 F.3d 965, 973–974 (9th Cir. 2003) (holding that fees in Americans with Disabilities Act and Rehabilitation Act suits are not governed by the PLRA fee limitations).

488. Torres v. Walker, 356 F.3d 238, 243 (2d Cir. 2004) (holding that where a case was resolved by a stipulation that did not require the court's approval and disclaimed defendants' liability, "it cannot be said that [plaintiff's] attorneys' fees were directly and reasonably incurred in proving an actual violation. . . ."; relying on parties' stipulation, not the PLRA, in awarding fees); Duvall v. O'Malley, No. ELH-94-2541, 2014 U.S. Dist. LEXIS 48093, *34 (D. Md. Apr. 7, 2014) (*unpublished*) (denying fees for obtaining a private settlement agreement that "expressly provides that '[i]t does not operate as an adjudication of the merits of the litigation' . . . and that it is not 'an admission of liability of or by any party'").

489. *See* Laube v. Allen, 506 F. Supp. 2d 969, 979–980 (M.D. Ala. 2007) (holding that fees may be awarded for injunctive settlements to the extent they first satisfy the PLRA's "need-narrowness-intrusiveness"

awarded if they are "directly and reasonably incurred in enforcing the relief ordered for the violation."[512] The statute says that fees must be "proportionately related to the court ordered relief for the violation,"[513] but this provision has little effect on fee awards in addition to that of the other PLRA restrictions on fees. Defendants may be required to pay fee awards of up to 150 percent of any damages awarded—but no more.[514]

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.[515] Unfortunately, this rate is much lower than the market rates most lawyers usually charge, and the amount usually awarded in non-incarcerated person cases, and it probably discourages many lawyers from taking incarcerated people's cases.[516]

Incarcerated people are more directly affected by the part of the PLRA that says up to twenty-five percent of a monetary judgment can be applied to the fee award. The Supreme Court has held that the phrase "not to exceed 25 percent" means that the court "must apply as much of the judgment as necessary, up to 25%, to satisfy an award of attorney's fees," and has no discretion to apply a smaller percentage.[517]

The courts have rejected arguments that attorney's fee restrictions deny incarcerated people equal protection or otherwise violate the Constitution.[518]

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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).

490. 42 U.S.C. § 1997e(d)(1)(B)(ii); *see* Ilick v. Miller, 68 F. Supp. 2d 1169, 1173 n. 1 (D. Nev. 1999), *abrogated by* Kimbrough v. California, 609 F.3d 1027, 1032 n.7 (9th Cir. 2010) (noting that *Illick* was the only case in the Ninth Circuit were a person who was incarcerated did not need to affirmatively establish an actual violation in order to recover attorneys' fees under the PLRA, instead finding that sufficient evidence that the post-PLRA fees were "directly and reasonably" incurred.); West v. Manson, 163 F. Supp. 2d 116, 120 (D. Conn. 2001) (holding fees are recoverable for post-judgment monitoring).

491. 42 U.S.C. § 1997e(d)(1)(B)(i).

492. 42 U.S.C. § 1997e(d)(2); *see* Parker v. Conway, 581 F.3d 198, 201 (3d Cir. 2009); Walker v. Bain, 257 F.3d 660, 666-67 (6th Cir. 2001) (so interpreting the statute). That means when a court or jury awards $1.00 in nominal damages, Pearson v. Welborn, 471 F.3d 732, 742–744 (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 concluding 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. *See* 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).

493. 42 U.S.C. § 1997e(d)(3).

494. 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. 18 U.S.C. § 3006A(d).

