No.

IN THE

Supreme Court of the United States

NELDA KELLOM individually and as Personal Representative of the Estate of TERRANCE KELLOM, Deceased; KEVIN KELLOM, individually; TERIA KELLOM individually; LAWANDA KELLOM Individually; TERRELL KELLOM, individually; JANAY WILLIAMS as personal representative of Terrance Kellom's two minor children, son, T.D.K. and daughter, T.D.K.;

Petitioners

v.

UNITED STATES OF AMERICA

Respondent

On Petition For Writ Of Certiorari
To The United States Sixth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Given the judicial unwillingness in other circuits to permit the United States to stand on technicalities and this Court's guidance in *Arbaugh v Y&H Corp*, 546 US 500, 511; 126 S Ct 1235, 1242–43; 163 L Ed 2d 1097 (2006), should Petitioners' FTCA claim for the fatal shooting of Terrance Kellom, brought by amendment after administrative exhaustion, have been allowed to proceed against the United States, in light of the plethora of caselaw which suggests the claim should have been allowed to proceed?

2. As the administrative exhaustion defense successfully used by Respondent to defeat Petitioners FTCA claim for a fatal shooting is subject to waiver as a non-jurisdictional claims processing rule [*Copen v. United States*, 3 F.4th 875 (6th Cir. 2021)], how long and to what extent can the government delay raising the exhaustion defense in earnest before the trial court, and participate in litigation of the FTCA claims, before they are considered to have waived the administrative exhaustion defense?

3. Is an improper circuit split begun by the lower courts' rulings that 28 USC § 2675 barred Petitioners' from initiating a claim against the United States by amending their complaint to add one where none had existed before, in disagreement with the Ninth Circuit (*Valadez-Lopez v. Chertoff*, 656 F.3d 851 (9th Cir. 2011),

and, in fact, Sixth Circuit precedent. (*Copen v. United States*, 3 F.4th 875 (6th Cir. 2021))?

4. Did the District Court err in its ruling that the Sixth Circuit's remand of the FTCA excessive force claim did not necessarily remand the issue of excessive force?

5. Did the lower courts err requiring review in ruling that Petitioners' claims were time-barred by interpreting the language of 28 USC § 2679(d)(5) in a manner that differed from its plain, unambiguous, meaning, which allows the initiation of a new "proceeding" by amendment of a complaint?

LIST OF PROCEEDINGS IN FEDERAL TRIAL AND APPELLATE COURTS

This petition arises out of two United States District Court for the Eastern District of Michigan cases: 17-cv-11084 (*Kellom v. Quinn, et al*) and 19-cv-11622 (*Kellom v. United States*). Both cases were appealed to the Sixth Circuit (20-1003 (*Kellom v. Quinn*) and 20-1222 (*Kellom v. US*)) and jointly decided in an opinion remanding to the district court.

After decision on remand, both were appealed again to the Sixth Circuit (22-1591 (*Kellom v. Quinn*) and 22-1592 (*Kellom v. US*)), which were jointly decided by the Sixth Circuit. Those two final appeals are the subject of this petition.

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I. PETITION FOR WRIT OF CERTIORARI

The family of Terrance Kellom petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

