# The Second Circuit PLRA Exhaustion Crib Sheet

**John Boston**
**The Legal Aid Society**
**Prisoners' Rights Project**

**Updated September 2, 2008**
**for Second Circuit**
**Staff Attorneys' Training**

This outline sets out the Second Circuit's rules, with some supplementation from lower courts, applying the requirement of administrative exhaustion under the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a): "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." All the issues addressed herein are discussed in more detail in the exhaustion section of *The Prison Litigation Reform Act* (2008).

## Contents

## I. Scope and Applicability

The statute applies to suits about "prison conditions," meaning "all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong."

*Porter v. Nussle*, 534 U.S. 516, 532 (2002).

It applies to cases *filed* after the enactment of the PLRA in April 1996.

*Scott v. Coughlin*, 344 F.3d 282 (2d Cir. 2003); *Salahuddin v. Mead*, 174 F.3d 271 (2d Cir. 1999).

A motion to enforce the terms of a pre-existing judgment is not a separate "action" requiring exhaustion.

*Clarkson v. Coughlin*, 2006 WL 587345 at *3 (S.D.N.Y., Mar. 10, 2006); *accord*, *Arce v. O'Connell*, 427 F.Supp.2d 435, 440-41 (S.D.N.Y. 2006).

Decisions are in conflict whether a motion in a criminal prosecution affecting conditions of confinement is an "action" that must be exhausted.

*Compare U.S. v. Hashm*i, 2008 WL 216936 at *6-7 (S.D.N.Y., Jan. 16, 2008) (motion contesting "Special Administrative Measures" affecting communication between the defendant and his counsel was not an "action," a term which it defined to mean a separate proceeding, and need not be exhausted) *with U.S. v. Khan*, 540 F.Supp.2d 344, *349-52 (E.D.N.Y. 2007) (placement of detainee in segregated confinement must be exhausted; decision appears to confuse PLRA and habeas exhaustion law).

A person who files suit after release from prison need not exhaust prison conditions suits because such a suit is not "brought by a prisoner."

*Greig v. Goord*, 169 F.3d 165 (2d Cir. 1999).

The provision applies to any "jail, prison, or other correctional facility," which as a matter of federal law "includes within its ambit all facilities in which prisoners are held involuntarily as a result of violating the criminal law," including the Willard "drug treatment campus" notwithstanding that state law says it is not a correctional facility.

*Ruggiero v. County of Orange*, 467 F.3d 170, 174-75 (2d Cir. 2006).

Persons confined non-criminally are not "prisoners" subject to the statute.

*Gashi v. County of Westchester*, 2005 WL 195517 at *1 (S.D.N.Y., Jan. 27, 2005) (immigration detainees).

The PLRA should not be interpreted to overturn the usual practices of federal litigation except insofar as Congress actually said so.

*Jones v. Bock*, ___ U.S. ___, 127 S.Ct. 910, 920-21, 924-26 (2007).

## II. Procedural Issues in Litigating Exhaustion

Exhaustion is not jurisdictional.

*Woodford v. Ngo*, 548 U.S. 81, 101 (2006); *Richardson v. Goord*, 347 F.3d 431 (2d Cir. 2003).

Exhaustion is not a pleading requirement; non-exhaustion is an affirmative defense that defendants must plead.

*Jones v. Bock*, ___ U.S. ___, 127 S.Ct. 910, 919-22 (2007); *Johnson v. Testman*, 380 F.3d 691, 695 (2d Cir. 2004); *Jenkins v. Haubert*, 179 F.3d 19, 28-29 (2d Cir. 1999).

Defendants have the burden of proof, as well as pleading, of failure to exhaust.

*Jenkins v. Haubert*, 179 F.3d at 28-29 (noting it is for defendants to assert exhaustion); *see Roberts v. Barreras*, 484 F.3d 1236, 1240-41 (10th Cir. 2007) (holding that burden of proof follows burden of pleading).

That burden includes all matters relevant to exhaustion, including the availability of a remedy for the prisoner's problem.

*Key v. Fischer,* 2008 WL 2653840 at *6 (S.D.N.Y., July 7, 2008) (declining to dismiss where defendants provided no information on whether the state grievance system was available to a prisoner transferred to federal facility); *Westchester County Dept. of Corrections*, 2008 WL 144827 at *2 (S.D.N.Y., Jan. 15, 2008) (defendants who failed to identify available remedies or show that they were available to the plaintiff did not establish non-exhaustion).

The defense of non-exhaustion can be waived by failure to raise it, or to raise it timely.

*Handberry v. Thompson*, 446 F.3d 335, 342-43 (2d Cir. 2006) (finding waiver by early disavowal of defense); *Johnson v. Testman*, 380 F.3d 691, 695-96 (2d Cir. 2004) (holding the defense waived by failure to assert it in the district court); *Davis v. New York*, 316 F.3d 93 (2d Cir. 2002); *see*, *e.g., Wright v. Goord*, 2006 WL 839532 at *5 (N.D.N.Y., Mar. 27, 2006); *Leybinsky v. Millich*, 2004 WL 2202577 at *2 (W.D.N.Y., Sept. 29, 2004).