495. Murphy v. Smith, 138 S. Ct. 784, 790, 200 L. Ed. 2d 75 (2018).

496. *See* Wilkins v. Gaddy, 734 F.3d 344, 347–348 (4th Cir. 2013); Parker v. Conway, 581 F.3d 198, 203-04 (3d Cir. 2009); Johnson v. Daley, 339 F.3d 582, 597–598 (7th Cir. 2003) (en banc) (finding no constitutional violation of equal protection); Jackson v. State Bd. of Pardons & Paroles, 331 F.3d 790, 796–798 (11th Cir. 2003) (holding that § 1997e(d) passed the rational basis test and was therefore constitutional); Foulk v. Charrier, 262 F.3d 687, 704 (8th Cir. 2001); Walker v. Bain, 257 F.3d 660, 670 (6th Cir. 2001) (stating "[w]e admit to being troubled by a federal statute that seeks to reduce the number of meritorious civil rights claims and protect the public fisc at the expense of denying a politically unpopular group their ability to vindicate actual, albeit 'technical,' civil rights violations"; upholding statute nonetheless); Hadix v. Johnson, 230 F.3d 840, 843 (6th Cir. 2000); Madrid v. Gomez, 190 F.3d 990, 996 (9th Cir. 1999); Collins v. Montgomery Cnty. Bd. of Prison Inspectors, 176 F.3d 679, 686 (3d Cir. 1999) (en banc) (affirming by divided vote the 150% cap's constitutionality); Carbonell v. Acrish, 154 F. Supp. 2d 552, 561–566 (S.D.N.Y. 2001) (upholding 150 percent limit as a rational means to achieve Congress's end).

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.[519]

This provision means that with the suits of people who are incarcerated, the defendants do not have to answer the complaint unless the court tells them to answer. Courts can do this if "the plaintiff has a reasonable opportunity to prevail on the merits."[520] In practice, courts generally direct defendants to answer if the case survives the court's first screening or a motion to dismiss, which means that the complaint states a claim for which relief can be granted.[521]

If you amend the complaint to add parties after the initial screening, the court might not automatically direct the new defendants to answer. When you move to amend or edit a complaint, always ask the court to direct the defendants to answer when it grants 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.[522]

The provision that "[n]o relief shall be granted to the plaintiff unless a reply has been filed"[523] may limit "default judgments," which are judgments granted in favor of the plaintiff if a defendant fails to respond to the complaint.[524] Clearly no default or default judgment can be entered unless the defendants have been directed to answer the complaint.[525] Although it is possible to read this provision to say that courts cannot grant default judgments if defendants refuse to reply,[526] this view has been

497. 42 U.S.C. § 1997e(g).

498. 42 U.S.C. § 1997e(g).

499. *See, e.g.*, Cameron v. Rantz, No. CV 08–42–H–DWM–RKS, 2008 WL 5111875, *6 (D. Mont. Dec. 4, 2008) (*unpublished*); 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)").

522. Amendment by motion and as a matter of course are discussed in FED. R. CIV. P. 15.

523. 42 U.S.C. § 1997e(g)(1)

524. *See* 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.").

525. Lafountain v. Martin, No. 1:07-cv-76, 2009 U.S. Dist. LEXIS 112349, at *10 (W.D.Mich.Dec 3, 2009) (*unpublished*) (where the court affirmed the magistrate judge's denial of Plaintiff's motion for default) ; Olmstead v. Balcarecel, No. 06-CV-14881, 2007 U.S. Dist. LEXIS 53130, at *3 (E.D.Mich., July 24, 2007) (*unpublished*); Cidone v. Chiarelli, No. Civ. 1:CV-07-0746, 2007 U.S. Dist. LEXIS 51581, at *n.1 (M.D.Pa., July 17, 2007) (*unpublished*); Wallin v. Brill, No. Civ.A. 04-cv-00215-WDM-MJW, 2007 U.S. Dist. LEXIS 17674, at *5 (D.Colo., Mar. 13, 2007) (*unpublished*) (setting aside default); 269 F.App'x. 820 (10th Cir. 2008), cert. denied, 555 U.S. 1051 (2008).

