TESTIMONY OF STEPHEN B. BRIGHT
REGARDING THE PRISON ABUSE REMEDIES ACT

To the Subcommittee on Crime,
Terrorism and Homeland Security
of the Committee on the Judiciary,
United States House of Representatives

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I appreciate the opportunity to address the Subcommittee on insuring that the Constitution and the rule of law apply in the prisons and jails in this country.

I have been concerned about this issue since bringing suit in 1976 on behalf of people confined in deplorable conditions in a small county jail in Kentucky. More recently I have been counsel in two cases, both involving the same large metropolitan jail, the Fulton County Jail in Atlanta, regarding failure to provide people being held there with life-sustaining medical care and failure to protect them from life-threatening assaults, as well as other issues, such as the jail's failure to release people when there was no longer legal bases for holding them. One of those cases is ongoing.

In the last 25 years as an attorney at the Southern Center for Human Rights, I am and have been involved in many other cases concerned with patently unconstitutional conditions and practices in prisons and jails throughout the South. The Center is a non-profit public interest program, which receives no government funds and is thus not prohibited from responding to some of the most urgent and compelling violations of the Constitution of the United States in this country.

Unfortunately, we are able to respond to only a very small percentage of the pleas we receive each day from people in prisons and jails and their families. We are concerned about some provisions of the Prison Litigation Reform Act – such as the exhaustion requirement, the physical injury requirement, the Act's application to children, and the limits on the power of the federal courts – because these provisions often result in denying justice to people who deserve it.

Much of the support for the PLRA was based on arguments that demonized prisoners and trivialized their concerns. However, the men, women and children

who are incarcerated in this country are not members of a faceless, undifferentiated mass unworthy of protection of the law. They are individuals, who vary considerably in the crimes they have committed, the lives they have led, their potential to be productive members of society, and their commitment to lead useful and productive lives. Most of them will return to society. They have families and friends who care about their safety. A significant number are mentally ill, have limited intellectual functioning, are addicted to substances or have a combination of these features.

In this very large population, there are some who, without educational or vocational programs or access to legal advice, attempt to file their own lawsuits, some of them quite misguided. But the issues that we address on their behalf are of fundamental importance to their lives, safety, and dignity. For example, we have brought cases on behalf of –

• HIV-positive men housed in a warehouse. Some suffered from pneumonia, which went untreated until they drowned in their own respiratory fluids. Others stood in long lines in the middle of the night to get pills they took on empty stomachs. When they took the pills, they vomited. Some died from starvation despite begging for food.

• Children convicted as adults who were raped when housed with older prisoners. One youth, Wayne Boatwright, who was just 18, was choked to death by three other inmates as they raped him. The prison failed to protect him despite pleas to the prison officials by the young man, his mother and grandmother to protect him from being raped. Other inmates at the same prison were bashed in the face and head with steel padlocks inside socks, broomsticks, trash cans, metal door plates and handmade knives.

• A woman who woke up with blood spurting from her neck because a mentally ill inmate slashed her from ear to chin with a razor as she slept. A single correctional officer had been assigned to supervise 116 women sleeping in bunk beds crowded into one huge room. Sometimes a single officer was responsible for the safety of 325 women in four dorms.

• A man put in four-point restraints and left there for days without being allowed to go to the bathroom.

• Men forced to sort through garbage on a conveyer belt containing hepatitis- and AIDS-infected needles and other medical waste without protective clothing at a "recycling" plant within a prison. One of many resulting injuries was permanent injury to a man's eye after a piece of glass flew into it.

These are not trivial matters. But the exhaustion requirement of the PLRA bars access to the federal courts for even the most egregious violations of the Constitution if people held in prisons and jails do not comply with the hyper-technical requirements of complicated grievance systems – some of them procedural mazes which would challenge many lawyers. People who are mentally ill, mentally retarded, or illiterate may be unaware of the two or three deadlines that may apply at various stages of the process, unable to find the right form to fill out or the right person to give it to, and unaware of what to do if no action is taken on the grievance for weeks or months.

Recovery for even the most degrading treatment – even the universally condemned practices at Abu Ghraib – is barred if there is no physical injury. A federal court threw out a suit we brought for such conduct.

