

CLOSED,APPEAL,AMDFVD,JURY,LC01,NOT-SERVED

**Eastern District of Washington
U.S. District Court (Spokane)
CIVIL DOCKET FOR CASE #: 2:22-cv-00004-MKD**

Burke v. State of Washington et al.,
Assigned to: Judge Mary K. Dimke
Demand: \$200,000
Cause: 42:1983 Prisoner Civil Rights

Date Filed: 01/10/2022
Date Terminated: 04/19/2022
Jury Demand: Plaintiff
Nature of Suit: 550 Prisoner: Civil Rights
Jurisdiction: Federal Question

Plaintiff**James Thomas Burke**

represented by **James Thomas Burke**
15001291
Tallahatchie County Correctional Facility
19351 U.S. Hwy 49 North
Tutwiler, MS 33963-5249
PRO SE

V.

Defendant**State of Washington****Defendant****Spokane County****Defendant****Spokane Sheriffs Office****Defendant****Dave Reagan****Defendant****« Eastern Washington Joint Fugitive Task Force****Defendant****U.S. Marshal Service***Unknown other[s] in their individual and official capacity[s]*

Date Filed	#	Docket Text
05/06/2022	<u>28</u>	9CCA Payment Notification form re <u>27</u> Notice of Appeal. Fee IFP. (MRJ, Case Administrator) (Entered: 05/06/2022)
05/06/2022	<u>27</u>	NOTICE OF APPEAL from District Court decision as to <u>26</u> Clerk's Judgment by James Thomas Burke. (Attachments: # <u>1</u> Cover Letter, # <u>2</u> Certificate of Service, # <u>3</u> Envelope)(MRJ, Case Administrator) (Entered: 05/06/2022)

18

03/21/2022	<u>10</u>	ORDER GRANTING APPLICATION TO PROCEED IN FORMA PAUPERIS AND DIRECTING INSTITUTION TO CALCULATE, COLLECT, AND FORWARD PAYMENT; ECF No. <u>8</u> re; construed Motion for Extension of Time is DENIED as moot. Signed by Judge Mary K. Dimke. (MRJ, Case Administrator) (Service of Notice on parties not registered as users of the Court CM/ECF system accomplished via USPS mail.) Modified on 3/22/2022 (cc: Premier Supply Links notified via USPS mail.) (MRJ, Case Administrator). (Entered: 03/21/2022)
01/26/2022	<u>6</u>	ORDER TO COMPLY WITH FILING FEE/IN FORMA PAUPERIS REQUIREMENTS; Case Management Deadline set for 2/25/2022. Signed by Judge Mary K. Dimke. (MRJ, Case Administrator) (Service of Notice on parties not registered as users of the Court CM/ECF system accomplished via USPS mail.) (Entered: 01/26/2022)
01/10/2022	<u>4</u>	Letter from Clerk - Advising prisoner of case number and deficiency. (MRJ, Case Administrator) Modified on 1/10/2022: Letter to include updated PLRA statement. (MRJ, Case Administrator). (Main Document 4 replaced on 1/10/2022) (MRJ, Case Administrator). (Entered: 01/10/2022)
01/10/2022	<u>1</u>	COMPLAINT against All Defendants (Filing Fee \$402, Receipt # IFP Pending) Jury Demand. Filed by James Thomas Burke. (Attachments: # <u>1</u> Civil Cover Sheet, # <u>2</u> Exhibits, # <u>3</u> Transmittal Letter, # <u>4</u> Transmittal Envelope)(MRJ, Case Administrator) (Entered: 01/10/2022)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

NOV 17 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

JAMES THOMAS BURKE,

Plaintiff-Appellant,

v.

STATE OF WASHINGTON; et al.,

Defendants-Appellees.

No. 22-35357

D.C. No. 2:22-cv-00004-MKD
Eastern District of Washington,
Spokane

ORDER

Before: CANBY, CALLAHAN, and BADE, Circuit Judges.

The district court has certified that this appeal is not taken in good faith. On May 10, 2022, this court ordered appellant to explain in writing why this appeal should not be dismissed as frivolous. *See* 28 U.S.C. § 1915(e)(2) (court shall dismiss case at any time, if court determines it is frivolous or malicious).

Upon a review of the record, the response to the court's May 10, 2022 order, and the opening brief, we conclude this appeal is frivolous. We therefore deny appellant's motions to proceed in forma pauperis (Docket Entry Nos. 5 and 14) and dismiss this appeal as frivolous, pursuant to 28 U.S.C. § 1915(e)(2).

All other pending motions are denied as moot.

No further filings will be entertained in this closed case.

DISMISSED.

APPENDIX-A

Apr 19, 2022

SEAN F. MCVOY, CLERK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

JAMES THOMAS BURKE,

Plaintiff,

vs.

STATE OF WASHINGTON,
SPOKANE COUNTY, SPOKANE
SHERIFFS OFFICE, DAVE REAGAN,
EASTERN WASHINGTON JOINT
FUGITIVE TASK FORCE and U.S.
MARSHAL SERVICE (UNKNOWN
OFFICER),

Defendants.

No. 2:22-cv-00004-MKD

ORDER DISMISSING COMPLAINT
WITH PREJUDICE

1915(g)

Before the Court are Plaintiff's three responses, ECF Nos. 22–24, to the Order to Show Cause or Voluntarily Dismiss Complaint issued by the Court on March 21, 2022, ECF No. 11. Specifically, the Court directed Mr. Burke to show cause why his Complaint, asserting the excessive use of force during his arrest in 2005, ECF No. 1, should not be dismissed as time-barred. ECF No. 11 at 9.

APPENDIX-B

ORDER DISMISSING COMPLAINT WITH PREJUDICE -- 1

1 Plaintiff, a Vermont prisoner currently housed at the Tallahatchie County
2 Correctional Facility in Tutwiler, Mississippi, is proceeding *pro se* and *in forma*
3 *pauperis*. ECF No. 17. The Court has not directed that Defendants be served with
4 the Complaint. Liberally construing Plaintiff's assertions in the light most
5 favorable to him, the Court finds that Mr. Burke has failed to show cause why his
6 Complaint should not be dismissed as time-barred.

7 Plaintiff asserts on the fifth page of his first response¹ that, under *Heck v.*
8 *Humphrey*, 512 U.S. 477 (1994), his § 1983 cause of action has not yet "accrued"
9 because he is still pursuing the invalidation of his allegedly unlawful conviction in
10 Vermont. ECF No. 22 at 5. A plaintiff who challenges conduct that resulted in a
11 valid criminal conviction has no cognizable cause of action under section 1983 if
12 the civil claim would imply the invalidity of the prior conviction. *Heck*, 212 U.S.
13 at 483. In *Heck*, the plaintiff sought damages against police and prosecutors for
14 conducting an arbitrary investigation, knowingly destroying exculpatory evidence,
15 and causing an illegal voice identification to be used at his trial which resulted in
16 his conviction for the charged offenses. *Id.* at 479.

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19 ¹ The first three pages of Plaintiff's second and third responses are substantially the
20 same, save for differences in highlighting and the fact that handwritten citations have
been typed. *See* ECF No. 22 at 2–4; ECF No. 23 at 3–5; and ECF No. 24 at 2–4.

1 Here, Plaintiff is challenging the excessive use of force to effectuate his
2 arrest in Spokane, Washington, in 2005. This cause of action for damages is in no
3 way attributable to an unconstitutional conviction or sentence. *Id.* at 489. A
4 finding in Plaintiff's favor would not affect the validity of his subsequent sexual
5 assault conviction in Vermont. Consequently, "if the district court determines that
6 the plaintiff's action, even if successful, will not demonstrate the invalidity of any
7 outstanding criminal judgment against the plaintiff, the action should be allowed to
8 proceed, in the absence of some other bar to the suit." *Id.* at 486–87 (internal
9 citations omitted); *see also Wallace v. Kato*, 549 U.S. 384, 393 (2007) (concluding
10 that petitioner could have brought his § 1983 action challenging his false arrest
11 immediately after being arrested, without waiting for the resolution of his criminal
12 case, and stating that *Heck* would not be a bar because there has been no
13 conviction yet).

14 In this case, the "other bar to the suit," *Heck*, 512 U.S. at 487, is the statute
15 of limitations. *See* ECF No. 11 at 5–8. Plaintiff invites the Court to apply *Bianchi*
16 *v. Bellingham Police Dept.*, 909 F.2d 1316 (1990), to toll the running of the three-
17 year statute of limitations. *See* ECF No. 22 at 1, 5–7; ECF No. 23 at 6. He
18 contends that his "incarcerated disability has . . . yet to be removed," because he
19 has been continuously incarcerated since May 25, 2005. ECF No. 22 at 4–6; ECF
20 No. 23 at 5–7. Plaintiff's reliance on *Bianchi* is misplaced.

APPENDIX_B.

