IN THE SUPREME COURT OF FLORIDA

ERIC GREEN,

Plaintiff/Petitioner,

vs.

Case No. SC15-1805
LT No. 1D14-4052

CALVIN K. COTTRELL, DANNY E. COOK, DONALD E. DUBLIN and SGT. D. BRYANT,

Defendants/Respondents.
_____/

RESPONDENTS BRYANT, COOK AND COTTRELL'S ANSWER BRIEF

On Discretionary Review from the District Court of Appeal
First District, State of Florida

CARL R. PETERSON, JR.
FLORIDA BAR NO. 980048
JOLLY, PETERSON & TRUCKENBROD, P.A.
Post Office Box 37400
Tallahassee, Florida 32315
Phone: 850-422-0282
Fax: 850-422-1913
Email: crp@jollylaw.com

Attorney for Respondents Bryant, Cook & Cottrell

TABLE OF CONTENTS

TABLE OF CITATIONS

Florida Statutes

Miscellaneous

STATEMENT OF THE CASE AND FACTS

Respondents agree with Petitioner's Statement of the Case and Facts except that Petitioner overlooked the threshold requirements needed before §768.28(14), Fla. Stat., can be reached. The initial section of the statutory waiver of sovereign immunity provides:

> **768.28 Waiver of sovereign immunity in tort actions; recovery limits; limitation on attorney fees; statute of limitations; exclusions; indemnification; risk management programs.—**
>
> (1) In accordance with s. 13, Art. X of the State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act. Actions at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages against the state or its agencies or subdivisions for injury or loss of property, personal injury, or death caused by the negligent or wrongful act or omission of any employee of the agency or subdivision while acting within the scope of the employee's office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant, in accordance with the general laws of this state, may be prosecuted subject to the limitations specified in this act.

SUMMARY OF ARGUMENT

On June 12, 2014, a hearing was held on Petitioner's Motion for Leave to file his proposed Third Amended Complaint. With regard to his state law claims, the circuit court did not abuse its discretion in finding that the proposed attempt to further amend Petitioner's complaint to be futile and, therefore, denied Petitioner's Motion

to Amend. Petitioner, ERIC GREEN'S, state law claims were correctly dismissed with prejudice because they were barred by the one year statute of limitations found in §95.11(5)(g), Fla. Stat.

In doing so, the Court found that further amendment of the complaint would be futile under both federal and Florida law since Petitioner simply "considered" his transfer back to DOC had exhausted his available administrative remedies; and, because his state common law claims of negligence and intentional infliction of emotional distress were barred by the specific, narrowly targeted one year statute of limitations for prisoners challenging their conditions of confinement. Such later enacted statute of limitations controls, instead of the more general four year statute of limitations found in §768.28(14). Some Florida prisons are operated by private contractors. Such contractors are specifically prohibited from raising sovereign immunity as a defense to any tort claims. Thus, the four year statute of limitations in §768.28(14) would not be applicable to them. Therefore, there is a good reason for the legislature's placement of the one year statute of limitations within Chapter 95, instead of within §768.28(14).

The Circuit Court correctly found the facts of this case were different from those of Patricia Calhoun, who was injured while she was housed at the Hernando County Jail while she was a pre-trial detainee. However, in contrast to Ms. Calhoun,

Petitioner GREEN has always been a convicted "prisoner" at all times material. Therefore, the Circuit Court correctly found that Calhoun v. Nienhuis, 110 So.3d 24 (Fla. 5th DCA 2013), was inapposite and not controlling here.

Alternatively, and respectfully, the Calhoun court erred by effectively eviscerating §95.11(5)(g) and making it a nullity. Well-settled law provides that courts are supposed to interpret statutes according to their plain language. They are supposed to always attempt to harmonize statutes dealing with the same general subject whenever possible and only reject applying statutes when there is a "hopeless inconsistency," or absurd result. In this instance, there is no hopeless inconsistency between §768.28(14) and §95.11(5)(g). Section 95.11(5)(g) should be viewed as a separate modification or exception to the normal four year statute of limitations for claims against government agencies found in §768.28(14); and, the legislature's expressed and clear intent should be upheld by affirming the First District's analysis.

Concerning Petitioner's §1983 claims, controlling case law allows courts to *sua sponte* dismiss prisoner's claims under the PLRA when failure to exhaust is shown by the face of complaint. In this instance, Petitioner's own Complaint shows that he failed to complete available administrative remedies because he simply "considered" his administrative remedies to be exhausted without making any attempt to followup with the Santa Rosa County Jail once he was transferred back to the Department of

Corrections.

Respondents concede, however, that Petitioner should be given an opportunity to make a record prior to ruling on the question of exhaustion. After affirming dismissal of the state law claims with prejudice, this matter should be remanded to the circuit court with instructions to follow the steps set forth by the Eleventh Circuit in its interpretations of the PLRA in Bryant v. Rich and its progeny. The parties should be instructed to make a record related solely to exhaustion. Then, the circuit court should be instructed to make specific findings to resolve any disputed factual issues related to exhaustion, if necessary, after treating any matters outside the pleadings as a motion for summary judgment as required under Florida law.

