

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

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|---------------------------|---|----------------------|
| MICHAEL PARKER, |) | |
| |) | |
| Plaintiff |) | |
| |) | |
| v. |) | Civil No. 04-214-B-W |
| |) | |
| DOUGLAS ROBINSON, et al., |) | |
| |) | |
| Defendants |) | |

RECOMMENDED DECISION ON AFFIRMATIVE DEFENSE

Michael Parker has filed a civil action complaining of the unnecessary use of force during a cell extraction at the Maine State Prison and arguing that the defendants violated his rights under the Eighth Amendment of the United States Constitution. The defendants have moved for summary judgment on the grounds that Parker did not properly exhaust his administrative remedies as required by 42 U.S.C. § 1997e(a) which provides: "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."

After I recommended denying the defendants' motion for summary judgment and that decision was affirmed, the defendants moved for an evidentiary hearing on the question of whether or not Parker had sufficiently fulfilled his 42 U.S.C. § 1997e(a) exhaustion requirement. On December 30, 2005, I convened a hearing at the Maine State

Prison and took testimonial evidence from Michael Parker and the prison's grievance review officer, Robert Costigan. As invited, there was additional briefing.

After consideration of those briefs I entered a stay to await the United States Supreme Court's decision reviewing the Ninth Circuit's Ngo v. Woodford, 403 F.3d 620 (2005), 126 S. Ct. 647. The question upon which the Supreme Court granted review was: "Does a prisoner satisfy the Prisoner Litigation Reform Act's administrative exhaustion requirement by filing an untimely or otherwise procedurally defective administrative appeal?" (Supreme Court Docket No. 05-416)(emphasis added).

The Supreme Court decided Ngo on June 22, 2006. See Woodford v. Ngo, ___ U.S. ___, 126 S. Ct. 2378 (2006). Analogizing the § 1997e(a) exhaustion requirement to the exhaustion requirements of administrative and habeas exhaustion law, id. at 2384 - 2387, the Court construed "exhaustion" in § 1997e(a), consistent with what the term means in administrative law, to "require proper exhaustion." Id. at 2387. In setting forth the parameters of administrative exhaustion, the Court explained: "Proper exhaustion 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." Id. at 2386 (emphasis added).

For the reasons set forth below, I recommend that the Court enter judgment against the defendants on their affirmative defense asserting that Parker did not comply with the exhaustion requirement of 42 U.S.C. § 1997e(a).

Discussion

After Parker successfully defended the defendants' motion for summary judgment, the defendants moved for an evidentiary hearing on the issue of exhaustion.

Parker objected to this request, contending that the question of whether or not he had complied with the exhaustion requirement had already been answered in his favor. As Parker pointed out in his objection, in the recommended decision on the motion for summary judgment I concluded that Parker had generated a genuine dispute of material fact regarding the issue of whether or not he had sufficiently exhausted his administrative remedies at the Maine State Prison. I considered the defendants' request for an evidentiary hearing an appropriate pre-trial avenue for resolving this dispute once and for all. Thus, the hearing was convened.¹

Facts

The undisputed facts material to the exhaustion question are as follows. The Maine Department of Corrections has a process for handling prisoner grievances. (Defs.'s SMF ¶ 2.) Under that policy, there is a formal grievance process that has three levels of review. (Id. ¶ 3.) The third level of review provided for under the policy, review by the Commissioner of Corrections, is the final administrative level of review. (Id. ¶ 4.) Under the policy, not only the original grievance and the appeal to the second level, but also the appeal to the third level must be filed with the Grievance Review Officer. (Id. ¶ 5.)

Parker filed a grievance concerning the cell extraction of April 16, 2004. (Id. ¶ 6.) The grievance contained claims of excessive force by the officers when escorting Parker down the hallway by allegedly pushing his arms above his head making it hard for him to walk, slamming him head first onto the corridor, and refusing to loosen his handcuffs after he was placed in the restraint chair. (¶ 7.) With respect to Parker's grievance

¹ This approach has been taken in the District of Massachusetts, even in a post-Ngo world. See Wigfall v. Duval, Civ. No. 00-12274-DPW, 2006 WL 2381285 (D. Mass. Aug. 15, 2006).

pertaining to the cell extraction, there is no dispute that he fully complied with the first and second stages of the prison's grievance procedure. The grievance was denied at the third level because Parker failed to file the appeal to the third level with the Grievance Review Officer. (Id. ¶ 8.)

Attached to Parker's complaint are copies of his grievances. These documents demonstrate that he filed his initial grievance on April 25, 2004, which stated:

On Friday April 16th I was extracted from my cell on second shift. The supervisor was Sgt. Robinson. During the extraction I did not resist nor did I fight in any way however I sustained several injuries from the brutal and mali[c]ious force used on me by the officers. I am filing this grievance because of the seriousness as to how bad I feel.

