

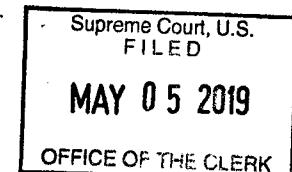
No. 18-9313

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

WARREN WATSON-PETITIONER
VS.

MATTHEW W KILLOUGH "et-al"-RESPONDENT(S)



ON PETITION FOR A WRIT OF CERTIORARI TO

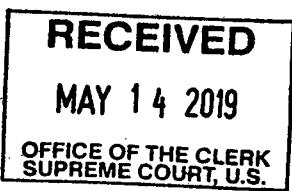
UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

WARREN WATSON
AVCF, 12750 HWY 96 LN 13
ORDWAY, COLORADO 81034

QUESTION(S) PRESENTED



THE PROPER EXHAUSTION RULE

1. What is considered proper exhaustion and was there enough confusion in the policy handbook and other procedures to warrant non-exhaustion?
2. As it pertains to exhaustion of claims when there is multiple ways in filing a grievance should the claim be dismissed because plaintiff followed one procedure that was outlined in the handbook and not the other when it is not clear which one will be accepted?
3. Should the prisoner's case be dismissed for non-exhaustion where it was unclear what they had to do to exhaust, either because the rules were not clear or because the actions or the instructions of the officials created confusion in this particular case?
4. The court stated that Plaintiff conceded on Appeal that he did not follow the Handbook procedures for filing civil right grievance or medical services grievance [The plaintiff made no such statements in his arguments], What he stated was that he did not follow the normal procedures as it pertained to one part of the Jefferson County Handbook, should the court be allowed to misconstrue plaintiffs reasoning to fit their reasoning?
5. By allowing the County to have several options in determining how to file a grievance does this open the door to dismissal of a claim because a plaintiff has no ideal which one will be recognized as proper? And the defendants can refer to another option when it feels the need to dismiss the claim based on not exhausting in the proper manner?

LIST OF ALL PARTIES

[*] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is subject of this petition is as follows:

1. MATTHEW W KILLOUGH
2. CATHERINE ROWE
3. KATHRYN TETREAULT
4. YASEMIN TAYLOR
5. CORRECTIONAL HEALTH CARE COMPANY (dba)

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Detention Facility Inmate Handbook

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment below.

OPINIONS BELOW

[*] For cases from Federal Courts:

The opinion of the United States court of appeals appears at Appendix A to the petition and is:

- [*] reported at 750 Fed. Appx. 773* or,
- [] has been designated for publication but is not yet reported; or,
- [] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is.

- [*FEB] reported at 750 Fed. Appx. 773 *; or,
- [] has been designated for publication but is not yet reported; or ,
- [] is unpublished.

JURISDICTION

[] For cases from **Federal Courts**:

The date on which the United States Court of Appeals decided my case was
FEBRUARY 7, 2019

[*] No petition for rehearing was timely filed in my case.

The jurisdiction of this Court is invoked under *28 U.S.C. § 1254 (1)*.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The plaintiff contends that the statutes and regulations involved are as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

In this index case the primary issue is whether the lower court's decision was inaccurate. Plaintiff, a Colorado prisoner proceeding pro se, filed a complaint against Correctional Healthcare Solutions and its personnel at the Jefferson County Detention Facility (JCDF) in Golden, Colorado, including Nurse Yasemin Taylor, Nurse Catherine Rowe, Nurse Kathryn Tetreault, and Physician's Assistant Matthew Killough (Defendants). Plaintiff alleged that Defendants acted with deliberate indifference to his medical [[**2]] needs, in violation of the Fourteenth Amendment. These allegations arose out of a series of medical requests by Plaintiff over the final eight months of his pretrial detention at the JCDF. In February 2015 Plaintiff submitted his first of five medical requests—known as medical "kites"—relating to a growth around his knee. According to Plaintiff, Defendants saw him several times but failed to adequately treat the growth before he was transferred to a different facility, allowing the swelling to worsen and to cause chronic pain and limited mobility. Plaintiff claims that if Defendants had adequately treated him, he would not have had to wait until August 2016 to undergo surgery to fix this malady.