ARGUMENT

I. THE MORE SPECIFIC AND LATER ENACTED ONE YEAR STATUTE OF LIMITATIONS IN § 95.11(5)(g) SHOULD BE APPLIED TO THIS CASE.

The Circuit Court denied Petitioner's attempt to file a Third Amended Complaint and dismissed the Florida common law claims with prejudice because further amendment would be futile. The standard of review for refusal to grant leave to amend because the amendment would be futile is abuse of discretion. Soucy v. Casper, 658 So.2d 1017, 1018 (Fla. 4th DCA 1995); Port Marina Condo. Ass'n, Inc. v. Roof Services, Inc., 119 So. 3d 1288, 1291 (Fla. 4th DCA 2013). Interpretation of a statute is reviewed *de novo.* Heart of Adoptions, Inc. v. J.A., 963 So.2d 189, 194 (Fla. 2007).

A. More specific statutes of limitations trump more general statutes of limitations.

Florida follows the general rule applied in most states. "A specific statute of limitations addressing itself to a specific matter takes precedence over a more general statute of limitations even though the specific statute provides for a shorter period of limitations." Sheils v. Jack Eckerd Corp., 560 So.2d 361, 363 (Fla. 2nd DCA 1990) (collecting cases); see also, 54 C.J.S. *Limitations of Actions*, §6(a) (1987); see also, Day v. State, 977 So.2d 664, 665-66 (Fla. 5th DCA 2008) ("The correct principle of law to apply, however, is that: '[g]enerally speaking, a special statute of limitations

which addresses itself to specific matters will take precedence over a general statute.'"), *quoting*, Carcaise v. Durden, 382 So.2d 1236 (Fla. 5th DCA 1980).

In this instance, the First District correctly found that §95.11(5)(g) "is not a statute of a general nature applying to a particular cause of action that might be brought against a private entity." Green v. Cottrell, 172 So.3d 1009, 1012 (Fla. 1st DCA 2015). Instead, as the plain language of § 95.11(5)(g) makes abundantly clear, "[w]e find the statute of limitations outlined in section 95.11(5)(g) to be more specific, as it applies *only* to actions brought *by or on behalf of prisoners regarding their confinement.*" Green, at 1011 (emphasis in original).

By its terms, the statute cannot possibly apply to any other persons *except* actual "prisoners;" and, then *only if* relates to their conditions of confinement. If their complaint concerns something that occurred before they were sentenced and confined, i.e., an alleged false arrest or excessive force incident prior to their conviction and sentencing, the statute would not apply. Instead, the more general statute of limitations found in §768.28(14) for all other law suits against governmental entities would apply. On the other hand, if a convicted prisoner wishes to sue about any alleged statutory violation, or any common law negligent or intentional tort related to his/her conditions of confinement, i.e., a slip and fall; a

jailer's use of force; or, one or more jailer's alleged negligence,[1] then the one year statute of limitations applies, due to the specific two-part test found in the statute.

The key to determining whether the one year statute of limitations in §95.11(5)(g), Fla. Stat., applies is whether the plaintiff "is a prisoner" when the action is filed. §57.085(1), Fla. Stat. (1996) defines the term "prisoner" for purposes of the effective statute of limitations. "[T]he term 'prisoner' means a person *who has been convicted* of a crime and *is incarcerated* for that crime or who is being held in custody pending extradition or sentencing." Id., (emphasis added). When those two elements (conviction and incarceration) are met, then the plain language of the statute applies. If the term "prisoner" applies to a particular plaintiff, then a *unique* statue of limitations is in effect for any claims related to their conditions of confinement. §95.11(5)(g), Fla. Stat. (1996) ("Except for actions described in subsection (8), 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," [must be brought within one year]).

Thus, if a person is a mere pre-trial detainee when the action is filed, then §57.085 would not apply because they would not be a "prisoner" at the moment the

---

[1]GREEN alleged negligence and intentional infliction of emotional distress under Florida law. e.g., Second (and proposed Third) Amended Complaints, ¶81.

action is filed.[2] Likewise, if a person has been previously convicted, but has been released from incarceration when a lawsuit is brought or filed, then they are no longer a prisoner, and §57.085 would not apply. Under either scenario, the shorter statute of limitations period applicable to prisoners' conditions of confinement claims would not apply by its plain language. Florida Dept. of Children and Family Services v. P.E., 14 So.3d 228, 234 (Fla. 2009) ("Legislative intent guides statutory analysis, and to discern that intent we must look first to the language of the statute and its plain meaning. Where the statute's language is clear or unambiguous, courts need not employ principles of statutory construction to determine and effectuate legislative intent."); 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."). In this matter, §95.11(5)(g)'s plain language controls, and no statutory construction is actually needed. But, well-established principles of statutory construction also support the result reached by the First District here.

Further, federal case law interpreting the PLRA makes the same type of bright line distinction as does §57.085 and §95.11(5)(g). It is the Plaintiff's status as of the

---

[2]As the legislative history of Ch. 96-106 shows, see R. Tab B, App. 2, p. 8, the final bill was amended to limit its effects only to prisoners. See also, App. 2 hereto. The statute intentionally excludes pre-trial detainees.

moment of filing suit that counts. Harris v. Garner, 216 F.3d 970, 975 (11th Cir. 2000) ("It is confinement status at the time the lawsuit is 'brought,' i.e., filed, that matters.")

