No. 08-886

IN THE

# Supreme Court of the United States

CHRISTOPHER PAVEY,

*Petitioner,*

v.

PATRICK CONLEY, *et al.*,

*Respondents.*

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

## RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION

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## QUESTION PRESENTED

In a civil rights case brought by a prisoner and subject to the Prison Litigation Reform Act, 42 U.S.C. § 1997e ("PLRA"), is the affirmative defense of failure to exhaust administrative remedies a threshold matter that may be resolved by the judge before the presentation of any other evidence at trial?

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## STATEMENT OF THE CASE

Petitioner Christopher Pavey, a state prisoner, brought this action pursuant to 42 U.S.C. § 1983 against several current or former officers employed by the Indiana Department of Correction ("DOC"). Pet. App. 25a. Pavey claimed that six guards at the Maximum Control Facility in Westville, Indiana, used excessive force in violation of the Eighth Amendment when they broke his arm during a cell extraction on October 14, 2001. Pet. App. 25a.

The Defendants moved for summary judgment, claiming that Pavey failed to exhaust his administrative remedies as required by the Prison Litigation Reform Act, 42 U.S.C. § 1997e, because he did not file a timely grievance with the prison authorities. Pet. App. 2a. Pavey responded that due to his injury, he was physically unable to prepare a written grievance until January 15, 2002. Pet. App. 2a, 26a. By that time, he had been transferred to the Pendleton Correctional Facility. Pet. App. 26a. Pavey claimed that he attempted to file a grievance at Pendleton on January 15, but was told the grievance was untimely, as it should have been filed at the Westville facility. Pet. App. 26a.

The district court granted summary judgment in favor of the Defendants, holding that Pavey had failed to exhaust his administrative remedies and that his inability to write did not excuse him from properly utilizing the grievance process. Pet. App. 29a. The Seventh Circuit reversed, however, finding that the record reflected genuine issues of material

fact concerning the exhaustion question. Pet. App. 35a.

Upon remand to the district court, Pavey sought and was granted the right to a jury trial on his Section 1983 damages claims. Pet. App. 21a. In a discovery order, the district court provided that the Defendants would present evidence as to the exhaustion issue to the jury after Pavey had rested his case in chief on the merits of his claim. Pet. App. 19a-20a. The Defendants moved the court to reconsider, arguing that exhaustion should be tried to the court, separately and without a jury, before the parties addressed the merits of Pavey's constitutional claim. Pet. App. 16a. The district court denied the motion, stating that "[t]he time for presenting affirmative defenses to the jury is no different in this case than it is in any other: after the plaintiff has rested his case in chief." Pet. App. 16a.

Upon the Defendants' motion, however, the district court certified this series of orders for interlocutory appeal under 28 U.S.C. § 1292(b). Pet. App. 8a-11a. The Seventh Circuit reversed the district court's orders and held that in cases in which exhaustion is contested, the district court judge—not the jury—must resolve genuine disputed facts about exhaustion in a preliminary hearing before the case proceeds to the merits. Pet. App. 6a. Noting that "not every factual issue that arises in the course of a litigation is triable to a jury as a matter of right," the court reasoned that "juries do not decide what forum a dispute is to be resolved in," but rather, they "decide cases, not issues of judicial traffic control." Pet. App. 3a-4a. The court went on to state that "trying the merits before exhaustion . . . is

unsatisfactory . . . because it would thwart Congress's effort to bar trials of prisoner cases in which the prisoner has failed to exhaust his administrative remedies." Pet. App. 5a.

The court set forth a simple, commonsense sequence to be followed in cases where exhaustion is contested, beginning with limited discovery and, if necessary, a hearing on exhaustion. Pet. App. 6a. If the judge finds that the prisoner has exhausted his administrative remedies or that no such remedies were available, the case proceeds to discovery and resolution of the merits. Pet. App. 6a. If, on the other hand, the judge finds that the prisoner failed to exhaust available administrative remedies, the course of litigation depends on the cause of that failure. If the failure was innocent (as where prison officials prevent a prisoner from exhausting his remedies), then the prisoner is permitted to go back and exhaust. Pet. App. 6a. But, if the judge finds that the failure to exhaust was the prisoner's fault, the case is over. Pet. App. 6a.

Pavey filed a petition for rehearing with a suggestion of rehearing en banc. The court denied the petition, but amended its earlier opinion to permit limited discovery on factual issues relating to both exhaustion and the merits of the claim. Pet. App. 7a, 36a. On remand, the district court referred the case to a magistrate judge for an evidentiary hearing on exhaustion, but stayed the proceedings pending Pavey's promised petition for review by this Court.

