IN THE SUPREME COURT OF FLORIDA

CASE NO. SC15-1805

ERIC GREEN,

Petitioner,

vs.

CALVIN COTTRELL, ET AL.,

Respondents.

PETITIONER GREEN'S INITIAL BRIEF

ON DISCRETIONARY REVIEW FROM CASE NO. 1D14-4052,
A DECISION OF THE FIRST DISTRICT COURT OF APPEAL

Charles M. Auslander
Florida Bar No. 349747
John G. Crabtree
Florida Bar No. 886270
Brian C. Tackenberg
Florida Bar No. 107224
CRABTREE & AUSLANDER, P.A.
240 Crandon Boulevard, Suite 234
Key Biscayne, Florida 33149
Telephone (305) 361-3770
Facsimile (305) 437-8118
jcrabtree@crabtreelaw.com
causlander@crabtreelaw.com
floridaservice@crabtreelaw.com
Counsel for Petitioner

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The Petitioner, Eric Green, will be referred to as Mr. Green. The Respondents, Calvin Cottrell, et al. will be referred to as the defendants or the Respondents.

The Petitioner's brief will follow the citation convention of "R.___" references to the index to the record on appeal.

Introduction

The Court granted jurisdiction to review a conflict in decisions regarding which statute of limitations should be applied to prisoner litigation. The Court's precedent would have applied a four-year statute of limitations to Mr. Green's state law claims. The First District determined, however, that a one-year statute of limitations applied. The practical effect of this ruling was to bar Mr. Green's state law claims for negligence and intentionally caused injuries.

Separately tucked away in the First District's decision was the court's affirmance—without discussion—of the dismissal of Mr. Green's Second Amended Complaint, on the basis that he had failed to exhaust administrative remedies, as to his *federal* claims. We note, in passing, there was no dispute on appeal that those claims were timely filed. The only dispute as to those claims was whether there had been a failure to exhaust administrative remedies.

The supreme court's review and determination of that alternative holding is therefore outcome determinative as to Mr. Green's federal claims, regardless of the result on the statute of limitations issue controlling the state law claims. The Court has discretion to determine all issues once discretionary review is granted, "as though the case had originally come to this Court on appeal." *Special v. West Boca Med. Ctr.*, 160 So. 3d 1251, 1261 (Fla. 2014) (quoting *Savoie v. State*, 422 So. 2d 308, 312 (Fla. 1982)). In this circumstance, the exhaustion of administrative remedies issue was fully briefed below and is dispositive of a portion of this case. *See Special*, 160 So. 3d at 1261 (noting particular value in considering "other issues . . . properly briefed and argued [that] are dispositive of the case."); *see also Basulto v. Hialeah Auto.*, 141 So. 3d 1145, 1157 (same).

STATEMENT OF THE CASE AND THE FACTS

I. The Allegations of the Complaint:

Eric Green was beaten savagely by two other inmates at the Santa Rosa County Jail facility, on June 22, 2008. (R.56-80; at 5:¶17). He suffered grievous injuries that required immediate medical attention. (*Id.*). He filed a grievance shortly thereafter. (R. 75) (Id.). But, eight days later Mr. Green was transferred to a state prison. (*Id.*).

His Complaint was filed in June, 2012. (R. 54). For the purpose of the two legal issues raised on appeal (statute of limitations and exhaustion of administrative remedies), there are no meaningful differences among the complaint, second amended complaint, and proposed third amended complaint he filed. In the interest of readability, this brief will refer short-form to the Second Amended Civil Rights Complaint as the "Complaint."

Mr. Green asserted state law claims for negligence and intentional torts against the named defendants, each of whom was employed by the county facility. (R.76-79). Mr. Green also asserted federal violations under the Eighth and Fourteenth Amendments to the Constitution of the United States. (*Id.* at 75-76:¶¶81,84).

With respect to exhaustion of administrative remedies, the Complaint alleged in paragraph 82:

> The Plaintiff has exhausted his administrative remedies by use of the grievance procedure that was available to him at S.R.C.J. to try and correct the violations. However, the Plaintiff was transferred back to Florida State Prison on or about June 30, 2008. Therefore, he was unable to receive a response or submit his grievances to the next level. Accordingly, the grievance prices is exhausted.

(R.75:¶82).

II. The Circuit Court's Order dismissing the Complaint.

The circuit court dismissed the Complaint, denied leave to amend, and closed the file. (R.140-46). With respect to the statute of limitations, the court concluded that the one-year period found in section 95.11(5)(g) controlled as to the state law claims, which arose from conditions of confinement. (R.141-42:¶¶2-5). As to the federal claims, the court held that the Complaint demonstrated in paragraph 82 that Mr. Green had failed to exhaust administrative remedies. (R. 144-45:¶¶8-10).

More particularly, the circuit court stated that:

> Here, [Mr. Green's] Complaint shows he filed a grievance prior to being transferred. Complaint, ¶82. But, it also shows that he did nothing to followup or to appeal any lack of answer or negative decision. Id. (Since he was transferred a few days later, 'the grievance procedure is considered exhausted.') Accordingly, the four corners of the Complaint itself show [Mr. Green] failed to exhaust his administrative remedies.

(R.145:¶9). And, according to the circuit court:

> Here, [Mr. Green] could have finished his administrative remedies anytime between the occurrence of the fight with two other inmates on June 22, 2008; and the mailing of his complaint four years later on

> June 22, 2012. If he had received a negative response or no response at all, he had an appeal mechanism available to him by following up with the Santa Rosa County Jail. But, his pleading admits he did nothing, but simply 'consider [ ] [his grievance] exhausted.' Id.