After being cuffed and shackled I was brought out of my cell, as I was being escorted down the hallway the officers pushed my arms above my head which made it hard to walk, as I started to say something about it I was picked up and slammed head first into the corridor, my left shoulder and left side of my head hitting simultaneously. I believe that I lost consciousness for a few seconds because of the impact from being slammed. I asked what was happening and why did I get slammed, I was not fighting or resisting in any way. I started asking for the Sgt. and why was I being treated like this. I believe the Sgt. came up to where I had been slammed and told the officers to walk me out and to support me.

Once I was out in receiving I was put into the security chair. After being strapped into the chair I realized that I was having a hard time feeling my hands. I asked the officer if I could have the cuffs loosened up and he said that he couldn't help me out.

I subsequently was left in the chair for at least 1 ½ hrs, possibly longer, with the handcuffs extremely tight cutting into my wrists, cutting off my circulation.

Once I was let out of the chair and brought back to my cell; my shoulder was swollen scraped and bruised, my head had a large bump on it and was throbbing, I had a black eye, and probably worst of all, my hands were twice their normal size from being swollen as well as purpled in color- and the handcuffs had left deep cuts that were bleeding. (its been over a week since this happened however I still have not gained feeling in (3) of my fingers)

(Compl. App. at 1-3.) He received a response from Sergeant Douglas Robinson on April 27, indicating that it would be inappropriate for Robinson "to comment on, attempt

informal resolution too or sign and return the form to [Parker] for further processing"; Robinson was forwarding the grievance to U.M. Starbird for his review. (Compl. App. at 4.)

On May 12, Bob Costigan, the Grievance Review Officer, issued a first level response denying his grievance, indicating:

I have completed the review of your grievance regarding the use of force. I have reviewed the staff reports relating to this incident on 4-16-04. I am satisfied that the staff response was appropriate and approved procedures were followed. Reports indicate that restraints were used and checked by medical personnel. Medical staff also responded to your medical complaints in a timely fashion. Your action to barricade yourself in cell and refuse orders issued by staff members created this incident. I do not find merit in your allegations that the staff used force without reason. Your grievance is denied.

(Id. at 8.)

Parker appealed that decision on May 12. He explained that he reviewed the staff reports and wrote:

[I]t is my opinion that not only are the reports inadequate but there are obvious falsified portions of the reports; Sgt. Robinson's report states that I resisted ironically only during the time in which I allege the misuse of force and they also state that my restraints were checked by medical (Nurse Liberty) which they weren't, several portions of the various officers' reports contradict each other in regards to me resisting etc.

It is my belief that the video tape of the incident will support my allegations and grounds that I based my grievance on. I further believe that it will support the fact of this appeal.

In conclusion I just have to say that I do accept responsibility for my actions on the 16th (the date of the incident.) However, it is obvious to me that the use of force was excessive in my case and it caused me serious injury. I strongly believe that if the tape is reviewed thoroughly, it can be seen that at no point was I physically combative with the staff nor did I resist in any way. To this date of 5-12-04 my injuries still have not been documented by the security, photographed, and an incident report in regards to my injuries has not been written, (I filed a grievance on 04-24-06 in regards to the medical dept. not photographing & documenting my injuries, on 5-06-04 I met with medical supervisory in regards to my grievance with them and I was told that it was a security issue for

photographs & reports to be taken for injuries suffered during extractions. I requested the medical dept. to forward the grievance to Sgt. Robinson and I as well since have written several request[s] for interview –non[e] of which have been answered.

(Id. at 9.)²

Jeffery Merrill, Warden at the Maine State Prison, responded to this Level Two Grievance on June 7, 2004:

I have reviewed your grievance appeal concerning your allegations that excessive force was used during a cell extraction incident involving you on April 16, 2004. I also requested staff review the reports and video record of this incident. As you know, the Investigator attempted to talk with you on May 21, 2004 about your complaint and you refused to talk with him.

Staff who reviewed the video tapes which covered the entire incident and the reports of this incident concluded that cell extraction team followed correct cell extraction and restraint chair placement procedures. Reports submitted by the cell extraction team members note that you resisted on two occasions, once while being secured in your cell and again during the walk to the receiving area. Medical staff saw you within a short time of your placement in the chair and again upon removal from the chair. When you were removed from the restraint chair, medical staff noted bruising on your left shoulder which can be seen on the video record. You also had follow up medical care after this incident for an ongoing chronic problem and your complaints about injuries associated with the incident on April 16, 2004 which were noted by medical staff.

