19-6410

# In The
# Supreme Court of the United States

No. _____

Donald W. Rager (10038-029),

Petitioner,

v.

FILED
AUG 20 2019
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SUPREME COURT, U.S.

Paige Augustine, Warden, FCI Marianna, Federal Bureau of Prisons Keith Buford, Lieutenant, FCI Marianna, Federal Bureau of Prisons S. Malone, Lieutenant, FCI Marianna, Federal Bureau of Prisons Eddie Snell, Case Manager, FCI Marianna, Federal Bureau of Prisons Connie Copeland, Counselor, FCI Marianna, Federal Bureau of Prisons R. Honeycutt, Lieutenant, FCI Marianna, Federal Bureau of Prisons, K. O'Bryan, Officer, FCI Marianna. Federal Bureau of Prisons, T. Lewis, Captain, FCI Marianna, Federal Bureau of Prisons, Mr. Simmons. Southeast Region Administrative Remedy Coordinator, FBOP Harrell Watts, National Administrative Remedy Coordinator, FBOP, Charles E. Samuels, Jr., Director of Federal Bureau of Prisons, United States of America ,

Respondents.

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**On Appeal to the United States Court of Appeals for the Eleventh Circuit (18-10834-HH) from the United States District Court For the Northern District of Florida Civil Action No. 5:15-cv-00035-MW-EMT**

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# PETITION FOR WRIT OF CERTIORARI

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**Donald W. Rager**
**Petitioner**
***In Forma Pauperis***
***August 20, 2019***

## QUESTION PRESENTED FOR REVIEW

Incarcerated inmate Donald W. Rager (Rager) was physically assaulted by Federal Bureau of Prisons (BOP) Lt. Keith Buford on July 13, 2010. Rager filed multiple grievances alleging violations of his rights by 13 BOP employees and spent three years exhausting those grievances. The exhaustion process took between 322 days and 901 days to reach final disposition, and four of the grievances were never answered. On February 24, 2015 Rager filed a civil rights lawsuit against the 13 BOP employees alleging multiple violations of his constitutional rights under 42 USC §1983/Bivens.

The District Court for the Northern District of Florida dismissed most of the claims brought by Rager as beyond the statute of limitation (SOL) without considering or applying tolling for exhaustion of administrative remedies (AR's) as required by the Prison Litigation Reform Act (PLRA), 42 USC §1997e(a): "No action shall be brought with respect to prison conditions under Section 1983 of this title, or any other federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." Rager specifically argued that tolling applies to exhaustion of AR's and cited the following rulings:

*Gonzalez v. Hasty* 651 F 3d 318 (2nd 11)

*Pearson v. Secy Dept of Corr* 775 F 3d 598, 602-04 (3rd 15)

*Harris v. Hegmann* 198 F 3d 158 (5th 99)

*Brown v. Morgan* 209 F 3d 595, 596 (6th 00)

*Johnson v. Rivera* 272 F 3d 519, 522 (7th 01)

*Williams v. Pulaski Co. Det Ctr* 278 Fed Appx 695 (8th 08)

*Brown v. Valoff* 422 F 3d 926, 943 (9th 05)

*Roberts v. Barreras* 484 F 3d 1236 (10th 07)

These eight cases ruled that tolling applies to the time that a prisoner spends exhausting AR's under the PLRA. Rager also cited cases from the 11th Circuit which alluded that "the SOL may have been tolled on account of Leal's exhaustion of AR's." *Leal v. Georgia* 254 F 3d 1276 (11th 01); "We proffer, but do not hold, as that issue is not before us, that such a result may be mitigated by the doctrine of equitable tolling, as other Circuits have applied that doctrine to the administrative exhaustion requirement for prison conditions suits under 42 USC §1997e(a)." *Napier v. Preslicka* 314 F 3d 528 n.3 (11th 02).

Upon appeal to the 11th Circuit, Rager again specifically argued for tolling for exhaustion of AR's in PLRA suits but the 11th Circuit Panel merely stated: "We have expressly declined to address the question of whether the SOL can be tolled while a prisoner is in the process of exhausting his administrative remedies as a mandatory prerequisite for filing a federal lawsuit." *Rager v. Augustine* 2019 US App Lexis 3279 (11th 19). At around the same time, the 4th Circuit, becoming the 9th Circuit to make such a ruling, ruled that, under federal tolling principles, tolling is applicable to the time spent exhausting AR's as required by the PLRA. "Battle asks that we apply federal equitable tolling principles to account for the time lost during his 83-day mandatory exhaustion period. We agree with Battle (and our sister Circuits) that those principles apply during this period." *Battle v. Ledford* 912 F 3d 708 (4th 19).

The ruling by the 11th Circuit, or, more accurately, their refusal to rule on the question of tolling of the SOL for exhaustion of AR's, which allows the District Court's ruling to stand, has created a Circuit split which in turn pits the 11th Circuit against the ten other Circuits that have made a ruling on this issue. "We agree with the uniform holdings of the Circuits that have considered the question that the applicable statute of limitations must be tolled while a prisoner

completes the mandatory exhaustion process." *Brown v. Valoff* 422 F 3d 926 (9th 04); "Thus, every Circuit that has confronted a state no-tolling rule and reached this question has applied federal law to equitably toll §1983 limitations during the PLRA exhaustion period." *Battle* supra.

