

No. 17-5420

In the Supreme Court of the United States

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MARVIN BELSER, PETITIONER

V.

BRENDA JAMES, ET AL.

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

BRIEF IN OPPOSITION

Bill Schuette
Michigan Attorney General

Aaron D. Lindstrom
Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
LindstromA@michigan.gov
(517) 373-1124

James E. Long
Assistant Attorney General
Civil Litigation, Employment and
Elections Division

Attorneys for MDOC Respondents
Brenda James, Stephen Mieko, Glenn
Caron, and Robert Napel

QUESTION PRESENTED

1. Whether the Sixth Circuit erred in affirming the dismissal of the complaint under 42 U.S.C. § 1997e(a), where the prisoner failed to complete the administrative review process in accordance with the Michigan Department of Corrections' grievance policy?

PARTIES TO THE PROCEEDING

The petitioner is Marvin Besler, a state prisoner confined in the Michigan Department of Corrections (MDOC). The respondents are Brenda James, Dr. John Austin, Angela Rose, Steve Mieko, Glenn Caron, and Robert Napel. The Michigan Department of Attorney General represents the MDOC respondents (Brenda James, Steve Mieko, Glenn Caron, and Robert Napel). The other respondents (Dr. John Austin and Angela Rose) are contractual employees and are represented by private counsel.

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OPINIONS BELOW

The October 27, 2016 order of the United States District Court for the Western District of Michigan, which granted summary judgment to the MDOC respondents on Marvin Belser's 42 U.S.C. § 1983 complaint, is unreported, but included in the petition appendix. The June 6, 2017 order of the United States Court of Appeals for the Sixth Circuit, which affirmed the dismissal, is also unreported, but included in the petition appendix.

JURISDICTION

The district court had jurisdiction over Belser's claims under 28 U.S.C. § 1331. The court of appeals had jurisdiction to review the district court's final judgment under 28 U.S.C. § 1291. The court of appeals filed its order on June 6, 2017. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1997e(a), enacted as part of the Prison Litigation Reform Act (PLRA), provides:

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

INTRODUCTION

Belser, a prisoner of the Michigan Department of Corrections (MDOC), alleges that the MDOC respondents violated his Eighth Amendment right to be free from cruel and unusual punishment by withholding from him proper medical care, and he alleges that his failure to exhaust these claims should be excused because he was denied access to the grievance process. But while he is correct that such a denial would excuse him from the exhaustion requirement, he failed to present evidence at the summary-judgment proceedings that suggested he was denied access. Rather, the summary-judgment record establishes that he did have access to the grievance process: he filed nine separate grievances during the time period covered by his complaint, taking all steps necessary to exhaust *those* grievances. But for the claims at issue in *this* case, he did not exhaust his administrative remedies, and therefore the lower courts properly granted the MDOC respondents summary judgment because he failed to satisfy the requirement of 42 U.S.C. § 1997e(a) that he exhaust his administrative remedies.

Belser does not allege that his case implicates any circuit split or other issue of broad importance. Rather, he simply seeks error correction based on a fact-bound issue. But no error occurred, and this Court's review is not warranted.

STATEMENT OF THE CASE

A. Overview of MDOC's grievance process

An MDOC policy directive (Directive 03.02.130, "Prisoner/Parolee Grievances," effective 07/09/2007) governs the administrative process applicable to Belser's claims.

(MDOC Defs' Brf. in Supp. of Mot. Summ. Judg., R. 50, Page ID ## 286–92.) The MDOC's grievance policy consists of a three-step process and sets deadlines and requirements for proper exhaustion, such as mandating that the grievant include in the grievance the dates, times, places and the names of all those involved in the issue grieved. (*Id.*, Page ID ## 288–91.)