(R.145:¶9).

III. The First District's decision.

On appeal, the First District affirmed the dismissal of the Complaint as to the federal claims without discussion. *Green v. Cottrell*, 172 So. 3d 1009 (Fla. 1st DCA 2015). In determining the application of the statute of limitations, the First District declined to follow the reasoning of "*Calhoun* [*v. Nienhuis*], 110 So. 3d 24 (Fla. 5th DCA 2013), in which the Fifth District held that the four-year statute of limitations period set forth in section 768.28(14), Florida Statutes, applied to a prisoner's negligence action against the county sheriff rather than the one-year statute of limitations period of section 95.11(5)(g)." *Green*, 172 So. 3d at 2.

IV. The statutes involved in this appeal.

(a) Statutes of limitations.

Section 768.28(14) provides a four-year statute of limitations and applies to "[e]very claim against the state or one its agencies or subdivisions for damages for a negligent or wrongful act or omission pursuant to this section." This section was enacted in 1973.

Section 95.11(5)(g) applies a one-year limitation period to "an action brought by or on behalf of a prisoner, as defined in s. 57.085, relating to the conditions of

the prisoner's confinement." This provision was adopted in 1996.

Section 95.011 provides in pertinent part that: "A civil action or proceeding, called "action" in this chapter . . . shall be barred unless begun within the time prescribed in this chapter or, if a different time is prescribed elsewhere in these statutes, within the time prescribed elsewhere." This provision was enacted in 1974 and revised in 1977.

(**b**) **Exhaustion of administrative remedies.**

The Prison Litigation Reform Act, 42 U.S.C. §1997e:

"(a) Applicability of administrative remedies. 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."

SUMMARY OF ARGUMENT

The result in *Calhoun v. Nienhaus*, 10 So. 3d 24 (Fla. 5th DCA 2013), sensibly reconciles the four-year statute of limitations period set forth in section 768.28(14) for negligent or intentional acts against the state (or its agencies or subdivisions) with the one year period found in section 95.11(5(g) for suits related to conditions of prison confinement.

First, the legislature has expressed in the plainest of terms in section 95.011 that the time prescribed *elsewhere* in other statutes controls the limitations period. Therefore, the plain terms of the two statutes of limitations can be reconciled simply by implementing the express reconciliation already in place by legislative directive. *Calhoun* does just this, relying on precedent from this Court.

Second, the statutory construction analysis engaged in by the First District below, which avoids the plain directive of section 95.011 that would apply section 768.28(14)'s limitation period, is not persuasive. While section 95.11(5)(g) is more specific as to suits based on prison conditions, it is *less* specific as to suits based on "negligent or wrongful acts or omissions," the very language found in section 768.28(14). Applying the principle of statutory construction favoring a law of specific application over a more general law to this case makes sense only if one ignores that section 768.28(14) *is* the more specific provision with respect to tort claims based on negligence.

Third, the application of section 768.28(14)'s four-year statute of limitations would not *nullify* section 95.11(5)(g), as the First District concluded. Suits involving prison conditions range wider than the class of tort claims that would fall within the lengthier four year limitations period. Accordingly, avoidance of statutory nullification would not be a reason to restrain the operation of section 768.28(14). Both section 768.28(14) and section 95.11(5)(g) can exist in harmony, each construed to have a field of operation. There is no need to restrict by implication the reach of section 768.28(14). *See Oldham v. Rooks*, 361 So. 2d 140, 143 (Fla. 1978) (repeal by implication is not appropriate absent repugnancy of former statute to more recently enacted law).

As to his federal claims, a prisoner is *not* required to plead exhaustion of administrative remedies in his civil rights complaint arising from prison conditions; lack of exhaustion is an affirmative defense. *Jones v. Bock*, 549 U.S. 199, 212 (2007) (Prisoner Litigation Reform Act does not require that a plaintiff allege the exhaustion of administrative remedies). Mr. Green's allegation that he commenced a county grievance procedure does not facially establish that the grievance procedures at the Santa Rosa County Jail were still *available* to him to complete after his transfer from county jail to a state correctional institution. We can infer from the complaint only that some form of grievance procedure was available to inmates-in-residence, but we can infer nothing about the substance of those

grievance procedures—much less whether they were available after transfer of Mr. Green from a county facility to a state prison.

In concluding that the allegations of Mr. Green's Complaint facially demonstrated a failure to exhaust administrative remedies, the circuit court deprived Mr. Green of the benefit of the state law embedded four-corners rule about complaints facing a motion to dismiss. The court necessarily drew inferences beyond the boundaries of the Complaint about the continuing availability of administrative process and relief following Mr. Green's transfer to a state facility. The inference should not have been drawn against the pleader that he could still avail himself of the county jail's administrative remedy when he was transferred from county to state jurisdiction a mere eight days after the incident. *Mlinar v. United Parcel Serv., Inc.*, 2016 WL 825261 *6 (Fla. March 3, 2016).

Moreover, it does not appear that a Florida appellate court has decided whether *transfer* from one jurisdiction to another forecloses the *availability* of an administrative remedy. There is no binding precedent from the Supreme Court of the United States construing the Prison Litigation Reform Act on this question of law. The better reasoned rule would be that an available remedy is one that can be used to accomplish a purpose, and that at the least questions of fact must be determined before a transferred inmate can be shown to have foregone an available administrative remedy.