Beyond that, we waste a lot of time and precious judicial resources litigating questions of whether inmates have complied with every last stage of grievance processes, were capable of doing so, were prevented from doing so by prison officials and other collateral issues, as well as questions such as whether a sexual assault or lack of care leading to a stillbirth constitutes a "physical injury" under the PLRA.[1]

I would like to address the exhaustion requirement, the physical injury requirement and the application of the PLRA to juveniles.

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1. *See, e.g.*, *Hancock v. Payne*, 2006 WL 21751 at *3 (S.D. Miss. 2006) (concluding that "bare allegation of sexual assault" does not satisfy physical injury requirement); *Liner v. Goord*, 196 F.3d 132, 135 (2d Cir. 1999) (concluding that "the alleged sexual assaults qualify as physical injuries as a matter of common sense"); *Pool v. Sebastian County*, 418 F.3d 934, 943 n.2 (8th Cir. 2005) (noting assertion that no physical injury resulted from failure to care for pregnant woman leading to delivery of stillborn baby); *Clifton v. Eubanks*, 418 F. Supp.2d 1243 (D. Colo. 2006) (concluding that improper medical care leading to stillbirth constituted physical injury).

I. The PLRA exhaustion requirement should be modified so that technical problems with prisoners' grievances do not forever bar judicial review.

The exhaustion requirement of the Prison Litigation Reform Act[2] has been interpreted not only to require prisoners to present their claims to prison officials before filing suit, but also to bar claims if inmates fail to comply with all of the technical requirements of the prison or jail grievance systems.[3] Grievance systems usually have two or three levels of review – for example, an inmate may be required to seek an informal resolution by a certain deadline, file a formal grievance within a specified deadline if the problem cannot be resolved informally, and file an appeal within yet another deadline if the formal grievance is denied. The deadlines in some systems are as short as three to five days.

Thus, while an attorney who has been trained in the law may have two years under the applicable statute of limitations to file an lawsuit in an automobile negligence case, a prison system may give people who are mentally ill, illiterate or of limited intelligence just five days to file their grievances or be forever barred from seeking vindication of their rights in court.

The exhaustion provision of the PLRA puts the potential civil rights defendants in charge of defining the procedural hurdles that a prisoner must clear in order to sue them. This produces a perverse incentive for prison officials to implement complicated grievance systems and require hyper-technical compliance with them in order to shield themselves from prisoners' lawsuits. That has become the main purpose of many grievance systems.

I once helped a client complete a grievance form and dropped it off with a deputy warden on my way out of the prison to be sure it was filed within the five-day deadline. Nevertheless, it was denied because a rule required that *the inmate* file the grievance. As I said previously, the hyper-technical requirements of the grievance systems pose a challenge even to attorneys.

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2. 42 U.S.C. § 1997e(a)(2008) 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."

3. *Woodford v. Ngo*, 126 S.Ct. 2378 (2006).

In another case, an inmate was beaten with a sock full of combination locks. Filing a grievance was not the first thing on his mind during the five days he had to file one – he was in and out of consciousness during that time. Nevertheless, it was argued that he could not file suit because of his failure to comply with the deadline.

Other trivial technical defects like using the wrong form, directing a grievance to the wrong person, or filing the wrong number of copies all could bar prisoners' claims from court.[4] Inmates may not be able to obtain the required forms – or even pencils with which to fill complete them. They may not be able to give grievances to the designated persons or may be afraid to do so for fear of retaliation. Even when an inmate files within the deadline, in some situations no action is taken on the grievance.

A prisoner who learns upon filing suit that she has failed to comply with prison rules cannot simply return to court after filing the appropriate forms and comply with the rules. By the time a court determines that a claim is procedurally defaulted under the PLRA exhaustion provision, the deadline for using the prison grievance system will be long past.