1 At the time *Bianchi* was decided in 1990, it was true that Washington's
2 tolling provision, RCW 4.16.190 (1989), applied to plaintiffs "imprisoned on a
3 criminal charge, or in execution under the sentence of a court for a term less than
4 his natural life." *Bianchi*, 909 F.2d at 1318. That tolling provision applied to Mr.
5 Bianchi who had been "continuously imprisoned since his arrest." *Id.*

6 Since 2004, however, the Ninth Circuit has recognized that an arrestee's
7 causes of action under Washington law for false arrest, false imprisonment,
8 negligence, and personal injury were tolled only until the date when the arrestee
9 was sentenced. *See Gausvik v. Perez*, 392 F.3d 1006, 1009 (9th Cir. 2004). Mr.

10 Burke does not dispute that he was sentenced in Vermont in 2010 on the sexual
11 assault charges that were pending when he was arrested in Spokane, Washington,
12 in May 2005. ECF No. 11 at 6.

13 Plaintiff cites to *Hardin v. Straub*, 490 U.S. 536 (1989) for the proposition
14 that Washington's three-year statute of limitation should be tolled. ECF No. 22 at
15 4; ECF No. 23 at 5; and ECF No. 24 at 4–5. *Hardin* involved a Michigan statute
16 that suspended limitations periods for those under legal disability, including
17 prisoners, until one year after their disability had been removed. Even if this one-
18 year suspension applied, the disability under Washington law in this case was
19 removed upon sentencing in 2010. *See Gausvik*, 392 F.3d at 1009. Plaintiff did
20 not submit his complaint to this Court until January 1, 2022. *See* ECF No. 1-3 at 1.

APPENDIX-B .

ORDER DISMISSING COMPLAINT WITH PREJUDICE -- 4

1 Because considerably more than three years elapsed after he was sentenced
2 in 2010 and before he initiated his civil rights action in this District in 2022,
3 Plaintiff's cause of action is clearly time barred. *See RK Ventures, Inc. v. City of*
4 *Seattle*, 307 F.3d 1045, 1058 (9th Cir. 2002); *Millay v. Cam*, 135 Wash.2d 193
5 (1998) (requiring "bad faith, deception, or false assurances by the defendant and
6 the exercise of diligence by the plaintiff," for equitable tolling to apply).

7 Although provided the opportunity to do so, Plaintiff has failed to
8 demonstrate either a statutory or equitable basis to toll the running of
9 Washington's three-year statute of limitations in this action. *See Levald, Inc. v.*
10 *City of Palm Desert*, 998 F.2d 680, 686-87 (9th Cir. 1993). Plaintiff also did not
11 avail himself of the opportunity to voluntarily dismiss this action.

12 Accordingly, **IT IS ORDERED** that the Complaint, ECF No. 1, is
13 **DISMISSED WITH PREJUDICE** as time-barred. This is a qualifying dismissal
14 under 28 U.S.C. § 1915(g). *See Belanus v. Clark*, 796 F.3d 1021, 1023 (9th Cir.
15 2015).

16 Pursuant to 28 U.S.C. § 1915(g), enacted April 26, 1996, a prisoner who
17 brings three or more civil actions or appeals that are dismissed as frivolous,
18 malicious, or for failure to state a claim will be precluded from bringing any other
19 civil action or appeal *in forma pauperis* "unless the prisoner is under imminent
20 danger of serious physical injury." 28 U.S.C. § 1915(g). Plaintiff is advised to read

APPENDIX-B.

1 the statutory provisions under 28 U.S.C. § 1915. This dismissal of Plaintiff's
2 Complaint may adversely affect his ability to file future claims.

3 The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal of this
4 Order would not be taken in good faith and would lack any arguable basis in law or
5 fact.

6 **IT IS SO ORDERED.** The Clerk of Court is directed to enter this Order,
7 enter judgment, provide copies to Plaintiff at his last known address, and **CLOSE**
8 the file. The Clerk of Court is further directed to provide a copy of this Order to the
9 Office of the Attorney General of Washington, Criminal Justice Division.

10 DATED April 19, 2022.

11 *s/Mary K. Dimke*
12 MARY K. DIMKE
13 UNITED STATES DISTRICT JUDGE
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18

19 APPENDIX-B.
20

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

NOV 17 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

JAMES THOMAS BURKE,

Plaintiff-Appellant,

v.

STATE OF WASHINGTON; et al.,

Defendants-Appellees.

No. 22-35357

D.C. No. 2:22-cv-00004-MKD
Eastern District of Washington,
Spokane

ORDER

Before: CANBY, CALLAHAN, and BADE, Circuit Judges.

The district court has certified that this appeal is not taken in good faith. On May 10, 2022, this court ordered appellant to explain in writing why this appeal should not be dismissed as frivolous. *See* 28 U.S.C. § 1915(e)(2) (court shall dismiss case at any time, if court determines it is frivolous or malicious).

Upon a review of the record, the response to the court's May 10, 2022 order, and the opening brief, we conclude this appeal is frivolous. We therefore deny appellant's motions to proceed in forma pauperis (Docket Entry Nos. 5 and 14) and dismiss this appeal as frivolous, pursuant to 28 U.S.C. § 1915(e)(2).

All other pending motions are denied as moot.

No further filings will be entertained in this closed case.

DISMISSED.

APPENDIX-C

Nov. 29th, 2022

CLERK, U.S. Court Of Appeals
For The Ninth Circuit
P.O. Box-#193939
San Francisco, CA. 94119-3939

Re: Burke v. State of Washington, 9th Cir. Case-#22-35357 &
District Court Case-#2:22-cv-00004-MKD

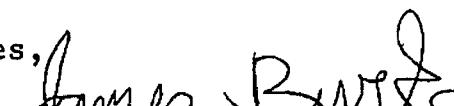
Dear Clerk:

Would your office be so kind as to please accept for filing in the above entitled matter, My enclosed Pro-se, (APPELLANTS PETITION FOR REHEARING EN BANC BY THE FULL NINTH CIRCUIT COURT OF APPEALS) together with it's attached (COPY OF APPELLANT'S INFORMAL OPENING BRIEF), with it's Nov. 29th, 2022, CERTIFICATE OF SERVICE.

Please allow the full Ninth Circuit Court of Appeals review for rehearing en banc and let Me know of any new rulings.

Please also inform Me if your office needs additional copies upon the full court allowing a hearing.

Thank you and best wishes,


James T. Burke, VT.-#15001291
Pro-se
T.C.C.F.
19351 U.S. Hwy. 49 North
Tutwiler, MS. 38963-5249

APPENDIX-C's

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMES T. BURKE, Pro-se,
Plaintiff-Appellant,
v.
STATE OF WASHINGTON; et al.,
Defendants-Appellees.

No. 22-35357

D.C. No. 2:22-cv-00004-MKD
Eastern District of Washington,
Spokane

APPELLANTS PETITION FOR REHEARING EN BANC BY THE FULL NINTH CIRCUIT
COURT OF APPEALS

#1. On Nov. 17th, 2022, Ninth Circuit Judges Canby, Callahan, and Bade, "over-looked" Appellants existing arguments and misunderstood the facts of this case that have legal and clear NATIONAL SIGNIFICANCE pursuant to the United States Supreme Courts holdings in; See Hardin v. Straub, 490 U.S. 536, 109 S.Ct. (1998). The most Honorable justice to have ever ruled are U.S. Supreme Court, Justice Stevens, with the majority opinions of his fellow jurist, Held that. "State Statues suspending limitations periods for those under legal disability, including prisoners, until (1) one year after disability has been removed WAS consistent with § 1983, and thus, inmates action was NOT time barred". Again please review correctly cited above and below; Hardin v. Straub, 490 U.S. 536, 109 S.Ct. (1998), 104 L.Ed. 2d 582, 57 USLW-#4554. (Please see again Appellants attached INFORMAL OPENING BRIEF), which was un-opposed by Washington State's Attorney General Appeals Ct.--division with NO Appellee's Answering-Brief.

#2. A correct and un-bias second review of the Appellant's (attached) INFORMAL OPENING BRIEF, documents existing legal arguments that were clearly and unlawfully "over-looked" and misunderstood pursuant to the facts of this case that have again, the most legal and United States NATIONAL SIGNIFICANCE of any other case currently before this Honorable Ninth Circuit Court of Appeals, pursuant to are also Honorable United States Supreme Courts current holdings in again; Hardin v. Straub, 490 U.S. 536, 109 S.Ct. (1998) (NEW HOLDING).

#3. On Nov. 17th, 2022, Not only did this Ninth Circuit "over-look" Appellants (attached-arguments) pursuant to cited, Hardin v. Straub, 490 U.S. 536, 109 S.Ct. (1998), but this Ninth Circuit also misunderstood the facts of cited; Woods v. Candela, 47 F. 3d 545 (1995), U.S. App. LEXIS-#2495, and all arguments made in the (ATTACHED APPELLANTS INFORMAL BRIEF), pursuant to Woods v. Candela, 47 F.3d 545 (1995).

