IN THE SUPREME COURT OF THE UNITED STATES

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LORENZO L. JONES, :

Petitioner, :

v. : No. 05-7058

BARBARA BOCK, WARDEN, ET AL.; :

and :

TIMOTHY WILLIAMS, :

Petitioner, :

v. : No. 05-7142

WILLIAM S. OVERTON, ET AL. :

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Washington, D.C.

Monday, October 30, 2006

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:06 a.m.

APPEARANCES:

JEAN-CLAUDE ANDRE, ESQ., Los Angeles, Cal.; on behalf of the Petitioner.

LINDA M. OLIVIERI, ESQ., Assistant Attorney General, Lansing, Mich; on behalf of the Respondents.

C O N T E N T S

P R O C E E D I N G S

(11:06 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Jones versus Bock, and Williams versus Overton. Mr. Andre.

ORAL ARGUMENT OF JEAN-CLAUDE ANDRE

ON BEHALF OF THE PETITIONER

MR. ANDRE: Mr. Chief Justice, and may it please the Court:

In these three cases, each of the three Petitioners filed administrative grievances with the Michigan Department of Corrections. The Michigan Department of Corrections conducted investigations and issued final decisions on the merits of Petitioner's grievances. Nevertheless, a year and a half later, each of the Petitioner's complaints was thrown out of Federal court without leave to amend because Petitioners failed to satisfy on of the Sixth Circuit's judge-made corollaries to the PLRA's exhaustion requirement. None of those three corollaries find any meaningful support in the Federal Rules of Civil Procedure, in fact they contradict the Federal rules. Nor do they find any support in administrative law or habeas law, the two areas of law to which this Court looks for guidance in interpreting the Prison Ligitation Reform Act.

Finally, the overwhelming majority of the circuits that have considered these questions have rejected them all.

I'd like to begin with the heightened pleading rule that the Sixth Circuit applied here. The Federal Rules of Civil Procedure require a plaintiff to simply provide a short claim statement of the basis on which his or her claim will lie. The Federal Rules of Civil Procedure do enumerate certain kinds of allegations that a plaintiff must plead with specificity, those are enumerated in Federal Rule of Civil Procedure 9(c), but exhaustion is not one of them. Accordingly --

JUSTICE KENNEDY: Suppose the district court finds that in its experience, 80 percent of the claims are ones that are unexhausted, just assume that. And the district court said, the only way I can figure out the good 20 percent from the 80 percent that are ultimately going to be dismissed is to have a motion for a more definite, an order for a more definite statement, because I'll do it sua sponte under 12(e), I think. Can the district court do that?

MR. GRANT: I think that would be correct, and that would be consistent with this Court's habeas jurisprudence.

JUSTICE KENNEDY: The court could ask for a

pleading which set forth the facts of exhaustion?

MR. ANDRE: I believe that's true.

JUSTICE KENNEDY: Then why isn't this -- this is just the same if the court has said, you know, in order to make our screening function efficient, we just have to know about exhaustion.

MR. ANDRE: Well, first of all, when Congress created the various screening provisions in the PLRA, it noticeably omitted exhaustion. It clearly had exhaustion in mind when it enacted the PLRA. The term "exhaustion" appears both in 42 U.S.C. 1997(e)(A) --

JUSTICE KENNEDY: Well, but I mean, if you concede the district court could do it on an individual cases or in most cases, why can't the Sixth Circuit do it? That's my question.

MR. ANDRE: Well, what sets the Sixth Circuit's rule apart from I think the hypothetical you propose, and also from this Court's habeas jurisprudence is that in both of those scenarios the plaintiff, the prisoner, is given a chance to respond. In the Sixth Circuit, if they don't satisfy the heightened pleading rule at the minute at the instance that they file their initial complaint, they are out. There is no leave to amend, and that's what happened in this case.

In Petitioner Jones' case, he filed the

complaint and he actually did allege that he exhausted his administrative remedies. He said: I exhausted my administrative remedies, I filed my step one grievance on this date, I received a denial on that date, and he went down the list through all three steps.

JUSTICE ALITO: The briefs point out that a number of district courts have form complaints that are often used in these cases and that these forms call on the prisoner-plaintiff to address the issue of exhaustion. Now, do you think there's something wrong with those forms, and if a prisoner fills out the form and reveals in filling it out that a claim was not exhausted, is it improper for the district court at the screening stage to dismiss the case?

MR. ANDRE: With respect to the form, I don't think that the form is improper, but I think it would be improper for a court to dismiss the prisoner's case if the prisoner failed to fill out the section of the form that asked him about exhaustion because exhaustion is an affirmative defense in both administrative law and habeas, and there's no indication in this statute that Congress --

JUSTICE ALITO: If it's an affirmative defense, then why is it -- why is it proper for a district court, for a district court, to have a form

that calls on the plaintiff to negate the affirmative defense?

MR. ANDRE: I think the district court can ask the plaintiff pretty much whatever the district court likes. But whether the district court could, could dismiss a case for failure to comply, failure to respond to that question, that's another matter.

CHIEF JUSTICE ROBERTS: Well, we know under the statue they can dismiss a case because it's frivolous, right?

MR. ANDRE: Absolutely.

CHIEF JUSTICE ROBERTS: Regardless of the substance of the claim on the merits, if you know that you've just ignored the exhaustion requirement isn't that a frivolous claim?

MR. ANDRE: We would certainly concede that if it is clear on the face of the complaint that a prisoner has not exhausted his or her administrative remedies then that claim can be dismissed. I guess the way it would operate -- and I haven't seen a case like this -- but it would be where a prisoner says, I didn't exhaust my administrative remedies and I have no excuse for failing to do so, but please, district court, take mercy on me. And in that situation the district court could say, there's absolutely no way you can

possibly prevail on the merits, so your claim --

JUSTICE BREYER: Probably the reason they do this is that there are lots and lots of claims by prisoners in Federal courts that are hard to decipher. They don't know what it's about. They don't want to put the defendant to the burden of coming in in every single complaint when it's quite a good probability it's about nothing. That's the kind of reasoning that would lead to a rule like this. So -- and then you have the statute and the statute says indeed there's a special power here to dismiss if it's frivolous or it doesn't state a claim or malicious.

So why isn't this just an exercise of the Sixth Circuit's or a court's ordinary subsidiary rulemaking powers? They're trying to figure out how to manage their docket.

MR. ANDRE: The problem is that it conflicts with Federal Rule of Civil Procedure Rule 8. And as this Court this repeatedly said, including as recently as last term in Hill v. McDonough, the Court will not impose a heightened pleading requirement absent an amendment to the Federal Rules of Civil Procedure.