Rager now asks the Court to take up the question of tolling of the SOL for the time spent exhausting AR's as a mandatory prerequisite under the PLRA 42 USC §1997e(a) for incarcerated prisoners prior to the filing of a suit in federal court and determine that the SOL begins to run from the final disposition of the administrative procedure.

## CERTIFICATE OF INTERESTED PERSONS (CIP)

The Certificate of Interested Persons (CIP) was filed for this appeal per 11th Cir. R. 26.1-1 on March 23, 2017. I do hereby certify that there have been no changes to the CIP.

Respectfully,

Donald W. Rager
August 20, 2019

## TABLE OF CONTENTS

# TABLE OF AUTHORITIES

**Page(s)**

**Cases**

**Statutes**

**Other Authorities**

**IN THE**
**SUPREME COURT OF THE UNITED STATES**

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**No. 18-10834-H**

**DONALD W. RAGER,**
***Petitioner,***

**v.**

**PAIGE AUGUSTINE, et al**
***Respondent.***

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

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# Petition for Writ of Certiorari

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Mr. Donald W. Rager respectfully petitions the Supreme Court of the United States for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered case number 18-10834-H in that Court on February 1, 2019, *Rager v. Augustine, et al*, which affirmed the judgment and commitment of the United States District Court for the Northern District of Florida, Case No. 5:15-cv-00035-MW-EMT.

## OPINION BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit (Appendix A) which affirmed the decision and commitment of the District Court of the Northern District of Florida (Appendix C) is contained in the Appendix.

## STATEMENT OF JURISDICTION

The Court, to whom this petition is directed, has jurisdiction to hear and rule on the matters addressed in the petition.

The instant case was originally filed in the Northern District of Florida in Pensacola, Florida on February 24, 2015 (Case No. 5:15-cv-00035-MW-EMT). The District Court (Doc.106) on January 10, 2017 accepted the Report and Recommendation of the Magistrate Judge (Doc.103) dated November 29, 2016 as to the dismissal of most of the claims presented by Rager in the Amended Complaint—specifically those which pre-dated February 24, 2011.

On August 14, 2018, Rager filed a notice of appeal to the 11th Circuit Court of Appeals in Atlanta, GA. The District Court transmitted the notice of appeal to the 11th Circuit. The appeal was docketed as appeal number 18-10834-HH. On February 01, 2019, a Panel of the 11th Circuit issued judgment affirming the District Court's judgment. Rager filed a petition for rehearing En Banc (and Panel rehearing) on March 27, 2019. The petitions were denied by the 11th Circuit on May 23, 2019.

Rager now files the Petition for Writ of Certiorari to the United States Court of Appeals for the 11th Circuit under Supreme Court rule 10(a).

This court having jurisdiction over this appeal from a ruling of the 11th Circuit Court of Appeals (11th Circuit) declined to rule on the question of tolling for exhaustion of administrative

remedies (AR's) prior to filing a suit in federal court under 42 USC §1997e(a). The District Court for the Northern District of Florida denied Donald Rager's request to apply automatic tolling for the exhaustion of AR'. On appeal to the 11th Circuit, the 11th Circuit "declined to rule on tolling for exhaustion. Rager submitted a request for rehearing and petition for hearing en banc. The 11th Circuit issued an order denying both request on May 23, 2019.

The ruling of the 11th Circuit is contrary to the rulings of the 2nd, 3rd, 4th 5th, 6th, 7th, 8th, 9th, 10th, and DC Circuits who all have made precedential rulings granting tolling for exhaustion of AR's required by the PLRA. The rulings of the sister Circuits have proclaimed that the Statute of Limitation runs from the final response of prison administrators.

This appeal has import for all incarcerated prisoners governed by the PLRA who wish to bring claims of constitutional violations by prison officials and who may have their claims in jeopardy due to the dilatory tactics, intentional or otherwise, that extend the exhaustion of AR's to the point of reducing the time available to investigate, prepare, and file a civil action in court under the applicable statute of limitation. "Certiorari is only granted in cases involving principles, the settlement of which is of importance to the public as distinguished from the parties and in cases where there is real and embarrassing conflict of opinion and authority between Courts of Appeals." *NLRB v. Pittsburgh S.S. Co.* 340 U.S. 498, 71 S CT 453, 95 L Ed, 479 (51); "Period for seeking review by Certiorari began to run from date of lower Court's denial of petition for rehearing by parties seeking review, rather than from date of original entry of judgment." *U.S. v. Healy* 376 US 75, 84 S CT 553, 11 L Ed 2d 527 (64).

Now comes Donald W. Rager (Rager), petitioner, an incarcerated prisoner proceeding *pro se* and in *forma pauperis*, appealing to the United States Supreme Court (the Court) pleading for a writ of Certiorari on the issues of 1) the Constitutionality of the Prison Litigation Reform

Act of 1995 (PLRA), and 2) the ruling of the 11th Circuit Panel (Panel) in declining to address the question of tolling of the statute of limitation (SOL) for the exhaustion of administrative remedies (AR's) by an incarcerated prisoner as a mandatory prerequisite to filing a suit in federal court in a 42 US §1983 or *Bivens* case as per the PLRA. Additionally the ruling, or more accurately the refusal to rule, which allows the decision of the District Court to reject tolling of the SOL for exhaustion of AR's to stand, is contrary to previous statements by the 11th Circuit in *Leal* and *Napier*, and this ruling creates a Circuit split, pitting it against the rulings of every other Circuit to have addressed the issue granting automatic tolling of the prescriptive period for exhaustion of AR's.

## STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner intends to rely on the following statutory and Constitutional provisions:

**42 USC §1983**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

**42 USC §1997e(a)**

**APPLICABILITY OF ADMINISTRATIVE REMEDIES**
No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

**28 CFR §542, P.S. 1330.18**

If accepted, a Request or Appeal is considered filed on the date it is logged into the

Administrative Remedy Index as received. Once filed, response shall be made by the Warden or CCM within 20 calendar days; by the Regional Director within 30 calendar days; and by the General Counsel within 40 calendar days. If the Request is determined to be of an emergency nature which threatens the inmate's immediate health or welfare, the Warden shall respond not later than the third calendar day after filing. If the time period for response to a Request or Appeal is insufficient to make an appropriate decision, the time for response may be extended once by 20 days at the institution level, 30 days at the regional level, or 20 days at the Central Office level. Staff shall inform the inmate of this extension in writing. Staff shall respond in writing to all filed Requests or Appeals. If the inmate does not receive a response within the time allotted for reply, including extension, the inmate may consider the absence of a response to be a denial at that level.

**U.S. Constitution, Amendment 5**

"No person shall be deprived of life, liberty, or property without due process of law."

**U.S. Constitution, Amendment 14**

"No state shall make or enforce any law which shall abridge the privileges or immunities of a citizen of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of its laws."

## SECTION 1: RESOLVING THE CIRCUIT SPLIT BETWEEN THE 11TH CIRCUIT AND EVERY OTHER CIRCUIT TO HAVE ADDRESSED THE ISSUE OF TOLLING FOR EXHAUSTION OF ADMINISTRATIVE REMEDIES AS REQUIRED BY THE PLRA, AS WELL AS SEVERAL OF THE 11TH CIRCUIT'S OWN FINDINGS.

On January 10, 2017 (Doc. 106), the U.S. District Court for the Northern District of Florida ruled in *Rager v. Augustine* 5:15-CV-00035-MW-EMT that Rager's complaint of violations of his 1st, 4th, 5th, 8th and 14th Amendment rights regarding his having been assaulted by Bureau of Prison's Lt. K. Buford on July 13, 2010 and his subsequent confinement in the Special Housing Unit (SHU) being served with a fraudulent incident report, retaliatory actions by Ofc. K. O'Bryan, Lt. Hunnicutt, Lt. Malone, Counselor Copeland, Case Manager Snell, Captain Lewis, Warden Augustine, Regional AR Coordinator Simmons and Central Office AR Coordinator Watts, denial of medical care, failure to provide access to recreation, religious

services, education, due process, etc. was filed outside of Florida's SOL of four years. The District Court determined that the cause of action accrued on November 12, 2010. Rager filed his suit on February 24, 2015. Rager exhausted his available AR's on 11 grievances encompassing all of the above violations and others. Rager, in his pleadings, detailed the step-by-step exhaustion of each grievance (see grievance timelines DR1-DR11, Appendix #1). The grievance process, which policy and Code of Federal Regulations (CFR) 28 CFR §542, P.S. 1330.18 state must be completed within 180 days (28 USC §47(e)), took over three years and four of the grievances were never answered. Rager made extensive argument and citation that the SOL should have been tolled for the exhaustion of AR's as required by the PLRA before he could file his suit in federal court. Rager timely appealed to the 11th Circuit Court of Appeals and again pled and extensively argued that the SOL should be tolled for exhaustion of AR's. On February 1, 2019, the Circuit Court in its ruling addressed the issue only by saying "we have expressly declined to address the question of whether the SOL can be tolled while a prisoner is in the process of exhausting his AR's as a mandatory prerequisite for filing a federal lawsuit." *Rager v. Augustine* 2018 US App Lexis 3279 (11th 19). This refusal to rule on this issue allowed the District Court's opinion to stand, thereby creating the unofficial standard for the 11th Circuit. Rager requested reconsideration and a hearing en banc, both of which were denied on May 23, 2019. Rager now timely files this petition for writ of certiorari.

When properly presented, briefed, and argued an issue which is at the heart of a legal dispute, which has been ruled upon in the lower Court, and is a primary basis, or as in this case, is the sole basis for the upper Court's ruling, must be addressed by the Appellate Court. The Appellate Court cannot be allowed to simply decline to address that issue without some substantive legal reasoning. *Rager v. Augustine*, Supra: "We have expressly declined to rule on

this issue." Having previously "declined to rule" on an issue is not a precedent which must be followed until overruled by a higher Court or by the Circuit sitting en banc. Indeed, when the Circuit had "declined to rule" on the issue of tolling for exhaustion of remedies in *Leal* and *Napier*, the Panels implied that it supported tolling and had cited the rulings of other Circuits which had granted tolling for exhaustion of AR's, and in both cases, in their declinations to rule, it was explained that the issue had not been decided below. Both Panels remanded the cases to the District Court with strong cues that tolling should have been granted. By their declining to rule on the issue of tolling, the Panel in this case affirmed the ruling of the District Court in their decision that tolling does not apply. The 11th Circuit has, in fact, made a ruling.

The question of tolling for the exhaustion of AR's is a very important one which impacts all incarcerated prisoners subject to the PLRA who wish to present to the Courts violations of their constitutional rights regarding prison conditions.

