

**An Abridged Version:  
The Prison Litigation Reform Act**

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# The Prison Litigation Reform Act

## I. Introduction

The Prison Litigation Reform Act of 1995 (PLRA), actually enacted in 1996, comprises a number of provisions of the U.S. Code that restrict and discourage litigation by prisoners. They fall into two broad categories: the prospective relief provisions, directed mainly at institutional reform injunctive litigation, and the prisoner litigation provisions, directed generally at civil actions brought by prisoners. This summary is an abridged version of a much longer outline prepared by John Boston. Do not even consider litigating PLRA issues without acquiring the full outline.

## II. Scope and definitions

The prospective relief sections of the PLRA apply to “civil action[s] with respect to prison conditions,” which are defined to include “any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but do not include habeas corpus proceedings challenging the fact or duration of confinement in prison.”<sup>1</sup> A “prison” is a facility “that incarcerates or detains juveniles or adults accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law.”<sup>2</sup> “Prospective relief” is “all relief other than compensatory money damages.”<sup>3</sup>

The prisoner litigation sections of the PLRA mostly apply to “civil actions” brought by “prisoners.” A prisoner is “any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.”<sup>4</sup>

Persons who are civilly committed are generally not prisoners, even if their commitment has its origins in past criminal charges or sentences.<sup>5</sup> However, persons who are civilly committed but whose criminal proceedings are still pending remain pre-trial detainees and are therefore prisoners.<sup>6</sup>

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<sup>1</sup> 18 U.S.C. § 3626(g)(2).

<sup>2</sup> 18 U.S.C. § 3626(g)(5).

<sup>3</sup> 18 U.S.C. § 3626(g)(7). Interpretation of this term is discussed in § III, below.

<sup>4</sup> 42 U.S.C. § 1997e(h); 28 U.S.C. § 1915(h); 28 U.S.C. § 1915A(c).

<sup>5</sup> See *Michau v. Charleston County, S.C.*, 434 F.3d 725, 727-28 (4<sup>th</sup> Cir. 2006) (person civilly detained pursuant to sexually violent predator statute), *cert. denied*, 126 S.Ct. 2936 (2006); *Agyeman v. I.N.S.*, 296 F.3d 871, 885-86 (9<sup>th</sup> Cir. 2002) (alien detained pending deportation); *Contra*, *Willis v. Smith*, 2005 WL 550528 at \*10 (N.D.Iowa, Feb. 28, 2005) (holding that a person civilly committed as a sexually violent predator after completion of his sentence was a prisoner for PLRA purposes).

<sup>6</sup> *Kalinowski v. Bond*, 358 F.3d 978, 979 (7<sup>th</sup> Cir.) (holding that persons held under the Illinois Sexually Dangerous Persons Act are prisoners for PLRA purposes), *cert. denied*, 542 U.S. 907 (2004);

Persons who are not lawfully subject to detention are not prisoners.<sup>7</sup> Prospective prisoners are not prisoners; an arrestee is not a prisoner even if he is subsequently jailed,<sup>8</sup> and someone who has been sentenced to prison but has not yet surrendered is not “confined” in a correctional facility even though he may be within the prison system’s legal custody.<sup>9</sup>

Ex-prisoners are not prisoners; most decisions hold that the PLRA does not apply to suits filed after release, even if they concern events that occurred in prison.<sup>10</sup> Persons released on parole to residential facilities they are not free to leave remain prisoners because they are “confined” to institutions that fit the definition of “correctional facilities.”<sup>11</sup>

### III. Prospective Relief

Prospective relief in prison conditions litigation, whether contested or entered by consent, must be supported by findings that it is narrowly drawn, extends no further than necessary to correct a violation of federal rights, and is the least intrusive means of doing so.<sup>12</sup> Courts are to give substantial weight to adverse impacts on public safety or criminal justice operations, and to avoid directing the violation of state law unless necessary to correct violations of federal rights.<sup>13</sup>

Prospective relief is defined as “all relief other than compensatory money damages.”<sup>14</sup>

Injunctions in prison conditions litigation may be terminated on motion unless the court finds that there is a “current and ongoing” violation of federal law; if the court makes such findings, relief must meet the same need/narrowness/intrusiveness requirements as for the initial entry of relief.<sup>15</sup> Relief may not be continued based on the

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<sup>7</sup> Williams v. Block, 1999 WL 33542996 at \*6 (C.D.Cal., Aug. 11, 1999) (holding that persons held after they were entitled to be released were not prisoners).