Gravely serious claims are dismissed for failure to comply with grievance procedures. For example, a prisoner's suit alleging that he had been beaten and seriously injured by guards was dismissed for failure to comply with a grievance procedure that required an attempt at informal exhaustion within two days and the filing of a grievance within five days.[5] The prisoner said that he had been placed in segregation after the beating, and that the officers had not given him grievance forms. Another suit alleging repeated rapes by other inmates was dismissed for failure to timely exhaust; the inmate who sought to file the suit said that he "didn't think rape was a grievable issue."[6] A prisoner who had been beaten by other inmates maintained that he had failed to file a grievance within the 15 days required because he had been hospitalized; the magistrate judge recommended staying the case for 90 days to allow him to exhaust (as the amendment in the

4. *See* Margo Schlanger & Giovanna Shay, *Preserving the Rule of Law in America's Prisons: The Case for Amending the Prison Litigation Reform Act*, http://www.acslaw.org/files/Schlanger%20Shay%20PLRA%20Paper%203-28-07.pdf at 8 (March 2007).

5. *Latham v. Pate*, 2007 WL 171792 (W.D. Mich. 2007).

6. *Benfield v. Rushton*, 2007 WL 30287 (D.S.C. 2007).

Prison Abuse Remedies Act would permit), but the district court dismissed the case instead.[7]

These are not isolated examples.[8] And they do not begin to tell how many cases are not brought because it is clear that they will be dismissed for failure to comply with grievance procedures.

The Prison Abuse Remedies Act would correct this problem by allowing federal courts to stay proceedings for up to 90 days to permit prisoners to exhaust administrative remedies. Prison officials would have had an opportunity to resolve such complaints, but they would not be able to dodge accountability by asserting inmates' failure to comply with complex and technical requirements.

The argument that the PLRA need not be amended because courts can simply conclude that administrative remedies are not "available" within the meaning of the statute simply ignores reality. Grievance procedures may be "available" in a legal, technical sense, but they are too complicated for most prisoners to comply and they are strictly enforced to avoid justice rather than obtain it.

It is reasonable to require a prisoner to inform the authorities of a violation of rights so that officials may promptly deal with it. But that can be accomplished by requiring a statement to a warden within a reasonable time. The officials in charge of the system should be responsible for forwarding complaints to the various levels of review if they want to have such a system. But they should not be encouraged to impose upon prisoners procedural requirements more complex and demanding than the legal system requires of attorneys. That is what the PLRA does now and why the exhaustion requirement should be repealed.

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7. *Washington v. Texas Department of Criminal Justice*, 2006 WL 3245741 (S.D. Tex. 2006).

8. For other cases dismissed for failure to exhaust, see Giovanna Shay & Johanna Kalb, *More Stories of Jurisdiction-Stripping and Executive Power: Interpreting the Prison Litigation Reform Act (PLRA)*, 29 CARDOZO L. REV. 291, 321 (2007).

II. The PLRA's physical injury requirement bars recovery for degrading and dehumanizing abuse of prisoners, and it should be repealed.

People in this country and around the world were horrified by images of Abu Ghraib, as undoubtedly were all the members of this Subcommittee. What few people know is that if such conduct occurs in a prison or jail in this country, those subject to it would have no redress in the federal courts due to the "physical injury" requirement of the PLRA.[9]

We had such a case. Officers who hid their identity by not wearing or by covering their badges rampaged through a prison – swearing at inmates, calling some of them "faggots"; destroying their property; hitting, pushing and kicking them; choking some with batons; and slamming some to the ground. The male inmates were ordered to strip and subjected to full body cavity searches in view of female staff. Some were left standing naked for 20 minutes or more outside their cells, while women staff members pointed and laughed at them. Some were ordered to "tap dance" while naked – to stand on one foot and hold the other in their hands, then switch, and rapidly go from standing on one foot to the other. The Court of Appeals for the Eleventh Circuit held that this conduct did not satisfy the physical injury requirement of the PLRA.[10]

Other courts have found the physical injury requirement was not satisfied by

• a "bare allegation of sexual assault" even where male prisoners alleged that a corrections officer had sexually assaulted them repeatedly over a span of hours,[11]

• prisoners being housed in cells soiled by human waste and subjected to the screams of psychiatric patients,[12]

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9. 42 U.S.C. § 1997e(e) (2008) provides that "no federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury."

10. *Harris v. Garner*, 216 F.3d 970 (11th Cir. 2000) (en banc).

11. *Hancock v. Payne*, 2006 WL 21751 at *3 (S.D. Miss. 2006).

12. *Harper v. Showers*, 174 F.3d 716, 719-20 (5th Cir. 1999).