JUSTICE BREYER: So your point would be that they can do this if we amend the Federal Rules. If it's a problem take it to the Rules Committee?

MR. ANDRE: I think that's correct. I think that's correct, but if it --

JUSTICE SOUTER: If we amended the rules that way, in effect it would no longer be an affirmative defense. I mean, by definition an affirmative defense gets raised by the defendant and so on, so if we amended the Federal Rules in practical terms it would be like adding an element to the claim.

MR. ANDRE: Right. Or if the Court were to add PLRA exhaustion to the Rule 9(c).

CHIEF JUSTICE ROBERTS: But Rule 8 and the normal rules weren't addressed to the unusual situation under the PLRA where the district court has an affirmative obligation to screen on its own before the defendant even gets involved. So if in fact, just to follow on Justice Kennedy's hypothetical, 80 percent of the cases have this exhaustion problem, why isn't this a reasonable means of facilitating the screening obligation?

MR. ANDRE: It may be a reasonable means, but that doesn't necessarily mean that it's permissible, because Congress had exhaustion in mind when it enacted the PLRA and noticeably absent from all the PLRA screening provisions is the term "exhaustion."

CHIEF JUSTICE ROBERTS: Well, but you just

told me earlier that if it was a case in which exhaustion is required and not done that would be a frivolous claim, and the statute does refer to frivolous claims. So the district court or the Sixth Circuit has just said, we know that in a large number of cases they are going to be frivolous because they have ignored the exhaustion requirement, and we just want to try to find out which those cases are to fulfill the screening obligation, which takes this out of the normal Rule 8 type of case.

MR. ANDRE: Right, I think I understand. I think it goes back still to the fact that there's not a clear Congressional expression to take these cases out of the Federal Rules. In Califano v. Yamasaki we believe is instructive on that point. In that case the Secretary of the Department of Health Education and Welfare had argued that section 205(g) of the Social Security Act, which used the term "individual," somehow took those, those judicial review proceedings, out of the operation of Federal Rule of Civil Procedure 23, the class action provision. This Court said: No, we cannot read the word "individual" as such a clear expression. It may have been Congress's policy to have individual claims be addressed one by one, but you have to find that clear expression in the statute and that clear expression is not here.

JUSTICE ALITO: Well, what about 1997(e)(G) which, which prohibits, seems to prohibit a case from getting beyond the complaint, not even to the answer unless the district court finds that the plaintiff has a reasonable opportunity to prevail on the merits. Doesn't this clearly take this out of the normal pleading procedures?

MR. ANDRE: I don't think so, Justice Alito. We have exhaustively researched that language, the reasonable opportunity to prevail on the merits language of 1997(e)(G), and the only courts that construe that language are courts construing 1997(e)(G) and they have universally found that that provision simply summarizes the other screening provisions' terms, so, frivolous, malicious, fails to state a claim, or seeks -- from an immune defendant. And we can't really think of what, what else Congress would have had in mind because while it's like the preliminary injunction standard it makes no sense that Congress wanted a prisoner to satisfy a preliminary injunction standard before requiring prison officials to respond.

JUSTICE SOUTER: Would your answer be different if amendment were allowed? I mean isn't the problem in substance here, quite apart, and I don't mean to dismiss your arguments from the rules, but leaving the argument

from the text of the rules aside, it wouldn't be a real problem here in substance if the circuit law allowed amendment, would there be?

MR. ANDRE: I think if the circuit were to, Sixth Circuit were to allow amendment it would certainly mitigate the situation. It's our position that the screening provisions can't overrule Federal Rule of Procedure 15 either, but the problem we see with even doing away with the no amendment rule, but keeping in place the heightened pleading rule, is that we are talking about prisoners. Prisoners who don't have a lot of access to materials. They may have -- legal materials. They may have great difficulty holding on to their, their formally filed grievances.

JUSTICE GINSBURG: Mr. Andre, didn't you have in one of these cases that the exhaustion was spelled out by the defendant, there was a complaint that alleged exhaustion, generally but not in all detail. Then the answer attached every piece of paper that came up at all three levels of the grievance procedure, and then the plaintiff said oh, that's a good idea, I'm going to copy all those documents and make them my own. And nonetheless, that case was dismissed for failure to allege exhaustion in sufficient detail although the record made it plain that there had been exhaustion.

The rule that you are opposing would operate that way. If you don't allege exhaustion in detail, it doesn't matter that the deficiency has been made up by the answer. You go out. Wasn't that the decision in one of these cases?

MR. GRANT: Yes. That was in Petitioner Jones's case, and that -- Petitioner Jones's case is a great example of how both the heightened pleading rule and the no amendment rule work together to result in a prisoner being unable to cure any problem with his or her initial complaint.

CHIEF JUSTICE ROBERTS: You talk about the lack of statutory direction on the first two points but there is a very explicit statute on the third question. It says no action shall be brought until administrative remedies are exhausted. And yet you say the action should be allowed to be brought even if there are unexhausted claims in the complaint.

MR. ANDRE: Well, I -- we concede that an action that contains unexhausted claims or a mixed action shouldn't have been brought in the first place, but it's there. And the question then becomes what to do about it. And the language no action shall be brought; it's very common in administrative exhaustion schemes, the Americans with Disabilities Act uses almost

identical language, the Immigration Nationality Act uses very similar language, Title VII --

CHIEF JUSTICE ROBERTS: This is a very different statutory scheme. This is designed to address the problem of an overwhelming number of frivolous complaints that result in the fact that meritorious complaints can be overlooked. We've got a haystack in a needle problem here. And if you allow the action to continue, that doesn't do anything to reduce the number of filing of claims that as you say should not have been brought.

MR. ANDRE: I guess I should be clear at the outset that we are by no means advocating that a prisoner can shoe horn in unexhausted claims with exhausted claims. So the unexhausted claims must go.

CHIEF JUSTICE ROBERTS: Well right, but you provide under your approach no incentive for the prisoner to leave those claims out. Instead what, a screening function turns into an editing function. The district court is supposed to just excise out the unexhausted ones but allow the exhausted ones to continue.

MR. ANDRE: Well, it's been our experience and from reading the case law it appears that prisoners don't intentionally try to shoe horn in unexhausted

claims with their exhausted claims. It's typically based on an innocent mistake, a failure to understand either the particular circuit within which they are housed, a difficulty in understanding that circuit's exhaustion law, difficulty in understanding the prison grievance procedures that they attempted to comply with, and perhaps even being further confused by the fact that prison grievance administrators seem to apply prison grievance regulations, I don't want to say in an ad hoc manner, but inconsistently. And so when they bring these complaints that are mixed they actually are intending to bring a fully exhausted complaint but then after a little bit of judicial review, it becomes clear that they didn't exhaust.

