24-6684

No. _____

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Andrew R. Lopez — PETITIONER
(Your Name)

vs.

D. C. Thomas — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

NINTH CIRCUIT, UNITED STATES COURT of APPEALS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Andrew R. Lopez
(Your Name)

San Quentin Rehabilitation Center
(Address)

San Quentin, Ca. 94974
(City, State, Zip Code)

NA (Prisoner)
(Phone Number)

QUESTIONS PRESENTED

UNIFORMITY AMONG THE CIRCUITS

I. **Definitive Guidance Is Needed on Whether The Ninth Circuit's Decision Conflicts with Other Circuit Court Reasoning that Exhaustion Becomes Unavailable When Prison Officials Mislead Inmates about The Administrative Appeal Process. It Also Conflicts With Decisions Within Its Own Circuit.**

   A. **The Ninth Circuit's Decision Conflicts with Other Circuit Court's Reasoning And Remedy Regarding When Prison Officials Mislead Inmates During The Grievance Process.**

   B. **The Ninth Circuit's Decision Conflicts with a Panel From its own Court.**

THE ISSUE IS OF PUBLIC IMPORTANCE

II. **There Exists a Great Public Interest in Ensuring Constitutional Protections For All Citizens, Including Inmates' Right to Petition a Court for Redress of Constitutional Violations and Right To Jury Trial.**

   A. **Is The Right To Petition For Redress Eroded When Prison Officials' Mislead Inmates By Telling The Inmate They Will Receive A Separate Response To Their Constitutional Claims, Implying The Inmate Need Not Pursue Additional Administrative Appeals, Then Fail To Provide A Separate Response And Argue In Court That The Separate Issues Are Not exhausted, Attempting To Depriving the Right To Redress Constitutional Violations in Court and Jury Trial? If so,**

   B. **Do Lower Courts' Deprive Inmate Plaintiffs' of Their Right To Jury Trial By Granting Summary Judgement For Defendant Prison Officials On The Ground That The Inmate Failed To Administratively Exhaust Their Constitutional Claims When *Undisputed* Evidence Shows That, During The Administrative Appeal Hearing Process, High Ranking Prison Appeals Officials Specifically mislead The Inmate Such As By Telling The Inmate They would Receive A *Separate* Response Regarding Constitutional Claims-Implying The Inmate Need Not Submit A Separate Appeal?**

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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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 judgement below.

OPINIONS BELOW

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

JURISDICTION

The date on which the United States Court of Appeals denied my case was December 10, 2024. A timely petition for rehearing was denied by the United States Court of Appeals on the following date: December 20, 2024, and a copy of the order denying rehearing appears at Appendix C.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. CONSTITUTION-AMENDMENTS

FIRST: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

EIGHTH: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

FOURTEENTH, § 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES

42 U.S.C. § 1983 *(See Appendix D)*

42 U.S.C. § 1997e *(See Appendix D)*

STATEMENT OF THE CASE

While walking the prison yard, Plaintiff and an elderly Hispanic inmate were subjected to an unprovoked attack. Plaintiff defended himself and the inmate he was walking with. When the aggressor fell, with his arms at his sides Plaintiff stood his ground approximately 20 feet away.

As prison staff approached, the aggressor arose and resumed advancing upon Plaintiff. With his arms still at his sides, Plaintiff backed away while believing that custody staff would stop the aggressor.

A white officer, Defendant D. C. Thomas bypassed the aggressing white inmate and, wielding his baton like a baseball bat viscously attacked Plaintiff, using so much force that Thomas fell to one knee.

The above acts are preserved on video. Plaintiff suffered mental and physical pain, including an 8"x 2" black bruise that persisted for three months.

Plaintiff was charged with 'fighting'. The charge sheet documents that the aggressor white inmate "initiated the fight...by throwing a punch with his right hand."

Prison rules provide that an inmate could file only one CDCR 602 form (grievance) every 14 days. The 602 forms are very limited in space. The 602 process requires a hearing to "clarify" the "issues" at the first level of review or, *if the first level is waived,* at the second level. (CDCR Dept. Operations Manual (DOM) § 54100.12 & 54100.14). The hearing is also to allow the hearing officer to ask questions. (id.)