<sup>8</sup> Brewer v. Philson, 2007 WL 87625 at \*2 (W.D.Ark., Jan. 10, 2007) (holding plaintiff was not a prisoner for purposes of excessive force on arrest, though he was for purposes of excessive force in a jail holding cell).

<sup>9</sup> Jasperson v. Federal Bureau of Prisons, 460 F.Supp.2d 76, 87 (D.D.C. 2006).

<sup>10</sup> Norton v. The City Of Marietta, OK, 432 F.3d 1145, 1150 (10th Cir. 2005); Nerness v. Johnson, 401 F.3d 874, 876 (8th Cir. 2005) (per curiam); Ahmed v. Dragovich, 297 F.3d 201, 210 n.10 (3d Cir. 2002) (citing cases); Janes v. Hernandez, 215 F.3d 541, 543 (5th Cir. 2000), *cert. denied*, 531 U.S. 1113 (2001); Greig v. Goord, 169 F.3d 165, 167 (2d Cir. 1999); Kerr v. Puckett, 138 F.3d 321, 322 (7<sup>th</sup> Cir. 1998).

<sup>11</sup> Jackson v. Johnson, 475 F.3d 261, 265-67 (5th Cir. 2007).

<sup>12</sup> 18 U.S.C. § 3626(a).

<sup>13</sup> 18 U.S.C. § 3626(a).

<sup>14</sup> 18 U.S.C. § 3626(g)(7).

<sup>15</sup> 18 U.S.C. § 3626(b); *see* Benjamin v. Fraser, 264 F.3d 175 (2d Cir. 2001) (affirming findings of continuing and ongoing violations).

prospect of future violations,<sup>16</sup> but the court may reimpose relief after termination if a new showing of constitutional violation is made and if the court has retained jurisdiction of other aspects of the case.<sup>17</sup>

There are additional provisions restricting “prisoner release orders,”<sup>18</sup> preliminary injunctions,<sup>19</sup> and the use of special masters in prison conditions litigation.<sup>20</sup>

#### IV. Exhaustion of Administrative Remedies

##### A. The Statutory Requirement

The most-litigated provision of the PLRA is its exhaustion requirement, which provides: “No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.”<sup>21</sup>

The Supreme Court has stated: “Beyond doubt, Congress enacted § 1997e(a) to reduce the quantity and improve the quality of prisoner suits; to this purpose, Congress afforded corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case.”<sup>22</sup> However, the Court has more recently stated that the statutory term “exhausted” has the same meaning as in administrative law,<sup>23</sup> and it has drawn on the understanding of the term in habeas corpus as well,<sup>24</sup> leading one Justice to suggest that the exceptions to exhaustion requirements recognized in those bodies of law should apply as well under the PLRA.<sup>25</sup>

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<sup>16</sup> Para-Professional Law Clinic at SCI-Graterford v. Beard, 334 F.3d 301, 304-05 (3d Cir. 2003); Castillo v. Cameron County, 238 F.3d 339, 353 (5<sup>th</sup> Cir. 2001); Cason v. Seckinger, 231 F.3d 777, 784 (11<sup>th</sup> Cir. 2000).

<sup>17</sup> Hadix v. Caruso, 461 F.Supp.2d 574, 589 (W.D.Mich. 2006), *remanded on other grounds*, 2007 WL 2753026 (6th Cir., Sept. 21, 2007) (per curiam).

<sup>18</sup> 18 U.S.C. § 3626(a)(3).

<sup>19</sup> 18 U.S.C. § 3626(a)(2) (limiting duration of preliminary injunctions to 90 days, requiring them to meet the need-narrowness-intrusiveness standards).

<sup>20</sup> 18 U.S.C. § 3626(f).

<sup>21</sup> 42 U.S.C. § 1997e(a).

<sup>22</sup> Porter v. Nussle, 534 U.S. 516, 524-25 (2002); *accord*, Jones v. Bock, \_\_\_ U.S. \_\_\_, 127 Ct. 910, 923 (2007) (“We have identified the benefits of exhaustion to include allowing a prison to address complaints about the program it administers before being subjected to suit, reducing litigation to the extent complaints are satisfactorily resolved, and improving litigation that does occur by leading to the preparation of a useful record.”)

<sup>23</sup> Woodford v. Ngo, \_\_\_ U.S. \_\_\_, 126 S.Ct. 2378, 2387 (2006).

<sup>24</sup> *Woodford*, 126 S.Ct. at 2386.

