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

REPLY BRIEF FOR THE APPELLANT

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ARGUMENT

I. A post-decision split of authority in Florida's Courts of Appeal forms an important basis for Claim I, and could not have been raised below.

In Claim I, Mr. Ealy claims that courts should borrow Florida's four-year general residual personal injury limitations period for his federal Rehabilitation Act claim. Mr. Ealy argues several alternative theories of the proper statute of limitations. He does not raise the only argument advanced at trial: that under Florida law, the four-year limitations period for claims involving Florida's waiver of sovereign immunity applies to Appellee, even though Appellee is not entitled to sovereign immunity under any circumstances. Nevertheless, considering the intervening change in the law, it should be enough that the general issue of the Appellee's affirmative defense was litigated below.

At the time of trial, the only precedential case in Florida held that the four-year sovereign immunity limitations period controlled claims by a prisoner against the state. Calhoun v. Nienhuis, 110 So. 3d 24, 25 (Fla. 5th DCA 2013). As Appellee points out, a split on the issue has developed since the initial brief was filed. Green v. Cottrell, No. 1D14-4052, 2015 Fla. App. LEXIS 13129 (Fla. 1st DCA Sept. 3, 2015) (applying one-year limitations period for suits challenging prison conditions). Now, if they look to state law for the limitations period that would apply in state court, federal courts deciding prisoner claims must choose

between the two cases and predict how the Florida Supreme Court would rule on this issue, without the stability provided when no split of authority exists. Molinos Valle Del Cibao, C. por A. v. Lama, 633 F.3d 1330, 1348 (11th Cir. 2011).

At trial, it was not apparent that the one-year versus four-year dispute would be meaningful outside of the context of prisoners incarcerated in private facilities. Cf. FDIC v. Verex Assurance, 3 F.3d 391, 395 (11th Cir. 1993) (declining to consider unraised claim where Appellant could not seriously maintain it realized importance of issue "only after the district court's opinion"). Mr. Ealy should not be penalized for trial counsel's failure to predict that a split of authority would make the public/private distinction of secondary importance in his case. Post v. 120 E. End Ave. Corp., 464 N.E.2d 125, 129 (N.Y. 1984) (applying, where statute had been amended after appeal, the principle that "a court applies the law as it exists at the time of appeal, not as it existed at the time of the original determination . . . and new questions of law may be raised for the first time on appeal if they could not have been presented to the trial court." (citations omitted)). Therefore, the Court should not hold that Mr. Ealy's claim is unpreserved.

II. Mr. Ealy presented the substance of Claim II to the district court by objected to resolving exhaustion on a motion to amend.

In his objection to the report and recommendation, Mr. Ealy objected to the district court finding facts on a motion for leave to amend. (D.E. 62, at 16). The district court was bound by Bryant v. Rich, 530 F.3d 1368 (11th Cir. 2008), but counsel argued that Bryant did not extend beyond motions to dismiss. (D.E 62, at 16-18). Counsel pointed out that ruling on disputed facts on a motion to amend would "appear directly contrary to the dictate of the Supreme Court in Jones [v. Bock, 549 U.S. 199 (2007)]." (Id. at 18). Therefore, the district court was presented with the argument that Bryant was not consistent with Jones. As the district court could have refused to extend Bryant but could not have overruled it, the Court should find this issue sufficiently preserved for review.

III. The Court should exercise its discretion to review any unpreserved claims.

The Supreme Court has explained the purpose of the preservation requirement: so that "parties may have the opportunity to offer all the evidence they believe relevant" and so that "litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." Hormel v. Helvering, 312 U.S. 552, 556 (1941). Five factors guide the Court in determining whether to address claims not raised below:

1. Whether the claim involves a pure issue of law and refusal to consider it would result in a miscarriage of justice;

2. Where the appellant raises an objection he had no opportunity to raise at trial;

3. Whether the interest of substantial justice is at stake;

4. Whether the proper resolution of the issue is beyond any doubt; and,

5. Whether the claim presents an issue of "general impact or great public concern." Access Now, Inc. v. Sw. Airlines Co., 385 F.3d 1324, 1332 (11th Cir. 2004).

Mr. Ealy's claims are pure questions of law, which present issues of general importance to the administration of justice in the Eleventh Circuit. Claim I relies in part on a split of authority which was only hypothetical until after the initial brief was filed, and could not have been raised in full below. Claim II asks the

Court to reconsider a position rejected by every other federal circuit, including the court whose reasoning the Court adopted. The district court's factual findings rendered Claim III irrelevant, functionally depriving him of a chance to present it. Finally, the exhaustion issue implicates substantial justice because it touches on Mr. Ealy's constitutional right to file a grievance against prison officials. Mr. Ealy believes that the arguments in his case are issues of law appropriate for consideration even if unpreserved.