ARGUMENT

I. Standard of Review.

The standard of review governing the dismissal of a complaint is *de novo*. *See Mlinar v. United Parcel Serv.*, 2016 WL 825261 *6 (Fla. March 3, 2016) ("This Court reviews an order granting a motion to dismiss de novo."); *see also Wallace v. Dean*, 3 So. 3d 1035, 1045 (2015) (same). "Such review must be confined to the four corners of the complaint." *Mlinar*, at *6. And, the "allegations of the complaint are assumed to be true and all reasonable inferences arising therefrom are allowed in favor of the plaintiff." *Wallace*, 3 So. 3d at 1042-43 (citation omitted); *Fla. Dept. of H.R.S. v. S.A.P.*, 835 So. 2d 1091, 1094 (Fla. 2002) (same).

The *de novo* review also applies to a dismissal based on a legal issue surrounding a statute of limitations question. *Fox v. Madsen*, 12 So. 3d 1261, 1262 (Fla. 4th DCA 2009).

II. The four-year statute of limitations in section 768.28(14) should be applied to the state law tort claims.

(a) The plain terms of section 95.011 refer to a statute of limitation "prescribed elsewhere": section 768.28(14).

Section 95.011 was enacted over 40 years ago. It could be considered a mechanism for routing statutes of limitation akin to a railway switch that allows tracks to converge but not crash at junction points.

This Court's precedent makes clear that this "exception clause" provision "clearly provides that the periods of time provided in chapter 95 do not apply if a different period is provided elsewhere in the statutes . . . [t]he language of section 95.011 is plain: If a different statute prescribes a different time, then the periods of time in chapter 95 have no applicability." *Pub. Health Trust v. Menendez*, 584 So. 2d 567, 569 (Fla. 1991). And, as *Calhoun* recognizes (110 So. 3d at 26), this Court has in two additional decisions made plain that section 768.28's provisions control when negligence actions are brought against the state (or its subdivisions and employees) so that there is a uniform period delineated for all such actions. *Fla. Dep't of Health & Rehab. Servs. v. S.A.P.*, 835 So. 2d 1091, 1092 (Fla. 2002); *Beard v. Hambrick*, 396 So. 2d 708, 712 (Fla. 1981). The First District's legal analysis does not comport with this binding precedent; the conflicting Fifth District's decision does. *Calhoun*, 110 So. 3d at 25-26.[1]

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[1] We note, as well, that *Calhoun* rejected its own court's previous application of the one-year statute of limitations to a prisoner's negligence claim, because that previous decision failed to reconcile its holding with the applicability of section 768.28. 110 So. 2d at 26-27, discussing *Nicarry v. Eslinger*, 990 So. 2d 661 (Fla. 5th DCA 2008). *See also Rogers v. Judd*, 389 Fed. Appx. 983, 988 (11th Cir. 2010) (following *Nicarry* to apply the one-year limitations period of section 95.11(5)(g) rather than the four-year statute of limitations for assault and battery claims found in section 95.11(3)(o). But *Nicarry*'s principal argument against the application of the one-year statute of limitations was that his claim involved only a single instance of negligence, not a continuous condition of confinement. 990 So. 2d at 664. The Supreme Court of the United States rejected this "ongoing conditions" interpretation of "conditions of confinement" in *Porter v. Nussle*, 534 U.S. 516, 122 S.Ct. 983 (2002), when the Court considered the similar language of the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a).

The plain language of the three statutes involved here shows that the legislature's intended interaction among them is both clear and precise: the one-year statute of limitation from 95.11(5)(g)—according to the plain language of section 95.011—must yield to the four-year statute of limitations provided by section 768.28(14), which "prescribes a different time" as expressly anticipated by section 95.011. *Menendez*, 584 So. 2d at 569.

When statutory language is clear, and unambiguous, a court's first and only step in statutory construction is to apply the legislature's words plainly. *State v. Hackley*, 95 So. 3d 92, 93 (Fla. 2012) ("The first place we look when construing a statute is to its plain language—if the meaning of the statute is clear and unambiguous, we look no further.") Rounding out this point, the plain terms of a statute apply unless it is shown that absurdity would result. *Id.* at 95 ("In certain circumstances, the absurdity doctrine may be used to justify departures from the general rule that courts will apply a statute's plain language. . . . But the absurdity doctrine is not to be used as a freewheeling tool for courts to second-guess and supplant the policy judgments made by the Legislature.") There is nothing absurd about the legislature's use of section 95.011 to steer limitations periods away from chapter 95 to other enunciated limitations periods found "elsewhere," here section 768.28(14).

Unfortunately, the decision of the First District negates that sphere of influence—in fact, in this circumstance, leaving no meaning for the plainly worded directive of section 95.011 to apply a limitation period found and "prescribed elsewhere." By characterizing the properly plain language reading of section 95.011 as a "broad interpretation" by *Calhoun*, the First District was actually making an exception to the operation of that provision in order to implement section 95.11(5)(g) the way the First District believed was more appropriate. *Green*, 172 So. 3d at 1011-12. But that reasoning does not comport with this Court's decision in *Menendez* or the concern expressed in *Hackley* (nor, of course, decisions of this Court on which it relied), not to "second-guess" the legislature.

