No. 14-82

In The
Supreme Court of the United States

JOHN SCOTT, SHERIFF,
LOS ANGELES COUNTY, CALIFORNIA,

Petitioner,

vs.

JUAN ALBINO,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

COLLINS COLLINS MUIR + STEWART, LLP
MELINDA W. EBELHAR*
CATHERINE M. MATHERS
CHRISTIAN E. FOY NAGY
JAMES C. JARDIN
1100 El Centro Street
South Pasadena, CA 91030
(626) 243-1100
mebelhar@ccmslaw.com
**Counsel of Record*

Attorneys for Petitioner
John Scott, Sheriff, Los Angeles County, California

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

I. THE CIRCUIT CONFLICT IS CLEAR AND DIRECT

Judge Randy Smith, writing for the three-judge dissent in this case, spotlighted the circuit split created or deepened by the Ninth Circuit's *en banc* majority decision: "Because the majority's interpretation and application of the PLRA in this case deviates from the approach required by the Supreme Court and creates a circuit split with the Eighth and Tenth Circuits, I must dissent." *Albino v. Baca*, 747 F.3d 1162, 1178 (9th Cir. 2014) (App. 32, 41).

Tope v. Fabian, 2010 WL 3307351 (D. Minn. July 29, 2010), report and recommendation adopted, 2010 WL 3307354 (D. Minn. Aug. 19, 2010), cited in the Brief in Opposition at p. 21, succinctly presents and analyzes the circuit split which now exists on the question of whether an inmate's subjective knowledge of the existence of a grievance procedure counts when determining whether that procedure is "available." Respondent's Brief is not candid in its reliance on this case as proof that there is no circuit split. The district court in *Tope* acknowledges a circuit split, at p. 8 of the opinion, three paragraphs prior to the sentence quoted by Respondent: "There is a split among the District Courts and Circuit Courts, with respect to whether an administrative remedy is 'available,' when the prisoner has no notice of the procedures related to that remedy. . . ."

Other district courts note, and struggle with, the split. See, e.g., *Womack v. Smith,* 2008 WL 822114

(M.D. Pa. Mar. 26, 2008), rev'd and remanded on other grounds, 310 Fed.Appx. 547 (3d Cir. 2009) ("[T]here is a split of authority on whether a correctional institution's failure to provide an inmate with sufficient information about his or her administrative remedies may render those remedies unavailable.").

That split has not yet been resolved; in fact the decision here has deepened it. This case provides the vehicle for resolution.

The cases relied on by Petitioner in the Petition do demonstrate the split, despite Respondent's mischaracterization of their holdings. Respondent claims that in several of these cases the decision turned on the fact that the inmates were notified of the administrative procedures and/or otherwise knew of their existence. (BIO at 17.) Not so. In *Gonzales-Liranza*, 76 Fed.Appx. 270 (10th Cir. 2003) (unpublished), plaintiff claimed that he was unaware of the existence of any administrative remedy at the prison. The district court assumed the truth of the inmate's claim that he had never been told about the grievance procedure for the purposes of summary judgment. The appellate court held that "as a matter of law, any factual dispute between the parties as to whether or not the plaintiff was ever advised of the prison's grievance procedures was not relevant." *Id.* at 272. The court then held that "failure to inform" is not an exception to the exhaustion requirement. That is in sharp contrast to what the Ninth Circuit's opinion here holds.

Similarly, in *Johnson v. District of Columbia,* 869 F.Supp.2d 34, 43 (D.D.C. 2012), also on summary

judgment, the court assumed the truth of plaintiff's averment that he had never been told about the grievance process, despite defendant's claims to the contrary. Nevertheless the court held that "failure to inform" is not an exception to the exhaustion requirement. The court engaged in an analysis of the "contrary" authority – one side holding that the inmate's knowledge matters and the other side holding that it does not – and concluded that it would follow the line which refused to create exceptions not written into the statute by Congress.

And in *Brock v. Kenton County, KY,* 93 Fed.Appx. 793, 795 (6th Cir. 2004) (unpublished), plaintiff contended that he had never received any information on the existence of a grievance process at the jail; the defendant jailer contended that the jail did have a process and that inmates were informed about it. The district court, and the court of appeals, held that the jailer's affidavit about giving notice to inmates was "not material" to the decision. *Id*. at 799. The court concluded that "any alleged failure of notice" of the available administrative remedies does not excuse the exhaustion requirement.

Thus, contrary to Respondent's assertions, the decisions in each of these three cases accepted as true the inmate's claims that he did not know and had not been given notice about an existing grievance process, and did not consider whether the inmate had any sort of constructive knowledge based on alleged notice. Regardless, each decision held that the process was "available" to the inmate, and each decision held that

the inmate's failure to exhaust was not excused. That is in stark contrast to the decision under consideration here.