I have concluded that there is no merit to your claim that staff used excessive force and accordingly, your appeal is denied. The force used was necessary and appropriate in this case. I would note that you created a dangerous situation for yourself and others by barricading your cell door and greasing the floor. There are more constructive ways of dealing with food complaints.

(Id. at 18.)

With respect to the next step in the grievance process, the State of Maine Department of Corrections policy provides:

² Parker filed another Level One grievance on May 18, complaining that security personnel, specifically Sergeant Robinson, did not document his injuries sustained during the cell extraction. In this new grievance he indicates that he initially filed a grievance on April 24 and that after several requests to Robinson for an interview without a response Parker concluded that no response was to be forthcoming. He met with medical on May 18 and they advised him to file this new grievance. (Id. at 14-15.)

Procedure E. Third Level Review of a Client's Grievance

1. If, upon receipt of the written response from the Chief Administrative Officer of the facility or the Regional Correctional Administrator, the client still believes that the matter has not been resolved, he/she may indicate on the grievance appeal form his/her reasons why the response was inadequate. The appeal must be filed with the Grievance Review Officer within ten (10) days of the date of response (the date the Chief Administrative Officer or Regional Correctional Administrator signs the response and sends it to the client). An appeal is considered filed on the day it is collected and stamped. The Grievance Review Officer shall date and log the receipt of the appeal and forward the appeal, together with all prior correspondence and documentation, to the Commissioner of Corrections. The client shall not raise an issue on appeal that was not brought forward in the original grievance, or the response to the second level appeal. The Commissioner shall grant an exception to the time limit for filing an appeal where it was not possible for the client to file a grievance appeal within the ten (10) day period.
2. The Commissioner shall respond in writing to the client within thirty (30) days of receipt of the appeal. A copy of the response shall be forwarded to the Grievance Review Officer.
3. This level shall be the final administrative level of appeal.

(Evidentiary Hearing Ex. 2 at 8.)

Parker signed his appeal of the Level Two determination on June 13, 2004.

(Compl. Attach. at 19.) Rather than submitting this to the Grievance Review Officer, Parker sent it directly to the Commissioner of the Department of Corrections. In this form Parker wrote:

The first (2) levels of appeal were not effective in establishing the fact that the force used on me during the cell extraction was not only excessive but also brutal and malicious.

I did not resist or fight the extraction team at all or at any time however I received serious injuries. I have deep purple scars that formed around both wrists from where the handcuffs cut into my wrists from being left in the security chair for so long without my hands being checked. I am taking medication to help the nerve damage that I sustained.

The reports are conflicting to one another as well as to the tape. It can be clearly seen on the tape that after a while of my door being jammed I tried to help the staff unjam my door.

I complied with the staffs orders to lie down on my bunk once the door was unjammed. Why would I all of a sudden resist and conveniently

only during the (2) times when the officers assaulted me, again the tape shows my point.

I was picked up and slammed off my head. I was handcuffed behind my back when the officers picked me up by my arms and slammed me off my head, knocking me unconscious for a few seconds. What type of resistance, if any constitutes this action? Its been almost (2) months and I still have yet to heal from what happened to me.

It is my opinion that correct cell extraction and restraint chair procedures were not followed. Because of inadequate supervision, excessive force was used against me and I sustained what very well could possible be permanent nerve damage to my hands because of being left in the security chair for (2) or more hours with the cuffs cutting into my wrists.

In conclusion I would like to say that my grievance itself supports this appeal as well as the tape, if looked at by an impartial fact finder. I do not condone my actions in anyway and have accepted responsibility for my actions. I feel the Eighth Amendment has been violated from what has happened to me. I see abuse like this happen quite often here in the SMU Unit and these things get swept under the rug all the time. I plan to pursue this case until some type of justice is served.

(Id. at 19-21.)

In a memo dated July 20, 2004, Commissioner Martin Magnusson 'responded' to Parker by indicating that he had "received and reviewed" his grievance. (Id. at 22)(emphasis added). "Your appeal is being returned to you," Magnusson wrote, "because you failed to follow the requirement of the grievance policy that the appeal be forwarded to the Grievance Review Officer." (Id.) Drawing the inference in Parker's favor, I assume that his grievance was received by the Commissioner on June 15, 2004, (June 13, the date Parker signed the appeal, having fallen on a Sunday). Magnusson's response to "the client" was not within 30 days as promised by the grievance policy.