The policy provides a mechanism for a prisoner who does not receive a response to his grievance: “[a] grievant may file a Step II grievance if s/he is dissatisfied with the response received at Step I or if s/he did not receive a timely response.” (*Id.*, Page ID # 290, ¶BB.) Likewise, the policy provides that “[a] grievant may file a Step III grievance if s/he is dissatisfied with the response received at Step II or if s/he did not receive a timely response.” (*Id.*, Page ID # 291, ¶FF.)

Grievances filed at different steps are not all filed with the same individual: Step I grievances are filed with the Step I Grievance Coordinator, Step II grievances with the Step II Grievance Coordinator, and Step III grievances with the Grievance and Appeals Section of the Office of Legal Affairs in Operation Support Administration (an office located not at the prison in Marquette, but in Lansing). (*Id.*, Page ID # 288, ¶ N.)

B. The district court concludes that Belser failed to exhaust.

Belser filed his federal civil-rights action under 42 U.S.C. § 1983 in December 2015, naming Brenda James, Dr. John Austin, Angela Rose, Steve Mleko [sic], Glenn Caron, Robert Napel, Erica Huss, and K. Giesen as defendants. (Complaint, R. 1, Page ID ## 1–7.) Erica Huss and K. Giesen were dismissed at the screening stage.

(1/26/16 Opinion, R. 5, Page ID ## 21–32.) In his complaint, Belser alleged a variety of Eighth Amendment claims, contending primarily that he was denied appropriate medical care while at the Marquette Branch Prison. (Complaint, R. 1, Page ID ## 4–6.)

In response, both the privately represented respondents (Austin and Rose) and the MDOC respondents (James, Mieko, Caron, and Napel) filed motions for summary judgment based on Belser’s failure to exhaust his administrative remedies. (Austin & Rose Mot. Summ. Judg., R. 45, Page ID ## 195–205; MDOC Defs’ Mot. Summ. Judg., R. 49, Page ID ## 271–84.) These motions focused solely on the failure-to-exhaust issue, consistent with the district court’s case management order. (4/8/16 Order, R. 26, Page ID # 85.)

The magistrate judge recommended granting the MDOC respondents’ motion for summary judgment. (8/12/16 R. &R., R. 57, Page ID ## 307–315.) In his report, the magistrate judge discussed each of Belser’s nine grievances that he filed through Step III of MDOC’s grievance process, and determined that the grievances either did not name any of the defendants as required for proper exhaustion under MDOC’s grievance policy, or were irrelevant to the claims Belser asserted in his complaint. (8/12/16 R. & R., R. 57, Page ID ## 312–15.) In his objections, Belser argued, in part, that he submitted a Step I grievance to the grievance coordinator on or about October 13, 2014, but that the grievance coordinator did not file the grievance, even though Belser received a unique identifying number for the grievance. (Pl’s Obj. to R&R, R.

61, Page ID ## 322–324.) Belser did not identify any other grievances that he claims the grievance coordinator did not process.

The district court adopted the magistrate judge’s report and recommendations. (Order Adopting R. & R., R. 66, Page ID ## 335–338.) In so doing, the district court determined that even if Belser had filed a grievance on October 13, 2014, and had not received a Step I response, he should have appealed the grievance to Step II and Step III under MDOC’s grievance policy to fully exhaust his administrative remedies.

C. The Sixth Circuit agrees that Belser failed to exhaust.

On appeal to the Sixth Circuit, Belser alleged new facts, identifying for the first time grievances that he filed at Marquette Branch Prison that he says were not properly responded to or processed. Specifically, Belser filed a reply brief where, for the first time, he attached documents that he said showed that he filed grievances at Marquette Branch Prison related to the claims asserted in his complaint. (Pl’s 3/9/17 C.A. Reply, C.A.R. 13.) Belser maintained that the prison’s grievance coordinator did not properly respond to or process those grievances and, therefore, administrative remedies were not available to him.

On June 6, 2017, the Sixth Circuit affirmed the dismissal of Belser’s complaint in an unpublished order.

REASONS FOR DENYING THE PETITION

I. The Sixth Circuit did not create a circuit split on what constitutes proper exhaustion when it dismissed Belser’s claims based on the evidence that Belser failed to exhaust the administrative remedies available to him under MDOC’s grievance policy.