Under the statute's plain language, if a plaintiff has been *convicted, and is incarcerated* when he or she initially files suit; and, if such suit involves anything related to the prisoner's conditions of confinement, then §95.11(5)(g) applies. See, P.E., 14 So.3d at 234.

Petitioner seeks to avoid imposition of the plain language of the statute by arguing that the "exception clause" found in §95.011 applies to say the one year period in Ch. 95 has no applicability here. (Initial Brief, p. 11). However, such argument overlooks the fact that private persons simply do not operate jails or prisons. Furthermore, Petitioner's argument overlooks the fact that this statute is most certainly not a general statute of limitations that might be applied outside a jail or prison setting. Instead, it acts as an exception to the typical statute of limitations applicable to most governmental lawsuits, and there is no more specific statute of limitations related to a prisoner's conditions of confinement. So, §95.11(5)(g) can be given full effect without resort to §768.28(14), and there is no "different statute prescrib[ing] a different time, . . ." Public Health Trust of Dade Co. v. Menendez, 584 So.2d 567, 569 (Fla. 1991); see also, §95.011.

Menendez provided a "mirror image" of the statutes in question in this case. In Menendez, the Public Health Trust ("PHT") argued for application of the *general* statute of limitations applicable to all medical malpractice actions as then found in §95.11(4)(b), Fla. Stat. In other words, PHT wanted to apply the general statute of limitations, not the more specific one. However, there was a more specific statute of limitations applicable to all government entities, including those operating hospitals. The Menendez court noted "A staff summary attached to these amendments endorsed the view that, under then-existing law, section 768.28(11) applies to medical malpractice actions against governmental hospitals and section 95.11(4) does not." Id. at 569-570. The court also noted that both statutes were later changed in 1988 to make it clear that the two year statute of limitations applied both to governmental hospitals and to privately run hospitals. Id. at 570.

Here, no such clarification or statutory change is needed because the legislative language and history is abundantly clear. See, Final Final (sic) Bill Analysis and Economic Impact Statement, R, Tab B, Appendix 2, p. 6 ("According to the Attorney General's Office, savings would likely be realized at the local level since counties would no longer have to absorb the expense of frivolous inmate lawsuits."). The State Courts Administrator also anticipated a reduction in caseloads after enactment of the statute. Id. Unlike the legislative history at issue in Menedez, the applicable

staff analysis here shows the legislature did, in fact, intend to change the law to shorten the statute of limitations to reduce frivolous prisoner lawsuits.

Calhoun overlooked the fact that the 1996 Legislature had crafted a *very narrow exception* to the normal 4-year statute of limitations for law suits against governmental agencies. The Legislature could have, and arguably even should have, placed the 1996 amendment within the text of §768.28, instead of changing §95.11. But, such statutory placement does not mean that the two statutes cannot be completely harmonized and given full effect.

> It is axiomatic, however, that the courts must presume that statutes are passed with knowledge of prior existing statutes and where possible, it is the duty of the courts to favor a construction that gives a field of operation to all rather than construe one statute as being meaningless or repealed by implication. Therefore, whenever possible, courts must attempt to harmonize and reconcile two different statutes to preserve the force and effect of each. 'This follows the general rule that the legislature does not intend 'to enact purposeless and therefore useless legislation.' There must be hopeless inconsistency before rules of construction are applied to defeat the plain language of one of the statutes.

Agency for Health Care Admin. v. In re: Estate of Johnson, 743 So. 2d 83, 86-87 (Fla. 3d DCA 1999), *citations omitted* (emphasis added). On the facts of this case, there is certainly no "hopeless inconsistency" between §95.11(5)(g) and §768.28(14). In effect, however, the Calhoun Court's reliance upon placement of the language within §95.11, instead of §768.28, has the effect of elevating form over substance.

Shouldn't "what" the Legislature says ordinarily be more important than "where" it chooses to put the implementing language? Beyel Bros., 664 So.2d at 63-64, *citations omitted* ("'The classification of a law or a part of a law in a particular title or chapter of Florida Statutes is not determinative of legislative intent.' Legislative intent must be determined exclusively from the language of the statute.").

If Ms. Calhoun was a convicted prisoner when her suit was "brought," then the Calhoun Court erroneously nullified the Legislature's much later expressed intent, and substituted its own judgment for the Legislature's. And, surely, there is no "hopeless inconsistency" between the two statutes sufficient to defeat imposition of §95.11(5)(g) here. Estate of Johnson, 743 So.2d at 86-87. "Statutes in derogation of state sovereignty are to be strictly construed" against plaintiffs to protect the state's treasury. 48A Fla. Jur. 2d *Statutes* § 183 (2015). Properly and "strictly construed" as it should be, §95.11(5)(g) should be viewed merely as an exception to the normal, more general, four year statute of limitations applicable to *all other* suits alleging negligence and intentional infliction of emotional distress against governmental entities. §95.11(5)(g) is similar to the two year statute of limitations exception for wrongful death and medical malpractice claims against governmental entities that has now been added within §768.28(14). It is just located in a different statute/place.