At the evidentiary hearing on this grievance procedure, Parker testified that sometime after he received the missive from Magnusson he resubmitted his Level Three Grievance to the Grievance Review Officer, Robert Costigan. Costigan's records indicate that he never received the Level Three grievance submitted to him on the proper form

and in any event Parker's window for submitting a proper Level Three grievance was open only until June 17, 2004. Costigan testified that he does have some discretion, he thinks, to accept a late filing, but he never was called upon to exercise that discretion in this case. Costigan did agree that sometime after August 6, 2004, Parker sent him a letter attempting to ascertain the status of the Level Three grievance because in Parker's view Magnusson's letter had not been a denial of the grievance, but was merely an informative letter and he assumed the grievance was still pending. Additionally, the record reflects that Parker communicated with the inmate advocate after he received Magnusson's letter to attempt to ascertain what steps he should take regarding his Level Three grievance, including whether it should be resubmitted to the Grievance Review Officer.

At the evidentiary hearing, Parker did present copies of two letters he sent to the advocate. (Evidentiary Hearing Ex. 1.) The first is dated July 23, three days after Magnusson wrote his response:

I'm writing in regards to the appeal that I sent directly to Augusta. Enclosed you will find the response that I received. I did not receive the appeal as it said I would in the response. Its unclear to me as to whether or not I can re-submit the appeal through the grievance review officer – If you could find out for me I would appreciate it, also whether or not the appeal was sent back to me or not. I will need the copy of the response for my file so if you could send it back to me or just bring it over the next time you come over, that would be great. Thank you for your time, Anne.

(Id. at 1.) There is a notation on this letter dated July, 27, 2004: "Saw Michael[.] Spoke with Monica[.] She is sending down the original appeal that was to be enclosed in the letter as she hadn't sent it w/the letter." (Id.)

The second letter to the advocate Parker submitted is not dated. It reads:

Hello, how are you? I'm writing in regards to the issue we talked about last week, my grievance appeal – level III – response. The response

from Augusta said my grievance was being returned because I did not follow policy & procedure/ there was no appeal with that response.

On 7/29 – last Thursday, I received a copy of the appeal,

Now that I have a copy of the appeal am I suppose[d] to now send it to Costigan so that he can forward it? Am I going to be told that the time has now run out?

In the response there is no denial of my appeal (from Augusta), so does that mean they will accept it if I send it through Costigan?

Either way I would like a final answer so that I can send that whole package to my attorney as proof that I tried to resolve this issue in house-through the grievance process although the law clearly states that with excessive force cases, I don't have to exhaust my administrative remedies before pursuing the issue legally.

If you could find out if I would be wasting my time resubmitting my appeal, I would appreciate it.

I look forward to hearing from you.

(Id. at 3-4.) The notation on this letter states: "As I told you before just send it to Robt Costigan and adding a cover note to tell him what transpired & see what happens." (Id. at 4.) Finally, Parker submitted a copy of an August 6, 2004, memorandum from the advocate's office regarding a recent note by Parker. This memorandum states: "Michael, all you do is put in your 3rd level appeal to Robert Costigan with an explanation and see what happens." (Id. at 5.) Given the fact that Parker has demonstrated his persistent efforts to complete the grievance process after receiving his letter from Magnusson, it is reasonable to infer in his favor that he did in fact re-file the grievance with Costigan despite Costigan's testimony to the contrary.

The sole purpose of the Level Three grievance being filed with the Grievance Review Officer, as far as I am able to discern, is that the Grievance Review Officer, who has already seen the identical grievance through the two prior levels, attaches the reports and exhibits that have been generated while investigating the grievance at Level One and Two and then forwards a complete package to the Commissioner for his ultimate review. Parker's obvious frustration was that he had already submitted two grievances to the same

officer and received no satisfaction. Apparently he perceived that writing directly to the Commissioner had a greater chance of success although it was not the accepted prison procedure. It is undisputed that Parker knew the procedure that he was supposed to follow. It is further clear from the evidence that Parker did not properly complete the Level Three procedure.

Costigan testified that he believed his investigation in this case was adequate and fair. It is not a case wherein the prison was given an inadequate opportunity to consider the grievance. Nevertheless, Costigan did not personally review the videotape nor does he recall any interviews with the staff. He did ask a senior unit manager to review the tape and he directly reviewed the staff reports filed by those involved in investigating the incident. Costigan agreed that Parker had clearly articulated his grievance in his written submissions and, in fact, Costigan did not perceive a need to interview Parker because he understood precisely the nature of Parker's grievance.

