

**SAVE: COALITION TO STOP ABUSE AND VIOLENCE EVERYWHERE  
PROTECT VICTIMS OF PRISON RAPE AND OTHER ABUSES:**

## **Reform the Prison Litigation Reform Act (PLRA)**

In enacting the Prison Litigation Reform Act (PLRA) in 1996, Congress sought to curb what was perceived to be an overwhelming number of frivolous prisoner lawsuits. There certainly are frivolous prisoner lawsuits that have been kept out of court by the PLRA. However, after a decade of experience under the legislation, it is clear that the PLRA is also keeping countless serious claims from reaching the courts—including claims of physical and sexual abuse, indifference to inmate on inmate rape, gross mistreatment of confined juveniles, and markedly deficient medical and mental health treatment. This effectively prevents courts from exercising their role of protecting constitutional rights.

### **Components of the PLRA that Work**

The core of the PLRA is its preliminary screening requirement. Prisoner cases that are frivolous or malicious, that fail to state a claim on which relief can be granted, or that seek damages from a defendant who is immune from them, are to be dismissed out of hand, without service of process on the defendants and without requiring prison officials to respond.<sup>1</sup> As a result of this pre-service screening, correctional administrators no longer see a large volume of prisoner cases, and courts only must deal with those cases once. This provision directly addresses the problem of frivolous prisoner litigation and should remain the law.

### **Needed Reforms to the PLRA**

#### ***Repeal the physical injury requirement--42 U.S.C. § 1997e(e).***

The PLRA prohibits prisoners from bringing actions for compensatory damages “for mental or emotional injury” without proof of physical injury. This provision, while intended to facilitate dismissal of frivolous claims, has been applied by most courts to virtually any violation of intangible constitutional rights, including deprivation of religious freedom,<sup>2</sup> protracted punitive confinement without due process or in retaliation for constitutionally protected speech,<sup>3</sup> and confinement under inhumane and disgusting, but not physically injurious, conditions.<sup>4</sup> In addition, courts have held that physical injury must be “more than *de minimis*” to pass muster under this provision, and have dismissed some cases reflecting significant physical abuse on that ground.<sup>5</sup> Some courts have even held that sexual abuse is no more than “mental or emotional injury,” or is *de minimis*, under this statute.<sup>6</sup>

**CASE IN POINT:** *A court found that a prisoner who complained that he was kept in solitary confinement, his hands and feet shackled, and subjected to body cavity strip searches and allowed out of his cell only three hours a week could not bring an action for mental or emotional injury because his suffering did not constitute physical injury under the PLRA. Adnan v. Santa Clara Dept. of Corrections, 2002 WL 32058464, at \*3 (N.D. Cal., Aug. 15, 2002).*

This provision should be repealed because it obstructs court remediation of plainly unconstitutional conditions, and serves no useful function. The above-mentioned provisions for initial screening and dismissal of frivolous prisoner cases have proven effective at getting rid of truly frivolous lawsuits.

***Amend the exhaustion provision to ensure that complaints are first addressed at the prison level, without precluding subsequent judicial review-- 42 U.S.C. § 1997e(a).***

The PLRA requires prisoners to exhaust “such administrative remedies as are available,” which means that prisoners must complete the prison’s internal administrative grievance process before filing suit, in the hope that many disputes will be resolved before they get to court. The Supreme Court has held that this requires “proper exhaustion,” *i.e.*, “compliance with an agency’s deadlines and other critical procedural rules.”<sup>7</sup>

Over the past 10 years, hundreds, even thousands, of claims of serious and unconstitutional abuse of prisoners have been forever barred for lack of “proper exhaustion,”<sup>8</sup> with no inquiry into the truth of the prisoner’s substantive claims.<sup>9</sup> Prisoners – many of whom have little education, read poorly or not at all,<sup>10</sup> or have mental illness or mental retardation<sup>11</sup> – are ill-equipped to comply with technical rules under short deadlines and without the assistance of legal counsel. Unlike most federal administrative remedies, prison and jail grievance systems tend to have extremely short deadlines, mostly 30 days or less, many as short as a week or two.<sup>12</sup> Further, many prison grievance systems have unclear rules<sup>13</sup> or are inconsistently administered,<sup>14</sup> and some prisoners are subjected to misinformation<sup>15</sup> or even threats by prison staff<sup>16</sup> that impede them from exhausting properly. Some prisoners’ grievances simply disappear.<sup>17</sup> In a remarkable number of cases, prisoners receive no response whatsoever to their grievances,<sup>18</sup> and prison officials have gotten many cases dismissed by arguing that the prisoner failed to appeal the officials’ *failure* to respond.<sup>19</sup> There is no exception for immediate threats to health or safety.<sup>20</sup> The result is that prisoner litigation has turned into a game of “gotcha”<sup>21</sup> in which correctional system lawyers and the federal courts scour the record for mistakes in exhausting, while the merits are forgotten,<sup>22</sup> often on the most hair-splitting of grounds.<sup>23</sup>

**CASE IN POINT:** *A court dismissed the claim of a prisoner who said prison staff told him that his complaint that he was raped could not be grieved through the facility’s formal grievance process. As a result, he did not file grievances. But the court found that “futility” was not an excuse for failing to exhaust his grievances even though he followed the direction of prison staff. Mendez v. Herring, 2005 WL3273555, at \*2 (D. Ariz., Nov. 29, 2005).*

The purpose and value of exhaustion can be preserved, while bypassing the technicalities of the present exhaustion rule, by requiring simply that claims be presented to responsible prison officials before filing suit. Where a prisoner has not done so, the court should stay

the case for up to 90 days and return it to prison officials for whatever administrative consideration they deem appropriate. Some cases will be resolved; those that are not will go forward, and the courts' time will not be wasted on satellite litigation about the adequacy of the prisoner's grievances.

***Exempt youth detained in juvenile facilities from the PLRA—amend 42 U.S.C. § 1997e(h).***

The PLRA currently applies to all prisoners, regardless of age or status. Its provisions should not apply to minors. Historically, youth confined in juvenile facilities have filed a very small amount of litigation,<sup>24</sup> so the concerns expressed by Congress about large volumes of frivolous litigation simply do not apply.

Detained youth are among the most vulnerable to some constitutional violations.<sup>25</sup> They are also far less sophisticated about legal and administrative processes than adults, and are more at risk of losing their rights if required to comply with the PLRA's extensive requirements.<sup>26</sup> This is particularly true for youth in juvenile facilities, who generally lack access to even the meager legal resources available in adult prisons, and are ill-equipped to use them anyway.<sup>27</sup> It is necessary, therefore, to change the definition of "prisoner" to exclude detained youth.