The ruling of the 11th Circuit, or more accurately, their refusal to rule, is in contravention to their own statements and implications in several previous cases. In *Leal v. Georgia Dept. of Corr.* 254 F 3d 1276 (11th 01) they stated, "Because the SOL may have been tolled on account of Leal's exhaustion of AR's, it does not appear beyond a doubt from the complaint that Leal can prove no set of facts which would avoid an SOL bar." (Remanded to District Court as the issue was not decided below.) A year later they again alluded to the SOL being tolled for exhaustion of AR's: "We proffer but do not hold, as that issue is not before us, that such a result might be mitigated by the doctrine of equitable tolling as other Circuits have applied that doctrine to the administrative exhaustion requirement for prison condition suits." *Napier v. Preslicka* 314 F 3d 528, 534 n.3 (11th 02). Once again, in 2005: "The Magistrate Judge (MJ) failed to address whether the time period may have been tolled while Howell pursued his AR's. Howell argued

before the MJ and argues to this Court, that the SOL should have been tolled while he pursued AR's, and that officials never responded to his grievances. Based on the factual record before us, we cannot make a determination as to whether tolling might be appropriate." *Howell v. Proctor* 136 Fed Appx 267, 270 (11th 05); *Hughes v. Lott* 350 F 3d 1157, 1163 (11th 03).

In *Leal* and *Napier*, the reason given for their decision not to make a final ruling was that the issue had not been decided in the lower court. They remanded the cases and direct the District Court to make a ruling in "the first instance." "If the District Court resolves this issue in favor of tolling, then the Court should address the factual issue of whether Leal pursued AR's such that sufficient tolling occurred to enable Leal to avoid a SOL bar...Because none of these issues were decided initially, we decline to address them for the first time on appeal." *Leal* supra. In their ruling, the Circuit Court cited *Brown v. Morgan* 209 F 3d 595, 596 (6th 00) and *Harris v. Hegmann* 198 F 3d 158 (5th 99) as authority for its agreement and support of the tolling for exhaustion of AR's. Although *Leal* and *Napier* were not precedential rulings, several of the sister Circuits have cited those rulings as support for their rulings granting tolling for exhaustion of AR's: *Roberts*, supra (*Leal*); *Soto v. Unknown Sweetman* 882 F 3d 865 (9th 17) (*Napier*); *Shropshear v. Corp Counsel of Chi* 275 F 3d 593 (7th 01); *Battle* (*Napier*), and by the 11th Circuit itself: *Howell v. Proctor* 136 Fed Appx 267 (11th 05) (*Leal*); *Hughes v. Lott* 350 F 3d 1157 (11th 03) (*Leal*).

The PLRA was enacted in 1995 and almost immediately the Courts recognized the conflict between the requirements of exhaustion of AR's and the statutes of limitation of the individual states for bringing a cause of action in federal court. Several states, including Illinois, Louisiana, Texas, and Pennsylvania, have statutes that include tolling of SOL for the exhaustion of AR's: *Harris v. Hegmann* supra (Louisiana); *Johnson v. Rivera* 272 F 3d 519 (7th 01)

(Illinois); *Pearson v. Sec'y Dept. of Corr.* 775 F 3d 598 (3rd 14) (Pennsylvania). The Circuit Courts, applying the state SOL and tolling statutes, have thus granted automatic tolling for exhaustion for prisoner suits. Several other Circuits have ruled, based only on federal law and principles and despite the state law not providing a tolling statute for exhaustion of AR's, that tolling is appropriate based upon the PLRA being a bar to commencement of a §1983 action. *Gonzalez v. Hasty* 651 F 3d 318 (2nd 09); *Brown v. Valoff* 422 F 3d 926 (9th 04) "We agree with the uniform holdings of the Circuits that have considered the question that the applicable SOL must be tolled while a prisoner completes the mandatory exhaustion process."; *Brown v. Morgan* 209 F 3d 595 (6th 00) "This language unambiguously requires exhaustion as a mandatory threshold requirement in prison litigation. Prisoners are therefore prevented from bringing suit in federal court for the period of time required to exhaust 'such AR's as are available.' For this reason, the SOL which applied to Brown's civil rights action was tolled for the period during which his available state remedies were being exhausted."; *Roberts v. Barreras* 484 F 3d 1236 (10th 07) "In order to determine how long Mr. Robert's claim should be tolled, we must know how long his grievance remained viable under the institution's grievance procedures in effect at the time of Robert's grievance." "We know that every Circuit to address the issue has held that the filing of a mandatory administrative grievance tolls the SOL for §1983 and *Bivens* claims. We remanded to the District Court with instructions to consider whether the SOL should have been tolled." *Id.* Finally, in a case decided just this year, the 4th Circuit has emphatically ruled:

> "Where due to circumstances external to the party's own conduct, it would be unconscionable to enforce the limitation period against the party and gross injustice would result...Finally, in joining this consensus, we note that the ordinary arguments against equitable

> tolling do not apply...We therefore reject the officers' invitation to deviate from the path followed by seven other Circuits. Battle's limitations period must be tolled for the 83 days in which he exhausted his AR, as he was required to do before bringing suit...In sum, Battle's §1983 complaint is timely; it was filed within two years of the date he exhausted AR's required by the PLRA." *Battle v. Ledford* 912 F 3d 708, 718, 720 (4th 19).

