No. 14-14199

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

EARVIN EALY,
Plaintiff/Appellant,

v.

GEO GROUP, INC., et al.
Defendant/Appellees.

On Appeal from the United States District Court
For the Middle District of Florida, Case No. 12-cv-00205-MP-CJK

BRIEF FOR THE APPELLANT

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DATED: August 17, 2015

STATEMENT OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1-1, I hereby certify that the following named persons are parties interested in the outcome of this case:

Adkins, Gwendolyn P., Coppins, Monroe, Adkins and Dincman P.A.

Ealy, Earvin Plaintiff/Appellant

GEO Group, Inc. Boca Raton, Florida (Symbol: GEO)

Henry, Mark Warden, Graceville Correctional Facility

Kahn, Charles J. Magistrate Judge, N.D. Fla.

Mattox, Marie A. Mattox Law Firm

McGinty, Carrie Head of Classification, GEO Group, Inc.

Paul, Maurice M. Senior District Judge, N.D. Fla.

Payne, Denise Health Services Administrator GEO Group, Inc.

Seagle, Scott J. Coppins, Monroe, Adkins, and Dincman P.A.

Womble, Gray Medical Personnel, GEO Group

STATEMENT REGARDING ORAL ARGUMENT

This case requires the Court to decide an unsettled question regarding the statute of limitations in Rehabilitation Act cases, and potentially all other federal civil rights cases, including Section 1983. In two unpublished cases, the Court has taken contradictory positions on this issue. This case also invites the Court to reconsider an earlier decision establishing a point of law that no other federal circuit has adopted. Additionally, this case was initiated by an inmate acting *pro se*, rendering the record somewhat procedurally muddled. For these reasons, counsel for Appellant believes oral argument would benefit the Court.

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STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION

The issues appealed pertain to alleged violations of 42 U.S.C. § 1983 and 29 U.S.C. § 791 *et seq*. Exhaustion of administrative appeals is a prerequisite imposed by 42 U.S.C. § 1997e. This case therefore presents federal questions, and jurisdiction is appropriate pursuant to 28 U.S.C. § 1331. Although Mr. Ealy's claims were nominally dismissed without prejudice, the district court's reasoning would render every claim untimely if refiled. Mr. Ealy therefore appeals from a final decision of the district court, pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1) Whether a Rehabilitation Act claim filed by a Florida prisoner against a private corrections facility borrows as "most analogous" the four-year limitations period for personal injury claims; the four-year limitations period that would apply if the claim were filed against a state facility; or, the one-year limitations period for challenges to conditions of confinement?

2) Whether this Court, now the only one to treat exhaustion under the Prison Litigation Reform Act as a "matter in abatement," should join the Ninth Circuit in concluding that the Supreme Court's decision in Jones v. Bock prohibits addressing exhaustion on a motion to dismiss?

3) Whether a blind plaintiff who alleges that his aide failed to file grievances on his behalf must demonstrate that the threats were sufficient to deter a prisoner of ordinary firmness?

STATEMENT OF THE CASE

This case is an appeal of an order denying leave to file a third amended complaint and granting a motion to dismiss against a blind inmate who sought to recover in relevant part under 42 U.S.C. § 1983 and the Rehabilitation Act ("RA"). Mr. Ealy, a Florida prisoner incarcerated at the privately-operated Graceville Correctional Facility, was injured four times while his primary inmate aide was unavailable, during a long period wherein he had no secondary aide assigned. In July 2008, Mr. Ealy fell and injured his right hand. (D.E. 34, at 4). In August 2009 and again in November 2009, both hands were injured in separate falls. (Id. at 7-8). In April 2010, he fell and damaged his front teeth. (Id. at 9).

Mr. Ealy originally sought to proceed *pro se* through three separate suits, one of which (regarding the August 2009 incidents) had been docketed as an amended complaint in the case below, contrary to Mr. Ealy's intentions. Because these procedural issues are not relevant to the disposition of this case, the statement of facts begins with the unopposed, counseled motion to consolidate the actions and file a second amended complaint, which also the dropped claims based on the 2009 incidents as unexhausted. (D.E. 33, at 2).

Although named as an initial defendant, the Florida Department of Corrections was never served with process, and dismissed on that ground. (D.E. 60, at 26; D.E. 68, at 15).

I. Second Amended Complaint.

The Second Amended Complaint (D.E. 34) raised the following claims:

Count I: Eighth and Fourteenth Amendment violations by Defendants GEO, Henry, Payne, McGinty, and Womble, which were only exhausted as to the incidents in July 2008 and April 2010 (Id. at 12).

Count II: ADA violations against Defendant DOC (Id. at 15).

Count III: Rehabilitation Act violations against Defendant DOC (Id. at 17).

Count IV: Negligence against Defendant GEO (Id. at 19).

Count V: Negligence *per se* against Defendant GEO (Id. at 20).

