**IN THE SUPREME COURT OF FLORIDA**

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CASE NO. SC15-1805

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ERIC GREEN,
*Petitioner,*

vs.

CALVIN COTTRELL, ET AL.
*Respondents.*

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# PETITIONER GREEN'S REPLY BRIEF

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ON DISCRETIONARY REVIEW
FROM THE FIRST DISTRICT COURT OF APPEAL

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### *Introductory Comment Regarding Respondents' Concession on Exhaustion of Administrative Remedies*

Green asks that the Court approve the accurate concession by Respondents regarding Green's federal claims that failure to exhaust administrative remedies was not plain on the face of the Second Amended Complaint (Complaint). (AB 29). Therefore, the Court should address the *second* issue raised by this appeal, although it is not the issue on which discretionary jurisdiction was granted, because it is dispositive of the fate of the federal claims raised, and this issue was fully briefed below. *Special v. West Boca Med. Ctr.*, 160 So. 3d 1251, 1261 (Fla. 2014) (noting value in the court's considering "other issues … properly briefed and argued [that] are dispositive of the case"). As the Court is aware, it has the power to determine all issues once discretionary review is granted, "as though the case had originally come to this Court on appeal." *Special*, 160 So. 3d at 1261; quoting *Savoie v. State*, 422 So. 2d 308, 312 (Fla. 1982).

### I. Standard of Review

The Respondents do not expressly disagree that the standard of review governing the dismissal of a complaint is *de novo*. *Mlinar v. United Parcel Serv., Inc.*, 2016 WL 825261 *6 (Fla. March 3, 2016) ("This Court reviews an order granting a motion to dismiss de novo."). Nor do they disagree that dismissal based on a legal

issue surrounding a statute of limitations question is also an issue of law to which *de novo* review applies. *Fox v. Madsen*, 12 So. 3d 1261, 1262 (Fla. 4th DCA 2009).

The Respondents' reference to district court cases applying abuse of discretion review to orders refusing to grant leave to amend based on futility (AB 5) is accurate—but misplaced: the order under review expressly granted final dismissal of the case on the bases of a failure to state a cause of action (federal claims) and the statute of limitations (state claims). Review *de novo* properly applies to the purely legal sufficiency of these rulings.

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

*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 with the one-year period found in section 95.11(5(g) for suits related to conditions of prison confinement. It does not nullify the one-year period, as it allows each of the three interrelated statutes—Florida Statutes sections 768.28(14), 95.11(5)(g) and 95.011—a proper sphere of responsibility. Moreover, *Calhoun* honors this Court's precedent that, in determining which of two possible statutes of limitation might apply to a claim, the preference is to apply the longer period of time. *Baskerville-Donovan Engineers, Inc. v. Pensacola Exec. House Condo. Ass'n*, 581 So. 2d 1301, 1303 (Fla. 1991) (choosing four- rather than two-year statute of limitations where both might have applied to claims).

Respondents' arguments run through an exercise in several layers of statutory construction. (AB 5-24). These are 1) *specificity*: the more specific statute defeats the general; 2) *recency*: the more recent statute controls its elder; and 3) *nullification*: a statute should not be rendered a nullity.

Respondents also dive into the legislative intent in passing section 95.11(5)(g)'s one-year limitations period for actions brought by a prisoner relating to the conditions of his confinement. (AB16-17). There can be no disagreement that the provision was intended to reduce unmeritorious filings by prisoners regarding conditions of confinement. Those arguments further embrace a related statute that waives sovereign immunity for private contractors that care for inmates. (AB 13-14).

All of the statutory construction arguments were anticipated and addressed in Green's initial brief. They all possess strengths, but none of them persuasively control the outcome here.

First, *specificity*, is, in this instance, in the eye of the beholder. (IB 7,16, 18-21). Section 95.11(5)(g) is surely more specific as to suits to redress prison conditions, but section 768.28(14) is the more specific respecting suits for "negligent or wrongful acts or omissions." (*See also* IB 7, 16, 18-21). Specificity itself does not provide a clear answer as to which to apply here.