• a prisoner being forced to stand in a 2 ½-foot wide cage for 13 hours, naked for the first 10 hours, in acute pain, with clear, visible swelling in leg that had been previously injured in car accident,[13]

• a prisoner who complained of suffering second-degree burns to the face.[14]

There are far more cases that are never brought or promptly dismissed because of the physical injury requirement. Prior to enactment of the PLRA, we brought suit on behalf of women who were constantly splattered with bodily waste as a result of being housed with severely mentally ill women. Our clients could not sleep at night because the mentally ill women shrieked and carried on loud conversations, often with themselves. We would not bring that suit today. Our clients were degraded, they were deprived of sleep, but they suffered no physical injury.

Recently, we have concluded that suits could not be brought by men who complained of being chained to a bed in one case and a grate in the floor in another, each left for several days without breaks and so they had to defecate and urinate on themselves repeatedly, or by women who complained that officers barged into their shower and toilet areas without announcing themselves, opened the shower curtains and made sexual comments to them.

Denying money damages is significant for several reasons. Damages awards create incentives for prison administrators to improve policies and training and not retain officers who abuse prisoners. Beyond that, the physical injury requirement changes the framework of the debate because it provides incentives for officials to argue that truly reprehensible and degrading conduct was acceptable because it did not produce a "physical injury."

The "physical injury" provision of the PLRA should be repealed.

13. *Jarriett v. Wilson*, 162 Fed. Appx. 394, 399 (6th Cir. 2005).

14. *Brown v. Simmons*, 2007 WL 654920 at *6 (S.D. Tex. 2007).

III. Juveniles should be exempted from the provisions of the Prison Litigation Reform Act.

The PLRA is applied to juveniles.[15] All of its problems are magnified when it is applied to children. Incarcerated minors account for very little prison litigation, and are even less equipped to navigate technical areas like exhaustion. At the same time, incarcerated juveniles are at-risk for abuse and may be particularly in need of court intervention.

It was revealed last year that some officials of the Texas Youth Commission had extended the sentences of youths in their custody if they refused to have sex with a supervisor.[16] A Texas Ranger who investigated abuse at the West Texas State School in Pyote told a legislative committee, that he had seen "kids with fear in their eyes – kids who knew they were trapped in an institution that would never respond to their cries for help."[17] Even worse, this Texas law enforcement officer was unable to interest local prosecutors in the case.

Another example is provided by a case from Indiana, *Minix v. Pazera*.[18] While incarcerated as a juvenile on a theft charge in various Indiana facilities, S.Z. was repeatedly beaten by other detainees – once with padlock-covered socks. He was also raped. S.Z. suffered visible injuries and symptoms, including bruising, a split lip, a seizure-like reaction, and a bloody nose, yet staff failed to take adequate measures to protect him. S.Z. was afraid to report this abuse, because some of the staff actually instigated fights among juvenile detainees, even handcuffing some of the youths so that others could beat them. S.Z.'s mother, Cathy Minix, however, reported these assaults and threats both to staff at the facility and to state judges (who relayed the complaints to the Governor). She attempted to meet with the superintendent of one of the facilities, but staff members prevented the meeting. Ultimately, S.Z. was "unexpectedly released on order from the Governor's office."

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15. *See* Anna Rapa, *Comment: One Brick Too Many: The Prison Litigation Reform Act as a Barrier to Legitimate Juvenile Lawsuits*, 23 T.M. COOLEY L. REV. 263, 279 (2006).

16. Ralph Blumenthal, *Texas, Addressing Sexual Abuse Scandal, May Free Thousands of Its Jailed Youth*, N.Y. TIMES, March 24, 2007.

17. Staci Semrad, *Texas Ranger Tells of Prosecutor's "Lack of Interest,"* N.Y. TIMES, March 9, 2007, at A20.

18. 2005 WL 1799538 (N.D. Ind. 2005).

Despite all of Mrs. Minix's efforts to notify state officials of the abuse, when she and S.Z. filed suit, it was dismissed for failure to comply with the PLRA grievance requirement. The grievance policy then in effect in Indiana juvenile facilities had numerous steps, the first one requiring that grievances be filed within two business days. The Court noted that although Mrs. Minix had made "heroic efforts" to help her son, it could not replace the requirement that he personally file a grievance. Among other things, it noted, "[h]er communications didn't comply with the general time constraints built into the grievance process."