JUSTICE BREYER: Why does it hurt if you dismiss the whole thing? They could just refile.

MR. ANDRE: Well, it hurts for a couple of reasons. Well -- and -- it hurts under the Sixth Circuit's rule because they do not allow prisoners to amend. So --

JUSTICE BREYER: No. No. What would happen is you just dismiss the complaint.

So -- I guess again the reason they have these things is they get a certain number of complaints, they have no idea what it sys, to tell you the truth,

they don't know what the claim is, they don't understand it, there are a lot of things written here; the person wasn't represented; it's hard to make out. And for, the judge thinks I have to go through all these papers; I have to figure out if there is something here that was exhausted, we know something happened; it was something exhausted -- so the simplest thing is just dismiss it.

Now the prisoner can always refile it with the parts that he has to now figure out were exhausted. Now is -- and it doesn't hurt because, just refile it.

MR. ANDRE: It doesn't hurt if the --

JUSTICE BREYER: Is that true? Or what happens?

MR. ANDRE: Well, I guess there is two different versions of the total exhaustion rule as it's termed. There is the Eighth Circuit's rule with is with leave to amend. So the complaint is dismissed, and prisoner can file a new complaint without the unexhausted claims.

Then there is the Sixth Circuit's rule, which is the most draconian of all the versions. And that says the entire action is dismissed, prisoner must institute a new action.

CHIEF JUSTICE ROBERTS: Why is that draconian?

MR. ANDRE: It's draconian because by the

time the prisoner refiles his or her action there could be a statute of limitations problem. The prisoner may not be able to bring those claims any more. In fact the Fifth Circuit in --

JUSTICE STEVENS: Does he have to file a new filing fee?

MR. ANDRE: Not in the Sixth Circuit anymore, and not in the Fourth Circuit.

CHIEF JUSTICE ROBERTS: How many prisoners pay the filing fee in the first place?

MR. ANDRE: I believe they all do. If they qualify --

CHIEF JUSTICE ROBERTS: They are not entitled to IFP status?

MR. ANDRE: If they get IFP status, all that means -- well, first of all, they only get to do that three times. Or to have three actions dismissed before they lose their IFP status.

CHIEF JUSTICE ROBERTS: Is that a draconian rule, do you think? You have to have three actions dismissed before you have to pay the filing fee?

MR. ANDRE: No, no, no. I mean -- but that's not really at issue in this case. But even if they qualify for IFP status they still have to pay the $350 filing fee. It's just taken out in installments.

And so for a prisoner who makes $2.50 a day or $2.50 a week it -- it is costly for them to --

JUSTICE SCALIA: Well, I guess this is probably not a question for you, but a question for your friend on the other side. You can ask, why does it hurt? You can also ask why does it help? What good does it do to bounce the whole thing back when you're just going to have them filed again?

MR. ANDRE: I think that's exactly right, Justice Scalia.

JUSTICE BREYER: No, well, the reason it would hurt is because it's difficult for the judge to go through this complaint that he can't quite make sense out of. And it puts the burden of the prisoner to go through and figure out what he really wants to say. That's why -- that's why it's easier for the judge just to dismiss it than to go through many, what could be many pages with a fine-toothed comb trying to figure out if there is anything here that was exhausted.

CHIEF JUSTICE ROBERTS: And the other incentive is if you adopt your rule, the incentive on the prisoner is to put in every possible claim, even if it is not exhausted because maybe it will get through, maybe it won't. And if it doesn't get through, no harm. He doesn't even have to pay another $50.

MR. ANDRE: But I think at least, at least under that scenario, the district court still only has to take one look at the case and then it can move forward, it deletes the unexhausted claims. So from a judicial efficiency standpoint I think the Ortiz V. McBride rule out of the Second Circuit, which is the rule that we are advocating, is -- is the cleanest approach. It takes the choice away from the prisoner; it puts the choice with the district court, and it allows the district court to delete off any unexhausted claims. And in most instances post Woodford v. Ngo --

JUSTICE KENNEDY: Is there any argument that if the State does not insist on exhaustion or plead exhaustion, that it just drops out of the case? If the State resolves the case on the merits even though there is no exhaustion, can the Federal court hear it, is there general agreement about that?

MR. ANDRE: I think there is. The circuits before Woodford v. Ngo were unanimous that PLRA exhaustion is not jurisdictional, and in Woodford we know this Court confirmed that. And so to the extent that the PLRA exhaustion is an affirmative defense, then it would operate like other exhaustion schemes in administrative -- administrative law, and habeas, where it is waivable by the other side.

JUSTICE GINSBURG: If -- if we accept your first two arguments, then if there is no heightened pleading rule and you don't have to name the specific defendants in the administrative grievance that you end up naming in the complaint, if you prevail on both of those, then isn't the third question, have you, what happens when you haven't properly exhausted, is really not live anymore in this case, because you will have properly exhausted. So why should the Court go on to answer what would happen if you hadn't properly exhausted?

MR. GRANT: Respectfully, Justice Ginsburg, it's unfortunately more complicated than that. If the first question in the Jones case, the heightened pleading rule question, is resolved in favor of Petitioner Jones, then total exhaustion is a live issue. Because the Sixth Circuit as an alternative holding justified the dismissal of Jones's complaint on the total exhaustion ground. And I guess on the other side if the Court were to resolve the identifying the defendant's issue against Petitioner --

JUSTICE GINSBURG: But the Sixth Circuit obviously would have been wrong; if he has totally exhausted; they have, gave that as a no alternative grounds, but if they are wrong on the first one and he

has exhausted. That's the end of it.

MR. GRANT: The Sixth Circuit -- and it's not really clear from this opinion, because it's an unpublished opinion, but the Sixth Circuit appears to have adopted the magistrate judge's finding which was based on Respondent's motion to dismiss that Jones substantively, for lack of a better term, didn't exhaust all of his claims, so -- I'm sorry if I'm not being clear.

JUSTICE GINSBURG: That was the case where the, where the defendant estate, wasn't that the case where they put in all the papers from the administrative record?

MR. ANDRE: Yes. But they also argued that Jones failed to exhaust his administrative remedies on everything but his First Amendment retaliation claim. Or what they termed his negative work --

JUSTICE GINSBURG: Yes, but they were wrong about that. If, if there was exhaustion in the case, and if there is no rule that you must name every single defendant that you end up suing, if those two are established, again wouldn't we be dealing with a moot question? Moot in this case?

