



SCHOOL of LAW

FACULTY OFFICES

November 6, 2007

Attn: Ms. Rachel King
House Judiciary Committee
Rachel.King@mail.house.gov

**Written Testimony of Asst. Professor Giovanna Shay
Regarding Proposed Revisions to Prison Litigation Reform Act**

Dear Members of the House Judiciary Committee:

My name is Giovanna Shay, and I am an Assistant Professor at Western New England College School of Law. I am submitting this written testimony in support of the SAVE coalition's proposed revisions to the Prison Litigation Reform Act (PLRA).

For a number of years, I have been involved in both scholarly legal research and litigation regarding the PLRA. I have published articles on how the PLRA undermines court access and the rule of law. These include an American Constitution Society (ACS) issue brief with Prof. Margo Schlanger entitled *Preserving the Rule of Law in America's Prisons and Jails: The Case for Amending the Prison Litigation Reform Act* (March 2007),¹ and a full-length law review article with Johanna Kalb which is appearing this month in the *Cardozo Law Review—More Stories of Jurisdiction-Stripping and Executive Power: Interpreting the Prison Litigation Reform Act*, 29 *CARDOZO L. REV.* 291 (October 2007).² I served as counsel for *amicus curiae* the Jerome N. Frank Legal Services Organization of the Yale Law School, which filed a brief in *Woodford v. Ngo*, 126 S.Ct. 2378 (2006) (interpreting the PLRA exhaustion provision to encompass a procedural default component). I also contributed research to the *amicus* brief filed on behalf of a number of organizations by the American Civil Liberties Union National Prison Project in *Jones v. Bock*, 127 S.Ct. 910 (2007), another Supreme Court case involving PLRA exhaustion issues.³

Based on my research and experience in this area, I support all of the proposed SAVE reforms to the PLRA. In particular, I urge you to modify the exhaustion

¹ available at www.acslaw.org/node/4587.

² available at www.Cardozolawreview.com/PastIssues/29.1_shay_kalb.pdf.

³ The views that I express in this testimony are mine alone; they do not necessarily represent the views of my current institution, Western New England College School of Law, or any other entity or person.

requirement, eliminate the physical injury requirement, and limit the PLRA so that it does not apply to juveniles. However, I want to focus this written testimony on the exhaustion requirement, which has been a particular subject of my research.

As the Committee probably is aware, the current PLRA exhaustion requirement has been interpreted by the Supreme Court in *Woodford v. Ngo*, 126 S.Ct. 2378, to include a procedural default component. This means that prisoners are not only required to exhaust--to present their grievances first to prison and jail officials before filing in court--but also that they are forever barred from filing their claim in court if they fail to comply with any of the steps in the grievance procedure. This is a very arduous requirement, because prison and jail grievance systems often have several deadlines, and they can be as short as only a few days. Thus, if a prisoner's case is dismissed because of a technical flaw in the exhaustion process, the prisoner most likely will have missed a short deadline in the grievance procedure and will be unable to seek relief in court. (And missing a deadline itself counts as a procedural flaw).

For the brief that I filed on behalf of *amicus curiae* the Jerome N. Frank Legal Services Organization of the Yale Law School in *Woodford*, we conducted a survey of prison and jail grievance policies. Because it is sometimes difficult to obtain prison and jail grievance policies, we could *not* guarantee that the policy that we obtained from each jurisdiction was the most up-to-date as of the filing of our brief in February, 2006. (Certainly, new policies may have been issued subsequently.)⁴ However, we were able to obtain at least one illustrative policy from each jurisdiction. I attach to this testimony the chart that we developed that sets out the deadlines.

As you can see from the chart, prison and jail grievance policies often require several levels of review, with filing deadlines at each stage as little as a few days. Here is how we summarized our conclusions in our *Woodford* brief:

About a dozen of the department of corrections policies summarized in the chart provide for periods shorter than fourteen days for the filing of the first official grievance. A number of those filing deadlines are significantly shorter than fourteen days—between three and ten days.⁵ To

⁴ For example, the Indiana Department of Corrections (DOC) issued a new policy effective December 1, 2005 (No. 00-02-301).

