

NO. 23-1121

ORIGINAL

In the  
Supreme Court of the United States

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BRENT EDWARD CLARK,

*Petitioner,*

v.

VIBEKE DANKWA,

*Respondent.*

On Petition for a Writ of Certiorari to the  
United States Court of Appeals for the Fourth Circuit

**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

The district court *sua sponte* raised the statutes of limitations affirmative defense to in part dismiss the Petitioner's *Bivens* action. The district court also ignored the Petitioner's statutory right to motion for a remand of his removed *Bivens* action. Secondly, the circuit court's conclusion that the Petitioner's *Bivens* action is precluded because the FTCA judgment bar had been triggered by the Petitioner's previously dismissed FTCA claim is at odds with Supreme Court precedents.

### The Questions Presented Are:

- 1) Did the district court make two reversible errors in 1) *sua sponte* raising the statutes of limitations affirmative defense to dismiss the Petitioner's *Bivens* action and 2) ignoring the Petitioner's statutory right to remand his removed *Bivens* action?
- 2) Was the Petitioner's previously dismissed FTCA claim a Section 2680 "Exception" to the FTCA that did not trigger the FTCA judgment bar?

## **LIST OF PROCEEDINGS**

U.S. Court of Appeals for the Fourth Circuit  
No. 23-1300

Brent Clark, *Plaintiff-Appellant*, v. Dr. Vibeke Dankwa,  
individually and in her official capacity, *Defendant-  
Appellee*.

Date of Final Opinion: October 26, 2023

Date of Rehearing Denial: January 17, 2024

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U.S. District Court for the Northern District of  
West Virginia at Wheeling

No. 5:23-CV-9

Brent Clark, *Plaintiff*, v. Dr. Vibeke Dankwa, individ-  
ually and in her official capacity, *Defendant*.

Date of Final Order: January 19, 2023

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## **PETITION FOR A WRIT OF CERTIORARI**

The Petitioner, Brent Clark, respectfully petitions this honorable Court for a writ of certiorari to preserve the protections afforded by the Eighth and Fourteenth Amendments to the Constitution. The circuit court has so far departed from the accepted and usual course of judicial proceedings, and sanctioned such departure by a lower court, as to call for an exercise of this Court's supervisory power.



## **OPINIONS BELOW**

The decision of the district court of the Northern District of West Virginia dismissing the Petitioner's *Bivens* action is included at App.4a dated January 19, 2023. The per curiam opinion of the Fourth Circuit Court of Appeals affirming the district court's dismissal is included at App.1a dated October 26, 2023



## **JURISDICTION**

The Order by the Fourth Circuit Court of Appeals denying the Petitioner's request for a rehearing and rehearing en banc is included at App.29a dated January 17, 2024. The Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).



## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

### **U.S. Const. amend. VIII**

Excessive bail shall not be required, nor excessive fine imposed, nor cruel and unusual punishment inflicted.

### **U.S. Const. amend. XIV**

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

### **Federal Tort Claims Act**

#### **28 U.S.C. § 1346(b)**

- (1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person,

would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

- (2) No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act (as defined in section 2246 of title 18).

**Federal Tort Claims Act Judgment Bar**  
**28 U.S.C. § 2676**

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

**Federal Tort Claims Act Exceptions**  
**28 U.S.C. § 2680(a)**

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

**42 U.S.C. § 250**

The Service shall supervise and furnish medical treatment and other necessary medical, psychiatric, and related technical and scientific services in penal and correctional institutions of the United States.

**28 U.S.C. § 1254(1)**

By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

**STATEMENT OF THE CASE**

Pursuant to the Eighth Amendment of the Constitution, cruel and unusual punishment shall not be inflicted. This honorable Court in *Carlson v. Green*, 446 U.S. 14 (1980) held that deliberate indifference to the serious medical needs of incarcerated people — a population that is disproportionately sick and poor — violates the Eighth Amendment prohibition against cruel and unusual punishment. While incarcerated at a federal prison the Petitioner was injured after falling. The Respondents, public health service employees, were deliberately indifferent to the Petitioner's serious medical needs when the Respondents furnished no medical care whatsoever for the Petitioner's injuries. As a result of receiving no medical care whatsoever for his injuries the Petitioner suffered permanent brain damage. The Respondent's deliberate indifference to the Petitioner's serious medical needs violated the injured Petitioner's Eighth Amendment right that prohibits cruel and unusual punishment.

