No.

In the Supreme Court of the United States

DOUGLAS BROWNBACK, ET AL., PETITIONERS

v.

JAMES KING

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, waives the sovereign immunity of the United States and creates a cause of action for damages for certain torts committed by federal employees "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)(1). The FTCA also imposes a judgment bar, which provides that "[t]he judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." 28 U.S.C. 2676.

The question presented is whether a final judgment in favor of the United States in an action brought under Section 1346(b)(1), on the ground that a private person would not be liable to the claimant under state tort law for the injuries alleged, bars a claim under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), that is brought by the same claimant, based on the same injuries, and against the same governmental employees whose acts gave rise to the claimant's FTCA claim.

PARTIES TO THE PROCEEDING

Petitioners were the appellees in the court of appeals. They are Special Agent Douglas Brownback of the Federal Bureau of Investigation and Detective Todd Allen of the City of Grand Rapids, Michigan, Police Department.[*]

Respondent is James King.

RELATED PROCEEDINGS

United States District Court (W.D. Mich.):

King v. *United States*, No. 16-cv-343 (Aug. 24, 2017)

United States Court of Appeals (6th Cir.):

King v. *United States*, No. 17-2101 (Feb. 25, 2019), petition for reh'g denied, May 28, 2019.

[*] Respondent's complaint in the district court named, as additional defendants, Officer Connie Morris of the Grand Rapids Police Department and the United States. See App., *infra*, 49a-50a. The district court dismissed respondent's claims against Officer Morris and the United States, *id.* at 80a, and respondent did not appeal his claims against those defendants. As a result, those defendants did not appear in the court of appeals. See *id.* at 2a.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of Special Agent Douglas Brownback and Detective Todd Allen, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-45a) is reported at 917 F.3d 409. The opinion and order of the district court (App., *infra*, 46a-81a) are not published in the Federal Supplement but are available at 2017 WL 6508182.

JURISDICTION

The judgment of the court of appeals was entered on February 25, 2019 (App., *infra*, 84a-85a). A petition for rehearing was denied on May 28, 2019 (App., *infra*, 82a-83a). On August 18, 2019, Justice Sotomayor extended the time within which to file a petition for a

writ of certiorari to and including September 25, 2019. On September 16, Justice Sotomayor further extended the time to and including October 25, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, provides at 28 U.S.C. 1346:

> **United States as defendant**
>
> * * *
>
> (b)(1) Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, * * * for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 2676 provides that:

> **Judgment as bar**
>
> The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

Other relevant statutory provisions are reproduced in the appendix to this petition. App., *infra*, 87a-88a.

STATEMENT

1. The FTCA waives the sovereign immunity of the United States, creates a cause of action for damages, and confers exclusive federal-court jurisdiction for claims that fall within the statute's terms. See *FDIC* v. *Meyer*, 510 U.S. 471, 477 (1994). Congress directed each of those results in a single subsection of the FTCA, Section 1346(b)(1), which provides:

> Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims [1] against the United States, [2] for money damages, * * * [3] for injury or loss of property, or personal injury or death [4] caused by the negligent or wrongful act or omission of any employee of the Government [5] while acting within the scope of his office or employment, [6] under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 1346(b)(1); see *Meyer*, 510 U.S. at 477.

The remedy provided by the FTCA is generally "exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the [federal] employee whose act or omission gave rise to the claim." 28 U.S.C. 2679(b)(1). That limitation, however, "does not extend or apply to a civil action against an employee of the Government * * * which is brought for a violation of the Constitution of the United States." 28 U.S.C. 2679(b)(2). In addition, while the FTCA states that "[t]he provisions of this chapter and section 1346(b) of this title" generally "shall not apply to" "[a]ny claim arising out of" most intentional torts, the statute further provides that "with regard to acts or

omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising * * * out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution." 28 U.S.C. 2680(h). Thus, where a person alleges that federal law-enforcement agents committed one or more of the named state-law torts and also constitutional violations, the FTCA permits that person to plead either an FTCA claim against the United States or individual-capacity claims against the employees under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), or both.

The FTCA also imposes a judgment bar, which provides that "[t]he judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim." 28 U.S.C. 2676. The judgment bar establishes that a plaintiff who "receives a judgment (favorable or not) in an FTCA suit * * * generally cannot proceed with a suit against an individual employee based on the same underlying facts." *Simmons* v. *Himmelreich*, 136 S. Ct. 1843, 1847 (2016). The statute thereby "prevents unnecessarily duplicative litigation" after an FTCA claimant has had "a fair chance to recover damages for his" alleged injury. *Id.* at 1849.

2. This case arises from a violent encounter in July 2014 that occurred in Grand Rapids, Michigan between respondent James King and petitioners Douglas Brownback and Todd Allen. Petitioners "were members of a 'joint fugitive task force between the [Federal Bureau of Investigation (FBI)] and the City of Grand

Rapids.'" App., *infra*, 2a (citation omitted). Brownback was an FBI Special Agent. *Ibid.* Allen was a detective of the Grand Rapids Police Department who was assigned full time to the FBI-directed task force, *id.* at 2a, 36a, and who was "a federally deputized Special Deputy U.S. Marshal," *id.* at 54a.

The officers' task force was searching for a fugitive named Aaron Davison, who was the subject of a Michigan arrest warrant for felony home invasion. App., *infra*, 2a. The officers knew that Davison was a 26-year-old white male between 5'10" and 6'3" with glasses, short dark hair, and a thin build. *Id.* at 2a-3a. The officers also had two photographs of Davison, but they were of somewhat limited use because one was seven years old and the other showed Davison's face obscured by sunglasses. *Id.* at 3a; see *id.* at 18a (officers' photographs of Davison).

During their investigation, the officers learned that Davison bought a soft drink almost every day from a particular gas station in Grand Rapids between 2 p.m. and 4 p.m., so they went to that neighborhood and surveilled it. App., *infra*, 3a. Around 2:30 p.m., the officers saw respondent—a 21-year-old white male between 5'10" and 6'3" with dark hair and glasses—walking down the street in an area near the gas station where Davison was known to buy his daily soft drink. *Ibid.* The officers believed there was a "good possibility" that respondent was the fugitive, so they approached and stopped him. *Ibid.* (citation omitted). They were wearing plain clothes, but had badges on lanyards around their necks that were visible to respondent. *Id.* at 3a-4a. The officers asked respondent for his name, and he simply replied "James." *Id.* at 48a (citation omitted). The officers asked respondent for identification, and he

replied that he did not have any. *Id.* at 3a. The officers then instructed respondent to put his hands on his head and face their vehicle, and respondent complied. *Ibid.* He later testified that he did so because, based on the officers' badges, he "assumed [they had] some sort of authority." *Id.* at 3a-4a (citation omitted).

The officers asked respondent if he was carrying any weapons, and he replied that he had a pocketknife, so Detective Allen removed the pocketknife from respondent's pocket. App., *infra*, 4a. Detective Allen also commented on the size of respondent's wallet and removed it, too, from his pocket. *Ibid.* Respondent then asked, "Are you mugging me?" and attempted to run away. *Ibid.* (brackets and citation omitted). Detective Allen chased respondent and tackled him. *Ibid.* Respondent alleges that Detective Allen put him in a chokehold, which he says caused him to lose consciousness for several seconds. *Ibid.* It is undisputed, however, that respondent fought with the officers and violently resisted arrest, including by biting Detective Allen in the arm. *Ibid.*; see *id.* at 30a-31a, 74a. In an attempt to force respondent to release his bite, Detective Allen began "punching [respondent] in the head and face 'as hard as he could, as fast as he could, and as many times as he could.'" *Id.* at 4a (brackets and citation omitted).

The officers were able to subdue respondent only with the assistance of a bystander. App., *infra*, 31a. They took respondent to a hospital, where doctors concluded that he did not require admission for further treatment and released him with a prescription for painkillers. *Id.* at 5a. Eventually, law enforcement determined that respondent was not the fugitive for whom they had been searching. *Id.* at 49a. The State of Michigan tried respondent on charges of assault with intent

to do great bodily harm, aggravated assault of a police officer, and resisting arrest, but a jury acquitted him. *Id.* at 5a, 49a.

3. Respondent then sued the United States under the FTCA, alleging six torts under Michigan law: assault, battery, false arrest, false imprisonment, malicious prosecution, and intentional infliction of emotional distress. App., *infra*, 75a. As relevant here, respondent also sued the officers under both *Bivens* and 42 U.S.C. 1983, alleging constitutional violations including an unreasonable search and seizure, and use of excessive force. *Id.* at 5a, 50a. His complaint drew on testimony that had been given during his criminal trial. See Gov't C.A. Br. 3 n.1.

All defendants moved to dismiss the complaint on two grounds: lack of subject-matter jurisdiction and failure to state a claim upon which relief can be granted. App., *infra*, 50a-51a. In the alternative, the defendants moved for summary judgment. *Ibid.* The district court granted the motion. *Id.* at 46a-81a.

As to respondent's individual-capacity claims against the officers, the district court first ruled that those claims should be brought under *Bivens*, not Section 1983. App., *infra*, 54a-58a. Although Detective Allen was employed by the City of Grand Rapids at the time, the court found that he should be treated as a federal employee for purposes of this case because he was a deputized federal agent working on an FBI investigation pursuant to the federal Fugitive Felon Act, 18 U.S.C. 1073. App., *infra*, 54a-58a. On the merits of the *Bivens* claims, the court determined that the officers had not violated respondent's constitutional rights, either by engaging in an unreasonable search or seizure or by using excessive force. *Id.* at 59a-69a.

As to respondent's FTCA claims, the district court entered judgment for the United States, finding that respondent had failed to allege or introduce facts sufficient to show that the officers' actions could support "liab[ility] to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)(1); see App., *infra*, 75a-80a. Specifically, the court determined that, under Michigan law, the officers would be immune from the tort claims because their actions were "within the scope of their authority"; "in good faith, or were not undertaken with malice"; and "were discretionary, as opposed to ministerial." *Id.* at 79a-80a; see *id.* at 76a-80a. In the alternative, irrespective of any Michigan-law immunity, the court determined that respondent's state-law claims for assault and battery should be dismissed because the officers had "used reasonable force in subduing [him]"; respondent's claims for false imprisonment, false arrest, and malicious prosecution should be dismissed because "probable cause existed" to arrest and charge him; and respondent's claim for intentional infliction of emotional distress should be dismissed because the officers had "acted within their authority" throughout their encounter with him. *Id.* at 80a.

4. The court of appeals reversed in a partially divided opinion. App., *infra*, 1a-45a.[1]

a. Respondent initially noticed an appeal of the judgments on both his FTCA and *Bivens* claims. In his

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[1] The court of appeals stated that, because the district court had not specified the basis for its judgment in favor of the defendants and because the district court appeared to have considered at least some facts beyond the complaint, the court of appeals would treat the district court's ruling as a grant of summary judgment to the defendants. App., *infra*, 1a n.1.

opening brief, however, respondent stated that he had "decided not to pursue his claim against the United States on appeal." Resp. C.A. Br. 18 n.5. As a result, respondent's appeal encompassed only his *Bivens* claims, the United States was "not part[y] to th[e] appeal," App., *infra*, 2a, and the FTCA judgment became final. The officers accordingly argued on appeal that respondent's *Bivens* claims were precluded by the FTCA judgment bar, because those claims arose from "the same subject matter" as his FTCA claims and were pleaded against the same governmental employees "whose act or omission gave rise to the [FTCA] claim[s]." 28 U.S.C. 2676.

The panel majority rejected the officers' argument that the judgment bar foreclosed respondent's *Bivens* claims. App., *infra*, 6a-12a. The majority observed that the FTCA enacts a limited waiver of the United States' sovereign immunity, and "[s]overeign immunity is jurisdictional in nature." *Id.* at 6a (citing *Meyer*, 510 U.S. at 475). The majority therefore reasoned that, if a plaintiff's FTCA claim "fails to satisfy the[] six elements" described in 28 U.S.C. 1346(b)(1), it "does not fall within the FTCA's 'jurisdictional grant.'" App., *infra*, 7a (quoting *Meyer*, 510 U.S. at 477). In the majority's view, "[b]ecause [respondent] failed to state a FTCA claim," the district court must have "lacked subject-matter jurisdiction over [his] FTCA claim," and the district court's judgment "was not a disposition on the merits." *Id.* at 8a-10a. The majority then invoked *Himmelreich* v. *Federal Bureau of Prisons*, 766 F.3d 576 (6th Cir. 2014) (per curiam)—which this Court affirmed on different reasoning in *Simmons*, 136 S. Ct. at 1843—for the proposition that "[a] dismissal for lack of subject-

matter jurisdiction does not trigger the § 2676 judgment bar" because "in the absence of jurisdiction, the court lacks the power to enter judgment." App., *infra*, 7a (quoting 766 F.3d at 579). Applying that reasoning, the panel majority concluded that "the district court's dismissal of [respondent's] FTCA claim 'does not trigger the § 2676 judgment bar.'" *Id.* at 9a (citation omitted).

The panel majority additionally reasoned that this Court's decision in *Simmons* supported its refusal to apply the judgment bar in this case, because *Simmons* held that "'the FTCA's judgment bar provision functions in much the same way' as the 'common-law doctrine of claim preclusion.'" App., *infra*, 11a (quoting 136 S. Ct. at 1849 n.5). The majority thought it "well-established that 'a dismissal for a lack of subject-matter jurisdiction carries no preclusive effect.'" *Id.* at 11a-12a (quoting *Himmelreich*, 766 F.3d at 580).

After finding that respondent's individual-capacity claims were not precluded by the judgment bar, the court of appeals affirmed the district court's conclusion that those claims must be brought under *Bivens* rather than 42 U.S.C. 1983, App., *infra*, 34a-37a, because the officers' "conduct is fairly attributable only to the United States and not to the State of Michigan," *id.* at 36a. But the court of appeals concluded, viewing the record in the light most favorable to respondent, that the officers were not entitled to qualified immunity and were not entitled to summary judgment on some of respondent's *Bivens* claims. *Id.* at 13a-34a. The court therefore reversed the district court's judgment in favor of the officers on those claims and remanded for further proceedings. *Id.* at 38a.

b. Judge Rogers dissented on the ground that respondent's *Bivens* claims were precluded by the

FTCA judgment bar. App., *infra*, 39a-45a. He reasoned that "merits determinations under the FTCA are jurisdictional in that they implicate the sovereign immunity of the United States," but a dismissal for failure to state a claim under the FTCA is still a "'judgment'" within the meaning of 28 U.S.C. 2676. App., *infra*, 40a. Judge Rogers noted that "[t]he district court's dismissal of [respondent's] FTCA claims was based on an assessment of their merits under Michigan law." *Id.* at 41a. And this Court in *Simmons*, Judge Rogers explained, held that the judgment bar applies when an FTCA claim is dismissed "because [the plaintiff] simply failed to prove his claim." *Id.* at 40a (quoting 136 S. Ct. at 1849) (brackets in original). Judge Rogers further observed that, in "[e]very case" where a district court determines that a plaintiff failed to establish the elements of his FTCA claim, including even cases where judgment is entered against the plaintiff "after trial," the majority's reasoning would require the conclusion that the judgment bar does not apply because the court lacked jurisdiction. *Id.* at 42a. Therefore, the majority's reasoning "would effectively nullify the judgment bar" in all cases "where the FTCA judgment was in favor of the government"—a result that this Court expressly rejected in *Simmons*. *Ibid.*

c. A majority of the panel denied the officers' petition for rehearing, and the court of appeals denied a petition for rehearing en banc. App., *infra*, 82a.

REASONS FOR GRANTING THE PETITION

When "an action under" 28 U.S.C. 1346(b)(1) has gone to "judgment," Section 2676 establishes a "complete bar" to "any action" "by the claimant" arising from "the same subject matter" against the governmental employees "whose act[s] or omission[s] gave rise to the

[FTCA] claim." 28 U.S.C. 2676. The judgment bar is a key part of Congress's compromise for the FTCA: Congress opened the possibility of liability against the United States, but provided that once a claimant has attempted to prove his FTCA claim (unsuccessfully or successfully), he may not take "a second bite at the money-damages apple" by suing federal employees over the same acts. *Simmons* v. *Himmelreich*, 136 S. Ct. 1843, 1849 (2016). The court of appeals nevertheless held that a final judgment on an FTCA claim against a plaintiff who failed to establish the liability of the United States under state law cannot trigger the judgment bar, because that judgment could be described as implicating the district court's "jurisdiction." The court of appeals' holding—which would effectively nullify the judgment bar whenever the United States prevails in an FTCA suit—is contrary to the plain text of Section 2676, cannot be reconciled with this Court's explanation of the judgment bar in *Simmons*, and creates a direct conflict among the courts of appeals on a recurring issue of federal law.

A. The Decision Below Conflicts With The FTCA's Text And This Court's Decision In *Simmons*

1. A straightforward application of the text of the judgment bar requires dismissal of respondent's claims against the officers under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Respondent pleaded "an action under section 1346(b)." 28 U.S.C. 2676. The district court entered a "judgment" on his FTCA claims in favor of the United States, *ibid.*, on the ground that respondent had failed to allege or introduce facts sufficient to show any violation of Michigan law, and that judgment became final when respondent intentionally declined to

appeal it. Respondent's *Bivens* claims are directed "against the [same] employee[s] of the government whose act[s] or omission[s] gave rise to [his FTCA] claim[s]," and they concern "the same subject matter." *Ibid.* The "judgment in [the FTCA] action" therefore "constitute[s] a complete bar" to respondent's *Bivens* action. *Ibid.*

This Court's interpretation of Section 2676 in *Simmons* reinforces that the judgment bar precludes respondent's *Bivens* claims. In *Simmons*, the Court explained that the judgment bar applies "once a plaintiff receives a judgment (favorable *or not*) in an FTCA suit." 136 S. Ct. at 1847 (emphasis added). The Court went on to give examples of the kinds of FTCA judgments that Section 2676 would give preclusive effect: If a district court "issued a judgment dismissing [the plaintiff's FTCA suit] because the [federal] employees were not negligent, because [the plaintiff] was not harmed, or because [the plaintiff] *simply failed to prove his claim*." *Id.* at 1849 (emphasis added). That explanation of the judgment bar describes this case exactly. The district court found that respondent had "simply failed to prove" his FTCA claims, *ibid.*, because even accepting all of his factual allegations as true, he had not shown that a private person in analogous circumstances would be liable for the state-law torts that he claimed. App., *infra*, 80a. *Simmons* thus makes clear that the district court's FTCA judgment—which finally resolved the substantive liability of the United States on respondent's FTCA claims—was precisely the type of "judgment" that Congress intended to give preclusive effect through the judgment bar.

Simmons also explains why the purposes of the judgment bar are served by applying it here: Congress

directed that, when a plaintiff has had "a fair chance to recover damages for" his alleged injuries through his FTCA claim against the United States, "it would make little sense to give [the plaintiff] a second bite at the money-damages apple by allowing suit against the employees." 136 S. Ct. at 1849. The judgment bar thereby "prevents unnecessarily duplicative litigation." *Ibid.* Yet according to the reasoning of the court of appeals below, even when an FTCA plaintiff has had a fair chance to recover damages against the United States but has failed to prove any violation of state law, the FTCA judgment against the plaintiff carries no preclusive force, and the litigation must start over with the same federal employees facing trial on individual-capacity claims based on the same facts.