The Court has had to address the failure of Congress to have included in the PLRA a statute of limitations and the resultant problems. "In this case we again confront the consequences of Congress' failure to provide a specific SOL to govern §1983 actions." *Owens v. Okore* 488 US 235, 239, 102 L Ed 2d 594, 109 S CT 573 (89); "In *Wilson v. Garcia* 471 US 261, 85 L Ed 2d 254, 105 S CT 1938 (88) we sought to end the 'conflict, confusion, and uncertainty.' 471 US at 266. Recognizing the problems inherent in the case by case approach, we determined that 42 USC §1988 requires Courts to borrow and apply §1983 claims to the one most analogous state SOL. *Id.*at 275 ('Federal interests in uniformity, certainty and the minimization of unnecessary litigation supports the conclusion that Congress favored this simple approach.')"; "Our decision in *Wilson* that one 'simple broad characterization of all §1983 actions was appropriate under §1988 was, after all, grounded in the realization that the potential applicability of different state SOL had bred chaos and uncertainty.' *Id.* at 275." *Owens* at 243. Likewise, the applicability of the tolling rules has created the same "conflict, confusion, and uncertainty." And the application of a single tolling rule for §1983 would resolve those issues once and for all and level the playing field for all inmates subject to the PLRA.

The Court has addressed the issue of tolling for exhaustion in other contexts and ruled that when a statute requires exhaustion of administrative reviews or procedures that tolling for the period of exhaustion suspends the running of the SOL. "These exceptions to the SOL generally referred to as 'tolling,' (see *Johnson v. Railway Express Agency, Inc.* 421 US 454, 44 L Ed 2d 295, 95 S CT 1716 (75), are an integral part of the limitation system...Applying the converse of this reasoning, this Court found in *Occidental Life Ins. Co of Calif v. EEOC* 432 US 355 (77), that it would be inconsistent with federal law to apply a state statute of limitation to actions instituted by the EEOC under Title VII since the EEOC was 'required by law to refrain from commencing a civil action until it had discharged its administrative duties." 432 US at 368, 53 L Ed 2d 402, 97 S CT 2447; "Unless the doctrine that SOL's are not tolled pending exhaustion were overruled, *see Board of Regents v. Tomanio* 446 US 478, 64 L Ed 2d 440, 100 S CT 1796 (80), a judicially imposed exhaustion requirement might result in the effective repeal of §1983." *Patsy v. Board of Regents* 457 US 496, 514 n.17, 73 L Ed 2d, 172; "In light of the federal policy requiring employment discrimination claims to be investigated by the EEOC and whenever possible administratively resolved before suit is brought in federal court, it is hardly appropriate to rely on the State's wisdom in setting a limitation on the prosecution...For the State's wisdom in setting a limitation period could not have taken into account the decision of Congress to delay judicial action while the EEOC performs its administrative responsibilities." (internal citations omitted) *Occidental* at 368. This citation and ruling are eerily similar to the restrictions of the PLRA §1997e(a) which requires an incarcerated inmate to exhaust AR's "before a suit can be brought in federal court." Since the Court ruled that the limitation period should not begin to run until the final administrative decisions is made, it can only logically follow that the same ruling must apply in §1983 or *Bivens* cases governed by the PLRA.

Although the above citations refer to a different statute than the case at bar, §1997e(a)—PLRA, the end result of both statutes is the same—a party seeking redress is barred by statute from bringing an action in federal court until the administrative requirements have been completed. The principle here is clearly defined by the Court—a federal rule which, when Congress has determined that administrative action is a prerequisite to filing a suit in federal court, automatically tolls the SOL for the period of time during which the party has spent exhausting those administrative requirements and the SOL begins to run from the point of final disposition of the administrative action. "State tolling law is applicable in a §1983 action if it is not inconsistent with federal law or policy." *Hardin v. Straub* 490 US 536, 542, 109 S CT 1998, 104 L Ed 2d 582 (89); "Although state law is our primary guide in this area [tolling], it is not, to be sure, our exclusive guide. As the Court noted in *Auto Workers v. Hoosier Corp.* 383 US 696, 706-07, 16 L Ed 2d 192, 86 S CT 1107 (66), considerations of state law may be displaced where their application would be inconsistent with the federal policy underlying the cause of action under consideration." *Johnson* at 465 "So here the interests in uniformity and the interest in having 'firmly defined, easily applied rules (see *Chardon v. Fumero-Soto* 462 US 650, 667, 77 L Ed 2d 74, 103 S CT 2611 (83)) support the conclusion that Congress intended the characterization of §1983 to be measured by federal rather than state standards." *Wilson v. Garcia* 471 US at 269. The initiation of a single tolling rule would relieve the courts of the time, energy, and resources by applying a single standard to PLRA cases and require the answering of two questions:

1) Did the inmate exhaust the available AR's prior to filing suit as required by the PLRA?

2) On what date did he exhaust his AR's?

