No. 05-7142, 05A209

IN THE

Supreme Court of the United States

TIMOTHY WILLIAMS,

Petitioner,

v.

WILLIAM S. OVERTON, ET AL.,

Respondents.

JOHN H. WALTON,

Petitioner,

v.

BARBARA BOUCHARD, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTER STATEMENT OF QUESTIONS PRESENTED

1. The United States Court of Appeals for the Sixth Circuit requires, pursuant to the Prison Litigation Reform Act (PLRA), that prisoners name all the parties they intend to sue through the grievance process prior to filing a lawsuit or the entire complaint will be dismissed without prejudice. The Petitioners did not name all the parties they intended to sue during the grievance process. Does the PLRA require prisoners to name in the grievance process all the parties they later sue in federal court or have their cases dismissed without prejudice?

2. The United States Court of Appeals for the Sixth Circuit requires, pursuant to the Prison Litigation Reform Act (PLRA), that prisoners exhaust all of their claims against all parties they intend to sue through the grievance process prior to filing a lawsuit or the entire complaint will be dismissed without prejudice. The Petitioners did not exhaust all of their claims against all of the parties. Does the PLRA require prisoners to exhaust all claims against all parties or have their cases dismissed without prejudice?

PARTIES TO THE PROCEEDINGS BELOW

Walton v Bouchard

In addition to the parties named in the Petition, Assistant Deputy Warden Ron Bobo was named as a defendant in the District Court and Court of Appeals, and is a Respondent here.

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STATUTORY PROVISIONS INVOLVED

1. 28 USC § 1915A provides:

(a) Screening. The court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.

(b) Grounds for dismissal. On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint—

(1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or

(2) seeks monetary relief from a defendant who is immune from such relief.

2. 42 USC § 1997e(c)(1) and (2) provide:

(1) The court shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (*42 USC 1983*), or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief.

(2) In the event that a claim is, on its face, frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief, the court may dismiss the underlying claim without first requiring the exhaustion of administrative remedies.

STATEMENT OF THE CASE

Williams v Overton

Petitioner Timothy Williams, a Michigan prison inmate, brought suit against Respondents William Overton, David Jamrog, Mary Jo Pass, Paul Klee, Chad Markwell, and Bonnie Peterson (Respondents) because they denied him authorization for surgery and denied him placement in a handicapped accessible single cell.[1] Williams never served Dr. George Pramstaller so he was never a party in the District Court.[2] At the time he filed his complaint Williams was housed at the Gus Harrison Correctional Facility (ARF) in Adrian, Michigan. Petitioner Williams did not exhaust all of his administrative remedies against all of the Respondents as is required by the Prison Litigation Reform Act (PLRA).[3]

Williams claimed the Respondents violated his constitutional rights under the Eighth and Fourteenth Amendments. He also claimed the Respondents violated his statutory rights under the American with Disabilities Act (ADA)[4] and the Rehabilitation Act (RA).[5]

Williams suffers from a medical condition in his right arm known as "noninvoluting cavernous hemangiomas" which causes tumors to grow and results in disfigurement. On March 3, 2002, Dr. Raymond Noellert, a contract physician with Correctional Medical Services, recommended that Williams have surgery to remove the tumors and to straighten his wrist.

Pramstaller and Dr. Rocco DeMasi of Correctional Medical Services denied Dr. Noellert's recommendation on March 26, 2002, because the danger of the surgery outweighed the

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[1] Overton was the Director of the Michigan Department of Corrections. Jamrog was the Warden of the Gus Harrison Correctional Facility. Pass was the Assistant Deputy Warden of Programs. Klee was the Assistant Deputy Warden for Housing. Markwell was a Corrections Officer. Peterson was the Health Unit Manager.
[2] Pramstaller was the Chief Medial Officer of the Michigan Department of Corrections.
[3] 42 USC § 1997e(a).
[4] 29 USC § 701 *et seq*.
[5] 42 USC § 12101 *et seq*,

benefits. They believed that the surgery was purely cosmetic. On March 26, 2002 Williams appealed the denial. Williams pursued his request for surgery using two different channels. First, Dr. J. Hoffman asked for another referral which Dr. Pramstaller and Dr. DeMasi denied. Second, he appealed the denial through the administrative grievance process. Pramstaller and DeMasi denied Dr. Hoffman's request on April 8, 2002.

