Case No. 20-6351

SUPREME COURT OF THE UNITED STATES

JOHNNY TIPPINS,

Plaintiff-Appellant,

v.

PATRICIA CARUSO; BARBARA MEAGHER; JOHN DOES; JANE DOES; GEORGE KUBIN; JAMES C. KELLY; BLAINE LAFLER, Warden,

Defendants-Appellees.

On Appeal from United States Circuit Court
for the Sixth Circuit,
Case No. 17-1508

RESPONDENTS GEORGE KUBIN AND JAMES C. KELLY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PLUNKETT COONEY

By: MARY MASSARON (P43885)
LOUIS RONAYNE (P81877)
Attorneys for Defendants-Appellees
George Kubin and James C. Kelly
38505 Woodward Ave., Suite 100
Bloomfield Hills, MI 48304
(313) 983-4801
mmassaron@plunkettcooney.com

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I. INTRODUCTION

This case stems from Tippins' 42 U.S.C. 1983 claim that his constitutional rights under the Eighth Amendment were violated when he was forced to drink contaminated water while incarcerated, a claim that he has unsuccessfully pursued at every level imaginable, through the full extent of direct appeal, including an unsuccessful petition for a writ of certiorari in this Court, and now, once again in this Court, but this time on collateral review.

This time, Tippins seeks this Court's review of the Sixth Circuit's multiple rulings declining to recall its mandate, as Tippins requested in several vexatious motions. The reality is that Tippins cannot escape that his § 1983 claim is, by all accounts, time-barred because, based on his own pleadings and indisputable rules of law, the applicable statute of limitations under state law ran about four years before he filed suit (if not earlier). Therefore, in short, there is nothing before this Court in the instant Petition warranting such exceptional review.

II. MATERIAL FACTS AND PROCEDURAL HISTORY

A. Background and District Court Proceedings

Tippins is a state prisoner proceeding without the assistance of counsel, (R.E. 2, Application to Proceed in District Court without Prepaying Fees or Costs, 3/4/14, Page ID #14-25). In 2007, after he was transferred from the St. Louis Correctional Facility (in Michigan), Tippins allegedly became ill and developed an autoimmune disorder later that year. In his own words, Tippins "was told by Health Care personnel that the drinking water at St. Louis prison did not cause this injury," but in any event, based on his own allegations, Tippins was, at least, aware of an issue

with the water at St. Louis Correctional Facility and complained about it as early as 2007. (R.E. 1, Complaint, Page ID #6). For instance, Tippins' complaint states that he was examined by medical professionals at the St. Louis Correctional Facility from 2004-2007 for stomach pain, headaches, and fatigue. (*Id.*)

About seven years later, in March 2014, Tippins filed a 42 U.S.C. 1983 claim in the United States District Court for the Eastern District of Michigan, alleging that state prison officials, two local mayors (Kubin and Kelly), and the Velsicol Chemical Corporation[1] violated his Eighth-Amendment rights by forcing him to drink contaminated water while incarcerated at the St. Louis Correctional Facility. (R.E. 1, Complaint, Page ID #1-13). Tippins initially sought $100 million in damages, but after the district court granted his first motion for leave to amend his complaint, he reduced his damages claim to $70 million. (R.E. 7, Motion Requesting to Amend Plaintiff's 42 U.S.C. § 1983 Prisoner's Civil Right Complaint, Page ID# 35-39; (R.E. 9, Opinion and Order, 7/1/14, Page ID# 47-53; R.E. 19, Amended Complaint).

On January 23, 2015, Tippins moved to amend his complaint again (for the third time), to add facts regarding the chemical compound that allegedly poisoned him. (R.E. 16, Motion to Amend Complaint, Page ID# 97-103). The district court granted that motion, while also noting that at that time, none of the remaining

[1] The district court, *sua sponte*, dismissed Velsicol from this action because it was not a state actor and therefore not amenable to liability under § 1983. (R.E. 9, Opinion and Order, 7/1/14, Page ID# 47-53). Tippins challenged this ruling in a second motion for leave to amend his complaint, which the district court denied after considering it as a disguised motion for reconsideration. (R.E. 10, Motion to Amend Complaint, 7/14/14, Page ID# 54-68; R.E. 15, Order Denying Motion to Amend, 12/19/14, Page ID # 92-96).

defendants, including Kubin and Kelly, had received service of process.[2] (R.E. 18, Opinion and Order Granting Plaintiff's Motion to Amend Complaint, 3/3/15, Page ID # 106-110).