#4. Not only did this Calif. Ninth Circuit "over-look" Appellants (ATTACHED-ARGUMEMTS) ; but also "over-looked" it's own president[s] pursuant to their own Calif. president in; Cal. Civ. Proc. Code § 352(a)(3); Elliot, 25 F.3d at 802, a disability provision that tolls the Statute of Limitations when a person is imprisoned on a criminal charge, also "over-looked", in clear violation of the 5th & 14th Amend. to are U.S. Constitution in this case, See also; Elliott v. City of Union City, 25 F.3d 800, 803 (9th Cir. 1994) (Again see attached). (COPY OF APPELLANT'S INFORMAL OPENING BRIEF).

CONCLUSION

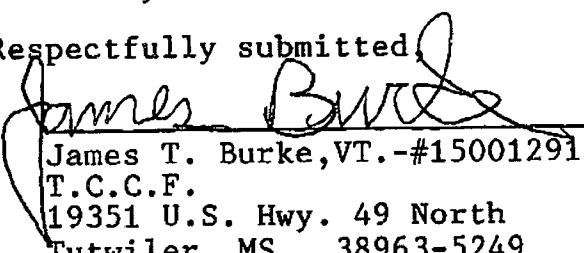
The Honorable majority opinion of the United States Supreme Court holdings pursuant to; Hardin v. Straub, 490 U.S. 536, 109 S.Ct. (1998) 104 L.Ed. 2d 582, 57 USLW-#4554, should be followed to the letter of the U.S. Supreme Court's thought-out and contemplated law by this also Honorable lower Ninth Circuit Court of Appeals.

WHEREFORE, Appellant respectfully request this Honorable Ninth Circuit Court of Appeals, honor U.S. Supreme Court Justice Steven's and the majoritys opinion holdings pursuant to; Hardin v. Straub, 490 U.S. 536, 109 S.Ct. (1998), (New-Law), 104 L.Ed. 2d 582, 57 USLW-#4554, and send this civil case back to the lower court with instructions to allow needed and timely discovery.

Respectfully submitted,

Dated: Nov. 29th, 2022.

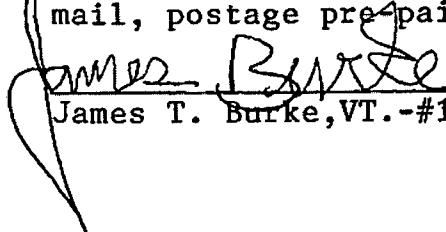
Pro-se


James T. Burke, VT.-#15001291
T.C.C.F.
19351 U.S. Hwy. 49 North
Tutwiler, MS. 38963-5249

CERTIFICATE OF SERVICE

I Appellant, James T. Burke, Pro-se, in the above entitled-matter herenow certifies that on this 29th, day of November, 2022, I served a true copy of My (APPELLANTS PETITION FOR REHEARING EN BANC BY THE FULL NINTH CIRCUIT COURT OF APPEALS) together with a copy of My (APPELLANT'S INFORMAL OPENING BRIEF) as the attachment, by first class mail, postage pre-paid to; Office of the Attorney General of Washington, Appeals Court Division
P.O. Box-#401100
Olympia, WA. 98504-0100, again by first class

mail, postage pre-paid on this 29th day of Nov., 2022.


James T. Burke, VT.-#15001291

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

James T. Burke, VT. -#15001291
Appellant(s),

vs.

9th Cir. Case No. 22-35357

District Court or
BAP Case No. 2:22-ev-00004-MKD

State of Washington; County of Spokane; Spokane County Sheriff's Office,
Appellee(s), et. al. individual and official capacity[s],

APPELLANT'S INFORMAL OPENING BRIEF

(attach additional sheets as necessary, up to a total of 50 pages including this form)

JURISDICTION. This information helps the court determine if it can review your case.

1. Timeliness of Appeal:

a. What is the date of the judgment or order that you want this court to review? April 19th, 2022.

b. Did you file any motion, other than for fees and costs, after the judgment was entered? Answer yes or no: Yes.

• If you did, on what date did you file the motion? April 29th, 2022.

• For prisoners or detainees, what date did you give the motion to prison authorities for mailing? April 29th, 2022.

• What date did the district court or bankruptcy appellate panel (BAP) decide the motion that you filed after judgment? April 19th, 2022.

c. What date did you file your notice of appeal? April 29th, 2022.

• For prisoners or detainees, what date did you give your notice of appeal to prison authorities for mailing? April 29th, 2022.

FACTS. Include all facts that the court needs to know to decide your case.

2. What are the facts of your case? Appellant relied on the fact that the U.S. Supreme Court held that the Statue of limitation periods did NOT count until prisoner's conviction is invalidated. Wood v. Candela, 47 F.3d 545 *1995, U.S. App. LEXIS-#2495. Appellant's conviction is very close to being invalidated and elected to start the discovery process pursuant to the attempted murder of him by Defendant's which resulted in temporary coma and brain damage and a 25" medical metal rod down the center of the left lower leg, metal plates and pins the left ankle, resulting in brain swelling pain-medication treatment, with-held discovery will document. (See lower court file of exhibits).

3. Because Appellant was and still is recovering from the brain injury, he further relied on: "Upon grant of certiorari, the United States Supreme Court, Justice Stevens, Held that State Statutes suspending limitations periods for those under legal disability, including prisoners, until (1) one year after disability has been removed was consistent with § 1983, and thus, inmate's action was NOT time barred." Hardin v. Straub, 490 U.S. 536, 109 S.Ct. (1998), 104 L.Ed. 2d 582, 57 USLW 4554.

4. Appellant additionally relied on the legal facts that under Calif. law, the Statue of limitations is tolled if the Appellant is/was imprisoned when action accrues. Cal. Civ. Proc. code § 352(a)(3); Elliott, 25 F.3d at 802, a disability provision that tolls the Statute of limitations when a person is imprisoned on a criminal charge, as Appellant has been since May 24th-25th, 2005-Spokane, WA. incarceration.

5. The court[s] have held that "actual, uninterrupted incarceration is the touchstone" for applying Calif. tolling provision for the disability of imprisonment" Id. Elliott v. City of Union City, 25 F.3d 800, 803 (9th Cir. 1994), the Statue of limitations is tolled if Appellant is/was imprisoned---

on a criminal charge, because inmates litigate under serious disadvantages. People v. Burnick, 14 Cal. 3d 306, 535 P.2d 352, 363, 121 Cal. Rptr. 488 (Cal. 1975); Rand v. Rowland, 154 F.3d 952, 958 (9th Cir. 1998); Elliot, 25 F.3d at 803; Hurst v. Hederman, 451 F. Supp. 1354, 1355 (N.D. Ill. 1978) ("Continously imprisoned since his arrest, he is entitled to tolling under § 4.16.190 for the period he was imprisoned"); Bianchi v. Bellingham Police Dept., 909 F.2d 1316* 1990 App. LEXIS-#12388 1318 (9th Cir. 1990), Appellant contends that § 4.16.190 applies because he was actually continually incarcerated on a criminal charge, less than his natural life so that there is a possibility of parole under Wash. Rev. Code § 9.95.115 (1989).

6. The U.S. Supreme Court's clear and fair holdings in Hardin v. Straub, 490 U.S. 536, 109 S.Ct. (1998), pursuant to State Statutes suspending limitations periods for those under legal disability, including prisoner's, until one year after disability has been removed was consistent with § 1983, and thus, inmates action was NOT time barred, conflicts with Gausvik v. Perez, 392 F.3d 1006, 1009 (9th Cir. 2004), because Gausvik, 392 F.3d at 1009, is a clear and bias misapplication of original correct federal law as was thought-out and articulated by the United States Supreme Court Justice[s] and now causes a un-lawful circuit split of law that originally had been clear and established by our U.S. Supreme Court, leading to the inmate bias lower federal district court's dismissal with prejudice conflicts with not only the U.S. Supreme Court's holdings in Hardin v. Straub, 490 U.S. 536, 109 S.Ct. (1998), but also; Wood v. Candela, 47 F.3d 545 *(1995), U.S. App. LEXIS-#2495, ("Statue of limitations did NOT count until conviction is invalidated"), both of which case's clearly conflict with Gausvik v. Perez, 392 F.3d 1006, 1009 (9th Cir. 2004), as said-----

Gausvik, 392 F.3d at 1009, unlawfully & biasly attempts to limit the rights of the People of this Country and is a clear misapplication of U.S. Supreme Court federal law as was originally articulated by that court, who originally established it, and is now being circumvented by Gausvik, 392 F.3d at 1009, which not only attempts to unlawfully limit the rights of the U.S. people, but also causes a circuit split of the originally established federal U.S. Supreme Court law pursuant to both the holdings Appellant relied on that now, AGAIN conflict with each other and violates both holdings in Hardin v. Straub, 490 U.S. 536, 109 S.Ct. (1998) & Wood v. Candela, 47 F.3d 545 *1995, U.S. App. LEXIS-#2495, together with them case's SHEPERDIZED-CASE[S], See also Board of Regents of Univ. of [**2374] State of N.Y. v. Tomanio, 446 U.S. 478, 64 L.Ed. 2d 440, 100 S.Ct. 1790 (1980), Hardin v. Straub, 490 U.S. 536, 104 L.Ed. 2d 582, 109 S.Ct. (1989), Heck v. Humphrey, 512 U.S. 477.