Courts can dismiss for non-exhaustion *sua sponte* but must give notice and opportunity to be heard.

*Mojias v. Johnson*, 351 F.3d 606 (2d Cir. 2003) (*sub silentio* overruling *Neal v. Goord*, 267 F.3d 116, 123-24 (2d Cir. 2001), which leaves notice and hearing to the district court's discretion); *accord, Giano v. Goord*, 380 F.3d 670, 675 (2d Cir. 2004)

The proper vehicle for raising failure to exhaust is usually a motion for summary judgment. A motion to dismiss under Rule 12(b)(6), Fed.R.Civ.P., is appropriate only where non-exhaustion is clear from the face of the complaint. If a Rule 12(b)(6) motion is accompanied by extrinsic matter, it must be converted to a motion for summary judgment for that material to be

considered. A Rule 12(b)(1) motion is not appropriate because such a motion is addressed to jurisdiction and PLRA exhaustion is not jurisdictional.

*McCoy v. Goord*, 255 F.Supp.2d 233, 249-51 (S.D.N.Y. 2003); *see Howard v. City of New York*, 2006 WL 2597857 at *7 (S.D.N.Y., Sept. 6, 2006) (declining to consider deposition testimony where motion to dismiss had not been converted to one for summary judgment).

Factual disputes over exhaustion appear to be for the trier of fact and not for pre-trial determination by the court.

*Lunney v. Brureton*, 2007 WL 1544629 at *10 n.4 (S.D.N.Y., May 29, 2007), *objections overruled,* 2007 WL 2050301 (S.D.N.Y., July 18, 2007); *Maraglia v. Maloney*, 499 F.Supp.2d 93, 94 (D.Mass. 2007) (noting that *Jones v. Bock* said to treat exhaustion like other affirmative defenses, and that these are usually jury issues); *Kendall v. Kittles*, 2004 WL 1752818 at *5 (S.D.N.Y., Aug. 4, 2004). *Contra*, *Amador v. Superintendents of Dept. of Correctional Services*, 2007 WL 4326747 at *5 n.7 (S.D.N.Y., Dec. 4, 2007); *see Pavey v. Conley*, 528 F.3d 494, 498 (7th Cir. 2008) (holding exhaustion is to be determined by the court; petition for en banc review is pending).

The remedy for non-exhaustion is dismissal, not a stay to allow exhaustion to be completed.

*Neal v. Goord*, 267 F.3d 116, 122 (2d Cir. 2001).

The *Neal* holding is open to re-examination in light of the Supreme Court's holding that the PLRA does not displace usual litigation practices (which include stays) absent an explicit statement by Congress.

*Jones v. Bock*, ___ U.S. ___, 127 S.Ct. 910, 920-21, 924-26 (2007).

The remedy for non-exhaustion is dismissal of unexhausted claims–without prejudice if remedies remain available, with prejudice if they do not.

*Berry v. Kerik*, 366 F.3d 85, 87-88 (2d Cir. 2004).

The remedy for a partial failure to exhaust is to dismiss the unexhausted claims, not the whole complaint; there is no "total exhaustion" rule.

*Jones v. Bock*, ___ U.S. ___, 127 S.Ct. 910, 923-26 (2007); *Ortiz v. McBride*, 380 F.3d 649 (2d Cir. 2004).

Failure to exhaust is not failure to state a claim unless it is apparent on the face of the complaint.

*Jones v. Bock*, ___ U.S. ___, 127 S.Ct. 910, 920-21 (2007)

A remediable failure to exhaust is not frivolous, so dismissal for non-exhaustion should not be a "strike" under 28 U.S.C. § 1915(g).

*Snider v. Melindez*, 199 F.3d 108, 111 (2d Cir. 1999).

New York State has represented that dismissal for non-exhaustion is within the scope of a state statute providing an additional six months to re-file an otherwise time-barred claim after

dismissal, and that state law may further toll the limitations period during post-dismissal administrative proceedings.

*Villante v. Vandyke*, 2004 WL 605290 at *2 (2d Cir., Mar. 29, 2004), *citing* N.Y.C.P.L.R. §§ 204(a), 205(a); *see Sims v. Goord*, 2005 WL 2327280 at *2 (2d Cir., Sept. 21, 2005) (characterizing question as unsettled); *see also McCoy v. Goord*, 255 F.Supp.2d 233, 253 (S.D.N.Y. 2003) ("Courts may combine a dismissal without prejudice with equitable tolling, when a judicial stay is not available, to extend the statute of limitations 'as a matter of fairness where a plaintiff has . . . asserted his rights in the wrong forum.'"; suggesting in dictum that time spent in federal court may also be tolled) (citation omitted).

The state law requirement that service, as well as filing, be completed within six months of dismissal for non-exhaustion is not applicable in federal court. *Allaway v. McGinnis*, 362 F.Supp.2d 390, 395 (W.D.N.Y. 2005); *Gashi v. County of Westchester*, 2005 WL 195517 at *9 (S.D.N.Y., Jan. 27, 2005).

## III. What the Exhaustion Requirement Requires

Prisoners must exhaust *before* filing suit.

*Neal v. Goord,* 267 F.3d 116, 122 (2d Cir. 2001).