Courts would then run the SOL from that date to determine if the filing of the suit in

court was timely. The current system requires extensive argument as to what, if any, tolling rules apply in the state in which the violations occurred, a detailed analysis of whether any of those state tolling rules applied to that particular case, as well as argument over whether the general and/or specific wording can be interpreted—all of this to be determined by that particular MJ or judge and the competing interpretations of each of the parties. If the state does not have a controlling tolling rule, then courts must evaluate and determine whether to apply general federal equitable tolling rules regarding misconduct, concealment or any other bias. Judicial economy argues emphatically in favor of the blanket tolling rule for exhaustion of AR's: proof of exhaustion and date of final reply and the issue is settled. The Court has stated, "In the absence of a plain indication to the contrary...Congress, when it enacts a statute, is not making the application of the Federal Act dependent on state law." *Mississippi Band of Choctaw Indians v. Holyfield* 490 US 30, 43, 104 L Ed 2d 29, 109 S CT 1597 (89) (quoting *Jerome v. United States* 318 US 101, 87 L Ed 640, 43 S CT 483 (43))"; "One reason for this construction is that federal statutes are generally intended to have uniform nationwide application." *Id.* "That assumption is based on the fact that the application of federal legislation is nationwide (*US v. Pelzer* 312 US 399, 402, 85 913, 915 61 S CT 659 (41)) and at times on the fact that the federal program would be impaired if the state law were to control." *Jerome* at 104.

Under the rulings of the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, and DC Circuits, the SOL is tolled during the period that an inmate is actively pursuing his AR's and the SOL period begins to run once the final answer is received. The fact that none of the above cases has been reviewed by the Court, or had certiorari denied much less overturned, speaks volumes to the validity and strength of these rulings, going back to 1999. In the ensuing twenty years, up to and including *Battle v. Ledford* (4th 19), the Circuits across the country have recognized the inequity of the

PLRA in its denial of an incarcerated plaintiff's right of access to the Courts in petitioning the government for redress of grievances. (14th Amendment, U.S. Constitution). "The inquiry here is objective. All a court must do is determine the point of exhaustion and run the limitations period from that date." *Battle* at 720; "Pressley received a final disposition of his March 23, 2005 grievance on May 20, 2005...The tolled SOL period would have expired no later than May 20, 2007." *Pressley v. Huber* 562 Fed Appx 67 (3rd 13); "When a SOL is tolled, the days during a tolled period are not counted against the limitation period." *Socop-Gonzalez v. INS* 272 F 3d 1176, 1195 (9th 01); "Our Circuits precedent indicated that the statutory clock is stopped while tolling is in effect. In *Knight v. Schofield* we addressed the SOL question in the habeas context. There we held that 'tolling means just what it says—the clock is stopped while tolling is in effect.' 292 F 3d 709, 712 (11th 02)...We find that it is equally applicable in the context of other statutes." *Cabello v. Fernandez-Larios* 402 F 3d 1148 (11th 05); "When a statute is equitably tolled, the statutory period does not begin to run until the impediment to filing a cause of action is removed." *Id.*; "We hold that §1367(d)'s instruction to 'toll' a statute of limitations period means to hold it in abeyance, i.e., to stop the clock." *Artis v. Dist. of Columbia* 583 US , 138 S CT 594, 199 L Ed 2d 473 (18). As a normal consequence tolling works to suspend the operation of an SOL during the pendency of an event or condition. See *American Pipe & Construction Co. v. Utah* 414 US 538, 560, 561, 38 L Ed 2d 713, 94 S CT 756 (74); *Burnett v. New York Central& Co.* 380 US 424, 427, 13 L Ed 2d 941, 85 S CT 1050 (65)." *Johnson v. Railway Express Agency* 421 US 454, 474, 44 L Ed 2d 295, 95 S CT 1716 (75). The inmates in each of these Circuits is therefore entitled, as is every other non-incarcerated plaintiff who files a §1983 suit for violation of Constitutional rights, to the entirety of the SOL period that the state in which the violation occurred deemed appropriate. Conversely, in the 11th Circuit, an inmate is only entitled to the

length of the state SOL minus whatever time the prison administrators consume in processing and answering the inmates' grievances. We join the 5th and 8th Circuits on this issue because we refuse to interpret the PLRA 'so narrowly as to...permit [prison officials] to exploit the exhaustion requirement through indefinite delay in response to grievances.'" *Lewis v. Washington* 300 F 3d 829, 833 (7th 02); "A no-tolling rule would even create perverse incentives for prison commissioners to extend regulatory deadlines and for wardens and investigators to stall in their review of individual grievances, for doing so might limit government officials' exposure." *Battle* at 716. "Nor would the no-tolling rule advance §1983 [Bivens] subsidiary interest in uniformity. But a rule that calculates the limitations deadline from the date of exhaustion is just as 'firmly defined' and 'easily applied.' *Wilson* 471 US at 270. Moreover, a no-tolling rule would destroy any semblance of meaningful uniformity by creating dramatic claim-to-claim variance in the actual filing time available to different §1983 litigants. Between prisoners, a no-tolling rule would afford a prisoner whose grievance was processed with delay less time to file than one whose grievance received speedy resolution. It would also create a disparity between those who are incarcerated and those who are not." *Id.* The Court pondered the question of the intentional abuse of the grievance process while considering the "proper exhaustion rule" in *Woodford v. Ngo* 548 US 81, 90-91. "Proper exhaustion demands compliance with an agency's deadlines and other critical procedural rules because no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings." *Id.* at 90; "Respondent contends that requiring proper exhaustion will lead prison administrators to devise procedural requirements that are designed to trap unwary prisoners and thus to defeat their claims. Respondent does not claim, however, that anything like this occurred in his case and it is speculative that this will occur in the future. We have no

occasion here to decide how such situations may be addressed." *Id.* at 102-03.