Recommendation on the Defendants' Affirmative Defense in View of Ngo

In his pleading responding to Ngo, Parker offers two arguments in response to Ngo. First, Parker asserts that there are "extreme differences" between Ngo and Parker's case. With respect to this assertion, Parker points out that the plaintiff in Ngo did not file a grievance for six months after the complained of event and that Parker, in contrast, made an immediate attempt at exhausting his grievance. (Pl.'s Suppl. Brief at 4-5.) His second assault on the defendants' argument is that, while the defendants hold him to the letter of the grievance policy, on the Maine State Prison's part the policy is honored in its breach. (Id. at 6-7.)³

³ With respect to this contention Parker has provided three affidavits in support of his argument that the prison officials do not observe the deadlines for their response to prisoner grievances. In view of the

The majority opinion in Ngo stressed that its holding, embracing the application of procedural default apropos 42 U.S.C. § 1997e(a), was predicated on the Congressional intent of stemming "unwarranted federal-court interference with the administration of prisons" and affording "corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case." 126 S. Ct. at 2387 (quoting Porter v. Nussle, 524 U.S. 516 (2002)). The Majority opinion further noted: "The PLRA also was intended to 'reduce the quantity and improve the quality of prisoner suits.'" Id. (quoting Nussle, 524 U.S. at 524). "The benefits of exhaustion," the Majority opined, "can be realized only if the prison grievance system is given a fair opportunity to consider the grievance. The prison grievance system will not have such an opportunity unless the grievant complies with the system's critical procedural rules." Id. at 2388.

Responding to an argument that "requiring proper exhaustion will lead prison administrators to devise procedural requirements that are designed to trap unwary prisoners and thus to defeat their claims," id. at 2392, the majority did reflect:

Respondent does not contend, however, that anything like this occurred in his case, and it is speculative that this will occur in the future. Corrections officials concerned about maintaining order in their institutions have a reason for creating and retaining grievance systems that provide-and that are perceived by prisoners as providing-a meaningful opportunity for prisoners to raise meritorious grievances. And with respect to the possibility that prisons might create procedural requirements for the purpose of tripping up all but the most skillful prisoners, while Congress repealed the "plain, speedy, and effective" standard, see 42 U.S.C. § 1997e(a)(1) (1994 ed.) (repealed 1996), we have no occasion here to decide how such situations might be addressed.

Id. at 2392 -93.

defendants' motion to strike, I have not considered these affidavits. However, the testimony of Parker and Costigan support this assertion, although not with as much precision. The motion to strike, Docket No. 53, is **GRANTED**.

I may stand to be corrected⁴, but I believe that this portion of the majority opinion leaves the door open for Courts to consider the particular circumstances of the case in front of them when resolving a 42 U.S.C. § 1997e(a) dispute. Certainly Justice Breyer thought so in his Ngo concurrence:

I agree with the Court that, in enacting the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(a), Congress intended the term "exhausted" to "mean what the term means in administrative law, where exhaustion means proper exhaustion." Ante, at 2387. I do not believe that Congress desired a system in which prisoners could elect to bypass prison grievance systems without consequences. Administrative law, however, contains well established exceptions to exhaustion. See Sims v. Apfel, 530 U.S. 103, 115 (2000) (Breyer, J., joined by Rehnquist, C. J., and Scalia and Kennedy, JJ., dissenting) (constitutional claims); Shalala v. Illinois Council on Long Term Care, Inc., 529 U.S. 1, 13 (2000) (futility); McKart v. United States, 395 U.S. 185, 197-201 (1969) (hardship); McCarthy v. Madigan, 503 U.S. 140, 147-148 (1992) (inadequate or unavailable administrative remedies); see generally II R. Pierce, Administrative Law Treatise § 15 (4th ed.2002). Moreover, habeas corpus law, which contains an exhaustion requirement that is "substantively similar" to administrative law's and which informs the Court's opinion, ante, at 2386, also permits a number of exceptions. See post, at 2396, n. 5 (Stevens, J., dissenting) (noting that habeas corpus law permits "petitioners to overcome procedural defaults if they can show that the procedural rule is not firmly established and regularly followed, if they can demonstrate cause and prejudice to overcome a procedural default, or if enforcing the procedural default rule would result in a miscarriage of justice" (citations omitted)).

At least two Circuits that have interpreted the statute in a manner similar to that which the Court today adopts have concluded that the PLRA's proper exhaustion requirement is not absolute. See Spruill v. Gillis, 372 F.3d 218, 232 (3d Cir. 2004); Giano v. Goord, 380 F.3d 670, 677 (2d Cir. 2004). In my view, on remand, the lower court should similarly consider any challenges that petitioner may have concerning whether his case falls into a traditional exception that the statute implicitly incorporates.

⁴ Although suggesting that the question is still open, Justice Stevens, writing for the Ngo dissenters, certainly thought the majority's interpretation of 42 U.S.C. § 1997e(a) might erect an unconstitutional bar, leaving the statute "vulnerable to constitutional challenges." Id. at 2403-04 (Stevens, J., joined by Souter and Ginsburg, JJ.)

Id. at 2393 (Breyer, J, concurring). Although the majority responded to arguments by the dissent penned by Justice Stevens several times, it never mentions this concurrence by Justice Breyer.