The PLRA exhaustion requirement requires "proper exhaustion," which "demands compliance with an agency's deadlines and other critical procedural rules because no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings."

*Woodford v. Ngo*, 548 U.S. 81, 90-91, 106 (2006).

"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."

*Jones v. Bock*, ___ U.S. ___, 127 S.Ct. 910, 923 (2007).

Unless the prison policy specifies otherwise, exhaustion does not require detailed pleading of facts, law, or items of relief in the administrative process; the plaintiff need only "object intelligibly to some asserted shortcoming."

*Johnson v. Testman*, 380 F.3d 691, 697 (2d Cir. 2004), *citing Strong v. David*, 297 F.3d 646, 650 (7th Cir. 2002). *But see Brownell v. Krom,* 446 F.3d 305, 310-11 (2d Cir. 2006) (holding that a prisoner who complained of lost property but did not allege that it had been lost intentionally failed to exhaust his access to court claim).

Litigation defendants need not have been named in grievances unless the prison policy so requires.

*Jones v. Bock*, ___ U.S. ___, 127 S.Ct. 910, 923 (2007).

The Supreme Court based its "proper exhaustion" holding on the perceived intent of Congress to use "exhaust" consistently with its use in administrative law, also noting that habeas exhaustion law is "substantively similar."

*Woodford v. Ngo*, 548 U.S.81, 92-93 (2006).

Justice Breyer, concurring, noted the majority's reliance on administrative law and habeas rules and observed that administrative law "contains well established exceptions to exhaustion," *e.g.*, for constitutional claims, futility, hardship, and inadequate or unavailabel remedies), and that habeas law also permits exceptions, *e.g.*, if the procedural rule is not "firmly established and regularly followed," if there is cause and prejudice to overcome a procedural default, or if procedural default rule would "result in a miscarriage of justice." He stated that the lower court on remand "should consider any challenges that petitioner may have concerning whether his case falls into a traditional exception that the statute implicitly incorporates."

*Woodford*, 126 S.Ct. at 2393 (concurring opinion). *But see Booth v. Churner,* 532 U.S. 731, 741 n. 6 (2001) (stating the PLRA rendered inapplicable "traditional doctrines of administrative exhaustion, under which a litigant need not apply to an agency that has 'no power to decree . . . relief,' [citation omitted], or need not exhaust where doing so would otherwise be futile.").

Before *Woodford*, the Second Circuit held that prisoners who err based on a reasonable misunderstanding of the rules are justified in failing to exhaust properly.

*Giano v. Goord*, 380 F.3d 670, 677-79 (2d Cir. 2004) (holding justification for failure to follow procedural rules "must be determined by looking at the circumstances which might understandably lead usually uncounselled prisoners to fail to grieve in the normally required way."); *see* § IV.C, below.

However, prisoners may not circumvent the exhaustion requirement by waiting until remedies are time-barred and therefore unavailable, or "bypass administrative procedural rules with impunity."

*Giano v. Goord*, 380 F.3d at 678.

Justice Breyer cited *Giano* with approval in his *Woodford* concurrence for the proposition that the proper exhaustion requirement is "not absolute."

*Woodford*, 126 S.Ct. at 2393 (Breyer, J., concurring in judgment)

The Second Circuit has applied the foregoing principles to prisoners who fail to comply with grievance time limits: ". . . [T]he plaintiff must allege 'circumstances which might understandably lead usually uncounselled prisoners to fail to grieve in the normally required way.'"

*Williams v. Comstock*, 425 F.3d 175, 176 (2d Cir. 2005) (per curiam) (holding prisoner who waited two years to file a grievance and whose explanation accounted only for a

small part of that time failed to exhaust; noting he "does not claim he misread DOCS policy"); *see Hill v. Chalanor*, 419 F.Supp.2d 255, 256, 259 (N.D.N.Y. 2006) (finding failure to appeal resulted from "confusion or mis-communication," directing that plaintiff's renewed grievance appeal "shall be deemed timely" and directing prison officials to make sure it reached its destination).

The extent to which these Second Circuit holdings are affected by *Woodford v. Ngo* has not been determined. District courts have generally assumed it remains valid. *See* § IV, below.

Even under a proper exhaustion/procedural default rule, where prison officials have addressed the merits of a prisoner's grievance, they cannot rely on procedural errors to seek dismissal.

*Harris v. Aidala*, 2006 WL 2583256 at *2 (W.D.N.Y., Sept. 6, 2006); *accord*, *Pozo v. McCaughtry*, 286 F.3d 1022, 1025 (7th Cir.), *cert. denied*, 537 U.S. 949 (2002).

Prisoners must appeal all the way to the highest level of the relevant administrative process.

*McCoy v. Goord,* 255 F.Supp.2d 233, 246 (S.D.N.Y. 2003).

Unless they prevail at an earlier stage (even if the disposition is not carried out).

*Abney v. McGinnis,* 380 F.3d 663, 669 (2d Cir. 2004) (noting there is no procedure for enforcing a failure of implementation, and the appeal deadline provides insufficient time to assess implementation. "Where, as here, prison regulations do not provide a viable mechanism for appealing implementation failures, prisoners in Abney's situation have fully exhausted their available remedies."); *see Marvin v. Goord*, 255 F.3d 40, 43 n.3 (2d Cir. 2001) (noting prisoner had gotten his problem solved by complaining to staff and "likely" exhausted).