The BOP's AR policy, 28 USC §541.18, PS 1330.18 provides the guidelines and deadlines for filing AR's:

> If accepted, a Request or Appeal is considered filed on the date it is logged into the Administrative Remedy Index as received. Once filed, response shall be made by the Warden or CCM within 20 calendar days; by the Regional Director within 30 calendar days; and by the General Counsel within 40 calendar days. If the Request is determined to be of an emergency nature which threatens the inmate's immediate health or welfare, the Warden shall respond not later than the third calendar day after filing. If the time period for response to a Request or Appeal is insufficient to make an appropriate decision, the time for response may be extended once by 20 days at the institution level, 30 days at the regional level, or 20 days at the Central Office level. Staff shall inform the inmate of this extension in writing. Staff shall respond in writing to all filed Requests or Appeals. If the inmate does not receive a proper response within the time allotted for reply, including extension, the inmate may consider the absence of a response to be a denial at that level.

Given the above stated timetables, the reality is that the process takes much more time and considerable effort and diligence to navigate. The process is designed and operated in such a manner as to frustrate and discourage all but the hardiest of souls. One look at Rager's timelines

of grievance (DR1-DR11) in the appendix will open the Court's eyes as to the machinations of the BOP administrators to defeat an inmate's attempts to properly exhaust AR's. The additional table below (table 1) will show the actual time Rager spent in exhausting the AR's he filed.

**Table 1**

| Exhibit # | AR# | Date Submitted | Actual Date of Final Answer | Due Date of Final Answer | Total Days Exhausting | Days remaining on 4 -yr SOL w/tolling | SOL expiration date w/tolling |
|---|---|---|---|---|---|---|---|
| DR 1 | 629355 | 09/16/10 | 03/05/13 | 07/14/12 | 901 | 801 | 07/14/16 |
| DR 3 | 629354 | 09/16/10 | 03/05/13 | 07/14/12 | 901 | 801 | 07/14/16 |
| DR 5 | 604713 | 09/16/10 | no answer | 09/02/11 | 351 | 251 | 09/02/15 |
| DR 6 | 604713 | 07/19/10 | 06/06/11 | 06/10/11 | 322 | 222 | 06/10/15 |
| DR 7 | 624146 | 10/18/10 | no answer | 02/16/12 | 496 | 396 | 02/16/16 |
| DR 8 | 629349 | 10/14/10 | no answer | 02/09/13 | 849 | 749 | 02/09/17 |
| DR 9 | 624142 | 10/14/10 | no answer | 03/06/12 | 509 | 409 | 03/06/16 |

In a system that *must* be completed from initiation to final disposition within 180 days (28 USC §40.7(e)), Rager's timelines, Table 1, and the BOP's own AR Index (Doc.129-2) demonstrate that the answers at both the Regional and Central Offices were rejected, replied to or answered beyond the due date in nearly every instance. Their delivery delayed Rager's receipt until the time for reply and return was nearly or completely consumed. The final reply to Rager's grievances ranged from 312 days to 901 days beyond the due dates on the notices provided to Rager, even after extensions were taken. Rager attempted to follow the policy in that "if an inmate does not receive a response within the time allotted for reply, including extensions, the inmate may consider the absence of a response as a denial at that level. §541.18 Rager attempted to advance his grievances 71 times under this policy and was rejected every time (by Simmons 35 times, by Watts 36 times). He continued to diligently pursue the grievances following every rejection, return and unsatisfactory answer finally exchanging the 11 grievances over 130 times, including securing memos 15 times to excuse tardiness caused by the BOP's dilatory actions in delivering the replies to Rager. The Courts have recognized that the actual pursuit of grievances

is much different than the AR guidelines drafted in the vacuum of an executive office. In fact, four of Rager's grievances were never answered at all—a matter of fact admitted to by the AR Regional and Central Office Coordinators (Simmons & Watts) (Doc.129-3, 129-4) and held by the Panel that "It is true that several of Rager's administrative grievances were never answered." *Rager v. Augustine* 2018 US App Lexis 3279 (11th 19); "The time for achieving a resolution under the PLRA [BOP Grievance Policy] could be considerably longer than 140 days. In some instances, it is certainly possible that a full three years could pass while an inmate exhausts his AR's." *Gonzalez* supra.; "Exhaustion may be achieved in situations where prison officials fail to timely advance the inmate's grievances or otherwise prevent him from seeking his AR's." *Abney v. McGinnis* 380 F 3d 663, 667 (2nd 04).

The application of the federal equitable tolling rule is judged on the diligence of the claimant in pursuing his rights. This evaluation is subjective to the individual circumstances of the particular case.

> "Equitable tolling is 'reserved for those rare instances where, due to circumstances external to the party's own conduct, it would be unconscionable to enforce the limitation period against the party and gross injustice would result. (internal cite omitted) The Supreme Court has explained that 'generally a litigant seeking tolling bears the burden of establishing two elements: 1) that he has been pursuing his rights diligently, and 2) that some extraordinary circumstance stood in his way.' *Pace v. Diguglielmo* 544 US 408, 418, 125 S CT 1807, 161 L Ed 2d 669 (05). See also *Holland v. Florida* 568 US 621, 657, 130 S CT 2549,177 L Ed 2d

130 (16) (clarifying that 'the diligence required for equitable tolling is reasonable diligence, not maximum feasible diligence.') *Battle* at 718.