⁵ See Arizona Dept. of Corrections Dept. Order 802.09, 1.1.2 (Mar. 3, 2000)(ten days); Arkansas Dept. of Corrections Admin. Dir. 04-01(IV)(E)(7)(Feb. 1, 2004)(three working days); Georgia Dept. of Corrections Standard Operating Procedures (SOP) IIB05-0001(VI)(C)(2)(June 1, 2004)(five business days); Indiana Dept. of Corrections Policy No. 00-02-301 XVIII (C)(May 1, 2000)(two working days); Kentucky Dept. of Corrections Policy No. 14.6 II (J)(2)(Jan. 4, 2005)(five working days); Massachusetts Dept. of Correction, 103 CMR 491.08(4)(Jan. 5, 2001)(ten working days); Michigan Dept. of Corrections Policy 03.02.130 (X)(Dec. 19, 2003)(five business days); Missouri Dept. of Corrections Institutional Services Policy and Procedure Manual, Procedure No. IS8-2.1 III(I)(3)(Jan. 15, 1992)(five working days); Montana State Prison Policy No.

further complicate matters, more than thirty of the departments of corrections that we surveyed require a prisoner to at least attempt informal resolution—talking with a staff member or submitting a request form—before filing a grievance.⁶ Some of these policies set out deadlines for the informal resolution process that are quite short—as short as two days.

3.3.3 V (F)(1)(Apr. 1, 1997)(three working days); Nevada Dept. of Corrections Admin. Reg. 740.02, § 1.5.1 (Jan. 5, 2004)(five days); Rhode Island Code of Regulations 06.070.002(E)(10)(Jan. 7, 1980)(three days); Tennessee Dept. of Corrections Index No. 501.01 VI (C)(1)(May 1, 2004)(seven calendar days); Utah Dept. of Corrections Institutional Operations Division Manual, FDr02/03.03(C)(July 1, 2003)(five working days).

⁶ See United States Bureau of Prisons Directive 1330.13, § 542.13 (Aug. 13, 2002); Alaska Dept. of Corrections Policy Index No. 808.03 (B)(1)(May 23, 2002); Arizona Dept. of Corrections Dept. Order 802.01, 1.1.3 (Mar. 3, 2000); Arkansas Admin. Dir. 04-01 (IV)(E)(1)(Feb. 1, 2004); California Dept. of Corrections, tit. 15, Calif. Code of Reg. § 3084.2(b) (2005); Connecticut Dept. of Corrections Admin. Dir. 9.6 (9)(Mar. 5, 2003); Delaware Bureau of Prisons Proc. No. 4.4 at 5 (May 15, 1998); District of Columbia Dept. of Corrections D.O. 4030.1D VII (F)(1)(May 4, 1992); Rules of the Florida Dept. of Corrections, Ch. 33-103.005-(1)(Oct. 9, 2005); Georgia Dept. of Corrections, SOP Ref. No. IIB05-0001 (VI)(B)(1)(June 1, 2004); Hawaii Dept. of Corrections, Policy No. 493.12.03(4.0)(10)(b)(Apr. 3, 1992); Idaho Dept. of Corrections Dir. No. 316.02.01.001, 05.02.01 (Sept. 16, 2004); Illinois Dept. of Corrections, 20 Ill. Adm. Code § 504.810 (a) (2005); Indiana Dept. of Corrections, Policy No. 001-02-301, XIV (May 1, 2000); Iowa Dept. of Corrections, Policy No. IN-V-46 V(A)(January 2005); Kansas Dept. of Corrections, Article 15—Grievance Procedure for Inmates, § 44-15-101(b); Maine Dept. of Corrections, Policy and Procedures Manual subsection 29.1 VI(B)(1); Michigan Dept. of Corrections Policy No. 03.02.130(x)(Dec. 19, 2003); Minnesota Dept. of Corrections Policy No. 303.100(A)(1)(a)(2)(May 1, 2005); Missouri Dept. of Corrections, Institutional Services Policy and Procedure Manual Procedure No. IS 8-2.1 III(H)(1)(Jan. 15, 1992); Montana State Prison Policy No. 3.3.3 V(E)(Apr. 1, 1997); Nebraska Dept. of Correctional Services, Policy No. 217.02, referencing Nebraska Admin. Code, tit. 68, ch.2, § 003.02; Nevada Dept. of Corrections, Admin. Reg. 740, § 1.4.1.1 (Jan. 5, 2004); New Hampshire Dept. of Corrections, Statement No. 1.16 IV (A)(1)(Oct. 1, 2002); New Mexico Corrections Dept., CD-150501(A)(1)(June 22, 2005); North Carolina Dept. of Corrections, Rules and Policies Inmate Booklet, § 20(6)(a)(March 2002); North Dakota Dept. of Corrections Policies and Procedures Manual, Inmate Rights, VI(H)(1)(May 5, 2005); Ohio Admin. Code § 5120-9(J)(1)-31; Oklahoma Dept. of Corrections, OP-090124 IV(A)(Oct. 11, 2005); Oregon Admin. Rules 291-109-0140(1)(a); South Carolina Dept. of Corrections Policy No. GA-01.12 (13.1)(Nov. 1, 2004); Texas Dept. of Criminal Justice, Offender Orientation Handbook VI(B)(November 2004); Utah Dept. of Corrections, Institutional Operations Division Manual, FDr02/03.03(A)(July 1, 2003); Virginia Dept. of Corrections Procedure No. DOP 866-7.13 (Nov. 20, 1998); Washington Dept. of Corrections, No. DOC 550.100 (Mar. 1, 2005); Wyoming Dept. of Corrections, Admin. Reg. No. 2.501, Appendix A (C)(1)(a)(Dec. 11, 1998).