Williams filed a Step I administrative grievance (of a three-step process) regarding the denial of the surgery on June 17, 2002. (Pet. App. 52a-58a). In that grievance Williams did not name any of the Respondents. The Medical Services Advisory Committee subsequently denied his request for surgery a second time on July 25, 2002.[6] Williams then appealed that decision in Steps II and III of the grievance process. Michigan Department of Corrections officials denied his grievance at both Steps II and III. Neither of these grievances referred to any of the Respondents.

Williams requested placement in a handicapped-accessible single cell on August 13, 2002. On August 20, 2002, Williams filed a grievance against Respondent Jamrog in which he requested a single-cell accommodation. Tom Bell, the Deputy Warden, denied his grievance on September 12, 2002. Williams ultimately appealed the denial of his request through steps II and III. Prison officials denied his requests at the next two steps.

Williams did get placed in a single cell on September 9, 2002. Respondent Pass also authorized another prisoner to assist him in certain tasks on September 9, 2002. But prison officials removed him from the handicapped cell and denied him the use of a prisoner-assistant on September 10, 2002, because he failed to provide any medical documentation that he qualified for a single cell or that he needed an assistant. Williams then filed Step I grievances

[6] The Medical Services Advisory Committee is composed of physicians from the Michigan Department of Corrections and Correctional Medical Services, a private health maintenance organization.

naming Respondents Klee, Markwell, Pass, and Peterson. Williams alleged in his grievances that Markwell and Klee conspired together to remove him from his handicapped-accessible cell. He claimed that Pass and Peterson did not accommodate his disability as required by the ADA and RA by returning him to a handicapped-accessible cell after September 10, 2002. Prison officials denied his grievances at all three levels as to Klee, Markwell, Pass, and Peterson.

Williams filed suit in the District Court alleging that Respondents Jamrog, Klee, Markwell, Pass, Peterson and Overton violated his constitutional and statutory rights under the Eighth and Fourteenth Amendments and the ADA and the RA.

The Respondents filed a dispositive motion arguing that Williams failed to exhaust his administrative remedies. The Magistrate Judge concluded in the Report and Recommendation (R&R) that Williams failed to name any of the Respondents in his claim regarding the denial of his medical procedure during the administrative appeals process and therefore he failed to exhaust his administrative remedies. (Pet. App. 10a-37a). Since he failed to name all of the Respondents in the administrative process he had only partially exhausted his administrative remedies. Accordingly, the Magistrate Judge concluded the entire matter should be dismissed without prejudice. The Magistrate Judge also recommended dismissing the case on the merits.

The District Court adopted the portion of the R&R that dismissed the action based on Williams's failure to exhaust his administrative remedies pursuant to the PLRA. (Pet. App. 8a-9a). The District Court did not address the portion of the R&R that dealt with the issues on the merits. Williams filed a timely appeal on November 14, 2003.

The Court of Appeals affirmed the District Court based on Williams's failure to name the individuals he intended to sue in his grievance regarding his request for surgery in the

administrative appeals process.[7] (Pet. App. 1a-7a). The Court of Appeals concluded that his failure to name all of the Respondents constituted partial exhaustion of his administrative remedies. Previously, in *Jones Bey v Johnson*, the Court of Appeals had held that if a prisoner had only partially exhausted his claim, then the entire complaint had to be dismissed without prejudice.[8]

Walton v Bouchard

Petitioner John Walton, an African-American prison inmate, brought suit against Respondents Barbara Bouchard, Ken Gearin, David Bergh, Catherine Bauman, Ron Bobo, and Denise Gerth pursuant to 42 USC § 1983 alleging racial discrimination under the Fourteenth Amendment.[9]