"Due diligence does not require a prisoner to undertake repeated exercises in futility or to exhaust every available option or to exhaust every imaginable option, but rather to make reasonable efforts. Moreover, the due diligence inquiry is an individualized one that 'must take into account the conditions of confinement and the realities of the prison system.' (internal cite omitted) *Aron v. US* 291 F 3d 708, 712 (11th 02); "Tellingly, not one of these courts has required a claimant to prove additional extraordinary circumstances beyond the exhaustion requirement or to show constant diligence until the moment of filing. In fact, the 2nd Circuit even acknowledged 'substantial delay' arising from [plaintiff's] failure to 'properly litigate the claim before it,' but still equitably tolled the AR period in light of §1983's well established policies. *Gonzalez* 651 F 3d at 320, 323." *Battle* at 270; "Finally, in joining the consensus, we note that the ordinary arguments against equitable tolling do not apply. For example, there is no 'potential for...endless tolling' of a prisoner's claim, because the clock would only stop for the length of the state's exhaustion period." *Id.*; "A clear rule that tolls limitations during the grievance process also avoids the risk of 'loosening the rule of law to whims about the adequacy of excuses, divergent responses to claims of hardship, and subjective notions of fair accommodation.' *Harris* 209 F ed at 330. The inquiry here is objective. All a court must do is determine the point of exhaustion and run the limitation period form that date." *Id.*

The Court has ruled in cases involving tolling for mandatory completion of administrative cases under other statutes and granted tolling in each of them: *Crown Coat Front Co. v. US* 386 US 503, 575, N.11, 18 L Ed 2d 256, 87 S CT 1177 (67) "We should in this

respect heed the Court of Claims: 'To say abruptly at this moment that limitation runs from the contract's completion, regardless of subsequent mandatory administrative proceedings, would undoubtedly cut off scores of contractors who, relying on our past decisions, have waited to bring suit until the end of the administrative process. There is no adequate reason to disrupt these justified expectations. 177 CT CL at 253-54, 386 F 2d at 860 (2nd 06).'"; "If the time bar starts running from the completion date, the contractor could thus be barred from the courts by the time his administrative appeal is finally decided...This is not an appealing view or one, in our opinion, Congress intended." *Id.* at 514; "We therefore conclude....1) Its right to bring a civil action first accrued when the Armed Services Board of Contract Appeals finally ruled on its claim, and 2) Its suit in District Court was timely filed." *Id.* at 522.

**SECTION 2: SUMMARY**

In summary, the Prison Litigation Reform Act 42 USC §1997e(a) which requires exhaustion of administrative remedies prior to an incarcerated inmate filing suit in federal court for claims involving conditions of confinement has placed those inmates in a disadvantageous circumstance wherein they are allowed less time under the applied state statute of limitation to prosecute their case in court than other non-incarcerated plaintiffs. The only available saving grace for incarcerated prisoners is a tolling rule that suspends running of the statute of limitation during the prisoner's exhaustion of available administrative remedies. A few states, to whom the courts look for statutes of limitation and tolling rules, have statutes that allow tolling for exhaustion of administrative remedies. In addition, nine Federal Circuits have ruled that tolling for exhaustion of AR's is appropriate in PLRA cases. The 11th Circuit has implied in several cases that tolling is appropriate in PLRA cases: *Leal*, *Napier*, *Howell*, *Hughes*. The 11th

Circuit and other Circuits have cited those 11th Circuit cases in making argument and rulings supporting their own rulings on tolling. Rager's *Bivens* case, because it was filed in Florida in the 11th Circuit, was dismissed by the District Court for being outside the Florida SOL of four years. Had this case been filed in any other Federal Circuit, tolling for the 312 to 901 days (see table 1) spent exhausting AR's would have been applied and the filing of the suit would have been ruled timely. Rager diligently pursued the grievances through 130 submissions, replies, and responses, 15 staff memos to excuse tardiness caused by the administrators' untimely responses and delays in delivering responses to Rager. Rager sought assistance from prison administrators repeatedly when responses were not timely received or not received at all. When he received no reply on the four unanswered grievances and determined no answer was forthcoming, Rager proceeded to court. During the grievance process, Rager attempted to advance grievances for failure to respond at previous levels 71 times and was rejected every time.

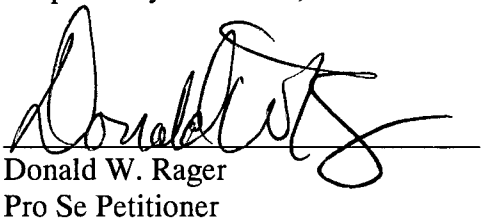
Rager spent 312 days to 901 days exhausting grievances in this incident. Using the tolling rule as applied in the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, and DC Circuits, the SOL would not have begun to run until those grievances were properly exhausted; therefore, the earliest date that the SOL for any of the violations of Rager's constitutional rights would have been June 6, 2015, thus making all claims for the original complaint filed February 24, 2015 timely—with over three months to spare.

Rager asks this Court to take up this issue on certiorari and to rule that under the PLRA, an inmate's time spent exhausting available AR's is automatically tolled and that the statute of limitations for the issues grieved begins to run upon receiving the final answer to the grievance. Rager seeks to have the ruling of the District Court, which was not ruled upon by the 11th Circuit, overturned and the case remanded, and the case ruled timely filed.

## CONCLUSION

Based on the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the 11th Circuit.

Respectfully submitted,



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August 20, 2019