Second, *recency* is not a definitive tool of statutory construction, unless the former law is repugnant to the more recent statute. Here, however, both sections 95.11(5)(g) and 768.28(14) can coexist—each with a field of operation. *See Oldham v. Rooks*, 361 So. 2d 140, 143 (Fla. 1978) (repeal by implication of prior statute is disfavored unless the repugnancy cannot be reconciled). (*See also* IB 8, 16, 20-21). These two laws' utter repugnancy might come about only if the operation of section 768.28(14) nullified the *entire* sphere of section 95.11(5)(g). It does not, as turning to the concern with nullification demonstrates.

*Nullification*, the third argument, is not the circumstance here. Numerous suits about prison conditions can be imagined that would *not* be torts subject to the longer limitations period provided by section 768.28(14). Suits might be brought based on issues involving access to reading materials or a legal library, by way of example. These complaints concerning prison conditions would not necessarily be cognizable as negligent or intentional torts embraced by the section 768.28(14). (*See* IB 16-17) Hence, there is no absolute nullification of section 95.11(5)(g)'s one-year limitations provision for claims not covered by section 768.28(14). This reasonable construction of the coexistent functions of both provisions carries with it a second value, which is that the "railway switch" provision, as we have termed it—section 95.011— is not, itself, nullified. This interpretation allows for the "different time … prescribed elsewhere," in section 768.28(14) to apply to tort claims within its scope.

Respondents' contention that the intention of the legislature was to reduce frivolous prisoner suits by enacting a one-year statute of limitations does not provide a sound or complete answer to the foregoing analysis. A shortened limitations period is certainly a way to reduce suits, but the legislature could also have plainly and expressly excluded the application of any limitations period other than section 95.11(5)(g) to prisoner suits, had it wanted to accomplish this with clarity.

Nor does Respondents' discussion of Florida Statutes section 957.01, the Correctional Privatization Act, result in a different conclusion. (AB 13). That provision excludes private actors serving inmates from raising sovereign immunity as a defense in tort. § 957.05(1), Fla. Stat. Florida Statutes section 768.28(1) similarly waives sovereign immunity in the public realm. Why that means that the one-year limitations period of section 95.11(5)(g) necessarily applies to the public sector is not immediately clear, despite Respondents' argument that it does so.

By insisting that the terms of section 95.11(5)(g) mandate that every prisoner suit is governed by the provision, Respondents offer the Court an interpretation at odds with the plain language of sections 95.011 and 768.28(14), demanding that the overriding intention of the legislature achieve what the plain terms of these three statutes cannot together do. In fact, this legislative intent laden approach would improperly negate the application of section 95.011.

But, as urged in the initial brief, a plain terms construction, allowing each of the three provisions to operate within its sphere, is hardly absurd. (IB 12). *See State v. Hackley*, 95 So. 3d 92, 95 (Fla. 2012) (when statutory language is plain its terms apply unless an absurdity would result). Section 95.011 sensibly steers limitations periods away from chapter 95 to enunciated periods found "elsewhere" that apply to claims. There is nothing absurd about this result.

The four-year limitations period found in section 768.28(14) should be applied to Green's state law claims.

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

The concession of error by Respondents with respect to this issue is ultimately based on their recognition that the four corners of Green's complaint did not establish the affirmative defense of failure to exhaust administrative remedies. Respondents squarely acknowledge that: "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." (AB 29). This concession should be recognized and now result in a reversal of the dismissal of the federal claims. Moreover, as noted by way of introduction to this reply, the Court should address this issue because it will result in the reversal of the dismissal of Green's federal claims. *Special*, 160 So. 3d at 1261.