On July 17, 2001, Respondent Gearin put Walton on an indefinite "upper slot restriction" for assaulting a corrections officer. The upper slot restriction required that he could only receive food and paperwork through a lower food slot of his cell door. Walton subsequently filed a grievance on April 16, 2002, against Respondent Bobo. Walton alleged in his grievance that white prisoners received, at most, a 60-day suspension for similar conduct. His grievance was only directed at Respondent Bobo. Respondent Gerth responded to the grievance by indicating that ADW Gearin had placed him on the upper slot restriction. Gerth's response dated April 26, 2002, explained that prison discipline is imposed on an individual basis.

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[7] *Williams v Overton, et al*, unpublished per curiam opinion, No. 03-2507, 2005 US App LEXIS 12277 (CA 6 June 22, 2005).
[8] *Jones Bey v Johnson*, 407 F3d 801, 805 (CA 6 2005).
[9] Bouchard was the Warden of the Alger Maximum Correctional Facility. Gearin was an Assistant Deputy Warden. Bergh was an Assistant Deputy Warden. Bobo was an Assistant Deputy Warden. Bauman was a Resident Unit Manager. Gerth was an Assistant Resident Unit Supervisor.

Walton appealed his grievance through Steps II and III. Bobo is the only person Petitioner Walton named in his Step II and III grievances. Prison officials denied his grievances at both steps.

Walton subsequently filed suit under Section 1983 and the Fourteenth Amendment against Bouchard, Gearin, Bergh, Bobo, Bauman, and Gerth. Petitioner Walton did not exhaust his grievances against anyone other than Bobo prior to filing suit.

The Magistrate Judge issued an R&R recommending dismissal based on Petitioner Walton's failure to exhaust his administrative remedies. (Pet. App. 46a-51a). The Magistrate Judge found that Walton had not exhausted his administrative remedies against Bouchard, Gearin, Bergh, Bauman, or Gerth.

The District Court adopted the R&R and applied the total exhaustion rule, prior to the Court of Appeals' decision in *Jones Bey*, and dismissed the case without prejudice. (Pet. App. 44a-45a). The total exhaustion rule requires prisoners to exhaust all of their claims against all of the parties they intend to sue during the administrative process. [10] Failure to do so requires the District Court to dismiss the action in its entirety without prejudice. The District Court found Walton had not named each of the Respondents in his grievances. Consequently, he had only partially exhausted his administrative remedies. Walton filed a timely Notice of Appeal on October 29, 2003.

The Court of Appeals affirmed, citing its decisions in *Curry v Scott* and *Jones Bey*.[11] (Pet. App. 38a-43a).[12] In its decision, the Court of Appeals ruled that Walton had only named Bobo in his grievances. Thus, he had only partially exhausted his administrative remedies.

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[10] *Jones Bey*, 407 F3d at 809.
[11] *Curry v Scott*, 249 F3d 493, 503 (CA 6 2001); *Jones Bey*, 407 F3d at 805.
[12] *Walton v Bouchard, et al*, unpublished per curiam opinion, No. 03-2458, 2005 US App LEXIS 11991 (CA 6 June 17, 2005).

REASONS FOR DENYING THE PETITION

I. This Court should deny the Petition because the Court of Appeals decisions pursuant to the Prison Litigation Reform Act, requiring a prisoner to name a particular prison official during the grievance process in order to sue that person, are correct.