II. OPINIONS BELOW

The district court's Opinion & Order Granting Defendant Quinn's Motion for Partial Dismissal is unreported. *Kellom v. Immigr. & Customs Enf't Agent Mitchell Quinn*, No. 17-11084, 2018 WL 1509188 (E.D. Mich. Mar. 27, 2018). The district court's Opinion & Order Granting in part and Denying in part Defendants' Motions to Dismiss is unreported. *Kellom v. Quinn*, No. 17-11084, 2018 WL 4111906 (E.D. Mich. Aug. 29, 2018). (**Appx. A., a. 1.**) The district court's Opinion & Order on Defendants' Summary Judgment Motions is reported at *Kellom v. Quinn*, 381 F. Supp. 3d 800, 803 (E.D. Mich. 2019), *aff'd in part, remanded in part*, No. 20-1003, 2021 WL 4026789 (6th Cir. Sept. 3, 2021). (**Appx. B, a. 49.**) The district court's Opinion & Order Granting Defenant's Motion to Dismiss is unreported. *Kellom v. United States*, No. 19-11622, 2020 WL 95805 (E.D. Mich. Jan. 8, 2020), *aff'd in part, remanded in part sub nom. Kellom v. Quinn*, No. 20-1003, 2021 WL 4026789 (6th Cir. Sept. 3, 2021). The Sixth Circuit's Opinion remanding the case is unreported. *Kellom v. Quinn*, No. 20-1003, 2021 WL 4026789 (6th Cir. Sept. 3, 2021). (**Appx. C, a. 118.**) The district court's Opinion & Order on Renewed Summary Judgment Motions, Filed Following Remand is unreported. *Kellom v. Quinn*, No. 17-11084, 2022 WL 2230447 (E.D. Mich. June 21, 2022),

aff'd, 86 F.4th 288 (6th Cir. 2023). (**Appx. D, a. 133.**) The Sixth Circuit's Opinion denying the second appeal is reported at *Kellom v. Quinn*, 86 F.4th 288, 290 (6th Cir. 2023). (**Appx. E, a. 165.**)

III. JURISDICTION

This petition requests review of the Sixth Circuit's November 8, 2023 Opinion, Order, and Judgment (**Appx. E, a. 165.**) It is brought pursuant to Supreme Court Rule 13.

This Court has jurisdiction pursuant to 28 USC § 1254.

Because the Respondent is the United States, service of this petition for writ of certiorari has been made pursuant to Rule 29.4(a) on the United States, *via* first class US mail at:

Solicitor General of the United States,
Room 5616,
Department of Justice,
950 Pennsylvania Ave., N. W.,
Washington, DC 20530-0001.

IV. STATUTES INVOLVED IN THE CASE

This case revolves around the Federal Torts Claims Act ("FTCA"). The provisions of the FTCA are found at 28 USC §1346(b), §1402(b), §2401(b), and §§2671-2680. All are attached at **Appx. F, a. 177-185**.

V. STATEMENT OF THE CASE

This case was about the shooting of a young, 20-year-old, black man, in his father's home, by a federal agent. The government's only justification for the shooting is and has been that the Terrance was walking towards the federal agent while brandishing a hammer. There were several issues with that version of events, however, including that Terrance had been shot in the back. And that the only officer with a clean record, who had witnessed the shooting (along with Terrance's father and sister who witnessed the shooting), swore under oath that Terrance did not have a hammer in his hand. ***Id.*** The raid on Terrance's father's home was conducted supposedly because Terrance was suspected of having robbed a pizza delivery man, of what must have been petty cash and possibly a pizza pie. No legal proceedings were ever held regarding that matter to determine the truth of the suspicion, because Terrance was shot and killed before they could occur.

The Estate of Terrance, the Petitioner, sued the federal agent *via* a claim brought pursuant to *Bivens v Six Unknown Named Agents of Fed Bureau of Narcotics*, 403 US 388, 389; 91 S Ct 1999; 29 L Ed 2d 619, 622 (1971), and then, after the Estate's claim to the appropriate federal agency had been denied, filed an **unopposed** amendment to their complaint, adding a claim against the United States government and adding as plaintiffs the remaining Petitioners: Terrance's parents, siblings, and children, individually, all bringing their own Federal Torts Claims Act ("FTCA") claim against the United States government.

The FTCA waives the United States' sovereign immunity when an individual has suffered personal injury, death, or damage from the negligent or wrongful act or omission of an employee of the federal government. The provisions of the FTCA are found at 28 USC §1346(b), §1402(b), §2401(b), and §§2671-2680. (**Appx. F, a. 177-186.**)

28 USC § 2675 states in part:

> An action shall not be instituted upon a claim against the United States…, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied…

Previously, this Circuit interpreted this language to be a jurisdictional rule. See *Exec. Jet Aviation, Inc. v. United States*, 507 F.2d 508, 514–15 (6th Cir. 1974). **This Circuit now holds 28 USC § 2675 to merely be a claims-processing rule. See *Copen v. United States*, 3 F.4th 875 (6th Cir. 2021)**. Either way, here, Petitioners substantially complied with the rule.