Indeed, the legislature knows how to second-guess itself. This Court pointed out in *Menendez* that the legislature reversed course by amending chapter 768 (then section 768.28(11) and now 768.28(14)) to steer back an action for damages arising from medical malpractice from section 768.28 to the limitations period found in section 95.11(4). *Menendez*, 584 So. 2d at 569-70. Similarly, the legislature expressly removed actions for contribution from the scope of section 768.28(14). *See Horn v. State, Dep't of Transp.*, 665 So. 2d 1122, 1124-25 (Fla. 2d DCA 1996). Therefore, unless the legislature expressly says otherwise, section 768.28(14)'s period of limitations applies to tort actions permitted by the limited waiver of sovereign immunity, notwithstanding the availability of another possible statutory source for a

limitations period. *See Horn*, 665 So. 2d at 1124-25. *Calhoun* tracks and follows this logical analysis, 110 So. 3d at 26-27, which *Green* rejects. 172 So. 3d at 1011-12

Moreover, this Court has crystallized through its legal analysis that statutes of limitation are the domain of the legislature: "At common law, there were no fixed time limits for filing lawsuits. Rather, fixed limitations on actions are predicated on public policy and are a product of modern legislative, rather than judicial, processes." *Major League Baseball v. Morsani*, 790 So. 2d 1071, 1074 (Fla. 2001) (footnotes omitted). Thus, the legislature's will should logically control in the context of statutes of limitation, which were not known to the common law. *S.A.P.*, 835 So. 2d at 1098. And although statutes of limitation are strictly construed, there is no fundamental rationale to depart from their plain terms, absent compelling reason. *See, e.g., S.A.P.*, 835 So. 2d at 1099-1100 (assuming truth of complaint's allegations, equitable estoppel would bar government's assertion of limitations period).

In section 95.011, the legislature has expressed in the plainest of terms that the time prescribed *elsewhere* in other statutes trumps chapter 95 default limitations periods. The statutory analysis for this case need not traipse further into the byzantine morass of competing canons of construction, given this clarity. Instead, the plain terms of the two statutes of limitation can be reconciled simply by

implementing the express reconciliation already put in place by legislative directive. *Calhoun* does just this, relying on precedents from this Court. 10 So. 3d at 26.

As Dr. Seuss authored and his Horton offered: "I meant what I said, and I said what I meant." Geisel, Theodore Seuss (Dr. Seuss), *Horton Hatches the Egg* (McMillan, 1940). *Green*, however, is not loyal to the legislature's plain assertion, and, instead, errantly concludes that "[i]t would make little sense to apply the broad exclusion language contained in chapter 95 to these circumstances." *Green*, 172 So. 3d at 1012-13. In short, *Green* prefers its reasoning to that of the legislature. This was error.

(b) Statutory interpretation would still result in the application of section 768.28(14) to the state law claims pled.

The statutory construction engaged in by the First District is also unpersuasive. The district court embarked on its analysis by stating that courts presume the legislature passes laws with knowledge of existing statutes, not intending to keep contradictory laws on the books and not intending to repeal a law without saying so. *Green*, 172 So. 2d at 1012. This much is an accurate recitation of the axiom, but respectfully, a discordant use of *Knowles v. Beverly Enters.-Fla., Inc.*, 898 So. 2d 1, 9 (Fla. 2004), the source on which *Green* relies.

First, there is no indication whatsoever that the legislature enacted section 95.11(5)(g) unknowing of the exception clause that already existed in section 95.011 of the same chapter. The First District offers no information on this point.

Second, the First District does not explain how its negation of the effect of section 95.011 and resulting limitation on the previously understood scope of section 768.28(14)'s four year statute of limitations would *not* repeal or, in part, abrogate a law without expressing an intention to do so. It is entirely clear from this Court's precedents that statutory repeal by implication is disfavored absent repugnancy of the former law to the more recently enacted. *See Oldham v. Rooks*, 361 So. 2d 140, 143 (Fla. 1978) (repeal by implication is not appropriate absent repugnancy of former statute to more recently enacted law); *State v. Gadsden County*, 58 So. 232, 235 (1912) ("An intent to repeal prior statutes or portions thereof may be made apparent when there is positive an irreconcilable repugnancy between the provisions of a later enactment and those of prior existing statutes. But the mere fact that a later statute relates to matters covered in whole or in part by a prior statute does not cause a repeal of the older statute.")

Third, the driving concern of this analysis—that application of section 95.011 "would render the subsequently passed and more specific section 95.11(5)(g) a nullity from the time of its original passage" is logically flawed. *Green*, 172 So. 3d at 1012. As a matter of law and precedent, *Menendez* did not avoid the application of section 95.011's routing provision to a later-enacted statute, thereby actually nullifying that later-enacted statute's application to that lawsuit. 584 So. 2d at 568-69.

Moreover, the application of section 768.28(14)'s four-year statute of limitations would *not* nullify section 95.11(5)(g), as the First District erroneously concluded. Suits involving prison conditions range wider than than negligence-based tort claims that would expressly fall within the lengthier, four-year limitations period. *E.g. Molfetto v. D.O.C.*, 96 So. 3d 450 (Fla. 1st DCA 2012) (challenge to disciplinary ruling on narcotics possession in prison); *Stokes v. Fla. D.O.C.*, 948 So. 2d 75 (Fla. 1st DCA 2007) (prisoner's circuit court review of failure of prison health staff to review circumstances of alleged suicide attempt); *Clark v. Wainwright*, 490 So. 2d 1055 (Fla. 1st DCA 1986) (alleged violation of inmate's due process for being placed in administrative confinement); *Granger v. Fla. State Prison*, 424 So. 2d 937 (Fla. 1st DCA 1983) (due process complaint regarding close management confinement and alleged arbitrary transfer); *Bagley v. Briton*, 362 So. 2d 1048 (Fla. 1st DCA 1978) (prison's alleged failure to comply with its own disciplinary rules). *See also Hollingsworth v. Brown*, 788 So. 2d 1078 (Fla. 1st DCA 2001) (prisoner claim asserting retaliatory conduct for violation of First Amendment right to file grievance). In short, claims by individuals involving conditions of their prison confinement extend well beyond tort claims subject to the four year limitations period of section 768.28(14).