7. The U.S. Constitution and laws of the Nation are to be accorded 'a sweep as broad as it's language', Mitchum v. Foster, 407 U.S. 225, 239 (1972); U.S. v. Price, 383 U.S. 787, 801 (1966); Felder v. Casey, 487 U.S. 131, 139 (1988) & Wash. Rev. Code § 4.16.190 (1987).

8. The Fourth Amendment requires Police officers making an arrest of un-armed Appellant, to use only an amount of force that is objectively reasonable in light of the (un-armed Appellant's) circumstances.

Tennessee v. Garner, 471 U.S. 1, 7-8, 105 S.Ct. 1694, 85 L.Ed. 2d 1 (1985). ("Neither tackling nor punching a suspect to make an arrest necessarily constitutes excessive force", but "even where some force is justified, the amount actually used may be excessive"). Blankenhorn v. City of Orange, 485 F.3d 463, 477 (9th Cir, 2007). (internal-quotations omitted).

PROCEEDINGS BEFORE THE DISTRICT COURT OR THE BAP. In this section, we ask you about what happened before you filed your notice of appeal with this court.

9. What did you ask the district court or the BAP to do—for example, did you ask the court to award money damages, issue an injunction, or provide some other type of relief? See attached docket sheets, ie. Filed USC 1983 complaint pursuant to the holdings of Hardin v. Straub, 490 U.S. 536, 109 S.Ct. (1998) and requested discovery after recovering enough from brain injury/coma Defendant's caused Appellant. (See lower Court complaint and exhibits of New Paper clipping of how Defendant's ran their patrol van into Appellant at approx. 50 miles an hour while on his bike crossing a parking lot), which amounted to attempted murder and broken bones, metal plates, left lower 25" leg rod and cast & stitches.

10. What legal claim or claims did you raise in the district court or at the BAP? Violation of the 4th, 5th, 8th & 14.1 Amendment[s] to the U.S. Consti.
Please review original lower court records.

11. Exhaustion of Administrative Remedies. For prisoners, did you use up all administrative remedies for each claim before you filed your complaint in the district court? If you did not, please tell us why.
Argued and exhausted all case's cited now and more in the lower Spokane, WA. federal district court.

PROCEEDINGS BEFORE THE COURT OF APPEALS. In this section, we ask you about issues related to this case before the court of appeals and any previous cases you have had in this court.

12. What issues are you asking the court to review in this case? What do you think the district court or the BAP did wrong?

See again FACTS, at paragraph[s]-#2 to #8. ie. The district court violated U.S. Supreme Court law in a attempt to under-mine Appellant's rights and the same rights of others as out-lined pursuant to cited; Hardin v. Straub, 490 U.S. 536, 109 S.Ct. (1998).

13. Did you present all issues listed in Question 6 to the district court or the BAP?

Answer yes or no: YES, Appellant also request leave to allow this case be reviewed on the original record without the use of a printed case.

14. What law supports these issues on appeal? (You may refer to cases and statutes, but you are not required to do so.)

PLEASE REVIEW FACTS PARAGRAPHS-#2, to #8, [ON PAGE-#2, @ FACTS].

15. Other Pending Cases. Do you have any other cases pending in the court of appeals? If so, give the name and docket number of each case.

[NO].

CONCLUSION

The Honorable majority opinion of the United States Supreme Court holdings pursuant to, Straub v. Hardin, 490 U.S. 536, 109 S.Ct. (1998), 104 L.Ed. 2d 582, 57 USLW 4554, should be followed to the letter of the U.S. Supreme Court's thought-out and contemplated law by this also Honorable Ninth Circuit Court of Appeals.

16. Previous Cases. Have you filed any previous cases that the court of appeals has decided? If so, give the name and docket number of each case.

[NONE].

WHEREFORE, Appellant respectfully request this Honorable Ninth Circuit Court of Appeals, honor U.S. Supreme Court Justice Steven's and the majoritys opinion holdings pursuant to, Straub v. Hardin, 490 U.S. 536, 109 S.Ct. (1998), 104 L.Ed. 2d 582, 57 USLW 4554, and send this civil case back to the lower court with instructions to allow needed and timely discovery.

Respectfully submitted,

Dated: June 10th, 2022.

James T. Burke, VT.-#15001291

Name James T. Burke, Pro-se @
T.C.C.F.

19351 U.S. Hwy. 49 North
Tutwiler, MS. 38963-5249

[same as above]

Address

James Burke, Pro-se
Signature, James T. Burke, Pro-se
T.C.C.F.
19351 U.S. Hwy. 49 North
Tutwiler, MS. 38963-5249

June 10th, 2022.

Date

APPENDIX-C's

General Docket
United States Court of Appeals for the Ninth Circuit

Court of Appeals Docket #: 22-35357	Docketed: 05/06/2022		
Nature of Suit: 3550 Prisoner-Civil Rights	Termed: 11/17/2022		
James Burke v. State of Washington, et al			
Appeal From: U.S. District Court for Eastern Washington, Spokane			
Fee Status: Due			
Case Type Information:			
1) prisoner			
2) state			
3) civil rights			
Originating Court Information:			
District: 0980-2 : 2:22-cv-00004-MKD			
Trial Judge: Mary K. Dimke, Magistrate Judge			
Date Filed: 01/10/2022			
Date Order/Judgment: 04/19/2022	Date Order/Judgment EOD: 04/19/2022	Date NOA Filed: 05/06/2022	Date Rec'd COA: 05/06/2022
Prior Cases:			
None			
Current Cases:			
None			

APPENDIX-C

JAMES THOMAS BURKE (State Prisoner: 15001291)
Plaintiff – Appellant,

James Thomas Burke
[NTC Pro Se]
Tallahatchie County Correctional Facility
19351 U.S. Hwy 49, N
Tutwiler, 33963

v.

STATE OF WASHINGTON
Defendant – Appellee,

COUNTY OF SPOKANE
Defendant – Appellee,

SPOKANE COUNTY SHERIFF'S OFFICE
Defendant – Appellee,

DAVE REAGAN
Defendant – Appellee,

EASTERN WASHINGTON JOINT FUGITIVE TASK
FORCE
Defendant – Appellee,

U.S. MARSHAL SERVICE, Unknown other[s] in their
individual and official capacity[s]
Defendant – Appellee,

APPENDIX-C

JAMES THOMAS BURKE,

Plaintiff – Appellant,

v.

STATE OF WASHINGTON; COUNTY OF SPOKANE; SPOKANE COUNTY SHERIFF'S OFFICE; DAVE REAGAN; EASTERN WASHINGTON JOINT FUGITIVE TASK FORCE; U.S. MARSHAL SERVICE, Unknown other[s] in their individual and official capacity[s],

Defendants – Appellees.