After the Minix family suit was dismissed from federal court, the Department of Justice investigated the Indiana juvenile facilities in which S.Z. had been held. It concluded that these facilities failed "to adequately protect the juveniles in its care from harm," in violation of the Constitution. The Department specifically noted that the grievance system in the Indiana juvenile facilities – the same grievance system that resulted in the dismissal of S.Z.'s suit – was "dysfunctional" and contributed to the constitutional violations in the Indiana system.[19]

These cases illustrate why it is critically important to keep courthouse doors open to civil rights actions on behalf of incarcerated children. The Prison Abuse Reform Act would accomplish this by exempting people under 18 from the provisions of the PLRA.

CONCLUSION

To put the amendments proposed in the Prison Abuse Remedies Act in perspective, I would like to point out that even if they are adopted, most of the men, women and children in prisons and jails will not be filing lawsuits because the overwhelming majority of them have no access to lawyers and are incapable of filing suits themselves.

19. Letter from Bradley J. Schlozman, Acting Assistant Attorney General, to Mitch Daniels, Governor of the State of Indiana (Sept. 9, 2005), *available at* http://www.usdoj.gov/crt/split/documents/split_indiana_southbend_juv_findlet_9-9-05.pdf (quotes appear on pages 2, 3, and 7).

At one time people in Georgia's prisons had access to lawyers from federal legal services programs as well as lawyers and law students from a program operated by the law school at the University of Georgia. These programs not only helped prisoners bring meritorious suits regarding truly egregious practices and conditions, they also advised prisoners when there was no basis for bringing a suit. This is the most effective way to prevent frivolous suits. But all that is long gone. Since 1996, legal services programs which receive federal funding have been prohibited from representing prisoners. Many states stopped providing legal assistance to prisoners at some time after that.

Today, a few states like California, Massachusetts and New York, have small programs that provide legal services to a small percentage of the many prisoners who seek their help. A few national and regional programs, like the National Prison Project and our program, are able to take cases in a few states. But in some states there is not a single program or lawyer who provides legal representation to prisoners. In the part of the country where I practice, private lawyers were never very interested in responding to prisoner complaints even before the PLRA's restriction on attorney fees. Responding to prisoners' pleas for legal representation because of beatings, rapes, sexual harassment, denial of medical care or other egregious, even life threatening denial of rights is not attractive to lawyers in private practice.

For a lawyer in private practice, just seeing the potential client for an initial interview may involve a long drive to a remote part of the state where many prisons are located, submitting to a search, hearing heavy doors slam as he or she is led to a place in the prison for the interview, waiting – sometimes for hours – for the potential client to be brought up for the interview, and conducting a semi-private interview in a dingy room. The potential client may be mentally ill, mentally retarded, illiterate, or inarticulate. The lawyer will not know until he or she gets there. Investigation of the case is immensely difficult because most, if not all, of the witnesses are other prisoners or corrections officers. It is easier to get information from the Kremlin than from many departments of corrections. The lawyer may discover that no suit can be filed because the prisoner did not file a grievance or suffered no physical injury. And then there is the long drive back. This is not the way to develop a law practice that pays the bills and supports a family.

The exhaustion requirement, the physical injury requirement, the limits on the power of the federal courts and other aspects of the PLRA before you today

discourage lawyers from making these trips, interviewing inmates, and bringing lawsuits on their behalf. But even if Congress were to correct every one of those barriers to obtaining remedies for constitutional violations, most lawyers are not going to make those trips. They can make better and more secure livings doing real estate closings, handling personal injury cases, or a whole range of legal work that involves less stress and produces more income.

It is too bad and it should concern us. We believe in the rule of law, protection of constitutional rights, and equal justice. But these larger issues are not before you today. Instead, the Prison Abuse Remedies Act contains a few modest amendments that would eliminate the incentive for prisons and jails to adopt complicated grievance systems to avoid being sued and would prevent meritorious claims from being barred on hyper-technical grounds or because there was no physical injury. These amendments are in the interest of justice and they should be adopted.