Mr. Ealy alleged that when he arrived at the Florida Department of Corrections ("DOC"), a doctor classified him as legally blind and prescribed him an inmate aide to assist with daily living functions, along with a secondary aide to relieve his primary aide at times. (Id. at 3-4.). On July 2, 2008, at Graceville Correctional Facility, Mr. Ealy's aide was transferred to a separate cell, and Mr. Ealy had no inmate aide to assist him for approximately seven days. (Id. at 4). During this time, he injured his hand twice. (Id.). The remaining injuries occurred when Mr. Ealy's primary aide was not available and no secondary aide had been assigned. In November 2009, he injured each hand in two separate falls, and x-rays revealed injuries. (Id. at 7-8). In April 2010, he fell and damaged his front teeth. (Id. at 9-10).

The complaint alleges that Mr. Ealy filed many grievances while incarcerated; however, only the grievances filed around the time of the August 2009 incident are relevant to this appeal. Mr. Ealy alleged filing an unspecified grievance on May 15, 2009 requesting a secondary aide. (Id.). In June 2009, several emails were sent to Appellee/Defendant Warden Henry explaining that Mr. Ealy's primary aide was often unavailable. (Id.). Appellees/Defendants Classification Supervisor Officer McGinty, Health Services Administrator Denise Payne, and Nurse Gay Womble were aware of Mr. Ealy's situation from face-to-face contacts. (Id.).

Mr. Ealy alleged that after an encounter with Nurse Womble on June 16, 2009, Classification Supervisor McGinty threatened inmate James Nethery with "confinement" unless he signed a document refusing to serve as Mr. Ealy's secondary aide. (Id. at 5-6).

On June 17, 2009 Mr. Ealy filed a grievance requesting a secondary aide. This grievance was denied with the explanation that "he did not require a secondary aide." (Id. at 6). On July 13, 2009, he filed another grievance requesting a secondary aide. This grievance was approved. (Id.).

Mr. Ealy filed a separate grievance on July 13, 2009 specifically requesting that inmate James Nethery be assigned as the secondary aide. (Id.). The response stated that Mr. Ealy would have to select someone already housed in his quad.

(Id.). Separate grievances for the same issue filed on August 11, 2009 and August 12, 2009 were also denied. (Id. at 6-7).

By August 22, 2009, Mr. Ealy still had not been assigned a secondary aide. (Id. at 7). While his primary aide was not available, he fell and injured his left hand and wrist. (Id.). On August 26, 2009, Mr. Ealy requested treatment from "Defendants Womble and/or Payne" but was denied. (Id.).

On August 27, 2009, Mr. Ealy filed a grievance requesting that inmate Lonnie Ramey be assigned as his aide. (Id.). That request was denied. (Id.). On September 2, 2009, Warden Henry received an email informing him that Mr. Ealy had been injured and still had no secondary aide. (Id.). On November 3, 2009, Mr. Ealy filed grievance # 09-11-159-024, again requesting a secondary aide, but no response was ever filed. (Id. at 7-8). The grievance filed by Defendants shows that Mr. Ealy explained that "I don't want someone assigned to me that I do not know or trust. This person will be going through my property/canteen and writing letters for me." (D.E. 54-2, at 1). Mr. Ealy considered inmate Ramey to be someone he could trust. (Id.).

On the same day, he also filed a grievance requesting inmate Donta Bryant be assigned as his secondary aide. (D.E. 34 at 8). No response was received. (Id.).

In November 2009, Mr. Ealy fell and injured his hand while his primary aide was not available. (Id.). On November 24, 2009, he was diagnosed with injuries to his hand after an x-ray. (Id.).

On December 21, 2009, Mr. Ealy filed a grievance about his November 2009 grievances going unanswered. (Id.). On December 24, 2009, Mr. Ealy filed his first formal grievance requesting a second aide. (Id. at 8-9). The response stated that the informal grievance process had already addressed his concerns. (Id. at 9). On January 7, 2010, Mr. Ealy filed a grievance on this response. (Id.). Defendant Warden responded that Mr. Ealy had been approved for a second aide. (Id.).

On May 6, 2010, Mr. Ealy filed a grievance characterizing his right hand as "basically unusable," and requested to see a specialist. (Id.).

On September 6, 2013, the district court granted the motion to amend and denied the motion to consolidate because the other case had already been dismissed without prejudice. (D.E. 38).

II. Motion to dismiss the second amended complaint.

On October 7, 2013, The GEO Group, Inc., and the individual defendants (collectively "the GEO defendants") filed a motion to dismiss the second amended complaint. (D.E. 41). In relevant part, the GEO defendants argued that: the state law claims (Counts IV-V) were barred by Florida's one-year limitations period for

suits challenging a prisoner's conditions of confinement, (Id. at 2 (invoking §95.11(5)(g), Fla. Stat.), 4-5); and, any claims relating to the 2009 incident were unexhausted, as Mr. Ealy had conceded. (Id. at 2, 10-11).