Whenever information is discovered indicating that misconduct of a severity that would likely lead to adverse personnel action may have taken place, prison policy *requires* the 602 hearing officer to terminate the interview. (DOM § 54100.25.2). Also, when a staff misconduct 602 also includes other issues, the 'appeals coordinator' is required to inform the inmate that the other issues may be appealed separately. The inmate has 30 days from receipt of such notice to submit an additional 602 that addresses the separate issue(s). (Title 15, Calif. Code of Regs. § 3084.9 (i) (2); DOM § 54100.25; *See also, Brown V Valoff,* 422 F3d at 938-939 (referencing CDCR Administrative Bulletin 98/10, dated 8/21/1998)).

The prison 'Appeals Coordinator' is required to possess Correctional Counselor II (CC II) rank or higher. (DOM § 54100.3).

Undisputed are that:

Plaintiff timely filed a 602. Prison officials waived the first level of review and, pursuant to DOM § 54100.12 & 54100.14, CC II A. Bond interviewed Plaintiff at the second level.

During that interview, Plaintiff put CC II Bond on notice of the unnecessary and excessive force used by Defendant Thomas as Plaintiff was retreating from further attack by the aggressor inmate. CC II Bond responded that Plaintiff would receive a separate response to his use of force claim and, as required by DOM § 54100.25.2, CCII Bond terminated the interview.

Because CC II Bond held rank of overall Appeals Coordinator, Plaintiff believed Bond and did not submit a separate 602. And, Plaintiff never received any notice advising that he needed to file a separate 602.

Had CC II Bond not told Plaintiff he would receive a separate response, or had Plaintiff received notice that he had to submit a separate 602, Plaintiff would have timely submitted a separate 602. At all times, Plaintiff relied upon CC II Bond's assertion.

Pursuant to Title 42 U. S. C. § 1983, Plaintiff timely filed a Civil Rights Complaint in the United States District Court for the Northern District of California ("District Court"). The Complaint was allowed to proceed against only Defendant Thomas on the Eighth Amendment claim.

At the summary judgement stage: Defendant alleged failure to exhaust administrative remedies. Defendant's argument appears to be that the prison procedures of discontinuing the appeal interview and issuing a separate response applies only when a staff complaint is filed and other issues arise *but that it does not apply in the converse, i.e.* when the staff complaint issue arises during an appeal. Plaintiff responded that CC II Bond interviewed Plaintiff to clarify the issues according to procedure. That Bond terminated the hearing according to procedure, and told Plaintiff he would receive a separate response to the use of force issues. However, Plaintiff never received a separate response, nor notice that he needed to file a separate 602.

Although Plaintiff's facts were undisputed, and Plaintiff disputed Defendant's claims, the District Court granted summary judgement for Defendant. (See *Appendix B*)

Plaintiff timely appealed to the Ninth Circuit, United States Court of Appeals ("Ninth Circuit") arguing, inter-alia, that neither Defendant nor the District Court disputed that:

CC II Bond held rank of overall Appeals Coordinator *and* told Plaintiff he would receive a 'separate response' for the Eighth Amendment claims against Defendant Thomas made known to Bond during a 602 appeal hearing, and that Plaintiff believed Bond. Additionally, that Plaintiff never received any notice advising he needed to file a separate grievance on the Eighth Amendment issues.

Further, that the District Court erred by ruling on summary judgement when Plaintiff disputed Defendant's facts. And, the District Court erroneously claimed as undisputed-disputed facts, and made wrong claims, including, but not limited to, that: "Plaintiff and Ramirez walked toward Raper", "Raper and Ramirez" exchanged words about "disrespect" and then Raper "started swinging"' (*App. B at 5*), although Plaintiff repeatedly explained that 'Raper summoned Plaintiff and Ramirez as Raper crossed the basketball court toward them then, when within striking distance, *Raper* mentioned something about disrespect to Ramirez and began swinging'; Additionally, Rotely adopting Defendant's claims the District Court stated Defendant observed Plaintiff in a "combative stance near Raper who...had stood back up[,]...plaintiff was not getting on the ground. [so] to get plaintiff to comply with the commands to get down *and stop further escalation of the fight*, defendant used a single forward strike with his baton to plaintiff's upper leg" (*App. B at 6*) However, Plaintiff disputed those claims, submitting evidence that **1)** Plaintiff was not 'in a combative stance' but, instead as the video indisputably shows, was backing away with his arms at his sides as Raper got to his feet and began re-advancing to attack Plaintiff, i.e.