See, e.g., Indiana Dept. of Correction Policy No. 00-02-301 XVIII (A)(May 1, 2000)(forty-eight hours); Michigan Dept. of Corrections Policy No. 03.02.130 (R)(Dec. 19, 2003)(two business days).⁷ A number of policies require a prisoner to attempt informal resolution *within* the time for filing the first official grievance. *See, e.g.*, Connecticut Dept. of Correction, Admin. Dir. 9.6 (9) (Mar. 5, 2003); District of Columbia Dept. of Corrections, D.O. 4030.1D VII (F)(1) and (3)(May 4, 1992). Some policies allow prison officials a number of days in which to respond to the informal complaint before the prisoner may go on to file the formal one. *See, e.g.*, Connecticut Dept. of Correction, Admin. Dir. 9.6 (9), (10)(G) (Mar. 5, 2003)(requiring informal resolution and permitting staff fifteen days to respond to informal request, but requiring that formal grievance be filed within thirty days of incident).

All of the department of corrections policies that we reviewed required an inmate to pursue at least one level of review of the initial response to a formal grievance in order to complete administrative exhaustion. Many mandate two or more levels of review. Of the corrections department policies that we collected, a significant number required an administrative appeal in fewer than fourteen days; deadlines were as short as three to five days in many instances.⁸ The Alaska and Indiana policies that we

⁷ *See also* Arizona Dept. of Corrections, Dept. Order 802.08 (Mar. 3, 2000)(ten working days); Delaware Bureau of Prisons, Proc. No. 4.4 (May 15, 1998)(seven calendar days); Georgia Dept. of Corrections, SOP Ref. No. IIB05-0001 (VI)(B)(5)(June 1, 2004)(ten calendar days); Montana State Prison Policy No. MSP 3.3.3. V (E)(1)(Apr. 1, 1997)(five working days); Nebraska Department of Correctional Services, Policy No. 217.02, referencing Nebraska Admin. Code, tit. 68, ch.2, § 004.01 (three calendar days); New Mexico Corrections Dept., CD-150500 (June 22, 2005)(five calendar days); North Dakota Dept. of Corrections Policies and Procedures Manual, Inmate Rights VI (H) (May 5, 2005)(five calendar days); Oklahoma Dept. of Corrections, OP-090124 IV(A) and (B)(Oct. 11, 2005)(three days for attempt at verbal resolution, seven days for written attempt at resolution); Utah Dept. of Corrections, Institutional Operations Division Manual, FDr02/03.03 (July 1, 2003)(seven working days); Wyoming Dept. of Corrections, Admin. Reg. No. 2.501, Appendix A(C)(1)(Dec. 11, 1998) (seven calendar days).