On October 31, 2013, Mr. Ealy filed a response. (D.E. 46). He argued that the state law claims were subject to the four-year limitations period for claims relying on Florida's waiver of sovereign immunity. Id. at 5-7 (describing Calhoun v. Neinhuis, 110 So. 3d 24 (Fla. 5th DCA 2013)). He contended that Defendant GEO was included in the waiver for "corporations primarily acting as instrumentalities or agencies of the state." (Id. at 7 (quoting § 768.28(2), Fla. Stats.)). He did not, however, cite to any Florida case squarely holding that GEO group would be subject to a four-year statute of limitations under Florida law. (Id. at 7-10). He also contended that dismissal on the affirmative defense was inappropriate until summary judgment. (Id. at 10).

In their reply (D.E. 52), the GEO defendants argued that the four-year sovereign immunity waiver limitations period could not apply because Section 975.05(1), Florida Statutes, precluded GEO from raising the immunity defense, or alternatively because Mr. Ealy had not complied with administrative exhaustion requirements for sovereign immunity. (Id. at 2-5). Because neither the ADA nor the RA applied to GEO, count V failed. (Id. at 5-7).

III. Motion for leave to file third amended complaint.

On April 4, 2014, Mr. Ealy filed a motion for leave to file a third amended complaint. (D.E. 53). Counsel sought to reinstate claims for the August 2009 incident, which were previously abandoned as unexhausted. (D.E. 53-1, at 2). Counsel explained that she had just received an affidavit from Donald Wiggins, an inmate assistant for Mr. Ealy from January 2008 until his release in September 2011. (Id. at 1). The affidavit was dated March 27, 2014, and provided that on several occasions, he had been warned by officers not to file grievances regarding Mr. Ealy's injuries:

> [O]n several occasions that Mr. Ealy ask[ed] me to file various grievances for him. During my time in prison I had numerous threats made against me by both inmates and guards. I was told and threatened that if I filed various Grievances related to Mr. Ealy's injuries that "bad things could happen to me". Specifically but, not the only one, was a 2009 injury that Mr. Ealy suffered when we were moved to separate rooms. These threats were made by a Mr. Bobbie Lee and a Nurse Womble. They were not the only ones but the only names I can remember at this time. At times Mr. Ealy would ask me to file grievances and I would write them up but not mail them or just throw them away. When he would later ask about them I would say they probably "lost" them or I would take an old grievance with me to "mail call" and carry it back in the room saying they answered his grievance and it was denied or approved based on what would quite [sic] him up.

(D.E. 53-1, at 2). Counsel argued that the amendment would not be futile because the officers' intimidation of Mr. Wiggins rendered the grievance process

unavailable to Mr. Ealy. (D.E. 53, at 4). The proposed third amended complaint contended that this affidavit showed that his 2009 claims were exhausted. (D.E. 53-2, at 12).

The third amended complaint would also have named the GEO defendants in connection with Count III (Rehabilitation Act). (Id. at 15, 18).

In their April 11, 2014 response, defendants argued that the Wiggins affidavit did not demonstrate that the grievance process was not available because Mr. Ealy had filed other grievances, some during the "filing window for Ealy's claim that he was denied medical treatment," (D.E. 54, at 6-8). They contended that the nonspecific threat alleged could not deter an inmate of reasonable firmness from filing grievances; even if it could, a bypass system existed for inmates who feared reprisal. (Id. at 8-9). The opposition includes what purports to be all of the grievances filed on Mr. Ealy's behalf between August 1, 2009 and January 31, 2010. (D.E. 54-2).

On May 2, 2014, Mr. Ealy filed a reply arguing that the most analogous statute of limitations was the four-year statute of limitations for sovereign immunity waiver suits, which controlled despite the one-year limitations period for prison condition suits because GEO Inc. was an "instrumentality of the state" under the Sovereign Immunity waiver. (D.E. 59 at 4-9).

IV. Report and recommendation and final judgment.

On June 23, 2014, the magistrate judge filed a report and recommendation. (D.E. 60). The judge recommended dismissing Claim III (Rehabilitation Act), reasoning that because GEO could not claim sovereign immunity, the four-year period in the sovereign immunity waiver statute could not apply; moreover, if the four-year period applied, so would the three-year notice-of-claim deadline. (Id. at 10). Claim IV (negligence) and Claim V (negligence per se) were state law claims similarly barred under Florida's one-year limitations period for conditions of confinement actions. (Id. at 16-17). As to the exhaustion issue, the judge concluded that the grievances filed and the absence of grievances of reprisal demonstrated that the grievance process was available. (Id. at 13-15). The judge specifically found that, because other grievances regarding his medical care had been filed, that "plaintiff (or whoever assisted him) was not threatened or intimidated at all." (Id. at 14). Thus, Mr. Ealy had failed to show any circumstances that "would deter a reasonable inmate of ordinary firmness and fortitude from lodging a grievance or pursuing the part of the grievance process that the inmate failed to exhaust." (Id. at 15 (citation omitted)).