In May 2015, once Kubin and Kelly received service of process, they answered the amended complaint,[3] denying liability and raising the affirmative defenses of statute of limitations and absolute immunity. (R.E. 27, Answer to Amended Complaint and Affirmative Defenses, Page ID # 153-172). Kubin and Kelly further stated in their affirmative defenses that Tippins failed to state a claim upon which relief could be granted and that they "took no actions in relation to causing any contamination to the City's water system or failure to respond to applicable government regulations, orders and remediation plans." (*Id.*, Page ID # 171-172).

In lieu of filing an answer, Defendant Patricia Caruso, Director of the Michigan Department of Corrections (MDOC), moved to dismiss under Fed. R. Civ. P. 12(b), in part on the grounds that Tippins' claim was time barred for failure to commence suit within the three-year statute of limitations for personal injury claims under Michigan law. (R.E. 32, MDOC Defendant Caruso's Motion to Dismiss, Page ID # 179-197).

In spite of the district court's order requiring Tippins to respond to the motion to dismiss, Tippins unsuccessfully filed a fourth motion for leave to amend

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[2] Accordingly, the district court entered an order directing the United States Marshal to serve Tippins' Amended Complaint. (R.E. 21, Opinion and Order Granting Plaintiff's Motion to Serve Amended Complaint, Page ID # 123-126).

[3] Note that, at this point, while the district court had twice granted Tippins leave to amend his complaint, Tippins simply filed and served a single amended complaint as a result of these rulings. (R.E. 19, Amended Complaint).

his complaint. (R.E. 33, 6/22/15 Order; R.E. 34, Fourth Motion for Leave to Amend Complaint). This time, Tippins sought leave to amend to "add several important facts that were not mentioned in previous complaint(s)that are required to be addressed at this time." (*Id.*, Page ID # 210). This time, Tippins theorized that an unsuccessful and unrelated class action, *Rouse v. Caruso*, Case No. 06-10961 (E.D. Mich 2006), brought on behalf of St. Louis Correctional Facility inmates (not including Tippins) and including similar Eighth Amendment claims, tolled the statute of limitations. (R.E. 34, Fourth Motion for Leave to Amend Complaint, Page ID # 211-212).

Ultimately, the district court agreed that Tippins' cause of action was, by all accounts, outside the applicable limitations period and accordingly dismissed Tippins' complaint with prejudice. (R.E. 49, Order 10/14/15, Page ID # 399-405). As for the law, the district court determined that the applicable statute of limitations was three years under former M.C.L. 600.5805(10), given that there was no applicable statute of limitations under federal law, meaning the court was required to apply the statute of limitations governing personal injury actions under Michigan law. (R.E. 49, Order 10/14/15, Page ID # 399-405); see *Wolfe v. Perry*, 412 F.3d 707, 713-714 (6th Cir. 2005), quoting *Banks v. City of Whitehall*, 344 F.3d 550, 553 (6th Cir. 2003) ("[b]ecause Congress did not specifically adopt a statute of limitations governing § 1983 actions, 'federal courts must borrow the statute of limitations governing personal injury actions in the state in which the section 1983 action was brought.' "); *Collyer v. Darling*, 98 F.3d 211, 220 (6th Cir. 1996) (under federal law,

the "limitations period begins to run when the plaintiff knows or has reason to know that the act providing the basis of his or her injury has occurred.")

The district court further agreed with the magistrate that, according to Tippins' own pleadings, he "knew that he suffered an injury no later than 2007," but did not file his first complaint until seven years later, in 2014. (*Id.*, Page ID # 402-403). Consequently, the court dismissed the action in its entirety with prejudice and entered a corresponding final judgment. R.E.50, Judgment, Page ID # 406).