A. Mr. Ealy's claims are pure questions of law that should be considered to prevent any miscarriage of justice.

This case requires the Court to interpret various statutory provisions. Kannikal v. AG United States, 776 F.3d 146, 149 (3d Cir. 2015) (addressing claim raised for the first on appeal where it was "an important issue regarding the interplay between two statutory provisions, not a matter implicating the introduction of evidence"). Pure issues of law are appropriate for consideration even if not raised below. Axiom Worldwide, Inc. v. Excite Med. Corp., 591 F. App'x 767, 773 n.5 (11th Cir. 2014); Gillings v. Time Warner Cable LLC, 583 F. App'x 712, 713 n.1 (9th Cir. 2014).

The issues of what statute of limitations applies to Mr. Ealy's Rehabilitation Act claim is a pure question of law, as are the questions of whether to reject the procedure in Bryant and whether the "ordinary firmness" standard applies when a plaintiff must rely on another inmate to file his grievances. Sinaltrainal v. Coca-

Cola Co., 578 F.3d 1252, 1269 n.19 (11th Cir. 2009) (construing motion to dismiss for lack of subject matter jurisdiction as Rule 12(b)(6) motion to reach pure issue of law). Mr. Ealy's claims do not rely on "a thorough and meticulously calibrated factual analysis" that the district court never had a chance to conduct. Access Now, Inc. v. Sw. Airlines Co., 385 F.3d 1324, 1332 (11th Cir. 2004). Mr. Ealy's claims do not require any factual development for a full consideration.

"Any wrong result resting on the erroneous application of legal principles is a miscarriage of justice in some degree." Roofing & Sheet Metal Services, Inc. v. La Quinta Motor Inns, Inc., 689 F.2d 982, 990 (11th Cir. 1982). Because Mr. Ealy's points on appeal are well-supported, they deserve full consideration by the Court. Moreover, Mr. Ealy is not presenting a new theory of liability; he merely points out deficiencies in an affirmative defenses. Id.[1] Justice would be better served by entertaining Mr. Ealy's arguments regardless of whether the Court considers them properly preserved.

[1] The defense was improperly raised, because Defendants set forth their reasoning on the issue in the response in opposition to plaintiff's motion to file a reply to the opposition to the motion to file a third amended complaint (D.E. 57) rather than the memorandum in opposition itself. (D.E. 54). Mr. Ealy was granted

B. Due to the state of the law and the factual determinations of the District Court, Mr. Ealy had no meaningful opportunity to raise his appellate arguments at trial.

Mr. Ealy's situation does not appear similar to other cases in which this rule was applied. E.g., Baumann v. Savers Fed. Sav. & Loan Assoc., 934 F.2d 1506, 1513 (11th Cir. 1991) (entertaining new argument because conservator "was not a party to the suit at the trial level"). Nevertheless, he could not have argued below that a current split of authority in Florida courts rendered Appellee's approach unworkable. Claim III was resolved based on the district court's conclusion that Mr. Ealy was not actually intimidated or deterred from filing any grievance (D.E. 60, at 14), rendering the appropriate standard of firmness irrelevant and functionally depriving him of any opportunity to address the issue.

C. Mr. Ealy alleged facts that would violate his constitutional right to file a grievance, creating an issue of substantial justice.

Mr. Ealy enjoys a constitutional right to file grievances against prison officials. Thomas v. Evans, 880 F.2d 1235, 1242 (11th Cir. 1989). Because the district court applied Bryant, Mr. Ealy was not granted an opportunity to develop the record on whether officials intimidated and threatened the inmate upon whom he relied to exercise this right. Mr. Ealy does not seek a monetary judgment for this violation, he merely asks that he not be penalized. Under these circumstances,

this Court may find an issue of substantial justice. Valdez v. Feltman (In re Worldwide Web Sys.), 328 F.3d 1291, 1301 (11th Cir. 2003).