2. The court of appeals gave two justifications for refusing to apply the judgment bar to respondent's *Bivens* claims. Neither has merit.

a. The court of appeals reasoned principally that the judgment bar contains an implied exception for "dismissal[s] for lack of subject-matter jurisdiction." App., *infra*, 7a. In the court's view, because the FTCA waives the United States' sovereign immunity in Section 1346(b), a plaintiff's "fail[ure] to satisfy the sixth element" of his FTCA claim—*i.e.*, to show conduct that would constitute a violation of state law if committed by a private person—necessarily deprives the district court of subject-matter jurisdiction over the FTCA claim, with the result that a judgment dismissing that claim is not preclusive. *Id.* at 8a-9a.

The court of appeals' reasoning is foreclosed by the judgment bar's text and this Court's interpretation of that provision in *Simmons*. As explained above, 28 U.S.C. 2676 bars an FTCA plaintiff from pursuing

other related claims against individual employees when he receives a "judgment" in his FTCA action—including an unfavorable judgment—after having had "a fair chance to recover damages" through his FTCA claim, that is, a fair chance to prove the liability of the United States under state law. *Simmons*, 136 S. Ct. at 1849. The judgment bar does not depend on whether the plaintiff succeeded or failed at establishing the liability of the United States on his FTCA claim. *Id.* at 1847, 1849. And where an FTCA judgment does finally resolve the liability of the United States under state law, Section 2676 gives that judgment preclusive effect, see *ibid.*; the statute does not withhold preclusive effect on the ground that the FTCA judgment could, in some sense, be described as implicating the court's subject-matter jurisdiction.

The court of appeals' decision also failed to take appropriate account of the FTCA's structure. As described above, p. 3, *supra*, Section 1346(b)(1) confers subject-matter jurisdiction by waiving the United States' sovereign immunity on the exact same terms as the elements of the FTCA cause of action. See *FDIC* v. *Meyer*, 510 U.S. 471, 479 (1994) (Section 1346(b) "describes the scope of jurisdiction by reference to claims for which the United States has waived its immunity and rendered itself liable"). Thus, by the court of appeals' logic, *any* judgment against an FTCA claimant who fails to prove an element of his FTCA claim must be understood as a dismissal for lack of subject-matter jurisdiction that is incapable of triggering the judgment bar. See App., *infra*, 7a ("If a claim fails to satisfy the[] six elements, it is not 'cognizable' under § 1346(b) and does not fall within the FTCA's "'jurisdictional grant.'") (citation omitted). That reading of Section 2676 would

"effectively nullify" the judgment bar in any case "where the FTCA judgment was in favor of the government." *Id.* at 42a (Rogers, J., dissenting). And that reasoning is directly contrary to *Simmons*, which expressly said that the judgment bar *does* apply to an FTCA judgment that is not favorable to the claimant. 136 S. Ct. at 1847, 1849.

The court of appeals did not attempt to reconcile its opinion with the FTCA's text and structure, and it only barely mentioned this Court's explanation of the judgment bar in *Simmons*. The court of appeals stated that *Simmons* "does not conflict with" (App., *infra*, 11a) the court's own previous decision in *Himmelreich* v. *Federal Bureau of Prisons*, 766 F.3d 576 (6th Cir. 2014) (per curiam)—the decision that this Court affirmed in *Simmons*, *supra*, but on reasoning completely different from that of the court of appeals. That case presented the question whether the judgment bar is triggered when an FTCA claim is dismissed based on the FTCA's discretionary-function exception, 28 U.S.C. 2680(a), which is one of several enumerated "Exceptions" to Section 1346(b). See 28 U.S.C. 2680; *Simmons*, 136 S. Ct. at 1845-1846. The court of appeals held that the answer was no. See *Himmelreich*, 766 F.3d at 579-580. This Court agreed, but it did so because the text of the FTCA's exceptions section states that "[t]he provisions of this chapter [Chapter 171]"—which include the judgment bar—"shall not apply to" claims excluded from the FTCA by one of the enumerated exceptions. 28 U.S.C. 2680; see *Simmons*, 136 S. Ct. at 1847-1848. This Court did not endorse the Sixth Circuit's suggestion in *Himmelreich* that dismissals based on an FTCA exception carry jurisdictional consequences and fall outside the judgment bar for *that* reason. On the contrary, this

Court made clear that the judgment bar *would* apply to a judgment of dismissal based on the plaintiff's failure to prove his FTCA claim. See *Simmons*, 136 S. Ct. at 1849. Yet according to the Sixth Circuit in the opinion below, that failure of proof is the very thing that deprives the district court of jurisdiction and prevents application of the judgment bar.

The court of appeals attempted to justify its refusal to apply the judgment bar here by invoking the general principle that, where a district court makes findings that establish the absence of jurisdiction, those findings "*prevent*[ ] the district court from reaching a decision on the merits" of the claim. App., *infra*, 11a; see *ibid.* (observing that, ordinarily, establishing the requirements for subject-matter jurisdiction "determines only whether a court has the power to entertain a particular claim —a condition precedent to reaching the merits of a legal dispute") (quoting *Haywood* v. *Drown*, 556 U.S. 729, 755 (2009) (Thomas, J., dissenting)). But even to the extent that a judgment of dismissal based on a failure to prove an FTCA claim has jurisdictional consequences, the structure of Section 1346(b)(1)—by tying the waiver of sovereign immunity to claims that satisfy all the elements of the FTCA cause of action—demonstrates that the FTCA is an exception to that general principle. Section 2676 is therefore best read to mean that, where (as here) a district court determines that an FTCA claimant has failed to establish the liability of the United States under state law, the court's judgment is a "judgment in an action under section 1346(b)" that triggers the judgment bar, 28 U.S.C. 2676, regardless of whether the dismissal order can be described as implicating the court's jurisdiction.

Moreover, to the extent that it is relevant for present purposes to distinguish a dismissal "on the merits" from a dismissal "for lack of subject-matter jurisdiction" in the context of a plaintiff's failure to establish the elements of his FTCA claim under Section 1346(b)(1), this Court's decision in *FDIC* v. *Meyer*, *supra*, indicates that the district court here did have subject-matter jurisdiction that gave it the power to enter a preclusive judgment, contrary to the conclusion of the court of appeals. App., *infra*, 10a-12a. In *Meyer*, in the course of interpreting a different FTCA provision (not the judgment bar), this Court held that "[a] claim comes within [the FTCA's] jurisdictional grant * * * if it is actionable under [the FTCA]." 510 U.S. at 477. "And a claim is actionable under § 1346(b) if it *alleges* the six elements outlined," that is, if the claim is "[1] against the United States, [2] for money damages, . . . [3] for injury or loss of property, or personal injury or death [4] caused by the negligent or wrongful act or omission of any employee of the Government [5] while acting within the scope of his office or employment, [6] under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." *Ibid.* (quoting 28 U.S.C. 1346(b)(1)) (emphasis added; brackets in original).

Respondent here *alleged* all six elements of his claim under Section 1346(b)(1); he simply failed to plead factual allegations or introduce evidence to show that, under state law, a private person would be liable to him for analogous conduct. The reasoning of *Meyer* therefore leads to the conclusion that the district court had jurisdiction over respondent's FTCA claims that was sufficient to enter a judgment dismissing those claims

for failure to prove the liability of the United States, not merely for lack of subject-matter jurisdiction.

b. The court of appeals also reasoned that the judgment bar should not apply here because, in *Simmons*, this Court observed that the bar "'functions in much the same way' as the 'common-law doctrine of claim preclusion.'" App., *infra*, 11a (quoting 136 S. Ct. at 1849 n.5). The court of appeals once again characterized the district court's dismissal of respondent's FTCA claims as a "jurisdictional" determination, and then reasoned that, as such, the FTCA judgment would not have preclusive effect under general claim-preclusion principles. *Id.* at 11a-12a. That reasoning is flawed.

First, even if the court of appeals' analysis of common-law claim preclusion had been correct, this Court in *Simmons* stated only that the judgment bar operates in a manner "roughly analogous" to claim preclusion, 136 S. Ct. at 1849 n.5, not in lockstep with res judicata principles. As explained above, the judgment bar applies here by its terms, and interpreting Section 2676 to exclude the "judgment" entered against respondent—which addressed the merits and finally resolved the liability of the United States on his FTCA claims—would be directly contrary to the very point of Section 2676.

In any event, a judgment like the one in this case—which ruled on the substance of respondent's alleged state-law tort violations and found no liability—likely *would* have preclusive force under the common law. Some courts have labeled a judgment as "jurisdictional" (and non-preclusive) in the res judicata context if the judgment "rest[s] upon * * * defects of a technical or procedural nature which, if cured, normally ought not to bar a plaintiff from bringing the action again." *Rose*

v. *Town of Harwich*, 778 F.2d 77, 79-80 (1st Cir. 1985) (Breyer, J.), cert. denied, 476 U.S. 1159 (1986); see *Dozier* v. *Ford Motor Co.*, 702 F.2d 1189, 1192 (D.C. Cir. 1983) (Scalia, J.) (referring to the jurisdictional-dismissal exception to claim preclusion as covering "curable defect[s]," when a precondition absent from the first lawsuit can be and is remedied before the second lawsuit). By contrast, a judgment is "on the merits" for purposes of claim preclusion if it "actually 'passes directly on the substance of a particular claim' before the court." *Semtek Int'l Inc.* v. *Lockheed Martin Corp.*, 531 U.S. 497, 501-502 (2001) (citation omitted). Applying that standard here, the district court's judgment against respondent likely would have preclusive effect in subsequent litigation under common law, because the dismissal was based on respondent's inability to prove the elements of his FTCA cause of action; it was not because of any procedural defect that he could have cured.

B. The Decision Below Also Conflicts With Decisions Of Other Federal Courts Of Appeals

As described above, the Sixth Circuit held that, when a district court enters judgment in an FTCA action in favor of the United States on the ground that the plaintiff failed to establish the liability of the United States under state tort law, that judgment does not trigger the Section 2676 judgment bar, because the district court was deprived of subject-matter jurisdiction over the FTCA claim. See App., *infra*, 8a-9a. That holding conflicts with decisions of multiple other federal courts of appeals.

1. The Fourth Circuit has held, in circumstances similar to those in this case, that a judgment in an FTCA action grounded on the claimant's failure to establish the liability of the United States under state

law precludes the plaintiff from moving forward on *Bivens* claims arising from the same conduct by the same federal employees. See *Unus* v. *Kane*, 565 F.3d 103, 121-122 (2009), cert. denied, 558 U.S. 1147 (2010). The plaintiffs in *Unus* pleaded both FTCA and *Bivens* claims arising from the conduct of certain federal employees (among other defendants) in connection with the execution of a search warrant at the plaintiffs' home. *Id.* at 113-115.[2] The district court dismissed the *Bivens* claims based on qualified immunity, *id.* at 114, and it entered summary judgment in favor of the United States on the FTCA claims on the ground that the federal employees had not violated state tort law because they had "acted reasonably under the circumstances known to them at the time of their conduct," *id.* at 115. The Fourth Circuit affirmed the judgment for the United States on the FTCA claims, *id.* at 116-121, and then concluded that the judgment bar precluded the plaintiffs from pursuing their *Bivens* claims any further because those claims arose from the same facts as the dismissed FTCA claims, *id.* at 121-122.

Unlike the court of appeals below, the Fourth Circuit in *Unus* did not refuse to apply the judgment bar on the ground that the summary judgment in favor of the United States on the FTCA claims had been "jurisdictional" and without preclusive effect. The reasoning of *Unus* thus demonstrates that, if this case had been brought in the Fourth Circuit, the district court's summary judgment rejecting respondent's FTCA claims for failure to establish the United States' liability under

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[2] The plaintiffs in *Unus* initially pleaded state-law tort claims against the federal-employee defendants, but the United States substituted itself as a party under 28 U.S.C. 2679(d)(1). See 565 F.3d at 114.

state law would preclude respondent from pursuing his *Bivens* claims arising from the same conduct.

The court of appeals' opinion in this case also conflicts with the Seventh Circuit's decision in *Manning* v. *United States*, 546 F.3d 430 (2008), cert. denied, 558 U.S. 1011 (2009), which held that an FTCA judgment in favor of the United States after trial precluded *Bivens* claims arising from the same subject matter, even when that application of the judgment bar meant vacating a *Bivens* judgment that had already been entered in the plaintiff's favor after a trial. *Id.* at 432-438. The plaintiff in *Manning* brought both *Bivens* claims against federal employees and FTCA claims against the United States based on state-law intentional torts. *Id.* at 431. After a bifurcated trial in which the *Bivens* claims were tried to a jury and the FTCA claims were tried simultaneously before the district court, the jury returned a verdict for the plaintiff on the *Bivens* claims, but the court issued a judgment for the United States on the FTCA claims, finding that the plaintiff had failed to prove the alleged state-law torts. *Id.* at 432.[3] The court then granted the employees' motion under Federal Rule of Civil Procedure 59(e) to vacate the jury's *Bivens* judgment against them, based on Section 2676. See *Manning*, 546 F.3d at 432. The court of appeals affirmed, finding that dismissal was required "by the plain language of the judgment bar." *Id.* at 438; see *id.* at 432-438.

Here again, the Seventh Circuit in *Manning* did not conclude that the FTCA judgment in favor of the

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[3] FTCA claims cannot be tried to a jury, 28 U.S.C. 2402, so district courts often bifurcate trials when FTCA claims are joined to other claims that carry the right to a jury trial. See *Manning*, 546 F.3d at 432.

United States had necessarily been "jurisdictional" and non-preclusive. On the contrary, the court rejected the plaintiff's contention that the judgment bar distinguishes favorable merits judgments from unfavorable ones. 546 F.3d at 437.

The decision below additionally conflicts with *Farmer* v. *Perrill*, 275 F.3d 958 (2001), where the Tenth Circuit held that the dismissal of a plaintiff's FTCA claims for failure to prosecute them required dismissal of pending *Bivens* claims arising from the same subject matter. *Id.* at 960. The district court in *Farmer* initially denied the federal-employee defendants' motion for summary judgment on the plaintiff's *Bivens* claims. *Ibid.* Separately, the plaintiff also filed FTCA claims against the United States seeking damages for the same alleged injuries. *Ibid.* The court dismissed the FTCA action for failure to prosecute it, after which the employees invoked the judgment bar and sought reconsideration of the court's order denying them summary judgment in the *Bivens* action. *Id.* at 960-961. The court rejected the employees' contention that the *Bivens* claims were precluded by the judgment bar. *Id.* at 961. But the court of appeals reversed, holding that "[b]y its terms Section 2676 makes a final judgment on an FTCA claim preclusive against any *Bivens* action based on the same underlying complaint," *id.* at 962, and that "Section 2676 makes no distinction between favorable and unfavorable judgments." *Id.* at 963. The court also rejected the plaintiff's contention that the judgment bar should not apply because the district court had not adjudicated the merits of the FTCA claim, holding that "Section 2676 does not distinguish among types of judgments, [so] it is irrelevant that [the plaintiff's] FTCA judgment involved a dismissal for failure to prosecute."

Id. at 964-965. The reasoning in *Farmer* demonstrates that the Tenth Circuit would not have permitted respondent's *Bivens* claims to go further after the judgment on his FTCA claims became final.

Moreover, the court of appeals' decision in this case cannot be reconciled with the Sixth Circuit's own precedent in *Harris* v. *United States*, 422 F.3d 322 (2005), as Judge Rogers explained in his dissent below, App., *infra*, 39a, 42a. The district court in *Harris* dismissed the plaintiff's *Bivens* claims as barred by the statute of limitations, and after a bench trial, the court rejected the plaintiff's FTCA claims on the merits. 422 F.3d at 326. The court of appeals affirmed the judgment in favor of the United States on the FTCA claims, *id.* at 326-331, and then held that even though the district court had incorrectly applied the statute of limitations to the plaintiff's *Bivens* claims, those claims nevertheless could not go forward in light of the FTCA judgment bar, *id.* at 333-337. The court of appeals stated that "[n]othing in the common interpretation" of the text of Section 2676 "suggests that a judgment in favor of the United States may be treated differently from a judgment against the United States." *Id.* at 334.

The court of appeals here, by contrast, found that the fact that the FTCA judgment was in favor of the United States made all the difference to the judgment bar, because that conclusion supposedly deprived the district court of "jurisdiction." Using similar reasoning, the court distinguished this case from *Serra* v. *Pichardo*, 786 F.2d 237 (6th Cir.), cert. denied, 479 U.S. 826 (1986), on the ground that the judgment bar was applied there after "the district court granted judgment *for the plaintiff* on the merits of his FTCA claim." App., *infra*, 12a (emphasis added).

2. The court of appeals did not address the decisions of the other courts of appeals that directly reject its reasoning. The court did attempt to reconcile its opinion with *Harris* by stating that the district court in *Harris* had "rejected the plaintiff's FTCA claim on the merits after a bench trial." App., *infra*, 12a. But that factual difference between the two cases is no distinction at all. Nothing in the text or structure of the judgment bar supports a distinction between the preclusive effect of an FTCA judgment entered after a trial based on the plaintiff's failure to prove the liability of the United States versus a summary judgment entered before trial on the ground that the plaintiff's factual allegations, even if true, would not show the liability of the United States on the claim. Moreover, by acknowledging that the judgment bar would apply if respondent's FTCA claims had been rejected after a trial, the court of appeals undermined the core premise of its opinion, which was that an FTCA judgment based on the plaintiff's failure to establish an element under Section 1346(b)(1) is "jurisdictional," is not "on the merits," and for that reason is not preclusive.

The court of appeals offered no explanation for how an FTCA judgment reaching the same conclusion about the absence of the United States' liability under state law could be "jurisdictional" when entered before trial but "on the merits" when entered after a trial. Although the intra-circuit conflict between the decision below and the opinion in *Harris* would not be sufficient by itself to warrant certiorari, the court of appeals' attempt to square its result with *Harris* laid bare the inadequacy of its reasoning.

The court of appeals also claimed (App., *infra*, 9a) that the D.C. Circuit agreed with its understanding of

the judgment bar, citing *Atherton* v. *Jewell*, 689 Fed. Appx. 643, 644 (2017) (per curiam). But that unpublished order on a motion for summary disposition provides no support for the reasoning of the court of appeals here. See *id.* at 643. *Atherton* involved an FTCA judgment that was based on the statute's discretionary-function exception, and the D.C. Circuit simply observed that this Court has held that the FTCA by its terms excludes such judgments from the scope of Section 2676. See *id.* at 644 (citing *Simmons*, 136 S. Ct. at 1847-1849).[4]

C. The Question Presented Warrants This Court's Review

As explained above, the court of appeals' decision in this case conflicts directly with this Court's decision in *Simmons* and the decisions of multiple other circuit courts, including the court of appeals' own precedent. Certiorari is warranted to resolve the division and clarify the correct application of the judgment bar.[5]

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[4] The court of appeals also cited *Pesnell* v. *Arsenault*, 543 F.3d 1038 (9th Cir. 2008), but recognized that *Pesnell* involved an FTCA claim covered by the discretionary-function exception, and that *Pesnell* was therefore abrogated by *Simmons*. See App., *infra*, 10a.