Here, Respondent claimed a subjective lack of knowledge of the existence of the grievance process at the Los Angeles County Jail. The Ninth Circuit held that the Sheriff's assumed failure to inform Respondent specifically of existing grievance procedures rendered the Jail's administrative remedies unavailable within the meaning of the statute. Had this case been brought in the Sixth Circuit (*Brock,* 93 Fed.Appx. 793; *Napier v. Laurel County, Ky*., 636 F.3d 218, 221-22 (6th Cir. 2011) [rejecting inmate plaintiff's argument that "administrative remedies were not available to him" because administrators "failed to explain its grievance policy or the PLRA to him"); *id*. at n. 2 ("A plaintiff's failure to exhaust cannot be excused by ignorance of the law or the grievance policy."]); the Seventh Circuit (*Twitty v. McCoskey*, 226 Fed.Appx. 594, 596 (7th Cir. 2007) (unpublished)), the Eighth Circuit (*Chelette v. Harris,* 229 F.3d 684, 688 (8th Cir. 2000)); or the Tenth Circuit (*Yousef v. Reno,* 254 F.3d 1214, 1221 (10th Cir. 2001) [rejecting plaintiff's argument that the Assistant Attorney General had an obligation to advise plaintiff of the need to follow administrative procedures, after the AAG responded to a letter from plaintiff's counsel with no mention of the procedures]; *Simmons v. Stus,* 401 Fed.Appx. 380, 381 (10th Cir. 2010) [prisoner claimed he had not been informed how to file a grievance or given an inmate handbook

describing the procedure]), the result would have been in favor of the Sheriff.

Conversely, had this case been brought in the Third Circuit (*Small v. Camden County*, 728 F.3d 265, 271 (3d Cir. 2013) (dicta)); the Eleventh Circuit (*Goebert v. Lee County*, 510 F.3d 1312, 1323 (11th Cir. 2007)); or, most likely, the Fifth Circuit (*Dillon v. Rogers,* 596 F.3d 260, 268 (5th Cir. 2010) (dicta)), the result would be the same as, now, in the Ninth Circuit.

This conflict calls out for resolution by this Court.

II. THE QUESTION PRESENTED IS IMPORTANT AND CLEANLY PRESENTED

The Petition for Certiorari asks this Court to decide whether an inmate's subjective lack of awareness of an existing grievance procedure excuses his failure to exhaust his administrative remedies. Respondent quibbles with this, asserting that the question "really" is whether procedure is "available" within the meaning of the Prison Litigation Reform Act (42 U.S.C. § 1997e(a)) when the inmate does not know about the existence of the procedure, and prison officials allegedly did not tell him about it. This is a distinction without a difference. If the procedure is "available" regardless of the inmate's knowledge and regardless of whether officials advise him of its existence, then failure to exhaust is not excused. If the procedure is considered to be not "available" based on those same facts, then failure to exhaust is excused.

Here, there is no real dispute that a grievance procedure actually exists at the Jail (Respondent conceded the existence of the grievance procedure in his First Amended Complaint); the issue cleanly presented is whether, accepting Respondent's averments that he did not know about the procedure because he was never told about it, it was "available" to him.

Respondent also conceded that he never inquired about a grievance procedure; the record additionally reflects that despite allegedly being told by jail personnel that he should talk to his attorney about his complaints, he never did so. (App. 40.) The Sheriff presented uncontested evidence that there are complaint boxes in every housing unit, and complaint forms that are available. But Respondent claimed that he never saw the complaint boxes, never saw the forms, never received an orientation, and was never told to file a grievance. "[T]his case boils down to an inmate that alleges 'I didn't see' rather than 'I looked and couldn't find'; that alleges 'no one told me' rather than 'I asked and wasn't told or was told misinformation.'" (App. 40 [dissent].)

This Court has made it starkly plain that the courts do not have the authority to make exceptions to the PLRA's exhaustion requirement. *Booth v. Churner*, 532 U.S. 731, 746 n. 6 (2001). The requirement was meant to remove any "inducement to skip the administrative process." *Id.* at 741. If that seems harsh, the remedy is with Congress. The *en banc* decision below frames an issue that challenges the central purpose of the PLRA, and gives back to inmates

that very inducement, making it easy to excuse non-compliance. If evidence amounting to nothing more than "I didn't know" is sufficient to meet an inmate's burden, without additionally some showing that there is no reasonable way that he could have known, then the gate-keeping function of the PLRA falls.

CONCLUSION

The Ninth Circuit's decision here amounts to an end-run around the PLRA's administrative exhaustion requirement, *contra* to this Court's explicit directive in *Booth*, 532 U.S. 731, permitting avoidance by the simple expedient of shrugging the shoulders and saying "I didn't know."

For the foregoing reasons, Petitioner prays for a writ of certiorari to issue to the Court of Appeals for the Ninth Circuit.

DATED: September 30, 2014

Respectfully submitted,

COLLINS COLLINS MUIR + STEWART LLP

MELINDA W. EBELHAR
CATHERINE M. MATHERS
CHRISTIAN E. FOY NAGY
JAMES C. JARDIN

Attorneys for Petitioner, John Scott, Sheriff, Los Angeles County, California