2) Plaintiff was not responsible for 'escalation of the fight', and **3)** The District Court's adopting of Defendant's argument that 'one strike' of a baton does not violate the Eighth Amendment is wrong because the District Court ignored the undisputed, indeed indisputable facts, that Plaintiff was backing away from further attack by white Raper and white Defendant *bypassed the attacking Raper and attacked the retreating, non-aggressive Plaintiff victim*—had Plaintiff got on the ground Raper could have seriously injured or killed Plaintiff as Plaintiff's undisputed evidence established that Raper was much larger and heavier than Plaintiff. The District Court abused its authority by Rotely adopting Defendant's arguments or otherwise framing facts and claiming them to be 'undisputed' in order to dismiss Plaintiff's claims, and by ignoring Plaintiff's truly undisputed facts.

Similarly, regarding Plaintiff's exhaustion, the District Court characterized as "unavailing" Plaintiff's undisputed facts that CCII Bond was given notice of Plaintiff's use of force claims and told Plaintiff he would receive a separate grievance response on the matter, and that Plaintiff never received that separate response nor did he receive any notice to file a separate grievance. The District Court states "There was no mention *in the appeal* of excessive force being used against him or defendant",..."the appeal did not mention excessive force or defendant", then cites *Griffin V Arpaio*, 557 F3d 1117, at 1121 (9th Cir. 2009), for the proposition that prison officials were never provided notice because *Griffin's* grievance "never alerted prison officials "to the nature of his problem"", and the District Court proceeded to conclude that "prison officials could not know from this appeal that plaintiff was alleging he was the victim of excessive force by defendant". (*App. B at 8-9*). The District Court also stated proper exhaustion 'required a substantive decision at each level of review', and an inmate could 'not circumvent the appeals process by raising new issues for the first time at the second or third level of

review.'(*App. B at 9:13-17*). Again, ignoring Plaintiff's authorities and facts that establish an interview is required at the second level of review when the first level is waived and, here, the first level was waived *by prison officials* and that was the reason CCII bond interviewed Plaintiff at the second level; that the purpose of the interview is to "clarify" the related "issues" (plural) and for the interviewer to ask questions; that the space on the appeal form is small, i.e. hence the need for the interview and 'clarification'; and, importantly, CCII Bond held rank to satisfy the overall Appeals Coordinator position *and made a* ***substantive*** *decision* when he heard Plaintiff's use of force claim related to the fight and told Plaintiff he would receive a separate response to those claims—and Plaintiff had no reason to not believe CCII Bond, i.e. Plaintiff did not 'circumvent the appeals process' nor 'raise new issues for the first time at the second or third level of review'. Prison officials (CCII Bond) knew of Plaintiff's use of force issue.

Therefore, *Plaintiff* was entitled summary judgement based upon Plaintiff's undisputed facts.

Additionally, Plaintiff cited other circuit court cases showing that administrative exhaustion is waived when prison officials mislead inmates during the grievance process, as occurred either when CCII Bond told Plaintiff he would receive a separate response to his use of force issues *or* by prison officials failure to provide notice to Plaintiff to disregard CCII Bond's assertion and advise Plaintiff file a separate grievance if he wanted to exhaust on the force issue, or by both failures.

The Ninth Circuit ignored those undisputed facts and affirmed the District Court. (See *Appendix A*). Because it affirmed the dismissal on administrative exhaustion grounds, the Ninth circuit did not address the parties' other arguments. (Appendix A). And, denied Plaintiff's request for rehearing. (See *Appendix C*).

The lower courts' rulings are in contrast to the Third, Seventh, and Eighth Federal circuit courts that hold administrative exhaustion becomes 'unavailable' when prison officials mislead prisoners during the administrative appeal process. The lower courts' decision(s) also conflict with at least one decision in the Ninth circuit on the issue. Necessitating clarification.

REASONS FOR GRANTING THE PETITION

UNIFORMITY AMONG THE CIRCUITS

I.

The Ninth Circuit's Decision Conflicts with Other Circuit Court Reasoning that Exhaustion Becomes Unavailable When Prison Officials Mislead Inmates about The Administrative Appeal Process. It Also Conflicts With Decisions Within Its Own Circuit. Definitive Guidance is needed on the matter.