**CASE IN POINT:** *Corrections staff allowed the rape and repeated assault of a child detainee. The boy's lawsuit was thrown out of court because he did not file a formal grievance, even though he feared further abuse if he reported the incidents, and even though his mother repeatedly contacted prison and juvenile court officials to try to get them to stop the abuse. To satisfy the PLRA's exhaustion requirement, the boy would have had to file his formal grievance within 48 hours of any incident he complained about. Minix v. Pazera, 2005 WL 1799538 at \*4 (N.D.Ind., July 27, 2005).*

***Repeal the "prospective relief" provisions--18 U.S.C. § 3626.***

The PLRA contains a number of provisions restricting the equitable powers of federal courts to enter orders remedying prison conditions that violate the law. These restrictions are unjustified. Judges should be empowered with the same range of remedies in prisoners' civil rights actions that they possess in other civil rights cases. While prisoners' legal rights are diminished by the fact of their incarceration, those limited rights that they do retain are as worthy of judicial protection as anyone else's legal rights. This is not merely a question of prisoners' rights; it goes to the meaning of a society of laws and of the separation of powers. We all benefit when corrections systems are required to comply with the Constitution.

Rather than limit prisoner lawsuits, the most harmful of the prospective relief provisions encourage more civil trials and constant judicial review where they are otherwise not

needed. For example, a judge may only approve a consent decree based on findings that it meets the standard for injunctive relief – i.e., that it is “narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive measure necessary to correct the violation of the Federal right.” Because of this requirement, government officials must stipulate that they have violated federal law in order to agree to a consent judgment.<sup>28</sup> One of the primary reasons litigants settle cases is to avoid findings that they have violated the law. By creating a disincentive to settle, the consent decree provision increases the burden on courts, which are forced to conduct otherwise unnecessary trials.

The PLRA’s framework for monitoring injunctive relief is similarly problematic. Where a court has found that injunctive relief is necessary to remedy a constitutional violation, the PLRA provides that after the passage of two years, and every year thereafter, prison officials can seek to terminate the injunctive order, and the court must terminate the order unless it finds that there is a “continuing and ongoing” violation of federal rights. That is, the plaintiffs are required to prove their case again and again. In addition to posing an extreme burden on the public interest organizations that generally handle these cases, it burdens the courts with complicated proceedings that rehash issues the courts have often previously addressed, and it is also counter-productive. If it has taken an injunction to bring a constitutional violation under control, then terminating the injunction is likely to lead to future violations. When the PLRA was enacted, the Supreme Court had already addressed when to terminate injunctions against public agencies: before a court may terminate a decree, the public agency defendant must show (a) that it has fully and satisfactorily complied with the decree for a reasonable period of time; (b) that it has exhibited a good-faith commitment to the decree and the legal principles that warranted judicial intervention, and (c) that it is “unlikely to return to its former ways.”<sup>29</sup> There is no reason that injunctions against constitutional violations in prisons should be treated any differently from injunctions against other civil rights violations. Finally, the PLRA's "automatic stay" provides that prison officials' mere filing of a motion to terminate an injunction or consent decree suspends the operation of the decree until the court rules on the motion. 18 U.S.C. sec. 3626(e)(2). During the period of the stay, which may be months or even years, the prisoners are deprived of any protection under the decree. At the same time, the existence of the decree bars the prisoners from filing a new lawsuit to protect their rights.

**CASE IN POINT:** *The Maricopa County Jail in Phoenix, AZ, is the nation's fourth largest jail. In 1995, the Sheriff and other county officials agreed to settle a class action lawsuit that alleged dangerous and life-threatening conditions in the jail, and agreed to entry of a federal court consent decree. In September 2001, the officials moved to terminate the decree under the PLRA; thus, the protections of the decree were automatically stayed. More than five years later, the court still has not ruled on the termination motion, and as a result of the automatic stay, thousands of prisoners remain in a jail where there continue to be allegations of inadequate medical care, and unsafe and inhumane conditions of confinement have not been heard. Hart v. Arpaio, No. CIV-77-479-PHX-EHC (D. Ariz.).*

***Repeal the restrictions on attorneys' fees—42 U.S.C. § 1997e(d).***

In general, federal civil rights litigants who prove their cases are entitled to recover a reasonable attorneys' fee from the defendants. The purpose of this fee-shifting provision is to encourage counsel to represent persons whose civil rights have in fact been violated, even if the resulting economic harm is insufficient to pay lawyers a contingency fee. Moreover, it helps to ensure that indigent people are not prevented from pursuing meritorious claims due to their inability to pay for an attorney. The PLRA imposed severe restrictions on the recovery of attorneys' fees in prisoner cases.<sup>30</sup> These provisions should be repealed. Since only "prevailing parties" recover fees under any circumstances, these restrictions do not affect frivolous cases—they affect meritorious cases. Discouraging attorneys from representing prisoners with meritorious cases is quite counterproductive, since prisoners (or any other litigants) who try to represent themselves not only are much less likely to succeed even in the most meritorious litigation, but also present significant management problems for the courts because they are often unable to understand and comply with court rules and procedures. This provision, therefore, should be repealed.

**CASE IN POINT:** *A court determined that no more than \$1.50 in attorneys' fees (along with nominal monetary damages) could be awarded where a prison employee was found to have inflicted a year's confinement in a "supermax" facility on a prisoner in retaliation for his First Amendment-protected complaints about prison conditions. Pearson v. Welborn, 471 F.3d 732 (7th Cir. 2006).*

***Do not penalize indigent prisoners who file complaints that state a valid claim-- amend 28 U.S.C. § 1915(a), (b).***

The PLRA provides that indigent prisoners seeking to proceed *in forma pauperis*, unlike other indigent persons, must pay the full filing fee. An initial fee is calculated based on a percentage of the prisoner's resources (if any), and the remainder of the fee is collected in installments out of the prisoner's institutional account as funds are available. The theory behind this provision was to make prisoners "stop and think" before filing cases that might not be meritorious. But filing fees of \$150 and \$100 in the trial and appellate courts respectively (as they were when the PLRA was enacted) were even then an extremely steep price to charge for a chance at justice for indigent people who have meritorious claims of civil rights violations and those fees have been drastically increased, to \$350 and \$450. This is grossly excessive for indigent prisoners who *do* "stop and think" and get it right. We therefore propose that the filing fee be imposed only on those prisoners whose cases are dismissed at the initial merits screening. Prisoners whose cases are found to state a valid claim at that stage should go forward in the same manner as other indigent litigants' cases.