In Spruill, cited by Breyer and listed by the majority as one of the cases on the winning side of the circuit split it was deciding, the Third Circuit wrote:

Finally, we note that just as procedural default in the federal habeas corpus context must be predicated on an adequate (and independent) state ground, see Ford v. Georgia, 498 U.S. 411, 423-24 (1991), so too must a prison grievance system's procedural requirements not be imposed in a way that offends the Federal Constitution or the federal policy embodied in § 1997e(a). We made the same observation (albeit in somewhat different terms) in Nyhuis [v. Reno], 204 F.3d [65,] 77-78 [(3d Cir. 200)] where we explained that the policy of § 1997e(a) is that "compliance with the administrative remedy scheme will be satisfactory if it is substantial."

372 F.3d at 232; see id. ("As the next Part makes clear, though, we have no occasion in this case to further elaborate on this aspect of § 1997e(a).").⁵

Justice Breyer also cites to this passage from the Second Circuit's Giano:

As noted earlier, our circuit has recognized that while the PLRA's exhaustion requirement is "mandatory," Porter, 534 U.S. at 524, certain caveats apply. First, we have held that non-exhaustion is an affirmative defense subject to estoppel in cases where prison officials inhibit an inmate's ability to utilize administrative grievance procedures. Ziemba [v. Wezner], 366 F.3d [161,] 163-64 [(2d Cir. 2004)]. And, we today hold, in Abney [v. McGinnis], 380 F.3d 663 (2d Cir. 2004), that, in certain situations, administrative remedies may not be "available," 42 U.S.C. § 1997e(a), to prisoners seeking redress of their grievances. Such circumstances include, but are not limited to, instances where the prisoner obtains a favorable disposition of his grievance, only to find, after the time for filing an administrative appeal has expired, that the relief he had won was not forthcoming. Abney, citation. See also Underwood v. Wilson, 151 F.3d 292 (5th Cir.1998) (holding that where plaintiff had undertaken all possible appeals but the prison authorities failed to respond within required time period, prisoner had exhausted administrative remedies);

⁵ Despite Justice Breyer's pointed concurrence and reliance on Spruill and Giano, the only mention of Spruill by the majority is its listing as one of the cases on the 'winning' side if the circuit split that it was resolving. The Second Circuit's Giano is not recognized by the majority as part of the circuit split.

Foulk v. Charrier, 262 F.3d 687 (8th Cir.2001) (holding that remedies were not "available" to plaintiff where the warden did not respond to inmate's grievance during the time period required by regulations). Finally, Berry [v. Kerik, 366 F.3d 85 (2d Cir. 2004)] and Rodriguez [v. Westchester County Jail Correctional Department, 372 F.3d 485 (2d Cir. 2004)] confirm that the PLRA's exhaustion requirement is not so rigid as to permit the barring of all suits brought after administrative remedies are no longer available, regardless of the circumstances, and simply because the plaintiff failed to follow prison grievance procedures to the letter. "Special circumstances" may exist that amount to a "justification" for not complying with administrative procedural requirements. Berry, 366 F.3d at 88; Rodriguez Order at 1.

380 F.3d at 577. In a footnote appended to this paragraph the Giano Panel observed:

We note that the case law on the PLRA's exhaustion requirement does not always distinguish clearly between (a) cases in which defendants are estopped from asserting non-exhaustion as an affirmative defense, (b) situations in which administrative remedies are not "available" to the plaintiff, and (c) circumstances in which administrative remedies are "available," but the prisoner's original failure to exhaust is nonetheless justified, and hence does not bar the prisoner's subsequent suit. See, e.g., Brown v. Croak, 312 F.3d 109, 112 (3d Cir.2002) (stating, in a case where prisoner allegedly was told, contrary to prison regulations, that he could not file a grievance prior to the completion of a security investigation, that "[d]efendants have not met their burden of proving the affirmative defense of failure to exhaust remedies," and that "instructions by prison officials that are at odds with the wording of [state regulations]" might "render[] the formal grievance procedure unavailable [to the plaintiff] within the meaning of 42 U.S.C. § 1997e"); Miller v. Norris, 247 F.3d 736, 740 (8th Cir.2001) (holding that "a remedy that prison officials prevent a prisoner from utilizing is not an 'available' remedy under § 1997e(a)" (internal quotation marks omitted)). This may, of course, be because the same facts sometimes fit into more than one of these categories.

Id. at 677 n.6.

In a post -Ngo universe it may still be possible for an incarcerated plaintiff to overcome an admitted procedural misstep in the grievance process and survive the assertion of a 42 U.S.C. § 1997e(a) defense. See McKart v. United States, 395 U.S. 185, 200-01(1969) (noting that no case decided by the Court stands for "the proposition that the exhaustion doctrine must be applied blindly in every case"); see also Hairston v.