## REASONS FOR DENYING THE PETITION

### I. There is No "Disarray" in the Lower Courts Regarding Procedures for Adjudicating the PLRA Exhaustion Defense

Pavey writes of the supposed need to resolve "widespread conflict and uncertainty in the federal courts over the proper procedure for adjudicating the PLRA exhaustion defense." Pet. 26. There is no lower-court conflict justifying review, however.

Only two other circuits have addressed whether a judge or jury should decide exhaustion-related facts, and both have, like the Seventh Circuit, held that courts, not juries, should do so as a threshold matter prior to adjudication of the merits. In both *Bryant v. Rich*, 530 F.3d 1368 (11th Cir. 2008), and *Wyatt v. Terhune*, 315 F.3d 1108 (9th Cir. 2003), the courts held that exhaustion should be raised as an unenumerated Rule 12(b) motion, and that factual disputes should be resolved in that context by courts rather than juries. To be sure, the decision below rejected the Rule 12(b) procedural mechanism, Pet. App. 3a, but given that the outcome is the same (*i.e.*, exhaustion facts are decided by judges, not juries), that formalistic dispute hardly warrants intervention by this Court.

None of the remaining five cases cited by Pavey to illustrate "disarray" among the circuits discusses the proper method for resolving exhaustion-related factual disputes under the PLRA. Actually, in four, there were *no* disputed factual issues relating to exhaustion. The only exhaustion issues were

whether a grievance filed by the prisoner was legally sufficient and, if not, whether the insufficiency was excusable. *See Hinojosa v. Johnson*, 277 F. App'x 370, 380 (5th Cir. 2008) (reversing grant of summary judgment in favor of certain defendants where grievance was not made part of the record on appeal, and remanding for district court to determine whether the grievance provided the defendants a fair opportunity to address the problems that later formed the basis of the prisoner's Section 1983 claim); *Williams v. Beard*, 482 F.3d 637, 639 (3d Cir. 2007) (reversing summary judgment in favor of the defendant where the prisoner procedurally defaulted by failing to name the defendant in his initial grievance, but where such default was found by the court to be excusable); *Fields v. Okla. State Penitentiary*, 511 F.3d 1109 (10th Cir. 2007) (affirming summary judgment in favor of the defendants where the defendants' summary judgment brief pointed out various shortcomings in the prisoner's grievance filings and the prisoner failed to respond to these shortcomings in his response brief); *Brownwell v. Krom*, 446 F.3d 305, 311, 313 (2d Cir. 2006) (reversing the district court's grant of summary judgment in favor of the defendant officers where the prisoner's grievance "did not sufficiently allege intentional misconduct," but special circumstances nonetheless justified the prisoner's failure to exhaust).

Nor is the fifth case cited by Pavey, *Foulk v. Charrier*, 262 F.3d 687 (8th Cir. 2001), instructive. In that case, the defendants unsuccessfully raised the exhaustion defense for the first time during trial in an oral motion to dismiss. *Id.* at 697. Its holding says nothing about how the defense is to be handled

when raised prior to trial, so there is no reason to believe Pavey's case would have been resolved differently in the Eighth Circuit.

In short, none of Pavey's "disarray" cases precludes judges from resolving factual disputes related to the PLRA exhaustion defense. Indeed, the only three circuits to have addressed the issue have endorsed the procedure. There is simply no PLRA exhaustion issue warranting the Court's review.

## II. There is No Conflict Between the Decision Below and *Jones v. Bock* or Other Precedents Governing Adjudication of Affirmative Defenses Generally

Unable to demonstrate a PLRA-specific conflict, Pavey alternatively suggests that there is a conflict between the Seventh Circuit's holding and both *Jones v. Bock*, 549 U.S. 199 (2007), and holdings of lower federal courts governing treatment of affirmative defenses generally. By asserting that the decision below stands in conflict with *Jones* and cases sending affirmative defenses to juries, however, Pavey is essentially asking the Court to review whether, under the Seventh Amendment, all affirmative defenses are created equal and must be decided by a jury. Not only is that issue far broader than the question presented, but Pavey does not demonstrate any serious need for it to be addressed. When assessing whether to send an issue to a jury, courts typically do not peg their decisions to whether the issue is technically part of an affirmative defense. Instead, they look to other, more precise factors, such as whether the issue needs to be

decided as a threshold matter or whether instead it logically can be decided with the merits.