MR. ANDRE: I don't think so, Justice Ginsburg. I think in order for the total exhaustion

issue to be moot, the heightened pleading requirement would have to be resolved against Petitioner Jones, and the naming the defendants issue would have to be resolved in favor of Williams and Walton. I charted out on a matrix and verified it a couple of times.

Turning to the naming issue if I could, since we haven't addressed that yet, the Prison Litigation Reform Act simply sets a floor of how much specificity a prisoner must provide in his or her grievance. It does not require what the Sixth Circuit held here which is that as a matter of Federal statutory law a prisoner must have identified every individual who he or she later sues in Federal court. This is a kind of endemic, or flows logically from the Court's decision in Woodford V. Ngo. Woodford v. Ngo says that prisoners must comply with grievance procedures.

JUSTICE SCALIA: You would have no problem, I assume, if the State simply requires that you name the individuals?

MR. ANDRE: I guess broadly speaking no; in certain cases yes.

JUSTICE SCALIA: To the extent possible, I suppose.

MR. ANDRE: Right. Exactly. If -- in Michigan they have a --

JUSTICE SCALIA: Then, then there would not be exhaustion unless he had named the individuals.

MR. ANDRE: I believe that's correct. I mean, although I guess --

JUSTICE SCALIA: So we may not be, may not be litigating about a whole lot here.

MR. ANDRE: No, right. I think really the question is an X or not X question. It's does the PLRA as a matter of Federal statutory law require individuals to be named in the underlying grievances, and the PLRA is entirely silent on that question, and this Court's decision in Sims v. Apfel lends further support to the proposition that a Federal court cannot go beyond what the particular administrative agency's rules require. I realize that was a plurality decision but I think the Petitioners win under either the plurality opinion or under Justice O'Connor's concurrence. And so yes, Justice Scalia we agree with you that it's simply an X or not X question that down the road perhaps the Court could address the scenario where a prison system amends its rules to require individual defendants to be named and then perhaps a prisoner can't comply with that based on the short grievance filing deadlines, and then there is a question of whether the administrative remedies were actually ever available to

that particular prisoner.

JUSTICE GINSBURG: And you have in one of these cases, the person has said: I didn't know who was the person who said I couldn't have the operation until the prison identified him.

MR. ANDRE: That's correct. I believe you're referring to either the Williams or the Walker --

JUSTICE GINSBURG: Yes. So even if you had a rule, a reasonable rule, that named the people that you know, if you have it, that would not encompass someone? In two of these cases, the defendants -- the plaintiff, the prisoner, said, I didn't know who those guys were until they were identified.

MR. ANDRE: Right. And to that extent the prison grievance system worked, because the prisoners provided as much detail as they possibly could and then the prison grievance system went out, conducted its investigation, broadened the universe of relevant facts, and then made a determination. They happened to determine that Petitioner's grievances were not meritorious. Obviously, Petitioners disagree with that assessment. That's why they sued in Federal court.

But the prison grievance system worked. To borrow from the Third Circuit's decision in Spur v. Gillis, a cooperative ethos between inmate and jailer

was achieved, because so long as the prisoner provides sufficient information for the grievance system to go out and answer any unresolved questions and so long as the prison grievance system avails itself of that opportunity then the claim is exhausted.

If there are no further questions, I'd like to save the rest of my time for rebuttal.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Andre.

Ms. Olivieri.

ORAL ARGUMENT OF LINDA M. OLIVIERI

ON BEHALF OF RESPONDENTS

MS. OLIVIERI: Mr. Chief Justice and may it please the Court:

Congress enacted the Prison Litigation Reform Act to deal with the flood of prisoner litigation that was coming into the Federal courts, obscuring the treatment for meritorious claims brought by all litigants. The purpose of the act was to unburden the courts from dealing with this flood of litigation that largely was without merit. The purposes for the act were to increase the quality of the litigation, decrease the quantity of the litigation, allow the States to address first the issues that the prisoners have problems with and to develop an administrative record to

facilitate judicial screening. And all of this would result in increased judicial resources for all litigation that has potential merit.

The invigorated exhaustion requirement does require total exhaustion. The statute, the words of the statute itself confirm this. The statute states: "No action shall be brought until" --

JUSTICE STEVENS: May I ask you, what is a typical administrative record that is developed in these proceedings? There's never a transcript, is there?

MS. OLIVIERI: I've never seen a transcript. Typically it's one sheet of paper. The inmate states what the problem is, states what he did to try to resolve the problem before filing a grievance. And then there's space at the bottom for response. Frequently the response is right on that page. Sometimes the response indicates "See attached." If there's a lengthier response there may be a separate page.

Similarly, if the prisoner can't put all of his --

JUSTICE STEVENS: Is there normally a statement of reasons for the denial of relief or are they just denied in many cases?

MS. OLIVIERI: For the most part they attempt to address the issue.

JUSTICE STEVENS: Are the opinions a page or two or just a sentence or two? What is typical?

MS. OLIVIERI: Typically they are --

JUSTICE STEVENS: I'm just wondering how, how much help that will give the judge later on in processing the case.

MS. OLIVIERI: In the last 12 months there have been 13,000 grievances processed by the Michigan Department of Corrections at the third step, and that's for people who appeal all the way through to the third step. So there are many more than that before that. Some of the responses can be very detailed. They can go on for a full page typewritten single spaced. Some of the responses --

JUSTICE STEVENS: How many of the 13,000 are of that variety?

MS. OLIVIERI: I haven't read all 13,000, but typically the response would be about a half a dozen lines.

JUSTICE STEVENS: I see. And the other question: Of the 13,000 grievances, how many did result in litigation?

MS. OLIVIERI: Last -- in the last year that ended June 30th, 12 months, we had approximately 200 cases.

JUSTICE STEVENS: 200 out of 13,000?

MS. OLIVIERI: Correct. In the previous years we had somewhat fewer, so it's sort of going up. But you know, it's between 160, 180, 200. This year we're on that same pace, approximately 200.

JUSTICE STEVENS: Can you explain what the disincentive or other reasons for there being just 200 lawsuits out of the 13,000?

MS. OLIVIERI: These 200 are ones that we were served with. That doesn't include the ones that may have been screened out by the courts and we were never served with them.

JUSTICE KENNEDY: I see.

MS. OLIVIERI: This only includes ones where a defendant was actually served with process.

JUSTICE BREYER: Basically, I mean you've heard the question and so forth. It seems to me that my questions and probably others were based on certain empirical premises that might be true, might not be true. So why isn't this a question for the Rules Committee? Why not go to the Rules Committee if this really is a burden and so forth, rather than doing something unusual, which is to make exhaustion something other than an affirmative defense, to dismiss the whole complaint, have what appear to be rules that reached

draconian results in a few cases anyway.