LaMarche, No. 05 Civ. 6642(KMW)(AJP), 2006 WL 2309592, *4 - 11 (S.D.N.Y. Aug. 10, 2006) (Peck, Magis. J.)(Recommend Decision).⁶

As earlier stated, the majority analogized the exhaustion requirement of 42 U.S.C. § 1997e(a) to the exhaustion requirement applicable to habeas cases. If this analogy is operable then the "cause and prejudice" analysis, see Bousley v. United States, 523 U.S. 614, 622 (1998), should be undertaken in this case as it is for procedurally defaulted 28 U.S.C. § 2254 claims. See Ngo, 126 S. Ct. at 2393 (Breyer, J., concurring); id. at 2396, n. 5 (Stevens, J., dissenting).

The 28 U.S.C. § 2254 "cause and prejudice" exception to procedural default does not fit like a glove because in reviewing 28 U.S.C. § 2254 exhaustion disputes the State of Maine, almost without exception provides upfront, a complete record of the state court proceedings for the federal court's review. (The court also will have on hand a complete – although sometimes less-comprehensible-record when undertaking review of administrative proceedings such as in the areas of immigration, labor, and agriculture.) Here, the defendants have not attempted to provide the court with any evidence concerning what the Prison has in its files concerning Parker's grievance efforts; it has simply submitted blank copies of its grievance forms. All I have before me in terms of the defendants' affirmative case is the testimony of Robert Costigan who was purportedly referencing a complete file on Parker during the evidentiary hearing. In contrast, Parker,

⁶ In Casanova v. Dubois the First Circuit concluded that 42 U.S.C. § 1997e(a) was an affirmative defense, joining other circuits. 304 F.3d 75, 78 n.3 (1st Cir. 2002). In that footnote they include a parenthetical citation: " See also Wendell v. Asher, 162 F.3d 887, 890 (5th Cir.1998) ("Rather, the amended statute imposes a requirement [of exhaustion], rather like a statute of limitations, that may be subject to certain defenses such as waiver, estoppel, or equitable tolling.")" Id. Though it may be a hint, this certainly is not an obvious adoption of the notion that waiver, estoppel, or equitable tolling apply to 42 U.S.C. § 1997e(a) disputes and it is unclear to me how such a hint will weather Ngo.

who did not even have access to carbon paper during his incarceration on the SMU, has supplied the court with copies of all the above mentioned evidence.

In the context of 42 U.S.C. § 1997e(a) exhaustion, I believe that Parker has demonstrated sufficient cause for not complying with the third-stage requirement that he submit his appeal to the Commissioner through the Grievance Review Officer. Parker considered his decision to forward the appeal directly to the Commissioner a way of streamlining the grievance process; there is no evidence that he took this step in an effort to thwart the Commissioner's ability to review his appeal. Furthermore, Parker had no reason to believe that his grievance was not being reviewed by the Commissioner for over thirty days after he sent it in the mail. Crediting Parker's testimony that the grievance procedure is honored in its breach, from his perspective during that period in waiting he had no reason to try to correct his procedural flaw. And when Parker finally received his letter from Magnusson Parker has demonstrated that he did everything in his power to complete the process to ready his claim for federal litigation.⁷ With respect to prejudice, Parker has pled a viable Eighth Amendment claim before this court; it is not a claim that is susceptible to summary dismissal. To grant the defendants summary judgment on their affirmative defense would, to state the obvious, prejudice Parker by thwarting his efforts to pursue this claim.

Alternatively, if under Ngo it is permissible to estop defendants from asserting non-exhaustion as an affirmative defense based on the correctional institution's handling of a particular grievance, I believe that the doctrine of equitable estoppel could be applied to Parker's case. See Kaba v. Stepp, ___ F.3d ___, ___, 2006 WL 2358002, *8 (7th Cir. Aug.

⁷ Parker's suggestion in his letter to the advocate that he might not need to exhaust an excessive force claim does nothing to undermine the evidence that he advances that he was attempting to fully exhaust the claim nevertheless.

16 2006) (after analyzing Ngo, concluding that the plaintiff had made a sufficient showing that the administrative remedies were unavailable, noting the question of whether equitable estoppel applies to the PLRA's exhaustion requirement has yet to be answered in the Seventh Circuit). The prison officials in this case have admitted that they themselves do not always follow the letter of the grievance policy. Indeed the Grievance Review Officer suggested at the evidentiary hearing that he believes he has some inherent discretion in how strictly he applies the deadlines for filing, although he has no guidance as to how that discretion might be applied. In this case Magnusson could have immediately returned the Level Three grievance to Parker or he could have requested the grievance review officer send him the investigative materials to complete the packet and aid his review, all within the timelines set forth in the grievance policy. Instead, Magnusson held the grievance for more than thirty days and then returned it to Parker without an outright denial of the grievance and without a copy of his appeal. Of course, by this point in time Parker had missed the deadline for filing a proper Level Three grievance and had lost the opportunity to fully comply with the grievance policy.