Because of the very clear language in §95.11(5)(g), Florida's limited waiver

of sovereign immunity as found in §768.28 should not be reached. For causes of action occurring after July 1, 1996, §768.28 should not be applicable in a lawsuit by a prisoner challenging their conditions of confinement. Instead, such limited waiver of sovereign immunity in §768.28 applies *only* to enable a lawsuit against a government agency, "if a private person, would be liable to the claimant." §768.28(1), Fla. Stat. (2012). Thus, the limited waiver of immunity found in §768.28(1) is not applicable. It should not be reached to create an uncertainty that does not exist in interpreting the unique language of §95.11(5)(g). Here, however, §95.11(5)(g) is applicable only to government units operating jails and prisons (including those who contract with them and stand in the government's shoes).

Chapter 957, Fla. Stat., is the Correctional Privatization Act. §957.01, Fla. Stat. It was initially passed in 1993; three years prior to the passage of the statute of limitations applicable here. In doing so, the legislature specifically excluded private contractors from raising sovereign immunity as a defense "in any action arising out of the performance of any contract entered into under this chapter or as a defense in tort, or any other application, with respect to the care and custody of inmates under the contractor's supervision . . ." §957.05(1), Fla. Stat. (1993) (emphasis added); Ch. 93-406, §40, Laws of Florida; see also, Ealy v. Geo Group, Inc., 2014 WL 4437636, Case No. 5:12-cv-205-MP-CJK (N.D. Fla. 2014).

Ealy found that the one year statute of limitations applied after finding that "[i]t is undisputed that Plaintiff is a prisoner and the claims in his proposed amended complaint against Geo Group relate to the conditions of his confinement." Id., at *4. "Because Geo Group is prohibited from asserting sovereign immunity in this action, this action may not be characterized as one brought pursuant to section 768.28, as is required for the application of the four-year limitations." Id., at *5.

Ealy gives a good example of why, when it passed Ch. 96-106 three years later, the legislature chose to put the one year statute of limitations within §95.11(5)(g), instead of placing it within §768.28(14). If it had been placed within §768.28(14), the legislature would have had to make an "exception to an exception" to ensure prisoners housed at a privately contracted prison were treated the same as prisoners at a DOC-run facility; or, to those prisoners actually serving their sentences at a county jail.

B. More recently enacted statutes should generally control as they show the latest expression of legislative intent.

"The latest enactment takes precedence over prior enactments." Carcaise, 382 So.2d at 1238; State v. Bd. of Public Instruction, 113 So.2d 368, 370 (Fla. 1959). "The Legislature is presumed to know its own statutes and when it enacts a new statute, it is done with that knowledge." Carcaise, 382 So.2d at 1238; Tamiami Trails Tours, Inc. v. Lee, 142 Fla. 68, 194 So. 305 (1940). "Courts must presume that the

legislature passes statutes with the knowledge of prior existing statutes and that the legislature does not intend to keep contradictory enactments on the books or to effect so important a measure as the repeal of a law without expressing an intention to do so." 48A Fla. Jur. 2nd *Statutes*, §172 (2015) (emphasis added); Knowles v. Beverley Enterprises-Florida, Inc. 898 So.2d 1, 9 (Fla. 2004). "Instead, [courts] are obligated 'to adopt an interpretation that harmonizes two related, if conflicting, statutes while giving effect to both.'" Saridakis v. State, 936 So.2d 33, 35 (Fla. 4th DCA 2006), *quoting*, Jones v. State, 813 So.2d 22, 25 (Fla. 2002).

Both the Carcaise court and the Day court held that a special or specific statute of limitations would apply, regardless of whether application of the specific statute of limitations gave a longer, or shorter, period of time within which to file suit. In Day, the court applied a specific statute of limitations which gave a shorter time within which to bring a criminal prosecution; and, it found that the alternative or general statute was a default statute that applies where no specific statute of limitations has been made applicable . . . or in situations *where the legislature has expressly called for its use.* Day, at 666 (emphasis added).

Here, the legislature's intention to apply §95.11(5)(g) to lawsuits by prisoners could not be any clearer. Such clarity is provided both by the express language of the statute and by the preamble to the related chapter law, Ch. 96-106, Laws of Florida.

R., TAB B; see also, Appendix 1 to Answer Brief.

In this instance, §768.28(14) is actually the default statute for bringing suit against governmental units. Every *other* type of suit brought against a governmental unit must comply with §768.28(14) and the related four year, or two year, statute of limitations expressed therein. However, the legislature specifically passed Ch. 96-106 with the express intent of reducing frivolous lawsuits. See, App. 1 at 92-93. Such legislative intent should be respected.

The year after Congress passed the Prison Litigation Reform Act, Florida followed Congress' lead in attempting to reduce frivolous prisoner lawsuits. Geffken v. Strickler, 778 So.2d 975, 977 (Fla. 2001) ("The legislative history of these amendments makes clear that the intent of all the amendments was to reduce the filing of frivolous lawsuits and reduce the amount of funds unnecessarily expended on such lawsuits in the courts."); See, Ch. 96-106, Laws of Florida; see also, Final Bill Analysis and Economic Impact Statement of Ch. 96-106, Laws of Florida. R., TAB B; See also, App. 1-2 hereto.

> WHEREAS, frivolous inmate lawsuits congest civil court dockets and delay the administration of justice for all litigants, and
>
> WHEREAS, each year self-represented indigent inmates in Florida's jails and prisons file an ever-increasing number of frivolous lawsuits at public expense against public officers and employees, and
>
> WHEREAS, state and local governments spend millions of dollars

> each year processing, serving, and defending frivolous lawsuits filed by self-represented indigent inmates, and
>
> WHEREAS, the overwhelming majority of civil lawsuits filed by self-represented indigent inmates are frivolous and malicious actions intended to embarrass or harass public officers and employees, and . . .