[5] Shortly after the court of appeals' decision in this case, the Ninth Circuit held in *Fazaga* v. *FBI*, 916 F.3d 1202 (2019), that the judgment bar does not apply where a plaintiff brings FTCA claims and *Bivens* claims in the same action (as opposed to bringing FTCA claims first and then later attempting separately to bring *Bivens* claims concerning the same alleged injuries), unless the plaintiff obtains a judgment in his or her favor against the government. *Id.* at 1250 (citing *Kreines* v. *United States*, 959 F.2d 834, 838 (9th Cir. 1992)). The court of appeals in this case did not rely on that reasoning, no other court of appeals has accepted it, and more than one other court has rejected it. See *Manning*, 546 F.3d at 437 (rejecting *Kreines*); *Harris*, 422 F.3d at 335 (same); see also *Gasho* v. *United States*, 39 F.3d 1420, 1437 (9th Cir. 1994) (stating that "the holding

In addition, the question whether the FTCA judgment bar applies where a district court dismisses an FTCA claim on the ground that the plaintiff failed to establish the liability of the United States under state law is of general importance. The question is one of statutory interpretation that recurs with some frequency, because plaintiffs regularly elect (as respondent did) to bring both *Bivens* claims and FTCA claims arising from the same alleged injuries.

The court of appeals' decision will seriously undermine the purposes of the judgment bar. As explained above, Congress enacted the judgment bar because successive litigation of related claims imposes significant burdens both on the United States and on governmental employees sued for actions within the scope of their employment. Allowing the court of appeals' decision to stand would seriously undermine those objectives by "effectively nullify[ing]" the judgment bar in the Sixth Circuit in cases where the government prevails. App., *infra*, 42a (Rogers, J., dissenting). Under the court of appeals' reasoning, any decision in favor of the government on an FTCA claim based on a failure to show liability under state law can be characterized as "jurisdictional," with the result that a very large number of FTCA judgments rejecting the liability of the United States would be deprived of the judgment bar's preclusive effect.

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in *Kreines* was narrowly confined to its facts" and rejecting the plaintiffs' argument that "Congress intended to permit a claimant to have a second chance after losing his FTCA action"), cert. denied, 515 U.S. 1144 (1995). While the Ninth Circuit's FTCA precedents do not squarely conflict with the decision below, they demonstrate the confusion that persists in the courts of appeals regarding the judgment bar.

Respondent had a fair chance to litigate his FTCA claims against the United States. After considering respondent's complaint, and the incorporated excerpts of the record from his criminal trial, the district court determined that respondent's factual allegations did not show any violation of Michigan law. See App., *infra*, 46a, 59a-69a, 80a. Respondent chose not to appeal the district court's conclusions. Yet the court of appeals' decision below would now force the officers to stand trial for the very same conduct that was the subject of the FTCA claims that respondent abandoned. In the face of respondent's "simpl[e] fail[ure] to prove his [FTCA] claim[s]," it makes "little sense" to afford him "a second bite at the money-damages apple by allowing suit against the employees." *Simmons*, 136 S. Ct. at 1849. This Court should therefore grant the petition for a writ of certiorari and correct the court of appeals' erroneous interpretation of the FTCA judgment bar.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 2019

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 17-2101

JAMES KING, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

DOUGLAS BROWNBACK; TODD ALLEN,
DEFENDANTS-APPELLEES

Argued: Aug. 1, 2018
Decided and Filed: Feb. 25, 2019

Appeal from the United States District Court
for the Western District of Michigan at Grand Rapids
No. 1:16-cv-00343—JANET T. NEFF, District Judge

OPINION

Before: BOGGS, CLAY, and ROGERS, Circuit Judges.

CLAY, Circuit Judge. James King ("Plaintiff") appeals the district court's order granting summary judgment[1] for Officers Todd Allen and Douglas Brownback

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[1] The district court stated that it was dismissing Plaintiff's claims "under Federal Rule[] of Civil Procedure 12(b)(1) and (b)(6)," but that it was also granting summary judgment for Defendants "to the extent the Court deems it necessary to review [Defendants'] arguments under Rule 56." (R. 91 at PageID #1006.) Because the district

(together "Defendants") on Plaintiff's Fourth Amendment claims arising under 42 U.S.C. § 1983 or, alternatively, under the implied right of action set forth in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). The district court also granted summary judgment for two additional defendants, including the United States, who are not parties to this appeal. With respect to Plaintiff's § 1983 or *Bivens* claims, this Court **REVERSES** the judgment of the district court for the reasons set forth below.

BACKGROUND

A. Factual History

On July 18, 2014, Defendants were searching for a criminal suspect named Aaron Davison. Police believed that Davison had committed felony home invasion, and the State of Michigan had issued a warrant for his arrest. Defendants were members of a "joint fugitive task force between the FBI and the City of Grand Rapids." (R. 30 at PageID #108.) Defendant Allen was a detective with the Grand Rapids Police and had been assigned to the FBI task force full-time. Defendant Brownback was a special agent with the FBI. Neither officer was wearing a uniform as they conducted their search, but both of them were wearing lanyards with their badges displayed over their plainclothes.

Defendants knew that Davison was a 26 year-old white male between 5'10" and 6'3" tall with glasses;

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court did not explain this ambiguity in its ruling, and because the district court explained that its decision "relies on [the parties'] Joint Statement of Facts . . . unless otherwise indicated," (*id.* at 1002), the Court treats the district court's ruling as a grant of summary judgment for Defendants.

short, dark hair; and a thin build. Defendants also knew that Davison had a habit of buying a soft drink from a particular gas station every day between 2:00 p.m. and 4:00 p.m. And Defendants had two photographs of Davison. In the first photograph, the lighting was so dark that Davison appeared as the silhouette of a man playing electric guitar. The second photograph, a driver's license photo, showed Davison's face clearly, but the photo was seven years old at the time of the search.

Around 2:30 p.m., Defendants saw Plaintiff walking down the street in an area near the gas station where Davison was known to buy his daily soft drinks. Although Plaintiff was actually a 21-year-old college student who was walking between his two summer jobs, Defendants thought Plaintiff might be their suspect because Plaintiff was a young white male between 5'10" and 6'3" and was wearing glasses. From their unmarked vehicle, Defendants studied Plaintiff's face and decided that there was a "good possibility" that he was Davison. (R. 73 at Page ID #429-30.) Defendants parked near Plaintiff and approached him. According to Plaintiff, Defendants never identified themselves as police officers. But Defendants assert that Allen identified himself as a police officer when he first approached Plaintiff.

Defendants started asking Plaintiff questions. They asked Plaintiff who he was, and Plaintiff truthfully answered that his name was James. Defendants then asked Plaintiff for identification, and Plaintiff said that he had none. Defendants told Plaintiff to put his hands on his head and to face their vehicle. Plaintiff later testified that he complied because Defendants "had small

badges around their chest, and [he] assumed [Defendants had] some sort of authority." (*Id.* at PageID #474, 477.) Defendants asked Plaintiff if he was carrying any weapons, and Plaintiff told them that he had a pocketknife. Detective Allen removed the pocketknife from Plaintiff's pocket, commented on the size of Plaintiff's wallet, and then removed that, too, from Plaintiff's pocket. Plaintiff asked, "[a]re you mugging me?" and attempted to run away, but Detective Allen tackled him, grabbed Plaintiff's neck, and pushed him to the ground. (*Id.* at PageID #474.) Plaintiff yelled for help and begged passersby to call the police. Detective Allen then put Plaintiff in a chokehold, at which point, Plaintiff claimed, he lost consciousness. Several seconds later, when Plaintiff came to, he bit into Detective Allen's arm. Detective Allen then started punching Plaintiff in the head and face "as hard as [he] could, as fast as [he] could, and as many times as [he] could." (*Id.* at PageID #433.) Plaintiff attempted to escape and to fight back and eventually released his bite. But he could not get away; the fight continued for over sixty seconds.

As Detective Allen continued to punch Plaintiff in the head and face, several bystanders called the police and began filming the incident. Numerous police officers arrived on the scene, one of whom ordered the bystanders to delete their videos because the videos could reveal the identities of undercover FBI agents. Some of the bystanders deleted their videos, and footage of the actual altercation was never discovered. The surviving footage from immediately after the incident includes one bystander who can be heard saying, "I was worried. . . . They were out of control pounding him. . . . They were pounding his fa—head for no reason; they were be-

ing brutal." (Ex. 6, Timestamp 0:47-1:11.) A bystander who called 911 told the operator "[t]hey're gonna kill this man. . . . We can't see the victim now. They're over top of him. They look like they're suffocating him. . . . I understand they have badges on, but I don't see no undercover police cars, no other—backup, no nothing." (Ex. 18, Timestamp 1:43-3:21.)

Plaintiff was transported from the scene to the emergency room, where he received medical treatment. The emergency room doctors concluded that Plaintiff's injuries did not require him to be admitted for further treatment, and they released him with a prescription for painkillers. Upon Plaintiff's discharge, police arrested him and took him to Kent County Jail. Plaintiff spent the weekend in jail before posting bail and visiting another hospital for further examination. Prosecutors pursued charges against Plaintiff, but a jury acquitted him of all charges.

B. Procedural History

Plaintiff brought this suit alleging that Defendants violated his clearly established Fourth Amendment rights by conducting an unreasonable seizure and by using excessive force. Plaintiff also asserted a claim against the United States. The district court found that it lacked subject-matter jurisdiction to hear Plaintiff's claim against the United States, and it granted summary judgment for Defendants on the basis that Defendants are entitled to qualified immunity. Plaintiff then filed this timely appeal of his claims against Defendants.

DISCUSSION

A. The Federal Tort Claims Act Judgment Bar Does Not Preclude Plaintiff's Claims Against Defendants

The Court requested supplemental briefing on whether the judgment bar of the Federal Tort Claims Act ("FTCA"), *see* 28 U.S.C. § 2676, prohibits Plaintiff from maintaining his § 1983 or *Bivens* claims against Defendants. After considering the parties' arguments and examining the governing statutes and case law, the Court concludes that the FTCA does not preclude Plaintiff's claims.

1. Analysis

a. Standard of Review

This Court reviews the application of the FTCA judgment bar *de novo*. *See United States v. Kuehne*, 547 F.3d 667, 678 (6th Cir. 2008) ("Because this issue is a matter of statutory interpretation, we conduct *de novo* review." (quoting *United States v. VanHoose*, 437 F.3d 497, 501 (6th Cir. 2006))).

b. Relevant Legal Principles

"Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994) (citing *Loeffler v. Frank,* 486 U.S. 549 (1988)). Sovereign immunity is jurisdictional in nature. *Id.*

"In 1946, Congress passed the FTCA, which waived the sovereign immunity of the United States for certain torts committed by federal employees." *Id.* at 475-76. The FTCA's waiver provides "subject matter jurisdiction for plaintiffs to pursue state law tort claims against

the United States." *Milligan v. United States*, 670 F.3d 686, 692 (6th Cir. 2012) (citing 28 U.S.C. § 1346(b)(1)). "Section 1346(b) [of the FTCA] grants the federal district courts jurisdiction over a certain category of claims for which the United States has waived its sovereign immunity and 'render[ed]' itself liable." *Meyer*, 510 U.S. at 477 (quoting *Richards v. United States*, 369 U.S. 1, 6 (1962)). "A claim comes within this jurisdictional grant" only if it is:

> [1] against the United States, [2] for money damages, . . . [3] for injury or loss of property, or personal injury or death [4] caused by the negligent or wrongful act or omission of any employee of the Government [5] while acting within the scope of his office or employment, [6] under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Id. (quoting 28 U.S.C. § 1346(b)). If a claim fails to satisfy these six elements, it is not "cognizable" under § 1346(b) and does not fall within the FTCA's "jurisdictional grant." *Id.*

The FTCA's judgment bar provision precludes a plaintiff from bringing additional claims concerning the "same subject matter" as an FTCA claim after judgment is entered on the FTCA claim. 28 U.S.C. § 2676.

"A dismissal for lack of subject-matter jurisdiction does not trigger the § 2676 judgment bar. Put bluntly, in the absence of jurisdiction, the court lacks the power to enter judgment." *Himmelreich v. Fed. Bureau of Prisons*, 766 F.3d 576, 579 (6th Cir. 2014); *see also Meyer*, 510 U.S. at 478 (holding that if a claim "is not

cognizable under § 1346(b), the FTCA does not constitute [a plaintiff's] 'exclusive' remedy" because the FTCA's judgment bar does not apply).

c. Application to the Matter at Hand

As explained below, the district court dismissed Plaintiff's FTCA claim for lack of subject-matter jurisdiction. Because the district court did not reach the merits of Plaintiff's FTCA claim, the FTCA's judgment bar does not preclude Plaintiff from pursuing his claims against Defendants.

"The FTCA waives sovereign immunity where state law would impose liability against a private individual." *Milligan*, 670 F.3d at 692 (citing *Myers v. United States*, 17 F.3d 890, 894 (6th Cir. 1994)). Under Michigan law, a government employee is entitled to qualified immunity for intentional torts if he or she establishes that:

> (1) the employee's challenged acts were undertaken during the course of employment and that the employee was acting, or reasonably believed he was acting, within the scope of his authority, (2) the acts were undertaken in good faith, and (3) the acts were discretionary, rather than ministerial, in nature.

Odom v. Wayne Cty., 760 N.W.2d 217, 218 (Mich. 2008) (adopting test articulated in *Ross v. Consumers Power Co.*, 363 N.W.2d 641 (Mich. 1984)). The district court found that Plaintiff failed to satisfy the *Odom/Ross* test. According to the district court, the undisputed facts indicated that Defendants' conduct occurred during the course of their employment and within the scope of their authority, was not undertaken with the requisite malice required under Michigan law, and was discretionary. (Dist. Ct. Op. at PageID #1029-30.) Because Plaintiff

failed to state a claim against the United States under Michigan law, the district court held that the United States was "entitled to immunity under the FTCA." (*Id.* at PageID #1030.)

The FTCA does not bar Plaintiff from maintaining his claims against Defendants because the district court lacked subject-matter jurisdiction over Plaintiff's FTCA claim. Plaintiff failed to satisfy the sixth element of the *Meyer* test—he failed to allege a claim "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." *Meyer*, 510 U.S. at 477. Because Plaintiff failed to state a FTCA claim, his claim did not fall within the FTCA's "jurisdictional grant." *Id.* And because the district court lacked subject-matter jurisdiction over Plaintiff's FTCA claim, the district court's dismissal of his FTCA claim "does not trigger the § 2676 judgment bar." *Himmelreich*, 766 F.3d at 579.

Few circuit courts of appeals have addressed whether the FTCA's judgment bar applies when a district court dismisses a plaintiff's FTCA claims for lack of subject-matter jurisdiction. But the D.C. Circuit reached the same conclusion that this Court reaches here—the FTCA's judgment bar does not apply to dismissals for lack of subject-matter jurisdiction. *See Atherton v. Jewell*, 689 F. App'x 643, 644 (D.C. Cir. 2017) (holding that because the district court "correctly determined that it lacked subject-matter jurisdiction" under the FTCA, the FTCA's judgment bar "is not a basis for the denial of appellant's motion to amend the complaint" to include a *Bivens* claim) (citing *Simmons v. Himmel-*

reich, 136 S. Ct. 1843, 1847-49 (2016)). The Ninth Circuit reached a similar conclusion in *Pesnell v. Arsenault*, 543 F.3d 1038 (9th Cir. 2008), *abrogated by Simmons v. Himmelreich*, 136 S. Ct. 1843 (2016), where it held that the FTCA's judgment bar did not preclude a plaintiff from pursuing *Bivens* claims after the district court dismissed his FTCA claims for lack of subject-matter jurisdiction. *Arsenault*, 543 F.3d at 1041. However, the Ninth Circuit stated that the plaintiff's *Bivens* claims "are barred to the extent that they rest upon the same misrepresentations alleged" in the FTCA action dismissed for lack of subject-matter jurisdiction. *Id.* at 1042. This holding is clearly wrong. If a federal court lacks subject-matter jurisdiction, it lacks the power to hear a case. *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868). Therefore, its dismissal for lack of subject-matter jurisdiction does not have any preclusive effect. *Himmelreich*, 766 F.3d at 580.

The government contends that the district court denied Plaintiff's FTCA claim on the merits because it found that Defendants failed to act with malice as required to defeat qualified immunity under Michigan law. The Court rejects this argument. The district court could not, as a matter of law, decide the merits of Plaintiff's FTCA claim—it lacked subject-matter jurisdiction over that claim. *Himmelreich*, 766 F.3d at 580. It is true that the district court analyzed Michigan law to determine whether Plaintiff stated a FTCA claim. But stating a claim under state law is a *jurisdictional prerequisite* without which the FTCA's waiver of sovereign immunity does not apply. *Meyer*, 510 U.S. at 477. Therefore, the district court's conclusion that Plaintiff failed to state a claim under Michigan law was not a disposition on the merits. In fact, it was the opposite—it

precluded the district court from exercising subject-matter jurisdiction over the FTCA claim and *prevented* the district court from reaching a decision on the merits. *Haywood v. Drown*, 556 U.S. 729, 755 (2009) ("Subject-matter jurisdiction determines only whether a court has the power to entertain a particular claim—a condition precedent to reaching the merits of a legal dispute."); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) ("Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." (quoting *McCardle*, 74 U.S. (7 Wall.) at 514)).

The Supreme Court's opinion in *Simmons v. Himmelreich*, 136 S. Ct. 1843 (2016), does not change the result. In *Simmons*, the Supreme Court affirmed the Sixth Circuit's ruling and held that the judgment bar does not apply where an FTCA claim was dismissed because it fell within an enumerated "[e]xception." *Id.* at 1845. While *Simmons* was decided on narrower grounds than *Himmelreich*, it does not conflict with the unequivocal rule in this Circuit that "[a] dismissal for lack of subject-matter jurisdiction does not trigger the § 2676 judgment bar." *Himmelreich*, 766 F.3d at 579.

Defendants argue that footnote 5 in *Simmons* supports their position. This argument fails to persuade the Court. Footnote 5 explains that "the [FTCA's] judgment bar provision functions in much the same way" as the "common-law doctrine of claim preclusion." *Simmons*, 136 S. Ct. at 1850 (internal citations and quotations omitted). It is well-established that "a dismissal for a lack of subject-matter jurisdiction carries no

preclusive effect." *Himmelreich*, 766 F.3d at 580 (citing *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 382 (1985)). Thus, Defendants fail to appreciate that footnote 5 actually undermines their argument: because the district court dismissed Plaintiff's FTCA claim for lack of subject-matter jurisdiction, its dismissal does not carry any preclusive effect. *See id.* Therefore, under the logic of footnote 5, the FTCA judgment bar does not prevent Plaintiff from pursuing his claims against Defendants.

The cases that Defendants rely on are inapposite. In *Harris v. United States*, 422 F.3d 322 (6th Cir. 2005), the district court rejected the plaintiff's FTCA claim on the merits after a bench trial. *Id.* at 324. This Court held that the FTCA's judgment bar precluded further adjudication of the plaintiff's *Bivens* claims against the individual defendants. *Id.* at 324-25. In *Serra v. Pichardo*, 786 F.2d 237 (6th Cir. 1986), the district court granted judgment for the plaintiff on the merits of his FTCA claim. *Id.* at 237. This Court held that the decision on the merits prevented the plaintiff from maintaining a *Bivens* action against the individual defendants. *Id.* at 238. Defendants' analogy to *Harris* and *Serra* fails. Here, unlike in those cases, the district court did not reach the merits of the FTCA claim.

2. Conclusion

Because the district court dismissed Plaintiff's FTCA claim for lack of subject-matter jurisdiction, the FTCA's judgment bar provision does not preclude Plaintiff from pursuing his remaining claims against Defendants.