D. The proper resolution of Claim II appears to be beyond doubt.

This Court stands alone in holding that the Supreme Court has not abrogated the Bryant approach. (Initial Br., at 25-27). The Bryant majority reasoned that:

> Although the Supreme Court recently announced in Jones v. Bock, 549 U.S. 199, 127 S. Ct. 910, 166 L. Ed. 2d 798 (2007), that failure to exhaust under the PLRA was an affirmative defense, it did so in resolving the question whether the PLRA required plaintiffs, instead of defendants, to plead specifically that all administrative remedies had been exhausted. See id. at 921 ("We conclude that failure to exhaust is an affirmative defense under the PLRA, and that inmates are not required to specially plead or demonstrate exhaustion in their complaints."). Jones decided nothing about the independent question of whether a judge, as opposed to the jury, may resolve disputed facts about exhaustion.

Bryant v. Rich, 530 F.3d 1368, 1374 n.9 (11th Cir. 2008). Subsequently the Ninth Circuit concluded that Jones had rendered its approach, which this Court adopted in Bryant, untenable and contrary to law. Albino v. Baca, 747 F.3d 1162, 1169 (9th Cir. 2014). With due respect to the Court's power and responsibility to decide questions of law for itself, it appears that many jurists would find it beyond doubt that Bryant should be overruled.

E. Mr. Ealy's claims present issues of great public importance.

Claim I "concerns the application of one of the landmark civil rights statutes in the country." Access Now, Inc., 385 F.3d at 1334. Claim II affords this Court an opportunity to reconsider a holding rejected by every other federal circuit and adopt a new procedure for resolving the exhaustion issue in prisoner suits. Claim III addresses the fundamental injustice of punishing disabled inmates for the failures of other inmates responsible for their care. Each of these issues is important to the general administration of justice in Florida and in the Eleventh Circuit, and should be settled here.

IV. Like Section 1983 claims, Rehabilitation Act claims borrow the state's personal injury statute of limitations.

Appellee appears to concede in pages 18-23 of the answer brief that Florida lacks "a state law identical to the Rehabilitation Act from which to borrow a limitations period." Everett v. Cobb Cnty. Sch. Dist., 138 F.3d 1407, 1409 (11th Cir. 1998). This court's precedent therefore directs lower courts to apply the state's statute of limitations for personal injury claims. Id. In Florida, that limitations period is found in Section 95.11(3)(p), Florida Statutes. The one-year limitations period in Section 95.11(5)(g), for prisoners challenging the conditions of their confinement, is not the general personal injury limitations period. Indeed, it is not even a personal injury statute of limitations because it is only directed

towards "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)). Appellee is therefore incorrect to state that the only relevant inquiry is "whether the claim is brought by a prisoner." (Answer Br., at 28).

Appellee fails to show any meaningful distinction between Rehabilitation Act claims and Section 1983 claims. It would be just as straightforward to apply the one-year prisoner claim limitations period in the Section 1983 context as the Rehabilitation Act context.[2] Nevertheless, this Court has rejected the one-year limitations period in favor of an approach that categorically relies on the four-year personal injury limitations period. Ellison v. Lester, 275 F. App'x 900, 902 (11th Cir. 2008) (reversing; holding without explanation that one-year limitations period did not apply).

In this, the Rehabilitation Act is absolutely not "unlike the issues confronted in the § 1983 contexts." (Answer Br., at 28). As with Section 1983 claims before Owens v. Okure, 488 U.S. 235 (1989), the complicating factor is uncertainty as to which statute of limitations would apply in state court. Florida law is currently

[2] Appellee correctly points out that, contrary to the undersigned's representation in the initial brief, there is no split of authority on this issue. (Answer Br., at 28 n.17). Unfortunately this error went uncorrected below as well. (D.E. 60, at 8). The undersigned regrets the error and apologizes for any inconvenience to opposing counsel, but recognizes that Mr. Ealy's position on the issue is thereby strengthened.

unsettled as to which limitations period applies to prisoner suits. In searching for the limitations period that the state would apply, rather than simply applying the general personal injury statute, courts make federal rights dependent on changing state law. At worst, prisoners who relied on the four-year limitations period in Calhoun will lose their federal claims if the Florida Supreme Court – or a federal court predicting that court's holding – finds Greene's reasoning more persuasive. Thus, appellee's approach, which requires determining which state limitations period applies, will create the same confusion regarding the federal statute of limitations for Rehabilitation Act claims that used to exist for Section 1983 claims.