⁸ *See* Alaska Dept. of Corrections, Index No. 808.03 (B)(4)(May 23, 2002)(two working days); Arizona Dept. of Corrections, Dept. Order 802.09, 1.3 (Mar. 3, 2000)(ten calendar days); Arkansas Dept. of Corrections, Admin. Dir. 04-01 IV (G) (Feb. 1, 2004)(five working days); Colorado Dept. of Corrections, Reg. No. 850-04 IV (D)(1)(c)(Dec. 15, 2005)(five calendar days); Connecticut Dept. of Correction, Admin. Dir. 9.6(16)(Mar. 5, 2003)(five calendar days); Delaware Bureau of Prisons, Pro. No. 4.4, IGP Resolution Levels: Appeals (May 15, 1998)(three days); District of Columbia Dept. of Corrections, D.O. 4030.1D VII(G)(3)(May 4, 1992)(five days); Georgia Dept. of Corrections, SOP II B05-0001 (VI)(D)(2)(1)(five business days); Hawaii Dept. of Public Safety, Policy No. 493.12.03, 4.15 (a) and (f)(Apr. 3, 1992)(five days); Idaho Dept. of Correction, Dir. No.

reviewed allow only two working days for appeals.⁹ The Delaware and Kansas policies that we obtained permit three calendar days for appeals.¹⁰ Several departments of corrections permit only three working days for appeals.¹¹ The New York State Department of Correctional Services

316.02.01.001, 05.03.00 (Sept. 16, 2004)(ten days); Indiana Dept. of Corrections, Policy No. 00-02-301 XVIII (C) (May 1, 2000)(two business days); Kansas Dept. of Corrections, Article 15—Grievance Procedure for Inmates, § 44-15-102(b) and (c)(1)(three days); Kentucky Dept. of Corrections, Policy No. 14.6 II (J)(2)(j) and (3)(c) (Jan. 4, 2005)(three working days); Louisiana, La. Admin. Code, tit. 22 pt. I, § 325(G)(2)(a)(five days); Maine Dept. of Corrections, Policy and Procedures Manual subsection 29.1IV(D)(1) and (E)(1)(ten days); Maryland Dept. of Public Safety and Correctional Services (Division of Correction), Directive No. 185-101 III(G)(1)(April 1, 1993) (ten calendar days), Massachusetts Dept. of Correction 103 CMR 491.12(1)(ten working days); Michigan Dept. of Corrections Policy Directive No. 03.02.130 (DD) and (HH)(Dec. 19, 2003)(five business days and ten business days); Missouri Dept. of Corrections Institutional Services Policy and Procedure Manual III(K)(January 15, 1992)(five working days and ten working days); Montana State Prison Policies and Procedures, Policy No. 3.3.3 V(I)(1)(a)(Apr. 1, 1997)(three working days); Nebraska Department of Correctional Services, Policy No. 217.02, referencing Nebraska Admin. Code, tit. 68, ch.2, § 004.05 (ten days); Nevada Dept. of Corrections, Admin. Reg. 740.02, 1.3.4 (Jan. 5, 2004)(five days); New Jersey Dept. of Corrections IMM.RRP.003 IV(H)(August 1, 2003)(ten working days); New Mexico Corrections Dept., CD-150501(D)(1)(June 22, 2005)(seven days); New York State Dept. of Correctional Services, N.Y. Comp. Codes R. & Regs., tit. 7, § 701.7(b)(1)(four working days); North Dakota Dept. of Corrections Policies and Procedures Manual, Inmate Rights, VI (I)(3)(a)(May 5, 2005)(five days); Pennsylvania Dept. of Corrections, Policy No. DC-ADM 804 VI(C)(1)(b)(Jan. 3, 2005)(ten working days); Rhode Island Code of Rules 06 070 002 (C)(I), (D)(1), and (E)(2) (three working days); South Carolina Dept. of Corrections Policy No. GA-01.12(13.5)(Nov. 1, 2004)(five calendar days); Tennessee Dept. of Corrections, Index No. 501.01 VI (C)(2) and (3)(May 1, 2004) (five days); Utah Dept. of Corrections, Policy Manual, FDr02/03.031(C)(July 1, 2003)(five working days); Virginia Dept. of Corrections, Pro. No. DOP 866-7.16(5)(Nov. 20, 1998)(five days); West Virginia Division of Corrections, W.Va. Code of State Rules § 90-9-3.1.10, 3.2.1 (five working days); Wisconsin Dept. of Corrections, Wisconsin Admin Code § DOC 310.13(1)(2005)(ten days); Wyoming Dept. of Corrections, Admin. Reg. No. 2.501, Appendix A(G)(2)(Dec. 11, 1998)(ten days).