Tippins next made a barrage of post-judgment motions, starting with a motion for oral argument (R.E. 52, Page ID # 409-410), a motion for relief from judgment (R.E. 53, Page ID # 411-423), a motion for reconsideration (really a disguised regurgitation of his motion for relief from judgment, as the court observed, See R.E. 62, Page ID # 593) (R.E. 54, Page ID # 427), and another (fifth) motion for leave to amend his complaint (R.E. 55, Page ID # 443-451).[4] The court denied Tippins' motions for oral argument and leave to amend his complaint (R.E. 59, Page ID # 560; R.E. 60, Page ID # 568), but granted him limited relief from judgment, ordering that the case be reopened to permit Tippins to file objections to the magistrate's September 1, 2015 report regarding the motion to dismiss (R.E. 62, Page ID # 593).[5] The district court then overruled Tippins' objections and again dismissed the case with prejudice. (R.E. 63, Page ID # 596).

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[4] In his fifth motion for leave to amend his complaint, Tippins, argued, among other things, that he was entitled to amend his complaint because the court had somehow been "misled" by the caselaw. R.E. 55, Page ID # 446).

[5] As the court noted in its order granting Tippins limited relief from judgment, however, because all of his objections concerned the merits of his claim and therefore did not affect the statute of limitations issue, they were not worth considering. (*Id*. Page ID # 595).

Tippins, yet again, challenged the district court's rulings with motions for reconsideration and relief from judgment (R.E. 65, Page ID # 600; R.E. 66, Page ID # 608), and a sixth motion for leave to amend his complaint, this time to assert a claim under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601 *et seq*. (R.E. 67, Page ID # 623). In that motion, Tippins mistakenly argued that CERCLA tolled the limitations period such that it rendered his action timely. (*Id*.) In addition, Tippins filed a "supplemental motion to amend/correct and motion to amend/correct complaint." (R.E. 70, Page ID # 655).

Tippins' focus in this round of postjudgment motions was his assertion that he could replead under CERCLA to get the benefit of 42 U.S.C. § 9658(a)(1) and push back the date on which his limitation period began to run. (See R.E. 68, Page ID # 642-653). More specifically, § 9658(a)(1) provides that when a state's statute-of-limitations commencement date "is earlier than the federally required commencement date," the statute-of-limitations period commences "at the federally required commencement date in lieu of the date specified in such State statute." 42 U.S.C. § 9658(a)(1).[6]

Ultimately, while the district court allowed Tippins to supplement his pending motion for leave to amend his complaint with the facts stated in his

[6] Of course, this argument was meaningless because "federal law determines the accrual of civil rights claims," anyway, not state law, and, as noted, federal law provides that "the statute of limitations period begins to run when the plaintiff knows or has reason to know that the act providing the basis of his or her injury has occurred." *Collyer v Darling*, 98 F3d at 220. See 42 U.S.C. § 9658(b)(4)(A) (the "federal commencement date" under CERCLA is "the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages . . . were caused or contributed to by the hazardous substance or pollutant or contaminant concerned . . . .")

supplemental filings, it otherwise denied the motions substantively. The court observed that even assuming it applied, the "federal commencement date" under CERCLA is "the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages . . . were caused or contributed to by the hazardous substance or pollutant or contaminant concerned," 42 U.S.C. § 9658(b)(4)(A), meaning CERCLA's commencement date was, like the § 1983 commencement date, at latest in 2007, consistent with the court's prior determinations as to when the Michigan statute of limitations period commenced. In other words, even assuming CERCLA applied, Tippins' action was, nevertheless, time-barred. (R.E. 72, Page ID # 667). Therefore, the district court concluded that permitting Tippins leave to amend his complaint to plead under CERCLA would be futile because it would not materially affect the statute-of-limitations analysis. (*Id.*, at 667, 669).

At this time, the district court also enjoined Tippins from making further filings without leave of court. (*Id.* at 669-670). The court's injunction reflected its finding that Tippins' had continued to "allege, at length, the same meritless arguments already rejected by the Court," which all "revolved around his claims arising from allegedly contaminated water and his assertion that the statute of limitations has not run on those claims." (*Id.* at 669-670).