Petitioners FTCA claims have now been dismissed, twice, for failure to exhaust Petitioners' administrative remedy. For the following reasons, the Sixth Circuit's affirmation of the second dismissal (after remanding the first), was error requiring review.

The jurisdiction of the US district court was invoked pursuant to the Federal Torts Claims Act, 28 USC § 1346(b) *et seq*; the Civil Rights Act, 42 USC §§ 1983 and 1985 *et seq*; the Judicial Code, §§ 1331 and 1343(a), *Bivens v. Six Unknown Named Agents of the*

Federal Bureau of Narcotics, 403 US 388, 91 S. Ct. 1999 (1971), and the Constitution of the United States.

VI. ARGUMENT

1. The lower courts erred requiring review in ruling that Petitioners' FTCA claims were barred by a claims processing rule because where, as here, a plaintiff exhausted his administrative remedy before bringing an FTCA claim, modern FTCA jurisprudence does not support dismissal.

On September 3, 2021, the Sixth Circuit issued an order [**Appx. C, a. 118**] reversing and remanding the District Court's jurisdictional-based dismissal of Petitioners' Federal Torts Claims Act ("FTCA") claims against the United States for agent Quinn's shooting of Terrence Kellom. The Sixth Circuit reversed that decision by the District Court, remanding the dismissal of the FTCA claim because the Sixth Circuit recently interpreted this Supreme Court's precedent as holding that the FTCA's administrative exhaustion requirement is not jurisdictional. On remand, however, the District Court dismissed Petitioners' FTCA claims a second time. See **The district court's 06/21/22 Opinion & Order on Renewed Summary Judgment Motions, Filed Following Remand, Appx. D, a. 133**.[1] The Sixth Circuit then affirmed.

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[1] The Sixth Circuit cited *Copen v United States*, 3 F.4th 875, 880-1 (CA 6, 2021) (citations omitted):

The federal courts have made it clear that a claims-processing rule should not be used to the government's unfair or inequitable advantage, as that was not the FTCA statutes intended purpose. "Federal courts have noted that Congress did not intend for the procedural requirements in the FTCA 'to place procedural hurdles before potential litigants' but rather 'to facilitate early dispositions of claims.'" *Copen v United States*, 3 F.4th 875, 882 (CA 6, 2021) quoting *Burchfield v. United States*, 168 F.3d 1252, 1255 (11th Cir. 1999). "A careful scrutiny of the statute's legislative history has persuaded the Sixth Circuit that its purpose is essentially remedial. In its report on the bill, the House Judiciary committee described it as providing for 'more fair and equitable treatment of private individuals and claimants.' *Locke v United States*, 351 F Supp 185, 187 (D Haw, 1972); citing S.Rep.No.1327, 89th Cong., 2d Sess., 1966 U.S. Code Cong. & Ad. News, p. 2515 *et seq*. "Given this background, there has been judicial unwillingness [in other circuits] to permit the United States to stand on technicalities..." *Id*. (emphasis added). (See also *Stokes v. United States*, 444 F.2d 69 (4th Cir. 1971); *Rabovsky v. United States*, 265 F. Supp. 587 (D.Conn., 1967); and *Little v. United States*, 317 F. Supp. 8 (E.D.Penn., 1970) for examples of cases in which courts refused to dismiss based on technicalities out of equitable considerations.) "Thus, we … recogniz[e] that individuals wishing to sue the government must comply with the details of the law, but also keep[] in mind that **the law was not intended to put up a**

> [T]he Supreme Court… [has] concluded that such "drive-by jurisdictional rulings" should have "no precedential effect" regarding "whether the federal court had authority to adjudicate the claim."

barrier of technicalities to defeat their claims." *Lopez v United States*, 758 F2d 806, 809 (CA 1, 1985) (emphasis added). Instead, a mandatory claims-processing rules "seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." *Henderson v. Shinseki*, 562 U.S. 428, 435, 131 S. Ct. 1197, 179 L. Ed. 2d 159 (2011).