The Respondents acknowledge that the federal courts of appeals are split on the question of whether a prisoner must name a prison official in the grievance process in order to proceed in filing a lawsuit. Nevertheless, this Court should deny the petition for writ of certiorari in these cases because the Sixth Circuit correctly decided that the PLRA requires prisoners to specifically name in the administrative grievance process the parties they later sue in federal court.[13]

A rule requiring prisoners to first name in the grievance process those they later name in the federal lawsuit is consistent with one of the policy objectives of the PLRA, which is to allow prison officials the opportunity to review issues at the administrative level first. If a prisoner does not name a specific wrong-doer in the administrative process there is no way for prison officials to correct the alleged problem and, if necessary, discipline the wrong-doer. A rule requiring a prisoner to name all of the officials in the grievance process prior to filing suit, and exhaust administrative remedies as to them, also helps further the goal of creating an administrative record for the district court to review. This Court has held that creating an administrative record is an important purpose behind the PLRA; "for cases ultimately brought to court adjudication could be facilitated by an administrative record that clarifies the contours of the controversy."[14] Moreover, requiring prisoners to name the individuals who allegedly wronged them provides prison officials with fair notice of the claims against them.

Two Circuits (the Sixth and the Eighth) do require prisoners to name individuals during the administrative grievance process, and exhaust administrative remedies as to them, before

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[13] *Curry*, 249 F3d at 505; *Burton*, 321 F3d at 575; *Thomas*, 337 F3d at 735.
[14] *Porter v Nussle*, 534 US 516, 525 (2002).

they can sue the individuals in a federal court.[15] Those courts have held that a failure to do so requires a dismissal without prejudice. Three Circuits (the Third, Fifth, and Eleventh) do not require prisoners to specifically name in the grievance proceedings the prison officials they later sue in federal court.[16] Rather, those three Circuit Courts require that prisoners must provide fair notice in the grievance process to those they later sue in federal court. Two circuits (the Seventh and Ninth) expressly rejected a rule requiring prisoners to name in the grievance process those they later sue in federal court and instead only require that prisoners generally describe the problem in order to satisfy the PLRA's exhaustion requirement.[17]

The approach adopted by the Seventh and Ninth Circuits is contrary to the overall purpose of the PLRA.[18] The approach adopted by the Seventh and Ninth Circuits that only requires prisoners to generally describe a problem in the grievance process as a prerequisite to exhaustion allows prisoners to circumvent the PLRA. Merely describing a problem does not allow prison officials an opportunity to take appropriate action against the potential wrong-doer. Nor does it provide the accused any sort of fair notice that the accused's behavior is inappropriate. Such a rule would ensure that the administrative records in most cases would be of little or no value to the district court. Similarly, the rule adopted by the Third, Fifth, and Eleventh Circuits would frustrate the policy objectives of the PLRA because it would do little, if anything, to create an accurate administrative record. The burden would fall to prison officials to determine who the alleged wrong-doer was. Requiring that prisoners do no more than describe a situation in their grievance effectively nullifies Congress's intent in requiring exhaustion of administrative remedies.

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[15] *Curry*, 249 F3d at 505; *Burton v Jones*, 321 F3d 569, 585 (CA 6 2003); *Thomas v Woolum*, 337 F3d 720, 735 (CA 6 2003); *Kozohorsky v Harman*, 332 F3d 1141 (CA 8 2003).
[16] *Spruill v Gillis*, 372 F3d 218 (CA 3 2004); *Johnson v Johnson*, 385 F3d 503 (CA 5 2004); *Brown v Sikes*, 212 F3d 1205 (CA 11 2000).
[17] *Ricardo v Rausch*, 375 F3d 521 (CA 7 2004); *Butler v Adams*, 397 F3d 1181 (CA 9 2005).
[18] *Ricardo*, 375 F3d at 524; *Butler*, 397 F3d at 1183.