In short, Pavey's case for certiorari presumes that all affirmative defenses should be treated the same. Without a conclusive demonstration as to why that should be the case, however, there is no basis from which to argue that lower courts are in "conflict" over how to handle affirmative defenses generally, and no justification for review by this Court.

1. Pavey suggests that the opinion below conflicts with the Court's recent holding in *Jones v. Bock*, 549 U.S. 199 (2007), that the PLRA's requirement that prisoners exhaust administrative remedies before coming to federal court constitutes an affirmative defense. *See* Pet. i, 14-15. The Court in *Jones* predicated its holding on the notion that, absent congressional directive, courts should not depart from the "usual" procedural practices outlined in the Federal Rules of Civil Procedure. *Jones*, 549 U.S. at 212. Pavey essentially argues that, by allowing the exhaustion defense to be decided by a judge rather than a jury, the Seventh Circuit has departed from the "usual practice" governing affirmative defenses and has therefore ignored *Jones*. Pet. 14-15. This argument stretches *Jones* well beyond its limits and insupportably assumes that all affirmative defenses must be treated the same.

In *Jones*, the relevant "usual practice under the Federal Rules" was that exhaustion must typically be raised as an affirmative defense—a practice directly at odds with a rule imposing a non-textual burden on plaintiffs to plead and prove exhaustion.

*Jones*, 549 U.S. at 212. Such allocation of the burdens of pleading and proof, however, says nothing about when and by whom relevant facts are to be decided. There is nothing inherent in the notion of "affirmative defense" that demands *jury* resolution of disputed facts.

Indeed, unlike in *Jones*, there is no "usual practice under the Federal Rules" directing that affirmative defenses be resolved by juries. Rule 38, which provides for jury trials, refers only to "[t]he right of trial by jury as declared by the Seventh Amendment . . . or as provided by a federal statute." Fed. R. Civ. P. 38(a). Accordingly, any "usual practice under the Federal Rules" with regard to trying affirmative defenses turns on the reach of the Seventh Amendment (and federal statutes affording jury trials). Without such a link, there is no "usual practice" of the sort invoked in *Jones* that has been thwarted by the decision below.

2. This case, however, has never really been a Seventh Amendment case. The Seventh Amendment was never a focal point below (*See* Appellee's Br. at 6), and the question that Pavey presents to this Court does not frame a Seventh Amendment issue. Pavey does invoke the Seventh Amendment in Part I.B. of the Petition, but he makes no attempt to explain how affirmative defenses must by nature be subject to jury trials under the Seventh Amendment.

This is significant because PLRA exhaustion is not unique as a non-jurisdictional procedural threshold affirmative defense subject to judicial factfinding. As the decision below recognized, factual disputes concerning venue are decided as a threshold

matter by judges, not juries. Pavey dismisses the Seventh Circuit's analogy of exhaustion to venue, citing *American Dredging Co. v. Miller,* 510 U.S. 443 (1994), for the observation that venue does not go to a plaintiff's substantive right to recover. *See id.* at 454. But as a procedural defense, exhaustion is no more an "essential element of a claim for relief," *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006), and no more "bears directly upon a prisoner's right to recover," Pet. 21, than venue. Indeed, exhaustion is essentially a subcategory of venue, requiring the court to answer the question, "has the plaintiff brought the claim to the right place?"

Accordingly, any attempt to suggest the decision below conflicts with cases putting other types of affirmative defenses in the hands of juries requires a rich and detailed comparative analysis, which Pavey does not provide. Pavey does, indeed, cite a bevy of cases directing that a wide variety of affirmative defenses be tried by juries. However, none of those cases suggests that affirmative defenses generally must be tried to juries as a matter of Seventh Amendment doctrine. In fact, *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.,* 356 U.S. 525, 537 n.10 (1958), expressly disclaims such analysis: "Our conclusion makes unnecessary the consideration of—and we intimate no view upon—the constitutional question whether the right of jury trial protected in federal courts by the Seventh Amendment embraces the factual issue of statutory immunity when asserted, as here, as an affirmative defense in a common-law negligence action."

Rather, the cases cited by Pavey stand only for the unremarkable proposition that sometimes it is

appropriate for a jury to consider certain affirmative defenses, particularly where those affirmative defenses go directly to the merits of the case. *See, e.g., Siler-Khodr v. Univ. of Texas Health Sci. Ctr. San Antonio*, 261 F.3d 542, 547-48 (5th Cir. 2001) (in Title VII equal pay case, defendant university raised affirmative defenses explaining the wage differential at issue); *Kaplan v. Exxon Corp.*, 126 F.3d 221, 223 (3d Cir. 1997) (in "slip and fall" negligence case, defendant raised affirmative defense of assumption of risk claiming that plaintiff willingly walked across snowbank, thus causing her fall); *U.S. v. Duncan*, 850 F.2d 1104, 1105, 1115 (6th Cir. 1988) (defendant charged with making and preparing a tax return containing a false statement raised affirmative defense of reliance upon advice of counsel, claiming he relied in good faith on the advice of his certified public accountant).