***In the “three strikes” provision, limit “strikes” to cases that are dismissed as malicious—amend 28 U.S.C. § 1915(g).***

Under the PLRA, a prisoner who has had three complaints or appeals dismissed as “frivolous, malicious, or fail[ing] to state a claim on which relief may be granted,” is barred from using the *in forma pauperis* provisions at all, even on the installment basis applied to other prisoners.<sup>31</sup> If the prisoner cannot pay \$350 up front—and most prisoners cannot—he cannot file his case, no matter how meritorious it may be. This provision was intended to address a real problem –the “frequent filer” who consciously abuses the court system by persistently filing multiple meritless cases – but it is grossly overbroad in operation. First, the prohibition is permanent; a prisoner who files three silly lawsuits in his first year of incarceration will be barred from filing *in forma pauperis* fifteen years later for sexual assault if he is still in prison, no matter how meritorious his case may be. (The provision also counts as “strikes” cases that were filed even before the PLRA was enacted.) Second, the provision counts as “strikes” not just frivolous or malicious cases, but those that fail to state a claim on which relief can be granted. Since the Justices of the Supreme Court often sharply disagree whether a complaint states a claim on which relief can be granted, such cases can hardly be labeled as abusive.<sup>32</sup> The provision also counts as strikes cases that involve mistakes of law by uneducated litigants rather than any attempt to abuse the court system.<sup>33</sup>

**CASE IN POINT:** *A prisoner who was bringing an excessive force lawsuit as a pro se plaintiff was being assisted in the process by another prisoner, but was transferred to another prison (and his legal papers confiscated) before he could file the lawsuit. The other prisoner filed the suit on his behalf, unsigned, but within the statute of limitations. The plaintiff then submitted a signed copy, but after the limitations period. The court declared the lawsuit “frivolous” based on this technical error; it thus counts as a “strike” under the PLRA. Gonzales v. Wyatt, 157 F.3d 1016, 1019-22 (5th Cir. 1998).*

We propose that this provision be retained, but limit “strikes” to cases dismissed as malicious—which therefore constitute genuine abuses of the court—and apply the provision only to litigants who have accumulated three qualifying dismissals within the preceding five years. Our proposal cures the over-breadth of the present provision, while continuing to address the problem of the persistently abusive prisoner litigant.

*For More Information, please visit the SAVE Coalition’s website at:*  
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<sup>1</sup> 28 U.S.C. § 1915(e)(2); 28 U.S.C. § 1915A; 42 U.S.C. § 1997e(c)(1). Former law authorized the dismissal of any case filed *in forma pauperis* (as are the vast majority of prisoner cases) if it was frivolous or malicious. Collectively, these PLRA provisions expand the grounds for dismissal of cases filed *in forma pauperis* to include those that fail to state a claim or that seek to recover damages from an immune defendant as well as those that are frivolous or malicious, and they mandate the initial screening process and require dismissal upon a finding of one of these grounds, all before defendant corrections officials need respond.

<sup>2</sup> *Allah v. al-Hafeez*, 226 F.3d 247 (3d Cir. 2000) (compensatory damages for alleged violation of First Amendment right to religious freedom barred by physical injury requirement); *accord, Massingill v. Livingston*, 2006 WL 2571366 at \*2-3 (E.D.Tex., Sept. 1, 2006) (holding claims asserting various religious restrictions were subject to mental/emotional injury provision); *Daniels v. Waller*, 2006 WL 763115 at \*2 (S.D.Miss., Mar. 24, 2006) (holding claim of refusal to acknowledge Muslim name was one for mental or emotional injury).

<sup>3</sup> *Pearson v. Welborn*, 471 F.3d 732 (7th Cir. 2006) (holding nominal damages appropriate where jury found that prison employee had inflicted a year's "supermax" confinement on prisoner in retaliation for his First Amendment-protected complaints about prison conditions); *Royal v. Kautzky*, 375 F.3d 720, 724 (8th Cir. 2004) (declining to award a prisoner who spent 60 days in segregation "some indescribable and indefinite damage allegedly arising from a violation of his constitutional rights"), *cert. denied*, 544 U.S. 1061 (2005).

<sup>4</sup> *Harper v. Showers*, 174 F.3d 716, 719-20 (5th Cir. 1999) (barring damage claims for placement in filthy cells formerly occupied by psychiatric patients and exposure to deranged behavior of those patients); *Vega v. Hill*, 2005 WL 3147862 at \*3 (N.D.Tex., Oct. 14, 2005) (holding allegations of "exposure to mold, mildew, dead bugs, dirty showers, and spoiled food" failed to establish required physical injury); *Starnes v. Gillespie*, 2004 WL 1003358 at \*7-8 (D.Kan., Mar. 29, 2004) (holding allegation that segregated prisoner was denied showers, drinking water, and water for cleaning and personal hygiene and prevented from communicating with lawyer and family barred by PLRA's physical injury requirement); *Adnan v. Santa Clara County Dept. of Corrections*, 2002 WL 32058464 at \*3 (N.D.Cal., Aug. 15, 2002) (holding that prisoner who complained that he was kept in solitary confinement, his hands and feet were shackled, and he was subjected to body cavity strip searches and allowed out of his cell only three hours a week could not seek compensatory damages because he did not allege physical injury).

<sup>5</sup> *Rawls v. Payne*, 2006 WL 2844563 at \*5 (S.D.Miss. Sep 11, 2006) (dismissing the claim of a prisoner who alleged that he suffered "scratches, bruises, a busted lip, and a sprained ankle" in an assault, asserting injuries were *de minimis*); *Wallace v. Brazil*, 2005 WL 4813518 at \*1 (N.D.Tex., Oct. 10, 2005) (dismissing a claim that an officer hit the prisoner in the head with an iron bar, punched his back, and twisted his neck; asserting a soft knot on his head and an abrasion on his leg were *de minimis*).

<sup>6</sup> *See Hancock v. Payne*, 2006 WL 21751 at \*1, 3 (S.D.Miss., January 4, 2006) (holding plaintiffs' allegations of abuse, including that a staff member "sexually battered them by sodomy," were barred by § 1997e(e)). While some courts have reached the opposite conclusion, *see Kemner v. Hemphill*, 199 F.Supp.2d 1264, 1270 (N.D.Fla.2002), it is questionable whether their holdings are more consistent with the statutory language than is *Hancock*.

<sup>7</sup> *Woodford v. Ngo*, 548 U.S. 81, 90-91, 126 S.Ct. 2378, 2386 (2006). This "proper exhaustion" rule contrasts sharply with the treatment of other civil rights litigants in federal court. Concerning the administrative filing requirement of Title VII of the Civil Rights Act of 1964, the Court said that "technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers initiate the process," *Love v. Pullman*, 404 U.S. 522, 526 (1972), and it refused to allow violation of a state administrative time limit to bar the litigant from proceeding in federal court.