Defendants moved for summary judgment for failure to exhaust administrative remedies, arguing that Plaintiff did not follow the grievance procedure for civil-rights violations outlined in the Inmate Handbook. Plaintiff responded that the relevant grievance process that defendant stated was a different one mentioned in the Inmate Handbook that governed grievances about medical services. The district court granted the motion for summary judgment, reasoning that it was irrelevant whether the civil-rights or medical-services grievance procedure applied because

Plaintiff did not follow either procedure. That is, Plaintiff never submitted any sort of grievance, only sending medical kites to request treatment [**4] for the swelling around his knee.

Plaintiff's argument was based on the Detention Facility Inmate Handbook, 2014.

Complaint/Grievances regarding medical services should be submitted on Administrative "Kite" (not the Medical Request Form/medical kite) to the Health Services Administrator. His issue is that there seems to be 3 different ways in which to file his complaint/ grievance **(1) following pg 27-CHS1363 of Jefferson County Sheriff's Office Detention Facility Inmate Handbook,**

"which specifically relates to medical issues such as in this case," 2014 (2)

COMMUNICATION FORM CSO 000001 (3) CHS 1374 INMATE HANDBOOK pg 38.

Which would seem to relate to other grievance matters.

Plaintiff pointed out that the Detention handbook stated that **Complaints/Grievances** regarding medical services should be submitted on an Administrative "Kite" (not the Medical Request Form/medical kite) to the Health Services Administrator. At the time of this issue there was no separate kite available. Second the exhibit C communication Form CSO 000001 clearly states, please submit a medical kite to be seen for any **complaints.**

REASONS FOR GRANTING THE PETITION

PROCEDURAL REQUIREMENTS ARE NOT CLEAR:

Nichols v. Husz, 2011 U.S. Dist. LEXIS 134547

("The burden is on the Department of Corrections to make grievance procedures clear and easy to follow") The plaintiff has produced evidence that indicates differing procedures for filing complaints at the Jefferson County Detention Facility.

Prison officials may not take unfair advantage of the exhaustion requirement, however, and a remedy becomes "unavailable" or otherwise use affirmative misconduct to prevent a prisoner from exhausting. *Lewis v. Washington*, 300 F.3d 829, 833 (7th Cir. 2002); *Dale v. Lappin*, 376 F.3d 652, 656 (7th Cir. 2004).

The Court has decided an important question in a way that conflicts with the decision of another state court: The United States Court of Appeals determined that Mr. Watson claim was dismissed based on his failure to properly file a grievance, however they claim that he stated he never filed a Claim/ Grievance, according to the Jefferson County Detention Handbook, this is not the case, what Mr. Watson stated was that he did not file in the fashion as it pertained to what the defendants state is the only way to file the claim/ grievance pointing out." **Only CHS 1374 of the Jefferson County Inmate Handbook, 2014" GREIVANCE PROCEDURE.** Which is unsupported when it comes to medical complaints .see page 27 of Detention Handbook.

In the **Order and Judgment: February 7, 2019** on pg. 3 the court acknowledged that Plaintiff did send medical kites concerning his claim. In the communication form CSO 000001, the lower section it specifically states that ,(quote) "Please submit a medical kite to be seen for any complaints" this is just another area that can be misconstrued and confusing when looking at the Detention Handbook page 27 and page 38.

The lower court acted on behalf of the defendants, since defendants themselves did not attempt to respond to this issue as it pertained to CHS 1363 pge 27 of the Detention Handbook, the lower

court should have responded to what the defendants had argued, whether plaintiff had failed to properly file his complaint as it pertained to medical issues, should he have followed the grievance procedure the defendants argued? What should be reviewed is the other section of this handbook along with the communication form CSO 000001, that specifically states when an individual files a claim or grievance that pertains to Medical issues they should follow what has been outlined on Page 27 of the handbook or as stated on the form, CHS 000001.

The exhaustion requirement is a gatekeeper not a gotcha meant to trap unsophisticated prisoners who must navigate the administration process"); *Ouellette v. Maine State Prison, 2006 WL 173639 * 3n2 (D. Me, Jan. 23, 2006)* (noting that once suit is filed , "the defendants in hindsight can use any deviation by the prisoner to argue that he or she has not complied with *42 U.S.C. § 1997 e (a) responsibility* ")), *aff'd , 2006 WL 348315 (D .Me, Feb.14, 2006.*

Campbell v. Chaves, 402 F. Supp.2d 1101, 1106 n.3 (D.Ariz.2005) (noting danger that grievance systems might become "a series of stalling tactics, and dead-end without resolution") (While proper compliance with the grievance system makes sound administrative sense, the procedures themselves, and the directions given to inmates seeking to follow those procedures should not be traps designed to hamstring legitimate grievance.")