526. Johns v. Lockhart, No. 2:11-cv-458, 2013 U.S. DIST. LEXIS 45817, at *1 (W.D.Mich., Feb. 7, 2013) (*unpublished*) ("The only action required of any defendant is the filing of an appearance within the time allowed

rejected by at least one court,[527] and courts continue to grant default judgments in prison cases.[528] 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.[529]

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.[530]

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by the Court's order of service. No default will be entered against any defendant for exercising the right under section 1997(e(g)(1) not to respond to the complaint."), *affirmed in part, vacated in part, remanded on other grounds*, Johns v. Lockhart, No. 13-1720, 2014 U.S. App. LEXIS 18520 (6th Cir., Feb. 18, 2014) (unpublished); Smith v. Heyns, No. 2:12-CV-11373, 2013 U.S. Dist. LEXIS 39534, at *16 (E.D.Mich., Jan. 10, 2013) (*unpublished*), *report and recommendation adopted,* Smith v. Heyns, No. 12-11373, 2013 U.S. Dist. LEXIS 38148 (E.D.Mich., Mar. 20, 2013) (*unpublished*); Bell v. Lesure, No.CIV-08-1255-R, 2009 U.S. Dist. LEXIS 38691, at *3-4 (W.D.Okla., May 6, 2009) (*unpublished*) (holding the PLRA forbids entry of default judgments in prisoner cases); Vinning v. Walls, No. 01-CV-994-WDS, 2009 U.S. Dist. LEXIS 26936, at*1 (S.D.Ill., Mar. 31, 2009) (*unpublished*) (holding default judgment could be entered, but no relief ordered, under the PLRA).

527. McCurdy v. Johnson, No. 2:08-cv-01767-MMD-PAL, 2012 U.S. Dist. LEXIS 107171, at *2 (D.Nev., Aug. 1, 2012) (*unpublished*) (holding a default judgment may be entered if the court has entered an order specifically based on 42 U.S.C. § 1997e(g)(2), which authorizes requiring a reply where the court has found a reasonable opportunity to prevail on the merits).

528. *See, e.g.*, Montez v. Hampton, No. Civ.A. H-11-1891, 2013 U.S. Dist. LEXIS 172070, at *1–2 (S.D.Tex., Dec. 6, 2013) (*unpublished*) (awarding damages based on earlier default judgment); Benton v. Rousseau, 940 F.Supp.2d 1370, 1380-1381 (M.D.Fla. 2013) (entering default judgment against defendant who did not answer third amended complaint); Johnson v. MDOC, No. 4:05CV250-P-D, 2009 U.S. Dist. LEXIS 6142, at *3 (N.D.Miss., Jan. 28, 2009) (*unpublished*); Cameron v. Myers, 569 F. Supp. 2d 762, 766 (N.D. Ind. 2008) (entering default judgment in favor of a *pro se* prisoner plaintiff).

529. On contempt damages, *see* Hutto v. Finney, 437 U.S. 678, 691, 98 S. Ct. 2565, 2573, 57 L. Ed. 2d 522, 534 (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, 148–149 (S.D.N.Y. 1990) (holding a prison accountable for "compensatory damages to be paid to any member of 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. Hernandez 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.").

530. 42 U.S.C. § 1997e(f); *see* Moss v. Gomez, No. 97-56234, 1998 U.S. App. LEXIS 27753, at *4 (9th Cir.

Long before the PLRA, many federal courts were using telephones and videos in court proceedings and holding some proceedings at prisons.[531] 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.[532] Conducting a trial or evidentiary proceeding by video conferencing raises serious questions of fairness, particularly in jury trials. In *United States v. Baker*,[533] a non-PLRA case, the Fourth Circuit Court of Appeals said that it was constitutional to hold incarcerated persons' psychiatric commitment hearings by video. However, the court was careful to say that these decisions are generally based on expert testimony and don't depend on the appearance of the witnesses or the "impression" made by the person being committed, and that the proceeding does not involve fact-finding in the usual sense.[534] That description does not fit most evidentiary proceedings in the cases of incarcerated people, and courts have traditionally expressed a strong preference for having incarcerated plaintiffs physically present in court for trial.[535]

If the court does hold a hearing by telephone or video in your case, it is your responsibility to subpoena (call to court) any witnesses you wish to present or cross-examineor take any other action the court directs, just as in a live hearing in the courtroom.[536]

J. Revocation of Earned Release Credit

The PLRA added a new statutory section concerning earned release credit:

> § 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

Oct. 26, 1998) (*unpublished*) (holding district court should have considered teleconferencing as an alternative to producing prisoner witness who was a security risk).

