

**IN THE  
SUPREME COURT OF THE UNITED STATES**

\_\_\_\_\_  
WAYNE A. SOUSER

*Petitioner,*

v.

SERGEANT J. ROBINSON, Building 9;  
LIEUTENANT G. JACOBS, Building 9;  
L. JOHNSON, Nurse

*Respondents.*

\_\_\_\_\_  
**On Petition for a Writ of Certiorari to the  
Court of Appeals for the Fourth Circuit**

\_\_\_\_\_  
**RESPONDENT'S BRIEF IN OPPOSITION**

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September 18, 2007

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## QUESTIONS PRESENTED

As framed by the Petitioner, the Questions presented are:

1. Is being in the infirmary and not being able to get the proper paperwork for filing informal complaints and having to use what paperwork you can get your hands on (like request forms) to file complaints on grounds for not [ac]cepting a case?
2. Is it grounds for dismissal when you ask the court to return to you the papers for you to make copies that the court requested and then return them back to the court once copies are made?
3. Are the grounds for dismissal of a case proper when you have [done] your best to file the proper paperwork through all the state requirements with the exception of one which could not be gotten?
4. Is being in the infirmary for four months and not being able to obtain the proper paperwork grounds for dismissal?
5. Whether satisfaction of the PLRA's exhaustion requirement is a prerequisite to a prisoner's federal civil rights suit such that the prisoner must allege in his complaint how he exhausted his administrative remedies (or attach proof of exhaustion to the complaint), or instead, whether non-exhaustion is an affirmative defense that must be pleaded and proven by the defense?
6. Whether the PLRA prescribes a "total exhaustion" rule that requires a federal district court to dismiss a prisoner's federal civil rights complaint for failure to exhaust administrative remedies whenever that is a single unexhausted claim, despite the presence of other exhausted claims.

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Virginia Attorney General Robert F. McDonnell, on behalf of all Respondents (collectively “Virginia”) and pursuant to this Court’s Order of August 2, 2007, directing that a response be filed, hereby responds to the Petition for Writ of Certiorari.<sup>1</sup> For the reasons detailed in this brief in opposition, the petition should be denied.

### **INTRODUCTION**

In *Jones v. Bock*, 127 S. Ct. 910 (2007), this Court unanimously concluded that lower courts could not impose extra-statutory roadblocks to inmate lawsuits by requiring inmates to plead exhaustion. However, *Jones* does not require the lower appellate courts to raise any possible error by the trial court *sua sponte*. Since Souser never complained at trial or on appeal about the district court’s requirement that he demonstrate exhaustion, the Fourth Circuit appropriately declined to raise the issue on its own motion. Furthermore, this Court’s decision in *Jones* did not address the extent to which a court may raise the exhaustion defense *sua sponte*. While the Court may need to address that issue in the future, this case, litigated by a pro se inmate at every stage, would be a poor vehicle for the Court to address the issue.

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<sup>1</sup> In its order entered on August 20, 2007, this Court extended the time for such filing to and including October 3, 2007.

**STATEMENT OF THE CASE**

1. On August 16, 2005, Wayne A. Souser, an inmate at the Greenville Correctional Center, filed a complaint invoking 42 U.S.C. § 1983 in the United States District Court for the Eastern District of Virginia, Norfolk Division. The facts alleged – and at this stage they are allegations only – are gleaned from Souser’s complaint. Souser states that on the morning of July 12, 2004, around 6:00 a.m., he suffered “bad chest pains.” He had taken several “nitro” tablets. He told the nurse around 8:00 a.m. that he was suffering from chest pains. According to Souser, the nurse told him to “put in an emergency grievance and then she walked away.” Souser then told a correctional officer at 10:00 a.m. that he was still suffering from chest pains. The officer contacted his sergeant. However, Souser says, the sergeant never arrived. Around noon, Souser told another officer about his chest pains. The officer told Souser he would return immediately, but did not return until 1:30 p.m. At that point, he was taken to a local hospital and from there to the infirmary. He eventually underwent surgery for his heart problems. Souser alleged that correctional personnel violated his rights because they ignored repeated complaints of chest pain over the course of seven and-a-half hours, thereby causing him to suffer unnecessary pain. He asked for damages in the amount of \$1,000,000.