APPENDIX-C

05/06/2022	<u>1</u>	DOCKETED CAUSE AND ENTERED APPEARANCE OF PRO SE APPELLANT AND NO APPEARANCE FOR APPELLEES. SEND MQ: No. The schedule is set as follows: Appellant James Thomas Burke opening brief due 07/05/2022. [12440487] (JMR) [Entered: 05/06/2022 01:42 PM]
05/06/2022	<u>2</u>	Filed Appellant James Thomas Burke letter dated 04/29/2022 re: Notice of appeal, questions on how to proceed. Paper filing deficiency: None. [12440707] (RL) [Entered: 05/06/2022 03:15 PM]
05/10/2022	<u>3</u>	Filed clerk order (Deputy Clerk: JW): A review of the district court's docket reflects that the district court has certified that this appeal is not taken in good faith. See 28 U.S.C. § 1915(a). This court may dismiss a case at any time, if the court determines the case is frivolous. See 28 U.S.C. § 1915(e)(2). Within 35 days after the date of this order, appellant must: (1) file a motion to dismiss this appeal, see Fed. R. App. P. 42(b), or (2) file a statement explaining why the appeal is not frivolous and should go forward. If appellant files a statement that the appeal should go forward, appellant also must: (1) file in this court a motion to proceed in forma pauperis, OR (2) pay to the district court \$505.00 for the filing and docketing fees for this appeal AND file in this court proof that the \$505.00 was paid. If appellant does not respond to this order, the Clerk will dismiss this appeal for failure to prosecute, without further notice. See 9th Cir. R. 42-1. If appellant files a motion to dismiss the appeal, the Clerk will dismiss this appeal, pursuant to Federal Rule of Appellate Procedure 42(b). If appellant submits any response to this order other than a motion to dismiss the appeal, the court may dismiss this appeal as frivolous, without further notice. If the court dismisses the appeal as frivolous, this appeal may be counted as a strike under 28 U.S.C. § 1915(g). The briefing schedule for this appeal is stayed. The Clerk shall serve on appellant: (1) a form motion to voluntarily dismiss the appeal, (2) a form statement that the appeal should go forward, and (3) a Form 4 financial affidavit. Appellant may use the enclosed forms for any motion to dismiss the appeal, statement that the appeal should go forward, and/or motion to proceed in forma pauperis. [12442986] (CKP) [Entered: 05/10/2022 01:34 PM]
05/20/2022	<u>4</u>	Filed Appellant James Thomas Burke letter dated 05/13/2022 re: Questions concerning case. Paper filing deficiency: None. (Sent copy of docket sheet) [12452889] (RL) [Entered: 05/20/2022 03:23 PM]
05/27/2022	<u>5</u>	Filed Appellant James Thomas Burke request for leave to proceed in forma pauperis. Deficiencies: None. Served on 05/20/2022. [12458745] (RL) [Entered: 05/27/2022 03:28 PM]
05/27/2022	<u>6</u>	Filed Appellant James Thomas Burke motion for leave to hear appeal on the original lower US District Court record. Deficiencies: None. Served on 05/20/2022. [12458746] (RL) [Entered: 05/27/2022 03:29 PM]
05/27/2022	<u>7</u>	Filed Appellant James Thomas Burke first and last motion for leave for a 30 day extension of time to file the opening brief on or before August 5, 2022. Deficiencies: None. Served on 05/20/2022. [12458752] (RL) [Entered: 05/27/2022 03:31 PM]
06/21/2022	<u>8</u>	Received original and 7 copies of Appellant James Thomas Burke opening brief of 8 pages (Informal: Yes). Served on 06/10/2022. Major deficiency: briefing is stayed. [12477201] (QDL) [Entered: 06/22/2022 01:22 PM]
06/21/2022	<u>9</u>	Filed Appellant James Thomas Burke addendum to Motion to proceed in forma pauperis; FORM 4. Dated 06/10/2022. Paper filing deficiency: None. [12477665] (RL) [Entered: 06/22/2022 03:36 PM]
06/27/2022	<u>10</u>	Filed Appellant James Thomas Burke letter dated 06/22/2022 re: Request for forms to file a petition for writ of cert in Supreme Court. Paper filing deficiency: None. [12482076] (RL) [Entered: 06/28/2022 02:10 PM]
07/11/2022	<u>11</u>	Filed Appellant James Thomas Burke letter dated 07/05/2022 re: Opening brief and copies sent on June 10, 2022. Paper filing deficiency: None. (Sent appellant copy of docket sheet.) [12490996] (QDL) [Entered: 07/11/2022 02:41 PM]

07/12/2022	<u>12</u>	Filed Appellant James Thomas Burke letter re: Request for confirmation of receipt of opening brief. Paper filing deficiency: None. (Copy of docket sheet sent to appellant on 07/11/2022.) [12493168] (QDL) [Entered: 07/13/2022 03:20 PM]
07/15/2022	<u>13</u>	Filed Appellant James Thomas Burke response to order to show cause dated 05/10/2022. Served on 06/06/2022. [12495101] (QDL) [Entered: 07/15/2022 02:43 PM]
07/15/2022	<u>14</u>	Filed Appellant James Thomas Burke motion to proceed In Forma Pauperis. Deficiencies: None. Served on 06/06/2022. [12495105] (QDL) [Entered: 07/15/2022 02:44 PM]
07/15/2022	<u>15</u>	Filed Appellant James Thomas Burke letter dated 07/11/2022 re: Opening brief sent on June 10, 2022. Paper filing deficiency: None. [12495117] (QDL) [Entered: 07/15/2022 02:47 PM]
07/15/2022	<u>16</u>	Filed Appellant James Thomas Burke letter dated 07/11/2022 re: Request for copy of documents. Paper filing deficiency: None. [12495120] (QDL) [Entered: 07/15/2022 02:48 PM]
07/15/2022	<u>17</u>	Sent Appellant a copy of the docket sheet in response to the letter filed on 07/15/2022. [12495178] (JR) [Entered: 07/15/2022 03:21 PM]
08/09/2022	<u>18</u>	Filed Appellant James Thomas Burke request to put case back on schedule for briefing (document formatted as letter). Deficiencies: None. Served on 07/27/2022. [12513277] (RL) [Entered: 08/09/2022 02:00 PM]
08/24/2022	<u>19</u>	Filed Appellant James Thomas Burke letter dated 08/16/2022 re: Case status. (Sent copy of docket sheet). Paper filing deficiency: None. [12525108] (RL) [Entered: 08/24/2022 11:55 AM]
11/17/2022	<u>20</u>	Filed order (WILLIAM C. CANBY, CONSUELO M. CALLAHAN and BRIDGET S. BADE) The district court has certified that this appeal is not taken in good faith. On May 10, 2022, this court ordered appellant to explain in writing why this appeal should not be dismissed as frivolous. See 28 U.S.C. § 1915(e)(2) (court shall dismiss case at any time, if court determines it is frivolous or malicious). Upon a review of the record, the response to the court's May 10, 2022 order, and the opening brief, we conclude this appeal is frivolous. We therefore deny appellant's motions to proceed in forma pauperis (Docket Entry Nos. [5] and [14]) and dismiss this appeal as frivolous, pursuant to 28 U.S.C. § 1915(e)(2). All other pending motions are denied as moot. No further filings will be entertained in this closed case. DISMISSED. [12590674] (OC) [Entered: 11/17/2022 04:29 PM]
12/05/2022	<u>21</u>	Filed Appellant James Thomas Burke motion to reconsider (document titled: petition for rehearing en banc). Deficiencies: No further filings per 11/17/22 order. Served on 11/29/2022. (Sent copy of docket sheet & 11/17/22 order) [12603307] (RL) [Entered: 12/06/2022 11:16 AM]

APPENDIX-C

1

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

NOV 17 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

JAMES THOMAS BURKE,

Plaintiff-Appellant,

v.

STATE OF WASHINGTON; et al.,

Defendants-Appellees.

No. 22-35357

D.C. No. 2:22-cv-00004-MKD
Eastern District of Washington,
Spokane

ORDER

Before: CANBY, CALLAHAN, and BADE, Circuit Judges.

The district court has certified that this appeal is not taken in good faith. On May 10, 2022, this court ordered appellant to explain in writing why this appeal should not be dismissed as frivolous. *See* 28 U.S.C. § 1915(e)(2) (court shall dismiss case at any time, if court determines it is frivolous or malicious).

Upon a review of the record, the response to the court's May 10, 2022 order, and the opening brief, we conclude this appeal is frivolous. We therefore deny appellant's motions to proceed in forma pauperis (Docket Entry Nos. 5 and 14) and dismiss this appeal as frivolous, pursuant to 28 U.S.C. § 1915(e)(2).

All other pending motions are denied as moot.

No further filings will be entertained in this closed case.

DISMISSED.

APPENDIX-C

1

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

DEC 09 2022

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

JAMES THOMAS BURKE,
Plaintiff - Appellant,
v.
STATE OF WASHINGTON; et al.,
Defendants - Appellees.

No. 22-35357

D.C. No. 2:22-cv-00004-MKD
U.S. District Court for Eastern
Washington, Spokane

MANDATE

The judgment of this Court, entered November 17, 2022, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Nixon Antonio Callejas Morales
Deputy Clerk
Ninth Circuit Rule 27-7

APPENDIX-C's

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

James T. Burke, VT. -#15001291 9th Cir. Case No. 22-35357

Appellant(s),

vs.

District Court or

BAP Case No. 2:22-cv-00004-MKD

State of Washington; County of Spokane; Spokane County Sheriff's Office,
Appellee(s), et. al. individual and official capacity[s],

APPELLANT'S INFORMAL OPENING BRIEF

(attach additional sheets as necessary, up to a total of 50 pages including this form)

JURISDICTION. This information helps the court determine if it can review your

1. Timeliness of Appeal:

a. What is the date of the judgment or order that you want this court to review? April 19th, 2022.

b. Did you file any motion, other than for fees and costs, after the judgment was entered? Answer yes or no: Yes.

• If you did, on what date did you file the motion? April 29th, 2022.

• For prisoners or detainees, what date did you give the motion to prison authorities for mailing? April 29th, 2022.

• What date did the district court or bankruptcy appellate panel (BAP) decide the motion that you filed after judgment? April 19th, 2022.

c. What date did you file your notice of appeal? April 29th, 2022.

• For prisoners or detainees, what date did you give your notice of appeal to prison authorities for mailing? April 29th, 2022.

APPENDIX-D .

FACTS. Include all facts that the court needs to know to decide your case.

2. What are the facts of your case? Appellant relied on the fact that the U.S. Supreme Court held that the Statue of limitation periods did NOT count until prisoner's conviction is invalidated. Wood v. Candela, 47 F.3d 545 *1995, U.S. App. LEXIS-#2495. Appellant's conviction is very close to being invalidated and elected to start the discovery process pursuant to the attempted murder of him by Defendant's which resulted in temporary coma and brain damage and a 25" medical metal rod down the center of the left lower leg, metal plates and pins the left ankle, resulting in brain swelling pain-medication treatment, with-held discovery will document. (See lower court file of exhibits).