B. Qualified Immunity Does Not Shield Defendants

1. Standard of Review

This Court "review[s] a grant or denial of summary judgment *de novo*, using the same Rule 56(c) standard as the district court." *Williams v. Mehra*, 186 F.3d 685, 689 (6th Cir. 1999) (en banc). Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In deciding a motion for summary judgment, this Court views the factual evidence and draws all reasonable inferences in favor of the non-moving party. *Nat'l Enters. v. Smith*, 114 F.3d 561, 563 (6th Cir. 1997). In order to defeat a motion for summary judgment, the non-movant must show sufficient evidence to create a genuine issue of material fact. *Klepper v. First Am. Bank*, 916 F.2d 337, 341-42 (6th Cir. 1990) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). A mere scintilla of evidence is insufficient; "there must be evidence on which the jury could reasonably find for the [non-movant]." *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)). Entry of summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

2. Analysis

Plaintiff argues that the district court erred when it granted summary judgment for Defendants because the

evidence leaves material facts in dispute as to whether Defendants are entitled to qualified immunity. The doctrine of qualified immunity shields government officials "from liability for civil damages if their actions did not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Webb v. United States*, 789 F.3d 647, 659 (6th Cir. 2015) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). The qualified immunity analysis involves a two-step inquiry: (1) whether, viewing the record in the light most favorable to the plaintiff, a constitutional right has been violated; and (2) whether the right at issue was "clearly established" at the time the constitutional violation occurred. *Id.*

The Court will first analyze qualified immunity in the context of Plaintiff's unreasonable search and seizure claims. The Court will then turn to Plaintiff's excessive force claims. As explained below, the district court erred by finding that qualified immunity shielded Defendants in regard to both sets of claims.

a. Unreasonable Search and Seizure Claims

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]" U.S. Const. amend. IV. "A warrantless search or seizure is '*per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.'" *United States v. Roark*, 36 F.3d 14, 17 (6th Cir. 1994) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)). The Supreme Court has identified three types of reasonable, and thus permissible, warrantless encounters be-

tween the police and citizens: (1) consensual encounters, which may be initiated by a police officer based on a mere hunch or without any articulable reason whatsoever; (2) investigative stops (or *Terry* stops), which are temporary, involuntary detentions that must be predicated upon "reasonable suspicion;" and (3) arrests, which must be based upon "probable cause." *United States v. Pearce*, 531 F.3d 374, 380 (6th Cir. 2008) (citing *United States v. Alston*, 375 F.3d 408, 411 (6th Cir. 2004)). Under this framework, an individual is free "to ignore the police and go about [his or her] business," *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000), unless a police officer has at least reasonable suspicion that the individual has committed, or is about to commit, a crime. *See Family Serv. Ass'n ex rel. Coil v. Wells Twp.*, 783 F.3d 600, 604 (6th Cir. 2015).

In this case, Plaintiff argues that Defendants acted unreasonably when they (1) performed an investigative stop, (2) performed a protective search, and (3) stopped Plaintiff's attempt to run away. The Court analyzes each argument in turn.

i. Reasonableness of the Investigative Stop

As a threshold matter, Defendants could have arrested Plaintiff without running afoul of the Fourth Amendment if they had reasonably mistaken Plaintiff for Davison. "Arrest warrants in the hands of a police officer, unless facially invalid, are presumed valid." *Fettes v. Hendershot*, 375 F. App'x 528, 532 (6th Cir. 2010). "[P]olice and correction employees may rely on facially valid arrest warrants even in the face of vehement claims of innocence by reason of mistaken identity or otherwise."

Masters v. Crouch, 872 F.2d 1248, 1253 (6th Cir. 1989) (citing *Baker v. McCollan*, 443 U.S. 137, 145 (1979)). "[W]hen the police have probable cause to arrest one party, and when they reasonably mistake a second party for the first party, then the arrest of the second party is a valid arrest." *Hill v. California*, 401 U.S. 797, 802 (1971) (internal citations and quotation marks omitted); *see also Fettes*, 375 F. App'x at 532; *Ingram v. City of Columbus*, 185 F.3d 579, 595 (6th Cir. 1999).

But Defendants do not argue that they reasonably mistook Plaintiff for Davison. Instead, they argue that they reasonably *suspected* that Plaintiff *might be* Davison, thereby justifying an investigative stop.[2] "[I]f police have a reasonable suspicion, grounded in specific and articulable facts, that a person they encounter was involved in or is wanted in connection with a completed felony, then a *Terry* stop may be made to investigate that suspicion." *United States v. Hensley*, 469 U.S. 221, 229 (1985). Reasonable suspicion is:

> more than a mere hunch, but is satisfied by a likelihood of criminal activity less than probable cause, and falls considerably short of satisfying a preponderance of the evidence standard. If an officer possesses a particularized and objective basis for suspecting the particular person . . . based on specific and articulable facts, he may conduct a *Terry* stop.

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[2] The parties dispute whether the encounter between Plaintiff and Defendants began as an investigative *Terry* stop or instead as a consensual encounter, but this dispute is ultimately inconsequential because, as explained *infra*, there is a genuine dispute of material fact as to whether the officers had reasonable suspicion, even by the point that the encounter escalated to what was alleged to constitute a *Terry* stop.

Dorsey v. Barber, 517 F.3d 389, 395 (6th Cir. 2008) (quoting *United States v. Arvizu*, 534 U.S. 266, 273 (2002)) (citations and internal quotation marks omitted).

Defendants assert that they had reasonable suspicion to believe that Plaintiff was Davison. However, the undisputed facts do not show that the officers' suspicion was reasonable under the totality of the circumstances. The foundation of Defendants' suspicion was a physical description of Davison, which described him as a 26-year old white male with a height between 5'10" and 6'3", short dark hair, glasses, and a thin build. But given the broad swath of the population that matches this physical description and the requirement that reasonable suspicion be based on a "particularized and objective basis for suspecting [a] *particular* person," *Dorsey*, 517 F.3d at 395 (emphasis added), this physical description of Davison alone would not have given Defendants a reasonable suspicion that *anyone*, let alone Plaintiff, was Davison.

Building on their physical description of Davison, the officers had information about one of Davison's habits. Defendants knew that "[a]lmost every day between 2:00 pm and 4:00 pm, he bought a soft drink from the Shell gas station at the intersection of Leonard Street and Alpine Avenue." (Def. Br. 3-4.) This information arguably could have provided Defendants with a reasonable basis to detain and request identification from any individual who matched Davison's physical description and bought a soft drink consistent with Davison's habit. *See Family Serv. Ass'n*, 783 F.3d at 604 (explaining that officers may request identification if relevant to purpose of *Terry* stop); *United States v. Orsolini*, 300 F.3d 724, 730 (6th Cir. 2002) ("[A]n investigative detention must be temporary and last no longer than is

necessary to effectuate the purpose of the stop." (quoting *Florida v. Royer*, 460 U.S. 491, 500 (1983))). But that is not what happened. Defendants cite no evidence to show that Plaintiff bought a soft drink or even entered the relevant gas station, which was located at the intersection of Leonard and Alpine Streets. Rather, Defendants say that they merely found Plaintiff "*near* the intersection of Leonard and Alpine" at 2:30 p.m. while Plaintiff was "walking down Leonard Street." (Def. Br. at 4.) In fact, Plaintiff was several blocks away from the relevant intersection. Thus, Defendants could not have mistaken Plaintiff for Davison based, in part, on Davison's habit. Although Defendants found Plaintiff in the general neighborhood where they thought Davison might be found, Defendants also do not cite any cases suggesting that officers may detain everyone in an entire neighborhood who matches the vague physical description of a criminal suspect. Fourth Amendment case law has clearly established the contrary. *See Dorsey*, 517 F.3d at 395.

Further building on their description of Davison, the officers had two photographs:

The first of these photographs depicts the silhouette of a man playing an electric guitar. The man is wearing sunglasses, his head is tilted downward, and there is insufficient light to discern identifying characteristics. This photograph adds nothing to the physical description of Davison and therefore did not provide additional support for the *Terry* stop.

The second photograph—a 2007 driver's license photo—depicts Davison's face clearly. Obviously, Plaintiff, whose photograph appears below, is not a match to the driver's license photo:

Defendants admit that they "did not know how Mr. Davison looked in 2014," (R. 74-1 at PageID #610), but they suspected that he "look[ed] more like the [silhouette] photo" than the driver's license photo. (R. 73 at

PageID #428). Defendants' theory seems to be that they could have detained anybody who remotely resembled Davison's old driver's license photograph, given that Davison could have changed his appearance in the intervening seven years. But whether Plaintiff resembles the photograph is a question of fact. *See Ingram*, 185 F.3d at 596 ("[A] genuine issue of fact existed as to whether the officers' mistake in identifying [the plaintiff] as [a particular fugitive] was a reasonable one."); *Thomas v. Noder-Love*, 621 F. App'x 825, 830 (6th Cir. 2015) ("[D]eciding whether the man in the Footage Photo and the man in the Booking Photo looked similar in appearance . . . raises issues of fact that are only properly resolvable at trial."). A jury could reasonably conclude that Plaintiff bears no resemblance whatsoever to Davison's driver's license photograph, in which case the photograph could not have supported reasonable suspicion for a *Terry* stop.

Finally, Defendants assert that their reasonable suspicion was cemented when Plaintiff "declined to supply has last name and denied possessing any identification." (Def. Br. 21.) But there is no evidence in the record to show that Defendants asked Plaintiff for his last name, so he could not have "declined" to provide it.[3] Moreover, it would not have been suspicious, as a matter of

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[3] Plaintiff also argues that Defendants' suspicion, if any, should have been dispelled when Plaintiff stated that his name was "James" because the suspect's name was not James. But if Defendants reasonably suspected that Plaintiff matched the photo of Davison, Defendants were not required to believe Plaintiff's assertions that his name was James. *See Masters*, 872 F.2d at 1253. As further explained in this opinion, Plaintiff's response to being asked for his name was largely inconsequential—unless, of course, his answer had been "Aaron."

law, for Plaintiff to refuse to cooperate with Defendants' investigation. *Family Serv. Ass'n*, 783 F.3d at 604 ("Refusing to answer an officer's questions during an officer's attempt to conduct a consensual encounter does not create reasonable suspicion for a *Terry* stop."). Thus, unless Defendants already had reasonable suspicion that Plaintiff was Davison when they approached him, Plaintiff's simple refusal to cooperate was not suspicious and could not provide grounds for a *Terry* stop. *See id.*

Thus, under the totality of the circumstances, the following factors supported Defendants' suspicion that Plaintiff was Davison: Plaintiff matched a rather incomplete physical description of Davison that did not include any defining characteristics; Defendants saw Plaintiff walking during the afternoon in a neighborhood near where Davison was known to buy soft drinks in the afternoon, but Plaintiff had not purchased a soft drink; and Defendants may have reasonably suspected that Plaintiff resembled a seven-year-old driver's license photograph of Davison—or a photograph that did not show Davison's face. The first two factors together could not have provided a "particularized and objective basis for suspecting [a] particular person," because they could describe any number of people in the neighborhood where Plaintiff was walking. *See Dorsey*, 517 F.3d at 395. Thus, under clearly established law, Defendants needed more; they needed to find someone who resembled the photographs of Davison. Because there is a genuine dispute about whether a reasonable officer could conclude that Plaintiff resembled the photographs, the district court erred in granting Defendants' motion for summary judgment on the basis of qualified immunity.

In granting Defendants qualified immunity, the district court correctly explained that "'certainty' is not 'the touchstone of reasonableness under the Fourth Amendment'" (R. 91 at PageID #1016 (quoting *Hill*, 401 U.S. at 803-04)) and that "the reasonableness inquiry includes some 'latitude for honest mistakes' . . . in the difficult task of finding and arresting fugitives." (*Id.* (quoting *Maryland v. Garrison*, 480 U.S. 79, 87 (1987))). Indeed, "the ultimate touchstone of the Fourth Amendment is 'reasonableness.'" *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006). But this standard does not become more forgiving as the quality of evidence (or of police work) decreases. Rather, as the description of a suspect becomes less reliable—due to the passage of time or otherwise—an officer's reliance on that description becomes objectively *less* reasonable and *less* likely to support a warrantless detention, arrest, or search. When officers mistake a person for a criminal suspect, the officers' "subjective good-faith belief" is irrelevant; the mistake must be "understandable" and based on "sufficient probability." *Hill*, 401 U.S. at 804; *see Illinois v. Gates*, 462 U.S. 213, 232 (1983) (explaining that the Fourth Amendment inquiry requires "the assessment of probabilities in particular factual contexts").

In support of the district court's logic, Defendants explain that their mistake was reasonable because "[d]espite their best efforts, the officers 'did not know how . . . Davison looked in 2014' because they could not find a recent image of his face." (Def. Br. 23.) But Defendants' logic is faulty; the old age of a suspect's photograph cannot *increase* its reliability or, in turn, the chances of finding a match. The less an officer knows about a suspect's appearance, the less reasonable it is for the officer to suspect that any particular person

matches that appearance. *See Dorsey*, 517 F.3d at 395. The greater difficulty in accurately identifying anyone as Davison decreases, not increases, the reasonableness of any particular suspicion. Under the totality of the circumstances, the only way for Defendants to have had reasonable suspicion that Plaintiff was Davison was if Defendants' belief that Plaintiff resembled Davison's old driver's license photograph was "understandable" in light of the other identifying information available to Defendants at the time. *See Hill*, 401 U.S. at 804. This is a question for the jury.

ii. Reasonableness of the Protective Search

Plaintiff also argues that Detective Allen violated his Fourth Amendment right to be free from unreasonable searches when he frisked Plaintiff for weapons and removed Plaintiff's wallet from his pocket.[4]

For a protective search conducted during a *Terry* stop to be reasonable, "the police officer must reasonably suspect that the person stopped is armed and dangerous." *Arizona v. Johnson*, 555 U.S. 323, 326-27 (2009). The officer "must be able to point to particular facts from which he reasonably inferred that the individual was armed and dangerous." *Sibron v. New York*, 392 U.S. 40, 64 (1968). Based on such suspicion, "the officer may conduct a limited search for concealed weapons." *United States v. Strahan*, 984 F.2d 155, 158

[4] If Defendants lacked reasonable suspicion to conduct a *Terry* stop, clearly established law provides that this frisk was unreasonable in its entirety. *Sibron v. New York*, 392 U.S. 40, 64 (1968) ("The police officer is not entitled to seize and search every person whom he sees on the street or of whom he makes inquiries.").

(6th Cir. 1993). As applicable to this case, "*Terry* allows only an examination for concealed objects and forbids searching for anything other than weapons." *Id.* (citing *Ybarra v. Illinois*, 444 U.S. 85, 92-94 (1980)). "If the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry*." *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993).

Plaintiff does not dispute that Defendants could have reasonably believed he was armed and dangerous, assuming of course that Defendants reasonably believed that he was Aaron Davison.[5] Rather, Plaintiff argues that Detective Allen exceeded the scope of a lawful protective search when he removed Plaintiff's wallet from the back pocket of Plaintiff's pants.

The Supreme Court has recognized that officers' training enables them to identify objects with particularity during protective frisks. In *Dickerson*, for instance, the Supreme Court articulated the so-called "plain touch" doctrine: "[i]f a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of the suspect's privacy beyond that already authorized by the officer's search for weapons; if the object is contraband, its warrantless seizure would be justified by the same practical considerations that inhere in the plain-view context."

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[5] Before the frisk, Plaintiff told Defendants that he was armed with a pocket knife. Because Plaintiff does not press the issue, the Court does not analyze whether Plaintiff's admission to possessing a pocket knife, combined with reasonable suspicion that Plaintiff was Davison, would give rise to reasonable suspicion that Plaintiff was armed and dangerous.

Id. at 375-76. This Court has elaborated on the plain touch doctrine and the relevance of an officer's training to investigatory decisions made during a frisk:

> In assessing whether an object's incriminatory nature is immediately apparent, the court must look to three factors, none of which is necessary but each of which is instructive. These factors are: (1) a nexus between the seized object and the [suspected criminal activity]; (2) whether the intrinsic nature or appearance of the seized object gives probable cause to believe that it is associated with criminal activity; and (3) whether the executing officers can at the time of discovery of the object on the facts then available to them determine probable cause of the object's incriminating nature.

United States v. Pacheco, 841 F.3d 384, 395 (6th Cir. 2016) (quoting *United States v. Garcia*, 496 F.3d 495, 510 (6th Cir. 2007)) (citations and internal quotation marks omitted).

Applying these principles, removing Plaintiff's wallet was not "necessary to determine if the suspect [was] armed" and was therefore unreasonable based on clearly established law. *See Dickerson*, 508 U.S. at 373. Detective Allen admits that the object in Plaintiff's pocket looked like a wallet, felt like a wallet, and was located where one would expect to find a wallet. And nothing related to the circumstances of the investigative stop or to the crime that Davison was suspected of committing created a reasonable suspicion that the wallet might be something other than what it immediately appeared to be. Detective Allen points to the existence of razor blades and artfully concealed weapons—weapons "that are designed to look like wallets but in fact are not"—

but he does not suggest that there was reason to believe that Plaintiff (or Davison) might have been carrying a razor blade or an artfully concealed weapon. (Def. Br. 27.) In the context of reasonable suspicion, which requires a "particularized and objective basis" for suspicion "based on specific and articulable facts," *Dorsey*, 517 F.3d at 395, the fact that razor blades exist does not give rise to a reasonable inference that there is a razor blade in any particular person's wallet. The same analysis applies to artfully concealed weapons. Indeed, if an officer's suspicion that a suspect is armed and dangerous were sufficient to *also* reasonably suspect that every object in a suspect's pocket either contains a razor blade or is an artfully concealed weapon, then there would be no practical distinction between a protective search and a search incident to arrest. *Cf. United States v. Robinson*, 414 U.S. 218, 236 (1973) ("Since it is the fact of custodial arrest which gives rise to the authority to search, it is of no moment that [the officer] did not indicate any subjective fear of the respondent or that he did not himself suspect that respondent was armed.").

Defendants argue that removing Plaintiff's wallet was reasonable and cite several cases in support of their assertion, but these cases are easily distinguishable. In *Strahan*, 984 F.2d at 158, we concluded that an officer was justified in reaching into Strahan's pockets when the officer reasonably believed that Strahan was armed because the officer: (1) was familiar with Strahan; (2) had a reliable tip that Strahan was armed; and (3) felt a bulge in Strahan's pocket during the frisk, which could have been a weapon. In *United States v. Brown*, 310 F. App'x 776, 781 (6th Cir. 2009), we concluded that

an officer did not violate the Fourth Amendment by taking Brown's wallet from his pocket when the officer was alone, it was late at night, and Brown was acting nervous and made a furtive gesture towards his back pocket as he tried to leave the scene. In *United States v. Muhammad*, 604 F.3d 1022, 1026-27 (8th Cir. 2010), the Eighth Circuit concluded that removing Muhammad's wallet was permissible when the officer felt a four-inch by three-inch hard object in Muhammad's pocket, the officer could not tell what the object was, and Muhammad had been detained for his suspected participation in an armed robbery that had taken place less two hours earlier. Here, by contrast, Defendants were working together in broad daylight and did not suspect Plaintiff's wallet was a weapon.