This approach to the interplay of these provisions—avoiding a construction nullifying the operation of one statute at the behest of another law—is far more

aligned with the settled interpretative consideration that the "courts' obligation is to adopt an interpretation that harmonizes two related, if conflicting statutes while giving effect to both, since the legislature is presumed to pass subsequent enactments with full awareness of all prior enactments and an intent that they remain in force." *Palm Harbor Special Fire Control Dist. v. Kelly*, 516 So. 2d 249, 250 (Fla. 1987)

Therefore, the First District's trepidation—that applying section 95.011 by its express terms to send this case "elsewhere" (to section 768.28(14)) causes the statutory nullification of section 95.11(5)(g)—is not only an uncertain conclusion; it is simply inaccurate. All three statutory provisions can exist in harmony, with each construed to have a field of operation. There is no need to repeal by implication part of the operation of section 95.011 and the heretofore understood application of the four-year statute of limitations for tort claims in section 768.28(14). *See Oldham*, 361 So. 2d at 143 (no repeal by implication when each statute has a field of operation).

Rather than reach the most logical conclusion, that there was no intention to repeal the application of sections 95.011 and 768.28(14) to prisoner tort suits, the First District's analysis in *Green* pivots to reasoning that section 95.11(5)(g) is more specific than section 768.28(14), and that the later-enacted statute should take precedence over a prior enactment. 172 So. 3d at 1012.

While section 95.11(5)(g) is more specific to suits based on prison conditions, it is *less* specific with respect to suits based on "negligent or wrongful acts or omissions," the language found in section 768.28(14). Applying the principle of statutory construction favoring a law of specific application over a more general law would make sense in this situation only if one ignores that section 768.28(14) *is* the more specific provision with respect to tort claims. Section 95.11(5)(g) is more specific *only* by reference to suits by prisoners that are about prison conditions, but it is entirely possible to have a suit about prison conditions that is not a tort claim.

Therefore, the interplay of section 95.11(5)(g) with sections 95.011 and 768.28(14) is not persuasively analogized to cases such as *Day v. State*, 977 So. 2d 664 (Fla. 5th DCA 2008), and *Carcaise v. Durden*, 382 So. 2d 1236 (Fla. 4th DCA 1980), both relied on by *Green*. 172 So. 3d at 1012. Those two cases involved specific statutes of limitation for particular criminal offenses and more generally phrased statutes of limitation that could have applied to those same criminal offenses. In *Day*, the court even referred to the more general statute "as a default statute that applies where no specific statute of limitations has been made applicable to a criminal offense . . ." 977 So. 2d at 666. It would not be plausible to refer to section 768.28(14) as a "default statute" for tort claims. In *Carcaise*, the court applied a previously-enacted, five-year statute of limitations specifically for

securities violations, rather than a more-recently-enacted statute of limitations "applicable to crimes generally." 382 So. 2d at 1237.

Moreover, while giving *Day* and *Carcaise* their due, the reconciliation of statutes governing limitations periods specially or generally available for the same alleged crime—and choosing the more specialized—does not assist greatly with the solution as to whether a "conditions of prison confinement" limitations period should override a provision governing statutes of limitations for tort claims. In addition, the settings in *Day* and *Carcaise* did not include interaction with a third provision that specifically directs courts to the governing limitations period, as section 95.011 directs us to section 768.28(14).

Of course, there is no disputing that section 95.11(5)(g) was enacted more recently than the other two statutes. But *Carcaise* shows that this canon of statutory construction is not always followed. There, in fact, recency did not overcome specificity. The more specific statute of limitations for securities law criminal violations was the first enacted, albeit it was later revised (and the limitations period left unchanged), after the general statute of limitations was enacted. 382 So. 2d at 1238. Nevertheless, the *older* securities law limitations period was held to apply.

In construing which of two potential statutes of limitation to apply, the supreme court has followed the rule that limitation periods should be construed strictly, and where there is doubt as to legislative intent, the preference is to allow

the longer period of time to apply. *Baskerville-Donovan Engineers v. Pensacola Exec. House Condo. Ass'n*, 581 So. 2d 1301, 1303 (Fla. 1991) (applying four- rather than two-year statute of limitations absent privity).[2] In following *Baskerville-Donovan* in a case involving competing limitations periods applicable to a condominium dispute, the Fifth District rephrased the point ever so slightly: "We believe that reasonable arguments can be made supporting the application of either statute of limitations . . . If there is doubt as to the applicability of a statute of limitations, the question is generally resolved in favor of the claimant." *Sheoah Highlands, Inc. v. Daugherty*, 837 So. 2d 579, 582 (Fla. 5th DCA 2003); *see also Fox v. Madsen*, 12 So. 3d 1261, 1263 (Fla. 4th DCA 2009) (applying five- rather than one-year limitations period where both might have been enforced).

Measuring mere recency is not, therefore, all that sturdy a method for determining which statute of limitations to apply. More compelling is the rule of construction that applies the lengthier limitations period in favor of the claimant, when dueling interpretations favor either of the two. *Baskerville-Donovan*, 581 So. 2d at 1303.