2. After resolving issues relating to the payment of the filing fee, the district court, on November 1, 2005, ordered the complaint filed. The same order states that “no action may be brought with respect to prison conditions . . . until the

prisoner has exhausted all available administrative remedies.” The Order further states that

[i]n order to determine whether or not plaintiff has, in fact, exhausted administrative remedies, the court will need further information from plaintiff. Accordingly, plaintiff is **ORDERED** to submit documentation of administrative exhaustion within thirty (30) days from the date of this order. Plaintiff is ADMONISHED that failure to respond within thirty days will result in the dismissal of the action.

Plaintiff may show exhaustion of administrative procedures by submitting copies of the grievances filed, of all levels of appeal, and of all responses to the grievances and appeals. Alternatively, plaintiff may show exhaustion by submitting statements which set forth in detail the grievances filed, all levels of appeal filed, and all responses filed.

Order of Nov. 1, 2005, at 2 (bold and capitalization in original).

On October 17, 2005, Souser submitted additional documents, including a “brief in summary” and a copy of several institutional complaints and informal complaint forms as well as legal papers relating to lawsuits Souser had filed in State courts.

By order dated December 17, 2005, the district court dismissed Souser’s complaint *sua sponte*. The district court held that

plaintiff has neither furnished proof of exhaustion nor requested an extension of time in which to do so. Plaintiff claims he sent the court all his grievances. . . . Plaintiff’s informal grievance was denied because it was filed outside the thirty-day limit. However, there is no indication that plaintiff appealed this determination, or otherwise proceeded to exhaust his administrative remedies through Level II of the inmate grievance procedure available at Greenville Correctional Center. Therefore, plaintiff has failed to exhaust his administrative remedies with respect to his federal civil rights claim, and therefore this claim is **DISMISSED**.

Order of December 7, 2005 at 2 (bold and capitalization in original). The Court noted that the dismissal was “without prejudice to plaintiff’s right to resubmit the case after he has exhausted the available administrative remedies. Plaintiff is ADMONISHED, however, that the statute of limitations continues to run.” *Id.* (capitalization in original).

**3.** Souser noted his appeal on December 14, 2005. He filed an informal brief in the Fourth Circuit, the argument portion of which consists of a single page. He raised two issues. The first issue he framed as “dismissal of case due to lack of being able to prove complete exhaustion of all state procedures.” He argued that because he was in the infirmary, he could not obtain the proper form, but instead had to modify other paperwork and use it to for his complaint to prison officials. He noted that he received no response. He said that by the time he was released from the infirmary, it was too late to file the complaints. Souser argued that he tried to file the “proper state remedies” but was ignored.

Second, Souser complained that the district court had requested copies of materials the court had in its possession. He noted that he asked the district court’ clerk’s office to return the papers to him, so he could then copy them and resubmit them to the court.

The Fourth Circuit, by unpublished order dated April 27, 2007, affirmed. The Court stated that “[w]e have reviewed the record, considered the Supreme Court’s recent decision in *Jones v. Bock*, 127 S. Ct. 910 (2007), and find no reversible error. Accordingly, we affirm for the reasons stated by the district court.” This Petition for Certiorari followed.

**REASONS WHY THE PETITION FOR A WRIT OF CERTIORARI  
SHOULD BE DENIED**

**I. JUST AS COURTS SHOULD NOT IMPOSE UNWARRANTED ROADBLOCKS IN THE PATH OF INMATE LAWSUITS, NEITHER SHOULD THEY RAISE ISSUES ON BEHALF OF INMATES WHEN THE INMATES THEMSELVES DO NOT RAISE THEM.**

**A. The Petitioner Never Complained Below That the District Court Could Not *Sua Sponte* Require Him to Demonstrate Exhaustion.**

Although Souser has raised numerous questions presented, only one merits substantial comment—whether after the holding in *Jones*, 127 S. Ct. 910, the court below erred in requiring Souser to file paperwork showing that he had exhausted his claim.

With respect to this issue, the Fourth Circuit was not among the circuits that imposed a heightened pleading requirement for inmate lawsuits. To the contrary, the Fourth’s Circuit’s decision in *Anderson v. XYZ Correctional Health Servs., Inc.*, 407 F.3d 674, 681 (4<sup>th</sup> Cir. 2005), anticipated this Court’s holding in *Jones*. Indeed, this Court cited *Anderson* in its opinion in *Jones* for its holding that exhaustion under the PLRA, 18 U.S.C. § 3626 (“Prison Litigation Reform Act”), is an affirmative defense rather than a pleading requirement. *Jones*, 127 S. Ct. at 915 n.2.