But the meaning of "prevail" is now in doubt after a Second Circuit decision holding that a prisoner who repeatedly asked for a cell change to avoid assault, got the cell change after being assaulted, and did not file a formal grievance, still had remedies available, because officials could have taken "some action" by developing policies and procedures or disciplining staff.

*Braham v. Clancy*, 425 F.3d 177, 183 (2d Cir. 2005).

*Braham* appears to contradict both *Abney* and *Marvin*, since in both cases the prisoner could have continued the process (Abney by appealing his supposed victories and Marvin by filing a formal grievance) to seek policy changes and staff discipline. The *Braham* panel summarily rejected a request for rehearing pointing out the apparent contradictions.

The Second Circuit has reinforced the approach of *Braham* by holding that a prisoner who prevailed informally was required to exhaust the grievance process because of "the larger interests at stake," *i.e.*, that filing a grievance "still would have allowed prison officials to reconsider their policies and discipline any officer

who had failed to follow existing policies."

*Ruggiero v. County of Orange,* 467 F.3d 170, 178-79 (2d Cir. 2006).

The Circuit further stated that *Marvin v. Goord* "does not imply that a prisoner has exhausted his administrative remedies every time he receives his desired relief through informal channels." The court did not say what, if anything, *Marvin* does mean.

*Ruggiero v. County of Orange,* 467 F.3d at 177.

## IV. The Second Circuit PLRA Exhaustion Analysis

If a plaintiff "plausibly seeks to counter" a claim of failure to exhaust, the court should engage in a three-part inquiry, asking: (1) whether administrative remedies were available to the prisoner; (2) whether defendants waived or forfeited the defense, or whether their "actions inhibiting the inmate's exhaustion of remedies may estop one or more of the defendants from raising" non-exhaustion; and (3) if remedies were available and there was no estoppel, waiver, or forfeiture, "the court should consider whether 'special circumstances' have been plausibly alleged that justify 'the prisoner's failure to comply with administrative procedural requirements.'"

*Hemphill v. New York*, 380 F.3d 680, 686 (2d Cir. 2004) (citations omitted); *accord*, *Brownell v. Krom*, 446 F.3d 305, 311-12 (2d Cir. 2006).

In considering the various defenses to a claim of non-exhaustion, "[f]requently, availability should be evaluated before consideration" of the others.

*Abney v. McGinnis*, 380 F.3d 663, 667 (2d Cir. 2004).

This order of consideration is presumably because a finding of unavailability is a simpler disposition than one of justification, which requires considering whether remedies are available at the time of decision, or estoppel, which as noted below may apply only to some defendants.

*Hemphill*, 380 F.3d at 689-91.

The Second Circuit has not addressed whether the *Woodford v. Ngo* "proper exhaustion" rule invalidates any part of the above analysis, but it appears not to do so.

There was no discussion of the meaning of availability in *Woodford,* and no claim of unavailable remedies, of estoppel, waiver, or forfeiture, or of special circumstances justifying non-exhaustion before the Court.

Justice Breyer's *Woodford* concurring opinion cited with approval *Giano v. Goord*, which sets out the "special circumstances" analysis, for the proposition that the proper exhaustion requirement is "not absolute," without comment from the majority.

*Woodford*, 126 S.Ct. at 2393 (Breyer, J., concurring in judgment)

District courts within the circuit have held or assumed that the Second Circuit's analysis survives *Woodford*.

*Withrow v. Taylor*, 2007 WL 3274858 at *6 (N.D.N.Y., Nov. 5, 2007); *Wilkinson v. Banks*, 2007 WL 2693636 at *5 (W.D.N.Y. Sep 10, 2007); *Singh v. Goord*, 520 F.Supp.2d 487, 496 n.1 (S.D.N.Y., Oct. 9, 2007); *Harrison v. Stallone*, 2007 WL 2789473 at *3-4 (N.D.N.Y., Sept. 24, 2007); *Collins v. Goord*, 438 F.Supp.2d 399, 411 n. 13 (S.D.N.Y. 2006) (stating *Woodford* leaves the question open, applying *Hemphill* though questioning whether all applications of *Hemphill* remain viable after *Woodford*); *Hairston v. LaMarche*, 2006 WL 2309592 at *6 n.9 (S.D.N.Y., Aug. 10, 2006); *James v. Davis*, 2006 WL 2171082 at *16-17 (D.S.C., July 31, 2006); *Hernandez v. Coffey*, 2006 WL 2109465 at *3 (S.D.N.Y., July 26, 2006).

Courts in other jurisdictions have adopted or continued to rely on the Second Circuit analysis after *Woodford.*

*Turner v. Burnside*, ___ F.3d ___ , 2008 WL 3941976 at *5-6 (11th Cir. 2008) (following *Hemphill* and *Kaba*); *Kaba v. Stepp*, 458 F.3d 678, 684-86 (7th Cir. 2006) (adopting *Hemphill* holding); *MacDonald v. Pedro*, 2007 WL 283045 at *4-5 (D.Or., Jan. 24, 2007); *Hernandez v. Schriro*, 2006 WL 2989030 at *4 (D.Ariz., Oct. 18, 2006); *James v. Davis*, 2006 WL 2171082 at *16-17 (D.S.C., July 31, 2006).