⁹ Alaska Dept. of Corrections Index No. 808.03 (B)(4)(May 23, 2002); Indiana Dept. of Corrections, Policy No. 00-02-301 XVIII (E), (G), and (I)(May 1, 2000).

¹⁰ Delaware Bureau of Prisons Policy, No. 4.4, IGP Resolution Levels: Appeals (May 15, 1998); Kansas Dept. of Corrections, Art. 15, Policy No. 44-15-102 (c)(1).

¹¹ Kentucky Dept. of Corrections Policy No. 14.6 II (J)(2)(j) and (3)(c)(Jan. 4, 2005); Maryland Dept. of Public Safety and Correctional Services (Division of Pretrial Detention and Services), Dir. No. 180-1 V (C)(1)(Nov. 30, 2000); Montana State Prison

policy permits only four working days for appeals. N.Y. Comp. Codes R. & Regs., tit. 7, § 701.7 (2004). Ten of the policies that we collected (including the policy of the Connecticut Department of Correction) allow five calendar days to appeal.¹² An additional six state corrections policies permit five working days to appeal.¹³

The PLRA applies not only to state corrections agencies, but also to local jails and detention centers. As a practical matter, the smaller and more local the facility, the more difficult it is to obtain a copy of its grievance policy. However, we have included in our chart two county sheriffs' policies covering jails, and the deadlines in these policies are also quite short. The policy in the Glenn County (California) Jail provides five working days for the formal grievance and five working days for the appeal.¹⁴ The Clark County (Washington) Sheriff's Office permits seven calendar days for the grievance and forty-eight hours for the appeal.¹⁵

Policy No. 3.3.3 V(I)(1)(a) and (K)(1)(Apr. 1, 1997); Rhode Island Dept. of Corrections, R.I. Code R. 06.070.002 (C)(1), (D)(1), and (E)(2)(Jan. 7, 1980).

¹² See Colorado Dept. of Corrections Admin. Reg. 850-04 IV (D)(1)(c)(Dec. 15, 2005); Connecticut Dept. of Corrections, Admin. Dir. 9.6 (16)(Mar. 5, 2003); District of Columbia Dept. of Corrections, D.O. 4030.1D VII (G)(3) and (4)(Apr. 4, 1992); Hawaii Dept. of Public Safety, Policy No. 493.12.03(15)(a)(F)(Apr. 3, 1992); Louisiana, La. Admin. Code, tit. 22, pt. I, § 325(G)(2)(a)(2005); Nevada Dept. of Corrections, Admin. Reg. 740.02, § 1.6.1 (Jan. 5, 2004); North Dakota Dept. of Corrections Policies and Procedures Manual, Inmate Rights, VI (I)(2)(a) and (3)(a)(May 5, 2005); South Carolina Dept. of Corrections, Policy No. GA-01.12(13.5)(Nov. 1, 2004); Tennessee Dept. of Corrections, Index No. 501.01 VI (C)(2) and (3)(May 1, 2004); Virginia Dept. of Corrections, Proc. No. DOP 866-7.16(5)(Nov. 20, 1998).

¹³ See Arkansas Dept. of Correction, Admin. Dir. 04-01 IV (G)(Feb. 1, 2004); Georgia Dept. of Corrections, SOP Ref. No. IIB05-0001 VI (D)(2)(June 1, 2004); Michigan Dept. of Corrections, No. 03.02.130 (DD)(Dec. 19, 2003); Missouri Dept. of Corrections Institutional Services Policy and Procedure Manual, Procedure No. IS8-2.1 III(K)(Jan. 15, 1992); Utah Dept. of Corrections, Institutional Operations Division Manual, FDr02/03.04(B)(July 1, 2003); and West Virginia Division of Corrections, W. Va. Code St. R. § 90-9-3 (2005).

¹⁴ See Glenn County Jail Handbook, *available at* <http://www.countyofglenn.net/Jail> (last visited Jan. 24, 2006).