MS. OLIVIERI: When it's a dismissal without prejudice, it's improper to characterize it as draconian.

JUSTICE BREYER: It could be, because the statute of limitations could have run. So it depends. Sometimes it is, sometimes it isn't. But my basic question here, isn't this a matter for the Rules Committees rather than for the Sixth Circuit to go off on its own?

MS. OLIVIERI: This Court in Neitzke versus Williams took a look at the previous version of the in forma pauperis statute and that statute allowed sua sponte dismissals for only two reasons, frivolous and malicious cases. Under that, in that opinion, the Court indicated that when it's a sua sponte review for those two issues you don't get the benefit of the adversary process that's embodied in the Federal Rules of Civil Procedure. Congress, recognizing that even in Neitzke the Court indicated that the Federal courts were being flooded with prison litigation, much of it meritless, expanded the categories that are now subject to sua sponte dismissal, and those include suing someone who is immune from liability or failing to state a claim.

JUSTICE GINSBURG: But that doesn't include

failure to exhaust.

MS. OLIVIERI: It doesn't specifically include failure to exhaust.

JUSTICE GINSBURG: And if you follow the normal rule, that that's an affirmative defense, then, then the burden would be on the prison to do just what it did in the Jones case. Why, why would we say, depart from the normal rule that makes exhaustion an affirmative defense when we know that the party best equipped to provide the information about exhaustion is the prison, as the Jones case showed so well? They, the prison, had all of the grievances. They had all of the responses and they presented that to the court. So the prisoner is less well equipped to attach those papers than the prison is, so why isn't it not only traditional to have exhaustion as an affirmative defense, but makes the most sense because the one most likely to have the information is the prison?

MS. OLIVIERI: Congress dealt with that in 1997(e)(G), the waiver of reply provision, which confirmed what the 1997(e)(C) dismissal provision provides. This is all a screening situation for the Federal district courts, designed to move these cases that have been proven largely meritless quickly through the system rather than bogging the courts down --

JUSTICE GINSBURG: If Congress meant to reverse the ordinary burden on pleading exhaustion, why didn't it put that in? It was expanding the categories and it included failure to state a claim, which had not been there before, and it included if you sue somebody who has got immunity. But it didn't include exhaustion, so why should we read that in?

MS. OLIVIERI: Well, exhaustion is the very first provision and it's --

JUSTICE GINSBURG: It's not in the screening. It doesn't say you screen out for failure to exhaust.

MS. OLIVIERI: It's not specifically there, but the exhaustion provision is a precursor. It's a precondition. You can't even get into court until you've exhausted because it says no action shall be brought.

JUSTICE GINSBURG: But there are other provisions than "no action shall be brought." Take a statute of limitations that reads "No action shall be brought after two years" or something like that. There is no action shall be brought. Does that make it no longer an affirmative defense?

MS. OLIVIERI: The courts have interpreted statutes of limitations consistently to be in the

category of an affirmative defense. The problem with that is this statute, the PLRA, is the new regime for prison litigation, not for all the litigation across the board. And in the waiver of reply, the Congress specifically took the defendant out of the equation, requiring the court to determine whether or not the case has been exhausted, whether or not the plaintiff has failed to state a claim and the other criteria that are all in that --

JUSTICE GINSBURG: Well, all the criteria are there, but failure to exhaust is not.

MS. OLIVIERI: Not specifically, but failure to exhaust could be construed as a --

JUSTICE GINSBURG: But last time -- and you said before the statute was there were only frivolous and malicious. And the court says, we could see from the face of this complaint that it fails to state a claim, too bad it's not a ground for automatic dismissal. So Congress said, yes, it should be, and put that one in.

MS. OLIVIERI: Congress put the screening provision as number one, where you cannot even bring a case to court unless you have exhausted administrative remedies. So it's unimaginable that that would not be a ground for sua sponte dismissal when you can't even bring the case until you've exhausted.

JUSTICE SCALIA: Miss Olivieri, you also rely on the "no action shall be brought" language to justify dismissal of the entire action, all claims, even though only some of them have not been exhausted. Do you have any, even a single example of the many other instances where that language is used in the Federal statutes? And there are many of them. Do you know any other case where it's been interpreted that way, so that claims that are perfectly valid will not be retained, but rather the whole action will be dismissed?

MS. OLIVIERI: Habeas corpus is another situation where there is a provision that says no relief shall be granted, no writ shall be granted, absent exhaustion of -- exhaustion of State court remedies. There in the habeas situation, it is a little bit different than in the PLRA -- pardon me -- because there is a stay in abeyance provision in habeas --

JUSTICE SCALIA: Right.

MS. OLIVIERI: -- which was in the statute before Congress passed the PLRA, and Congress actually took out the stay in abeyance provision.

It all serves the purpose that Congress intended, which was to allow the courts to quickly screen these cases. If you look at (e)(A)(c)(1) and (C)(2), they give the court many options for doing what

is most judicially prudent in that particular case to preserve resources.

JUSTICE SCALIA: What is the basis in the habeas context for dismissing the entire habeas application despite the fact that some of the claims have been exhausted? Is there any statutory basis for that or is it just, just judicial efficiency?

MS. OLIVIERI: There is -- I believe it's under the exhaustion requirement. The court has the option of dismissing the entire action -- actually, I believe there the Petitioner gets the option, do they want to proceed on the exhausted claims or do they want to drop out the unexhausted claims.

JUSTICE GINSBURG: And that's not -- the statute doesn't settle that. Our decisions settle that, right? So why should we deal with that, the two, any differently? It's not as though Congress wrote the statute differently. We said you can't proceed with unexhausted claims, so you have a choice. Either you go out of the Federal court and exhaust everything -- or even you don't have to go out; you could use the stay in abeyance -- or you just lop off the unexhausted claims, stay in the Federal court on the ones that you have exhausted.

That's all made up by this Court. So why

should the Court react differently in the PLRA than it did? Why should it fill those gaps differently than it did in habeas?

MS. OLIVIERI: I think because Congress did revoke the stay in abeyance provision in the PLRA.

JUSTICE SCALIA: But your answer was it shouldn't, I think. I think she's making your argument for you.

MS. OLIVIERI: Pardon me?

JUSTICE SCALIA: I think she is saying that we should treat this area the same way we treat habeas, so that the whole case should be dismissed rather than just the individual claims, which is what I think you want?

MS. OLIVIERI: Yes, that is my argument, yes.

JUSTICE SCALIA: Okay. Well, don't fight it.