The Second Circuit has held that one extension of its analysis—the suggestion that if a complaint provided sufficient notice for prison officials to respond, its procedural correctness does not matter—is overruled by *Woodford*.

*Macias v. Zenk*, 495 F.3d 37, 43-44 (2d Cir. 2007), *acknowledging overruling of Braham v. Clancy*, 425 F.3d 177, 183 (2d Cir. 2005); *see* § IV.A, below, for further discussion.

## A. "Available" Administrative Remedies

To dismiss for non-exhaustion, the court must ensure that a remedy is available as a matter of law.

*Snider v. Melindez*, 199 F.3d 108, 114 (2d Cir. 1999) (noting that availability of a remedy is a question of law or contains such questions).

The court must "establish the availability of an administrative remedy from a legally sufficient source."

*Mojias v. Johnson*, 351 F.3d 606 (2d Cir. 2003); *accord, Snider v. Melindez*, 199 F.3d at 108 (noting that questions of law about available remedies cannot be resolved by parties' concessions such as check marks on the *pro se* form complaint).

The court must ensure that the remedy is available *for the prisoner's type of claim* and

that the claim does not fall into an exception to the remedy's coverage.

*Mojias, id.*

The court is apparently obliged to determine availability as a matter of law independently of the plaintiff's contentions or lack thereof.

*Snider v. Melindez*, 199 F.3d at 108 (noting that questions of law about available remedies cannot be resolved by parties' concessions).

A remedy is presumed to be available and required to be exhausted unless it "lacks authority to provide *any* relief or to take *any* action whatsoever in response to a complaint."

*Booth v. Churner,* 532 U.S. 731, 736 (2001) (emphasis supplied); *see Marvin v. Goord*, 255 F.3d 40, 43 (2d Cir. 2001) (holding that remedy must offer "some redress" for prisoner's problem to be "available").

The alleged futility or ineffectiveness of the remedy does not excuse failure to exhaust.

*Booth*, 532 U.S. at 741 n. 6 (holding the PLRA rendered inapplicable "traditional doctrines of administrative exhaustion, under which a litigant need not apply to an agency that has 'no power to decree . . . relief,' [citation omitted], or need not exhaust where doing so would otherwise be futile."); *Giano v. Goord*, 250 F.3d 146, 150 (2d Cir. 2001). *But see Woodford v. Ngo*, 548 U.S. 81, 103-04 (2006) (Breyer, J., concurring) (stating that the *Woodford* majority's reasoning supports availability of established administrative law and habeas defenses).

The remedy's failure to provide a particular desired form of relief does not excuse failure to exhaust.

*Booth v. Churner*, 532 U.S. 731, 740-41 (2001).

The court must also ensure that a remedy is available as a matter of fact.

*Hemphill v. New York*, 380 F.3d 680, 686 (2d Cir. 2004) ("Depending on the inmate's explanation for the alleged failure to exhaust, the court must ask whether administrative remedies were *in fact* 'available' to the prisoner.") (emphasis supplied).

Threats can render all or some remedies "functionally unavailable" to the prisoner; circumstances that may deter prisoners from filing an internal grievance may not deter them from "appealing directly to individuals in positions of greater authority within the prison system, or to external structures of authority such as state or federal courts," which may "draw outside attention to his complaints, thereby neutralizing threatened retaliatory conduct from prison employees."

*Hemphill*, 380 F.3d at 688; *see, e.g.*, *Thomas v. Cassleberry*, 2007 WL 1231485 at *2 (W.D.N.Y., Apr. 24, 2007) (applying *Hemphill*).

The standard for assessing claims of non-exhaustion because of threats is whether "'a similarly situated individual of ordinary firmness' [would] have deemed [remedies]

available."

*Hemphill*, 380 F.3d at 688.

Other forms of obstruction may also render a remedy unavailable.

*See, e.g.*, *Smith v. Westchester County Dept. of Corrections*, 2008 WL 361130 at *3 (S.D.N.Y., Feb. 7, 2008) (holding remedies were unavailable if supervisors refused to accept plaintiff's grievance); *Johnson v. Tedford*, 2007 WL 4118284 at *3 (N.D.N.Y., Nov. 16, 2007) (holding failure to record grievance could make grievance appeal unavailable); *Collins v. Goord*, 438 F.Supp.2d 399, 415 (S.D.N.Y. 2006) (citing allegations that facility personnel invented an unauthorized screening procedure and did not allow him to file his grievance); *Burgess v. Garvin*, 2004 WL 527053 at *5 (S.D.N.Y., Mar. 16, 2004) (holding that "procedural channels . . . not made known to prisoners . . . are not an 'available' remedy in any meaningful sense"); *Wheeler v. Goord*, 2005 WL 2180451 at *6 (N.D.N.Y., Aug. 29, 2005) (holding prisoner who was misinformed by staff about how to grieve raised an issue whether remedies were available). Similar facts are often considered as special circumstances excusing failure to exhaust correctly; *see* § IV.C, below.