Administrative exhaustion is an affirmative defense that must be pled and proven. Compliance with the prison grievance procedure is all that is required (Jones V Bock (2007) 549 U.S. 199, 212-218). Inmates must exhaust "available" remedies (Woodford V Ngo (2006) 548 U.S. 81, 85). Because "no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings"(id. 90-91), proper exhaustion requires "the parties" follow the prison's rules of procedure. (id. 106). Circumstances render administrative remedies not capable of use when prison officials thwart inmates from taking advantage of the grievance process. (Ross V Blake (2016) 578 U.S. 632, 642).

A. The Ninth Circuit's Decision Conflicts With Other Circuit Court's Reasoning.

Based upon the facts, the lower court's decisions are in conflict with, at least, Third, Seventh, and Eighth Circuits that have determined when prison officials mislead inmates' regarding the prison grievance process that administrative exhaustion becomes 'unavailable' and, hence, exhaustion is waived. (*See*, Brown V Croak, 312 F3d 109, 113 (3d Cir. 2003) ("**Brown V**

Croak") (Assuming security officials told Brown to wait for the termination of the investigation before commencing a formal claim, and assuming the defendant never informed Brown that the investigation was complete, the formal grievance procedure was never "available" to Brown); Lewis V Washington, 300 F.3d 829, 833 (7th Cir. 2003) ("***Lewis***") (Non-response makes a remedy unavailable); Miller V Norris, 247 F3d 736, 740 (8th Cir. 2001) ("Miller") (Remedy officials prevent a prisoner from utilizing is not "available".)).

In the Third circuit, in *Brown V Croak,* although conceding that their argument would have no merit *if Brown was told* to wait until an investigation was complete before filing a grievance, the defendant argued that "Brown failed to exhaust his administrative remedies because he did not even attempt to file a grievance for "initial review". (*Brown V Croak,* 312 F3d at 111). While noting "[t]here is an unresolved factual question as to whether he was given these instructions", the Third circuit recognized *Brown's* position as that he "relied to his detriment on the defendant's erroneous or misleading instructions", and stated that the "salient questions at this stage are whether Brown was entitled *to rely on instructions by prison officials that are at odds with the wording of* [prison procedures] and *whether these instructions rendered the formal grievance procedures unavailable to him* within the meaning of 42 U.S.C. § 1997 (e)." (id. at 112). (*Emphasis* added)

The Third Circuit found that assuming prison officials advised *Brown* to wait for the termination of an investigation before commencing a formal claim, and assuming that they never informed *Brown* that the investigation was completed, the formal grievance proceeding required by prison procedures was never "available" to *Brown.* (id. at 113).

Like *Brown*, Plaintiff relied upon what prison officials told him about receiving a separate response and, thereupon, Plaintiff did not submit a separate grievance. Also like *Brown*,

prison officials violated their own procedures by not informing Plaintiff that a separate grievance was required after having told Plaintiff that he would receive a separate response on his force issues.

Whenever prison officials mislead inmates about the grievance procedures administrative exhaustion should always be deemed "unavailable" and the exhaustion defense waived. Accordingly, This Court should grant Certiorari and clarify the matter to ensure uniformity.

B. The Ninth Circuit's decision conflicts with a panel from its own court.

The Ninth Circuit's decision is in conflict with at least one panel from its own court. In *Eaton V. Blewett*, a panel of the Ninth Circuit determined administrative exhaustion was waived because prison officials created the situation. (*See*, Eaton V Blewett, 50 F 4th 1240 (9th Cir. 2022)).

Prison officials created the situation in Plaintiff's case as well by telling Plaintiff he would receive a separate response on his use of force issues, leading Plaintiff to believe he did not have to submit a separate grievance. Additionally, despite being required by prison procedures, prison officials never gave Plaintiff notice of anything different after being informed of Plaintiff's use of force issues and telling Plaintiff he would receive a response.

II.

THE ISSUE IS OF PUBLIC IMPORTANCE

There Exists a Great Public Interest in Ensuring Constitutional Protections For All Citizens, Including Inmates' Right to Petition a Court for Redress of Constitutional Violations and Right To Jury Trial.