JUSTICE GINSBURG: I was suggesting that in habeas it is the prisoner's option to say I don't want the whole case dismissed. I will amend my petition so that the court will have, will retain the exhausted claims. You are saying not like habeas, I don't want it to be like habeas, because if it were like habeas, the prisoner would have the option to stay in the Federal

court as long as he lopped off the unexhausted claims. You don't want it. You don't want it to be like habeas?

MS. OLIVIERI: I don't want the prisoner to be allowed to choose to lop off the unexhausted claims, that is true, or to amend, to delete them, because then there is absolutely no incentive for the prisoner to improve the quality of the litigation by stopping and thinking, being careful to exhaust all his claims, and being careful to plead only claims that are exhaustive.

JUSTICE SOUTER: The same arguments apply in habeas, don't they?

MS. OLIVIERI: But in habeas you have the stay and abeyance provision that was specifically removed --

JUSTICE SOUTER: Not if you had your way.

MS. OLIVIERI: Remove -- well --

JUSTICE SOUTER: I think you're making an argument that it would preclude that too.

MS. OLIVIERI: Right.

JUSTICE SOUTER: So it seems to me that if we accept your response to Justice Ginsburg, we've got to go back and to the extent that we can do anything about it, we'd better toughen up habeas so that these things get thrown out more readily.

MS. OLIVIERI: Habeas does deal with a

person's liberty whereas the PLRA is simply dealing with people basically for the most part trying to get some sort of relief, either injunctive or monetary relief, that does not deal with their basic freedom. So in that respect --

CHIEF JUSTICE ROBERTS: One reason to require total exhaustion is because, I would assume the prisoner may get sufficient relief if the claims are exhausted, that he doesn't feel the need to go forward with litigation. But I guess that's only true if the exhausted claims are still alive, and how many, when we're talking about unexhausted claims, are those typically claims that are not going to be available or are they claims that may generate relief once there is exhaustion?

MS. OLIVIERI: It could be -- I mean, it's obviously both. I mean, there are claims that are partially exhausted when the inmate files the lawsuit. He may finish exhausting and get the relief that he's looking for without ever pursuing the case in Federal court.

JUSTICE SCALIA: And sometimes it's impossible to complete the exhaustion. I assume in some cases that the time limit for the last appeal will have expired, right?

MS. OLIVIERI: That can also be the case, and under Woodford versus Ngo, now that they have to do proper exhaustion, there will be more of those cases where it probably, there wouldn't be anything left to do after it's dismissed except for the plaintiff to be the one to go through the maybe 20 claimed complaints and call out the claims that are not exhausted, rather than putting that burden on the court, which is contrary to Congress's purpose, to streamline this system.

JUSTICE STEVENS: May I ask you about, there's another question you haven't really touched on yet, the requirement that the prisoner name every defendant that he intends to sue in the exhausting, in the internal procedure. I'd just like a little help on just exactly what happens. The prisoner doesn't get the kind of medical care he thinks he's entitled to, and he only knows it because either the low level person says no, the doctors said you can't have it. And he brings a proceeding, an informal administrative proceeding, and they deny relief. And then later on when he wants to sue, his lawyer happens to find out the name of the doctor who was involved, and there are several levels of authority making the decision. Does he have to start all over again to name those people, or what does he do?

MS. OLIVIERI: Medical care is -- well, for

one thing, prisoners do have counselors, and so if they're not sure who is responsible for something, that's one of the things that they're supposed to do is talk to their counselor to find out. You know, I'm having this problem, I'm not getting surgery, why am I not getting surgery, who do I talk to, who do I complain to. So that's one way to resolve the problem.

JUSTICE STEVENS: And what if he does talk to the prison guard and the guard says I don't know, I don't know who's responsible for that decision, that's in the warden's office, or something like that. What is the prisoner supposed to do?

MS. OLIVIERI: If the prisoner makes inquiry and just simply can't find out who it is, then he should state that in his grievance and indicate that somebody in the medical department is denying me the surgery. You know, I've talked to Dr. So and So, he's recommended that I get it, somebody is saying no, I haven't been able to find out who that is. And likely during the grievance process, he will find out who it is, because one of the responses will probably say that.

JUSTICE STEVENS: What if he doesn't? One of his grievances is nobody told me. Is he out of luck then? And I think there may well be situations in which prisoners don't have complete access to all the

facts that go into a decision denying them medical care, for example, or say a prisoner has a religious problem and can't get the diet he wants, or something like that. But before he can sue, under your view if I understand it, he has to find out so he can name the people in his administrative complaint.

MS. OLIVIERI: He has to make a good faith attempt to find out. And if he really, you know, if he says I've asked my counselor, he is not able to provide me with that information, then he will get a response on the grievance.

JUSTICE GINSBURG: What is the purpose of that requirement? As long as he has made known in the administrative proceeding what his problem is, and they have had a chance to investigate it and determine whether it has merit or not, why should he have to name the individuals who made the decision in order, before he can sue them when he later finds out who they are?

MS. OLIVIERI: That goes back to 1997(e)(G), the waiver of reply, where it says that no defendant can be made to respond to the complaint unless the court can certify that the prisoner has a reasonable opportunity to prevail on the merits. It talks about defendants there. Also, you get a case like Mr. --

JUSTICE KENNEDY: Well, no, it's a standard

law of agency. It doesn't make any difference. The prison has denied him his rights. As Justice Stevens said, there may be three or four different people who concurred. Do your rules say that if he can't find out with reasonable efforts that he doesn't need to, or does the Sixth Circuit rules say that the delegation of the names is not required?

MS. OLIVIERI: The Sixth Circuit rule basically says name or identify. And for instance, here with respect to Mr. Jones, he didn't name the classification director. He used the title. Nobody had anything negative to say about that. We know you're talking about the classification director. It's Mr. Morrison. We've only got one, not a problem. The Sixth Circuit rule is basically name or identify, so if you're going to identify --

JUSTICE SOUTER: Am I right that the Sixth Circuit rule requires the identification, for complete exhaustion requires the identification to be made at the first stage?

MS. OLIVIERI: The Sixth Circuit rule does require that.

JUSTICE SOUTER: So to make sure I understand this, in a case, let's say at stage one he names Dr. X. And for whatever reason in the course of

the response perhaps, he learns that not only was Dr. X involved but Dr. Y was involved in that decision. So if he is denied relief at stage two, he says X and Y, and he identifies X and Y all the way through. He gets nothing satisfactory to him, so he goes in to Federal court. Is it correct that under the Sixth Circuit rule they would say you have not completely exhausted because at stage one you did not mention Y? Is that correct?