The available administrative remedy that must be exhausted is most frequently the prison grievance system.

Unless a different remedy is prescribed by the prison system.

*Jenkins v. Haubert*, 179 F.3d 19 (2d Cir. 1999) (noting exhaustion through a disciplinary appeal). *But see Singh v. Goord*, --- F.Supp.2d ----, 2007 WL 2982249 at *4 (S.D.N.Y., Oct. 9, 2007) (noting disciplinary appeal did not exhaust as to constitutionality of underlying rule).

Unless the grievance system is not available for the prisoner's claims.

*Mojias v. Johnson,* 351 F.3d 606 (2d Cir. 2003).

Or the prisoner reasonably understands any of the above to be the case.

*Braham v. Clancy*, 425 F.3d 177, 184 (2d Cir. 2005); *Giano v. Goord*, 380 F.3d 670, 678-79 (2d Cir. 2004); *Johnson v. Testman*, 380 F.3d 691, 696-97 (2d Cir. 2004).

One Circuit decision seemed to suggest that if a prisoner's informal complaints provide sufficient notice to prison officials to allow them to take appropriate responsive measures, the prisoner has exhausted.

*Braham v. Clancy*, 425 F.3d 177, 183 (2d Cir. 2005), *quoting Johnson v. Testman*, 380 F.3d 691, 697 (2d Cir. 2004).

The Circuit has now held that *Woodford*'s "proper exhaustion" holding overruled that earlier suggestion. The PLRA requires both "substantive exhaustion" (notice to officials)

and "procedural exhaustion" (compliance with the rules), and "after *Woodford* notice alone is insufficient."

*Macias v. Zenk*, 495 F.3d 37, 43-44 (2d Cir. 2007).

Thus any claim that a prisoner who did not follow prison rules in exhausting has nonetheless satisfied the PLRA must be supported by a claim of unavailability of the remedy, justification by special circumstances, or estoppel, waiver, or forfeiture of the defense as set forth in this section.

*See Johnson v. Testman*, 380 F.3d 691, 697-98 (2d Cir. 2004) (remanding for the lower court to determine both whether the lack of clarity of prison rules justified the plaintiff's raising his claims by disciplinary appeal rather than separate grievance, *and* whether his appeal gave prison officials sufficient notice of his complaint); *see Macias*, 495 F.3d at 43 (noting lack of claim that confusing rules led the plaintiff to believe he properly exhausted, and remanding to consider availability and estoppel arguments).

The court's prior statement that prevailing through informal means may satisfy the exhaustion requirement is in doubt.

*See* discussion *supra* of *Marvin v. Goord* and *Ruggiero v. County of Orange*.

The extent of prisoners' obligation to exhaust remedies outside the prison system is unclear.

The Second Circuit assumed without deciding that the PLRA requires that school-aged prisoners exhaust the separate administrative remedies provided under the Individuals with Disabilities Education Act, but concluded that such prisoners had no available IDEA remedies, in a case involving systemic denial of educational services on Rikers Island.

*Handberry v. Thompson*, 436 F.3d 52, 61 n.3 (2d Cir. 2006).

District courts have disagreed over whether prisoners with disability claims must exhaust the Department of Justice disability complaint procedure in addition to the prison grievance procedure.

*Compare Veloz v. State of N.Y.*, 2004 WL 2274777 at *8 (S.D.N.Y., Sept. 30, 2004); *Shariff v. Artuz*, 2000 WL 1219381 (S.D.N.Y., Aug. 28, 2000) (holding no) *with Scott v. Goord*, 2004 WL 2403853 at *7 (S.D.N.Y., Oct. 27, 2004); *Burgess v. Garvin*, 2003 WL 21983006 at *3 (S.D.N.Y., Aug. 19, 2003), *on reconsideration,* 2004 WL 527053 (S.D.N.Y., March 16, 2004) (holding yes).

The Department of Correctional Services has repudiated that argument in the Second Circuit for all cases.

*Rosario v. N.Y. State Dept. of Correctional Services*, 400 F.3d 108 (2nd Cir. 2005) (per curiam).

It continues to be asserted by other state agencies.

*William G. v. Pataki*, 2005 WL 1949509 at *5-6 (S.D.N.Y., Aug. 12, 2005).

District courts have generally analyzed exhaustion of Federal Tort Claims Act claims and *Bivens* claims against federal prison officials as separate worlds, with FTCA claims not requiring exhaustion of the prisons' Administrative Remedy Procedure, and *Bivens* claims not requiring exhaustion of the FTCA administrative claims procedure.

*See, e.g.*, *Crum v. Dupell*, 2008 WL 902177 at *3 (N.D.N.Y., Mar. 31, 2008) ("the exhaustion procedures under the FTCA and under the PLRA for *Bivens* claims differ, and fulfillment of one does not constitute satisfaction of the other"); *Hartman v. Holder*, 2005 WL 2002455 at *6-8 (E.D.N.Y., Aug. 21, 2005); *Williams v. U.S.*, 2004 WL 906221 (S.D.N.Y., Apr. 28, 2004) (treating FTCA exhaustion as requiring tort claim and *Bivens* exhaustion as requiring Administrative Remedy Procedure filing).