Mr. Ealy objected, arguing that the Rehabilitation Act claims were not governed by the four-year sovereign immunity limitations period (D.E. 62, at 3-12), and because the notice of claim requirement did not apply. (Id. at 12-16).

Regarding exhaustion, he claimed that the judge's inquiry into fact was too broad for a motion for leave to file an amended complaint because the plaintiff was not obligated to plead facts to overcome an affirmative defense. (Id. at 16-19).

On September 5, 2014, the district judge adopted the report and recommendation. (D.E. 68). As to the order denying leave to amend, the district judge reasoned that "it 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. Consequently, the limitations period in section 95.11(5)(g) is the most analogous and must be applied." (Id. at 7). GEO's status as an instrumentality of the state was irrelevant because it was not entitled to claim sovereign immunity, and therefore the entire statue did not apply. (Id. at 8). As to exhaustion of the August 2009 incident, the magistrate judge was required to make specific findings because the allegations in the complaint did not resolve the issue, and the district judge agreed with them. (Id. at 8-9).

Mr. Ealy appeals three questions of law: the proper limitations period for a Rehabilitation Act claim by a Florida prisoner incarcerated in a private institution; whether the district court improperly resolved questions of fact at the motion to dismiss stage; and, whether an inmate who must rely on an inmate aide to file grievances for him must show that threats to the aide are sufficient to deter an inmate of ordinary firmness. These questions are reviewed by the Court *de novo*.

Preferred Sites, LLC v. Troup Cnty., 296 F.3d 1210, 1216 (11th Cir. 2002); Alexander v. Hawk, 159 F.3d 1321, 1323 (11th Cir. 1998).

SUMMARY OF THE ARGUMENT

Florida statutes provide for a one-year limitations period for any suit challenging a prisoner's conditions of confinement. Regardless of which statute of limitations would control a suit in Florida courts, this Court should apply the four-year limitations period for personal injuries to Rehabilitation Act claims. To the extent the exact state limitations period is relevant, the most analogous claim to a prisoner suit against a private facility is a prisoner suit against a state-run institution. Because the only intermediate appellate court to rule on the issue has decided that the four-year statute of limitations in the sovereign immunity statute applies to suits against the state, the same should apply to suits against private prisons. Alternatively, the relatively analogous Florida's anti-discrimination statue would apply a four-year limitations period to any claim for which the Commission on Human Rights fails to make a timely determination of cause to sue. Therefore, the Court should apply the four-year period and hold that Mr. Ealy's Rehabilitation Act claims against the GEO Group, Inc. were timely filed.

This Court should also reconsider its holding in Bryant v. Rich, pursuant to which the district court concluded that Mr. Ealy's claims were not exhausted. 530 F.3d 1368 (11th Cir. 2008). Bryant authorizes district courts to determine issues of

credibility during the motion to dismiss stage when defendants raise the affirmative defense of failure to exhaust. The Ninth Circuit adopted this approach in 2003; however, in 2014 that court concluded that the Supreme Court's 2007 decision Jones v. Bock prohibited this approach. Bryant is a bad decision that has not aged well, and the Court should end its misery now.

An inmate who files his own grievances is held to the "prisoner of ordinary firmness standard" when courts decide whether a threat was sufficiently severe to render an administrative grievance process unavailable. When another inmate files a grievance on behalf of a blind inmate like Mr. Ealy, the plaintiff's own fortitude becomes irrelevant. The inmate who files, here Mr. Wiggins, acts on another's behalf, and regardless of his firmness in the abstract has no incentive to incur any risk of any future disadvantage at all. Even the prospect of damaging his relationship with a particular staff member could be enough to dissuade a rational actor from filing a grievance for another. Therefore, regardless of the procedure used to determine the facts, the Court should only require the threats to Mr. Wiggins to have been "not completely incredible" or some similar standard.

ARGUMENT

I. The Court should apply a four-year limitations period to Mr. Ealy's Rehabilitation Act claims against GEO.

Pursuant to direction from the Supreme Court, in Florida, the four-year residual limitations period for personal injury claims applies to Section 1983 claims and other federal civil rights suits. Because the Supreme Court requires uniform limitations periods, this Court should not vary the limitations period according to the limitations period a particular plaintiff would face in state court. If the Court does take such an approach, it should apply the four-year limitations period for claims by prisoners incarcerated in state prisons to avoid creating an arbitrary distinction that could frustrate the vindication of federal rights. Alternatively, the most analogous state action is created by the Florida Civil Rights Act, which covers discrimination based on disability, and uses the four-year residual limitations period when the Commission on Human Rights does not issue a timely probable cause determination. Regardless of the reasoning, the Court should apply a four-year statute of limitations and remand for further proceedings.