Geffken, 778 So.2d at 977, n. 4, *quoting* Ch. 96-106, Preamble, at 92-93, Laws of Florida; R., Tab B, App. 1.

Such timing of similarly motivated statutes is also significant. Congress enacted the Prison Litigation Reform Act in 1995. See, Pub. Law. 104-34 (1995). Congress undoubtedly intended to reduce the number of frivolous lawsuits. See, e.g., Porter v. Nussle, 534 U.S. 516, 524-25, 122 S.Ct. 983, 988 (2002).

The next year, the Florida Legislature intended to reduce frivolous prisoner suits by passing the amendment to §95.11(5)(g). "The Legislature is presumed to know its own statutes and when it enacts a new statute, it is done with that knowledge." Carcaise, 382 So.2d at 1238; Tamiami Trails Tours, Inc. v. Lee, 142 Fla. 68, 194 So. 305 (1940). "Courts must presume that the legislature passes statutes with the knowledge of prior existing statutes and that the legislature does not intend to keep contradictory enactments on the books or to effect so important a measure as the repeal of a law without expressing an intention to do so." 48A Fla. Jur. 2nd *Statutes*, §172 (2015) (emphasis added); Knowles v. Beverley Enterprises-Florida, Inc. 898 So.2d 1, 9 (Fla. 2004). "Instead, [courts] are obligated 'to adopt an

interpretation that harmonizes two related, if conflicting, statutes while giving effect to both.'" Saridakis v. State, 936 So.2d 33, 35 (Fla. 4th DCA 2006), *quoting*, Jones v. State, 813 So.2d 22, 25 (Fla. 2002).

The Calhoun court never explicitly recognized the fact that Ms. Calhoun was not a "prisoner" when she filed her suit. By overlooking her status as a mere pre-trial detainee, it missed the fact that § 95.11(5)(g) simply should not have applied to her facts at all. See, Argument, *infra*. Instead, it relied upon this Court's reasoning in Beard, S.A.P., and Horn in rejecting application of the one year statute of limitations to its facts. Calhoun, 110 So.3d at 26. None of those cases, however, dealt with the express language of § 95.11(5)(g). Also, Calhoun never attempted to harmonize the two statutes.

Changing the Calhoun facts slightly, assuming *arguendo* Ms. Calhoun was convicted when she "brought" (filed) her case, the Calhoun Court erroneously applied the *more general* 4-year statute of limitations found in §768.28(14), instead of the *later adopted and more specific* 1-year statute applicable only to suits against government entities or contractors by prisoners challenging their conditions of confinement. See, Calhoun, 110 So.3d at 26, *citing* Beard v. Hambrick, 396 So. 2d

708, 712 (Fla. 1981).[3]

Beard found the more specific four-year statute of limitations in § 768.28, not the general two-year statute of limitations for all other wrongful death actions against non-governmental entities, applied to wrongful death claims brought against a Florida Sheriff. But, since Beard was issued in 1981, the Legislature has plainly amended §768.28(14) to make it clear that the *general* two-year statute of limitations applicable to other defendants shall now also apply to wrongful death and medical malpractice claims brought against Florida Sheriffs and other state subdivisions. Lewis v. North Broward Hospital District, 574 So.2d 318, 319, n. 1 (Fla. 4th DCA 1991) (since October 1, 1988, medical malpractice claims against governmental units must be brought within the same period as shown in §95.11(4), Fla. Stat.); Calhoun, 110 So.3d at 26, n. 1. Furthermore, the Beard court could not possibly comment on or consider the much later effects of the 1996 amendments to §95.11. Such amendments to §95.11 did not come until 15 years later. This Court said it best in 1959 in Board of Public Instruction:

---

[3]Calhoun does not indicate that Patricia Calhoun was ever convicted of anything. Instead, the Calhoun opinion shows that Ms. Calhoun was a mere pre-trial detainee and was never a "convicted prisoner." Calhoun, at 25. So, §95.11(5)(g) did not apply in the facts of her case. The Calhoun court reached the right result, but for the wrong reasons. Respectfully, this Court should concur in the result only, but disagree with Calhoun's analysis because this important point was overlooked in the Court's analysis. It is a critical distinguishing fact.

> Taking the later statute as a modification of the first gives effect to both statutes by giving each a field of operation and leaves neither meaningless. This meets the requirements of the rules of statutory construction.

State v. Board of Public Instruction, 113 So.2d 368, 370 (Fla. 1959). The same thing is true here. By treating the amendment to §95.11 as a modification of the first statute, §768.28(14), both statutes can be given a full field of operations. And, both will have meaning and application in their particular circumstances. § 768.28(14) will apply to every suit against a governmental unit, except for suits by prisoners related to their conditions of confinement.

Stated another way, in dealing with lawsuits filed by prisoners related to their conditions of confinement, there is "no different time prescribed elsewhere in these statutes." § 95.011, Fla. Stat. The railroad switch mechanism of § 95.011 just does not apply here. See, Initial Brief, p. 10. Instead, Petitioner should not be allowed to use §95.011 to create a train wreck where none needs to exist. The two statutes can have parallel tracks that need not intersect.