3. Because Appellant was and still is recovering from the brain injury, he further relied on: "Upon grant of certiorari, the United States Supreme Court, Justice Stevens, Held that State Statutes suspending limitations periods for those under legal disability, including prisoners, until (1) one year after disability has been removed was consistent with § 1983, and thus, inmate's action was NOT time barred." Hardin v. Straub, 490 U.S. 536, 109 S.Ct. (1998), 104 L.Ed. 2d 582, 57 USLW 4554.

4. Appellant additionally relied on the legal facts that under Calif. law, the Statue of limitations is tolled if the Appellant is/was imprisoned when action accrues. Cal. Civ. Proc. code § 352(a)(3); Elliott, 25 F.3d at 802, a disability provision that tolls the Statute of limitations when a person is imprisoned on a criminal charge, as Appellant has been since May 24th-25th, 2005-Spokane, WA. incarceration.

5. The court[s] have held that "actual, uninterrupted incarceration is the touchstone" for applying Calif. tolling provision for the disability of imprisonment" Id. Elliott v. City of Union City, 25 F.3d 800, 803 (9th Cir. 1994), the Statue of limitations is tolled if Appellant is/was imprisoned--

on a criminal charge, because inmates litigate under serious disadvantages. People v. Burnick, 14 Cal. 3d 306, 535 P.2d 352, 363, 121 Cal. Rptr. 488 (Cal. 1975); Rand v. Rowland, 154 F.3d 952, 958 (9th Cir. 1998); Elliot, 25 F.3d at 803; Hurst v. Hederman, 451 F. Supp. 1354, 1355 (N.D. Ill. 1978) ("Continously imprisoned since his arrest, he is entitled to tolling under § 4.16.190 for the period he was imprisoned"); Bianchi v. Bellingham Police Dept., 909 F.2d 1316* 1990 App. LEXIS-#12388 1318 (9th Cir. 1990), Appellant contends that § 4.16.190 applies because he was actually continually incarcerated on a criminal charge, less than his natural life so that there is a possibility of parole under Wash. Rev. Code § 9.95.115 (1989).

6. The U.S. Supreme Court's clear and fair holdings in Hardin v. Straub, 490 U.S. 536, 109 S.Ct. (1998), pursuant to State Statutes suspending limitations periods for those under legal disability, including prisoner's, until one year after disability has been removed was consistent with § 1983, and thus, inmates action was NOT time barred, conflicts with Gausvik v. Perez, 392 F.3d 1006, 1009 (9th Cir. 2004), because Gausvik, 392 F.3d at 1009, is a clear and bias misapplication of original correct federal law as was thought-out and articulated by the United States Supreme Court Justice[s] and now causes a un-lawful circuit split of law that originally had been clear and established by our U.S. Supreme Court, leading to the inmate bias lower federal district court's dismissal with prejudice conflicts with not only the U.S. Supreme Court's holdings in Hardin v. Straub, 490 U.S. 536, 109 S.Ct. (1998), but also; Wood v. Candela, 47 F.3d 545 *(1995), U.S. App. LEXIS-#2495, ("Statue of limitations did NOT count until conviction is invalidated"), both of which case's clearly conflict with Gausvik v. Perez, 392 F.3d 1006, 1009 (9th Cir. 2004), as said-----

Gausvik, 392 F.3d at 1009, unlawfully & biasly attempts to limit the rights of the People of this Country and is a clear misapplication of U.S. Supreme Court federal law as was originally articulated by that court, who originally established it, and is now being circumvented by Gausvik, 392 F.3d at 1009, which not only attempts to unlawfully limit the rights of the U.S. people, but also causes a circuit split of the originally established federal U.S. Supreme Court law pursuant to both the holdings Appellant relied on that now, AGAIN conflict with each other and violates both holdings in Hardin v. Straub, 490 U.S. 536, 109 S.Ct. (1998) & Wood v. Candela, 47 F.3d 545 *1995, U.S. App. LEXIS-#2495, together with them case's SHEPERDIZED-CASE[S], See also Board of Regents of Univ. of [**2374] State of N.Y. v. Tomanio, 446 U.S. 478, 64 L.Ed. 2d 440, 100 S.Ct. 1790 (1980), Hardin v. Straub, 490 U.S. 536, 104 L.Ed. 2d 582, 109 S.Ct. (1989), Heck v. Humphrey, 512 U.S. 477.

7. The U.S. Constitution and laws of the Nation are to be accorded 'a sweep as broad as it's language', Mitchum v. Foster, 407 U.S. 225, 239 (1972); U.S. v. Price, 383 U.S. 787, 801 (1966); Felder v. Casey, 487 U.S. 131, 139 (1988) & Wash. Rev. Code § 4.16.190 (1987).

8. The Fourth Amendment requires Police officers making an arrest of un-armed Appellant, to use only an amount of force that is objectively reasonable in light of the (un-armed Appellant's) circumstances.

Tennessee v. Garner, 471 U.S. 1, 7-8, 105 S.Ct. 1694, 85 L.Ed. 2d 1 (1985). ("Neither tackling nor punching a suspect to make an arrest necessarily constitutes excessive force", but "even where some force is justified, the amount actually used may be excessive"). Blankenhorn v. City of Orange, 485 F.3d 463, 477 (9th Cir. 2007). (internal-quotations omitted).

PROCEEDINGS BEFORE THE DISTRICT COURT OR THE BAP. In this section, we ask you about what happened before you filed your notice of appeal with this court.

9. What did you ask the district court or the BAP to do—for example, did you ask the court to award money damages, issue an injunction, or provide some other type of relief? **See attached docket sheets, ie. Filed USC 1983 complaint pursuant to the holdings of Hardin v. Straub, 490 U.S. 536, 109 S.Ct. (1998) and requested discovery after recovering enough from brain injury/coma Defendant's caused Appellant. (See lower Court complaint and exhibits of New Paper clipping of how Defendant's ran their patrol van into Appellant at approx. 50 miles an hour while on his bike crossing a parking lot), which amounted to attempted murder and broken bones, metal plates, left lower 25" leg rod and cast & stitches.**

10. What legal claim or claims did you raise in the district court or at the BAP? **Violation of the 4th, 5th, 8th & 14.1 Amendment[s] to the U.S. Consti.**
Please review original lower court records.

11. Exhaustion of Administrative Remedies. For prisoners, did you use up all administrative remedies for each claim before you filed your complaint in the district court? If you did not, please tell us why.

Argued and exhausted all case's cited now and more in the lower Spokane, WA. federal district court.

PROCEEDINGS BEFORE THE COURT OF APPEALS. In this section, we ask you about issues related to this case before the court of appeals and any previous cases you have had in this court.

12. What issues are you asking the court to review in this case? What do you think the district court or the BAP did wrong?

See again FACTS, at paragraph[s]-#2 to #8. ie. The district court violated U.S. Supreme Court law in a attempt to under-mine Appellant's rights and the same rights of others as out-lined pursuant to cited; Hardin v. Straub, 490 U.S. 536, 109 S.Ct. (1998).

13. Did you present all issues listed in Question 6 to the district court or the BAP?

Answer yes or no: YES, Appellant also request leave to allow this case be reviewed on the original record without the use of a printed case.

If not, why not?

14. What law supports these issues on appeal? (You may refer to cases and statutes, but you are not required to do so.)

PLEASE REVIEW FACTS PARAGRAPHS-#2, to #8, [ON PAGE-#2, @ FACTS].

15. Other Pending Cases. Do you have any other cases pending in the court of appeals? If so, give the name and docket number of each case.

[NO].

CONCLUSION

The Honorable majority opinion of the United States Supreme Court holdings pursuant to, Straub v. Hardin, 490 U.S. 536, 109 S.Ct. (1998), 104 L.Ed. 2d 582, 57 USLW 4554, should be followed to the letter of the U.S. Supreme Court's thought-out and contemplated law by this also Honorable Ninth Circuit Court of Appeals.

16. Previous Cases. Have you filed any previous cases that the court of appeals has decided? If so, give the name and docket number of each case.

[NONE].

WHEREFORE, Appellant respectfully request this Honorable Ninth Circuit Court of Appeals, honor U.S. Supreme Court Justice Steven's and the majoritys opinion holdings pursuant to, Straub v. Hardin, 490 U.S. 536, 109 S.Ct. (1998), 104 L.Ed. 2d 582, 57 USLW 4554, and send this civil case back to the lower court with instructions to allow needed and timely discovery.

Respectfully submitted,

Dated: June 10th, 2022.

James T. Burke, VT.-#15001291

Name James T. Burke, Pro-se @
T.C.C.F.

19351 U.S. Hwy. 49 North
Tutwiler, MS. 38963-5249

[same as above]

Address

James Burke, Pro-se
Signature, James T. Burke, Pro-se
T.C.C.F.
19351 U.S. Hwy. 49 North
Tutwiler, MS. 38963-5249

June 10th, 2022.