Initially, the Petitioner filed a Federal Tort Claim Act claim because of his injuries (hereinafter “FTCA”). *See Appendix 6 at App.34a*, the Petitioner’s FTCA Complaint. The Petitioner’s FTCA claim was based upon the omissions of government employees to furnish adequate medical care to the Petitioner while executing a statute. Because the Petitioner’s FTCA claim was based upon the omissions of government employees executing a statute the Petitioner’s FTCA claim represented a Section 2680 “Exception” to the FTCA. The United States did not waive sovereign immunity to the Petitioner’s FTCA claim because the Petitioner’s FTCA claim represented a Section 2680 “Exception” to the FTCA. *See Appendix 5 at App.31a*, 28 U.S.C. § 2680. The district court did not dismiss the Petitioner’s FTCA claim because it was a Section 2680 “Exception” to the FTCA but instead granted the defendants summary judgment. *See Appendix 3 at App.20a*, the district court’s summary judgment Order in the Petitioner’s dismissed FTCA claim.

The Petitioner appealed the district courts summary dismissal of his FTCA claim to the circuit court. The circuit court without a written opinion affirmed the district court’s dismissal of the Petitioner’s FTCA claim. The Petitioner then filed the instant *Bivens* action in West Virginia state court which was removed to the district court. The Petitioner’s *Biven* action involved the same transactions and occurrences from the Petitioner’s dismissed FTCA claim. Seven days after removal, before the defense could plead, the district court *sua sponte* raised the statutes of limitations affirmative defense and dismissed the Petitioner’s *Bivens* action in part because of the limitations. *See Appendix 2 at App.4a*, the district court’s dismissal

Order of the Petitioner's *Bivens* action after raising the statutes of limitations affirmative defense. The Petitioner appealed the district court's *sua sponte* dismissal of the Petitioner's *Bivens* action to the circuit court. The circuit court in affirming the district court's dismissal of the Petitioner's *Bivens* action stated it did not rely upon the district courts' reasons for dismissal of the Petitioner's *Bivens* action. Instead, the circuit court stated it relied on completely different grounds supported by the record. *See Appendix 1 at App.1a*, the circuit court's dismissal Order.

The circuit court held it dismissed the Petitioner's *Bivens* action because the FTCA judgment bar<sup>1</sup> had been triggered by the Petitioner's previously dismissed FTCA claim. The circuit court also held because the defendants had been granted summary judgment in the Petitioner's dismissed FTCA claim, claim preclusion barred the Petitioner's instant *Bivens* action in addition to the FTCA judgment bar. The Petitioner requested a rehearing of the circuit court's dismissal. The petition for rehearing was denied by the circuit court. *See Appendix 4 at App.29a*. The Petitioner now prays for this honorable Court to grant a writ of certiorari.

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<sup>1</sup> FTCA Judgment Bar – The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.



## REASONS FOR GRANTING THE PETITION

First, the Petitioner maintains the district court departed from the accepted and usual course of judicial proceedings by *sua sponte* raising the statute of limitations affirmative defense to dismiss the Petitioner's *Bivens* action. The district court *sua sponte* raising the statute of limitations affirmative defense is a reversible error that requires a writ of certiorari. Pursuant to Fed. R. Civ. P. 8(c)(1), AFFIRMATIVE DEFENSES, which states;

In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense.

Just seven days after removal and before the defense could plead, the district court raised the statutes of limitations affirmative defense to in part dismiss the Petitioner's *Bivens* action. *See Appendix 2 at App.4a*, the district court's dismissal Order raising the statute of limitations affirmative defense. *See also Appendix 10 at App.55a*, the district court docket. The Petitioner's *Bivens* action was not a *habeas* petition or *in forma pauperis* that would have allowed the district court to *sua sponte* raise the statute of limitations affirmative defense to dismiss the Petitioner's *Bivens* action. This Court has stated:

We clarified, however, that a federal court does not have carte blanche to depart from the principle of party presentation basic to our adversary system.