The Public has a vested interest to ensure that all branches of Government uphold and defend the Constitution and laws of the United States-even in the case of incarcerated persons' access to court to redress grievances of Constitutional magnitude, such as Eighth Amendment violations as occurred here. That interest is eroded when prison officials' fail to comply with the notice they provide inmates' regarding their prison systems' administrative appeal expectations, such as occurred here where, during a required hearing intended to "clarify" the issues, Plaintiff put officials on notice of force used upon his person and prison officials misled Plaintiff by telling him a "separate" grievance response related to Eighth Amendment use of force claims would be forthcoming and never advised Plaintiff of anything different. Then never provide that "separate response", nor advise Plaintiff he needed to submit a separate grievance on the use of force issues, especially after Plaintiff attempted to contact the high ranking official who told Plaintiff would be receiving a separate response and that official no longer worked for the prison.

Those acts effectively deprived Plaintiff of the right to redress constitutional violations in court when prison officials were granted summary judgement upon the argument that Plaintiff failed to exhaust administrative remedies. Particularly so because Plaintiff's facts describing his being misled by a high ranking official that led him to believe he did not have to file a separate grievance are undisputed.

A. That Right To Petition For Redress Eroded When Prison Officials' Mislead Inmates By Telling The Inmate They Will Receive A Separate Response To Their Constitutional Claims, Implying The Inmate Need Not Pursue Additional Administrative Appeals, Then Fail To Provide A Separate Response And Argue In Court That Issues Are Separate And Were Not exhausted, Effectively Depriving the Right To Redress Constitutional Violations in Court?

Plaintiff's Constitutional right to jury trial on his Eighth Amendment use of force claims against Defendant were infringed upon by a high ranking prison official telling Plaintiff he would receive a separate response to those claims during an appeal hearing, and by prison

officials' failure to advise Plaintiff of anything different that would amount to notice that Plaintiff needed to submit a separate grievance. Plaintiff's access to the court on his claims were further obstructed by prison officials' subsequently arguing in court that Plaintiff failed to exhaust administrative remedies when it was prison officials' misleading Plaintiff to believe he would receive a separate response to the relevant claims he made known to officials that caused Plaintiff to not file a separate grievance. Lastly, the lower courts obstructed Plaintiff's access to the courts by ignoring Plaintiff's *undisputed* evidence that he was misled by a high ranking prison official to believe he need not file a separate grievance on his force issues by that officials' telling Plaintiff he would receive a separate response on that force issue, i.e. leading Plaintiff to believe the issues were being addressed 'in a separate response', and by granting summary judgement in Defendant's favor and against Plaintiff on failure to administratively exhaust grounds..

B. Lower Courts' Deprive Inmate Plaintiffs' of Their Right To Jury Trial By Granting Summary Judgement For Defendant Prison Officials On The Ground That The Inmate Failed To Administratively Exhaust Their Constitutional Claims When *Undisputed* Evidence Shows That, During The Administrative Appeal Hearing Process, High Ranking Prison Appeals Officials Specifically mislead The Inmate Such As By Telling The Inmate They would Receive A *Separate* Response Regarding Constitutional Claims- Implying The Inmate Need Not Submit A Separate Appeal?

Incarcerated Plaintiffs are deprived of their right to jury trial to redress Constitutional claims in federal court when 1) prison officials mislead them into believing grievance claims are being processed then fail to adhere to the claim and subsequently argue in court to dismiss on grounds of failure to administratively exhaust, and 2) when courts ignore undisputed evidence of prison officials' misleading incarcerated Plaintiffs by telling them they will receive a separate response, effectively implying that the issues are being processed, then proceed to dismiss those

Incarcerated persons right to Constitutional protections are indispensable and should not be so easily eroded such as by allowing prison officials to use deceptive means, such as those that occurred in Plaintiff's case, to deprive the right to court redress on the merits. To the contrary, holding prison officials accountable for their unconstitutional acts are the best way to deter them from committing future similar acts. Additionally, doing so aids the incarcerated persons' rehabilitation through fairness by example, showing that all persons are subjected to consequences for their actions. Society cannot expect rehabilitation to occur when the incarcerated population witness prison officials violate the Constitution and laws are treated with impunity and go unpunished.

This Court should provide clarity to ensure all prison officials' misleading of inmate Plaintiff's during the administrative grievance processes are found to make administrative remedies "unavailable". And, that all courts must respect the 'undisputed' evidence. Doing so will also ensure uniformity among the circuit courts.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Date: January 28, 2025.

Andrew R. Lopez

Prisoner Petitioner Pro Per