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A more recent Supreme Court decision concerning the exhaustion requirement was decided in the prisoners' favor. *See Jones v. Bock*, 549 U.S. 199 (2007). However, that decision addressed several extreme interpretations of the PLRA adopted in the Court of Appeals for the Sixth Circuit, which required prisoners to plead exhaustion in their complaints with specificity and documentary support and to have named all the defendants in their lawsuits in their prison grievance. That court also required "total exhaustion," meaning that if any aspect of the prisoner's complaint (including the naming of a defendant) had not been exhausted, the entire complaint must be dismissed. The Supreme Court's correction of these aberrant rules did not cure the problems discussed in this report.

<sup>8</sup> Dismissal for non-exhaustion is usually without prejudice, meaning that in theory the prisoner can exhaust the claim properly and return to court. *See, e.g., Berry v. Kerik*, 366 F.3d 85, 87-88 (2d Cir. 2004). Reality is more like *Catch-22*: by the time a case is dismissed for a mistake in exhaustion, the brief time limit for filing a grievance will inevitably have passed, so under the "proper exhaustion" rule, the prisoner can never satisfy the exhaustion requirement. *Regan v. Frank*, 2007 WL 106537 at \*4-5 (D.Haw., Jan. 9, 2007). (Some prison systems have provisions for late grievances at officials' discretion, but that discretion often is not exercised in favor of prisoners, particularly those who clearly are seeking to sue prison personnel.)

<sup>9</sup> *See, e.g., Minix v. Pazera*, 2005 WL 1799538 at \*4 (N.D.Ind., July 27, 2005) (dismissing for non-exhaustion because the 15-year-old prisoner, who had been repeatedly beaten and raped, did not file a grievance, even though his mother had made repeated complaints to numerous officials while the abuse was ongoing); *Gerrard v. Daley*, 2000 WL 34229777 (W.D.Wis., July 24, 2000), *subsequent determination*, 2000 WL 34231492 (W.D.Wis. Aug. 21, 2000) (dismissing for non-exhaustion the claim of a prisoner who was denied testing for symptoms of cancer until the disease had become terminal because his complaint to the director of the bureau of health services, pursuant to Wis. Admin. Code § DOC 310.08(4), did not comply with the inmate grievance policy specified in Wis. Admin. Code § DOC 310.04).

<sup>10</sup> The National Center for Education Statistics reported in 1994 that seven out of ten prisoners perform at the lowest literacy levels. Karl O. Haigler et al., U.S. Dept. of Educ., *Literacy Behind Prison Walls: Profiles of the Prison Population from the National Adult Literacy Survey xviii*, 17- 19 (1994) (available at <http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=94102>).

<sup>11</sup> Prisoners with mental illness are subject to the same exhaustion requirement as other prisoners. *See Williams v. Kennedy*, 2006 WL 18314 at \*2 (S.D.Tex., Jan. 4, 2006) (dismissing despite prisoner's claim he didn't know of the exhaustion requirement and a prior brain injury made it difficult for him to remember things); *Bakker v. Kuhnes*, 2004 WL 1092287 (N.D.Iowa, May 14, 2004) (rejecting plaintiff's argument that his medication doses were so high they "prohibited him from being of sound mind to draft a grievance"; noting that he failed to submit a grievance after his medication was corrected, and he filed other grievances during the relevant period).

Another court addressing a claim by a prisoner with mental illness also felt constrained to dismiss for non-exhaustion. It did direct prison officials to appoint someone to assist the plaintiff in exhausting. *Ullrich v. Idaho*, 2006 WL 288384 at \*3 (D.Idaho, Feb. 6, 2006). However, it is not clear that a court has the power to direct such relief in a case that must be dismissed. In any case, such an order would likely be ineffectual, since the prisoner's claim would almost always be time-barred under the short deadlines characteristic of prison grievance systems.

We note that there is very little law on this subject despite the well-known concentration of persons with mental illness in prison. It is likely that many prisoners with mental illness are not capable of adequately framing an argument that their mental condition has prevented them from strictly complying with grievance procedures as the Supreme Court has directed.

<sup>12</sup> *Woodford v. Ngo*, 548 U.S. 81, 126 S.Ct. 2378, 2389 (2006). The Court noted that the 15-day deadline the plaintiff missed is not unusual; grievance deadlines are typically 14 to 30 days according to the United States and even shorter according to the plaintiff. *Woodford*, 126 S.Ct. at 2389. The dissenting opinion cited a case from a juvenile facility involving a 48-hour time limit. *Id.* at 2403, citing *Minix v. Pazera*, 2005 WL 1799538 at \*2 (N.D.Ind., July 27, 2005).

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<sup>13</sup> Even prison officials sometimes can't get their own rules straight. In *Giano v. Goord*, 380 F.3d 670 (2d Cir. 2004), New York State prison officials argued that the plaintiff's claim that evidence in a disciplinary hearing had been falsified was not exhausted by appealing his disciplinary conviction, but that he should have filed a separate grievance on the subject. The court held that the plaintiff had shown special circumstances justifying his failure to exhaust, since any misunderstanding he had of the rule was entirely reasonable. In a later case presenting the same fact situation under the same rules, prison officials made precisely the opposite argument, claiming that a prisoner who had filed a separate grievance about false disciplinary charges should instead have pursued his claims through a disciplinary appeal. *Larkins v. Selsky*, 2006 WL 3548959 at \*9 (S.D.N.Y., Dec. 6, 2006). In the years after *Giano*, the prison system did nothing to clarify its rules to distinguish between the scope of disciplinary appeals and that of grievances. See also *Westefer v. Snyder*, 422 F.3d 570, 580 (7th Cir. 2005) (observing prison policies did not "clearly identifi[y]" the proper administrative remedy and there was no "clear route" to administrative review of certain decisions); *Abney v. McGinnis*, 380 F.3d 663, 668-69 (2d Cir. 2004) (noting the lack of instruction in the grievance rules for instances where a favorable grievance decision is not carried out).