In line with the Supreme Court's trend of loosening the restrictions on plaintiff's seeking remedy against the government, the Supreme Court has now even gone so far as to hold that the FTCA's statute of limitation, 28 USC § 2401(b) is also a procedural rule and not a jurisdictional time bar. *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1627, 191 L. Ed. 2d 533 (2015). Despite the strong language of § 2401(b) stating that tort claims "shall be forever barred," the Supreme Court now holds that § 2401(b) cannot disregard the power federal district courts have to hear FTCA claims in 28 USC § 1346(b)(1). *Id*. (stating "district courts. . . shall have exclusive jurisdiction" over tort claims filed against the United States). *Wong* at 1635.

Here, the District Court's dismissal on remand cuts directly against the above-cited caselaw and the spirit of the FTCA. The dismissal is entirely based on a hyper-technical hurdle of the type that the higher Courts now seek to avoid imposing on plaintiffs. The District Court originally ruled, after briefing and oral argument, that Petitioners had exhausted their administrative remedies. "There is a rather long sequence of events in this case that relate to this issue, but the Court ultimately concludes that the Estate exhausted its [administrative] claims." **Appx. B, a. 12**. At that time, the District Court cited *McNeil v.*

United States, 508 U.S. 106, 113 (1993) and reasoned: "When, as here, the plaintiff 'invoked the federal court's jurisdiction under the FTCA' after she exhausts her administrative remedies, *McNeil* does not control." *Id*. Yet the District Court later wrote as if Petitioners position was utterly absurd. "…Plaintiffs take a strange position and argue that they did exhaust their administrative claims before asserting a FTCA claim in this case." **The district court's 06/21/22 Opinion & Order on Renewed Summary Judgment Motions, Filed Following Remand, Appx. D, a. 153 (italics in original)**. What is "strange" is that Petitioners are being barred from seeking justice for the police shooting of 20-year-old black man in front of his family based on their reliance on the caselaw (*McNeil*) which the District Court interpreted to uphold Petitioners' FTCA claim and then, inequitably, relied on almost exclusively in dismissing it on remand; Not because they had not afforded the government the opportunity to adjudicate their claim before bringing it, not because the government had not yet denied their administrative claim before they brought it in court.

The District Court's dismissal on remand states: "First… under *McNeil*, a premature FTCA suit cannot be 'cured' by exhaustion of administrative remedies while the premature lawsuit is pending." ***Id*., a. 157**. "Second… a prematurely-filed FTCA suit cannot be 'cured' by virtue of filing an amended complaint in the premature action once administrative exhaustion occurs." ***Id*., a. 159**. This argument also relies primarily on *McNeil*.[2]

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[2] "The FTCA's exhaustion requirement does not prevent a plaintiff from amending a previously filed federal Complaint over

Any interpretation of *McNeil* as requiring the dismissal of an FTCA claim initiated by amendment to a complaint has been overruled. The Sixth Circuit's opinion remanding to the District Court directed the Court's attention to *Copen v United States*, 3 F.4th 875, 882 (CA 6, 2021) which reinterpreted this Circuit's FTCA jurisprudence based on the Supreme Court's holding in *Arbaugh v Y&H Corp*, 546 US 500, 511; 126 S Ct 1235, 1242–43; 163 L Ed 2d 1097 (2006).

> Judicial opinions… often obscure the issue by stating that the court is dismissing 'for lack of jurisdiction' when some threshold fact has not been established… We have described such unrefined dispositions as 'drive-by jurisdictional rulings' that should be accorded no precedential effect on the question whether the federal court had authority to adjudicate the claim in suit.
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> *Id.* (internal quotations and citations omitted, emphasis added).