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[2] We note that the circuit court quoted *Sheils v. Jack Eckerd Corp.*, 560 So. 2d 361, 363 (Fla. 2d DCA 1990) for the proposition that a specific statute of limitations will be applied over a more general provision, even if the specific statute shortens the period of limitations. *Sheils* could not reflect upon the later decided *Baskerville-Donovan*, in which this Court stated a preference when reasonable arguments could be made for either statute to apply to utilize the longer period of limitations.

In sum, the plain meaning of section 95.011 provides that the time prescribed elsewhere in other statutes controls the limitations period. By legislative fiat, the four-year statute of limitations provided by section 768.28(14) applies to tort claims brought by prisoners, as *Calhoun* correctly reasoned and as *Green* erred in departing from to insist that section 95.11(5)(g)'s one-year period applies. Resort to maxims of statutory construction is not proper and is unnecessary given the plain terms of section 95.011. Even so, resort to statutory construction would result in harmonizing section 95.011(5)(g) with 768.28(14), allowing each to operate without repugnancy or repeal by implication.

III. The Complaint's federal claims should not have been dismissed for the failure to exhaust administrative remedies.

(a) Binding law from the Supreme Court of the United States interpreting § 1997e(a):

The Supreme Court of the United States has made several pronouncements about the exhaustion of administrative remedies under §1997e(a) that are binding on this Court and therefore germane to this appeal.

First, exhaustion of administrative remedies is mandatory, and claims that are not exhausted cannot be brought in court. *Porter v. Nussle*, 534 U.S. 516, 524 (2002).

Second, exhaustion of administrative remedies is an affirmative defense, and a prisoner is *not* required to plead exhaustion of administrative remedies in a civil rights complaint arising from prison conditions. *Jones v. Bock*, 549 U.S. 199, 212,

(2007) (Prisoner Litigation Reform Act does not require that a plaintiff allege the exhaustion of administrative remedies).

Third, exhaustion of administrative remedies requires exhaustion of *available* remedies. *Booth v. Churner*, 532 U.S. 731, 736 (2001) ("neither argues that exhaustion is required where the relevant administrative procedure lacks authority to provide any relief or to take any action whatsoever in response to a complaint.")

Fourth, exhaustion of administrative remedies is required, which means that a prisoner may not bypass available remedies, even when they do not respond to the relief sought, e.g., the absence of monetary damages in an administrative proceeding. *Woodford v. Ngo*, 548 U.S. 81, 85 (2006). "Proper" exhaustion means that remedies are not properly exhausted if unavailable due to the prisoner's failure to meet a known deadline. *Id*. at 93-94.

(b) The circuit court erred when it went beyond the four corners in dismissing the Complaint's federal claims on the basis of failure to exhaust administrative remedies.

The circuit court expressly recognized that it was bound by the four corners of the complaint in addressing the motion to dismiss federal law claims on the basis of failure to exhaust administrative remedies. Nevertheless, the court failed to adhere to that legal principle, by inferring facts outside the four corners and, more prejudicially, against the pleader. Then, the First District affirmed without

comment Mr. Green's arguments that the pleading did not itself demonstrate a failure to exhaust an available administrative remedy.[3]

Mr. Green's allegations that (a) he commenced a county grievance procedure before transfer; and (b) after transfer "he was unable to receive a response or submit his grievances to the next level" (R.75:¶82), do not establish within the four corners of the Complaint that he had failed to *properly* exhaust an *actually available* administrative process or remedy. That is because his allegations do not facially establish that the grievance procedures at the Santa Rosa County Jail were still *available* to complete after his transfer from county jail to a state correctional institution, or that he could have acted to comply with such an administrative process—the substance of which is not disclosed on the face of the Complaint. We can only infer from the Complaint that some form of grievance procedure was available to inmates-in-*residence* at the county jail. No inference can be properly drawn from the Complaint about the continuing availability of county jail grievance procedures to inmates following their transfer from the county facility to a state prison.

In concluding to the contrary, that the allegations of the Complaint facially demonstrated a failure to exhaust administrative remedies, the circuit court

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[3] This issue and the next are properly before this Court "as though the case had originally come to this Court on appeal." *Special v. West Boca Med. Ctr.*, 160 So. 3d 1251, 1261 (Fla. 2014) (internal quotation omitted).

deprived Mr. Green of the benefit of Florida's four-corners rule governing motion to dismiss proceedings. The circuit court necessarily drew improper inferences beyond the boundaries of the pleading about the continuing availability of administrative process and relief following Mr. Green's transfer to a state facility. That error is facially apparent in several passages from the order of dismissal.

First, the circuit court stated that Mr. Green "did nothing to followup or to appeal any lack of answer or negative decision." (R.145:¶9) The comment betrays an assumption and inference—construed improperly against the pro se pleader—that there could have been an answer or negative decision from county jail authorities after Mr. Green's transfer from the county facility to a state prison.

Second, the court further aggravated the inferences drawn against the pleader by stating that Mr. Green "could have finished his administrative remedies anytime between the occurrence of the fight . . . and the mailing of his complaint four years later . . ." (R.145:¶9). Once again, the embedded assumption is that a county administrative process remained in place for a transferred inmate.

Third, the order drew an inference as to an unknown fact, when the court stated that Mr. Green "had an appeal mechanism available to him by following up with the Santa Rosa County Jail." (R.145:¶9). There is nothing in the Complaint that validates as a fact the existence of an appeal mechanism for a former county inmate, or that an available remedy existed for a transferred inmate.