<sup>14</sup> *Brownell v. Krom*, 446 F.3d 305, 311-12 (2d Cir. 2006) (citing prison officials' erroneous advice that the plaintiff's lost property was not the responsibility of the prison he had been transferred to, which resulted in a failure to investigate; a prison official's advice to abandon his property claim and pursue a grievance instead, resulting in loss of the ability to appeal the property claim; and the lack of any apparent provision in the grievance system for raising newly discovered facts in a previously filed grievance); *Warren v. Purcell*, 2004 WL 1970642 at \*6 (S.D.N.Y. Sept. 3, 2004) (noting 'baffling' grievance response that left prisoner with no clue what to do next); *Kendall v. Kittles*, 2004 WL 1752818 at \*2 (S.D.N.Y., Aug. 4, 2004) (noting that Grievance Coordinator's affidavit said that plaintiff needed a physician's authorization to grieve medical concerns; no such requirement appears in the New York City grievance policy); *Livingston v. Piskor*, 215 F.R.D. 84, 86-87 (W.D.N.Y. 2003) (noting evidence that grievance personnel, contrary to policy, refused to process grievances where a disciplinary report had been filed); *Casanova v. Dubois*, 2002 WL 1613715 at \*6 (D.Mass., July 22, 2002) (finding that, contrary to written policy, practice was "to treat complaints of alleged civil rights abuses by staff as 'not grievable'"), *remanded on other grounds*, 304 F.3d 75 (1<sup>st</sup> Cir. 2002).

<sup>15</sup> See *Jackson v. District of Columbia*, 254 F.3d 262, 269-70 (D.C.Cir. 2001) (holding that a plaintiff who complained to three prison officials and was told by the warden to "file it in the court" had not exhausted); *Yousef v. Reno*, 254 F.3d 1214, 1221-22 (10th Cir. 2001) (holding that plaintiff who was confused by prison officials' erroneous representations about the powers of the grievance system was still required to exhaust); *Chelette v. Harris*, 229 F.3d 684, 688 (8th Cir. 2000) (holding that a plaintiff who complained to the warden and was told the warden would take care of his problem, but the warden didn't, was not excused from exhausting the grievance system), cert. denied, 531 U.S. 1156 (2001); *Mendez v. Herring*, 2005 WL 3273555 at \*2 (D.Ariz., Nov. 29, 2005) (dismissing claim of a prisoner who said staff told him his rape complaint was not grievable, since futility is not an excuse); *U.S. v. Ali*, 396 F.Supp.2d 703, 707 (E.D.Va. 2005) (holding that a prisoner who received a response that "[a]s these issues are addressed by your attys [sic] and the government you will be informed" and did not appeal failed to exhaust); *Thomas v. New York State Dep't of Correctional Services*, 2003 WL 22671540 at \*3-4 (S.D.N.Y., Nov. 10, 2003) (dismissing case where prison staff told the prisoner a grievance was not necessary; this was "bad advice, not prevention or obstruction," and the prisoner did not make sufficient efforts to exhaust).

In other cases, the courts have allowed claims to go forward where prisoners were misled. See, e.g., *Brown v. Croak*, 312 F.3d 109, 112-13 (3d Cir. 2002) (holding that if security officials told the plaintiff to wait for completion of an investigation before grieving, and then never informed him of its completion, the grievance system was unavailable to him); *Scott v. California Supreme Court*, 2006 WL 2460737 at \*7 (E.D.Cal., Aug. 23, 2006) (holding that a prisoner who had relied on officials' misinformation and sought relief in state court had exhausted, notwithstanding officials' subsequent issuance of an untimely decision which he did not appeal); *Beltran v. O'Mara*, 405 F.Supp.2d 140, 154 (D.N.H. 2005) (holding, where a grievance was rejected on the ground that incidents which were the subject of disciplinary proceedings could not be grieved, "a reasonable inmate in [the plaintiff's] position" would believe the grievance process was not an available remedy and his claims should be raised in the

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disciplinary process), *on reconsideration*, 2006 WL 240558 (D.N.H., Jan. 31, 2006); *O'Connor v. Featherston*, 2003 WL 554752 at \*2-3 (S.D.N.Y., Feb. 27, 2003) (holding allegation that prison Superintendent told a prisoner to complain via the Inspector General rather than the grievance procedure presented triable factual issues).

<sup>16</sup> There is a well-known pattern in American prisons of threats and retaliation against prisoners who file grievances and complaints. *See Dannenberg v. Valadez*, 338 F.3d 1070, 1071-72 (9th Cir. 2003) (noting jury verdict for plaintiff on claim of retaliation for assisting another prisoner with litigation); *Walker v. Bain*, 257 F.3d 660, 663-64 (6th Cir. 2001) (noting jury verdict for plaintiff whose legal papers were confiscated in retaliation for filing grievances), cert. denied, 535 U.S. 1095 (2002); *Gomez v. Vernon*, 255 F.3d 1118 (9th Cir.) (affirming injunction protecting prisoners who were the subject of retaliation for filing grievances and for litigation), cert. denied, 534 U.S. 1066 (2001); *Trobaugh v. Hall*, 176 F.3d 1087 (8th Cir. 1999) (directing award of compensatory damages to prisoner placed in isolation for filing grievances); *Hines v. Gomez*, 108 F.3d 265 (9th Cir. 1997) (affirming jury verdict for plaintiff subjected to retaliation for filing grievances), cert. denied, 524 U.S. 936 (1998); *Cassels v. Stalder*, 342 F.Supp.2d 555, 564-67 (M.D.La. 2004) (striking down disciplinary conviction for “spreading rumors” of prisoner whose mother had publicized his medical care complaint on the Internet); *Atkinson v. Way*, 2004 WL 1631377 (D.Del., July 19, 2004) (upholding jury verdict for plaintiff subjected to retaliation for filing lawsuit); *Tate v. Dragovich*, 2003 WL 21978141 (E.D.Pa., Aug. 14, 2003) (upholding jury verdict against prison official who retaliated against plaintiff for filing grievances); *Hunter v. Heath*, 95 F.Supp.2d 1140 (D.Or. 2000) (noting prisoner’s acknowledged firing from legal assistant job for sending “kyte” (officially sanctioned informal complaint) to the Superintendent of Security concerning the confiscation of a prisoner’s legal papers), *rev’d on other grounds*, 26 Fed.Appx. 754, 2002 WL 112564 (9th Cir. 2002); *Maurer v. Patterson*, 197 F.R.D. 244 (S.D.N.Y. 2000) (upholding jury verdict for plaintiff who was subjected to retaliatory disciplinary charge for complaining about operation of grievance program); *Gaston v. Coughlin*, 81 F.Supp.2d 381 (N.D.N.Y. 1999) (awarding damages for trumped-up disciplinary charge made in retaliation for prisoner’s complaining about state law violations in mess hall work hours), *on reconsideration*, 102 F.Supp.2d 81 (N.D.N.Y. 2000); *Alnutt v. Cleary*, 27 F.Supp.2d 395, 397-98 (W.D.N.Y. 1998) (noting jury verdict for plaintiff who was subject to verbal harassment, assault, and false disciplinary charges in retaliation for his work as an Inmate Grievance Resolution Committee representative).