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which there is jurisdiction to add an FTCA claim once he has exhausted his administrative remedies." *Foerderer v Mathias*, ___F Supp 3d___; 2018 U.S. Dist. LEXIS 90044, at *9 (SD Ill, May 30, 2018). *Brooks v HSHS Med Group, Inc*, ___F Supp 3d___; 2018 U.S. Dist. LEXIS 180856, at *15 (SD Ill, Oct. 22, 2018). (Same conclusion.) *Lerose v United States*, ___F Supp 2d___; 2005 U.S. Dist. LEXIS 63038, at *5 (SD W Va, June 2, 2005). (Same.) *Warren v United States*, ___F Supp 3d___; 2020 U.S. Dist. LEXIS 35386, at *4 (ED Ky, Mar. 2, 2020). (Same.) *Thomas v Mace-Leibson*, ___F Supp 3d___; 2015 U.S. Dist. LEXIS 160635, at *7-8 (MD Pa, Dec. 1, 2015). (Same.) *Gillie v Esposito*, ___F Supp 3d___; 2018 U.S. Dist. LEXIS 208562, at *12 (DNJ, Dec. 11, 2018).

McNeil was precisely such a "drive-by jurisdictional ruling" through and through, as held by the Sixth Circuit. "Accordingly, as we reevaluate the nature of [the FTCA's] § 2675 post-*Arbaugh, McNeil* should be granted no deference." *Copen v United States*, 3 F4th 875, 881 (CA 6, 2021) (emphasis added).

Since *McNeil*, in *Duplan v. Harper*, 188 F.3d 1195, (10th Cir. 1999), the Tenth Circuit affirmed the "filing of [an] amended complaint [being] treated by… the court as the institution of a new suit against the government." *Id.* at 1200. *Duplan* even cited to *McNeil*, and described it as "implying that new action may in certain circumstances be instituted by document other than new complaint[.]" *Duplan* at 1200. Likewise, *Duplan* described the case *Hyatt v. United States*, 968 F. Supp. 96, 99–100 (E.D.N.Y.1997) as "implicitly acknowledging that filing of amended complaint may in certain circumstances be sufficient to institute new action" and *Ellis v. Hanson Natural Resources Co*., 857 F.Supp. 766, 771 (D.Or.1994) (aff'd, 70 F.3d 1278 (9th Cir.1995) (unpublished)) as implying that "filing of amended complaint may in certain circumstances be sufficient to institute new action[.]" Accordingly, it is this string of cases, and not the cases cited by the District Court in which an FTCA claim was brought before the filing of an administrative claim, that should have controlled here.

The District Court erred when it disregarded this Circuit's decisions in Copen and Duplan, and instead applied a hyper-technical burden from the outdated *McNeil* decision to dismiss Petitioners' FTCA claim on remand. Wherefore, the Sixth Circuit

should reverse and remand the District Court's order of dismissal a second time.

2. The lower courts erred requiring review when they ruled that the United States had not waived or forfeited its timeliness defense as the United States essentially acquiesced in Petitioners' bringing of an FTCA claim against it up until the summary judgment phase of litigation, when the United States first practically raised the failure-to-exhaust defense.

In the Sixth Circuit's September 3, 2021 order, remanding the case to the District Court, the Sixth Circuit stated: "We will leave it for the district court to decide in the first instance whether to excuse any delay and whether the amended complaint filed post-exhaustion cures any defect." **The Sixth Circuit's 09/03/21 Opinion remanding the case, Appx. C, a. 125**. For the reasons stated below, the District Court, in its June 21, 2022 opinion and order, decided the issue of the government's delay wrongly on remand. See **The district court's 06/21/22 Opinion & Order on Renewed Summary Judgment Motions, Filed Following Remand, Appx. D, a. 154**.

The Sixth Circuit asked the District Court to decide on remand "whether to excuse any delay" on the government's part for not timely raising its (non-jurisdictional, claims-processing rule) defense claiming that Petitioners had failed to exhaust their administrative remedy before first initiating their action. The District Court ruled that "[t]he government did not forfeit or waive its failure-to-exhaust defense to the FTCA claims[, t]hus, there is

no delay to excuse." ***Id.*****, a. 149 (Capital characters removed)**.