Accordingly, the district court erred when it concluded that "[n]othing in Plaintiff's allegations supports the proposition that Allen's 'search' was any broader than necessary to ensure that Plaintiff did not have access to a weapon." (*See* R. 91 at PageID #1018.) Detective Allen's interest in searching the contents of Plaintiff's pocket to avoid "unnecessary risks in the performance of [his] duties" was minimal given that Detective Allen could not have reasonably suspected that the wallet was anything other than a wallet. *See Terry*, 392 U.S. at 23. Under clearly established law, removing Plaintiff's wallet during a protective search was unreasonable even if the protective search was reasonable at its inception. *See Dickerson*, 508 U.S. at 373.

iii. Stopping Plaintiff's Attempt to Flee

Assuming that Defendants had detained Plaintiff upon reasonable suspicion and that they had properly

identified themselves as police officers, it was not unreasonable for Defendants to attempt to stop Plaintiff's flight. As the Supreme Court has explained:

> [U]nprovoked flight is simply not a mere refusal to cooperate. Flight, by its very nature, is not "going about one's business"; in fact, it is just the opposite. Allowing officers confronted with such flight to stop the fugitive and investigate further is quite consistent with the [Fourth Amendment].

Wardlow, 528 U.S. at 125. Plaintiff is therefore incorrect to the extent that he suggests that the Fourth Amendment compelled Defendants to permit him to flee from his detention, again, assuming that the detention was lawful. But if a jury determines that Plaintiff reasonably believed he was being mugged rather than being detained by police officers, then extending the detention after Plaintiff attempted to flee was just as unreasonable as detaining Plaintiff in the first instance.

b. Excessive Force Claim

Plaintiff next asserts that Defendants used excessive force in their attempt to prevent his flight. An excessive force claim may be analyzed under the Fourth, Eighth, or Fourteenth Amendment: "the applicable amendment depends on the plaintiff's status at the time of the incident: a free citizen in the process of being arrested or seized; a convicted prisoner; or someone in 'gray area[s]' around the two." *Coley v. Lucas Cty.*, 799 F.3d 530, 537 (6th Cir. 2015) (quoting *Burgess v. Fischer*, 735 F.3d 462, 472 (6th Cir. 2013)). Where a free citizen claims that a government actor used exces-

sive force during the process of an arrest, seizure, or investigatory stop, the applicable analysis is governed by the Fourth Amendment. *Id.*

"[T]he right to be free from the excessive use of force is a clearly established Fourth Amendment right." *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 902 (6th Cir. 2004) (quoting *Neague v. Cynkar*, 258 F.3d 504, 507 (6th Cir. 2001)). The Supreme Court has explained that "[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment." *Graham v. Connor*, 490 U.S. 386, 396 (1989). Rather, "the question is whether the officers' actions [were] 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* at 397. "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.* at 396. Therefore, to determine whether the use of force in a particular situation was reasonable, this Court must look to the totality of the circumstances. *See id.*; *Dickerson v. McClellan*, 101 F.3d 1151, 1161 (6th Cir. 1996) (citing *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985)). In doing so, the court must assume "the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396. The analysis of whether an officer's use of force was reasonable is guided by the following three factors: (1) the severity of the crime at issue; (2) whether the suspect posed an immediate threat to the safety of the officers or others; and (3) whether the suspect was actively resisting arrest or attempting to evade arrest by

flight. *Sigley v. City of Parma Heights*, 437 F.3d 527, 534 (6th Cir. 2006).

Excessive force cases typically require this Court to "analyze the events in segments." *Phelps v. Coy*, 286 F.3d 295, 301 (6th Cir. 2002) (citing *Dickerson*, 101 F.3d at 1161-62). In *Phelps*, for instance, this Court analyzed three separate segments: first, the officer arrested Phelps and placed him in handcuffs; second, the officer took Phelps to the police station for booking; and third, the officer tackled Phelps to the ground, sat on top of him, and beat him in response to a gesture by Phelps that the officer claimed he perceived to be threatening. *See id.* at 301-02.

Plaintiff alleges that Defendants used excessive force in two distinct segments of their encounter. First, Plaintiff alleges that Detective Allen used excessive force by continuing to beat Plaintiff even after he was subdued. Any level of violent force that an officer uses against a subdued detainee is excessive as a matter of clearly established law. *See Champion*, 380 F.3d at 902 (citing cases for the proposition that this Court has "consistently held that various types of force applied after the subduing of a suspect are unreasonable and a violation of a clearly established right"); *Adams v. Metiva*, 31 F.3d 375, 386 (6th Cir. 1994) (holding and continuing to spray mace in the face of an incapacitated arrestee, if proven, would be unreasonable as a matter of law); *Darnell v. Caver*, No. 97-5297, 1998 WL 416000, at *3 (6th Cir. July 7, 1998) (unpublished) (after suspect thrown to ground, unreasonable for officer to lift suspect's head and let it drop to pavement). But Plaintiff's allegation has no merit—there is no evidence to support it. Plaintiff suggests, without support, that he was subdued the

moment that he released his bite. (*See, e.g.*, Pl. Br. 45 ("[A] reasonable jury could conclude that Allen beat [Plaintiff] after [Plaintiff] released his bite.")) But Detective Allen testified during Plaintiff's criminal trial that he "couldn't gain control of [Plaintiff]" and that he "felt like [he] was losing the fight" until a nearby pedestrian provided assistance. (R. 73 at PageID #435.) Detective Allen stated that the incident ended only after the pedestrian "control[ed] [Plaintiff's] legs, at [which] point we were able to put the handcuffs on him." (*Id.*) The pedestrian also testified that Defendants needed his assistance to subdue Plaintiff. (*Id.* at PageID #448.) Plaintiff presents no evidence to show that he stopped resisting when he stopped biting, and he fails to refute extensive testimony indicating that three people were struggling to subdue him even after he released his bite.[6] Accordingly, Plaintiff has failed to show that Detective Allen used excessive force after Plaintiff was subdued.

Second, Plaintiff alleges that Defendants used excessive force in subduing him. This Court agrees, especially because a jury could find that Defendants failed to identify themselves as police officers.[7] It is impossible

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[6] Plaintiff states in his reply brief that he disputes whether the pedestrian helped Defendants subdue him. However, Plaintiff does not explain his dispute, nor does he cite any evidence that tends to show that Defendants continued to use force after Plaintiff was subdued.

[7] Detective Allen was primarily responsible for the use of force, but Officer Brownback participated in the *Terry* stop, was present throughout the encounter, did not intervene once the encounter became violent, and at some point joined Detective Allen in subduing Plaintiff. Without resolving the parties' factual disputes, the Court

to resist an arrest (or detention) without knowing that an arrest (or detention) is being attempted. *Metiva*, 31 F.3d at 385 ("[W]hether plaintiff was actively resisting arrest or attempting to evade arrest is contested as plaintiff alleges he was never told he was under arrest or why he was being further detained after submitting to two pat-down searches."). If a jury were to find that Defendants failed to properly identify themselves, then Plaintiff's flight did not constitute "actively resisting arrest or attempting to evade arrest by flight" as a matter of law. *Id.* Indeed, Plaintiff says that he ran away only after asking whether Defendants were mugging him. If a jury were to credit Plaintiff's testimony, then neither Defendant is entitled to qualified immunity because any reasonable officer would have known, based on clearly established law, that applying force—tackling Plaintiff to the ground, holding him down, choking him, and beating him into submission—was unreasonable under the circumstances.[8] *See id.*; *Atkins v. Twp. of Flint*,

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cannot conclude that Officer Brownback is entitled to qualified immunity for any portion of the encounter.

[8] Even if Defendants reasonably suspected that Plaintiff was Davison, Davison's suspected crime was not one for which it might have been reasonable for Detective Allen to tackle Plaintiff to the ground without explanation. Davison's suspected crime was home invasion, which the evidence indicates was a non-violent crime, if moderately severe. The degree of home invasion Davison allegedly committed is unclear. The lowest level of home invasion is a felony punishable by imprisonment for up to five years, a fine of up to $2,000, or both. MCL § 750.110a(7). This degree of home invasion does not necessarily require a perpetrator to commit an act of violence or to interact with others. *Id.* at § 750.110a(3). Thus, viewing the evidence in the light most favorable to Plaintiff, Defendants had no reason to think that Plaintiff was a particularly dangerous criminal and

94 F. App'x 342, 349 (6th Cir. 2004) (concluding that "a reasonable officer would ordinarily inform a suspect . . . that he was being arrested" for a low-level crime, especially when "there was no reason not to tell him he was under arrest"); *Griffith v. Coburn*, 473 F.3d 650, 657 (6th Cir. 2007).

But regardless of whether the force was justified at its inception, Detective Allen's use of a chokehold, if proven, would be excessive under clearly established law. The use of a chokehold constitutes deadly force. *See Coley*, 799 F.3d at 540. When a suspect resists arrest by "wrestling [himself] free from officers and running away," officers may reasonably use force, but such conduct "does not justify deadly force, especially when the struggle has concluded and the suspect is in flight." *Bouggess v. Mattingly*, 482 F.3d 886, 891 (6th Cir. 2007). Thus, "[t]he use of a chokehold on an unresisting—and even an initially resistant—detainee" constitutes excessive force. *Coley*, 799 F.3d at 540.[9] Therefore, any officer should have known based on clearly established law that using a chokehold when Plaintiff was attempting to run away was objectively unreasonable. Detective Allen argues that "the Constitution does not prohibit officers from using this technique [a chokehold] to restrain a suspect just seconds after the suspect attempts to punch an officer and to flee." (Def. Br. 32.) Although *Bouggess* addressed an officer's use of his firearm, rather

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no reason to tackle him to the ground without announcing themselves.

[9] Although *Coley* was published after the events giving rise to this case, this Court recognized in *Coley* that prior cases made it "abundantly clear" that "[c]hokeholds are objectively unreasonable where . . . there is no danger to others." *Coley*, 799 F.3d at 541.

than a chokehold, the principle from *Bouggess* applies to the instant case. *Bouggess* clearly established that using deadly force, when the struggle has concluded and a suspect is fleeing, is excessive and unconstitutional. *See Bouggess*, 482 F.3d at 891. The district court therefore erred by granting Detective Allen qualified immunity as to his use of force.

Therefore, neither Defendant is entitled to qualified immunity on Plaintiff's excessive force claims.

C. The District Court Correctly Held that Plaintiff's Claims Against Detective Allen are *Bivens* Claims Rather than § 1983 Claims

1. Standard of Review

This Court reviews *de novo* the purely legal question of whether a cause of action arises under § 1983 or instead under the implied right of action recognized in *Bivens*, 403 U.S. 388. *See United States v. Graham*, 484 F.3d 413, 416 (6th Cir. 2007); *Rodgers v. Banks*, 344 F.3d 587, 593 (6th Cir. 2003).

2. Analysis

As explained below, the Court concludes that the district court correctly held that Plaintiff's claims against Detective Allen are *Bivens* claims rather than § 1983 claims.

a. Relevant Legal Principles

To bring a claim under § 1983, the plaintiff must allege: "1) the defendant acted under color of state law; and 2) the defendant's conduct deprived the plaintiff of rights secured under federal law." *Fritz v. Charter Twp. of Comstock*, 592 F.3d 718, 722 (6th Cir. 2010) (citing *Bloch v. Ribar*, 156 F.3d 673, 677 (6th Cir. 1998)).

"The ultimate issue in determining whether a party is subject to liability under 42 U.S.C. § 1983 is whether the alleged infringement of federal rights is 'fairly attributable to the state.'" *Crowder v. Conlan*, 740 F.2d 447, 449 (6th Cir. 1984) (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982)). The question of fair attribution involves a two-step inquiry: "[f]irst, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the [S]tate or by a person for whom the State is responsible." *Lugar*, 457 U.S. at 937. In addition, "the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State." *Id.*

A defendant's actions performed pursuant to a "'mixed' federal and state program may . . . be actions 'under color of state law.'" *Rowe v. Tennessee*, 609 F.2d 259, 266 (6th Cir. 1979). The "evaluation of whether particular conduct constitutes action taken under the color of state [or instead federal] law, must focus on the actual nature and character of that action." *Schultz v. Wellman*, 717 F.2d 301, 304 (6th Cir. 1983). In *Schultz*, for instance, this Court explained that the decision by a defendant officer in the Kentucky Air National Guard to terminate a lower-level officer was made under color of state law, not federal law, because "[o]fficers in the National Guard . . . are officers of the state militia until called into active federal duty," and because terminations from the National Guard "are ordered by the state Adjutant General, a state officer, and must be approved by the Governor of the state." *Id.* at 305.

b. Application to the Matter at Hand

Plaintiff's claims against Detective Allen may not be brought under § 1983 because Detective Allen's conduct is fairly attributable only to the United States and not to the State of Michigan.[10] Although Detective Allen was a detective with the Grand Rapids Police and was therefore employed by the state, Detective Allen was working full time with an FBI task force at the time of the incident at issue. Plaintiff has not alleged or demonstrated that the state was involved in authorizing or administering the task force; instead, it appears that the FBI managed the operation with the benefit of state resources. Detective Allen's "official character" at the time of the incident was therefore "such as to lend the weight of the [United States] to his decisions." *See Lugar*, 457 U.S. at 937. As a deputized federal agent, Detective Allen carried federal authority and acted under color of that authority rather than under any state authority he may have had as a Grand Rapids Police detective. *See Guerrero v. Scarazzini*, 274 F. App'x 11, 12 n.1 (2d Cir. 2008) ("[B]ecause Scarazzini and McAllister were federally deputized for their Task Force work, this claim was properly brought . . . as a *Bivens* action."); *Majors v. City of Clarksville*, 113 F. App'x 659, 659-60 (6th Cir. 2004) (explaining that a § 1983 claim brought against police officers serving with a DEA task force was "in reality a *Bivens* claim under the Fourteenth Amendment").

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[10] Detective Allen's potential liability is unchanged by whether Plaintiff's claims properly arise under *Bivens* or § 1983. *See Butz v. Economou*, 438 U.S. 478, 500-04 (explaining that liability for an actionable claim under *Bivens* is indistinguishable from an analogous claim under § 1983).

Plaintiff argues that Detective Allen acted under color of state law because the task force was enforcing a state warrant for Davison's arrest at the time the events giving rise to this case took place. But Plaintiff fails to explain why the "nature and character" of a task force should change based on whether the task force chooses to pursue a state fugitive or a federal fugitive. *Schultz*, 717 F.2d at 304. Plaintiff points out that "Davison had committed no federal crime" and therefore "the officers had no authority independent of Michigan state law to *arrest* Davison." (Pl. Br. 61.) However, the nature and character of a cooperative federal-state program is determined by the source and implementation of authority for the *program*, not for the particular work that the agency chooses, in the exercise of its authority, to perform on a given day. *Cf. id.* at 305 ("That an agency of the state chooses to utilize federal substantive and procedural rules in the exercise of its state law authority does not transform the state law character of its actions."). Thus, as long as the task force's decision to apprehend Davison was made by virtue of an exercise of federal authority, which Plaintiff does not contest, Detective Allen remained a federal agent in the pursuit of a state fugitive. Therefore, the district court correctly concluded that Plaintiff's claims against Detective Allen are *Bivens* claims and not § 1983 claims.

CONCLUSION

For the reasons explained above, the Court **REVERSES** the district court's findings that (1) the FTCA judgment bar precludes Plaintiff's remaining claims and that (2) Defendants are entitled to qualified immunity, **VACATES** the district court's judgment in favor of Defendants, and **REMANDS** for proceedings consistent with this opinion.

DISSENT

ROGERS, Circuit Judge, dissenting. The district court's dismissal of King's FTCA claims against the United States based on the presence of state-law governmental immunity constitutes a "judgment" under 28 U.S.C. § 2676, such that the FTCA's judgment bar precludes King's claims against Allen and Brownback.

The FTCA's judgment bar provides:

> The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

28 U.S.C. § 2676. King had sued the United States under 28 U.S.C. § 1346(b) based on the allegedly tortious acts of Todd Allen and Douglas Brownback. The district court dismissed King's FTCA claims on state-law grounds. King did not challenge the dismissal of his FTCA claims on appeal, so the decision was final for the purposes of the FTCA's judgment bar. *See Serra v. Pichardo*, 786 F.2d 237, 239, 242 (6th Cir. 1986). Moreover, King does not dispute that the additional claims against Allen and Brownback arise from the same "subject matter" as his FTCA claims. A judgment for or against the United States on an FTCA claim bars claims based on the same subject matter, "even when 'the claims [a]re tried together in the same suit and [ ] the judgments [ ] entered simultaneously.'" *Harris v. United States*, 422 F.3d 322, 334 (6th Cir. 2005) (quoting *Serra*, 786 F.2d at 241). The district court's order in

favor of the United States on King's FTCA claims accordingly triggers the judgment bar and requires the dismissal of King's additional claims against Allen and Brownback.

Although the district court's order established that the district court lacked subject matter jurisdiction over the FTCA claims, this is because merits determinations under the FTCA are jurisdictional in that they implicate the sovereign immunity of the United States. The dismissal still amounted to a "judgment" under 28 U.S.C. § 2676. Indeed, the district court dismissed King's FTCA claims against the United States based on determinations that are legally indistinguishable from determinations that the Supreme Court has identified, albeit in dictum, as triggering the judgment bar. In *Simmons v. Himmelreich*, 136 S. Ct. 1843, 1849 (2016), the Court explained that the judgment bar applies when FTCA claims are dismissed "because the [defendants] were not negligent, because [the plaintiff] was not harmed, or because [the plaintiff] simply failed to prove his claim." Such dismissals are under § 1346(b), which lifts the sovereign immunity of the United States by granting jurisdiction over a cause of action for money damages against the government in certain limited circumstances.[1] According to the Court, "it would make little

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[1] 28 U.S.C. § 1346(b) provides:

> Subject to the provisions of chapter 171 of this title, the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government

sense to give [the plaintiff] a second bite at the money-damages apple by allowing suit against the employees" to proceed in such a case. *Id.* The hypothetical dismissals "would have given [the plaintiff] a fair chance to recover damages" for the alleged constitutional violations, such that applying the judgment bar to preclude litigation over claims arising from the same subject matter would be appropriate. *Id.*

This is precisely what happened in King's lawsuit. The district court dismissed King's FTCA claims against the United States because it determined that Michigan governmental immunity protected Allen and Brownback from liability for their alleged torts. According to the court, "the parties' undisputed facts support the finding that [Allen and Brownback's] actions were not undertaken with the malice required under Michigan law." The district court's dismissal of King's FTCA claims was based on an assessment of their merits under Michigan law. Such a dismissal is warranted by the limits set out in § 1346(b), like those in the *Simmons* dictum. Under § 1346(b), the FTCA creates a cause of action against the United States "for injury or loss of property, or personal injury or death," only where "the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

It is true that a merits-based dismissal under the limits of § 1346(b) is jurisdictional; the terms of § 1346(b) explicitly grant jurisdiction to the district courts for

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while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

such claims against the government. But that cannot be sufficient to preclude application of the FTCA judgment bar because that would effectively nullify the judgment bar with respect to cases where the FTCA judgment was in favor of the government. Every case that determines that the elements of the cause of action are not met is at the same time a determination that the government's immunity is not waived and that there is accordingly no jurisdiction. This is true even of a judgment entered after trial. *See, e.g., Harris*, 422 F.3d at 324-25; *Serra*, 786 F.2d at 241-42. But as the Supreme Court reasoned in *Simmons*, such cases *are* subject to the FTCA judgment bar. *See Simmons*, 136 S. Ct. at 1849.

The actual holding in *Simmons* was that the FTCA's judgment bar does not apply when a judgment is rendered for or against the United States based on one of the FTCA's "Exceptions" set out in 28 U.S.C. § 2680, such as the discretionary function exception. *Id.* at 1847-48. The Court relied upon the "plain text" of the FTCA for that conclusion. *Id.* The plain text provision dictates that the judgment bar does not apply to cases excepted under 28 U.S.C. § 2680.[2] But the plain

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[2] The Supreme Court determined:

> The "Exceptions" section of the FTCA reads: "[T]he provisions of this chapter"—Chapter 171—"shall not apply to . . . [a]ny claim based upon . . . the exercise or performance . . . [of] a discretionary function or duty." § 2680(a). The judgment bar is a provision of Chapter 171; the plain text of the "Exceptions" section therefore dictates that it does "not apply" to cases that, like Himmelreich's first suit, are based on the performance of a discretionary function.