531. *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).

532. *But see* Williams v. Forcade, No. Civ.A. 04-15 SECTION "I"(2), 2004 U.S. Dist. LEXIS 14494, at *1–2 (E.D. La. July 28, 2004) (*unpublished*) (directing that plaintiff participate in trial by telephone); 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), *aff'd* 228 F.3d 408 (5th Cir. 2000); Edwards v. Logan, 38 F. Supp. 2d 463, 466–468 (W.D. Va. 1999) (authorizing video jury trial for Virginia prisoner held in New Mexico; analogizing to PLRA's provisions concerning pretrial proceedings).

533. United States v. Baker, 45 F.3d 837 (4th Cir. 1995).

534. United States v. Baker, 45 F.3d 837, 845 (4th Cir. 1995).

535. *See, e.g.*, Muhammad v. Warden, Balt. City Jail, 849 F.2d 107, 113 (4th Cir. 1988) ("[C]onsideration should be given to securing the prisoner's presence, at his own or government expense, for trial of his action."); Poole v. Lambert, 819 F.2d 1025, 1029 (11th Cir. 1987) ("[A] district court should consider all possibilities for affording a prisoner his day in court before dismissing his case for failure to prosecute.").

536. *See. e.g.*, Bickham v. Blair, No. Civ.A. 98-881, 1999 U.S. Dist. LEXIS 12773, at *3 (E.D. La. Aug. 16, 1999) (*unpublished*) ("[Plaintiff's] proposed witnesses and the defendants did not attend the telephone hearing because he did not provide the court with sufficient information to subpoena the prisoners he listed as witnesses, …he did not list the defendants as witnesses,… and the defense apparently chose not to call the defendants as witnesses…. Therefore, the claim that he was denied cross-examination of the defendants is without merit."), Bickham v. Blair, 228 F.3d 408 (5th Cir. 2000).

> (3) the claimant testifies falsely or otherwise knowingly presents false evidence or information to the court.[537]

This seldom-used provision, which applies only to federal incarcerated people, allows a court to take away good time credit based on what a court thinks about an incarcerated person's litigation activities, or activities during the case. 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.[538]

K. Diversion of Damage Awards

The PLRA includes two provisions about awarding damages in a successful suit brought by an incarcerated person:

> 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.[539]

These provisions say that any compensatory (money) damages won by an incarcerated person in a lawsuit will be first used to pay any restitution orders or damages that the incarcerated person has not yet paid. There is very little case law about these statutes.[540] One important question is whether

537. 28 U.S.C. § 1932.

538. *See* United States v. Williams, No. 3:09-548-JFA, 2011 U.S. Dist. LEXIS 110297, at *1 (D.S.C. Sept. 26, 2011) (*unpublished*) ("The court finds that by filing a verified petition containing materially false statements of fact, the defendant presented false information to the court. Therefore, the court hereby revokes his earned release credit ('good time credits') pursuant to 28 U.S.C. § 1932."); United States v. Belt, No. PJM 10-2921, 2011 U.S. Dist. LEXIS 81548, at *24–25 (D. Md. July 26, 2011) (*unpublished*) (denying revocation of good time credit because the government instituted the suit); Armstrong v. Zickefoose, No. CIV.A. 10-4388 RMB, 2010 U.S. Dist. LEXIS 121571, at *10 (D.N.J. Nov. 17, 2010) (*unpublished*) (stating an order regarding revocation of good time credit will be ordered because plaintiff misrepresented prior litigation); Townsend v. United States, No. CV410-005, 2010 U.S. Dist. LEXIS 64625, at *1, n.2 (S.D. Ga. May 19, 2010) (*unpublished*) (noting that, in a previous case, the court had revoked plaintiff's earned good time credit for filing a frivolous and malicious suit); Rice v. Nat'l Sec. Council, 244 F. Supp. 2d 594, 597 (D.S.C. 2001) (revoking earned good time credit and dismissing complaint as frivolous and malicious), Rice v. Nat'l Sec. Council, 46 F. App'x 212 (4th Cir. 2002) (*per curiam*) (*unpublished*); Feurtado v. McNair, No. C/A 3:99-2582-17BC, 2000 WL 34448882, at *1 (D.S.C. July 20, 2000) (*unpublished*) (revoking earned time credit on the grounds "that this action was malicious and intended to harass"), Feurtado v. Mcnair, 3 F. App'x 113 (4th Cir. 2001) (per curiam).

539. Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, §§ 807–808, 110 Stat. 1321-66, 1321-75–1321-76 (1996). This provision is not codified, and appears after 18 U.S.C. § 3626 under the History heading.

540. *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 that a person who, after his release from prison, sued medical staff for their treatment of him while in a correctional facility was not a "prisoner" and the statute did not apply to him). *Cf.* Hutchinson v. Watson, No. 913CV862FJSRFT, 2014 WL 11515849, at *4 (N.D.N.Y. Aug. 13, 2014) (rejecting

the phrase "compensatory damages awarded" includes settlements of damage claims. As a matter of plain English, it would seem not, and that is the holding of the only relevant decision we are aware of.[541]

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.[542]

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.[543]

This standard is not very different from the law in effect before the PLRA,[544] though the requirement that the court make these specific findings ("need-narrowness-intrusiveness" findings) is new. The statute also bars injunctive relief that 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

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plaintiff's claim that notifying his victim of a settlement he received could form the basis of a retaliation suit, since the PLRA obligated the defendants to give notice), Hutchinson v. Watson, 607 F. App'x 116 (2d Cir. 2015).

541. In *Dodd v. Robinson*, Civil Action No. 03-F-571-N, Order, *1 (M.D. Ala. Mar. 26, 2004), in which a district attorney sought to satisfy a restitution order by moving in the court in which a case had been settled, the district court held that the PLRA provision concerning restitution orders "is not applicable in this case because the parties have reached a private settlement agreement." The court expressed confidence that the District Attorney had ample means in state court to enforce the restitution order. *Cf.* Torres v. Walker, 356 F.3d 238, 243 (2d Cir. 2004) (holding that a "so ordered" stipulation settling a damage claim was not a money judgment). The *Hutchinson* case cited in the previous footnote did treat a settlement as an award, but did not discuss the meaning of "compensatory damages awarded" in doing so.

542. One federal appeals court has held that under the PLRA's language, punitive damages are "prospective relief" subject to the PLRA's limitations. *See* Johnson v. Breeden, 280 F.3d 1308, 1325–1326 (11th Cir. 2002) (remanding to district court for determination of whether punitive damages are narrowly drawn). Other courts have mostly ignored this decision. One exception is Rieara v. Sweat, No. CV205-174, 2007 U.S. Dist. LEXIS 18644, at *14–16 (S.D. Ga. Mar. 16, 2007) (*unpublished*) (finding that punitive damages are a form of prospective relief under the PLRA, but that the court could first determine whether a punitive damage was warranted and then later determine whether it was excessive). These two cases seem conceptually wrong because the prospective relief provisions are clearly written to deal with injunctions and make very little sense as 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) (*unpublished*) (stating that the court could find no case applying the prospective relief provision to a punitive damage award).

543. 18 U.S.C. § 3626(a)(1)(A); *see* Brown v. Plata, 563 U.S. 493, 531 (2011) ("Narrow tailoring requires a fit between the remedy's ends and the means chosen to accomplish those ends. . . . [§ 3626(a)(1)(A)] means only that the scope of the order must be determined with reference to the constitutional violations established by the specific plaintiffs before the court); Armstrong v. Schwarzenegger, 622 F.3d 1058, 1071 (9th Cir. 2010) (stating "the core concern of the intrusiveness inquiry [is] whether the district court has 'enmeshed [itself] in the minutiae of prison operations,' beyond what is necessary to vindicate plaintiffs' federal rights. . . ."); Benjamin v. Fraser, 343 F.3d 35, 54 (2d Cir. 2003) ("Although the PLRA's requirement that relief be 'narrowly drawn' and 'necessary' to correct the violation might at first glance seem to equate permissible remedies with constitutional minimums, a remedy may require more than the bare minimum the Constitution would permit and yet still be necessary and narrowly drawn to correct the violation."). .