Contrary to the District Court assertion in its order on remand dismissing the FTCA claim again, Respondent had not raised the exhaustion defense "at every stage of the case." ***Id.*****, a. 151**. Instead, the government embraced the idea of Petitioners bringing an FTCA claim in its first motion to dismiss, stating that "Plaintiff is not without a remedy, however, because the proper defendant for any such claim is the United States."[3] Further, the government even stipulated to the FTCA claim being brought against it during oral argument on its initial motion to dismiss. "During oral argument, the parties agreed that the Court should enter a stipulated order that substitutes the United States Government for Defendant Quinn for purposes of Count IV [which became Count V in Petitioners' first amended complaint]…" The district stated in its 03/27/18 Opinion & Order Granting Defendant Quinn's Motion for Partial Dismissal**.**

Further still, the government concurred in Petitioners' motion for leave to file an amended complaint initiating an FTCA claim against the United States. Although that would have been the proper time for the government's counsel to raise their claims-processing defense, Respondent merely filed a two-page response to Petitioners' motion for leave to

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[3] That filing is completely devoid of any 'failure to exhaust,' 'jurisdictional,' or 'claims-processing' arguments against Petitioners' asserting an FTCA claim although the government did argue lack of subject matter jurisdiction regarding Petitioners' §§ 1983 and 1985 claims. Indeed, in that motion, the government appears to support Petitioners asserting an FTCA claim despite the government's knowing that Petitioners' administrative claim was still pending at that time.

file a first amended complaint stating: "For clarity, however, the concurrence granted by defendants Quinn and the United States is not a concession that the claims in plaintiff's proposed amended complaint are valid, and defendants reserve the right to challenge the proposed claims…" In other words, Respondent may have defenses, but would raise them when it felt like it, and no sooner.

In keeping with that mindset, the government's counsel later filed a motion to dismiss which, by the government's own admission failed to properly raise the jurisdictional issue or "inadvertently mischaracterized the jurisdictional issue." When that (second) motion to dismiss was denied, the government failed to file a motion for reconsideration, and instead allowed the Court and Petitioners to move forward with litigation for 107 days after its motion to dismiss was denied and before filing its motion for summary judgment. Much time and resources were, apparently, wasted because of the government's inexcusable delay in asserting their claims-processing rule defense. "Jurisdictional rules may also result in the waste of judicial resources and may unfairly prejudice litigants. For purposes of efficiency and fairness, our legal system is replete with rules requiring that certain matters be raised at particular times." *Henderson v Shinseki*, 562 US 428, 434-35; 131 S Ct 1197; 179 L Ed 2d 159, 166 (2011) (cleaned up).

Based on what the District Court believed to be the government's jurisdictional failure-to-exhaust defense, the District Court reversed itself and dismissed Petitioners' FTCA claim against the United States at the motion for summary judgment phase of litigation (see **The district court's 05/21/19**

Opinion & Order on Defendants' Summary Judgment Motions, Appx. B, a. 49.)

The only way that Respondent's failure to challenge Petitioners' motion to amend to add an FTCA claim within the time for responding to Plaintiff's motion to amend (the procedurally appropriate time) could not result in a waiver/forfeiture of Respondent's failure to exhaust defense is if that defense was jurisdictional. "Objections to a court's subject-matter jurisdiction may be raised at any point in the litigation…" *Copen v United States*, 3 F.4th 875, 879 (CA 6, 2021). That defense, however, was not jurisdictional. Id. "If the rule is classified as non-jurisdictional, compliance with it can be forfeited if not timely asserted. *Eberhart v. United States*, 546 U.S. 12, 14, 126 S. Ct. 403, 163 L. Ed. 2d 14 (2005)." *Mader v United States*, 654 F3d 794, 815 (CA 8, 2011). Accordingly, Respondent needed to make that defense at the appropriate time, which they did not. "[I]f the government's motion was truly too late, that could have consequences." **The Sixth Circuit's 09/03/21 Opinion remanding the case, Appx. C, a. 125**.