A. The Court should not look beyond Florida's residual limitations period for personal injuries.

In civil rights actions, courts look to state law when federal remedial measures are "deficient in the provisions necessary to furnish suitable remedies." 42 U.S.C. § 1988(a). As with other laws that do "not contain a statute of

limitations period," federal courts look to the "most analogous state statute of limitations" for Rehabilitation Act claims. Everett v. Cobb County School Dist., 138 F.3d 1407, 1409 (11th Cir. 1998) (citing Wilson v. Garcia, 471 U.S. 261, 266-67 (1985)). The state limitations period for a personal injury action is the most analogous to a federal civil rights claim, including the Rehabilitation Act. Id. (citing cases). "[W]here state law provides for multiple statutes of limitations for personal injury actions, courts considering § 1983 claims should borrow the general or residual statute for personal injury actions." Owens v. Okure, 488 U.S. 235, 249-50 (1989). Here, that period is the four-year limitations period described in Section 95.11(3)(p), Florida Statutes. Smith v. Belle, 321 F. App'x 838, 844 (11th Cir. 2009).

The categorical approach to limitations periods in federal civil rights cases has provided much-needed clarity and uniformity. Williams v. Atlanta, 794 F.2d 624, 627 (11th Cir. 1986) (observing that before the Supreme Court applied the residual limitations period to all Section 1983 claims, "selecting the most analogous statute of limitations under our former doctrine was a tortuous and uncertain process") (citations omitted). Nevertheless, recently the Court has issued two contradictory opinions in Section 1983 cases applying both the one-year limitations period for prison conditions and the four-year limitations period. *Compare* Rogers v. Judd, 389 F. App'x 983, 989 (11th Cir. 2010) (applying the

one-year period) *with* Ellison v. Lester, 275 F. App'x 900, 901-02 (11th Cir. 2008) (rejecting the one-year period for prisoners in favor of the four-year personal injury limitations period in § 95.11(3), Fla. Stat.). Supreme Court precedent would appear to prohibit the Rogers approach. Wilson, 471 U.S. at 275 ("We conclude that the statute is fairly construed as a directive to select, in each State, the one most appropriate statute of limitations for all § 1983 claims."). In the absence of a prior precedential decision to the contrary, the Court should not begin from the proposition that the one-year limitations period would apply if Mr. Ealy's claims were brought under Section 1983.

Most courts – including this one – have applied the Section 1983 personal injury limitations period to RA claims as well. See McCormick v. Miami Univ., 693 F.3d 654, 662-63 (6th Cir. 2012); Disabled in Action v. SEPTA, 539 F.3d 199, 208 (3d Cir. 2008) (citing cases from the Courts of Appeals for the Second, Fifth, Seventh, Eighth, Tenth, and Eleventh Circuits); Higgins v. Bubar, No. 1:11-cv-148, 2012 U.S. Dist. LEXIS 108054, *34, 2012 WL 3150813 (D. Me. Aug. 2, 2012) (applying general six-year statute of limitations to Rehabilitation Act claim even though Maine Human Rights Act was more analogous and provided two-year limitations period); Madden-Tyler v. Maricopa Cnty., 943 P.2d 822, 829 (Ariz. Ct. App. 1997) (applying personal injury statute rather than Arizona Civil Rights Act).

Many of these courts have observed that the Rehabilitation Act is similar to Section 1983, and that the same factors favor applying a uniform limitations period. Levy v. Kan. Dep't of Soc. & Rehab. Servs., 789 F.3d 1164 (10th Cir. 2015) (quoting Owens, 488 U.S. 235 at 243, for the proposition that ease and predictability are important factors in choosing a limitations period); Soignier v. American Bd. of Plastic Surgery, 92 F.3d 547, 551 (7th Cir. 1996) (finding that, as an action for "fundamental injury to the individual rights of a person," a claim under the ADA is best characterized for statute of limitations purposes as a claim for personal injury); Southerland v. Hardaway Mgmt. Co., 41 F.3d 250, 254-55 (6th Cir. 1994) ("Although it prohibits a particular type of discrimination rather than prohibiting discrimination generally as in § 1983, section 504 of the Rehabilitation Act also 'confers a general remedy for injuries to personal rights.'" (quoting Wilson, 471 U.S. at 278)); Morse v. Univ. of Vt., 973 F.2d 122, 126 (2d Cir. 1992) (concluding that the RA "has the same type of broad, remedial goals as §§ 1981 and 1983").

However, a few would look to a more closely analogous cause of action where one exists. In Wolsky v. Medical College of Hamptons Roads, the Fourth Circuit found that Virginia's "Rights of Persons with Disabilities Act" was practically identical to the Rehabilitation Act, and therefore its one-year period applied instead of the two-year personal injury period. 1 F.3d 222 (4th Cir. 1993).