Tippins filed another motion for leave, this time asking the district court to reopen the time for him to file a notice of appeal. (R.E. 74, Application Seeking Leave to File, 4/17/17, Page ID # 676-684). The district court granted this motion

and accordingly reactivated the time period for Tippins to appeal the February 16, 2017 Order until May 4, 2017, and Tippins filed a notice of appeal within that time frame. (R.E. 75, Order Reopening the Time to Appeal the Court's Order, Page ID # 687; R.E. 76, Notice of Appeal, 5/1/17, Page ID # 689).

B. Direct Appeal

The Sixth Circuit affirmed the district court's dismissal of Tippins' action on March 21, 2018. (R.E. 23-2, 3/21/18 Order). Like the district court, the Sixth Circuit rejected Tippins' statute-of-limitations theory. Its analysis, by and large, reflected the district court's reasoning. It explained that

> [w]hile Tippins claims that he did not know of his injury until 2014, when he discovered that the prison drinking water contained the p-CBSA contaminant, in his complaint he asserted that he complained to prison officials of stomach pain, headache, and fever resulting from contaminated water while he was incarcerated at the St. Louis facility from 2004 to 2007. Because Tippins knew of his injury by 2007 at the latest and did not file his complaint until 2014, the district court did not err in dismissing the complaint as untimely. [R.E. 23-2, 3/21/18 Order, p 3.]

The Sixth Circuit, in turn, affirmed the district court's rulings on Tippins' motions to amend his complaint upon determining that Tippins lacked standing to bring an action under CERCLA because he was not seeking costs associated with the cleanup of contamination. (*Id*.) See *Reg'l Airport Auth. of Louisville v. LFG, LLC*, 460 F.3d 697, 699-700 (6th Cir. 2006) ("[CERCLA] permits private party property owners to recover from prior private party property owners certain costs associated with the cleanup of contamination caused by the prior owners, where the cleanup costs were 'necessary.' ") The court of appeals, in turn, explained that even if Tippins had standing under CERCLA, "his claims would still be untimely

because he knew, or should have known, of his injury and its cause by no later than 2007 when he complained to prison officials of becoming ill from contaminated water." (*Id.*, pp 3-4); see 42 U.S.C. § 9658(b)(4). Therefore, the court of appeals concluded that because any CERCLA claim that Tippins could conceivably make "could not survive a motion to dismiss, the district court did not err in denying the motions to amend." (*Id.*, p 4).

Tippins petitioned for rehearing, which the court of appeals denied, having concluded that it "did not misapprehend or overlook any point of law or fact when it issued the March 21, 2018, order," Fed. R. App. P. 40(a). (R.E. 25-2, 4/24/18 Order). Tippins then unsuccessfully petitioned this Court for a writ of certiorari (10/1/18 Entry on United States Supreme Court Docket No. 17-9272).

C. Collateral Review

In June 2020, Tippins filed his first in a series of three redundant, vexatious and meritless motions to recall the mandate in the court of appeals. (R.E. 32, 6/1/2020 Motion). The court of appeals denied the motion on the grounds that Tippins failed to demonstrate exceptional circumstances warranting such relief, explaining that "Tippins [was] merely attempting to reargue this court's determination that his complaint was untimely after he failed to receive relief from the Supreme Court, which is not a basis for recalling the mandate that we issued more than two years ago." (R.E. 37, 7/9/20 Order). Moreover, the court of appeals noted that Tippins failed to even "argue that there ha[d] been a fraud on the court, a need to clarify an outstanding mandate, or a clerical mistake." (*Id.*)

Nevertheless, immediately after the court denied his initial motion to recall the mandate, Tippins filed a virtually identical motion, which the court of appeals denied. (R.E. 40, 8/19/20 Order). Naturally, Tippins immediately filed a third motion to recall the mandate on essentially the same grounds the court had rejected several times. (R.E. 42, 8/28/20 Motion). At this point, realizing they had to repeatedly defend against frivolous and vexatious appellate motions with no end in sight, Kubin and Kelly moved to enjoin Tippins from future filings in the Sixth Circuit without leave of court. (R.E. 44-1, 9/3/2020 Motion).