Courts have not hesitated to rule that the United States has forfeited its right to raise a 'failure to exhaust administrative remedies' argument pursuant to the FTCA's § 2675, and our Supreme Court has upheld such findings. "Here, where the Government failed to raise a defense of untimeliness… it forfeited that defense. The Court of Appeals should therefore have proceeded to the merits." *Eberhart v United States*, 546 US 12, 19; 126 S Ct 403, 407; 163 L Ed 2d 14 (2005).

Notably, this is true in cases were the defendant fails to raise a defense in response to a

plaintiff's amending of their complaint, which is exactly what occurred here.

> Both courts relied on decisions of sister Circuits holding that the timeliness provisions at issue here are not jurisdictional." Id., at 733 (citing *In re Benedict*, 90 F.3d 50, 54–55 (C.A.2 1996), and *Farouki v. Emirates Bank Int'l, Ltd.*, 14 F.3d 244, 248 (C.A.4 1994)); accord App. to Pet. for Cert. 31–32. Both courts also agreed with the Bankruptcy Court that [Defendant] had waived the right to challenge [Plaintiff]'s amended complaint as impermissibly late."
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> *Kontrick v Ryan*, 540 US 443, 451; 124 S Ct 906, 913; 157 L Ed 2d 867 (2004).

Because the United States failed to bring their arguments regarding Plaintiff's alleged failure to exhaust until the motion for summary judgment phase, approximately one year, one month, and 28 days since the United States claims it became a party to the case, Defendant forfeited that defense.[4] Accordingly, it was error for the District Court to

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[4] "On October 16, 2017, Defendant Quinn filed a Motion for Partial Dismissal, and attached a Certificate of Scope of Employment as to Quinn as an exhibit to the motion. The motion asserted that the United States should be substituted for Quinn as to the wrongful death claim." **The district court's 08/29/18 Opinion & Order Granting in part and Denying in part Defendants' Motions to Dismiss, Appx. A, a. 18**. Defendant United States first properly raised the claim processing rule argument in their December 14, 2018 rule 56 motion.

dismiss Petitioners' FTCA claim on remand based on the government's defense of untimeliness, and that decision should be
reversed and remanded again.

3. The lower courts erred requiring review when they found that 28 USC § 2675 barred Petitioners' from initiating a claim against the United States by amending their complaint to add a claim against the United States where none had existed before, because the FTCA jurisprudence is clear that amendments can initiate such claims.

As was discussed above, the caselaw which should have controlled the District Court's decisions regarding whether the filing of an amended complaint can "initiate" an FTCA claim against the United States is *Duplan v. Harper*, 188 F.3d 1195, (6th Cir. 1999). *Duplan*, because the government had concurred in the plaintiff's filing of an amended complaint, the court denied their motion to dismiss the FTCA claim on timeliness grounds. *Duplan* interpreted *McNeil* to mean that amendments can serve to initiate claims against the United States. As well, because counsel for the government initially mis-cited *Duplan* to Petitioners' counsel as a Sixth Circuit, and not a Tenth Circuit case, it was the case that appeared to Petitioners to control when the government's counsel emailed it to them in February of 2018. And it was the decision which the District Court seems to have initially followed when it denied Respondent's motion to dismiss. (**Appx. A, a. 1**.)

The District Court's reasoning upon its first considering the administrative exhaustion claims-processing rule made good sense:

> [T]he Government's reliance on *McNeil[v. United States*, 508 U.S. 106, 113 (1993)] is inapposite because that case involved a plaintiff that filed an FTCA claim before exhausting his FTCA administrative remedies… When, as here, the plaintiff invoked the federal court's jurisdiction under the FTCA after she exhausts her administrative remedies, *McNeil* does not control… The Estate filed the original complaint on April 6, 2017. Notably, it did not name the United States as a defendant and it did not assert any claims under the FTCA. It asserted claims against federal and state officers, and included a wrongful death claim under Michigan law.
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> ***
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> Thus, as of March 22, 2018, the Estate was asserting the wrongful death claim against the United States. That was after the Estate's administrative claim had been both constructively and actually denied.
>
> On May 4, 2018, Plaintiffs filed a First Amended Complaint, that named the United States as a Defendant and invoked jurisdiction under the FTCA. It included the wrongful death claim