<sup>25</sup> *Id.* at 2393 (Breyer, J., concurring).

The Supreme Court has cautioned in its most recent PLRA decision against judicial embellishment of the exhaustion requirement, holding that the PLRA's scheme for prison litigation does not displace usual litigation practices under the Federal Rules of Civil Procedure and that the exhaustion requirement may not be enhanced based on judges' policy views.<sup>26</sup>

Though the PLRA exhaustion requirement is mandatory, it is not absolute, and the Supreme Court has confirmed the view of most circuits that it is not jurisdictional.<sup>27</sup> Most circuits to consider the question have held that courts therefore can apply doctrines of waiver, estoppel, and equitable tolling to excuse failure to exhaust.<sup>28</sup> The Supreme Court has recently held that non-exhaustion is an affirmative defense to be raised by defendants;<sup>29</sup>

### **B. What Happens If the Plaintiff Has Failed To Exhaust?**

The statute says that "No action shall be brought . . . until such administrative remedies as are available are exhausted."<sup>30</sup> It does not say what courts should do if the plaintiff has not exhausted.

Most courts have held that claims not exhausted before filing must be dismissed, even if exhaustion has been completed by the time the court reaches the exhaustion question.<sup>31</sup>

### **C. What Is Exhaustion?**

Exhaustion under the PLRA means "proper exhaustion," *i.e.*, "compliance with an agency's deadlines and other critical procedural rules."<sup>32</sup> It also means completing the administrative process by appealing an adverse decision to the highest level of the

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<sup>26</sup> Jones v. Bock, \_\_\_ U.S. \_\_\_, 127 S.Ct. 910 (2007) (rejecting treatment of PLRA exhaustion as a pleading requirement, requirement that all litigation defendants have been named in the administrative grievance, and the "total exhaustion" rule).

<sup>27</sup> Woodford v. Ngo 126 S.Ct. at 2392.

<sup>28</sup> Hemphill v. New York, 380 F.3d 680, 686 (2d Cir. 2004) (waiver and estoppel); Wright v. Hollingsworth, 260 F.3d 357, 358 n.2 (5th Cir. 2001) (reiterating *Underwood* holding after *Booth v. Churner*); Foulk v. Charrier, 262 F.3d 687, 697 (8<sup>th</sup> Cir. 2001).

<sup>29</sup> Jones v. Bock, \_\_\_ U.S. \_\_\_, 127 S.Ct. 910, 919-22 (2007).

<sup>30</sup> 42 U.S.C. § 1997e(a).

<sup>31</sup> See Neal v. Goord, 267 F.3d 116, 122 (2d Cir. 2001); *accord*, Johnson v. Jones, 340 F.3d 624, 627-28 (8<sup>th</sup> Cir. 2003) (citing cases, overruling prior authority).

<sup>32</sup> Woodford v. Ngo, \_\_\_ U.S. \_\_\_, 126 S.Ct. 2378, 2386-87 (2006)..

administrative system,<sup>33</sup> and waiting to sue until the time for prison officials to render a decision has expired.<sup>34</sup>

What if the prisoner files a grievance and gets no response? The case law is replete with such instances.<sup>35</sup> Failure to respond cannot mean failure to exhaust; otherwise prison officials could keep prisoners out of court by simply ignoring their grievances.<sup>36</sup> Hence, as noted, once a prisoner has filed the final appeal and the deadline for a final response has passed, exhaustion is complete. Systems with no deadline for the final appeal present a more difficult problem, and courts have not resolved how long a prisoner must wait in the absence of a final deadline.<sup>37</sup>

As to failures to respond at an earlier stage, some courts have held that if the grievance system allows prisoners to treat non-response as a denial of the grievance, their failure to appeal the non-response is a failure to exhaust.<sup>38</sup> Conversely, if the prisoner cannot appeal without a decision, and is denied a decision, the prisoner has sufficiently exhausted “available” remedies.<sup>39</sup>

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<sup>33</sup> *Wright v. Hollingsworth*, 260 F.3d 357, 358 (5<sup>th</sup> Cir. 2001); *White v. McGinnis*, 131 F.3d 593, 595 (6<sup>th</sup> Cir. 1997).

<sup>34</sup> *Powe v. Ennis*, 177 F.3d 393, 394 (5<sup>th</sup> Cir. 1999); *accord*, *Whittington v. Ortiz*, 472 F.3d 804, 807-08 (10<sup>th</sup> Cir. 2007).