This Court should deny the petition in this case because the Sixth Circuit's decision requiring a prisoner to name individuals in the grievance process, and exhaust administrative remedies as to them, before he is permitted to bring a federal lawsuit against them is consistent with the PLRA's language.[19] The PLRA provides for a unique pre-service screening for prison litigation and mandates that a prisoner name individuals in the grievance process and exhaust administrative remedies before he is permitted to bring a federal lawsuit against them. Section 1915A provides that the district courts shall screen "as soon as is practicable after docketing" prisoner complaints against governmental officials or entities to determine, among other things, whether they state claims on which relief may be granted.[20] As the Court of Appeals noted in *Baxter v Rose,*[21] the PLRA sets up a unique screening process that puts the burden on the courts to determine whether the complaint states a claim upon which relief can be granted, even before the complaint is served on a defendant. If a prisoner does not name the individuals he intends to sue in the grievance process it will be difficult, if not impossible, for the district courts to carry out the screening requirement in Section 1915A. District Courts will be left to guess which claims have been exhausted against which defendants.

This Court has held that one of the PLRA's "dominant concern[s]" is to "foster better prepared litigation of claims aired in court."[22] In order to carry out that purpose the Sixth Circuit properly interpreted the PLRA to require that a prisoner name individuals in the grievance process, and exhaust administrative remedies as to them, before he is permitted to bring a federal lawsuit against them.

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[19] 42 USC § 1997(e)(a).
[20] 28 USC § 1915A.
[21] *Baxter v Rose,* 305 F3d 486, 490 (CA 6 2002).
[22] *Porter v Nussle,* 534 US at 528.

II. This Court should deny the Petition because the Court of Appeals decisions pursuant to the Prison Litigation Reform Act, requiring "total exhaustion" of all administrative remedies against all parties, are consistent with the plain language of the statute and the intent of Congress.

As with question one, the Respondents acknowledge that the federal courts of appeals are split on the issue of whether a prisoner must totally exhaust all of his administrative remedies against all parties or face dismissal of the entire complaint without prejudice. Currently, two Circuits (the Sixth and Tenth) have adopted a total exhaustion rule.[23] In addition, the Third Circuit implemented total exhaustion in an unpublished opinion.[24]

Two Circuits (the Second and Ninth) have adopted a partial exhaustion rule which allows prisoners to proceed forward on their exhausted claims while their unexhausted claims will be dismissed.[25] Two Circuits (the Fifth and Seventh) have not squarely addressed total exhaustion but indicated an exhausted claim might proceed despite the complaints including an unexhausted claim that is subject to dismissal.[26] The Fifth Circuit in *Johnson v Johnson* allowed exhausted claims to be litigated, while dismissing unexhausted claims. But the Court did not directly address total exhaustion, specifically noting that Defendants had not argued for implementation of total exhaustion.[27] Thus, it appears total exhaustion is an open question in the Fifth Circuit.

Similarly, the Seventh Circuit in *Lewis v Washington*[28] upheld the trial court's dismissing one claim for lack of exhaustion and remanded the remaining claim to determine whether Plaintiff had exhausted that claim. But the Seventh Circuit did not explicitly address the total exhaustion concept. From the decision which never refers to any arguments by Defendants, it appears that the district court probably dismissed the case prior to service. It appears that the

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[23] *Jones Bey*, 407 F3d at 809; *Ross v City of Bernalillo*, 365 F3d 1181, 1190 (CA 10 2004).
[24] *Vazquez v Ragonese*, unpublished per curiam opinion, No. 05-1203, 2005 US App LEXIS 16118 (CA 3 August 4, 2005).
[25] *Ortiz v McBride*, 380 F 3d 649 (CA 2 2004); *Lira v Herrera*, 427 F 3d 1164 (CA 9 2005).
[26] *Johnson v Johnson*, 385 F 3d 503, 523 (CA 5 2004).
[27] *Johnson*, 385 F 3d at 523, n 15.
[28] *Lewis v Washington*, 300 F 3d 829 (CA 7 2002).

Seventh Circuit was not presented with a total exhaustion argument. The Seventh Circuit has not expressly accepted or rejected total exhaustion. The Eighth Circuit has taken a position somewhere in the middle whereby a prisoner is allowed to amend the complaint to include only the exhausted claims.[29]

This Court should deny the petition in this case because the Sixth Circuit's adoption of the total exhaustion rule is correct and should not be overturned. And, the conflict among the circuits is not as stark as Petitioners suggest. Many circuits have not directly addressed total exhaustion.