*See Greenlaw v. United States*, 554 U.S. 237, 243-244 (2008). Only where the State does not “strategically withhold the [limitations] defense or choose to relinquish it,” and where the Petitioner is accorded a fair opportunity to present his position, may a district court consider the defense on its own initiative and ‘determine whether the interests of justice would be better served’ by addressing the merits or by dismissing the petition as time barred.

*Wood v. Milyard*, 566 U.S. 463 (2012), quoting *Day v. McDonough*, 547, U.S. 198 (2006).

To the above, the circumstances in the Petitioner’s *Bivens* action as it relates to the district court’s *sua sponte* raising an affirmative defense are squarely on point to this Court’s statement in *Wood*. Because the defense never pled before the district court dismissed the Petitioner’s *Bivens* action, the defense had not strategically withheld or relinquished the statute of limitations defense. Importantly, the Petitioner had no opportunity whatsoever to present his position on the statute of limitations before his *Bivens* action was dismissed by the district court. In *Day*, quoting *Plier v. Ford*, 542 U.S. 225, 231 (2004), this Court stated “district judges have no obligation to act as counsel or paralegal to *pro se* litigants, then, by the same token, they surely have no obligation to assist attorneys representing the State”. Therefore, pursuant to precedent established by this Court in *Day*, it was clearly reversible error by the district court to raise the statutes of limitations affirmative defense on its own initiative and dismiss the Petitioner’s *Bivens* action.

Separately, the district court also departed from the accepted and usual course of judicial proceedings in ignoring the statutory provision of 28 U.S.C. § 1447(c) that the Petitioner be allowed thirty days to motion for a remand of his removed *Bivens* action. Due process is a fundamental constitutional principle that ensures fairness and protection of individual rights in legal proceedings. When the district court ignored the statutory provision of 28 U.S.C. § 1447 and dismissed the Petitioner's *Bivens* action just seven days after removal it violated the Petitioner's Fourteenth Amendment right to due process. The Petitioner calls out for this honorable Court of last resort to exercise its inherent supervisory power to right the district court's wrongs. For the above two reversible errors alone this Court should grant certiorari.

Next, in affirming the district court's *sua sponte* dismissal of the Petitioner's instant *Bivens* action the circuit court stated it did not rely upon the district court's grounds for dismissal. The circuit court stated it *sua sponte* relied on completely different grounds supported by the record. The circuit court concluded that the Federal Tort Claims Act<sup>2</sup> judgment bar was triggered in the Petitioner's instant *Bivens* action by the Petitioner's previously dismissed FTCA claim. The FTCA judgment bar, 28 U.S. Code § 2676, states:

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

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<sup>2</sup> Federal Tort Claim Act, hereinafter FTCA.

The Petitioner maintains in the strongest of terms the FTCA judgment bar was not triggered by the Petitioner's dismissed FTCA claim for two reasons. First and most important, pursuant to this honorable Court's holding in *Simmons v. Himmelreich*, 578 U.S. \_\_\_ (2016), the judgment bar is not triggered if an FTCA claim falls under a Section 2680 "Exception" to the FTCA. See Appendix 5 at App.31a, Section 2680 "Exceptions" to the FTCA. The Petitioner's dismissed FTCA claim indeed fell under a Section 2680 "Exception" to the FTCA. Therefore, the FTCA judgment bar could not have been triggered by the Petitioner's dismissed FTCA claim. Contrary to the opinion of the circuit court, the Petitioner contends because the FTCA judgment bar was not triggered by the Petitioner's dismissed FTCA claim the Petitioner's instant *Bivens* action is not precluded. Immediately below is proof the Petitioner's dismissed FTCA claim was a Section 2680 "Exception" to the FTCA that did not trigger the judgment bar. Congress enacted the Federal Tort Claim Act in 1946 which authorizes plaintiffs to obtain compensation from the United States for the tort of its employees. Congress chose to preserve the United States sovereign immunity to certain lawsuits to lessen liability for discretionary acts. Hence, the Federal Tort Claim Act contains several exceptions that categorically bar plaintiffs from recovering tort damages in certain kinds of cases. These exceptions are set out in Section 2680 of the Federal Tort Claim Act. If a tort claim against the United States falls within any of the "Exceptions," the district court lacks subject matter jurisdiction to adjudicate the claim.