The key to the Fourth Circuit’s holding is the fact that Souser did not complain, either in the district court or on appeal, that he should not be required to prove exhaustion. In the district court, he submitted copies of several lawsuits he had filed as well as several grievance forms. This indicates

*compliance* with the order to show exhaustion rather than disagreement. In his informal brief in the Fourth Circuit, which consists of a single page of argument, Souser raised two issues. First, he argued that it was difficult for him to obtain the forms to file his grievance. He said he tried to file the proper forms but could not obtain them because he was in the infirmary. In other words, the gravamen of his argument on this point was that he had done the best he could to exhaust under his particular circumstances.<sup>2</sup> Second, he complained about the need to provide copies of forms that he said he had provided to the court. He noted that he asked for the district court to return the forms to him, so he could make additional copies and return them to the court. Souser did not complain on appeal about the district court's order directing him to show exhaustion. Instead, he argued that, under his set of circumstances, it should be excused.

When an appellant does not raise an issue at trial or on appeal, lower federal appellate courts have the discretion to review the judgment for "plain error." *See, United States v. Olano*, 507 U.S. 725, 731-32 (1995). Since Souser never raised, *either at trial or on appeal*, the issue he now raises in this Court, the Fourth Circuit should not be faulted for declining to raise the issue *sua*

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<sup>2</sup> To be sure, Souser stated in his informal brief as Issue 1 "Dismissal of case due to lack of being able to prove complete exhaustion of all state procedures." This statement does not support the notion that Souser objected to the court's order that he demonstrate exhaustion. Souser's brief argument, reviewed in its totality, shows unmistakably that Souser was complaining about the difficulties he experienced in obtaining the paperwork to present his claims to prison officials, i.e. the impossibility for him to properly exhaust, rather than the impropriety of the district court's requirement that he show exhaustion.

*sponte* and then grant him relief. That has been the consistent practice of this Court.<sup>3</sup> Thus, while his argument based on *Jones* might have afforded him relief had he raised it below, he did not raise it. At the end of the day, this question presented is nothing more than a garden variety application of the rules of procedural default that hardly merits a grant of *certiorari*.

Just as courts should not bend the rules to rid themselves of troublesome lawsuits by inmates, neither should they bend the rules to help inmates litigate issues they never properly raised. “Procedural default rules generally take on greater importance in an adversary system such as ours than in the sort of magistrate-directed, inquisitorial legal system . . . . In our system, however, the responsibility for failing to raise an issue generally rests with the parties themselves.” *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2686 (2006).<sup>4</sup> This Court should decline to grant a writ of *certiorari*.

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<sup>3</sup> See *Fry v. Pliler*, 127 S. Ct. 2321, 2327-28 (2007) (declining to reach issue not encompassed by question presented); *Norfolk Southern Ry. v. Sorrell*, 127 S. Ct. 799, 804-05 (2007) (declining to stretch question presented to reach issue not encompassed by the question); *Oregon v. Guzek*, 546 U.S. 517, 527 (2006) (declining to reach issue not encompassed by the question presented).

<sup>4</sup> See also *Corducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.) (“The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them.”).

**B. *Jones v. Bock* Does Not Preclude District Courts From Raising the Defense of Exhaustion *Sua Sponte*.**

This Court's holding in *Jones* addressed a discrete issue: whether exhaustion is an affirmative defense or a pleading requirement that inmates must include in their complaints. Nothing in *Jones* addresses – or precludes – a district court from, as here, accepting a complaint as properly pleaded and inquiring *sua sponte* into the affirmative defense of exhaustion. In other words, there is a difference between *sua sponte* dismissal for failure to exhaust and *sua sponte* inquiry regarding the existence or non-existence of an affirmative defense.