544. *See* Smith v. Ark. Dept. of Corr., 103 F.3d 637, 647 (8th Cir. 1996) (observing that the PLRA "merely codifies existing law and does not change the standards for determining whether to grant an injunction.").

violation, and 3) no other relief will correct the violation.[545] This provision also appears to be consistent with prior law.[546] The PLRA limits federal courts to prospective relief (relief that is ordered now against some future event) that corrects violations of "*federal* rights," which means a court cannot enter an injunction based on a violation of state or local law.[547]

2. Preliminary Injunctions

Preliminary injunctions must meet the same standards that apply to other prospective relief, though the court does not need to make the required need-narrowness-intrusiveness findings immediately. A preliminary injunction automatically expires after ninety days unless the court makes the required findings and makes the order final.[548] However, 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.[549] The PLRA's requirements for preliminary injunctions are in addition to, not instead of, the usual requirements for such an injunction.[550]

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 nonadmission of prisoners to a prison."[551] An order does not have to specifically direct the release of incarcerated people to be considered a prisoner release order.[552] Such orders are permitted only if previous, less intrusive relief has failed to fix the federal law violation in a reasonable time.[553] In other words, releasing incarcerated people to correct the federal law violation may 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.[554]

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545. 18 U.S.C. § 3626(a)(1)(B); *see, e.g.*, Doe v. Cook County, Illinois, 798 F.3d 558, 564 (7th Cir. 2015) (stating "under § 3626(a)(1)(B) the parties, like the court, must respect state law unless federal law leaves no other option"); Coleman v. Brown, 952 F. Supp. 2d 901, 904, 931–932 (E.D.Cal. 2013) (waiving all state and local laws that would interfere with compliance with a population limit), *stay denied*, Coleman v. Brown 960 F.Supp.2d 1057 (E.D. Cal. July 3, 2013), *stay denied sub nom.* Brown v. Plata, 563 U.S. 493 (2013); Perez v. Hickman, No. C 05-05241 JSW, 2007 U.S. Dist. LEXIS 44432, at *11, *16–17 (N.D. Cal. June 12, 2007) (*unpublished*) (ordering increase in salaries paid to prison dentists, contrary to state law, and finding PLRA standards met).

546. *See, e.g.*, Stone v. City & Cty. of S.F., 968 F.2d 850, 861–865 (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. *ex rel.* Moore 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.").

547. Handberry v. Thompson, 446 F.3d 335, 344–346 (2d Cir. 2006) (holding that in prison cases the PLRA overrides federal courts' "supplemental jurisdiction" to enforce state law).

548. 18 U.S.C. § 3626(a)(2).

549. *See, e.g.*, Mayweathers v. Newland, 258 F.3d 930, 935–936 (9th Cir. 2001) (upholding a second injunction when the defendants were then subject to a prior injunction that was being appealed, the injunctions were identical, and the granting of the first injunction raised no new issues unable to be reviewed by the court on appeal); Coleman v. Brown, 938 F. Supp. 2d 955, 990 (E.D. Cal. Apr. 5, 2013) (upholding an injunction that was "necessary to correct current and ongoing violations" of prisoners' federal rights and "extend[ed] no further than necessary to correct those violations.").

550. Gates v. Fordice, No. 4:71CV6-JAD, CONSOLIDATED WITH No. 4:90CV125-JAD, 1999 U.S. Dist. LEXIS 13443, at *2 (N.D. Miss. July 16, 1999).

551. 18 U.S.C. § 3626(g)(4).

552. Brown v. Plata, 563 U.S. 493, 511 (2011) (holding that an order that limited prison population to a percentage of the prisons' design capacity, but did not necessarily require release of any prisoners since the defendants could comply by expanding capacity or transferring prisoners to county jails or out of state, was a prisoner release order because "it nonetheless has the 'effect of reducing or limiting the prison population'"); *accord*, Ruiz v. Estelle, 161 F.3d 814, 825–827 (5th Cir. 1998).