The court also states that plaintiff failed to preserve this argument however, in plaintiffs' motion to proceed on Appeal he outlines his reasoning in detail concerning why he followed the guidelines on page 27 and the communication form CSO 000001.

The court also contends that the plaintiff could have filed a grievance anytime during the 8 months that the issue presented itself, this would lead one to believe plaintiff should have failed a complaint the same time he brought it to the attention of medical, which would have then lead

the defendants to say plaintiff never gave the defendants time to remedy the problem. By the defendants own statements they had been evaluating the problem, just not actually doing anything about it. *Greeno v. Dale*, 414 F.3d 645,655 (7th Cir. 2005); *White v. Napoleon*, 897 F.2d 103,109 (3d Cir.1990); *Ruffin v. Deperio*, 97 F. Supp. 2d 346,353 (W.D.N.Y. 2000) Jury found that treatment “consisted of little more than documenting [Plaintiff’s] worsening condition” and continuing ineffective treatment. Identical to the plaintiff’s issue. Also in keeping with the standard noted in the Jefferson County Inmate Handbook an individual must submit a kite to the duty sergeant within 5 days of the incident or situation explaining the incident in question, therefore the court would be in error to suggest that the plaintiff file a complaint anytime in the 8 month period in which he was at the Detention Facility, because it would have then been a argument that he waited too long to notify anyone at best this situation becomes a conundrum.

As stated before exhaustion requirement is a gatekeeper not a gotcha meant to trap unsophisticated prisoners who must navigate the administration process”); *Ouellette v. Maine State Prison*, 2006 WL 173639 * 3n2 (D. Me, Jan. 23, 2006)

Holding that a prisoner who did not have reason to know he had a medical care claim until he had been transferred to another prison justified by special circumstances in not exhausting. See: *Brownell v. Krom*, 446 F.3d 305 312 (2d Cir 2006).

(a) University of Texas Medical Branch v. Hohman, Douglas also argues that where a grievance or appeal procedure is unclear or otherwise ambiguous, jurisdictional questions should be resolved in favor of the nonmovant. 6 S.W.3d 767 (Tex. App.—Houston [1st Dist.] 1999, pet. dism'd w.o.j.)

(b) WHEN PROCEDURAL REQUIRMENTS ARE NOT CLEAR

(c) *Nichols v. Husz*, 2011 U.S. Dist. LEXIS 134547

The Second Circuit had held before *Woodford* that a prisoner who acted reasonably when the rules were not clear presented special circumstances justifying his failure to exhaust properly, even if he turned out to be wrong, and other courts have agreed or have held remedies unavailable under circumstances.

Since *Woodford*, courts have continued to hold that prisoners' cases cannot be dismissed for non-exhaustion where it was unclear what they had to do to exhaust, either because the rules were not clear or because the actions or instructions of officials (often in violation of their own rules) created confusion in a particular case. One Federal appeals court, the second Circuit has held that if a prisoner uses the wrong remedy through a reasonable misunderstanding of the rules, the prisoner is justified in failing to exhaust correctly. *Wood v Ngo*, 548 at 102 and in *Hemphill v. New York*, 380 F3d 680, 689-90 (2d Cir. 2004) holding that plaintiff's arguments that lack clarity in grievance regulations supported the reasonableness of his belief that he could exhaust by writing directly to the superintendent); *Barad v. Comstock*, 2005

Court must interpret exhaustion requirement in light of its purposes, which include goal of giving officials time and opportunity to address complaints internally; thus, grievance should be considered sufficient to extent that grievance gives officials fair opportunity to address problem that will later form basis of lawsuit, and further, as practical matter, amount of information that is necessary will likely depend to some degree on type of problem about which inmate is complaining. *Johnson v Johnson* (2004, CA5 Tex) 385 F3d 503. Based on the court's reasoning that plaintiff could have filed the type of grievance the defendants quote, during the 8 months of his claiming, would have gone directly against the plaintiff giving the defendants time to fully address his problem.

CONCLUSION