All of these inferences should have been drawn *favorably* to the pleader, Mr. Green, that upon his transfer there was no longer a county administrative mechanism applicable to him of which he could avail himself when he was transferred from county to state jurisdiction a mere eight days after the incident that gave rise to the Complaint. *See Mlinar v. United Parcel Serv.*, 2016 WL 825261 *6 (Fla. March 3, 2016). This dismissal on the pleadings was also contrary to the longstanding admonition that a pro se complaint must be afforded a liberal construction, in which any doubt that a cause of action has been validly stated is construed favorably to the pleading. *Haines v. Kerner*, 404 U.S. 519, 520 (1972); *see also Stokes v. Fla. Dept. of Corrections*, 948 So. 2d 75, 77 (Fla. 1st DCA 2007) ("Generally speaking, pleadings are to be construed favorably to the pleader. . . . Furthermore, liberal construction should be given to pro se pleadings.") (internal quotations and citations omitted).

Indeed, decisions of the First District support the conclusion that an available administrative remedy must appear on the face of the pleading not to have been exhausted, in order for dismissal to be appropriate. In *Owens v. Crews*, 131 So. 3d 799, 800 (Fla. 1st DCA 2013), the circuit court dismissed a prisoner's petition for failure to exhaust administrative remedies. The prisoner had not attached "responses" to his formal grievances when appealing to the department secretary, per the state administrative code. *Id.* The First District reversed this

dismissal, finding it "erroneous because a disputed issue of fact exists concerning whether Department officials timely provided the responses to [the prisoner], and the court did not take competent, substantial evidence to reach its determination that the door to review in the circuit court is closed." *Id.* at 800.

In *Miller v. Dept. of Corrections*, 172 So. 3d 574 (Fla. 1st DCA 2015), the First District took not more than three sentences to reverse a dismissal for failure to exhaust administrative remedies where the petition alleged that the prisoner had "exhausted all available avenues of administrative review via the inmate grievance procedure . . ." *Id.*

In *Adlington v. Mosley*, 757 So. 2d 573, 574 (Fla. 4th DCA 2000), the Fourth District reversed a dismissal because the trial court had to determine whether an inmate had an available procedure by which to grieve against private companies operating correctional facilities. *See also Bailey v. Fla. DOC*, 958 So. 2d 986, 987 (Fla. 4th DCA 2007) (reversing dismissal of complaint as it sufficed that a prisoner alleged he had "exhausted all administrate remedies").

Thus, Florida law is clear that the availability of a process to exhaust administrative remedies is necessary and that dismissal is not proper on the face of a complaint absent a clear allegation that there is an available remedy to exhaust. Here, the circuit court erred in inferring the existence of a continuing administrative process and the availability of a continuing administrative remedy

that could be properly exhausted post-transfer. In doing so, the court tread beyond the familiar requirement that all "allegations of the complaint are assumed to be true and all reasonable inferences arising therefrom are allowed in favor of the plaintiff." *Wallace*, 3 So. 3d at 1042-43.

This error alone requires reversal of the dismissal of the federal claims. Given the fact of this errant dismissal, we do not believe the Court needs to go further in addressing the exhaustion of administrative remedies issue, particularly given the posture of this record and the four corners error. Nevertheless, because the circuit court concluded that Mr. Green had not exhausted administrative remedies (and the First District affirmed that determination without comment), we will delve into that thicket below.

(c) The Complaint should not be dismissed for the failure to exhaust administrative remedies when it is not clear that the pro se prisoner had an available remedy to properly exhaust his federal claims.

No Florida appellate court appears to have decided whether the *transfer* from one jurisdiction to another forecloses the *availability* of an administrative remedy. There is no binding precedent from the Supreme Court of the United States construing the Prison Litigation Reform Act on this precise question related to the exhaustion of administrative remedies. Moreover, the procedural rules that a prisoner must properly exhaust are defined by the prison grievance process itself—in this case county jail procedures—not the Prison Litigation Reform Act. *Jones*,

549 U.S. at 218; *King v. McCarty*, 781 F.3d 889, 894 (7th Cir. 2015) ("The administrative remedies a prisoner must exhaust are established and defined by state law.")

And in deciding these questions, decisions of lower federal courts construing federal law are persuasive authority, but not binding on this Court or the lower courts of this state. *Raymond James Fin. Servs. v. Saldukas*, 896 So. 2d 707, 710 (Fla. 2005) ("decisions of the federal circuit courts are persuasive precedent [on federal statutory construction] but they are not binding"); *Doe v. Pryor*, 344 F.3d 1282, 1286 (11th Cir. 2003) ("The only federal court whose decisions bind state courts is the United States Supreme Court.").

The lower court's decision finding a failure to exhaust administrative remedies relied expressly on two cases, one from the United States Court of Appeals for the Eleventh Circuit and another from the Southern District of Florida, to conclude that Green's transfer did not absolve his responsibility to exhaust administrative remedies. (R.144:¶8). The two cases are both legally and factually distinguishable; and, of course, not binding on this Court.

In the first, an unpublished decision, the Eleventh Circuit determined that an inmate who did not file a grievance prior to transfer had not exhausted administrative remedies. *Hall v. Richardson*, 144 Fed. Appx. 835, 836 (11th Cir. 2005). In the second, *O'Connor v. Brown*, 2006 WL 889434 (S.D. Fla. March 30,

2006), the district court held that an inmate who did not submit a grievance during his 11-day incarceration at a county facility where he claimed to have been injured could not rely upon his subsequent transfer as grounds for claiming an inability to exhaust administrative remedies.