136 S. Ct. at 1847-48.

text applied in *Simmons* by its terms does not apply to dismissals based on the limits of § 1346(b), such as the dismissal in this case and the dismissals explicitly distinguished in the Court's dictum. *See id.*

Our decision in *Himmelreich v. Fed. Bureau of Prisons*, 766 F.3d 576 (6th Cir. 2014), does not require holding that dismissals under § 1346(b) preclude application of the judgment bar. That decision was the very court of appeals decision affirmed on different grounds in *Simmons*. In *Himmelreich*, we determined that "[a] dismissal for lack of subject-matter jurisdiction does not trigger the § 2676 judgment bar," because "in the absence of jurisdiction, the court lacks the power to enter judgment." 766 F.3d at 579. In its review of our *Himmelreich* decision, the Supreme Court in *Simmons* affirmed on narrower grounds, and in dictum reasoned in a way that logically requires application of the judgment bar in this case. *See Simmons*, 136 S. Ct. at 1849. We can hardly be bound by a rationale that the Supreme Court rejected on review of the very case in which we set it forth, in favor of a more limited rationale (the plain text of § 2680) that flatly does not apply in the case before us.

It could be argued that the Supreme Court's language regarding § 1346(b) dismissals is dictum, whereas our previous decision in that very case—more broadly reasoning that neither § 2680 dismissals nor § 1346(b) dismissals implicate the judgment bar—is holding, and thus still binding on subsequent panels in the Sixth Circuit. Such an argument is anomalous, however, and at bottom inconsistent with the theory of stare decisis. "Dicta" encompasses elements of an opinion that are not necessary for the resolution of the case. To discern the

difference between holding and dictum, we cannot simply rely on what a given decision purports to hold. Rather, we determine whether the purported holding was actually necessary for the resolution of the case. A subsequent decision issued by a reviewing court in that same case may inform whether the purported holding of the lower court was in fact necessary. When a lower court rules on a particular theory and the reviewing court affirms on narrower grounds, the affirmance can indicate that the broader portion of the lower court's theory was unnecessary and therefore dictum—even if the lower court did not recognize it as such at the time of the decision.

The litigation in *Simmons* illustrates the point. When we decided *Himmelreich*, we purported to hold that any dismissal of an FTCA claim for lack of subject matter jurisdiction—which would presumably include dismissals under both § 1346(b) and § 2680—would not trigger the judgment bar. *See* 766 F.3d at 579. On appeal, the Supreme Court determined that the case could be resolved on narrower grounds and affirmed on a theory that precluded the judgment bar from applying to § 2680 dismissals (the type of dismissal before it), while *permitting* in dictum the application of the judgment bar to § 1346(b) dismissals. *See Simmons*, 136 S. Ct. at 1849. Once the Supreme Court made the final decision in the *Himmelreich* litigation in *Simmons*, the analysis in the court of appeals decision, to the extent that it encompassed § 1346(b) dismissals, was effectively rendered dictum, if it was not already dictum. It was no longer necessary for the ultimate resolution of the case, since the dismissal of the FTCA claim in *Himmelreich* was based on § 2680 and not § 1346(b).

The Supreme Court, in other words, took away from the Sixth Circuit opinion any relevance that its § 1346(b)-related analysis may have had to the resolution of the case before it, rendering it the equivalent of dictum with respect to subsequent cases. The Supreme Court did so, moreover, before the *Himmelreich* litigation was final.

This leaves us with Sixth Circuit dictum that precludes the application of the judgment bar to § 1346(b) dismissals, and well-considered subsequent Supreme Court dictum that permits the application of the judgment bar to § 1346(b) dismissals. The Supreme Court dictum is far more compelling than our previous inconsistent dictum, and should be followed.

Accordingly, King's claims against Allen and Brownback, as sympathetic as they are, are precluded by the FTCA judgment bar.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 1:16-cv-343

JAMES KING, PLAINTIFF

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

Filed: Aug. 24, 2017

OPINION AND ORDER

Hon. JANET T. NEFF

Plaintiff James King filed this civil rights and Federal Tort Claims Act (FTCA) action against Defendants, seeking money damages for a July 18, 2014 incident. The matter is before the Court on Defendants' motions to dismiss (ECF Nos. 71 & 77). Having considered the parties' submissions, the Court concludes that oral argument is unnecessary to resolve the issues presented. *See* W.D. Mich. LCivR 7.2(d). For the reasons that follow, the Court grants Defendants' motions.

I. BACKGROUND

Many of the facts surrounding the July 18, 2014 incident giving rise to this case are in dispute. However, for purposes of this motion only, Defendants take Plaintiff's factual allegations as true (ECF No. 72 at PageID.357,

408, 362; ECF No. 78 at PageID.710; ECF No. 81 at PageID.838-839). To that end, the parties filed a "Joint Statement of Facts" (JSF) (ECF No. 79), which, as the Federal Defendants indicate (ECF No. 90 at PageID.946, n.1), is a nearly verbatim recitation of the factual allegations in Plaintiff's Amended Complaint (ECF No. 30). The Court relies on their Joint Statement of Facts for resolution of these motions unless otherwise indicated.

Plaintiff is a 23-year-old who came to Grand Rapids, Michigan from Alpena, Michigan to study computer science at Grand Valley State University (JSF ¶ 1). During the summer of 2014, Plaintiff worked two jobs, one installing DSL cable for Moss Telecommunications and the other working for the Geek Group, a local science education non-profit (*id.* ¶ 2). On Friday, July 18, 2014, Plaintiff had worked at Moss Telecommunications in the morning and had lunch at home (*id.* ¶ 4). After lunch, he left to walk to his next job at the Geek Group (*id.*). As Plaintiff was walking down Leonard Street, he came upon two men leaning against a black SUV near Tamarack Avenue (*id.* ¶¶ 3, 5). One of the men was Todd Allen, a Grand Rapids police detective (*id.* ¶ 6). The other was Douglas Brownback, an agent with the Federal Bureau of Investigation (FBI) (*id.* ¶ 7). Neither Allen nor Brownback were in uniform; rather, they were wearing plain clothes and baseball hats (*id.* ¶ 8). Allen was wearing jeans and sunglasses (*id.*). Allen and Brownback were both wearing lanyards with badges (*id.* ¶ 17).

Unbeknownst to Plaintiff, Allen and Brownback were members of a fugitive task force operating in West Michigan (JSF ¶ 9). They were looking for a fugitive named Aaron Davison (*id.* ¶ 10). Davison was wanted

for home invasion and had been seen in the area the previous day (*id.* ¶ 11). Allen and Brownback knew that Davison was a 26-year-old white male with glasses and that he was between 5'10" and 6'3" tall (*id.* ¶ 12). Allen and Brownback had a seven-year-old driver's license photo of Davison and a more recent Facebook photo, where Davison's face was not visible (*id.* ¶ 13).

Allen and Brownback did not find Davison on July 18, 2014, but they did find Plaintiff (JSF ¶ 14). Allen and Brownback determined that Plaintiff, a 21-year-old white male with glasses between 5'10" and 6'3" tall, matched Davison's description (JSF ¶¶ 15-16; Amended Compl. ¶ 24). Allen asked Plaintiff who he was, and Plaintiff simply replied, "James" (JSF ¶¶ 18-19). Allen asked Plaintiff for identification, and Plaintiff said that he did not have any (*id.* ¶¶ 20-21). One of the men patted Plaintiff's pants (*id.* ¶ 22). Allen and Brownback then told Plaintiff to get against the unmarked SUV and put his hands behind his head (*id.* ¶ 23). Plaintiff initially complied (*id.* ¶ 24).

Allen then removed Plaintiff's wallet (JSF ¶ 25). At that point, Plaintiff asked, "Are you mugging me?" (*id.* ¶ 26). And Plaintiff attempted to run (*id.* ¶ 27). However, Plaintiff was tackled to the ground (*id.* ¶ 28). Plaintiff yelled for help, begging for passersby to call the police (*id.* ¶ 29). Plaintiff bit Allen in the arm that was around Plaintiff's neck (*id.* ¶ 30). Allen then started punching Plaintiff in the head and face "as hard as I could, as fast as I could, and as many times as I could" (*id.* ¶ 31). Plaintiff continued screaming for help and for someone to call the police (*id.* ¶ 32). Several bystanders called the police, and uniformed officers eventually arrived (*id.* ¶¶ 33-34).

One of the bystanders took video on her phone (JSF ¶ 35). The video does not show the struggle, but it does contain bystander statements (*id.*). Among the uniformed officers who arrived on the scene was Grand Rapids Police Officer Connie Morris (*id.* ¶ 36). Morris ordered several bystanders to delete any video of the event (*id.* ¶ 37). No video of the actual struggle between Allen, Brownback and Plaintiff was ever discovered (*id.* ¶ 38).

Plaintiff was transported from the scene to the emergency room, where he was given a CT scan (JSF ¶ 39). Eventually, the police realized Plaintiff was not Davison, the sought-after fugitive (*id.* ¶ 40). Police took Plaintiff from the hospital to the Kent County Jail and booked him on charges relating to the incident: assault with intent to do great bodily harm, aggravated assault of a police officer, and resisting arrest (*id.* ¶ 41; Amended Compl. ¶ 62). Plaintiff spent the weekend in jail and was only allowed to leave his cell for meals (JSF ¶ 42). Plaintiff was released on bond the following Monday, after his parents posted bail (*id.* ¶ 43). Upon his release, Plaintiff visited another hospital for further examination (*id.* ¶ 44). By that time, much of the swelling had gone down, but the whites of his eyes had turned almost entirely black and red (*id.* ¶ 45). The prosecutor proceeded with the charges against Plaintiff (*id.* ¶ 46). Following a jury trial, Plaintiff was acquitted of all charges (*id.* ¶ 47).

On April 4, 2016, Plaintiff commenced the instant action against Defendants Allen, Brownback, Morris and the United States. Plaintiff filed an Amended Complaint on August 18, 2016, alleging the following four claims:

I. Violation of Rights Secured by the Fourth Amendment (42 U.S.C. § 1983—Defendants Brownback & Allen)

II. Violation of Rights Secured by the Fourth Amendment (*Bivens*—Defendants Brownback & Allen)

III. Violation of Rights Secured by the Fourth Amendment (42 U.S.C. § 1983—Defendant Morris)

IV. Federal Tort Claims Act (Defendant United States of America)

(ECF No. 30).

Following a Pre-Motion Conference on Defendants' proposed dispositive motions, the Court issued a briefing schedule (ECF No. 50). On January 17, 2017, Defendant Morris filed a Motion to Dismiss (ECF No. 77), to which Plaintiff filed a Response (ECF No. 80) and Defendant Morris filed a Reply (ECF No. 81). On January 17, 2017, Defendants Allen, Brownback and the United States (collectively, "the Federal Defendants") also filed a "Motion to Dismiss, or, in the Alternative, for Summary Judgment" (ECF No. 71), to which Plaintiff filed a Response (ECF No. 74). The Federal Defendants filed a Reply on February 6, 2017 (ECF No. 90).

II. ANALYSIS

A. Motion Standards

Defendants move to dismiss this case under Federal Rules of Civil Procedure 12(b)(1) and (b)(6), although the Federal Defendants (ECF No. 72 at PageID.368) and Defendant Morris (ECF No. 78 at PageID.715) alternatively request summary judgment under Rule 56,

to the extent the Court deems it necessary to review their arguments under Rule 56.

Federal Rule of Civil Procedure 12(b)(1) permits dismissal for a lack of subject-matter jurisdiction. FED. R. CIV. P. 12(b)(1). "When the defendant challenges subject matter jurisdiction through a motion to dismiss, the plaintiff bears the burden of establishing jurisdiction." *Angel v. Kentucky*, 314 F.3d 262, 264 (6th Cir. 2002) (quoting *Hedgepeth v. Tennessee*, 215 F.3d 608, 611 (6th Cir. 2000)). *See also Moir v. Greater Cleveland Regional Transit Auth.*, 895 F.2d 266, 269 (6th Cir. 1990).

A Rule 12(b)(1) motion for lack of subject matter jurisdiction can challenge the sufficiency of the pleading itself (facial attack) or the factual existence of subject matter jurisdiction (factual attack). *Cartwright v. Garner*, 751 F.3d 752, 759 (6th Cir. 2014) (citing *United States v. Ritchie*, 15 F.3d 592, 598 (6th Cir. 1994)). A facial attack goes to the question of whether the plaintiff has alleged a basis for subject matter jurisdiction, and the court takes the allegations of the complaint as true for purposes of Rule 12(b)(1) analysis. *Id.* A factual attack challenges the factual existence of subject matter jurisdiction. *Id.* In the case of a factual attack, a court has broad discretion with respect to what evidence to consider in deciding whether subject matter jurisdiction exists, including evidence outside of the pleadings, and has the power to weigh the evidence and determine the effect of that evidence on the court's authority to hear the case. *Id.* at 759-60. *See also Adkisson v. Jacobs Eng'g Grp., Inc.*, 790 F.3d 641, 647 (6th Cir. 2015) (describing the court's wide discretion to consider material

outside the complaint in assessing the validity of its jurisdiction); *Nichols v. Muskingum Coll.*, 318 F.3d 674, 677 (6th Cir. 2003) (same); *United States v. A.D. Roe Co., Inc.*, 186 F.3d 717, 721-22 (6th Cir. 1999) (same); *Ohio Nat'l Life Ins. Co. v. U.S.*, 922 F.2d 320, 325 (6th Cir. 1990) (same).

Federal Rule of Civil Procedure 12(b)(6) authorizes a court to dismiss a complaint if it "fail[s] to state a claim upon which relief can be granted[.]" FED. R. CIV. P. 12(b)(6). In deciding a motion to dismiss for failure to state a claim, the court must construe the complaint in the light most favorable to the plaintiff and accept all well-pleaded factual allegations in the complaint as true. *Thompson v. Bank of Am., N.A.*, 773 F.3d 741, 750 (6th Cir. 2014). To survive a motion to dismiss, the complaint must present "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557, 570 (2007). "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). *See also Commercial Money Ctr., Inc. v. Ill. Union Ins. Co.*, 508 F.3d 327, 335-36 (6th Cir. 2007) ("When a document is referred to in the pleadings and is integral to the claims, it may be considered without converting a motion to dismiss into one for summary judgment.").

Under Federal Rule of Civil Procedure 56, summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). The court must consider the evidence and all

reasonable inferences in favor of the nonmoving party. *Burgess v. Fischer*, 735 F.3d 462, 471 (6th Cir. 2013); *U.S. S.E.C. v. Sierra Brokerage Servs., Inc.*, 712 F.3d 321, 327 (6th Cir. 2013). The moving party has the initial burden of showing the absence of a genuine issue of material fact. *Jakubowski v. Christ Hosp., Inc.*, 627 F.3d 195, 200 (6th Cir. 2010). The burden then "shifts to the nonmoving party, who must present some 'specific facts showing that there is a genuine issue for trial.'" *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

The function of the district court "is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Resolution Trust Corp. v. Myers*, 9 F.3d 1548 (6th Cir. 1993) (citing *Anderson*, 477 U.S. at 249). "A dispute is genuine if there is evidence 'upon which a reasonable jury could return a verdict in favor of the non-moving party.' A factual dispute is material only if it could affect the outcome of the suit under the governing law." *Smith v. Erie Cty. Sheriff's Dep't*, 603 F. App'x 414, 418 (6th Cir. 2015) (quoting *Tysinger v. Police Dep't of City of Zanesville*, 463 F.3d 569, 572 (6th Cir. 2006)). "The ultimate question is 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Back v. Nestlé USA, Inc.*, 694 F.3d 571, 575 (6th Cir. 2012) (quoting *Anderson*, 477 U.S. at 251-52).

B. Discussion

1. Count I: § 1983 (Brownback & Allen)

The Federal Defendants argue that Plaintiff cannot bring his § 1983 claim in Count I against Allen and Brownback because they were acting under the color of federal law, in their capacities as federal agents (ECF No. 72 at PageID.369). Specifically, Defendant Brownback is a Special Agent employed by the FBI and assigned to its Grand Rapids Resident Agency Violent Crimes/Fugitive Safe Streets Task Force (*id.*). And Officer Allen is a federally deputized Special Deputy U.S. Marshal, also working full time with the Task Force (*id.*). The Federal Defendants emphasize that in looking for Davison, Brownback and Allen acted in an authorized FBI investigation pursuant to the federal Fugitive Felon Act, 18 U.S.C. § 1073 (*id.* at PageID.360-361).

In response, Plaintiff argues that the mere fact that Allen and Brownback may have been federal agents does not preclude § 1983 liability; instead, they are still liable under § 1983 if they acted under color of state law (ECF No. 74 at PageID.573). Plaintiff argues that Allen and Brownback were acting under color of state law because the officers were executing "a Michigan warrant for a Michigan fugitive who was wanted for a Michigan crime in Michigan" (*id.* at PageID.574). Plaintiff emphasizes that state law, MICH. COMP. LAWS § 764.15d, authorized Allen and Brownback to serve the state warrant and that the Chief of the Grand Rapids Police Department (GRPD) made the request to look for Davison (*id.*). Conversely, Plaintiff argues that although Officer Allen was apparently federally-deputized, he was employed by the GRPD and wearing his GRPD neck badge at the time of the incident (*id.*). Last, Plaintiff

argues that Agent Brownback was acting in concert with Officer Allen, and a federal agent who acts in concert with a state actor is liable under § 1983 (*id.* at PageID.575).

In reply, the Federal Defendants assert that Plaintiff has not identified a single case where a court held that § 1983 applied to a federal Task Force officer working on an open federal investigation (ECF No. 90 at PageID.964). The Federal Defendants further assert that Plaintiff has made no effort to distinguish the cases the Federal Defendants cited, cases that hold that § 1983 does not apply under these circumstances (*id.*).

The Federal Defendants' argument has merit.

42 U.S.C. § 1983 provides a remedy for a deprivation, "under color of any statute, ordinance, regulation, custom, or usage, of any State," of any right guaranteed by the Constitution and laws of the United States. "A prerequisite to the vesting of federal jurisdiction for an alleged wrong under § 1983 is the deprivation of a right guaranteed by the Constitution and laws of the United States. Such deprivation must be 'under color of law.' There must be state action." *Watson v. Kenlick Coal Co.*, 498 F.2d 1183, 1185 (6th Cir. 1974) (citing *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 150, 152, n.7 (1970); *United States v. Price*, 383 U.S. 787, 794, n.7 (1966)). The federal government and its officials are not subject to suit under 42 U.S.C. § 1983. *Conner v. Greef*, 99 F. App'x 577, 580 (6th Cir. 2004) (citing *Ana Leon T. v. Fed. Reserve Bank*, 823 F.2d 928, 931 (6th Cir. 1987)).