<sup>35</sup> *See Clarke v. Thornton*, 515 F.Supp.2d 435, 438-41 (S.D.N.Y. 2007) (noting plaintiff had filed seven grievances without proper response, but dismissing for non-exhaustion anyway because she did not appeal any of them to the final step).

<sup>36</sup> *John v. N.Y.C. Dept. of Corrections*, 183 F.Supp.2d 619, 625 (S.D.N.Y. 2002) (rejecting argument, three years after grievance appeal, that plaintiff must continue waiting for a decision); *In Dole v. Chandler*, 438 F.3d 804, 811-12 (7<sup>th</sup> Cir. 2006), the court held a prisoner had exhausted when he did everything necessary to exhaust but his grievance simply disappeared, and he received no instructions as to what if anything to do about it.

<sup>37</sup> The Seventh Circuit has held, in connection with a grievance system that called for appeals to be decided within 60 days “whenever possible,” that the remedy did not become “unavailable” because decision took six months. “Even six months is prompt compared with the time often required to exhaust appellate remedies from a conviction.” *Ford v. Johnson*, 362 F.3d 395, 400 (7<sup>th</sup> Cir. 2004).

Other courts that have considered similar delays have not found a failure to exhaust. *See McNeal v. Cook County Sheriff’s Dep’t*, 282 F.Supp.2d 865, 868 n.3 (N.D.Ill. 2003) (holding that 11 months is long enough, citing cases holding that seven months is long enough and one month is not).

<sup>38</sup> *Cox v. Mayer*, 332 F.3d 422, 425 n.2 (6<sup>th</sup> Cir. 2003).

<sup>39</sup> *Brengettcy v. Horton*, 423 F.3d 674, 682 (7<sup>th</sup> Cir. 2005) (holding prisoner who received no decision had exhausted where the grievance policy did not say what to do absent a decision); *Fouk v. Charrier*, 262 F.3d 687, 698 (8<sup>th</sup> Cir. 2001).

Courts have held that prisoners satisfied the exhaustion requirement in cases where they have failed to appeal because the grievance system or its personnel told them they could not appeal,<sup>40</sup> or gave other misleading or confusing responses.<sup>41</sup>

Exhaustion must be done personally; except in class actions, a prisoner cannot rely on another prisoner's exhaustion,<sup>42</sup> unless of course prison procedures so permit.<sup>43</sup>

### 1. What If the Prisoner Wins the Grievance?

Common sense and a growing body of case law hold that if the prisoner wins the grievance at an early stage (either by favorable decision or simply by getting the relief sought), it's over and the prisoner has exhausted.<sup>44</sup> This is true *a fortiori* where prison officials refuse to process a grievance or appeal on the ground that the prisoner has already received the relief sought.<sup>45</sup> Similarly, if a prisoner grieves and receives a favorable decision, but prison staff then ignore or fail to carry out the decision, the prisoner need not grieve the noncompliance—otherwise “prison officials could keep prisoners out of court indefinitely by saying ‘yes’ to their grievances and ‘no’ in practice.”<sup>46</sup> However, some courts have held that an administrative decision does not obviate the need for an appeal unless it is so completely favorable that no further relief is possible.<sup>47</sup> The Ninth Circuit has stated the matter less absolutely, holding that a prisoner need not exhaust further levels of review after receiving all “available” remedies at an

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<sup>40</sup> *Brown v. Valoff*, 422 F.3d 926, 935 (9th Cir. 2005) (holding “a prisoner need not press on to exhaust further levels of review once he has . . . been reliably informed by an administrator that no remedies are available”); *Miller v. Tanner*, 196 F.3d 1190 (11th Cir. 1999) (holding that grievance decision that stated it was non-appealable need not have been appealed).

<sup>41</sup> *Lee v. Walker*, 2002 WL 980764 at \*2 (D.Kan., May 6, 2002) (holding that prisoner who sent his grievance appeal to the wrong place would be entitled to reconsideration of dismissal if he showed that the prison handbook said it was the right place).

<sup>42</sup> *Newman v. Montana Dept. of Corrections*, 2007 WL 2461937 at \*3 & n.2 (D.Mont., Aug. 27, 2007).

<sup>43</sup> At least one prison system permits “group grievances” which may be filed by one prisoner on behalf of himself and others, subject to certain requirements. *See Smith v. Tuggles*, 2007 WL 685836 at \*3 (E.D.Cal., Mar. 5, 2007) (dismissing case where “group grievance” exhaustion was claimed because grievance omitted required information on inmates’ housing locations), *report and recommendation adopted*, 2007 WL 1544712 (E.D.Cal., May 25, 2007).