## B. Waiver, Forfeiture, Estoppel

The non-exhaustion defense can be waived by failure to raise it, or to raise it timely.

*Handberry v. Thompson*, 436 F.3d 52, 59-60 (2d Cir. 2006) (finding waiver by disavowal of defense at early stages); *Johnson v. Testman*, 380 F.3d 691, 695-96 (2d Cir. 2004) (holding the defense waived by failure to assert it in the district court); *Davis v. New York*, 316 F.3d 93 (2d Cir. 2002); *see*, *e.g., Leybinsky v. Millich*, 2004 WL 2202577 at *2 (W.D.N.Y., Sept. 29, 2004) (holding failure to plead exhaustion in answer, to move to amend to add it, or to raise it at all until discovery was over and the case was ready for trial waived the defense).

The court must ask if the defendants are estopped from raising exhaustion.

*Hemphill v. New York*, 380 F.3d 680, 688-89 (2d Cir. 2004) (holding allegations of verbal and physical threats and fear of further assault could support a finding of equitable estoppel); *Ziemba v. Wezner,* 366 F.3d 161, 162-63 (2d Cir. 2004) (holding allegations that prison officials beat and threatened the plaintiff, denied grievance forms and writing implements, and transferred him supported an estoppel claim). The plaintiff's failure to say "estoppel" in the district court was not fatal where the facts alleged supported an estoppel claim. *Id. See also Warren v. Purcell*, 2004 WL 1970642 at *6 (S.D.N.Y. Sept. 3, 2004) (holding "baffling" grievance response that left prisoner with no clue what to do next estopped defendants from claiming the defense).

Estoppel may be limited to defendants who engaged in misconduct, while other defendants are permitted to take advantage of the offending defendants' misconduct and pursue the defense.

*Hemphill*, 380 F.3d at 689; *Barad v. Comstock*, 2005 WL 1579794 at *7 (W.D.N.Y., June 30, 2005) (declining to find estoppel because persons who misled the plaintiff about the grievance system were not defendants)

Or it may not (a conclusion that makes sense because the exhaustion requirement is intended to protect institutional interests and not those of individual staff members who may be sued).

*Rivera v. Pataki*, 2005 WL 407710 at *11 (S.D.N.Y., Feb. 7, 2005) (holding that rejection of grievances as untimely, after the court had dismissed on condition that exhaustion would be allowed, estopped the defendants from claiming non-exhaustion); *Brown v. Koenigsmann*, 2005 WL 1925649 at *2 (S.D.N.Y., Aug. 10, 2005) ("Nothing in *Ziemba*, however, requires that the action or inaction which is the basis for the estoppel be that of the particular defendant in the prisoner's case.")

The *Woodford* decision requiring "proper exhaustion" did not address estoppel.

*Woodford v. Ngo*, 548 U.S. 81 (2006).

### C. Justification Based on Special Circumstances

The court must ask if the plaintiff was justified by "special circumstances" in failing to exhaust, or failing to exhaust properly.

*Giano v. Goord*, 380 F.3d 670, 676-77 (2d Cir. 2004); *see id.* at 678 (noting that justification in the PLRA context must be "determined by looking at the circumstances which might understandably lead usually uncounselled prisoners to fail to grieve in the normally required way").

The plaintiff has a minimal burden of going forward to invoke this requirement.

*Hemphill v. New York*, 380 F.3d at 686 (noting the question arises if the plaintiff "plausibly seeks to counter" a claim of non-exhaustion).

If there is justification for a past failure to exhaust, the plaintiff must now exhaust if remedies remain available, but is excused if they are not.

*Hemphill v. New York*, 380 F.3d at 690-91; *Brownell v. Krom*, 446 F.3d 305, 313 (2d Cir. 2006); *Rodriguez v. Westchester County Jail Correctional Dep't*, 372 F.3d at 488 (holding that a plaintiff with justification for non-exhaustion, who had been transferred so remedies were no longer available, could proceed without exhaustion); *see Giano v. Goord*, 380 F.3d at 679-80 (holding that the plaintiff must pursue administrative remedies if available, but not state judicial ones).

Circumstances that may provide justification for non-exhaustion include but are not limited to:

Threats or intimidation by prison staff.

*Hemphill v. New York*, 380 F.3d 680, 690 (2d Cir. 2004) (noting that the standard is whether a similarly situated individual of "ordinary firmness" would have been deterred from pursuing regular procedures).

Reliance on a reasonable interpretation of the grievance rules.

*Giano v. Goord*, 380 F.3d at 676 (rejecting procedural default rule, which requires strict compliance with rules); *id.* at 678 (finding plaintiff's interpretation of rules reasonable even if incorrect); *Hemphill v. New York*, 380 F.3d 680, 689-90 (2d Cir. 2004) (holding plaintiff's claim that, under the harassment grievance procedure, exhausting by writing to the Superintendent at least reflected a reasonable interpretation of the rules, was not "manifestly meritless" and should be considered on remand); *Partee v. Grood*, 2007 WL 2164529 at *4 (S.D.N.Y., July 25, 2007) (declining to dismiss where initial grievance response said plaintiff's issue was "beyond the purview" of the grievance program, and he did not appeal); *Barad v. Comstock*, 2005 WL 1579794 at *7-8 (W.D.N.Y., June 30, 2005) (holding allegation that prison staff told plaintiff erroneously that his time to commence a grievance had lapsed while he was hospitalized and bedridden constituted special circumstances); *see also Aponte v. Armstrong*, 2005 WL 1527701 at *2 (2d Cir., June 27, 2005) (unpublished) (holding that prisoner who had not been allowed to keep a manual describing grievance procedures might have justifiably believed that the informal means he used sufficed to exhaust).