The Sixth Circuit's decision in *Jones Bey*, along with decisions of the Third and Tenth Circuits is correct because it is consistent with the text of the statute.[30] In adopting the total exhaustion rule the United States Court of Appeals for the Sixth Circuit held, "We adopt the total exhaustion rule, in large part, because the plain language of the statute dictates such a result."[31] The PLRA specifically states that:

> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prison confined in any jail, prison, or other Correctional facility until such administrative remedies as are available are exhausted.[32]

Thus, the plain language of the PLRA prohibits any entire action from even going forward absent total exhaustion. Congress distinguished between the term "actions" and "claims" in 42 USC § 1997e(c)(1) and (2). Congress indicated that courts shall dismiss "[A]ny action that is frivolous, malicious or fails to state a claim."[33] The very next section provides that a court may dismiss a claim if it is frivolous, malicious, or fails to state a claim.[34] Congress drew a distinction between

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[29] *Graves v Norris,* 218 F 3d 884 (CA 8 2000); *Kozohorsky*, 332 F 3d at 1144.
[30] *Vazquez,* 2005 US App LEXIS 16118; *Ross*, 365 F3d at 1190.
[31] *Jones Bey*, 407 F3d at 807.
[32] 42 USC § 1997e(a).
[33] 42 USC § 1997e(c)(1).
[34] 42 USC § 1997e(c)(2).

a "claim" which is an individual allegation, and an "action," which is an entire lawsuit.[35] The use of the word "claims" in the Act indicates that claims are individual allegations while actions are entire lawsuits. As the Sixth Circuit noted in making the distinction between the terms "action" and "claim":

> If a district court is presented with a "mixed" petition, it has the power under subsection (c)(2) to dismiss any frivolous claim, exhausted or not, *with prejudice*. However, dismissal under subsection (a) allows the court to dismiss the entire action *without prejudice*. The *Smeltzer* court recognized that Congress must have intended that courts could use subsection (c)(2) to dismiss unexhausted claims as frivolous to keep them from "holding up" the others. *Smeltzer v Hook*, 235 F Supp 736, 744 (WD Mich 2002). In the alternative the court could dismiss the entire action without prejudice and allow the prisoner to refile only exhausted claims.[36]

A rule requiring total exhaustion is consistent with this Court's habeas corpus jurisprudence. The Sixth Circuit drew an analogy between the rule requiring total exhaustion in the habeas corpus context[37] and the Prison Litigation Reform Act:

> Additionally, adopting the total exhaustion rule creates comity between § 1983 claims and habeas corpus claims. The Supreme Court requires total exhaustion in habeas cases to allow the state courts the first opportunity to solve prisoners' cases because they are arguably in a better position to analyze and solve the problems. See *Preiser v Rodriguez*, 411 US 475 492; 36 L Ed 2d 439; 93 S Ct 1827 (1973). The PLRA, too, was enacted to allow state prison systems the first chance to solve problems relating to prison conditions. Because both bodies of law were created for similar reasons, their exhaustion rules should be interpreted in a similar manner.[38]

Moreover, the total exhaustion rule is consistent with the overall policy of the PLRA. As this Court recognized, "[I]t is beyond doubt that Congress enacted § 1997e(a) to reduce the quantity and improve the quality of prisoner suits."[39] A total exhaustion requirement satisfies the policy objectives in the Act in several ways.

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[35] *Jones Bey*, 407 F3d at 807.
[36] *Jones Bey*, 407 F3d at 807.
[37] *Rose v Lundy*, 455 US 509, 519 (1982).
[38] *Jones Bey*, 407 F3d at 807-808.
[39] *Porter v Nussle*, 534 US at 524.