MS. OLIVIERI: The Sixth Circuit probably would say that that he would be out of luck with respect to Y.

JUSTICE SOUTER: What justification is there for that? I mean, for two stages through the prison administrative process, Y has been identified. The prison has taken action on the merits on the assumption that Y is in fact at least an allegedly responsible party. What reason is there in a Federal court to say that the exhaustion is incomplete because he didn't mention Y back at stage one?

MS. OLIVIERI: The Sixth Circuit adopted that rule probably in a case like the Walton case here, where Mr. Walton had a problem with his slot restriction and said, you know, Deputy Warden Bobo put this restriction on me. It goes through the grievance process and they say Bobo didn't put that on you, Gearin

put it on you. That's at step one. They give that response. He goes then into court after exhausting two or three steps, still saying, you know, they're discriminating against me based on race with the slot restrictions.

JUSTICE SOUTER: Yeah, but that wasn't my hypo. As I understand it, in that case he keeps going after Bobo, period. And in my case at stage two, having learned something, he identifies Y. And I -- so I don't see the justification, what is the justification?

MS. OLIVIERI: I think I was probably giving too much explanation, but I think from my understanding of how this should operate, he is all right in that case to sue Mr. Gearin, who actually did put the slot restriction on him, and he had the wrong name at step one. No problem. We got the right name at step two or, excuse me, at the end of step one. And he pursues it? I think he's got a good claim against Mr. Gearin. The Sixth Circuit might not think that's true.

JUSTICE SOUTER: In my case, you said you understood that the Sixth Circuit would say that although he had identified both X and Y in stage two and at stage three, and there had been merits adjudications at those stages, understanding who the named Respondents were, the Sixth Circuit would nonetheless say you had

failed to exhaust because back at stage one you mentioned X but not Y. What is the justification, if that is still your answer, what could the justification for that be?

MS. OLIVIERI: I don't think the Sixth Circuit had that type of case in front of them when they issued --

JUSTICE SOUTER: But that apparently, if I understand your answer, is what the result would be. And is there -- and I don't want to, you know, make it hard for you. I think you're having a hard time finding a justification for that result and I certainly can't find one. Can you think of any?

MS. OLIVIERI: I'm saying there is none. I'm saying he's got a good claim against Mr. Gearin.

JUSTICE SOUTER: Well, how about Y in my example?

MS. OLIVIERI: Pardon me?

JUSTICE SOUTER: Does he have a good claim against Y?

MS. OLIVIERI: Y?

JUSTICE SOUTER: In the Federal court in my hypo --

MS. OLIVIERI: Okay. He named X, and now --

JUSTICE SOUTER: The Sixth Circuit says no,

out he goes.

JUSTICE BREYER: I think Y is Mr. Gearin.

MS. OLIVIERI: Y is Mr. Gearin, yes.

JUSTICE SOUTER: Okay.

MS. OLIVIERI: So he's got a claim against Y.

JUSTICE SOUTER: Even though the Sixth Circuit would throw it out for failure to exhaust.

MS. OLIVIERI: I disagree with the Sixth Circuit on that, but I don't disagree with the Sixth Circuit in that when he actually got to court, he sued four other people who were never mentioned in any grievance by anybody.

JUSTICE GINSBURG: How about Jones, who really did not know who was the doctor who said no surgery? He didn't know and then the prison told him. And he comes to the court, he says thanks, prison, for telling me, and so he names that person in his complaint. The Sixth Circuit said that's no good, he didn't put it in his initial complaint. He had only 15 days to find out and he didn't find out.

MS. OLIVIERI: I'm agreeing with you that the Sixth Circuit, both that the Sixth Circuit would say that that won't fly, and that in fact it should fly.

JUSTICE GINSBURG: So Jones did properly

exhaust, then, if you just made that concession, then Jones properly exhausted?

MS. OLIVIERI: Jones properly exhausted against the doctor who actually denied the medical treatment, denied the surgery. Yes. But Jones never served, unfortunately, that particular doctor, Dr. Cranstall.

CHIEF JUSTICE ROBERTS: Counsel, you've mentioned in your brief that there has been a change in the Michigan grievance policy with respect to naming individuals. What is the consequence of that change for our ability to address that claim?

MS. OLIVIERI: It will, it will be the same basic philosophy that I've been stating here. I mean, it's going to be a name or identify. Tell us who you've got a problem with. Don't tell us you have a problem with one person and then go into court and sue six other people who may be the people who actually responded to the grievance, because MDOC didn't know that you had a problem with this person.

CHIEF JUSTICE ROBERTS: I thought one of the objections to the Sixth Circuit rule from your friend was that this requirement of naming the individuals came out of thin air. And now we have that requirement articulated in the grievance policy. Does that make a

difference?

MS. OLIVIERI: It does make a difference in proper exhaustion.

JUSTICE GINSBURG: It's not an absolute policy, though. It isn't that if you haven't named him in the first administrative step, you can't name him in the complaint. That's not Michigan's new policy.

MS. OLIVIERI: Michigan doesn't say you have to name him at the first step. It says when you file your grievance, you know, name --

JUSTICE GINSBURG: Isn't there an exception when you couldn't find out?

MS. OLIVIERI: And if they say they can't find out, and they've made reasonable inquiry, and it is, you know, somebody at the top of the chain of the medical, that's understandable that they may not know, because they may have never seen Dr. Pramstaller.

CHIEF JUSTICE ROBERTS: Did the Sixth Circuit have the current Michigan policy before them when they issued their decision?

MS. OLIVIERI: Not on these three cases, no. It was the previous policy which indicated that the inmate had to be as specific, basically be as specific as possible, something along those lines.

JUSTICE SOUTER: I take it from your answer

to Justice Ginsburg that back in my Dr. X, Dr. Y case, if they got to -- under the new policy if they got to stage 2 and Y was identified, that Michigan would process the complaint? They wouldn't throw it out.

MS. OLIVIERI: We would process the grievance, absolutely.

JUSTICE SOUTER: The grievance.

MS. OLIVIER: Yes. Yes. Finally, I would ask the Court to keep in mind that the entire purpose of the Prison Litigation Reform Act is to relieve the courts of the burden and the screening process that's set in place by this statute allows the Court many options.

JUSTICE STEVENS: Now you say the primary purpose is to relieve the courts of the burden rather than to determine whether there is merit to the grievances?

MS. OLIVIERI: The, the purpose of the Prison Litigation Reform Act was to relieve --

JUSTICE STEVENS: Was to reduce the volume of litigation, period?