On October 1, 2020, the Sixth Circuit denied Tippins's third motion to recall the mandate on the grounds that he "failed to demonstrate exceptional circumstances warranting recalling the mandate," given that he was "merely attempting to reargue [the] court's determination that his complaint was untimely, which is not a basis for recalling the mandate." (R.E.47-1, 10/1/2020 Order, p 2). The court, in turn, granted Kubin and Kelly's motion to enjoin Tippins from future filings without leave of court. (*Id.*)

Tippins now, yet again, petitions for a writ certiorari concerning the Sixth Circuit's rulings on his motions to recall the mandate.

III. ARGUMENT

Nothing about the Sixth Circuit's rulings on Tippins' motions to recall the mandate warrants such extraordinary review, especially at this stage of collateral proceedings when the legal issues cannot be reasonable disputed. Tippins is simply using this process to, yet again, reargue that his § 1983 claim is not time-barred.

"[T]he courts of appeals are recognized to have an inherent power to recall their mandates, subject to review for an abuse of discretion." *Calderon v. Thompson*, 523 U.S. 538, 549; 118 S. Ct. 1489 (1998). "In light of 'the profound interests in repose' attaching to the mandate of a court of appeals, however, the power can be exercised only in extraordinary circumstances." *Id*., quoting 16 C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3938, p. 712 (2d ed. 1996).

" '[O]ne seeking recall of a mandate must demonstrate good cause for that action through a showing of exceptional circumstances,' including, but not limited to 'fraud upon the court, clarification of an outstanding mandate, [or] correction of a clerical mistake.' " *Patterson v. Haskins*, 470 F.3d 645, 662 (C.A. 6, 2006), quoting *BellSouth Corp. v. FCC*, 96 F.3d 849, 851-852 (C.A. 6, 1996) (declining to recall its mandate when an agency's delay in implementing the court's order adversely affected a private company); see also *United States v. Murray*, 2 Fed. Appx. 398, 399-400 (6th Cir. 2001) (noting that the enumeration of factors in *BellSouth* are "a nonexhaustive list of circumstances that are extraordinary enough to warrant a recall of a mandate").

In this case, while he seeks a writ of certiorari concerning the Sixth Circuit's rulings on his motions to recall the mandate, Tippins is attempting to recast his meritless arguments in support of his statute-of-limitations theory. As the Sixth Circuit properly determined, Tippins failed to establish, let alone try to establish, good cause necessary to recall the mandate. That is, in the court of appeals, Tippins

made little effort to demonstrate exceptional circumstances warranting such relief; instead, as he continues to do in this Court, Tippins continued to argue that the Sixth Circuit made erroneous determinations of law.

In particular, in his motions to recall the mandate, Tippins continued to argue his theory that CERCLA rendered his action timely, an argument that has been repeatedly rejected and for good reasons: It cannot be reasonably disputed that Tippins' § 1983 claim is time-barred.

As the district court and court of appeals properly determined several times, "[b]ecause Congress did not specifically adopt a statute of limitations governing § 1983 actions, 'federal courts must borrow the statute of limitations governing personal injury actions in the state in which the section 1983 action was brought.' " *Wolfe*, 412 F.3d at 713-714, quoting *Banks*, 344 F.3d at 553. At the time Tippins' cause of action arose,[7] M.C.L. 600.5805(10) provided that "[t]he period of limitations is 3 years after the time of the . . . injury for all other actions to recover damages for . . . injury to a person or property." And under federal law, the three-year limitations period began to run at the very latest in 2007, when, according to his own pleadings, Tippins knew or had reason to know that the act providing the basis of his alleged injuries had occurred. *Collyer*, 98 F.3d at 220. The Sixth Circuit properly applied these well-settled rules of law as such and consequently had no basis to recall its mandate.

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[7] Under Michigan law, "[t]he pertinent statute of limitations is the one in effect when the plaintiff's cause of action arose." *Chase v. Sabin*, 445 Mich. 190, 192 n 2; 516 NW2d 60 (1994). Also note that while Section 5805 of Michigan's Revised Judicature Act of 1961 has been amended several times since 2007, the statute of limitations for personal injury actions in general has been and remains three years. See M.C.L. 600.5805(2).