Date

APPENDIX-D.

Westlaw

APPENDIX-E

109 S.Ct. 1998
 490 U.S. 536, 109 S.Ct. 1998, 104 L.Ed.2d 582, 57 USLW 4554
 (Cite as: 490 U.S. 536, 109 S.Ct. 1998)

Page 1

Supreme Court of the United States
 Tyrone Victor HARDIN, Petitioner
 v.
 Dennis STRAUB.

No. 87-7023.
 Argued March 22, 1989.
 Decided May 22, 1989.

Inmate brought § 1983 action alleging that prison authorities deprived him of federal constitutional rights. The United States District Court for the Eastern District of Michigan, dismissed complaint and appeal was taken. The Court of Appeals for the Sixth Circuit, 836 F.2d 549, in an unpublished opinion, affirmed. Upon grant of certiorari, the United States Supreme Court, Justice Stevens, held that state statutes suspending limitations periods for those under legal disability, including prisoners, until one year after disability has been removed was consistent with § 1983, and thus, inmate's action was not time barred.

Reversed and remanded.

West Headnotes

[1] Federal Courts 170B ~~422.1~~

170B Federal Courts
 170BVI State Laws as Rules of Decision
 170BVI(C) Application to Particular Matters
 170BK422 Limitation Laws
 170Bk422.1 k. In General. Most Cited Cases
 (Formerly 170Bk422)

Federal courts should not unravel state statute of limitations rules unless their full application would defeat goals of federal statute at issue.

[2] Limitation of Actions 241 ~~75~~

241 Limitation of Actions

241III Computation of Period of Limitation
 241III(C) Personal Disabilities and Privileges
 241k75 k. Conviction or Imprisonment for Crime. Most Cited Cases

State statute that suspended limitations periods for persons under legal disability, including prisoners, until one year after disability has been removed was consistent with § 1983's remedial purpose and thus, inmate's § 1983 action was not time barred though it had been filed after expiration of three-year statute of limitations period for personal injury actions. 42 U.S.C.A. § 1983; M.C.L.A. §§ 600.5851, 600.5851 note.

****1999 Syllabus FN***

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

*536 In 1986, petitioner, who is incarcerated in a Michigan state prison, filed a *pro se* complaint under 42 U.S.C. § 1983 alleging that prison authorities had deprived him of his federal constitutional rights during 1980 and 1981. The Federal District Court *sua sponte* dismissed the complaint because it had been filed after the expiration of Michigan's 3-year statutory limitations period for personal injury actions, which is applicable in federal civil rights actions under 42 U.S.C. § 1988 and this Court's decisions. The Court of Appeals affirmed, refusing to apply a Michigan statute that suspends limitations periods for persons under a legal disability, including prisoners, until one year after the disability has been removed.

Held: A federal court applying a state statute of limitations to an inmate's federal civil rights action should give effect to the State's provision tolling the limitations period for prisoners. The Court of

See: Woods v. Candela, 47 F.3d 545 * 1995
 U.S. App. Lexis-2475/U.S. Supreme Ct.
 held Statute of Limitation did Not Count
 until Conviction is invalidated. APPENDIX-E

109 S.Ct. 1998
 490 U.S. 536, 109 S.Ct. 1998, 104 L.Ed.2d 582, 57 USLW 4554
 (Cite as: 490 U.S. 536, 109 S.Ct. 1998)

Page 2

Appeals' ruling to the contrary conflicts with *Board of Regents, University of New York v. Tomanio*, 446 U.S. 478, 100 S.Ct. 1790, 64 L.Ed.2d 440, which held that limitations periods in § 1983 suits are to be determined by reference to the appropriate state statute of limitations and the coordinate tolling rules, as long as the state law would not defeat the goals of the federal law at issue. The Michigan tolling statute is consistent with § 1983's remedial purpose, since some inmates may be loathe to sue adversaries to whose daily supervision and control they remain subject, and even those who do file suit may not have a fair opportunity to establish the validity of their allegations while they are confined. Pp. 2000-2003.

836 F.2d 549 (C.A.6 1987) reversed and remanded.

STEVENS, J., delivered the opinion for a unanimous Court.

Douglas R. Mullkoff, by appointment of the Court, 488 U.S. 953, argued the cause for petitioner. With him on the briefs were *Paul D. Reingold* and *Robert F. Gillett*.

Louis J. Caruso, Solicitor General of Michigan, argued the cause for respondent. With him on the brief were *Frank J. Kelley*, Attorney General, and *James L. Stropkai*, Assistant Attorney General.

*537 Justice STEVENS delivered the opinion of the Court.

This case presents the question whether a federal court applying a state statute of limitations to an inmate's federal civil rights action should give effect to the State's provision tolling the limitations period for prisoners.

Petitioner is incarcerated in a Michigan state prison. In 1986 he filed a *pro se* complaint pursuant to 42 U.S.C. § 1983, alleging that for approximately 180 days in 1980 and 1981 he had been held in solitary confinement in violation of his federal constitutional rights.^{FN1} The District Court *sua*

sponte dismissed the complaint because it had been filed after the expiration of Michigan's 3-year statutory limitations period for personal injury actions. The Court of Appeals affirmed. 836 F.2d 549 (CA6 1987). Following its 3-day-old decision in **2000 *Higley v. Michigan Department of Corrections*, 835 F.2d 623 (CA6 1987), the court refused to apply a Michigan statute that suspends limitations periods for persons under a legal disability until one year after the disability has been removed. Because that holding appeared to conflict with our decision in *Board of Regents, University of New York v. Tomanio*, 446 U.S. 478, 100 S.Ct. 1790, 64 L.Ed.2d 440 (1980), we granted certiorari.^{FN2} 488 U.S. 887, 109 S.Ct. 217, 102 L.Ed.2d 209 (1988). We now reverse.

FN1. The complaint alleged that petitioner had never received a hearing on his detention, even though an administrative regulation provided:

“ ‘A resident shall be afforded an opportunity for a hearing ... before being classified to administrative segregation (sic); however, a resident may be temporarily held in segregation status pending a hearing upon order of the institution head, or at the residents’ [sic] request. This period may not exceed four (4) weekdays.’ ” Michigan Department of Corrections – Administrative Rule 791.4405, as quoted in App. 7.

Petitioner contends that the detention without a hearing violated the Eighth and Fourteenth Amendments to the Federal Constitution. *Id.*, at 8.

FN2. Since *Tomanio* was decided, other Courts of Appeals considering the timeliness of inmates' § 1983 actions regularly have applied States' tolling provisions to statutory limitations periods. See, e.g., *Hughes v. Sheriff of Fall River County Jail*, 814 F.2d 532 (CA8) (despite South

Dakota statute's express exclusion of federal civil rights suits, holds plaintiff entitled to benefit of State's tolling provision), appeal dism'd, 484 U.S. 802, 108 S.Ct. 46, 98 L.Ed.2d 10 (1987); *Bailey v. Faulkner*, 765 F.2d 102 (CA7 1985) (applying *Tomanio*, holds Indiana tolling statute not inconsistent with § 1983's policies, though "hopelessly archaic" given inmates' access to federal courts); *Whitson v. Baker*, 755 F.2d 1406 (CA11 1985) (*per curiam*) (affirms State Supreme Court opinion interpreting Alabama statute to toll limitations period for convicted prisoners, despite state court's doubt that provision necessary); *Stephan v. Dowdle*, 733 F.2d 642 (CA9 1984) (mentioning *Tomanio* and state-court interpretation of state law, overrules Circuit precedent and holds Arizona's tolling provision applies to inmates' actions pursuant to § 1983); *Turner v. Evans*, 721 F.2d 341 (CA11 1983) (*per curiam*) (without discussing *Tomanio*, applies Georgia tolling provision); *May v. Enomoto*, 633 F.2d 164 (CA9 1980) (citing pre-*Tomanio* Circuit precedent, gives effect to California's tolling statute); *Miller v. Smith*, 625 F.2d 43 (CA5 1980) (*per curiam*) (in light of *Tomanio*, reverses earlier ruling in same case and holds Texas' tolling statute applies to prisoner's civil rights suit); *Brown v. Bigger*, 622 F.2d 1025 (CA10 1980) (*per curiam*) (without mentioning *Tomanio* applies Kansas tolling provision to inmate's § 1983 suit).