<sup>44</sup> *Brown v. Valoff*, 422 F.3d 926, 935 (9th Cir. 2005); *Ross v. County of Bernalillo*, 365 F.3d 1181, 1186-87 (10<sup>th</sup> Cir. 2004).

<sup>45</sup> *James v. Davis*, 2006 WL 2171082 at \*17 (D.S.C., July 31, 2006) (declining to dismiss for non-exhaustion where prison officials returned grievances as “unprocessed” and stated that the actions he requested had been accomplished, suggesting no need to appeal).

<sup>46</sup> *Sulton v. Wright*, 265 F.Supp.2d 292, 298-99 (S.D.N.Y. 2003); *McGrath v. Johnson*, 67 F.Supp.2d 499, 510 (E.D.Pa. 1999), *aff’d*, 35 Fed.Appx. 357, 2002 WL 1271713 (3rd Cir.2002).

<sup>47</sup> *See Ross v. County of Bernalillo*, 365 F.3d 1181, 1186-87 (10<sup>th</sup> Cir. 2004) (“When there is *no possibility of any further relief*, the prisoner’s duty to exhaust available administrative remedies is complete.”) (emphasis supplied).

intermediate stage or having been “reliably informed by an administrator that no remedies are available.”<sup>48</sup>

## 2. Specificity of Grievances

How specific and detailed must a grievance be to meet the exhaustion requirement? The answer is dictated by the Supreme Court’s adoption of a “proper exhaustion” requirement: “The level of detail necessary in a grievance to comply with the grievance procedures will vary from system to system and claim to claim, but it is the prison’s requirements, and not the PLRA, that defines the boundaries of proper exhaustion.”<sup>49</sup>

This seemingly straightforward holding raises a number of questions which the lower courts have not yet begun to grapple with, *e.g.*: Is there any limit on the specificity that prisons can demand in their grievances? To what extent are courts bound by the decisions of prison grievance bodies finding grievances inadequately specific?<sup>50</sup> What should the court do if a grievance has been decided on the merits, but defendants argue that the allegations in the subsequent judicial complaint were not stated specifically enough in the grievance?<sup>51</sup>

At present, it appears that most prison grievance systems do not require great specificity—though that may change in light of *Jones v. Bock* as prison officials realize that making their systems more demanding may make it easier to get prisoners’ lawsuits dismissed.<sup>52</sup>

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<sup>48</sup> *Brown v. Valoff*, 422 F.3d 926, 935 (9th Cir. 2005).

<sup>49</sup> *Jones v. Bock*, \_\_\_ U.S. \_\_\_, 127 S.Ct. 910, 923 (2007); *see* *Woodford v. Ngo*, \_\_\_ U.S. \_\_\_, 126 S.Ct. 2378 (2006) (adopting proper exhaustion rule).

<sup>50</sup> *See* *Cordova v. Frank*, 2007 WL 2188587 at \*7 (W.D.Wis., July 26, 2007) (rejecting grievance officials’ determination that grievance was not specific enough, despite rule in jurisdiction against revisiting prisons’ procedural determinations).

<sup>51</sup> *Crawford v. Dretke*, 2007 WL 784343 at \*1 (S.D.Tex., Mar. 12, 2007) (inferring that grievances were specific enough where they were rejected for untimeliness but not lack of specificity).

<sup>52</sup> The Michigan grievance system at issue in *Jones* required both that grievances “be as specific as possible” and that they be “brief and concise,” but contained no specific requirements for content. *Jones*, 127 S.Ct. at 922. Subsequently, the policy was amended to require “[d]ates, times, places and names of all those involved in the issue being grieved.” Michigan Dep’t of Corr. Policy Dir. No. 03.02.130 (Dec. 19, 2003). In Illinois, after the Seventh Circuit held that the required level of specificity was prescribed by the prisons’ grievance policy and observed that there was no specificity requirement in the policy, *Strong v. David*, 297 F.3d 646, 650 (7<sup>th</sup> Cir. 2002), the prison system revised its policy to require “factual details regarding each aspect of the offender’s complaint, including what happened, when, where, and the name of each person who is the subject of or who is otherwise involved in the complaint. This provision does not preclude an offender from filing a grievance when the names of individuals are not known, but the offender must include as much descriptive information about the individual as possible.” 20 Ill.Admin. Code § 504.810(b).