That court reasoned that unlike section 1983, which could "have no precise counterpart in state law," the Rehabilitation Act could and, in this case did, have "an exact state law counterpart." Id.; see Clink v. Or. Health & Sci. Univ., 9 F. Supp. 3d 1162, 1167-68 (D. Or. 2014); Jaiyeola v. District of Columbia, 40 A.3d 356 (D.C. 2012); Vaughn v. Nw. Airlines, 558 N.W.2d 736, 739-42 (Minn. 1997); Henrickson v. Sammons, 434 S.E.2d 51, 52-54 (Ga. 1993) (concluding that under federal law personal injury limitations period applied but criticizing its application to employment discrimination claims).

Mr. Ealy's case illustrates how searching for a more closely analogous state cause of action creates inequalities in the enforcement of federal rights. In 1996, the Florida legislature enacted measures similar to the federal Prison Litigation Reform Act that, *inter alia*, included a one-year statute of limitations on any suit "relating to the conditions of the prisoner's confinement." § 95.11(5)(g), Fla. Stat. Florida has adopted the federal definition of "conditions of confinement," which includes "all inmate suits about prison life, whether they involve 'general circumstances or particular episodes.'" Nicarry v. Eslinger, 990 So. 2d 661, 664 (Fla. 5th DCA 2008) (quoting Porter v. Nussle, 534 U.S. 516, 532 (2002)). Nevertheless, a subsequent opinion held that Florida law exempted claims against "the state or one of its agencies or subdivisions" from the one-year limitations period. Calhoun v. Nienhuis, 110 So. 3d 24, 25 (Fla. 5th DCA 2013) (quoting

§ 768.28(14), Fla. Stat.). The Calhoun court, which featured two of three judges from the Nicarry panel, applied the four-year limitations period in Section 768.28(14), Florida's sovereign immunity waiver statue.

The panel first observed that "Nicarry does not control, because it did not address the applicability of section 768.28." 110 So. 3d at 27. The Calhoun court reasoned that, because Section 95.011, Florida Statutes provides that "if a different time is prescribed elsewhere in these statutes [from Chapter 95]," then "the periods of time in Chapter 95 have no applicability." Id. at 26 (quoting § 95.011, Fla. Stat; Pub. Health Trust v. Menendez, 584 So. 2d 567, 569 (Fla. 1991)). Even without the Section 95.011 exclusion, the four-year limitations period for sovereign immunity waiver cases would have to control because Florida law permits only "one limitations period for actions under Section 768.28." Calhoun, 110 So. 3d at 26 (citing Beard v. Hambrick, 396 So. 2d 708, 712 (Fla. 1981)). If the legislature had intended a different result, an exception would have been enumerated in Section 768.28 itself, as for "claims for contribution and medical malpractice." Id. at 26. Without "persuasive evidence that the highest state court would rule otherwise," the Court should accept Calhoun as an accurate statement of Florida law. Bravo v. United States, 577 F.3d 1324, 1326 (11th Cir. 2009) (per curiam).

After Calhoun, the Rogers approach creates a four-year limitations period for federal civil rights claims filed by prisoners in institutions managed directly by the

Florida Department of Corrections. Until Florida courts decide whether Calhoun extends to private prisons as well,[1] determining which statute of limitations applies to prisoners in facilities managed by private contractors will require the Court to predict which the Supreme Court of Florida would choose – and might change if the Court gets it wrong. This would create administrative difficulties and directly contradict Supreme Court cases holding that Section 1983 – and, by analogy, the Rehabilitation Act – ought to have a limitations period that is uniform within a state. Wilson, 471 U.S. at 275 (explaining that "federal interests in uniformity, certainty, and the minimization of unnecessary litigation" favored choosing a single analogous action). Thus, the Court should look no further than Florida's four-year residual limitations period for personal injury claims to resolve this question.

B. If the Court seeks a more closely analogous cause of action, the Court should apply the four-year limitations period for sovereign immunity claims that would apply if Mr. Ealy had been incarcerated in a state-operated prison.

If the Court does adopt the minority position and search for the limitations period in the state action most analogous to each particular case, it should do so

[1] Unlike the United States Constitution, Article I, Section 21 of the Florida Constitution grants a specific right to access the courts. Henderson v. Crosby, 883 So. 2d 847, 852-54 (Fla. 1st DCA 2004) (discussing application of strict scrutiny when a measure affects suits for all rights). Ceteris paribus, this ought to make Florida courts more likely to find that the disparate treatment cannot stand.

with "an eye to the federal interests at stake." Chin v. Bowen, 833 F.2d 21, 23 (2d Cir. 1987) (citing Wilson, 471 U.S. at 269-70). The Rehabilitation Act contains its own requirement that states waive their sovereign immunity in exchange for federal funding, which displays a clear "congressional intent to equalize the remedies available against all defendants for § 504(a) violation." Lane v. Pena, 518 U.S. 187, 198 (1996). There being no countervailing federal interest in distinguishing between prisoners at state and private institutions, this Court should consider claims by prisoners at private facilities most analogous to claims by those at public institutions.