Again, the Petitioner adamantly avers his dismissed FTCA claim fell under a Section 2680

"Exception" to the FTCA, namely 28 U.S.C. § 2680(a), which states:

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

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

The pertinent part of 28 U.S.C. § 2680(a) to the Petitioner's argument is;

Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute.

Two very simple elemental questions are presented by the above pertinent part of 28 U.S.C. § 2680(a) that are central in proving the Petitioner's dismissed FTCA claim fell under 28 U.S.C. § 2680(a). The first elemental question is: Was the Petitioner's dismissed FTCA claim based upon an act or omission of a government employee. If the answer to the that question is yes, the second elemental question is was the act or omission by the government employee made while executing a statute. If the answer to both above questions is yes then the Petitioner's dismissed FTCA claim will be clearly proven to have fallen under 28 U.S.C. § 2680(a), a Section 2680 "Exception" to the FTCA. Pursuant to this Court's holding in *Simmons*,

proof that the Petitioner's dismissed FTCA claim fell under a Section 2680 "Exception" to the FTCA does not trigger the FTCA judgment bar. Therefore, if the FTCA judgment bar was not triggered by the Petitioner's dismissed FTCA claim the Petitioner's instant *Bivens* action is not precluded by the FTCA judgment bar. The Petitioner answers the first elemental question of whether the Petitioner's dismissed FTCA claim was based upon an act or omission of a government employee by presenting the Petitioner's dismissed FTCA Complaint. *See Appendix 6 at App.34a*, the Petitioner's FTCA Complaint. All three<sup>3</sup> of the Petitioner's claims in his dismissed FTCA Complaint were based upon the omissions of the Respondent government employees. Therefore, the answer to the first elemental question of whether the Petitioner's dismissed FTCA claim was based upon omissions of government employees is an obvious yes. The second and final elemental question is was the omission of adequate medical care to the injured Petitioner by government employees made while executing a statute. The Petitioner contends the statute being executed by the Respondent public health service government employees when they made omissions was Federal Statute 42 U.S.C. § 250. Federal Statute 42 U.S.C. § 250 – MEDICAL CARE AND TREATMENT OF FEDERAL PRISONERS plainly states:

The Service shall supervise and furnish medical treatment and other necessary medical, psychiatric, and related technical and scientific services in penal and correctional

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<sup>3</sup> The Petitioner alleged the defendants committed medical negligence, abandonment and 'loss of chance' by omitting to provide adequate medical care to him after being injured.

institutions of the United States.

Federal Statute 42 U.S.C. § 250 was enacted July 1, 1944 to ensure federal prisoners received standard of care medical treatment. Hence, the Petitioner being incarcerated in federal prison had standing to invoke the protections afforded by Federal Statute 42 U.S.C. § 250. After the Petitioner was injured after falling at a federal prison, the execution of Federal Statute 42 U.S.C. § 250 mandated the Petitioner receive medical treatment for his injuries. The Petitioner's Motion for Summary Judgment is *prima facie* evidence the Respondents were executing Federal Statute 42 U.S.C. § 250 after the Petitioner was injured in the fall. To that point, the Petitioner's Motion for Summary Judgment demonstrates the Respondents were executing Federal Statute 42 U.S.C. § 250 when they sent a triage nurse to assess and submit a status report regarding the Petitioner's injuries after his fall. *See Appendix 7 at App.46a*, the triage nurse's status report. The triage nurse's status report, which both Respondents cosigned in agreement, explicitly stated the injured Petitioner was to receive follow-up medical care from the Respondents. Therefore, the Respondents were executing federal statute 42 U.S.C. § 250 when they omitted to provide the Petitioner with the agreed upon follow-up medical care. *See Appendix 8 at App.52a*, Dr. Dankwa's admission at deposition that the Petitioner was omitted follow-up medical care after being triaged. Thus, the answer to the second elemental question of was the omission of adequate medical care to the Petitioner by government employees made while executing a statute is yes as well. Hence, both elemental questions presented above have been answered with a clear "yes".