While much of Belser’s petition focuses on the merits of his underlying Eighth Amendment claim for deliberate indifference to his serious medical needs, his claims were dismissed solely because he failed to exhaust his administrative remedies, as required by federal law. 42 U.S.C. § 1997e(a). On this issue, Belser contends that the grievance coordinator at the prison obstructed his attempts to file grievances by “denying and destroying and not filing” his grievances and, therefore, the administrative process was not available to him. To be sure, the MDOC respondents acknowledge that a prisoner is required to exhaust only administrative remedies that are available, and that “when prison administrators thwart inmates from taking advantage of a grievance process through machinations, misrepresentations, or intimidation . . . , such interference with an inmate’s pursuit of relief renders the administrative process unavailable.” *Ross v. Blake*, 136 S. Ct. 1850 (2016). But here, notwithstanding the allegations in Belser’s petition, there is no evidence to support his claim that administrative remedies were not available to him.

In the district court, Belser presented no evidence to rebut the MDOC respondents’ evidence that he failed to exhaust any grievance related to the claims asserted in his complaint. Nor did Belser present any evidence to support his claim that the grievance coordinator, or anyone else at Marquette Branch Prison, thwarted his at-

tempts to exhaust his administrative remedies. Accordingly, the Sixth Circuit correctly determined that, “Belser’s generalized statements are insufficient to create a genuine dispute of material fact as to whether the administrative process was available to him at MBP.” (6/6/17 C.A. Opinion, C.A.R. 14-2, p. 4 (citing *Arbuckle v. Bouchard*, 92 F. App’x 289, 291 (6th Cir. 2004) (“[Plaintiff]’s bald assertion that [the grievance coordinator] refused to give him grievance forms is not enough to excuse the complete absence of evidence that he attempted to exhaust his administrative remedies for the many claims he raised in his district court complaint.”).)

And he made matters worse on appeal, by adding evidence that confirmed that he had received a response to his Step I grievance, but he had not appealed that response to Step II or III. In his reply brief in the Sixth Circuit, and for the first time in this litigation, Belser identified several grievances that he filed while at Marquette Branch Prison that he contends were not responded to and/or properly processed under MDOC’s policy. (Pl’s 3/6/17 C.A. Reply, C.A.R. 13, pp. 67–78.) But those documents show that the grievances *were processed and responded* to at the Step I level. In fact, for grievance MBP-2014-10-1807-12D1, which Belser filed on or about October 13, 2014, and which he identified in his objections to the magistrate judge’s R&R, he attached the very responses that he claims he never received. As these documents confirm, Belser received an initial response to his October 13, 2014 grievance from grievance coordinator Glenn Caron dated October 20, 2014, acknowledging that Caron received the grievance, assigned the grievance a grievance identifier (MBP-2014-10-1807-12DI), and that Belser should receive a response to the grievance no later

than November 10, 2014. (Pl's C.A. Reply, C.A.R. 13, p. 68.) Thereafter, Belser received a response to the grievance, which he also attached to his reply brief on appeal. (Pl's C.A. Reply, C.A.R. 13, p. 69.) That Step I grievance response addressed Belser's allegations as follows:

Investigation reveals that, according to the grievant electronic medical record, grievant sent a kite with multiple complaints (breathing, vomiting, neck/spine pain, can't stand or walk, incontinent, need wheel chair, transfer to and from toilet). Grievant was notified that his chronic care appointment was scheduled for the next day. Grievant was a no show for his Chronic Care Appointment on 10/16/14. Appointment was re-scheduled. Grievant does not have a special accommodation for a wheelchair or for any sort of assistance. Grievant may discuss concerns at his chronic care appointment. Note: Video documentation on file that shows grievant getting up from his previously ordered wheelchair and standing, walking, and bouncing his legs. This was after claiming left sided paralysis. [Pl's C.A. Reply, C.A.R. 13, p. 69.]