¹⁵ See Clark County Sheriff's Office, Inmate Handbook, *available at* <http://www.co.clark.wa.us/sheriff/custody/handbook.pdf> (last visited Jan. 24, 2006).

Case law to date concludes that PLRA exhaustion requirements apply to juvenile facilities,¹⁶ which sometimes provide as few as one to two days for filing grievances. *See, e.g.*, North Carolina Department of Juvenile Justice and Delinquency Prevention Policy No. YD/DC 8.0 (providing that grievances must be appealed to Facility Director within twenty-four hours); *Minix v. Pazera et al.*, 2005 WL 1799538 at *3-4 (N.D. Ind. July 27, 2005) (discussing two-business-day deadline in Indiana juvenile facility).

Brief for the Jerome N. Frank Legal Services Organization of the Yale Law School as Amici Curiae Supporting Respondent, *Woodford v. Ngo*, 126 S. Ct. 2378 (2006) (No. 05-416), 2006 WL 304573, at *6-13.

The Supreme Court's 2006 decision in *Woodford* concluded that prisoners must comply with all of these requirements of prison and jail grievance procedures in order to file their claims in court. *Ngo*, 126 S.Ct. at 2378. This result deprives courts of the ability to address even meritorious claims. It abdicates to prison authorities the power to control whether federal claims ever see the light of day. It also gives correctional authorities every reason to deny claims on procedural (as opposed to merits) grounds, because procedural denials are basically unreviewable. And it creates incentives for prison and jail officials to create more complex grievance rules, because procedural denials protect them from potential civil liability. *See generally* Schlanger & Shay, *Preserving the Rule of Law in America's Prisons* at 8; Kermit Roosevelt, *Exhaustion Under the Prison Litigation Reform Act: The Consequences of Procedural Error*, 52 EMORY L.J. 1771, 1776 (2003).

The procedural default rule adopted in *Woodford* has harsh effects. In our article appearing in the Cardozo Law Review this month, Johanna Kalb and I surveyed cases citing *Woodford* from the day it was announced through January 2007. This is how we described our results:

In a survey of reported cases citing *Woodford* in the first seven months after it was decided, the majority were dismissed entirely for failure to exhaust.¹⁷ All

¹⁶ *See Alexander S. v. Boyd*, 113 F.3d 1373, 1385 (4th Cir. 1997), *abrogated on other grounds*, *Martin v. Hadix*, 527 U.S. 343 (1999); *Minix v. Pazera et al.*, 2005 WL 1799538 (N.D. Ind. July 27, 2005); *Moore v. Louisiana Dept. of Public Safety and Corrections*, 2002 WL 1791996 (E.D. La. Aug. 5, 2002); *Doe v. Cook County Juvenile Detention Center*, 1999 WL 1069244 (N.D. Ill. Nov. 22, 1999).

¹⁷ A Westlaw search conducted on January 26, 2007 produced a list of 405 cases citing *Woodford*. After removing Supreme Court, state, and duplicate federal cases, we were left with a sample set of 392 cases. These included decisions by appellate and district courts, and recommendations by magistrate judges. In 76 of these cases, the exhaustion issue was not resolved, leaving a pool of 316 cases in which the exhaustion issue was raised, briefed, and decided by a court. In approximately 70% of those cases, or 224 cases, all claims were dismissed for failure to exhaust. Some claims survived the

claims raised in the complaint survived the exhaustion analysis in fewer than fifteen percent of reported cases.¹⁸ And in most of those cases, the claims survived not because the prisoner had properly exhausted, but rather because the court found that the administrative remedy was “unavailable.”¹⁹

Giovanna Shay & Johanna Kalb, *More Stories of Jurisdiction-Stripping and Executive Power: Interpreting the Prison Litigation Reform Act*, 29 CARDOZO L. REV. 291, 321 (2007).