Significantly, as previously noted, unlike medical malpractice suits and wrongful death suits that can be brought against numerous private persons/entities, the suit here concerns or relates to a prisoner's conditions of confinement. And, there is a good reason *not* to place it within §768.28(14). The one year statute needs to apply to privately run prisons. In this instance, Petitioner seeks to create ambiguity which

does not exist. In doing so, he points to a prior enactment, and not to the text of the 1996 Chapter Law, as passed by the legislature. Such argument violates the rule established long ago that "prior acts may be resorted to to solve, but not to create, ambiguity in [a] statute." Adams v. Fielding, 4 So.2d 678, 683 (Fla. 1941).

Because §95.11 was modified 15 years later to deal with a narrow, very specific class of cases like the one at bar does not mean that Beard necessarily controls the outcome in Calhoun. Nor should Beard *necessarily* control in this case. But, its binding nature needs to be carefully considered. 12A Fla. Jur. 2d *Courts and Judges* §200 (2015) ("Legislative modification of a statute may change the law of Florida so that previous decisions in the state in this regard are no longer controlling.") The effect of a later amendment to a different statute must be considered on a case-by-case basis. See, Id. When such careful consideration is made, Beard is readily distinguishable.

In addition to its misplaced reliance on Beard, the Calhoun court erred because "[i]t is basic that statutes should not be interpreted in a manner that would deem legislative action useless [or a nullity]." Beyel Bros. Crane and Rigging Co. of So. Florida, Inc. v. Ace Transportation, Inc., 664 So.2d 62, 64 (Fla. 4th DCA 1995). "Courts may not construe statutory language so as to render it meaningless." Id.; G.G. v. Fla. Dept. of Law Enforcement, 97 So.3d 268, 273 (Fla. 1st DCA 2012), *citations*

omitted. In Corfan Banco Asuncion Paraguay v. Ocean Bank , 715 So. 2d 967, 970 (Fla. 3rd DCA 1998), the court quoted former Chief Justice Barkett with approval saying:

> The reason for the rule that courts must give statutes their plain and ordinary meaning is that only one branch of government may write laws. Just as a governor who chooses to veto a bill may not substitute a preferable enactment in its place, courts may not twist the plain wording of statutes in order to achieve particular results. Even when courts believe the legislature intended a result different from that compelled by the unambiguous wording of a statute, they must enforce the law according to its terms. A legislature must be presumed to mean what it has plainly expressed, and if an error in interpretation is made, it is up to the legislature to rewrite the statute to accurately reflect legislative intent.

"Unambiguous language is not subject to judicial construction, however wise it may seem to alter the plain language." Corfan Banco, 715 So. 2d at 969; State v. Jett, 626 So. 2d 691, 693 (Fla. 1993). Courts have crafted only one exception to this rule. That is when the result would be absurd or illogical. Corfan Banco, 715 So. 2d at 970; Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984). Courts are obligated to try to construe and harmonize statutes according to their plain language. Beyel Bros., 664 So. 2d at 64; G.G., 97 So.3d at 273. It would hardly be illogical or absurd for the legislature to try to reduce the significant expenses related to frivolous prisoner suits and relieve the workload on an already overburdened court system. See, Staff Analysis, App. 2, p. 6.

Furthermore, if Patricia Calhoun was both "convicted" and "incarcerated" when she filed suit, the Calhoun court's opinion effectively nullifies the 1-year statute of

limitations found in § 95.11(5)(g), Fla. Stat. Courts simply should not nullify or ignore statutes.

C. Allowing Calhoun's reasoning and holding to apply to these facts effectively eviscerates the later-enacted §95.11(5)(g) and makes it a nullity. If it does not apply here, it cannot apply anywhere.

GREEN should not be allowed to avoid imposition of the one year statute of limitations to his facts by arguing that the pre-existing "general" statute of limitations of four years applicable to "most" claims against a governmental agency should apply, instead of the far more specific and later enacted one year statute of limitations applicable only to "prisoners" found in §95.11(5)(g).

In issuing its opinion, the Fifth District correctly cited general principles of law. However, in addition to overlooking the fact that Ms. Calhoun was not a convicted "prisoner," it neglected to apply the Legislature's far more recent enactment. It essentially eviscerated and made a nullity of §95.11(5)(g), Fla. Stat. Courts are obligated to construe statutes as written by the Legislature, and they should not disregard clear legislative intent. GREEN effectively asks this Court to make §95.11(5)(g) a nullity. If it does not apply here, it cannot apply to any potential plaintiff raising claims regarding their conditions of confinement. See, Alexdex Corp. v. Nachon Enterprises, Inc., 641 So.2d 858, 862 (Fla. 1994) ("A contrary holding would ignore the latest legislative expression on the subject and run counter to our

principle enunciated in Sullivan, that a statute should not be interpreted in a manner that would deem legislative action useless."); see also, Beyel Bros., 664 So.2d at 64.

Here, the First District correctly interpreted the Legislature's much later expressed intent, and applied §95.11(5)(g) to a "prisoner." The First District's legal analysis is entirely consistent with this Court's binding precedent; and, the Fifth District's Calhoun opinion effectively nullifies the Legislature's much later expressed statutory intent because if the one-year statute of limitations does not apply here, it does not apply anywhere.