Throughout this litigation, Belser has contended, without evidentiary support, that the grievance coordinator at Marquette Branch Prison failed to process his grievances and thwarted his attempts to file grievances. But when Belser finally presented evidence related to those grievances, the evidence revealed that the grievance coordinator did not hinder Belser's attempt to file grievances, and in fact responded to them. (Pl's C.A. Reply, C.A.R. 13, pp. 69–81.) (This evidence also undermines Belser's underlying Eighth Amendment claim, by citing a video showing him standing and walking, contrary to his assertion in his petition that he was "unable to . . . stand or walk." Pet. I.) Thus, MDOC's grievance process was available to Belser, and his failure to exhaust his administrative remedies by appealing his grievances through Step III of MDOC's grievance process bars his claims.

To the extent Belser continues to assert that the prison's grievance coordinator failed to respond to his grievances at Step I or Step II (which is not supported by the record), thereby preventing him from filing a Step III grievance, his claim is without support.

And his assertion that the decision below creates an intra-circuit conflict with another Sixth Circuit decision is also incorrect. (Pet., "Reasons for Granting the Petition" section.) At the outset, he does not identify what decision would make up the other half of his alleged conflict. He may be referring to *Boyd v. Corrections Corp. of America*, 380 F.3d 989, 996 (6th Cir. 2004), a case cited in the Sixth Circuit briefing, because *Boyd* provides that the "exhaustion requirement is satisfied where prison officials fail to timely respond to an inmate's written grievance." But *Boyd* is not applicable here, where the grievance coordinator did respond to Belser's grievance and where MDOC's grievance policy in any event allows a prisoner to file a Step III grievance even in the absence of a Step II response.

In *Boyd*, the Sixth Circuit did not consider the language of MDOC's grievance policy, and specifically that portion of the policy that a prisoner may file a Step II (or Step III) grievance if the prisoner does not receive a timely response to a Step I (or Step II) grievance. (*Id.*, Page ID ## 290–291, ¶¶ BB and FF.) Under the grievance system at issue in *Boyd*, the plaintiff had no means of proceeding with the grievance process absent an initial response from the prison, which he did not receive. Here, however, Belser was permitted to file (and required to file to properly exhaust) a Step II and Step III grievance even if he did not receive a timely response to his Step I or

Step II grievance, and that means he did not exhaust all of his administrative remedies.

Boyd is also off point because, again, Belser did receive responses to his grievances that identified his grievances with a unique grievance identifier. In *Boyd*, the plaintiff never received a grievance identifying number or any response at all, and therefore arguably had nothing to appeal to the next grievance step. Here, because Belser had a grievance identifier, he could have appealed to Step III of MDOC's grievance process, using the unique identifier for the specific grievance he was appealing. But he failed to take that step, and so is barred by 42 U.S.C. § 1997e(a) from proceeding with his suit.

CONCLUSION

Belser did not exhaust the administrative remedies that were available to him before filing his complaint. Accordingly, under 42 U.S.C. § 1997e(a), his claims are barred. Notwithstanding Belser's unsupported allegations, he was not prevented from exhausting his administrative remedies. Even if he did not receive a timely response to a particular grievance, MDOC policy still allows (and requires) Belser to pursue his administrative remedies through Step III of MDOC's grievance process. Because administrative remedies were available to Belser, which he did not pursue in accordance with MDOC policy, the district court and the Sixth Circuit properly dismissed his complaint.

This Court should deny the petition for a writ of certiorari.

Respectfully submitted,

Bill Schuette
Michigan Attorney General

A handwritten signature in dark ink, appearing to read "Aaron D. Lindstrom".

Aaron D. Lindstrom
Solicitor General
Counsel of Record

James E. Long
Assistant Attorney General
Civil Litigation, Employment and
Elections Division

Attorneys for MDOC Respondents
Brenda James, Stephen Miekko, Glenn
Caron, and Robert Napel

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