Florida's statute prohibiting private facilities from raising the sovereign immunity defense demonstrates the public function of private prisons. After all, this provision could only exist because Florida's waiver of sovereign immunity would otherwise include private prisons as "corporations primarily acting as instrumentalities or agencies of the state, counties, or municipalities." § 768.28(2), Fla. Stat. Private prisons perform a traditional state function on behalf of the Florida Department of Corrections ("DOC"), which "retains ultimate responsibility for legal custody of inmates who have been committed by a court to the custody of the department." 1998 Fla. AG LEXIS 70, *6, Op. Att'y Gen. Fla. 1998-69. Powers and duties not delegable to a contractor include custody classifications; place of incarceration; and disciplinary actions and gain-time determinations.

Section 957.06, Fla. Stat. DOC also remains responsible for security. Fla. Stat. § 944.151. Florida's inspector general monitors private prisons, Fla. Stat. § 944.31, and each facility has an on-site contract compliance officer. Because private facilities are like State institutions, suits against private facilities are analogous to suits against State institutions.

Privatization exists to serve one purpose: to achieve savings relative to state institutions. Fla. Stat. § 957.04(1) (mandating that private prison contracts "shall maximize the cost savings of such facilities"). Part of the cost-saving embodied by privatization includes outsourcing liability. Fla. Stat. § 957.04(1)(b) (requiring private prisons to indemnify the state for civil rights liability and hold insurance). While cost-cutting may be a rational reason for the state to grant private prisons a shorter statute of limitations, it is not a reason for this Court to create two classes of inmates for limitations periods based solely on the Department of Correction's discretionary decision as to inmate housing. Barbara Kritchevsky, Is there a cost Defense? Budgetary Constraints as a Defense in Civil Rights Litigation, 35 Rutgers L. J. 483, 514 n. 155 (2004) (quoting Smith v. Sullivan, 611 F.2d 1039, 1043-44 (5th Cir. 1980) (holding that "it is well established that inadequate funding will not excuse the perpetuation of unconstitutional conditions of confinement")). The federal interest does not vary according to where an inmate is housed, and neither should the statute of limitations.

C. Alternatively, a four-year limitations period applies because the most analogous cause of action arises under the Florida Civil Rights Act and the residual limitations period is used when no timely right-to-sue determination occurs.

In any case, Florida's own anti-discrimination laws have a four-year statute of limitations "where the Commission [on Human Relations] has not made a reasonable cause determination within 180 days." Joshua v. City of Gainesville, 768 So. 2d 432, 439 (Fla. 2000). The few courts that have rejected the categorical personal injury approach have most often looked to state anti-discrimination laws. Cockrell v. Lexington County Sch. Dist. One, 2011 U.S. Dist. LEXIS 131797, *38-39, 2011 WL 5554811 (D.S.C. Nov. 15, 2011) (concluding that "the limitations periods set forth in state laws prohibiting discrimination on the basis of disability" apply to RA claims in the Fourth Circuit). The Rehabilitation Act does not provide claimants with the benefit of administrative procedure or investigatory board; therefore, claimants ought to get the benefit of the four-year period. For the reasons described above, federal law should not recognize any different limitations periods for prisoners incarcerated in private facilities.

II. The Court should reconsider Bryant v. Rich and treat exhaustion as an affirmative defense to be decided after full factual development, not a matter in abatement decided on affidavits before discovery.

About fifteen years ago, the Ninth Circuit adopted a procedure to accelerate the dismissal of unexhausted claims by classifying exhaustion as a matter in abatement cognizable in an unenumerated Rule 12(b) motion, which permitted courts to decide disputed issues of fact in the motion to dismiss stage. Wyatt v. Terhune, 305 F.3d 1033, 1044-45 (9th Cir. 2002) ("In deciding a motion to dismiss for a failure to exhaust nonjudicial remedies, the court may look beyond the pleadings and decide disputed issues of fact."). Subsequently, in Jones v. Bock, the Supreme Court ruled that exhaustion is an affirmative defense, and held that the Sixth Circuit had erred by requiring prisoners to plead that their claims were exhausted. 549 U.S. 199 (2007). The Jones court admonished that lower courts should "not depart from the usual practice under the Federal Rules on the basis of perceived policy concerns." Id. at 212.

Accordingly, the Ninth Circuit recently concluded that "Wyatt is no longer good law after Jones." Albino v. Baca, 747 F.3d 1162, 1169 (9th Cir. 2014). Except for the rare cases where failure to exhaust is evidence from the face of the complaint, summary judgment will be necessary. Id. at 1169. After Albino, "If there are disputed issues of material fact, then the district court should deny the summary judgment motion; however, the court may then decide the disputed

factual issue upon consideration of the evidence presented (and further discovery if necessary)." Fratus v. Peterson, 584 F. App'x 606, 607 (9th Cir. 2014).