II. FEDERAL LAW INTERPRETING THE PLRA SHOWS GREEN SHOULD HAVE BEEN GIVEN AN OPPORTUNITY TO DEVELOP THE RECORD FURTHER BEFORE THE COURT RULED ON THE EXHAUSTION ISSUE.

In this instance, GREEN was seeking to file his fourth version of his complaint, but the Circuit Court denied Plaintiff's Motion to Amend and dismissed his complaint *without prejudice* on June 24, 2014 for failure to exhaust his available administrative remedies under the Prison Litigation Reform Act before filing suit. Order, ¶10. Such orders dismissing prisoners' claims for failure to exhaust available administrative remedies are subject to *de novo* review. Johnson v. Meadows, 418 F.3d 1152, 1155 (11th Cir.2005), *cert. denied,* 548 U.S. 925, 126 S.Ct. 2978, 165 L.Ed.2d 988 (2006); Anderson v. Donald, 261 Fed. Appx. 254, 255 (11th Cir. 2008).

Failure to exhaust is now an affirmative defense, and inmates need not specially

plead exhaustion within their complaints. Jones v. Bock, 549 U.S. 199, 216, 127 S.Ct. 910, 921 (2007). Even so, in those cases where the affirmative defense of failure to exhaust is shown by the allegations of the complaint itself, *sua sponte* dismissal of the complaint for failure to state a cause of action is warranted. Anderson v. Donald, 261 Fed Appx. 254, 255-56 (11th Cir. 2008). "[A] complaint may be dismissed if an affirmative defense, such as failure to exhaust, appears on the face of the complaint," Id; Bock, 127 S. Ct. at 920-21 ("cautioning that the conclusion that exhaustion is not a pleading requirement 'is not to say that failure to exhaust cannot be the basis for dismissal for failure to state a claim.'"); Bingham v. Thomas, 654 F.3d 1171, 1175 (11th Cir. 2001).

Both the PLRA and Florida statutes *require* courts to screen complaints and to dismiss them when they are legally insufficient (fail to state a cause of action); or, on other enumerated grounds not applicable here. 42 U.S.C. §1997e(a), (c); §57.085(6), Fla. Stat. (2012) (courts must review prisoner's claims "to determine whether it is legally sufficient to state a cause of action for which the court has jurisdiction and may grant relief."); see also, 28 U.S.C. §1915A (dismissal of *informa pauperis* suits for frivolousness, among other reasons).

The Prisoner Litigation Reform Act ("PLRA") makes exhaustion of available administrative remedies a pre-condition to filing suit. "[T]he plain language of th[is]

statute makes exhaustion a precondition to filing an action in federal court." Higginbottom v. Carter, 223 F.3d 1259, 1261 (11th Cir. 2000) (quoting Freeman v. Francis, 196 F.3d 641, 643–44 (6th Cir. 1999)). "Congress has provided in §1997(e)(a) that an inmate must exhaust irrespective of the forms of relief sought and offered through administrative remedies." Booth v. Churner, 532 U.S. 731, 741 n.6 (2001). "[T]he PLRA's exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." Porter v. Nussle, 534 U.S. 516, 532 (2002). Exhaustion of all available administrative remedies is a precondition to litigation and no court can waive the exhaustion requirement. Booth, 532 U.S. at 741; Alexander v. Hawk, 159 F.3d 1321, 1325 (11th Cir. 1998); Woodford v. Ngo, 548 U.S. 81, 126 S.Ct. 2378 (2006).

Although failure to exhaust is not a jurisdictional requirement, the exhaustion issue is treated "like" a determination of whether a court has jurisdiction to proceed with a matter. "The Supreme Court has noted that courts, including it, 'have sometimes mischaracterized claim-processing rules or elements of a cause of action as jurisdictional limitations.'" Santiago-Lugo v. Warden, 785 F.3d 467, 472 (11th Cir. 2015), *quoting*, Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154, 161, 130 S.Ct. 1237, 1243-44, 176 L.Ed.2d 18 (2010). "Examples of non-jurisdictional rules on the other

hand, include 'claim-processing rules,' such as exhaustion requirements which 'seek to promote the orderly process of litigation by requiring that the parties take certain procedural steps at certain specified times.'" Id., *citation omitted.*

A failure to exhaust required administrative remedies is a preliminary matter which does not reach the merits of a Plaintiff's claims. "Exhaustion of administrative remedies is a 'matter [] in abatement, and ordinarily [does] not deal with the merits.'" Bryant v. Rich, 530 F.3d 1368, 1374 (11th Cir. 2008), *quoting*, 5C Charles Allen Wright and Arthur R. Miller, *Federal Practice and Procedure*, §1360 at 78, n. 15 (3rd Ed. 2004); see also, Wyatt v. Terhune, 315 F.3d 1108, 1119-20 (9th Cir. 2003). A court may resolve disputed factual issues where necessary to the disposition of a motion to dismiss for failure to exhaust. *See*, Bryant, 530 F.3d at 1373-74. The judge properly may consider facts outside of the pleadings to resolve a factual dispute as to exhaustion where doing so does not decide the merits, and the parties have a sufficient opportunity to develop the record. Bryant, at 1374; Trias v. Fla. Dept. of Corrections, 587 Fed. Appx. 531, 535 (11th Cir. 2014).