There have been mixed results from the courts in cases involving claims of failure to exhaust because of threats or intimidation. Some courts have simply dismissed such claims. *See, e.g., Enright v. Heine*, 2006 WL 2594485 at \*2 (D.Mont., Sept. 11, 2006) (“Even a prisoner’s fear of retaliatory action could not excuse her from pursuing administrative remedies.”); *Broom v. Engler*, 2005 WL 3454657 at \*3 (W.D.Mich., Dec. 16, 2005) (stating, where plaintiff recounted threats he received, “[t]he PLRA does not excuse exhaustion for a prisoner . . . who is afraid to complain”). Others have held that retaliation and threats can make a remedy unavailable or excuse the failure to exhaust. *See, e.g., Hemphill v. New York*, 380 F.3d 680, 688 (2d Cir. 2004); *accord, Kaba v. Stepp*, 458 F.3d 678, 684-86 (7<sup>th</sup> Cir. 2006). But even where courts hold the latter view, it will ultimately be a prisoner’s word against that of prison staff members who will be accused of covert misconduct to which there are unlikely to be witnesses.

<sup>17</sup> *See Dole v. Chandler*, 438 F.3d 804, 811-12 (7th Cir. 2006) (holding 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>18</sup> *See, for example*, these cases, which courts have allowed to go forward in spite of the protracted failure by prison officials to respond to grievances or appeals. *Brown v. Koenigsmann*, 2003 WL 22232884 at \*4 (S.D.N.Y., Sept. 29, 2003); *accord, Levi v. Briley*, 2006 WL 2161788 at \*3 (N.D.Ill., July 28, 2006) (declining to dismiss where the prisoner had waited two years for a final decision); *Jones v. Blanas*, 2005 WL 1868826 at \*3 (E.D.Cal., Aug. 3, 2005); *White v. Briley*, 2005 WL 1651170 at \*6 (N.D.Ill., July 1, 2005); *Casarez v. Mars*, 2003 WL 21369255 at \*6 (E.D.Mich., June 11, 2003) (holding that prison officials’ lack of response to a Step III grievance did not mean failure to exhaust); *John v. N.Y.C. Dept. of Corrections*, 183 F.Supp.2d 619, 625 (S.D.N.Y. 2002) (rejecting argument, three years after grievance appeal, that plaintiff must continue waiting for a decision).

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This response by the courts is far from universal. Some courts have stated categorically that exhaustion is not completed until the prisoner receives a decision, even if the prisoner has taken all necessary steps to exhaust. See *Petrusch v. Oliloushi*, 2005 WL 2420352 at \*4 (W.D.N.Y., Sept. 30, 2005) (dictum); *Rodriguez v. Hahn*, 209 F.Supp.2d 344, 347-48 (S.D.N.Y. 2002). That view would let prison officials keep prisoners out of court just by failing to decide grievances. Other courts have said that exhaustion is complete once the time for a decision on the final appeal has passed. See, e.g., *Powe v. Ennis*, 177 F.3d 393, 394 (5th Cir. 1999). However, that view is not necessarily followed in practice. In *Wyatt v. Doe*, 2006 WL 1407636 at \*1 (S.D.Tex., May 19, 2006), the court said that a prisoner whose grievance had remained “under exhaustion” for eight months and whose appeal had been ignored “[did] not establish that the investigation has been delayed unreasonably,” even though the grievance process in Texas is supposed to be completed within 90 days. See *Pugh v. Braneff*, 2006 WL 1408392 at \*2 (E.D.Tex., May 19, 2006). In *Ford v. Johnson*, 362 F.3d 395, 400 (7th Cir. 2004), a federal appeals court held that the prisoner had failed to exhaust where he had waited six months for a final decision in a system where decisions are supposed to be rendered within 60 days “whenever possible.” See also *Mendez v. Artuz*, 2002 WL 313796 at \*2 (S.D.N.Y., Feb. 27, 2002) (dismissing for non-exhaustion where a prisoner’s grievance appeal had not been initially processed as a result of “administrative oversight”).

Some grievance systems do not even have deadlines for responses, so the prisoner must engage in guesswork as to whether enough time has passed that the court will think he has waited long enough. See *Olmsted v. Cooney*, 2005 WL 233817 at \*2 (D.Or., Jan. 31, 2005) (holding prisoner who waited seven weeks after filing last appeal was not shown to have failed to exhaust); *Thompson v. Koeny*, 2005 WL 1378832 at \*5 (E.D.Mich., May 4, 2005) (holding that a decision delayed six and a half months was not “timely” and case could not be dismissed for non-exhaustion where prisoner filed after five and a half months); *McNeal v. Cook County Sheriff’s Dep’t*, 282 F.Supp.2d 865, 868 n.3 (N.D.Ill. 2003) (holding that 11 months is long enough, citing cases holding that seven months is long enough and one month is not).

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

<sup>20</sup> See, e.g. *Jones v. Oaks Correctional Facility Health Services*, 2005 WL 3312562 at \*2 (W.D.Mich., Dec. 7, 2005) (stating even a case that presents imminent danger of serious physical harm must be exhausted); *Calderon v. Anderson*, 2005 WL 2277398 at \*5 (S.D.W.Va., Sept. 19, 2005) (stating exhaustion was required despite the prisoner’s claim of “life-or-death situation”); *Drabovskiy v. U.S.*, 2005 WL 1322550 at \*2 (E.D.Ky., June 2, 2005) (“To the extent the plaintiff’s motion for emergency appeal is intended to be a request for the Court to forgive the exhaustion requirement necessary [sic], he provides no factual or legal grounds therefor.”); *Joseph v. Jocson*, 2004 WL 2203298 at \*1 (D.Or., Sept. 29, 2004) (“Plaintiff contends he should not be required to exhaust available remedies because delay may result in irreparable harm. Exhaustion is mandatory.”) While one court has suggested that preliminary relief may be granted pending exhaustion, see *Jackson v. District of Columbia*, 254 F.3d 262, 267-68 (D.C.Cir. 2001), we are not aware of cases in which that argument has actually been applied. One court did decline to dismiss for non-exhaustion where the prisoner was shortly to be executed and exhaustion was not complete. *Evans v. Saar*, 412 F.Supp.2d 519, 527 (D.Md. 2006).