Government employees at FCI Morgantown omitted to provide the injured Petitioner with adequate medical care while executing Federal Statute 42 U.S.C. § 250. As a matter of law, because the Petitioner's dismissed FTCA claim was based on the omissions of government employees executing a statute, the Petitioner's dismissed FTCA claim was a Section 2680 "Exception" to the FTCA. Pursuant to this honorable Court's holding in *Simmons v. Himmelreich*, the judgment bar is not triggered if an FTCA claim falls under a Section 2680 "Exception" to the FTCA. Hence, the FTCA judgment bar was not triggered by the Petitioner's dismissed FTCA claim because the dismissed FTCA claim was a Section 2680 "Exception" to the FTCA. Therefore, in impeachment of the circuit court's opinion, the Petitioner's instant *Bivens* action is not precluded by the Petitioner's dismissed FTCA claim that did not trigger the FTCA judgment bar.

Briefly, directly related to the above, the circuit court also concluded the summary judgment rendered by the district court in the Petitioner's dismissed FTCA claim was a final judgment on the merits. The circuit court reasoned because the summary judgment in the Petitioner's FTCA claim was a final judgment on the merits it barred the Petitioner's *Bivens* action by claim preclusion. The Petitioner contends the district court's granting of summary judgment in the Petitioner's FTCA action is invalid because the district court lacked subject matter jurisdiction pursuant to Section 2680 "Exceptions" to the FTCA. To that point, due to the FTCA's unique statutory scheme, the merits of a claim *i.e.*, the pleading of all elements of a FTCA claim, and jurisdiction are intertwined. *Brownback v. King*, 592 U.S. \_\_\_\_ (2021). In other words, to plead or

not plead all the elements of a FTCA claim is to plead or not plead subject matter jurisdiction. The Petitioner had successfully pled all elements or the merits of his FTCA claim<sup>4</sup>. In regards to jurisdiction, as proven above, his FTCA claim was a Section 2680 "Exception" to the FTCA. Because the Petitioner's FTCA claim fell under a Section 2680 "Exception" the district court lacked subject matter jurisdiction to adjudicate the claim due to the non-merits issue of the United States not waiving sovereign immunity. The lack of subject matter jurisdiction was not due to the Petitioner's failure to plead the merits of his FTCA claim *i.e.*, all the elements of a FTCA claim. To that point, this Court held in *Brownback* that when a court lacks subject matter jurisdiction due to a non-merits issue in a FTCA claim such as a Section 2680 "Exception" to the FTCA, the case must be dismissed under Rule 12b(1). A Rule 12b(1) dismissal is not a final judgment on the merits. *See Appendix 9 at App.54a, Brownback* footnote #8.

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<sup>4</sup> The elements of a FTCA claim pled by the Petitioner were (1) an injury was caused by a federal government employee; (2) the employee was acting within the scope of his official duties; (3) the employee was acting negligently or wrongfully; and (4) the negligent or wrongful act proximately caused injury to the Petitioner.



## CONCLUSION

The Petitioner has proven the district court made two reversible errors. First, the district court *sua sponte* raised the statutes of limitations affirmative defense to dismiss the Petitioner's *Bivens* action. Secondly, the district court ignored the Petitioner's Fourteenth Amendment due process statutory right to remand his removed *Bivens* action within thirty days. The circuit court's opinion that the Petitioner's *Bivens* action is precluded because the FTCA judgment bar had been triggered by the Petitioner's dismissed FTCA claim is at odds with settled Supreme Court law.

After applying the law to the facts and evidence the Petitioner prays for this honorable Court to exercise its supervisory powers and grant a writ of certiorari.

Respectfully submitted,

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April 12, 2024

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