Under Florida law, when a court considers factual matters outside the pleadings, a motion to dismiss would be treated as a motion for summary judgment. Even treating it as a motion for summary judgment, however, should not deprive the judge of making the necessary factual determinations to see if the case should proceed

further.

A determination "that [a] plaintiff has failed to comply with some prerequisite to filing suit, such as exhaustion of administrative remedies . . . is not a determination of the claim, but rather a refusal to hear it." Bryant., 530 F.3d at 1374, *citations omitted.*

However, before deciding questions relating to exhaustion on a motion to dismiss or a motion for summary judgment, the parties should be given an opportunity to develop a record. Bryant, 530 F.3d at 1376; Trias, 587 Fed. Appx. at 535; Tracy v. Coover, 797 N.W. 2nd 621 at *4 (Iowa Ct. App. 2011) (unpublished); Osborn v. United States, 918 F.2d 724, 729-30 (8th Cir. 1990) (noting the "unique nature" of a factual challenge to the court's power to hear a case); Wyatt, 315 F.3d at 1119-20 (9th Cir. 2003) (holding that judge must decide exhaustion even if court must make findings of fact); see also, Pavey v. Conley, 544 F.3d 739, 741 (7th Cir. 2008) (agreeing with Bryant that there is no jury trial right on debatable factual issues related to exhaustion in a §1983 suit).

Mr. GREEN was obviously aware of the existence of a grievance procedure at the Santa Rosa County Jail since he says he filed such a grievance prior to being transferred back to DOC custody.[4] In this instance, however, once he was transferred,

[4]Complaint, ¶82.

he simply "considered" his grievance to be exhausted rather than doing anything to followup with the Santa Rosa County Jail. He had ample opportunity to followup in the four years between the fight with other inmates on June 22, 2008, and June 22, 2012, the date on which he mailed his complaint. The circuit court correctly so found. It did not, however, provide GREEN with the opportunity to develop the record further by affidavit(s) or submitting a copy of the grievance he says he filed. See, Bryant, 530 F.3d at 1376; Trias, 587 Fed. Appx. at 535. No such copy of a written grievance was attached to the original Complaint, nor to any of the actual or proposed amended complaints. Nor was a copy of Santa Rosa County's grievance procedures or the grievance form itself made a part of the record. Under both Florida and federal law, a record should have been developed to more fully address the exhaustion issue before the Court ruled on whether GREEN had exhausted his "available" administrative remedies.

Dismissal of the federal claims for GREEN's failure to exhaust may still be the appropriate resolution of the §1983 claims in this matter. Dollar v. Coweta County Sheriff Office, 446 Fed. Appx. 248, 252 (11th Cir. 2011) ("The Defendants may yet prevail in an exhaustion defense if it is properly raised in a motion to dismiss, and the parties shed more light on whether administrative remedies at the [Santa Rosa] County Jail were available to [GREEN].").

In this case, the circuit court's *sua sponte* dismissal of GREEN'S §1983 claims was entered in response to Defendants' objections to Petitioner's attempted Third Amended Complaint. However, the Court should remand and find Petitioner should be given an opportunity to develop the record related to exhaustion before the court rules.

CONCLUSION

§95.11(5)(g) is by no means a statute of general application which might possibly apply to a private person. It is a highly specific statute of limitations, not a general one. And, since no private person operates Florida jails unless they are doing so on behalf of the government, the one year statute of limitations need not have been inserted within §768.28(14) in order for it to be effective. The legislature's obvious intention to limit frivolous prisoner lawsuits should be respected by applying the specific language of the statute in question, not the more general exclusion language and the more general provisions of §768.28(14), Fla. Stat. In this instance, the legislature plainly intended to make §95.11(5)(g) an exception to the normal four-year statute of limitations found in §768.28(14) for all other lawsuits against governmental agencies. The First District's analysis is correct. And, while the Fifth District reached the correct result in reversing the final summary judgement for the defendants in Calhoun, it did so for the wrong reasons. The Calhoun result was correct under the

"tipsy coachman" doctrine, but its reasoning was flawed.

The federal claims here were dismissed without giving the Petitioner an opportunity to develop a record and the Court to make specific fact-findings based upon that developed record whether Petitioner had exhausted his available administrative remedies. Accordingly, the matter should be affirmed in part and remanded in part.

It should be affirmed with respect to all claims under state law. The case should be remanded, however, for further factual development concerning the availability of administrative remedies at the Santa Rosa County Jail on the facts of this case.

Respectfully submitted this 30th day of March, 2016.

/s/ Carl R. Peterson, Jr.
CARL R. PETERSON, JR.
Fla. Bar No. 0980048
JOLLY, PETERSON & TRUCKENBROD, P.A.
Post Office Box 37400
Tallahassee, Florida 32315
Tel: (850) 422-0282
Fax: (850) 422-1913
Attorney for Appellees Bryant, Cook & Cottrell

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Florida Courts eFiling Portal to Charles M. Auslander, Esq., John G. Crabtree, Esq., and Brian C. Tackenberg, Esq., Crabtree & Auslander, 240 Crandon Blvd., Suite 234, Key Biscayne, Florida 33149 this 30th day of March, 2016.

/s/ Carl R. Peterson, Jr.
CARL R. PETERSON, JR.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

/s/ Carl R. Peterson, Jr.
CARL R. PETERSON, JR.