Pavey specifically compares PLRA exhaustion with statute of limitations defenses. Pet. 18. But, as with other affirmative defenses, there is no obvious reason why exhaustion and limitations defenses must be decided using the same procedures. Even though not a *jurisdictional* issue, *Woodford v. Ngo*, 548 U.S. 81, 101 (2006), PLRA exhaustion is nonetheless a *threshold* issue that warrants treatment analogous to jurisdictional issues.[1] In

[1] The decision below does not conflict with *Woodford*'s conclusion that the PLRA allows "a district court to dismiss plainly meritless claims without first addressing what may be a much more complex question, namely, whether the prisoner did in fact properly exhaust available administrative remedies." *Woodford*, 548 U.S. 81, 101 (2006). As the Court recently reinforced in *Pearson v. Callahan*, 129 S. Ct. 808, 817 (2009), such

contrast, a statute of limitations defense is not by its nature a threshold issue, and in many cases merely limits the measure of damages. *See Nieman v. NLO, Inc.*, 108 F.3d 1546, 1559 (6th Cir. 1997).

Even where a limitations defense would, if successful, preclude all liability, the defendant receives full protection even if the limitations period is decided by a jury at trial. *See Delany v. Padgett*, 193 F.2d 806, 811 (5th Cir. 1952). The same is not true for PLRA exhaustion, which is intended to prevent premature lawsuits from going to trial *at all*. *Jones*, 549 U.S. at 202. In fact, as the court observed below, there is much greater potential for successive jury trials—with their attendant costs—for PLRA exhaustion issues than for limitations defenses. With PLRA exhaustion issues, "one could envision a series of jury trials before there was a trial on the merits: a jury trial to decide exhaustion, a verdict finding that the prisoner had failed to exhaust, an administrative proceeding, the resumption of the

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"order of battle" determinations are fairly predicated on case-specific circumstances. There are many circumstances where it is far easier to determine that the complaint fails to state a claim than it is to determine a legitimate threshold issue—even a jurisdictional issue—and the Court's precedents generally allow for that. *See Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765, 778-80 (2000); *Sinochem Int'l. Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007). In the PLRA context, threshold dismissal of a "plainly meritless claim" is very different from full adjudication of a colorable claim on the merits prior to review of exhaustion. The PLRA mandates that exhaustion must be considered prior to the merits of a claim, and the Court's opinion in *Woodford* supports that mandate.

litigation, and another jury trial on failure to exhaust." Pet. App. 4a. In contrast, if a plaintiff fails to bring an action within the limitations period, the litigation is over, not merely "shunt[ed] . . . to another forum." Pet. App. 4a-5a. Accordingly, there is no basis for presuming that these two defenses should be subject to the same trial procedures.

3. Pavey separately relies on *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959), *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962), and *Curtis v. Loether*, 415 U.S. 189 (1974), for the principle that factual issues that overlap between jury and non-jury issues must be presented to a jury. But the Seventh Circuit accounted for these cases when it stated that "any finding that the judge makes, relating to exhaustion, that might affect the merits may be reexamined by the jury if—and only after—the prisoner overcomes the exhaustion defense and the case proceeds to the merits." Pet. App. 5a. This pragmatic approach effectively permits courts both to vindicate Congress' effort to bar trials of prisoner cases where the prisoner has failed to exhaust his administrative remedies and to afford jury trials on disputed fact issues going to the merits. These competing interests were not at stake in the lower-court cases cited by Pavey, *see* Pet. 23, so the decision below cannot reasonably be cast in conflict with them.

* * * *

The Court decided *Jones v. Bock* barely two years ago. Even if procedures for resolving PLRA exhaustion defenses may eventually warrant further review by this Court, it is far too early to take

another case on the subject. Especially given that the only three circuits to address the matter have agreed that judges are permitted to resolve factual disputes bearing on exhaustion, the Court should allow other circuits more time to consider the issue. That way the Court may, if ultimately it becomes necessary to explicate further procedures for resolving PLRA exhaustion defenses, have greater national input by judges who routinely engage the practical "traffic control" issues at stake.

## CONCLUSION

The Petition should be denied.

Respectfully submitted,

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