A recent example from the Eastern District of Michigan illustrates the harsh effects of the rule. In *Bonds v. Piper*, a *pro se* prisoner who was “paralyzed from the chest down” had claimed denial of adequate medical care, including being “required to reuse unsanitary disposable items that led to his acquiring an infection.”²⁰ The prisoner had filed a grievance on September 6, 2006. There were three steps to the grievance process, and the complaint was resolved at the first step, with a resolution that the prisoner was to receive medical supplies on a weekly basis.²¹ The prisoner claimed that on November 1, 2006, prison authorities had violated the “detail resolving the September grievance,” by failing to supply him with the necessary supplies.²² However, he did not file a separate grievance after this November 1st incident.²³ Michigan Department of Corrections policies required an attempt at informal resolution within two days, and an official grievance within five.²⁴ The prisoner did attempt to file a “Step III” grievance,

exhaustion analysis in 45 cases. All claims survived exhaustion in only 47 cases.

¹⁸ The fact that the claims survived the initial exhaustion challenge does not necessarily mean that they are decided on the merits. Claims that survive a motion to dismiss for non-exhaustion may still be dismissed at that stage for another reason, on summary judgment, or for some other procedural reason before trial.

¹⁹ See, e.g., *Holcomb v. Dir. of Corr.*, No. C-03-02765 RMW, 2006 WL 3302436, at *7 (N.D. Cal. Nov. 14, 2006) (holding that plaintiff’s failure to timely appeal was excused because the delay was caused by physical injuries and other circumstances beyond his control); *Cahill v. Arpaio*, No. CV 05-0741-PHX-MHM (JCG), 2006 WL 3201018, at *3 (D. Ariz. Nov. 2, 2006) (holding that plaintiff’s failure to appeal was excused because the Hearing Officer informed the plaintiff that no further appeal was necessary); *Coleman v. Butler*, No. 4:05cv147-RH/WCS, 2006 WL 2054355, at *3 (N.D. Fla. July 20, 2006) (plaintiff’s failure to grieve was excused because he was told by the Department of Corrections that the subject of his complaint “was inappropriate for the grievance procedure”); *Wallace v. Williams*, No. CV405-140, 2006 WL 3091435, at *3 (S.D. Ga. Oct. 30, 2006) (plaintiff’s failure to grieve was excused because his three requests for a grievance form were ignored).

²⁰ 2007 WL 3038036 at *1 (E.D. Mich. 2007).

²¹ *Id.* at *2.

²² *Id.* at *3.

²³ *Id.*

²⁴ *Id.* at *3 and note 2.

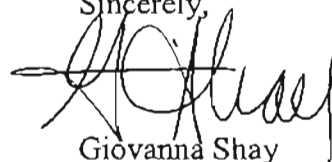
following up on the September grievance, in April 2007, but this was deemed inadequate, because the September complaint had been resolved at “Step I” and so the prisoner had not done “Step II.”²⁵ The court concluded that, “plaintiff did not timely follow the grievance procedures under MDOC’s rules over the alleged November 2006 wrongdoing,” and that “[h]e no longer can properly exhaust his administrative remedies with respect to these claims as would be required by the Supreme Court’s *Woodford* decision,” because the deadline had passed.”²⁶ The case was dismissed for failure to exhaust, even though prison officials had agreed that the paralyzed prisoner needed the self-care medical supplies that he had requested.²⁷

The PLRA as it is currently interpreted undermines courts’ ability to enforce the rule of law in the nation’s prisons and jails. The *Woodford* rule is also arbitrary because, as Justices Stevens, Souter, and Ginsburg wrote in their *Woodford* dissent, it “bars litigation at random, irrespective of whether a claim is meritorious or frivolous,” based solely on technical missteps in the prison grievance process. *Ngo*, 126 S.Ct. at 2401 (Stevens, J., dissenting).

The amendment to the PLRA advocated by the SAVE coalition will eliminate the excesses of the current exhaustion requirement while still meeting its goals. Prisoners will be required to present claims to grievance officials before filing them in court. But a failure to comply with all of the technical requirements of a prison or jail grievance system will not automatically bar a court from considering a claim. And a judge can stay a case for 90 days to allow an attempt at administrative resolution of an unexhausted claim.

In conclusion, I urge the Committee to adopt legislation that includes the SAVE coalition’s recommendations. I thank the Committee for its attention to these important issues, and for the opportunity to submit this testimony.

Sincerely,



Giovanna Shay
Assistant Professor
gshay@law.wnec.edu

²⁵ *Id.* at *3.

²⁶ *Id.* at *4.

²⁷ *Id.*