MS. OLIVIERI: To reduce the volume to provide more --

JUSTICE STEVENS: Wasn't there any interest in determining whether the complaints have merit? I

mean, I think you must be interested in getting rid of 11,000 complaints and reducing them down to 200. I would think that's more important than saving the court some time. There must be, you must have some interest in determining whether the complaints have merit.

MS. OLIVIERI: Well, we do have an interest. We respond to every one of those at three steps, and they never end up in litigation for the most part so the grievance process works totally outside of what litigation goes on. It does resolve complaints. But the Prison Litigation Reform Act allows the court to either --

JUSTICE STEVENS: But these rules that are challenged here are primarily to benefit the courts, not the profits-- the process.

MS. OLIVIERI: They are to, to benefit the courts by taking resources that had previously been spent on meritless cases and spending those instead on cases with merit, to efficiently screen these cases so that the courts are not spending a lot of time asking us for responses and so forth. If it's a failure to state a claim the case can be dismissed right there all without prejudice. There is nothing draconian here. They can be rebrought.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

MS. OLIVIERI: Thank you.

CHIEF JUSTICE ROBERTS: Mr. Andre, you have five minute remaining.

REBUTTAL ARGUMENT OF JEAN-CLAUDE ANDRE,
ON BEHALF OF PETITIONERS

MR. ANDRE: Justice Ginsburg, you asked earlier about who is better equipped to plead and show exhaustion. It's certainly our position that the Michigan Department of Corrections or prison grievance administrators are absolutely better equipped to do so.

CHIEF JUSTICE ROBERTS: How is that? The prisoner is the one presumably who knows best whether or not he filed the grievance or not.

MR. ANDRE: The prisoner may know best whether or not he or she filed a grievance and whether or not he appealed. The prisoner may not know precise dates on which he or she did so or have copies of the grievances anymore. This really kind of brings the heightened pleading rule, not just whether it's just affirmative defense or a general pleading rule, to the fore. Prisoners are prisoners. They get moved around, they get put in administrative segregation; they are subject to repeat searches; they have great difficulty in maintaining possession of their belongings. On the other hand the Michigan Department of Corrections keeps

copies of all the grievances, denials and appeals.

CHIEF JUSTICE ROBERTS: This seems to me to be a stretch to say that the prison, which has how many prisoners under their jurisdiction, is in a better position to know in individual cases, an individual prisoner, what this prisoner did or didn't do with respect to the grievance process. Surely the prisoner is in the best position. He knows what he did or at least what he is going to allege.

MR. ANDRE: He may be able to aver generally but with specificity there are many cases in which he won't be able to. But the Michigan Department of Corrections' policy directive makes clear that it has to maintain these records for future FOIA requests, and in many institutions it has to track them in a computer. And as Justice Ginsburg pointed out, in the Jones case, they were quite able to bring forward the proof of exhaustion that would satisfy, that would have satisfied the court that Jones had exhausted his administrative remedies.

Jones gets, just got thrown out of court, essentially, in a game of "gotcha," because he hadn't attached his complaint in the first instance. I think most importantly, from a judicial efficiency standpoint, making exhaustion an affirmative defense makes sense.

That means that the lawyers in the State attorney's general, in the State, in the office of the State's attorneys general, are going to be able to put forward the best arguments as to why a claim is or is not exhausted.

JUSTICE SCALIA: It requires, it requires response in all the cases, and as this subsection G indicates, part of the purpose of the act was to eliminate the necessity of responding to frivolous complaints. Why -- why, you know, you have to go through the requesting a response from the Government, when in fact there is nothing to this complaint because there has never been any exhaustion.

MR. ANDRE: But to go back to Justice Ginsburg's point earlier Congress could have included unexhausted claims among those kinds of claims that the court could screen out and dismiss or among those claims for which a court could --

JUSTICE SCALIA: That's a different argument. But I mean, don't tell me that it isn't more efficient to have the prisoner say at the outset whether it's exhausted or not. It certainly is.

MR. ANDRE: Or again, it may be more efficient to have them aver generally, but as far as having a prisoner comply with a heightened pleading

requirement, we don't think that that makes sense. We are talking, again we are talking about prisoners here.

JUSTICE ALITO: If it's an affirmative defense doesn't that mean that the prison is going to have to file, and the individual defendants are going to have to file an answer in every case and assert all of their defenses?

MR. ANDRE: Either --

JUSTICE ALITO: Just respond, even if there is no nonfrivolous, nonexhaustion argument that can be made, they are going to have to go through all of that in every instance?

MS. OLIVIERI: They would have to file an answer and motion to dismiss raising whatever affirmative defense they want to raise, but at least it gives them a choice and gives them the opportunity to frame this argument as opposed to putting it on, putting that burden on the court. Moreover if the Court were to adopt Respondents' reading of the screening provisions, those screening provisions would swallow up every single affirmative defense enumerated in the Federal rules, and also those not enumerated.

CHIEF JUSTICE ROBERTS: With respect, with respect to the naming of the individuals, is that claim moot because of the change in the policy?

MR. ANDRE: Oh, not at all. I mean, I can't see how, how Respondents could argue that --

CHIEF JUSTICE ROBERTS: I thought your main argument before was they invented this requirement without any basis, but now it's an actual requirement in the grievance procedure.

MR. ANDRE: Right, but it wasn't when these claims were decided. And that's where I think Sims v. Apfel comes into play. Under Justice Thomas' plurality opinion, the key is looking at kind of the nature of the proceedings and if it's informal and inquisitorial as opposed to adversarial, then a court cannot impose a requirement beyond that which the administrative agency itself required at the time that the claims were before the agency.

Under Justice O'Connor's concurrence, she was concerned about fair notice, and certainly here in these cases Petitioners Williams and Walton didn't have fair notice that a year and a half later the State of Michigan, after going through the entire grievance procedure and never relying on their failure to be sufficiently specific, can then come into Federal court and say, aha --

CHIEF JUSTICE ROBERTS: Future prisoners now do have fair notice because the grievance procedure says

name the individuals, dates, names, places, names of all those all involved.

MR. ANDRE: Yes, they would, they would. And again, there would certainly be constraints to too rigid enforcement of that particular provision.

JUSTICE GINSBURG: Is the no leeway built into the rule itself, that if you don't know --

MR. ANDRE: I'm sorry. I didn't --

JUSTICE GINSBERG: Isn't there -- the current rule, isn't there some leeway for cases where the prisoner simply doesn't know the names?

MR. ANDRE: I'm not aware of any, Justice Ginsburg.

CHIEF JUSTICE ROBERTS: Thank you, counsel. The case is submitted.

(Whereupon, at 12:06 p.m., the case in the above-entitled matter was submitted.)