This is not a case in which Parker was trying to force Magnusson to dismiss his grievance on procedural grounds. See Ngo, 126 S. Ct. at 2389. Nor is this a case where the plaintiff has not filled out the proper forms at the proper stage of the grievance process, a failure to do so which could leave the grievance officials to conclude that the inmate was dropping the matter, see Blount v. Boyd, No. 7:05-cv- 00643, 2006 WL 2381968, *1 -5 (W.D.Va. Aug. 17, 2006); Gardner v. Hendricks, Civ. No. 04-3561 (FLW); 2006 WL 2331102, *2 -4 (D.N.J. Aug. 10, 2006); Parker's three levels of grievances were complete, coherent, and in the proper format. The case had been fully

investigated by the prison officials and personally reviewed by Magnusson. Nor is this a case in which the inmate was careless in assuring that his grievance reached the hands of the necessary party and where there is no evidence that the grievances made it into the hands of the decision makers, compare Hale v. Civigenics, Inc., Civ. No. 5:06-CV-5, 2006 WL 2385281, *3 -4 (E.D.Tex. Aug. 17, 2006) (concluding that Ngo required dismissal when the most the inmate did to submit his second level grievance was to place it on "a ledge"); the evidence demonstrates that Parker fully complied with the requirements of the first two level of grievances and that, if anything, he went too far out of his way to assure that his third stage grievance was received by Magnusson.

I must say that in my view this case illustrates that the Ngo majority does seem overly optimistic about the hope of a constructive resolution of the prisoner's complaint at the pre-litigation grievance stage. See 126 S. Ct. at 2385; see also Spruill, 372 F.3d at 235 ("As we observed ... 'if in the long run, something of a cooperative ethos can be achieved between inmate and jailer, the internal administrative process could prove a less hostile and adversarial forum than that of federal court.' We are likewise hopeful that our holdings today on procedural default and waiver will not engender a prison grievance review culture marked by technicalities, but will instead foster the cooperative resolution of legitimate grievances by further encouraging prisoners to avail themselves of the forum usually best suited to redress those grievances."). In Parker's case the Commissioner was given a timely, although procedurally flawed, opportunity to review his grievance concerning his cell extraction and the Commissioner, after reviewing the legible, articulate, and earnest grievance, elected to rebuff it on procedural grounds rather

than deny it on its merits.⁸ In my opinion this is a case that the State's attorney might have elected to waive her § 1997e(a) argument. However, the defendants have chosen to ardently press this issue wielding § 1997e(a) as a sword rather than a shield.

Conclusion

For these reasons I recommend that the Court grant judgment against the defendants on their affirmative defense asserting that Parker failed to meet the 42 U.S.C. § 1997e(a) exhaustion requirement.⁹ If the court accepts this recommendation I will issue a scheduling order to govern this litigation.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

September 6, 2006.

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge

⁸ Parker has sent to the court an article in Prison Legal News, by Lance Tapley entitled "Torture in Maine's Prison." He directs the court's attention to paragraphs pertaining to criminal assault charges filed against one of his three named defendants regarding a cell extraction of another inmate. While the news article has no direct relevance to the issues presented in this motion, it nevertheless causes me grave concern that the State chooses to fight this case on this procedural technicality rather than on its merits or lack thereof. I review many cases involving prison litigation wherein the grievances are poorly drafted and almost impossible to decipher. Parker's grievance has been focused and well articulated from the beginning. His case may have no merit in the end, but in my view he has a right to have it heard given his substantial compliance with the pris on grievance procedure.

⁹ If the Court decides not to proceed as recommended it may or may not consider it more equitable to convene a second evidentiary hearing so that Parker has a fair opportunity to present whatever evidence he has that might buffer his case for exhaustion in view of Ngo. See Wigfall v. Duval, Civ. No. 00-12274-DPW, 2006 WL 2381285 (D. Mass. Aug. 15, 2006). I am referring specifically to the sort of information contained within the affidavits which have been stricken from evidence.

PARKER v. ROBINSON et al
Assigned to: JUDGE JOHN A. WOODCOCK, JR
Referred to: MAG. JUDGE MARGARET J.
KRAVCHUK
Cause: 42:1983 Prisoner Civil Rights

Date Filed: 12/10/2004
Jury Demand: Plaintiff
Nature of Suit: 550 Prisoner: Civil
Rights
Jurisdiction: Federal Question

Plaintiff

MICHAEL PARKER

represented by **MICHAEL PARKER**
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V.

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