Moreover, in addition to recasting his former arguments, Tippins now, as he did in his motions to recall the mandate, seems to add somewhat of a new spin on previously rejected arguments: he seems to suggest that alleged fraudulent concealment tolled the limitations period such that his action was timely. In other words, Tippins now seems to accept, at least to some extent, the inevitable legal conclusion that the Michigan statute of limitations applied to his § 1983 claim, but that he should nonetheless be granted a fresh opportunity to essentially raise new (but equally meritless) claims and legal theories pertinent to the law of the case. This theory is fatally misguided because, again, federal law dictates that the limitations period commenced when Tippins knew or had reason to know *of the injury* giving rise to his § 1983 claim. *Collyer*, 98 F.3d at 220. Therefore, whether Tippins could identity *all defendants* in 2007 (when he learned of his alleged injury, at the very latest) is wholly irrelevant to the ultimate question whether his § 1983 claims are time-barred.

Moreover, while it is true under Michigan law that statutes of limitation are "tolled when a party conceals the fact that the plaintiff has a cause of action," *Sills v. Oakland Gen. Hosp.*, 220 Mich. App. 303, 310; 559 N.W.2d 348 (1996), which requires "concealment by the defendant of the existence of a claim *or the identity of a potential defendant*," *McCluskey v. Womack*, 188 Mich. App. 465, 472; 470 N.W.2d 443 (1991); see also M.C.L. 600.5855, fraudulent concealment is also an independent tort claim under Michigan law, see *Doe v. Roman Catholic Archbishop of Archdiocese of Detroit*, 264 Mich. App. 632, 652; 692 N.W.2d 398 (2004). If

Tippins wants to pursue a claim of fraudulent concealment against the State of Michigan or any of its officers or agencies, he must pierce governmental immunity under the Government Tort Liability Act, M.C.L. 691.1401 *et seq*., by establishing, among other things, gross negligence, M.C.L. 691.1407(2)(c), and he must do so in the Michigan Court of Claims, M.C.L. 600.6419. Doing so via motion to recall the mandate in a federal court of appeals was not the proper forum.

None of Tippins' contentions remotely constituted "a showing of exceptional circumstances," which would have given the Sixth Circuit grounds to recall its mandate. *Patterson*, 470 F.3d at 662. Otherwise, Tippins has failed to present any valid reasons for this Court to grant certiorari. Instead, Tippins appears to view the legal process as an unlimited means by which he can continue to ask the courts to grant relief that is not, by any account, authorized by law.

Therefore, Tippins failed to demonstrate good cause in the court of appeals because it does not exist. Otherwise, nothing about his case warrants a writ of certiorari.

IV. CONCLUSION

Defendants-Appellees George Kubin and James Kelly respectfully request that this Honorable Court deny Tippins' Petition.

Respectfully submitted,

PLUNKETT COONEY

By: s/Mary Massaron

MARY MASSARON (P43885)
LOUIS RONAYNE (P81877)
Attorneys for Defendants-Appellees
George Kubin and James C. Kelly
38505 Woodward Ave., Suite 100
Bloomfield Hills, MI 48304
(313) 983-4801
mmassaron@plunkettcooney.com

Dated: November 25, 2020

CERTIFICATE OF SERVICE

MARY MASSARON, attorney with the law firm of PLUNKETT COONEY, being first duly sworn, deposes and says that on the 25th day of November, 2020, she caused a copy of this document to be served upon all parties of record, and that such service was made electronically upon each counsel of record so registered with the United States Supreme Court, and via U.S. Mail to any counsel not registered to receive electronic copies from the court, by enclosing same in a sealed envelope with first class postage fully prepaid, addressed to the above, and depositing said envelope and its contents in a receptacle for the U.S. Mail.

PLUNKETT COONEY

By: s/Mary Massaron
MARY MASSARON (P43885)
Attorney for Defendants-Appellees
George Kubin and James C. Kelly
38505 Woodward Ave., Suite 100
Bloomfield Hills, MI 48304
(313) 983-4801
mmassaron@plunkettcooney.com

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

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