The traditional definition of "acting under color of state law" requires that the defendant in a § 1983 action have exercised power "possessed by virtue of state law

and made possible only because the wrongdoer is clothed with the authority of state law." *United States v. Classic*, 313 U.S. 299, 326 (1941). *See also Monroe v. Pape*, 365 U.S. 167, 187 (1961) (adopting *Classic* standard for purposes of § 1983) (overruled in part on other grounds, *Monell v. New York City Dep't of Soc. Svcs.*, 436 U.S. 658, 695-701 (1978)); *Polk Cty. v. Dodson*, 454 U.S. 312, 317-318 (1981). That is, the conduct allegedly causing the deprivation of a federal right must be "fairly attributable" to the State. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). "[T]he deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible." *Id.* And "the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State." *Id.*

Here, Plaintiff does not dispute that (1) Agent Brownback is an FBI Agent; (2) Officer Allen is a Task Force Officer; (3) the FBI opened an investigation into Davison; and (4) in the course of that investigation, Agent Brownback and Officer Allen encountered King. As the Federal Defendants point out, the Sixth Circuit has repeatedly held that § 1983 does not apply to federal Task Force officers working on an open federal investigation. The fact that a state arrest warrant or state crime was involved in the exercise of duties under a cooperative federalism scheme does not change the analysis. Nor does Plaintiff provide any support for finding that either the geographical location of the federal Task Force officers or the citizenship of the fugitive sought

would change the analysis. The mere exercise of duties under a cooperative federalism scheme does not qualify a person as acting "under color of state law." *Strickland on Behalf of Strickland v. Shalala*, 123 F.3d 863, 867 (6th Cir. 1997) (reversing the district court's decision and observing that "[n]o other court has extended the 'under color of state law' element of § 1983 to the implementation of a cooperative federalism program by federal officials").

For example, in *Petty v. United States*, 80 F. App'x 986 (6th Cir. 2003), a case arising from the execution of a search warrant, the Sixth Circuit held that the federally deputized local law enforcement officers were federal actors. *Id.* at 989. The Sixth Circuit pointed out that a city police officer assigned to the FBI's multijurisdictional task force was considered a federal employee for purposes of the Federal Tort Claims Act (FTCA) "[b]y virtue of his assignment to an FBI-operated task force," while other city police officers involved in the same incident who were not attached to the task force were not subject to the FTCA "because they [were] not federal employees." *Id.* *See also Majors v. City of Clarksville*, 113 F. App'x 659, 659 (6th Cir. 2004) (§ 1983 claim against police officers acting as deputized task force agents of Drug Enforcement Administration [DEA] to participate in an investigation with the DEA was "in reality a *Bivens* claim"); *Ellis v. Ficano*, No. 94-1039, 1995 WL 764127, at *6 (6th Cir. Dec. 27, 1995) (table opinion) (§ 1983 did not apply to Wayne County law enforcement officers who were deputized as DEA Task Force agents executing a search warrant in conjunction with the Wayne County sheriff's department, but "the plaintiffs were left with an appropriate avenue of recovery against them under *Bivens*");

Love v. Mosley, No. 1:14-CV-281, 2015 WL 5749517, at *6-8 (holding § 1983 inapplicable to claim against the defendant-Michigan Department of Corrections investigator who was deputized as a U.S. Marshal and working with the U.S. Marshal's Grand Rapids Fugitive Task Force to arrest the plaintiff), adopted in 2015 WL 5749508 (W.D. Mich. 2015); *Pike v. United States*, 868 F. Supp. 2d 667, 678 (M.D. Tenn. 2012) (§ 1983 claims brought by resident of a residence searched by state and local law enforcement officers who served as members of a fugitive task force "are plainly *Bivens* claims, not § 1983 claims").

Similarly, "[t]he intergovernmental nature of a joint state-federal program does not by itself make out a conspiracy." *Strickland*, 123 F.3d at 867 (quoting *Olson v. Norman*, 830 F.2d 811, 821 (8th Cir. 1987)). Therefore, even if Officer Allen were acting under color of state law, there is no merit in Plaintiff's argument that Agent Brownback was conspiring with Officer Allen such that § 1983 would apply to both Defendants. There must be evidence that the federal and state officials engaged in a conspiracy or "symbiotic" venture to violate a person's rights under the Constitution or federal law, not that they merely participated in a joint state-federal program. *See Strickland, supra. Cf. Snyder v. United States*, 990 F. Supp. 2d 818, 836 (S.D. Ohio) (holding that the defendant-FBI employee is "a federal actor" and "cannot be sued under Section 1983"), aff'd, 590 F. App'x 505 (6th Cir. 2014).

Because Agent Brownback and Officer Allen acted under color of federal law, not state law, they are not subject to liability under § 1983. Accordingly, Count I is properly dismissed.

2. Count II: *Bivens* (Brownback & Allen)

Alternatively, Plaintiff alleges in Count II of his Amended Complaint that all of the actions taken by Brownback and Allen "were done while acting in their capacity as federal agents and caused the deprivation of James' clearly-established constitutional rights under the Fourth Amendment of the United States Constitution, including (a) Freedom from unreasonable seizure; (b) Freedom from unreasonable searches; (c) Freedom from the use of excessive force; and (d) Freedom from malicious prosecution" (ECF No. 30, Amend. Compl. at ¶ 80).

The Federal Defendants argue that qualified immunity protects Allen and Brownback from Plaintiff's *Bivens* claims in Count II (ECF No. 72 at PageID.371-405). Specifically, the Federal Defendants argue that accepting Plaintiff's version of the facts as true, his claim fails all three parts of the Sixth Circuit's qualified immunity test: (1) the Officers' conduct was reasonable and did not violate Plaintiff's constitutional rights; (2) even if one assumes that Plaintiff's rights were violated, they were not clearly established at the time, i.e., every reasonable officer would not have known that the Officers' conduct was unconstitutional; and (3) the Officers did not act in an objectively unreasonable manner given the tense and rapidly developing circumstances (*id.* at PageID.357-358).

Plaintiff rejects the Federal Defendants' argument that Allen and Brownback are entitled to qualified immunity (ECF No. 74 at PageID.576). According to Plaintiff, Allen and Brownback violated his constitutional rights in illegally stopping, searching and arresting him; using excessive force; and maliciously prosecuting him (*id.* at

PageID.576-589). Plaintiff asserts that these constitutional rights were clearly established at the time Allen and Brownback violated them (*id.* at PageID.589).

In *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), the Supreme Court "recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 66 (2001). The doctrine of qualified immunity is an affirmative defense to *Bivens* claims. *Robertson v. Lucas*, 753 F.3d 606, 614-15 (6th Cir. 2014). "Once the qualified immunity defense is raised, the burden is on the plaintiff to demonstrate that the officials are not entitled to qualified immunity." *Id.* at 615 (citation omitted). The Sixth Circuit has instructed that "insubstantial claims against government employees should be resolved as early in the litigation as possible, preferably prior to broad discovery." *Johnson v. Moseley*, 790 F.3d 649, 653 (6th Cir. 2015).

In *Saucier v. Katz*, 533 U.S. 194, 201-02 (2001), the Supreme Court set forth the following two-step qualified immunity analysis: a court must determine whether "the facts alleged show the officer's conduct violated a constitutional right," and the court must determine whether that right was "clearly established." *Id.* Some panels of the Sixth Circuit add a third inquiry: "whether the official's actions were objectively unreasonable in light of that clearly established right." *Abel v. Harp*, 278 F. App'x 642, 649 (6th Cir. 2008) (quoting *Risbridger v. Connelly*, 275 F.3d 565, 569 (6th Cir. 2002)). *See Sample v. Bailey*, 409 F.3d 689, 696 n.3 (6th Cir. 2005) (explaining the reasoning for the Sixth Circuit's three-

step approach for evaluating qualified immunity claims). *But see Grawey v. Drury*, 567 F.3d 302, 309 (6th Cir. 2009) (opining that the third step is "redundant" in excessive force cases).

The court must determine whether the plaintiff's facts, as necessarily admitted by the defendants, show a violation of clearly established law. *Abel*, 278 F. App'x at 649 (citing *Williams v. Mehra*, 186 F.3d 685, 690 (6th Cir. 1999) (en banc)). "If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity." *Saucier*, 533 U.S. at 201. *See also Abel*, 278 F. App'x at 649 ("If the analysis under the first step suggests that no constitutional violation transpired, then the analysis is complete, and we should grant summary judgment to the defendant.").

a. Freedom from Unreasonable Search & Seizure

The first *Bivens* claims Plaintiff alleges are a violation of his right to be free from an unreasonable search and a violation of his right to be free from an unreasonable seizure. The Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. In *Terry v. Ohio*, 392 U.S. 1, 30-31 (1968), the Supreme Court held that "when a law enforcement officer has a reasonable, articulable suspicion that a person may be involved in criminal activity, he may, consistent with the Fourth Amendment, conduct a brief investigatory stop of the person." *Loza v. Mitchell*, 766 F.3d 466, 476 (6th Cir. 2014). Moreover, "[d]uring the stop, the officer may make 'reasonable inquiries' of the person and conduct a pat-down

search to check for weapons." *Id.* "Reasonable inquiries" include, for example, questions about a person's identity. *Id.; see also United States v. Hensley*, 469 U.S. 221, 229 (1985) (observing that if police have a reasonable suspicion that a person they encounter was involved in connection with a completed felony, then they may conduct a *Terry* stop to "ask questions[ ] or check identification"); *Hayes v. Florida*, 470 U.S. 811, 816 (1985) ("[I]f there are articulable facts supporting a reasonable suspicion that a person has committed a criminal offense, that person may be stopped in order to identify him, to question him briefly, or to detain him briefly while attempting to obtain additional information."). "[I]nterrogation relating to one's identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure." *I.N.S. v. Delgado*, 466 U.S. 210, 216 (1984). Last, an officer may seize other evidence discovered during a pat-down search for weapons as long as the search "stays within the bounds marked by *Terry*." *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993).

The facts alleged in this case do not show that the officers' conduct violated Plaintiff's constitutional right to be free from an unreasonable search or seizure. Plaintiff argues that any suspicion that the officers had that Plaintiff had committed a crime was "neither reasonable nor grounded in specific and articulable facts" where Plaintiff and Davison "looked nothing alike" (ECF No. 74 at PageID.578-580). However, the Court agrees with the Federal Defendants that stopping Plaintiff to confirm whether he was the fugitive they sought did not violate Plaintiff's constitutional rights (ECF No. 72 at PageID.373).

"Reasonable suspicion for an investigative stop must be considered under the totality of the circumstances, considering 'all of the information available to law enforcement officials at the time.'" *Humphrey v. Mabry*, 482 F.3d 840, 846 (6th Cir. 2007) (quoting *Feathers v. Aey*, 319 F.3d 843, 849 (6th Cir. 2003)). At the time of the investigative stop in this case, Agent Brownback and Officer Allen had two photographs of the fugitive, and they knew he was a white male, 26 years old, between 5'10" and 6'3" tall, wearing glasses, and seen in the Leonard Street area on the previous day (JSF ¶¶ 11-13). The officers identified Plaintiff, a white male in his 20s, within the same height range, wearing glasses, and walking in the same vicinity the following day (*id.* ¶¶ 14-16). Their identification, while mistaken, had a particularized and objective basis. It was more than a mere hunch. And the officers' subsequent interaction with Plaintiff provided support for their reasonable suspicion. *See, e.g., Kowolonek v. Moore*, 463 F. App'x 531, 535 (6th Cir. 2012) (holding, where the plaintiff only "generally fit" the suspect's description and the officer was unable to immediately corroborate his identity, the plaintiff's angry demeanor and active resistance also provided support for the officer's reasonable suspicion).

While the officers' identification on July 18, 2014 was mistaken, "certainty" is not "the touchstone of reasonableness under the Fourth Amendment." *Hill v. California*, 401 U.S. 797, 803-04 (1971). Rather, the reasonableness inquiry includes some "latitude for honest mistakes" that officers may make in the difficult task of finding and arresting fugitives. *Maryland v. Garrison*, 480 U.S. 79, 87 (1987). Indeed, "[t]he concern of the immunity inquiry is to acknowledge that reasonable mis-

takes can be made as to the legal constraints on particular police conduct." *Sample*, 409 F.3d at 696 n.3 (quoting *Saucier*, 533 U.S. at 205).

An incorrect suspicion does not necessarily mean an unreasonable suspicion. *See, e.g., United States v. Mundy*, 591 F. App'x 320, 323 (6th Cir. 2014) ("That [the officer's] suspicion of a break-in turned out to be incorrect does not negate the reasonableness of his decision to stop and investigate."); *Dorsey v. Barber*, 517 F.3d 389, 397 (6th Cir. 2008) (while "the amount of detail in the suspects' descriptions in the ['be on the lookout'] left much to be desired" and was "not definitive, the available details supported the formation of reasonable suspicion that plaintiffs were the same two young black males" sought by the sheriff's department); *Wrubel v. Bouchard*, 65 F. App'x 933, 938 (6th Cir. 2003) ("although the fact that [the victim's] description did not identify all of Wrubel's distinctive facial features would create some doubt in any reasonable person's mind as to whether Wrubel was in fact the rapist, this fact does not make it unreasonable to conclude that Wrubel was the rapist"); *Houston v. Clark Cty. Sheriff Deputy John Does 1-5*, 174 F.3d 809, 813 (6th Cir. 1999) ("Viewing the totality of the circumstances, we are convinced that all four officers reasonably believed that a crime occurred at Chuck's and possessed a reasonable suspicion (to be sure, a mistaken one) that the occupants of Houston's car were involved in that crime.").

Neither does the seizure of the wallet, a fact alleged by Plaintiff (JSF ¶ 25), require a finding that a constitutional violation transpired. Assuming that Officer Allen removed Plaintiff's wallet, he could properly do so as part of the protective pat-down permitted by *Terry*.

See Loza, 766 F.3d at 476. The Supreme Court recognized in *Terry* that "the policeman making a reasonable investigatory stop should not be denied the opportunity to protect himself from attack by a hostile suspect." *Adams v. Williams*, 407 U.S. 143, 146 (1972). Nothing in Plaintiff's allegations supports the proposition that Allen's "search" was any broader than necessary to ensure that Plaintiff did not have access to a weapon. *See, e.g., United States v. Brown*, 310 F. App'x 776, 781 (6th Cir. 2009) (finding no Fourth Amendment violation where officer removed wallet from the suspect's pocket out of concern for her own safety).

In sum, Plaintiff's allegations, taken as true, do not set forth a constitutional violation of Plaintiff's right to be free from an unreasonable search and seizure. Accordingly, the Court holds that Officer Allen and Agent Brownback are entitled to qualified immunity from these *Bivens* claims in Count II.

b. Freedom from Use of Excessive Force

The Court turns next to Plaintiff's *Bivens* claim that Brownback and Allen violated his right to be free from excessive force. "[C]laims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard." *Jones v. City of Cincinnati*, 521 F.3d 555, 559 (6th Cir. 2008) (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)). Important to resolution of the issue in the case at bar is the instruction that the court must evaluate the excessive-force claim at issue by assuming "the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Abel*, 278 F. App'x at

649-52 (quoting *Graham*, 490 U.S. at 396); *Fox v. DeSoto*, 489 F.3d 227, 236 (6th Cir. 2007) (same).

In applying the reasonableness calculus, the court considers the following three factors: (1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others; and (3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight. *Abel*, 278 F. App'x at 650; *Sigley v. City of Parma Heights*, 437 F.3d 527, 534 (6th Cir. 2006); *Dunigan v. Noble*, 390 F.3d 486, 492 (6th Cir. 2004). Despite these three discrete factors, the jurisprudence on excessive-force claims has consistently maintained that "the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application . . . its proper application requires careful attention to the facts and circumstances of each particular case." *Abel, supra* (quoting *Graham*, 490 U.S. at 396).

Here, the "severity of the crime at issue"—home invasion—is a factor that weighs in favor of a finding of reasonableness on the part of Defendants Allen and Brownback. Home invasion is a felony crime under Michigan law, punishable by imprisonment up to 20 years. MICH. COMP. LAWS § 750.110a.

The second factor in the reasonableness calculus weighs against a finding of reasonableness on the part of Defendants Allen and Brownback, but only to the extent that Plaintiff did not pose an *immediate* threat to the safety of the officers or others. Defendants Allen and Brownback initiated the investigative stop, making a calculated—and mistaken—judgment about whether to stop Plaintiff and, indeed, the manner in which they stopped him.

However, the third factor—whether Plaintiff actively resisted or attempted to evade arrest—strongly weighs in favor of a finding of reasonableness on the part of Defendants Allen and Brownback. Unlike the plaintiff in *Abel, supra,* who did not actively resist arrest but instead adopted a passive position and "[b]alled up in a fetal position to protect [his] face, chest, and stomach," 278 F. App'x at 651-52, Plaintiff does not allege that he was a passive participant. Rather, Plaintiff admits that he attempted to run and that he bit Officer Allen in the arm that was around Plaintiff's neck (JSF ¶¶ 27-30).

Plaintiff thought Allen and Brownback were mugging him and believed he was acting in self-defense, but the reasonableness of Allen and Brownback's particular use of force is not judged from the perspective of the victim. Rather, the reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene. *Graham*, 490 U.S at 396. The reasonableness calculus "contains a built-in measure of deference to the officer's on-the-spot judgment about the level of force necessary in light of the circumstances of the particular case." *Burchett v. Kiefer*, 310 F.3d 937, 944 (6th Cir. 2002). From Allen and Brownback's perspective, it was reasonable of them to interpret Plaintiff's attempt to run and biting as an escalation of violence and to move "quickly and aggressively to end the confrontation." *See Lyons v. City of Xenia*, 417 F.3d 565, 578 (6th Cir. 2005). In *Bouggess v. Mattingly*, 482 F.3d 886, 891 (6th Cir. 2007), the Sixth Circuit explained that "resisting arrest by wrestling oneself free from officers and running away would justify use of some force to restrain the suspect." Likewise, in *Lyons*, 417 F.3d at 577-78, the Sixth Circuit concluded that

no constitutional violation was established where the officer tackled a suspect who resisted arrest. And in *Burchett v. Kiefer*, 310 F.3d 937, 944 (6th Cir. 2002), where the plaintiff admitted that he "twisted and turned some" when the officers tried to handcuff him, the Sixth Circuit found the officers' use of force reasonable.

In sum, the Court determines that the factors to be considered in the reasonableness analysis require a finding that no constitutional violation transpired. Accordingly, the Court holds that Officer Allen and Agent Brownback are also entitled to qualified immunity from Plaintiff's *Bivens* excessive-force claim in Count II.

c. Freedom from Malicious Prosecution

The parties agree that, assuming a *Bivens* claim of malicious prosecution exists, such a claim would require Plaintiff to prove "(1) the defendant made, influenced, or participated in the decision to prosecute the plaintiff; (2) there was a lack of probable cause for the prosecution; (3) as a consequence of the prosecution, the plaintiff suffered a deprivation of liberty, apart from the initial seizure; and (4) the criminal proceeding was resolved in the plaintiff's favor" (ECF No. 72 at PageID.397; ECF No. 74 at PageID.587). *Buchanan v. Metz*, 647 F. App'x 659, 665 (6th Cir. 2016). *See also Johnson*, 790 F.3d at 654 (delineating elements).

Here, Plaintiff does not include in Count II any specific factual allegations supporting his *Bivens* malicious prosecution claim. In an earlier paragraph in his Amended Complaint, he alleges the following:

> 68. Owing to the false and misleading statements of Allen and Brownback and the lack of video evi-

> dence to the contrary due to the actions of Morris, the prosecutor proceeded with charges against James and tried him for assaulting a police officer and causing injury (Allen), assaulting a police officer (Brownback), and assault with a dangerous weapon (for the handcuffs that Allen or Brownback was able to clasp to one of James's wrists while James was trying to escape).