Rather than rehash what was argued in Green's initial brief, the short form of the merits argument is straightforward: (1) Green's complaint does not reveal that there is an existing county jail administrative procedure let alone remedy for an inmate once he is transferred from a county jail facility to a state prison; and, (2) Green's Complaint does not reveal that he could have acted to comply with such a county administrative process, were one to exist for individuals who were transferred following the event that gave rise to the grievance and after the filing of that grievance.

Critically, Respondents bear the burden to demonstrate Green's failure to exhaust administrative remedies. The latter is an affirmative defense to be pled by the defendant, as to federal civil rights claims subject to the Prison Litigation Reform Act (PLRA). *Jones v. Bock*, 549 U.S. 199, 216-17 (2007); *Bailey v. Fla. Dept. of Corrections*, 958 So. 2d 986, 987-88 (Fla. 1st DCA 2007) (following *Jones* and confirming that bare assertion in complaint by inmate "that he had 'exhausted all administrative remedies' … was an adequate pleading of his satisfaction of the exhaustion requirement.")

Under state law the defendant bears the burden of proof with respect to substantiating affirmative defenses. *Hough v. Menses*, 95 So. 2d 410, 412 (Fla. 1957); *Ellington v. Fla. Dept. of Children & Family Servs.*, 896 So. 2d 926, 927 (Fla. 1st DCA 2005). Respondents may seek to shroud this legal verity in their contention that the

circuit court "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." (AB 29). But they misapprehend Florida law. This burden of proof rests with them, not upon the complainant.

Much of what Respondents discuss in their answer brief is about federal pleading and practice (e.g., AB 24-29). None of this recitation should dissuade the Court from following here the basic contours of state practice. The complaint provides notice of the elements of the action and the answer may include affirmative defenses, on which the defendant bears the burden of proof. While federal practice may at times allow for the conversion of motions to dismiss into motions for summary judgment (AB 27), that is not the Florida state practice, which is governed by the four corners requirement. *Mlinar v. United Parcel Serv., Inc.*, 2016 WL 825261 *6 (Fla. March 3, 2016) (review confined to four corners of the complaint); *Pizzi v. Central Bk & Tr. Co.*, 250 So. 2d 895, 897 (Fla. 1971) (court must confine itself strictly to four corners of complaint when determining its sufficiency).

Ever more tangentially referenced by Respondents, the United States Court of Appeals for the Eleventh Circuit may well follow the Ninth Circuit in treating exhaustion of administrative remedies as a matter in abatement that can be adjudicated in motions practice. (AB 27). But that practice, which has not been

uniformly followed by the federal courts,[1] is all the more far afield from Florida's state practice.

Moreover, the fact that there is a screening requirement for prisoner complaints to test them for legal sufficiency, under both federal and state law,[2] does not convert the Florida practice of four corners procedures for reviewing the legal sufficiency of a complaint to state a cause of action into a fact-finding mission to determine whether administrative remedies have been exhausted. Legal sufficiency may be jurisdictional, but the doctrine requiring exhaustion of administrative remedies is not jurisdictional, under Florida law. *Henry v. Santana*, 62 So. 3d 1122, 1127 (Fla. 2011); *Gulf Pines Mem'l Park, Inc. v .Oaklawn Mem'l Park, Inc.*, 361 So. 2d 695, 699 (Fla. 1978).

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[1] Moskovitz, "*The Usual Practice: Raising and Deciding Failure to Exhaust Administrative Remedies as an Affirmative Defense Under the Prison Litigation Reform Act*," 31 CARDOZO L.R. 1859, 1874-77 (2010).

[2] The Respondents' answer brief accurately notes that both the The Prison Litigation Reform Act, 42 U.S.C. §1997e and Florida Statutes section 57.085(6) identify a judicial screening process for prisoner complaints. (AB 25).

## 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,

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## CERTIFICATE OF SERVICE

On April 19, 2016, I emailed a copy of this brief to the attorneys listed below.

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## CERTIFICATE OF COMPLIANCE

I prepared this brief in Baskerville 14-point font.

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