Additionally, Florida's "perhaps unique[] . . .two general/residual personal injury limitations periods" (Answer Br., at 27) are actually created by the application of a special rule for prisoners to the single, general personal injury rule. A special rule for prisoners is certainly not an essential feature of a remedial statute, required to effect a limitations period. Moore v. Liberty Nat'l Life Ins. Co., 267 F.3d 1209, 1217 (11th Cir. 2001) (explaining that "when borrowing the residual personal injury statute of limitations from a state, federal courts borrow no more from state law than is necessary to effect that limitations period."). Appellee has failed to provide any authority indicating that the differential treatment does not "stand[] as an obstacle to the accomplishment and execution of the full

purposes and objectives of Congress." Arizona v. United States, 132 S. Ct. 2492, 2501 (2012) (citations omitted).

V. Overturning the decision in Bryant v. Rich would fundamentally alter this Circuit's approach to exhaustion of remedies, not merely change the nomenclature used to describe that approach.

In the Answer Brief, Appellee focuses primarily on the judge's role in either approach as finder of fact on the exhaustion issue. (Answer Br., at 29-33). The issue is not whether the judge or jury finds the facts. Appellant argues that the Court should ensure that "disputed issues of material fact and the credibility of conflicting witnesses are resolved through live testimony and not on paper." Jones v. Felker, 2011 U.S. Dist. LEXIS 13730, *4, 2011 WL 533755 (E.D. Cal. Feb. 11, 2011).

As Appellee acknowledges, Bryant shifts to the plaintiff the initial responsibility to request an evidentiary hearing or discovery. (Answer Br., at 30-31). This potentially creates a trap for unwary or unskilled pro se prisoner litigants.[3] Moreover, the abuse-of-discretion standard of review insulates many decisions to deny further development, Sunseri v. Macro Cellular Partners, 412 F.3d 1247, 1250 (11th Cir. 2005), and the district court's findings on the abbreviated record will be reviewed only for clear error. Bryant v. Rich, 530 F.3d

[3] To the extent the undersigned's impression is correct and the Court considers the matter proper for judicial notice on its own motion, it appears that district courts typically give pro se litigants instruction on responding to a motion for summary judgment, but not a motion to dismiss.

1368, 1377 (11th Cir. 2008). The ease with which defendants may be denied any opportunity to prove up their claims under Bryant is inconsistent with the principle that defendants bear the burden of proving exhaustion. Turner v. Burnside, 541 F.3d 1077, 1082 (11th Cir. 2008). Because Mr. Ealy's allegations created a material issue of disputed fact which the district court was required to resolve, he would be entitled to an opportunity for further factual development if Bryant were overturned.

VI. Articulating the proper standard to apply when a blind inmate alleges his inmate aide refused to file a grievance would be simple and helpful.

Appellee appears to believe that Mr. Ealy asks this Court to discard Turner v. Burnside, 541 F.3d 1077, 1085 (11th Cir. 2008), and maintains that threats or other misconduct must be sufficient to deter a reasonable inmate of ordinary firmness, even when a blind inmate relies on another inmate to file grievances. (Answer Br., at 35). Unfortunately, Appellee's *ipse dixit* assertion that Turner is "well suited these claims" [sic] does not advance consideration of this issue. (Answer Br., at 35). It is not clear which inmate Appellee believes must be of ordinary firmness, or what would constitute "ordinary firmness" if the relevant inmate is the aide. Appellee also appears to believe that Mr. Ealy's position is unsupported because no citations to authority occurred in the summary of the argument. (Answer Br., at 35 n.17).

Mr. Ealy proposed that the Court recognize that under existing law, the grievance process is not really "available" to a blind inmate who relies on an inmate aide when prison officials make any attempt at all to deter the aide. (Initial Br., at 28). Mr. Ealy suggested that the Court could describe the requisite threats as "not completely incredible." (Initial Br., at 14). If Appellee had engaged Mr. Ealy on the substance of this issue, another approach might currently be before the Court. In any event, if it chooses to do so, the Court will be very able to explain how lower courts can appropriately apply the "ordinary firmness" doctrine to Mr. Ealy's situation.

Appellee is correct, however, that the proper test is irrelevant if the lower court's determination of fact stands, because Mr. Ealy would still have to prove that the threats actually deterred him or his aide. (Answer Br., at 35).

CONCLUSION

This Court has the discretion to reach Mr. Ealy's claims, and if necessary the Court should exercise that discretion. Mr. Ealy asks the Court to adopt a rule on limitations period borrowing that will promote efficient judicial administration; to reconsider an approach that was universally rejected; and, if necessary, to offer guidance on how lower courts should apply existing law to inmates like Mr. Ealy.

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 3276 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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September 30, 2015

CERTIFICATE OF SERVICE

I hereby certify that on September 30, 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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