Mr. Green did, however, file a grievance before he was transferred. The record in this case does not support that he failed to exhaust administrative remedies for any other reason, because the fact barren record resulting from a dismissal on the pleadings does not reflect (a) whether the county administrative process in question permitted further proceedings, or (b) whether the transfer prevented Mr. Green from receiving a response to his grievance. In short, neither case relied upon by the circuit court in its dismissal order answers the critical questions of whether (a) the county jail's grievance process in substance continued and hence was available post-transfer and (b) whether, even if it did continue, a transferred inmate could comply with that process.

Cases considering the broader question of whether an administrative remedy is available to be exhausted acknowledge that, while ultimately a question of law, there is necessarily a factual inquiry first required. *See Small v. Camden County*, 728 F.3d 265, 271-72 (3d Cir. 2013) ("Although the availability of administrative remedies to a prisoner is a question of law . . . it necessarily involves a factual inquiry.") An available process must be one that is "capable of use or at hand." *Id.*

at 271. The administrative process that must be exhausted is that of the prison where the grievance is permitted, not a theoretical process. *Id.* at 272. In *Small*, some grievances were not responded to by the facility, hence the inmate could not appeal in conformity with the grievance procedure that had been established. Hence, summary judgment based on failure to exhaust administrative remedies was reversed as to those particular claims. *Id.* at 272-73.

Similarly, but in a case involving a transferred inmate, the Fifth Circuit reversed for a factual determination as to whether administrative remedies were available to an inmate because there was no evidence that he could have discovered them or whether they were suspended as to transferred inmates. *Dillon v. Rogers*, 596 F.ed 260, 266-68 (5th Cir. 2010). *But cf. Leggett v. Lafayette*, 608 Fed. Appx. 187, 191 (5th Cir. 2015) ("Even if [the inmate] was not informed of the relevant grievance procedure, uncontested record evidence indicates that a specific grievance procedure was in place at the time, its contours were knowable, and no one attempted to dissuade [the inmate] from using it.") But even so *evidence* was required to substantiate the continued availability of an unobstructed grievance process.

The Eleventh Circuit has also considered factual questions regarding whether transfer of an inmate impacted the authenticity and availability of an administrative grievance remedy. *Dollar v. Coweta County Sheriff Office*, 446 Fed.

Appx. 248 (11th Cir. 2011) (reversing in part a dismissal based on failure to exhaust administrative remedies because "it is not apparent from the face of the complaint that Dollar could use the grievance procedures at Wilcox State Prison to grieve conditions and treatment at the Coweta County Jail, much less that Dollar knew or should have known that he could do so"). *See also King v. McCarty*, 781 F.3d at 895 (reversing summary judgment for failure to exhaust administrative remedies by inmate that would have been required within five days of his transfer from county to state facility); *Rodriguez v. Westchester County Jail Correctional Dept.*, 372 F.3d 485, 488 (2d Cir. 2004) (inmate's transfer out of jurisdiction of county officials rendered administrative remedies no longer available); *Pauls v. Green*, 2011 WL 5520645 *4 (D. Idaho Nov. 14, 2011) (rejecting failure to exhaust administrative remedies where inmate was transferred from county to state facility and "there is no evidence of inter-facility cooperation between the county jail and the state prison regarding grievance procedures."); *Bradley v. Washington*, 441 F. Supp. 2d 97 (D.C. 2006) (transfer of an inmate from one prison jurisdiction to another abnegated prisoner's responsibility to exhaust administrative remedies where transferring jurisdiction's grievance procedures made no provision for submission of complaints by prisoners no longer detained by that jurisdiction).

Questions of fact predominate as to whether Mr. Green failed to exhaust his administrative remedies when he was transferred from a county to a state facility. It

was not established that an administrative remedy remained available to him following his transfer; whether he could further pursue his grievance in the absence of a ruling; or whether the transfer from the county to state jurisdiction impeded his ability to exhaust any administrative remedy that may still have been available to him. As a result, the circuit court erred in dismissing the federal claims based on failure to exhaust administrative remedies at the pleading stage.

CONCLUSION

The Court should reverse the dismissal of the state law claims based on the erroneous application of the one-year statute of limitations. The Court should also reverse the dismissal of the federal claims based on the failure to exhaust administrative remedies. Accordingly, the final judgment should be reversed with directions to reinstate Mr. Green's state and federal law claims.

Respectfully submitted,

/s/Charles M. Auslander
Charles M. Auslander

Charles M. Auslander
Florida Bar No. 349747
John G. Crabtree
Florida Bar No. 886270
Brian C. Tackenberg
Florida Bar No. 107224
Crabtree & Auslander, P.A.
240 Crandon Boulevard, Suite 234
Key Biscayne, Florida 33149
Telephone (305) 361-3770
Facsimile (305) 437-8118
jcrabtree@crabtreelaw.com
causlander@crabtreelaw.com
floridaservice@crabtreelaw.com
Counsel for Petitioner Eric Green

CERTIFICATE OF SERVICE

On March 10, 2016, I emailed a copy of this brief to the attorneys listed below:

Carl R. Peterson, Jr.
Jolly & Peterson, P.A.
Post Office Box 37400
Tallahassee, Florida 32315
Phone: 850-422-0282
Fax: 850-422-1913
email: crp@jollylaw.com
Attorneys for Appellees

/s/Charles M. Auslander

CERTIFICATE OF COMPLIANCE

I prepared this brief in Baskerville 14-point font.

/s/Charles M. Auslander