*538 [1] In enacting 42 U.S.C. § 1988 Congress determined that gaps in federal civil rights acts should be filled by state law, as long as that law is not inconsistent with federal law.^{FN3} See *Burnett v. Grattan*, 468 U.S. 42, 47-48, 104 S.Ct. 2924, 2928-2929, 82 L.Ed.2d 36 (1984). Because no federal statute of limitations governs, federal courts routinely measure the timeliness of federal

civil rights suits by state law. *Id.*, at 49, 104 S.Ct., at 2929; *Chardon v. Fumero Soto*, 462 U.S. 650, 655-656, 103 S.Ct. 2611, 2615-2616, 77 L.Ed.2d 74 (1983); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 464, 95 S.Ct. 1716, 1722, 44 L.Ed.2d 295 (1975). This tradition of borrowing analogous limitations statutes, cf. *O'Sullivan v. Felix*, 233 U.S. 318, 34 S.Ct. 596, 58 L.Ed. 980 (1914), is based on a congressional decision to defer to "the State's judgment on the proper balance between the policies of repose and the substantive policies of enforcement embodied in the state cause of action." *Wilson v. Garcia*, *539 471 U.S. 261, 271, 105 S.Ct. 1938, 1944, 85 L.Ed.2d 254 (1985).^{FN4} "In virtually all statutes of limitations the chronological length of the limitation period is interrelated with provisions regarding tolling, revival, and questions of application." *Johnson, supra*, 421 U.S., at 464, 95 S.Ct., at 1722. Courts thus should not unravel state limitations rules unless their full application would defeat the goals of the federal statute at issue. See, e.g., *Wilson, supra*, 471 U.S., at 269, 105 S.Ct., at 1943; **2001 *Chardon, supra*, 462 U.S., at 657, 103 S.Ct., at 2616:

FN3. Section 1988 provides that in the event a federal civil rights statute is "deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause...."

FN4. Cf. *Chardon v. Fumero Soto*, 462 U.S. 650, 662, 103 S.Ct. 2611, 2619, 77 L.Ed.2d 74 (1983) ("Until Congress enacts a federal statute of limitations to govern § 1983 litigation, comparable to the statute it ultimately enacted to solve the analogous

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problems presented by borrowing state law in federal antitrust litigation, federal courts must continue the practice of 'limitations borrowing' outlined in *Tomanio* " (footnote omitted).

These principles were invoked in *Board of Regents, University of New York v. Tomanio, supra*, to review a contention that a § 1983 action was barred by New York's 3-year limitations statute. The District Court and the Court of Appeals had rejected the defense by relying on a "federal tolling rule" not contained among the tolling provisions the state legislature had codified with its limitations periods. *Id.*, 446 U.S., at 482, 486, 100 S.Ct., at 1794, 1796. This Court reversed. Limitations periods in § 1983 suits are to be determined by reference to the appropriate "state statute of limitations and the coordinate tolling rules"; New York's legislative choices in this regard were therefore "binding rules of law." *Id.*, at 484, 100 S.Ct., at 1795. Since the State's rules did not defeat either § 1983's chief goals of compensation and deterrence ^{FN5} or its subsidiary goals of uniformity and federalism,^{*540} the Court held that Tomanio's suit was time barred. *Id.*, at 488-492, 100 S.Ct., at 1797-1799.

FN5. We reiterated just last Term that

"the central objective of the Reconstruction-Era civil rights statutes ... is to ensure that individuals whose federal constitutional or statutory rights are abridged may recover damages or secure injunctive relief." *Burnett v. Grattan*, 468 U.S. 42, 55, 104 S.Ct. 2924, 2932, 82 L.Ed.2d 36 (1984). Thus, § 1983 provides 'a uniquely federal remedy against incursions ... upon rights secured by the Constitution and laws of the Nation,' *Mitchum v. Foster*, 407 U.S. 225, 239, 92 S.Ct. 2151, 2160, 32 L.Ed.2d 705 (1972), and is to be accorded 'a sweep as broad as its language.' *United States v. Price*, 383 U.S. 787, 801, 86 S.Ct. 1152, 1160, 16 L.Ed.2d 267

(1966)." *Felder v. Casey*, 487 U.S. 131, 139, 108 S.Ct. 2302, 2307, 101 L.Ed.2d 123 (1988).

It is undisputed that the limitations period applicable to this case is three years, as established in Michigan's statute governing personal injury actions. ^{FN6} See *Owens v. Okure*, 488 U.S. 235, 109 S.Ct. 573, 102 L.Ed.2d 594 (1989); *Wilson v. Garcia, supra*. Since 1846, however, the Michigan Legislature has enacted provisions tolling the onset of limitations periods for prisoners and others suffering from legal disabilities.^{FN7} The contemporary counterpart provides:

FN6. The pertinent Michigan limitations provision states:

"The period of limitations is 3 years after the time of the death or injury for all other actions to recover damages for the death of a person, or for injury to a person or property." Mich.Comp.Laws Ann. § 600.5805(8) (1987).

FN7. Limitations periods applicable to various "personal actions" did not begin accruing for "any person ... within the age of twenty-one years, or a married woman, insane, imprisoned in the state prison, or absent from the United States" until "after the disability shall be removed." Mich.Rev.Stat., Tit. 26, ch. 140, § 6 (1846). Similar tolling provisions protected "disabled" defendants in ejectment suits and plaintiffs in all real property actions. *Id.*, Tit. 23, ch. 108, § 39; *id.*, Tit. 26, ch. 139, § 5.

"[I]f the person first entitled to make an entry or bring an action is under 18 years of age, insane, or imprisoned at the time the claim accrues, the person or those claiming under the person shall have 1 year after the disability is removed through death or otherwise, to make the entry or bring the action although the period of limitations has run."

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Mich.Comp.Laws Ann. § 600.5851(1) (1987).^{FN8}

FN8. Other States currently allowing some tolling of the limitations period for prisoners' lawsuits include: Ala.Code § 6-2-8 (1975); Ark.Code Ann. § 16-56-116 (1987) (if "imprisoned beyond the limits of the state"); Cal.Civ.Proc.Code Ann. § 352 (West Supp.1989); Haw.Rev.Stat. § 657-13 (1985) (does not apply to "actions against the sheriff, chief of police, or other officers"); Idaho Code § 5-230 (Supp.1988); Ill.Rev.Stat., ch. 110, ¶ 13-211 (1987) (excludes claims "against the Illinois Department of Corrections or any past or present employee or official of the Department of Corrections"); Kan.Stat.Ann. § 60-515 (1983) (inapplicable to prisoner who "has access to the court for purposes of bringing an action"); Me.Rev.Stat.Ann., Tit. 14, § 853 (Supp.1988); Minn.Stat. § 541.15 (1988); Mo.Rev.Stat. § 516.170 (1986); Mont.Code Ann. § 27-2-401 (1987); Neb.Rev.Stat. § 25-213 (1985); N.D.Cent.Code § 28-01-25 (Supp.1987); Ohio Rev.Code Ann. § 2305.16 (1981); Ore.Rev.Stat. § 12.160 (1987); R.I.Gen.Laws § 9-1-19 (Supp.1988); S.C.Code § 15-3-40 (Supp.1988); Vt.Stat.Ann., Tit. 12, § 551 (Supp.1988); Va.Code § 8.01-229 (Supp.1988) (limited to actions by "convict ... against his committee"); Wash.Rev.Code § 4.16.190 (1987); Wis.Stat. § 893.16 (1985-1986). Accord, D.C.Code § 12-302 (1981).

*541 Having passed this statute in 1961,^{FN9} the Michigan Legislature revised it in 1972 **2002 without altering its effect on prisoners' lawsuits. A legislative committee recognized:

FN9. 1961 Mich.Pub. Acts, No. 236, § 5851 (effective Jan. 1, 1963).

" '[E]ven prisoners can bring civil actions,

though they may not be allowed to be personally present, so it is not as necessary to provide long periods after the removal of the disability in which to sue as it was in the past when these disabilities were considerably more real. Nevertheless, it was considered better to allow a short period after the termination of the disability in which the person under the disability could bring an action.' " *Hawkins v. Justin*, 109 Mich.App. 743, 748, 311 N.W.2d 465, 467 (1981) (*per curiam*), quoting committee comment following Mich.Comp.Laws Ann. § 600.5851, p. 914 (1968).

Likewise, 1986 amendments to the provision did not affect its applicability to prison inmates. See historical note following Mich.Comp.Laws Ann. § 600.5851, p. 540 (1987).

In *Hawkins v. Justin, supra*, the Michigan Court of Appeals employed § 600.5851 to toll a state-law libel action by a plaintiff who was incarcerated in a state correctional institution. "[T]he purpose of the statute is to provide prisoners with additional time to assert their legal rights," the state court concluded, "and this purpose could reasonably be based upon the fact that prisoners have restricted access to the judicial system due to their confinement." *Id.*, at 748-749, 311 N.W.2d, at 467.

*542 The Court of Appeals for the Sixth Circuit nonetheless refused to apply the tolling provision to inmates' § 1983 suits in this case and in *Higley v. Michigan Department of Corrections*, 835 F.2d 623 (1987). Although it recognized in *Higley* that it was "obligated to apply state tolling statutes to § 1983 actions, as long as the result is not inconsistent with federal law or policy," *id.*, at 624, the court held that "application of a lengthy tolling period is clearly counterproductive to sound federal policy in attempting to deal with § 1983 claims as promptly as practicable," *id.*, at 626-627.^{FN10} Tolling is neither inconsistent with nor required by § 1983's goal of compensating persons whose constitutional rights have been violated, the court stated. Its result thus turned on two other interests, which it discussed in tandem: the settled § 1983