In *Anderson*, the Fourth Circuit addressed this issue. The court held that a district court can, as with other defenses, raise the issue of exhaustion *sua sponte*. *Anderson*, 407 F.3d at 682. *Cf. Day v. McDonough*, 547 U.S. 198, 209 (2006) (Although the statute of limitations in habeas cases is an affirmative defense, district courts are permitted, but not required, to raise the issue *sua sponte*). The Fourth Circuit further held that when a district court chooses to raise the issue *sua sponte*, “[e]xcept in the rare case where failure to exhaust is apparent from the face of the complaint, however, a district court cannot dismiss the complaint without first giving the inmate an opportunity to address the issue.” *Anderson*, 407 F.3d at 682.

This Court may, at some point, need to address whether a district court can *sua sponte* raise the affirmative defense of exhaustion, and if it can, under what circumstances. However, the Court need not reach the issue in the case

at bar. First, this case would be a very poor vehicle to reach the issue. If this Court decides to reach the issue, it should do so on a well-developed record. Second, the petitioner does not point to any division in the lower courts on the propriety of raising this affirmative defense *sua sponte* and the respondent is aware of none. Therefore, the Court should deny certiorari.

**II. THE REMAINING ISSUES ARE IRRELEVANT, BECAUSE THE DISTRICT COURT DID NOT DISMISS THE COMPLAINT ON THE BASES ASSERTED.**

The remaining issues Souser raises do not warrant certiorari. Souser frames the remaining issues as follows:

1. Is being in the infirmary and not being able to get the proper paperwork for filing informal complaints and having to use what paperwork you can get your hands on (like request forms) to file complaints on grounds for not [ac]cepting a case?
2. Is it grounds for dismissal when you ask the court to return to you the papers for you to make copies that the court requested and then return them back to the court once copies are made?
3. Are the grounds for dismissal of a case proper when you have [done] your best to file the proper paperwork through all the state requirements with the exception of one which could not be gotten?
4. Is being in the infirmary for four months and not being able to obtain the proper paperwork grounds for dismissal?

First, the issues he raises are academic. The sole reason for dismissal *without prejudice* was that Souser had not complied with the district court's order that he demonstrate exhaustion of his claims. While the petitioner supplied the district court with institutional forms showing that he had *filed* a

grievance, he did not show that he had *exhausted* that grievance. The district court did not fault Souser for failing to obtain a favorable disposition of his grievance. Because Souser's questions presented numbers 1, 2, 3, and 4 are irrelevant to the action taken by the district court, there is no reason to grant certiorari to address them. *See, e.g., United Public Workers of America v. Mitchell*, 330 U.S. 75, 90 n.22 (1947) ("It has long been this court's 'considered practice not to decide abstract, hypothetical, or contingent questions.'") (citation omitted).

Second, these claims are fashioned as nothing more than garden variety error correction. Reviewing routine cases for error-correction is not the function of this Court. A writ of certiorari will be granted only for "compelling reasons." Sup. Ct. R. 10. Given the number of petitions, this Court simply cannot devote itself to case-specific error correction.<sup>5</sup> This Court should deny the petition for a writ of certiorari.

Finally, Souser frames his sixth question presented as follows:

6. Whether the PLRA prescribes a "total exhaustion" rule that requires a federal district court to dismiss a prisoner's federal civil rights complaint for failure to exhaust administrative remedies whenever that is a single unexhausted claim, despite the presence of other exhausted claims.

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<sup>5</sup> *See Tory v. Cochran*, 544 U.S. 734, 739 (2005) (Thomas, J., joined by Scalia, J., dissenting) (noting that the Court does not grant review for "case-specific error correction"); *Overton v. Ohio*, 534 U.S. 982, 985 (2001) (Breyer, J.) (statement respecting denial of certiorari) (noting that it is "axiomatic that this Court cannot devote itself to error correction . . ."); *Calderon v. Thompson*, 523 U.S. 538, 569 (1998) (Souter, J., joined by Stevens, Ginsburg & Breyer, J.J., dissenting) (same).

The district court did not apply a “total exhaustion” rule to Souser’s complaint, *i.e.* dismissing all claims if one claim is not exhausted. *See Jones*, 127 S. Ct. at 923-926. Indeed, Souser raised a single issue, the alleged delay of the officers in the face of his complaints of chest pain. Simply put, this issue has nothing to do with the case at bar. Therefore, his sixth question presented is also irrelevant to the district court’s disposition.

### **CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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LIEUTENANT G. JACOBS, Building 9;  
L. JOHNSON, Nurse  
Respondents herein.

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