First, the District Courts will not have to sort through each complaint to make a determination of which claims are exhausted and which are unexhausted. A partial exhaustion rule would require courts to spend scarce judicial resources sorting through often voluminous records to determine which claims could proceed. And the legislative history of the PLRA supports the Court of Appeals' ruling here. Senator Kyl explained[40] the need for the statutory reform of mandatory exhaustion of administrative remedies by referring to a comment by Chief Justice Rehnquist in his dissent in *Cleavinger v Saxner*: "With less to profitably occupy their time than potential litigants on the outside, and with a justified feeling that they have much to gain and virtually nothing to lose, prisoners appear to be far more prolific litigants than other groups in the population."[41] Inmates have virtually endless time to complain about every perceived wrong, large and small. While this often results in their filing lengthy, rambling complaints, it also means that they have the time to pare it down and sue only for claims they have exhausted. And they also have the time to do it over, if the court dismisses the case due to failure to totally exhaust.

Absent total exhaustion the courts will be mired in the screening process, sorting through piles of documents, trying to determine whether the inmate exhausted his claim in all steps of the grievance process. This result would be inconsistent with the intent of the PLRA to improve the quality of the lawsuits. The PLRA was not intended to place the burden of sorting each exhausted claim out of the pile of unexhausted claims. The Court of Appeals interpretation of the statute as requiring the court to dismiss a case where even one claim in a complaint remains unexhausted is consistent with the legislative intent to place the burden on the inmate to show that the Corrections Officials have been given the opportunity to correct the alleged problem, before bringing the matter to court. Consistent with the PLRA's legislative history, total

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[40] 141 Cong Rec S7527 (daily ed. May 25, 1995).
[41] *Cleavinger v Saxner*, 474 US 193, 211 (1985) (Rehnquist, J. dissenting) (emphasis added).

exhaustion requires the inmate to take the time to sort it out and re-file only exhausted claims, if the complaint contains even a single unexhausted claim.

Second, the total exhaustion rule avoids piecemeal litigation.[42] If a prisoner were allowed to proceed on some claims and not others the prisoner could subsequently bring a second lawsuit requiring the District Court to once again expend scarce judicial resources reviewing whether each and every claim in the new action to determine which claims, if any, are unexhausted. This could result in a series of lawsuits dealing with the same set of operative facts pending at different stages of discovery, and different procedural postures. Potentially different outcomes could raise consideration of complicated questions of issue and claim preclusion. Total exhaustion, in contrast, promotes judicial efficiency because it is much more likely to result in a single action dealing with all claims arising out of the same set of operative facts. And since the dismissal for failure to comply with total exhaustion is necessarily without prejudice, the inmate has the opportunity to bring the action again, pleading only exhausted claims.

Third, the total exhaustion rule has collateral effects that support the policy objectives of the statute by encouraging prisoners and prison officials to make full use of the prison grievance procedure.[43] Congress intended that prison officials, not the Federal courts, have the first opportunity to resolve a prisoner's complaints.[44] The Federal courts must be the last step, not the first step, when a prisoner has a conflict with prison officials. The total exhaustion rule maximizes the incentive for prisoners to make use of the grievance process.

Finally, this rule would aid the Federal courts by ensuring that there was a full administrative record to review for each of the prisoner's claims.[45]

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[42] *Jones Bey*, 407 F3d at 808; *Ross*, 365 F3d at 1190.
[43] *Jones Bey*, 407 F3d at 807; *Ross*, 365 F3d at 1190.
[44] *Jones Bey*, 407 F3d at 807.
[45] *Jones Bey*, 407 F3d at 807; *Ross*, 365 F3d at 1190.

Requiring total exhaustion of all claims is not unduly punitive.[46] It is true that prisoners who do not totally exhaust all of their claims will have to re-file their complaint and pay and additional filing fee. But prisoners can still proceed *in forma pauperis*. Thus, they will not be denied an opportunity to proceed on all properly exhausted claims.

Accordingly, this Court should deny the Petition for a Writ of Certiorari.

[46] *Jones Bey*, 407 F3d at 808.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

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