553. 18 U.S.C. § 3626(a)(3)(A).

554. 18 U.S.C. § 3626(a)(3)(E)(i)–(ii).

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.[555]

The PLRA requires convening a three-judge court before a "prisoner release order" can be issued. Either the party asking for the order, or the district court itself, can request these orders.[556] In order to obtain a prisoner release order, the plaintiff will have to show a few things. First, the plaintiff must show that there has been a prior, less intrusive order that failed to correct the federal law violation that the plaintiff is seeking a remedy for. Second, the plaintiff must show that the defendants had a reasonable time to comply with the previous order.[557] Finally, the plaintiff will have to show that "(i) crowding is the primary cause of the violation of a Federal right; and (ii) no other relief will remedy the violation of the Federal right."[558] Since the statute is clearly most concerned with crowding, requests to remove incarcerated people from a particular prison for reasons unrelated to crowding are not governed by the prisoner release provisions.[559] However, in the context of the COVID-19 pandemic, most courts have held that requests to reduce prison populations to protect incarcerated people from the virus would be considered prisoner release orders.[560]

The PLRA permits state and local officials to intervene to oppose prisoner release orders.[561]

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 that, "extends no further than necessary" to correct a current the violation of federal law, and the "prospective relief" is narrowly drawn and the least intrusive means to correct the violation.[562] After this two-year period, orders may be challenged every year.[563] 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."[564] 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.[565] "Current and ongoing" violation of federal law means one that

555. Berwanger v. Cottey, 178 F.3d 834, 836 (7th Cir. 1999) (citing 18 U.S.C. § 3626(a)(3)(A) and finding that the prison official's request to modify an order could not be based on the PLRA because the order existed before the PLRA; however, the PLRA rules about *terminating* relief could still apply).

556. 18 U.S.C. § 3626(a)(3)(B)–(D).

557. 18 U.S.C. § 3626(a)(3)(C). *See* Coleman v. Schwarzenegger, No. S-90-0520 LKK JFM P, U.S. Dist. LEXIS 56043, at *2–5 (E.D.Cal., July 23, 2007) (*unpublished*) (citing materials supporting the showing required by § 3626(C)).

558. 18 U.S.C. § 3626(a)(3)(E).

559. Plata v. Brown, 427 F. Supp. 3d 1211 (N.D. Cal. 2013) (holding an order directing removal of medically vulnerable incarcerated people from a prison where Valley Fever was prevalent did not constitute a prisoner release order).

560. *See, e.g.*, Wilson v. Ponce, No. CV 20-4451-MWF (MRWx), 2020 U.S. Dist. LEXIS 160346, at *5 (C.D. Cal. July 14, 2020) (holding that petitioners' request to exercise social distancing cannot be separated from overcrowding and is therefore a prisoner release order); Alvarez v. Larose, 445 F. Supp. 3d 861, 868 (S.D. Cal. 2020); Money v. Pritzker, 453 F. Supp. 3d 1103, 1124-26 (N.D. Ill. 2020).

561. 18 U.S.C. § 3626(a)(3)(F); *see* Ruiz v. Estelle, 161 F.3d 814, 818–821 (5th Cir. 1998) (holding that PLRA grants individual legislators the right to intervene in litigation regarding prisoner release orders "where [such legislators'] legislative jurisdiction or function includes appropriation of funds for the construction, operation, or maintenance of prison facilities subject to the challenged prisoner release order").

562. 18 U.S.C. § 3626(b)(1)–(3).

563. 18 U.S.C. § 3626(b)(1)(A)(ii).

564. 18 U.S.C. § 3626(b)(2); *see* Tyler v. Murphy, 135 F.3d 594, 597 (8th Cir. 1998) (noting that, absent the required findings, the immediate termination provision rather than the two-year provision applies).