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<sup>21</sup> In addition to cases cited in the previous notes, another example of PLRA “gotcha” is cases where prisoners fail to exhaust out of fear or other justifiable circumstances, and courts then hold that they should have filed grievances when those conditions ceased to apply—even though, given the short deadlines for prison grievances, the grievance filing deadlines would generally have long passed and their grievances would be untimely. The result of a prisoner’s failure to appreciate this point, as with other failures to exhaust, is dismissal of the prisoner’s case, however meritorious it might be. A good illustration is the acknowledged pattern of physical abuse of prisoners by staff at the Rogers State Prison in Georgia, which resulted in the termination of a number of employees and lesser discipline to others, as well as a “series of prisoner-beating cases” in the federal district court. See *Priester v. Rich*, 457 F.Supp.2d 1369, 1371 & n.1 (S.D.Ga. 2006). In one of these cases, the plaintiff said he did not file a grievance because of his fear of violent retaliation, but the court said he should have filed a grievance when conditions changed, i.e., the administration was replaced and several officers were suspended and eventually terminated. *Stanley v. Rich*, 2006 WL 1549114 at \*3 (S.D.Ga., June 1, 2006). Similarly, in *Langford v. Rich*, 2006 WL 1549120 at \*2 (S.D.Ga., June 1, 2006), a prisoner who complained of threats of retaliation at Rogers should have filed an out-of-time grievance upon being transferred to another prison. Although these prisoners’ claims were dismissed without prejudice, as a practical matter they would be unable to exhaust and then refile their claims under the “proper exhaustion” rule of *Woodford v. Ngo*, *supra*, because any new attempt to exhaust would be untimely. *Accord, Hemingway v. Lantz*, 2006 WL 1237010 at \*2 (D.N.H., May 5, 2006) (holding a prisoner who said he did not grieve for fear of staff retribution should have done so once transferred to the “safety” of another state); *Haroon v. California Dept. of Corrections and Rehabilitation*, 2006 WL 1097444 at \*3 (E.D.Cal., Apr. 26, 2006) (holding that a prisoner who was in a coma during the usual time limit should have filed afterwards), *report and recommendation adopted*, 2006 WL 1629123 (E.D.Cal., June 9, 2006); *Isaac v. Nix*, 2006 WL 861642 at \*4 (N.D.Ga., Mar. 30, 2006) (holding prisoner who said he couldn’t get grievance forms within a five-day time limit should have filed a grievance within five days of getting the forms); *Brazier v. Maricopa County Sheriff’s Office*, 2006 WL 753157 at \*4 (D.Ariz., Mar. 22, 2006) (holding that a prisoner who was physically traumatized and unable to file a grievance within the 48-hour time limit was required to exhaust them later, even untimely), *reconsideration denied*, 2006 WL 1455569 (D.Ariz., May 22, 2006); *Ming Ching Jin v. Hense*, 2005 WL 3080969 at \*3 (E.D.Cal., Nov. 15, 2005) (holding a prisoner informed that there was no record of his appeal was obliged to take steps to pursue the appeal), *report and recommendation adopted*, 2006 WL 177424 (E.D.Cal., Jan. 20, 2006).

<sup>22</sup> As one court put it, once suit is filed, “the defendants in hindsight can use any deviation by the prisoner to argue that he or she has not complied with 42 U.S.C. § 1997e(a) responsibilities.” *Ouellette v. Maine State Prison*, 2006 WL 173639 at \*3 n.2 (D.Me., Jan. 23, 2006), *aff’d*, 2006 WL 348315 (D.Me., Feb. 14, 2006). Other courts have expressed similar concerns. See, e.g., *Campbell v. Chaves*, 402 F.Supp.2d 1101, 1106 n.3 (D.Ariz. 2005) (noting danger that grievance systems might become “a series of stalling tactics, and dead-ends without resolution”); *LaFauci v. New Hampshire Dept. of Corrections*, 2005 WL 419691 at \*14 (D.N.H., Feb. 23, 2005) (“While proper compliance with the grievance system makes sound administrative sense, the procedures themselves, and the directions given to inmates seeking to follow those procedures, should not be traps designed to hamstring legitimate grievances.”); *Rhames v. Federal Bureau of Prisons*, 2002 WL 1268005 at \*5 (S.D.N.Y., June 6, 2002) (“While it is important that prisoners comply with administrative procedures designed by the Bureau of Prisons, rather than using any they might think sufficient, . . . it is equally important that form not create a snare of forfeiture for a prisoner seeking redress for perceived violations of his constitutional rights.”).

<sup>23</sup> For example, in *Marshall v. Knight*, 2006 WL 3714713 (N.D.Ind. Dec 14, 2006), the prisoner said he had been subject to adverse disciplinary and classification action in retaliation for constitutionally protected activity. He did not file a grievance because the grievance system excludes disciplinary and classification matters. However, the defendants said, and the court agreed, that his claim was really about retaliation, not about classification and discipline, and he should have filed a grievance. Mr. Marshall’s case was dismissed because he followed a common-sense interpretation of the prison’s own grievance policy, and as noted, any attempt to exhaust after the dismissal would have been untimely.

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<sup>24</sup> As of 1998, there were fewer than a dozen reported opinions directly involving challenges to conditions in juvenile detention centers, and around two dozen cases with unreported opinions or settlements. Michael J. Dale, *Lawsuits and Public Policy: The Role of Litigation in Correcting Conditions in Juvenile Detention Centers*, 32 U.S.F. L. Rev. 675, 681-98 (1998). This figure contrasts strongly with the much larger number of reported and unreported opinions arising from challenges to adult prison conditions. The authors of this report are generally familiar with institutional litigation and can confirm that this large disparity persists.

<sup>25</sup> For example, detained youth have higher rates of sexual assaults than adult prisoners. See Allen J. Beck & Timothy A. Hughes, Bureau of Justice Statistics, *Sexual Violence Reported By Correctional Authorities*, 2004 (2005) (finding that the rate of reported sexual violence was nearly ten times higher in juvenile facilities than adult prisons). A more recent BJS survey, which focused solely on sexual violence reports filed in adult facilities confirmed that young inmates are also more likely to be victimized when in adult prisons. Allen J. Beck & Paige M. Harrison, Bureau of Justice Statistics, *Sexual Violence Reported By Correctional Authorities*, 2005 (2006).

<sup>26</sup> See, e.g., *Minix v. Pazera*, 2005 WL 1799538 (N.D.Ind. 2005) (dismissing claims of juvenile plaintiff, who was repeatedly raped and beaten in juvenile facilities, for failure to file an administrative grievance, despite his mother's "heroic efforts" to protect her son by contacting numerous government officials while the abuse was ongoing).