Procedural irregularities or obstruction in the grievance process.

*Brownell v. Krom*, 446 F.3d 305, 312-13 (2d Cir. 2006) (failure of prison staff to follow prison system's rules); *Tyree v. Zenk*, 2007 WL 527918 at *9-10 (E.D.N.Y., Feb. 14, 2007) (confusing and ambiguous instructions by prison staff); *Hairston v. LaMarche*, 2006 WL 2309592 at *9-11 (S.D.N.Y., Aug. 10, 2006) (referral by Superintendent to the Inspector General, the failure of either to provide the plaintiff with a decision, lack of clarity how he could take the process any further); *Collins v. Goord*, 438 F.Supp.2d 399, 415 (S.D.N.Y. 2006) (grievance barred by an unauthorized screening procedure devised by prison personnel); *Roque v. Armstrong,* 392 F.Supp.2d 382, 391 (D.Conn. 2005) (neither the prisoner nor the grievance system entirely followed the rules but the prisoner had received a response from the Commissioner, the final grievance authority); *Warren v. Purcell*, 2004 WL 1970642 at *6 (S.D.N.Y. Sept. 3, 2004) ("baffling" grievance response that left prisoner with no clue what to do next).

Reasonable misunderstanding of the exhaustion requirement.

*Rodriguez v. Westchester County Jail Correctional Dep't*, 372 F.3d 485, 487 (2d Cir. 2004) (holding that a prisoner who misunderstood the exhaustion requirement in the same way as the Second Circuit had, relying on decision reversed in *Porter v. Nussle*, did so reasonably, and was justified in failing to exhaust based on his belief); *Wilkinson v. Banks*, 2007 WL 2693636 at *6 (W.D.N.Y. Sep 10, 2007) (prisoner who relied on law later reversed in *Booth v. Churner* and filed a grievance a few weeks after *Booth* satisfied exhaustion requirement); *see Braham v. Clancy*, 425 F.3d 177, 184 (2d Cir. 2005) (remanding for consideration whether the prisoner's receipt of the relief he had requested without filing a formal grievance constituted a "special circumstance" that might reasonably lead to a conclusion that he had prevailed in the grievance process); *Rivera v. Pataki,* 2005

WL 407710 at *12 (S.D.N.Y., Feb. 7, 2005) (finding special circumstances where the prisoner "did the best he could to follow DOCS regulations while responding to an evolving legal framework"; noting the plaintiff had filed at a time when it appeared that his claim need not be exhausted, and had tried to exhaust after dismissal for non-exhaustion mandated by the subsequent Supreme Court *Porter v. Nussle* decision).

Reasonable misunderstanding of the facts.

*Borges v. Piatkowski*, 337 F.Supp.2d 424, 427 n.3 (W.D.N.Y. 2004) (holding that a prisoner who did not have reason to know he had a medical care claim until he had been transferred to another prison and the 14-day deadline had long expired was justified in not exhausting).

Psychiatric reasons.

*Petty v. Goord*, 2007 WL 724648 at *8 (S.D.N.Y., Mar. 5, 2007) (prisoner was transferred to a mental hospital after filing a grievance and missed the final deadline; the court notes lack of evidence of his mental state at the time, and holds that two months plus in a mental hospital constituted special circumstances).

Release from custody while a grievance was pending.

*Scott v. DelSignore*, 2005 WL 425473 at *6 (W.D.N.Y., Feb. 18, 2005).

The Supreme Court's decision adopting a "proper exhaustion" requirement for PLRA exhaustion did not address the special circumstances/justification rule, nor did the plaintiff make such an argument.

*Woodford v. Ngo*,548 U.S. 81 (2006).

Post-*Woodford* district court decisions have generally continued to apply the special circumstances analysis. The first of these found special circumstances where the plaintiff had tried hard and in multiple ways to bring his complaint to the attention of responsible officials rule, distinguishing *Woodford* because the plaintiff, though he did not literally comply with state procedures, had not "bypass[ed] prison grievance procedures" or "attempt[ed] to circumvent the exhaustion requirements."

*Hairston v. LaMarche*, 2006 WL 2309592 at *8, 11 (S.D.N.Y., Aug. 10, 2006); *see Collins v. Goord*, 438 F.Supp.2d 399, 411 n. 13 (S.D.N.Y. 2006) (suggesting that Second Circuit rules generally survive); *Rainge-El v. Moschetti*, 2006 WL 1980287 at *1 (D.Colo., July 12, 2006) (questioning *Woodford*'s applicability where the plaintiff "did not entirely ignore the prison's administrative grievance machinery").