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

is going on at the time the termination motion is litigated, not one that is anticipated to occur if the court order is terminated.[566]

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.[567]

5. Automatic Stay

The PLRA provides that courts must quickly rule on motions to terminate prospective relief. The PLRA also says that the prospective relief is automatically stayed (suspended) on the thirtieth day after the motion is made. If prospective relief is stayed the court will no longer enforce a rule or ruling requiring prison officials to remedy the violation.[568] 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.[569] Good cause may be established by showing that there is reason to believe there are continuing federal law violations in the prisons at issue.[570] The Supreme Court has held that the automatic stay provision does not violate the principle of separation of powers in the Constitution.[571]

6. Settlements

Under the PLRA, settlements that include prospective relief must meet the same need-narrowness-intrusiveness requirements that the PLRA establishes for other court orders.[572] 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.[573] In effect, they must be contracts enforceable in state court. The only federal court recourse for violation of a private settlement agreement is to reinstate the action as it was before the settlement, and litigate the case to conclusion. These agreements are not subject to the judgment

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566. Cason v. Seckinger, 231 F.3d at 777, 784 (11th Cir. 2000); Benjamin v. Jacobson, 172 F.3d 144, 166 (2d Cir. 1999); Graves v. Arpaio, No. CV-77-0479-PHX-NVW, 2008 U.S. Dist. LEXIS 85935 (D. Ariz. Oct. 22, 2008), *aff'd*, 623 F.3d 1043 (9th Cir. 2010).

567. Court of appeals decisions and district court decisions upholding the statute include Ruiz v. United States, 243 F.3d 941 (5th Cir. 2001); Gilmore v. California, 220 F.3d 987 (9th Cir. 2000); 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 Cty. Jail v. Rouse, 129 F.3d 649 (1st Cir. 1997); Gavin v. Branstad, 122 F.3d 1081 (8th Cir. 1997); and Plyler v. Moore, 100 F.3d 365 (4th Cir. 1996).

568. Richard J. Costa, Note, *The Prison Litigation Reform Act of 1995: A Legitimate Attempt to Curtail Frivolous Inmate Lawsuits and End the Alleged Micromanagement of State Prisons or a Violation of Separation of Powers?*, 63 BROOK. L. REV. 319, 324 (1997).

569. 18 U.S.C. § 3626(e)(3).

570. *See* Plata v. Schwarzenegger, No. C01-1351 TEH, 2009 U.S. Dist. LEXIS 20438, at *1 (N.D. Cal. Feb. 26, 2009) (granting less than a 60-day extension where it was undisputed that serious harm would result from delaying health care reforms but a hearing was scheduled on termination in less than 60 days); Lancaster v. Tilton, No. C 79-01630 WHA, 2007 U.S. Dist. LEXIS 89252, at *1 (N.D. Cal. Nov. 19, 2007) (holding evidence of continuing sanitary deficiencies were good cause to extend the stay). One court has held that good cause was established by "extraordinary complexity of the issues on which the parties must prepare to present evidence and the continuing opacity about what orders or provisions are being challenged." Braggs v. Dunn, No. 2:14cv601-MHT, 2020 U.S. Dist. LEXIS 186833, at *4 (M.D. Ala. Oct. 1, 2020) (granting plaintiffs' motion for on-site prison inspections related to mental-health care even during the COVID-19 pandemic because the minimal risk of transmission is outweighed by plaintiff prisoners' need to gather evidence to respond to the defendant's motion to terminate the court's remedial orders."

571. Miller v. French, 530 U.S. 327, 348, 120 S. Ct. 2246, 2259, 147 L. Ed. 2d 326, 343 (2000).

572. 18 U.S.C. § 3626(c)(1).

573. 18 U.S.C. § 3626(c)(2).

termination provisions.[574] 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 winning, you will have to get familiar 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 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.

574. Shultz v. Wells, 73 F. App'x 794, 795–796 (6th Cir. 2003) (*unpublished*); Davis v. Gunter, 771 F. Supp. 2d 1068, 1071–1072 (D. Neb. 2011); York v. City of El Dorado, 119 F. Supp. 2d 1106, 1109 (E.D. Cal. 2000).