The Ninth Circuit's decision illustrates that Bryant v. Jones was wrong when decided. 530 F.3d 1368, 1374-75 (11th Cir. 2008). It reasoning has not persuaded any other court. Albino, 747 F.3d at 1170 ("Now that we have joined these circuits, only the Eleventh Circuit employs an unenumerated Rule 12(b) motion to decide exhaustion of non-judicial remedies in PLRA cases."). As one observer commented, "whereas the Ninth Circuit at least relied on its longstanding precedent for applying the matter in abatement approach, the Eleventh Circuit had no such supporting precedent." Joshua Moskovitz, Note: The Usual Practice: Raising and Deciding Failure to Exhaust Administrative Remedies as an Affirmative Defense Under The Prison Litigation Reform Act, 31 Cardozo L. Rev. 1859, 1875 (2010) (discussing shortcomings of the unenumerated motion approach).

Judge Posner articulated a method by which courts could promote efficiency while giving inmates a full and fair hearing on the issue of exhaustion:

> The sequence to be followed in a case in which exhaustion is contested is therefore as follows: (1) The district judge conducts a hearing on exhaustion and permits whatever discovery relating to exhaustion (and only to exhaustion) he deems appropriate. (2) If the judge determines that the prisoner did not exhaust his administrative remedies, he will then determine whether (a) the plaintiff has unexhausted remedies, and so he

> must go back and exhaust; (b) or, although he has no unexhausted remedies, the failure to exhaust was innocent (as where prison officials prevent a prisoner from exhausting his remedies), in which event he will be allowed to go back and exhaust; or (c) the failure to exhaust was the prisoner's fault, in which event the case is over. (3) If and when the judge determines that the prisoner has properly exhausted his administrative remedies, the case will proceed to pretrial discovery, and if necessary a trial, on the merits; and if there is a jury trial, the jury will make all necessary findings of fact without being bound by (or even informed of) any of the findings made by the district judge in determining that the prisoner had exhausted his administrative remedies.

Pavey v. Conley, 544 F.3d 739, 742 (7th Cir. 2008) (Posner, J.). This Court should join every other federal circuit and abandon the *ad hoc* unenumerated motion approach in favor of procedures basically analogous to summary judgment.

III. When an aide acting on behalf of a blind inmate plaintiff fails to file a grievance, demonstrating that the grievance process was not available should not require that alleged threats be sufficiently severe to deter an inmate of ordinary firmness.

If the Court remands for further factual development, the district court should be instructed on the legal standard when officials are alleged to have threatened an inmate upon which a plaintiff depends to file grievances.

In the Eleventh Circuit, threats can render an administrative remedy if the threat is the actual cause of the failure to exhaust and "is one that would deter a reasonable inmate of ordinary firmness and fortitude from lodging a grievance or pursuing the part of the grievance process that the inmate failed to exhaust." Turner v. Burnside, 541 F.3d 1077, 1085 (11th Cir. 2008). Applying this test when an inmate relies on another to lodge the grievance is inappropriate for two reasons. First, the plaintiff, through no fault of his own, may be punished for the other's lack of fortitude. Second, as the Turner court recognized, when "cost outweighs benefit a rational decision maker will forego the benefit." Id. at 1084-85. There is no benefit to the inmate aide in filing a grievance. Thus, a "reasonable inmate" might not be willing to take on any risk at all. Exercising "ordinary firmness" for one's own interests can be expected, but selflessness and courage are no more common inside of prison than out. This Court should explain that Turner does not apply to inmates like Mr. Ealy, who must rely on others to lodge their greivances.

CONCLUSION

This Court should adopt the majority position with respect to statutes of limitation under the Rehabilitation Act. Rather than attempt to predict how state courts would handle a particular case, the Court should simply apply the statute of limitations for personal injury claims. Even if the Court looks for a more precisely analogous state law claim, the Court should not allow the vagaries of state law to impede a federal remedy by creating a shorter statute of limitations for prisoners in privately operated facilities. Mr. Ealy's claims under the Rehabilitation Act should be considered timely filed.

The Court is the only federal circuit to treat exhaustion as a matter in abatement. Mr. Ealy should receive a full and fair opportunity to develop the facts underlying his claim that threats to his inmate aide justified his failure to exhaust the claims based on the 2009 injuries.

Finally, requiring that threats against an inmate aide be sufficient to deter an inmate of ordinary firmness does not make sense. On remand, the Court should direct the district court not to punish Mr. Ealy for inaction by an inmate recruited to act on his behalf.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6484 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

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August 17, 2015

CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2015, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send a notice of electronic filing to the following counsel of record:
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