<sup>27</sup> See *Alexander S. v. Boyd*, 876 F. Supp. 773, 790 (D.S.C. 1995) (holding that juvenile detainees had no constitutional right to a law library because, in light of their limited capacity, they "would not benefit in any significant respect from a law library, and the provision of such would be a foolish expenditure of funds"); accord, *Shookoff v. Adams*, 750 F.Supp. 288 (M.D.Tenn. 1990), *aff'd in pertinent part, reversed in part on other grounds sub nom. John L. v. Adams*, 969 F.2d 228 (6th Cir. 1992).

<sup>28</sup> It remains possible under the PLRA for parties to enter into "private settlement agreements" that are treated as contracts in state court. However, these agreements are enormously wasteful and duplicative because they cannot be enforced in federal court. In one recent decision approving a private settlement of claims of physical abuse of prisoners by jail staff, the federal judge noted that "it makes little sense that, if a perceived problem with compliance should arise, short of seeking reinstatement of this action, plaintiffs can seek relief only in state court under state law. In view of the time and effort I have spent on this case, including countless hours discussing not only the substantive terms of the Agreement but also its language, it would be a tremendous waste of resources for the parties to have to go to state court to seek relief from a state court judge wholly unfamiliar with the case." *Ingles v. Toro*, 438 F.Supp.2d 203, 215 (S.D.N.Y. 2006).

<sup>29</sup> *Board of Educ. of Oklahoma v. Dowell*, 498 U.S. 237, 247-50 (1991); accord, *Freeman v. Pitts*, 503 U.S. 467, 491 (1992). Courts have the discretion to make this assessment on an issue-by-issue basis. *Freeman*, 503 U.S. at 489. While the decree is in effect, the court may address any operational problems by modifying it if there is a "significant change in circumstances" in either fact or law, and the proposed modification is "suitably tailored to the changed circumstance." *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 383 (1992).

<sup>30</sup> The statute restricts compensation to 150% of the rates paid defense counsel under the Criminal Justice Act (CJA), which are drastically lower than market rates in most jurisdictions. While CJA lawyers are paid regardless of outcome, counsel representing civil rights litigants are compensated only if they prevail, which presents an enormous risk when representing unpopular clients like prisoners. The restriction to below-market rates is a severe disincentive for private counsel to take even the most meritorious prisoner case. The statute also restricts compensation to 150% of damages awarded. This presents another major disincentive, since juries often award minimal damages to plaintiffs they disapprove of even when they are persuaded of liability. Moreover, it is fairly common for both judges and juries to be unable to place a dollar value on substantial constitutional rights and to award nominal damages of \$1.00 – leaving the attorney who has proved a constitutional violation with compensation of \$1.50. See *Boivin v. Black*, 225 F.3d 36 (1st Cir. 2000) (awarding \$1.00 and \$1.50 fees where pre-trial detainee was bound into a restraint

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chair with a towel over his mouth and lost consciousness). That will also be the outcome if the court holds that a constitutional claim is for “mental or emotional injury” under 42 U.S.C. § 1997e(e) and only nominal damages may be awarded. See *Pearson v. Welborn*, 471 F.3d 732 (7th Cir. 2006) (holding nominal damages and \$1.50 in fees appropriate where jury found that prison employee had inflicted a year’s “supermax” confinement on prisoner in retaliation for his First Amendment-protected complaints about prison conditions).

<sup>31</sup> Cases presenting an “imminent risk of serious physical harm” are exempted from this section, but there are many serious constitutional violations that do not threaten serious *physical* harm, such as violation of religious freedom or other First Amendment rights. Further, cases seemingly presenting such a risk are nonetheless dismissed under this provision. See, e.g., *Watley v. Collins*, 2006 WL 3422996 (S.D. Ohio, Nov. 28, 2006) (holding a prisoner did not meet the “imminent danger” standard even though he alleged that he has mental illness and has been placed in “supermax” conditions, which in turn aggravates his mental illness and therefore worsens his misbehavior; he has attempted suicide and engages in deranged behavior disturbing other inmates, resulting in confrontations and their throwing urine and feces at him; he has been maced to control him).

<sup>32</sup> For example, in *Olim v. Wakinekona*, 461 U.S. 238 (1983), the federal district court held that a prisoner who complained that he was transferred from Hawai’i to the mainland without due process failed to state a claim; two out of three judges on the Ninth Circuit held that his allegation did state a claim; and the Supreme Court held by a 6-3 vote that it did not state a claim and was properly dismissed. In *Helling v. McKinney*, 509 U.S. 25, 35 (1993), the Supreme Court held that a prisoner alleging danger to his future health from exposure to second-hand tobacco smoke stated a cause of action under the Eighth Amendment; the vote was 7-2.

<sup>33</sup> Many *pro se* prisoner cases are declared frivolous based on technical mistakes, some of them quite esoteric. For example, in *Gonzales v. Wyatt*, 157 F.3d 1016, 1019-22 (5th Cir. 1998), a suit alleging excessive force by staff, the plaintiff was being assisted by another prisoner, but was transferred to another prison and his legal papers confiscated before the complaint could be filed. The other prisoner filed the complaint on his behalf, unsigned, within the statute of limitations, and the plaintiff then submitted a signed copy, but after the limitations period. The court held that his claim was frivolous, and it will be a strike under § 1915(g). In *Monroe v. Lewis*, 165 F.3d 27 (Table), 1998 WL 537562 (6th Cir., Aug. 7, 1998), the prisoner’s medical care claim was dismissed as frivolous because the court found it time-barred: it was timely relative to the date the prisoner had learned of the seriousness of his injury, but the court held that the claim accrued earlier, when he was first denied care. Cases are often declared frivolous because the prisoner has raised a claim in a civil rights action that must properly be pursued via writ of habeas corpus. See *Hassler v. Carson County*, 111 Fed.Appx. 728 (5th Cir. 2004) (affirming dismissal as frivolous of allegation of failure to credit jail time served); *Ballesteros v. Vasquez*, 161 F.3d 11 (Table), 1998 WL 537008 (9th Cir., August 21, 1998) (affirming dismissal as frivolous of allegation of falsified evidence in disciplinary proceeding); *Grant v. Sotelo*, 1998 WL 740826 at \*1 (N.D. Tex., Oct. 17, 1998) (citing cases). This line-drawing problem for which prisoners are being penalized for guessing wrong is one with which the United States Supreme Court has grappled for three decades. See *Preiser v. Rodriguez*, 411 U.S. 475, 494 (1973); *Heck v. Humphrey*, 512 U.S. 477 (1994); *Edwards v. Balisok*, 520 U.S. 641 (1997); *Muhammad v. Close*, 540 U.S. 709 (2004) (per curiam); *Wilkinson v. Dotson*, 544 U.S. 74 (2005).