ECF No. 30 at PageID.117, Amended Compl. ¶ 68. This conclusory allegation against Officer Allen and Agent Brownback does not state a plausible malicious prosecution claim under Rule 12(b)(6). The Court agrees with the Federal Defendants that this paragraph, which does not identify the statements at issue or their speakers, is so non-specific as to make it impossible to discern the basis for Plaintiff's claim (ECF No. 72 at PageID.397-398). The Court cannot discern upon which statements Plaintiff is relying, let alone their materiality to the probable-cause determination. In short, Plaintiff's *Bivens* malicious-prosecution claim in Count II fails to present enough facts to state a claim to relief that is plausible on its face. *Twombly*, 550 U.S. at 557, 570. The allegations are insufficient to meet the notice pleading requirements of Federal Rule of Civil Procedure 8(a) and warrant further discovery proceedings. Accordingly, the *Bivens* malicious-prosecution claim in Count II will be dismissed.

3. Count III: § 1983 (Morris)

In Count III, Plaintiff alleges that "[a]ll of the actions taken by Morris and referred to in the preceding allegations were done while acting under color of Michigan law and had the effect of depriving James of his clearly-

established constitutional rights under the Fourth Amendment of the United States Constitution, including his freedom from malicious prosecution" (ECF No. 30 at PageID.120, Amend. Compl. ¶ 86). In the preceding allegations, Plaintiff alleges, in pertinent part, the following:

> 57. Morris ordered several bystanders to delete any video of the event, telling them: No, no, no, we got undercover officers there. No pictures. Delete it. Delete it. It's for the safety of the officers. Everybody has cameras . . . All we used to do was tell the story; we didn't have a picture to tell the story with, right? Did you delete it? . . . We don't need no pictures.
>
> 58. Morris confirmed that at least two bystanders deleted video of the event.
>
> 59. Because of Morris's actions, no video of the actual struggle between Allen and Brownback and James was ever discovered; only the aftermath remains.
>
> * * *
>
> 68. Owing to the false and misleading statements of Allen and Brownback and the lack of video evidence to the contrary due to the actions of Morris, the prosecutor proceeded with charges against James and tried him for assaulting a police officer and causing injury (Allen), assaulting a police officer (Brownback), and assault with a dangerous weapon (for the handcuffs that Allen or Brownback was able to clasp to one of James's wrists while James was trying to escape).

(ECF No. 30 at PageID.114 & 117, Amended Compl. ¶¶ 57-59 & 68).

Defendant Morris argues that she is entitled to dismissal of Count III against her under Federal Rule of Civil Procedure 12(b)(6) because Plaintiff fails to state a malicious prosecution claim (ECF No. 78 at PageID.712). Specifically, Defendant Morris argues that Plaintiff's complaint fails to allege that she "made, influenced, or participated" in the decision to prosecute (*id.* at PageID.712-715). Defendant Morris argues that at best, Plaintiff's allegation is that her on-scene statements to delete video "influenced" the decision to prosecute by depriving the prosecutor of additional evidence to consider when making the charging decision (ECF No. 78 at PageID.713-714). Morris argues that "[t]hat allegation is nothing more than the passive or neutral activity that fails to pass Sixth Circuit muster" (*id.* at PageID.714). Defendant Morris argues that "the speculated inconsistencies that may have arisen from undiscovered cellphone video cannot reasonably compel the conclusion urged by King, namely, that probable cause to prosecute had ceased to exist, or never existed at all" (*id.* at PageID.715). Alternatively, Defendant Morris argues that she is entitled to summary judgment on the basis of qualified immunity where Plaintiff fails to show that she personally violated his constitutional rights or to plead or show that she had some reason to doubt the victim eyewitness identification of him as the assailant (*id.* at PageID.715-718).

In response, Plaintiff argues that he sufficiently alleged in his Amended Complaint that Defendant Morris influenced the decision to prosecute him by actively

and intentionally destroying video evidence of his altercation with Allen and Brownback (ECF No. 80 at PageID.749). Plaintiff also argues that whether Morris influenced the decision to prosecute James is itself a material issue of fact that precludes summary judgment (*id.* at PageID.750). According to Plaintiff, there is nothing "passive or neutral" about Morris' actions on the day in question; rather, she went from person to person at the scene and ordered them to delete video and photographic evidence (*id.* at PageID.751).

Defendant Morris' argument entitles her to dismissal.

To prevail on his § 1983 claim in Count III, Plaintiff must establish that Defendant Morris was acting under color of state law and deprived him of a right secured by the Constitution or the laws of the United States. Defendant Morris does not dispute that she was acting under color of state law, nor does she dispute that malicious prosecution constitutes a constitutional deprivation in violation of the Fourth Amendment. And the parties generally agree on the elements of a malicious prosecution claim (ECF No. 78 at PageID.712; ECF No. 80 at PageID.749), as set forth *supra*. The parties' dispute centers on whether these unique facts, as set forth in Plaintiff's allegations, state a plausible claim for malicious prosecution, exposing Defendant Morris to liability under 42 U.S.C. § 1983. As there is no dispute that Plaintiff was deprived of his liberty as a result of criminal proceedings that were resolved in his favor, the parties focus on the first and second elements of the claim: whether Defendant Morris "made, influenced, or participated" in the decision to prosecute Plaintiff and whether there was a lack of probable cause for the prosecution.

As to the first element, the parties agree that what it means to "influence" a prosecution is not clearly established law (ECF No. 80 at PageID.749; ECF No. 81 at PageID.840-842). The Sixth Circuit observed that "[t]here is very little case law in this circuit discussing precisely what role an investigating officer must play in initiating a prosecution such that liability for malicious prosecution is warranted . . . " *Sykes v. Anderson*, 625 F.3d 294, 311 (6th Cir. 2010). The Sixth Circuit further noted that "[w]hether an officer influenced . . . the decision to prosecute hinges on the degree of the officer's involvement and the nature of the officer's actions." *Id.* at 311, n.9. "The totality of the circumstances informs this fact determination." *Id.*

Accepting all well-pleaded factual allegations therein as true, the Court determines that Plaintiff sufficiently alleged facts giving rise to a reasonable inference that Defendant Morris' actions "influenced" the prosecutor's decision to prosecute. Specifically, Plaintiff alleges that Defendant Morris' intentional destruction of video and photographic evidence surrounding Plaintiff's struggle with Officer Allen and Agent Brownback "influenced" the institution of legal process against Plaintiff. Although Morris asserts that the allegation is "pure speculation," the Court agrees that it is reasonable to infer that the decision to prosecute would have been altered had Defendant Morris not failed to preserve a video showing that Plaintiff was justified in assaulting Officer Allen and Agent Brownback. *See, e.g., Petrishe v. Tenison*, No. 10 C 7950, 2013 WL 5645689, at *4 (N.D. Ill. Oct. 15, 2013) ("Although Petrishe may have difficulty actually proving the contents of the now-erased video, e.g., the existence of evidence favorable to the accused, the court finds that Petrishe has pleaded

sufficient factual detail to put Defendants on notice of the factual basis for the claim pending against them and to plausibly suggest the existence and suppression of exculpatory or impeaching evidence [six seconds of a taser video] that would have altered the decision to go to trial.").

However, even assuming Plaintiff's allegations sufficiently implicate Defendant Morris' actions in the decision to prosecute, Plaintiff's allegations do not sufficiently allege an absence or lack of probable cause for the criminal proceeding against him. In *Fox*, 489 F.3d at 237, the Sixth Circuit indicated that while the contours of a § 1983-malicious claim may be uncertain, "[w]hat is certain, however, is that such a claim fails when there was probable cause to prosecute." Probable cause to initiate a criminal prosecution exists where "facts and circumstances [are] sufficient to lead an ordinarily prudent person to believe the accused was guilty of the crime charged." *Webb v. United States*, 789 F.3d 647, 660 (6th Cir. 2015) (quoting *MacDermid v. Discover Fin. Servs.*, 342 F. App'x 138, 146 (6th Cir. 2009)).

Here, Plaintiff's Amended Complaint does not address "probable cause," let alone sufficiently allege it was lacking. Conversely, Plaintiff acknowledges that Officer Allen and Agent Brownback were wearing lanyards with badges and admits fleeing from, resisting, fighting with, and eventually biting a law-enforcement officer (Amended Compl. ¶¶ 25, 43 & 48). In short, Plaintiff has not stated facts demonstrating that the facts and circumstances were insufficient to lead an ordinarily prudent person to believe Plaintiff was guilty of the crimes charged. *See* MICH. COMP. LAWS §§ 750.81d(l) (resisting and obstructing a police officer),

750.81d(2) (resisting and obstructing a police officer causing injury), and 750.82 (felonious assault). Accordingly, the Court will grant Defendant Morris' motion and dismiss Count III. *See McKinley v. City of Mansfield*, 404 F.3d 418, 444 (6th Cir. 2005) (affirming the trial court's decision finding that no constitutional violation occurred and therefore seeing no need to proceed to the issue of qualified immunity).

4. Count IV: FTCA (USA)

In Count IV, under the Federal Tort Claims Act, Plaintiff alleges that the actions of Agent Brownback and Officer Allen amount to the following torts: (1) Assault, (2) Battery, (3) False Arrest, (4) False Imprisonment, (5) Malicious Prosecution and (6) Intentional Infliction of Emotional Distress (ECF No. 30 at PageID.121, Amended Compl. ¶ 96). Plaintiff alleges that their actions were "intentional, malicious, undertaken in bad faith, and/or in gross and reckless disregard of James's constitutional rights" (*id.* ¶ 97).

The Federal Defendants argue that the United States is entitled to dismissal of each of the six tort claims delineated in Count IV against it because Michigan law bars these claims where law enforcement officers act in good faith (ECF No. 72 at PageID.405-409). The Federal Defendants also argue that the tort claims fail because the officers were acting within the law (*id.* at PageID.410-413). Last, the Federal Defendants argue that Plaintiff's FTCA claims based on Officer Allen's conduct must be dismissed because Plaintiff failed to exhaust his administrative remedies for this claim where Plaintiff's administrative claim only sought relief under the FTCA based on Agent Brownback's actions (*id.* at PageID.414-415).

In response, Plaintiff argues that Michigan law does not provide immunity under the FTCA for either Allen's or Brownback's actions (ECF No. 74 at PageID.590-593). Further, Plaintiff argues that even if Michigan governmental immunity applies, it only immunizes actions taken in good faith, and the officers did not act in good faith when they committed multiple torts against Plaintiff (*id.* at PageID.593-594). Plaintiff also argues that questions of fact preclude summary judgment on each of his tort claims (*id.* at PageID.594-595). Last, Plaintiff rejects the Federal Defendants' argument that he did not exhaust his administrative remedies as to Allen (*id.* at PageID.595). According to Plaintiff, the language in the form he submitted makes clear that his claim covered the actions of both Brownback and Allen (*id.* at PageID.596-597).

The Federal Defendants' argument has merit.

The United States may be liable under the FTCA for certain torts committed by federal employees, both individually and collectively. *See* 28 U.S.C. § 2671 *et seq.* Although generally exempted from liability under the FTCA for intentional torts, the United States remains liable for claims arising from certain intentional torts committed by investigative or law enforcement officers, including assault, battery, false imprisonment, false arrest, abuse of process, and malicious prosecution. 28 U.S.C. § 2680(h). The FTCA requires courts to apply the substantive law of the place where the event occurred. 28 U.S.C. § 1346(b)(1).

In *Odom v. Wayne County*, 760 N.W.2d 217, 228 (Mich. 2008), the Michigan Supreme Court stated that the proper method for determining whether govern-

mental immunity applies to intentional torts, such as assault and battery, is to apply the test set forth in *Ross v. Consumers Power Co.*, 363 N.W.2d 641, 667-68 (Mich. 1984). Under the *Ross* test, a governmental employee is immune from liability from intentional torts if he can establish that (1) the challenged actions were undertaken during the course of employment and the employee was acting, or reasonably believed that he was acting, within the scope of his authority; (2) the acts were undertaken in good faith, or were not undertaken with malice; and (3) the acts were discretionary, as opposed to ministerial. *Odom*, 760 N.W.2d at 228.

In *Valdez v. United States*, 58 F. Supp. 3d 795 (W.D. Mich. 2014) (Jonker, J.), this Court held that the United States retains the benefit of the same state law immunities available to the employees. The Court determined that this reading of the statute "measures the liability of the United States by the liability that would apply to its individual employee if that employee were sued in state court on the state tort law." *Id.* at 828. "To read [the FTCA] otherwise would lead to the incongruous result of the United States opening itself to liability that would never be imposed on the individual employee as an individual defendant under state law." *Id.* at 829. *See also Washington v. Drug Enforcement Admin.*, 183 F.3d 868, 874 (8th Cir. 1999) (applying Missouri law on police use of force during searches); *Jackson v. United States*, 77 F. Supp. 2d 709, 715 (D. Md. 1999) (applying actual malice requirement of Maryland law); *McElroy v. United States*, 861 F. Supp. 585, 594-96 (W.D. Tex. 1994) ("When determining whether the conduct of law enforcement officers constituted assault, false imprisonment, or false arrest under the FTCA, the

United States may invoke any defenses available to individual law enforcement officers under [state] law"); *Nash v. United States*, 897 F. Supp. 180, 182-83 (E.D. Pa. 1994) (applying Pennsylvania law for use of force by task force officers). The Court agrees that the United States is entitled to the same Michigan governmental immunity from intentional torts that Agent Brownback and Officer Allen would have had under state law in this case.

Applying the *Ross* test here, Plaintiff does not dispute that the Task Force officers' conduct was in the course of their employment and under their authority as Task Force officers. Nor does Plaintiff dispute that the acts at issue—Plaintiff's stop, arrest and prosecution—were discretionary, not ministerial, acts. The only prong of the *Ross* test that Plaintiff challenges is whether the officers acted in "good faith." Plaintiff asserts that the officers acted in bad faith because they unlawfully "stopped," "arrested" and "beat" him (ECF No. 74 at PageID.594).

The Michigan Supreme Court defines a lack of good faith as "malicious intent, capricious action or corrupt conduct" or "willful and corrupt misconduct." *Kreipke v. Wayne State Univ.*, 807 F.3d 768, 784 (6th Cir. 2015) (quoting *Odom, supra*). "Unlike qualified immunity under federal law, which uses an objective standard, '[t]he good-faith element of the *Ross* test is subjective in nature.'" *Bletz v. Gribble*, 641 F.3d 743, 757 (6th Cir. 2011) (citation omitted). *See also Brown v. Lewis*, 779 F.3d 401, 420 (6th Cir. 2015) ("Michigan state law imposes a subjective test for governmental immunity for intentional torts, based on the officials' state of mind, in

contrast to the objective test for federal qualified immunity."). Hence, "determining good faith is not the same as analyzing whether a defendant's conduct was objectively reasonable," although "evidence useful to determining objective reasonableness can also serve to evaluate good faith." *Scozzari v. Miedzianowski*, 454 F. App'x 455, 467 (6th Cir. 2012).

Here, the parties' undisputed facts support the finding that the Task Force officers' actions were not undertaken with the malice required under Michigan law. Rather, even Plaintiff's stated reason for the officers' stop was the officers' determination that Plaintiff was the fugitive, and the officers' motive for restraining Plaintiff was to secure him and ensure their safety after Plaintiff admittedly attempted to flee and bit Officer Allen. These facts do not indicate that the officers "demonstrated a reckless indifference to the common dictates of humanity." *Odom*, 760 N.W.2d at 225. While the officers' identification was mistaken, and Plaintiff's perception of the incident was vastly different, the officer who can show that he had a good-faith belief "is entitled to the protections of governmental immunity regardless of whether he was correct in that belief." *Rucinski v. Cty. of Oakland*, 655 F. App'x 338, 343-44 (6th Cir. 2016) (quoting *Latits v. Phillips*, 826 N.W.2d 190, 195 (Mich. Ct. App. 2012)). Hence, assuming arguendo that Plaintiff preserved his FTCA claims as to both Officer Allen and Agent Brownback, the United States is entitled to dismissal of the claims because (1) the challenged actions were undertaken during the course of employment and the employees were acting within the scope of their authority; (2) the acts were undertaken in good faith, or were not undertaken with malice; and (3) the acts were

discretionary, as opposed to ministerial. *See Odom*, 760 N.W.2d at 228.

Even if the United States is not entitled to immunity under the FTCA in this case, Count IV is also properly dismissed for failure to state a claim, for the reasons previously stated and for the reasons stated more fully by the Federal Defendants (ECF No. 72 at PageID.410-413; ECF No. 90 at PageID.971-973). Specifically, Plaintiff's claims for assault and battery are properly dismissed where the Task Force officers used reasonable force in subduing Plaintiff. Plaintiff's false-imprisonment, false-arrest and malicious prosecution claims are properly dismissed where probable cause existed. And Plaintiff's intentional-infliction-of-emotional-distress claim is properly dismissed where the Task Force officers acted within their authority.

In sum, Michigan law bars Plaintiff's FTCA claims, either on governmental immunity grounds or for failure to state a claim. Accordingly, Count IV is dismissed.

III. CONCLUSION

For the foregoing reasons,

IT IS HEREBY ORDERED that Defendants Allen, Brownback and the United States' Motion to Dismiss, or in the Alternative for Summary Judgment (ECF No. 71) is GRANTED.

IT IS FURTHER ORDERED that Defendant Morris' Motion to Dismiss (ECF No. 77) is GRANTED.

Because this Opinion and Order resolves all pending claims in this matter, a corresponding Judgment will also enter. *See* FED. R. CIV. P. 58.

Dated: Aug. 24, 2017

/s/ JANET T. NEFF
JANET T. NEFF
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 17-2101

JAMES KING, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

DOUGLAS BROWNBACK; TODD ALLEN,
DEFENDANTS-APPELLEES

[Filed: May 28, 2019]

ORDER

BEFORE: BOGGS, CLAY, and ROGERS, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied. Judge Rogers would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/ DEBORAH S. HUNT
DEBORAH S. HUNT, Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 17-2101

JAMES KING, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

DOUGLAS BROWNBACK; TODD ALLEN,
DEFENDANTS-APPELLEES

[Filed: Feb. 25, 2019]

On Appeal from the United States District Court
for the Western District of Michigan at Grand Rapids

JUDGMENT

Before: BOGGS, CLAY, and ROGERS, Circuit Judges.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, IT IS ORDERED that the district court's findings that the Federal Tort Claims Act judgment bar precludes Plaintiff's remaining claims, and that Defendants are entitled to qualified immunity are REVERSED, its judgment in favor of Defendants is VACATED, and the case is REMANDED for further proceedings consistent with the opinion of this court.

ENTERED BY ORDER OF THE COURT

/s/ DEBORAH S. HUNT
DEBORAH S. HUNT, Clerk

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 1:16-cv-343

JAMES KING, PLAINTIFF

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

Filed: Aug. 24, 2017

JUDGMENT

Hon. JANET T. NEFF

In accordance with the Opinion and Order entered this date:

IT IS HEREBY ORDERED that Judgment is entered in favor of Defendants and against Plaintiff.

Dated: Aug. 24, 2017

/s/ JANET T. NEFF
JANET T. NEFF
United States District Judge

APPENDIX F

1. 28 U.S.C. 2679(b) provides:

Exclusiveness of remedy

(b)(1) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government—

(A) which is brought for a violation of the Constitution of the United States, or

(B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

2. 28 U.S.C. 2680 provides in pertinent part:

Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

* * * * *

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided,* That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

* * * * *