> (Count V) and also added another tort claim, a claim for intentional infliction of emotional distress (Count VI)…
>
> Accordingly, after the Estate's administrative claim had been denied, but before the August 1, 2018 deadline for filing a FTCA action based on its administrative claim, the Estate asserted FTCA claims against the United States. Based on this sequence of events, the Court will not dismiss the Estates's claims in Counts V & VI for failure to exhaust administrative remedies.
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> **The district court's 08/29/18 Opinion & Order Granting in part and Denying in part Defendants' Motions to Dismiss, Appx. B, a. 6 (internal quotations omitted)**.[5]

When the District Court later reversed course, it was specifically because "[a]s the government[]

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[5] When it originally ruled in Petitioner's favor as to administrative exhaustion, the District Court relied on *Valadez-Lopez v. Chertoff*, 656 F.3d 851 (9th Cir. 2011), a case that was decided in light of *Arbaugh v Y&H Corp*, 546 US 500, 511; 126 S Ct 1235, 1242–43; 163 L Ed 2d 1097 (2006). When it revisited the issue, it stated: "Because this [*Harris v. City of Cleveland*, 7 F. App'x 452, 458 (6th Cir. 2001)] precedent conflicts with the Ninth Circuit's assumptions in *Valdez-Lopez*, the Sixth Circuit should follow Harris and not *Valdez-Lopez*." **The district court's 05/21/19 Opinion & Order on Defendants' Summary Judgment Motions, Appx. C, a. 93**. Yet *Harris* predates both *Argaugh* and *Copen*.

notes, [] this is a challenge to the Court's subject matter jurisdiction. A challenge to subject matter jurisdiction can be raised at any time and can never be waived… As such, the Court will consider this challenge to the Sixth Circuit's subject-matter jurisdiction over the FTCA claims in this case."[6] **The district court's 05/21/19 Opinion & Order on Defendants' Summary Judgment Motions, Appx. B, a. 109(emphasis in original)**. The District Court's dismissal on remand of Plaintiff's FTCA claim raises the question: If the District Court originally ruled that it "will not dismiss the Estate's claims…for failure to exhaust administrative remedies" [**Appx. A, a. 20**] and then later only dismissed the FTCA claim when it thought it "lack[ed] subject matter jurisdiction over the FTCA claims" [**Appx. B, a. 50**], why did it dismiss the FTCA claim again after learning from the Sixth Circuit that it did have jurisdiction?

The answer cannot be found in the caselaw cited by either the United States in its renewed

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[6] The District Court also cites a Western District of Michigan case, a DC Circuit case, and a Supreme Court case for the proposition that the Attorney General's certification of scope of employment automatically and immediately substitutes the United States into a case. But that is not what the Supreme Court case—the only potentially controlling case of the three—says: "[T]he Attorney General's certification is [merely] 'the first, but not the final word' on whether the federal officer is immune from suit and, correlatively, whether the United States is properly substituted as defendant." *Osborn v Haley*, 549 US 225, 246; 127 S Ct 881; 166 L Ed 2d 819, 840 (2007) citing *Gutierrez De Martinez v Lamagno*, 515 US 417, 419; 115 S Ct 2227; 132 L Ed 2d 375, 381 (1995). ("Treating the Attorney General's certification as conclusive for purposes of removal but not for purposes of substitution.")

motion for summary disposition on remand or the District Court's opinion, which relied entirely on the United States' arguments. The District Court's order cites, in a block quote of Respondent's motion, *Hoffenberg v. Provost*, 154 F. App'x 307, 310 (3d Cir. 2005) (an out of circuit case that predates *Copen* and, with no analysis of its own, relies solely on a citation to *McNeil*); *Norton v. United States*, 530 F. Supp. 3d 1, 8 (D.D.C. 2021) (not controlling and, again, relying solely on *McNeil*, as even the non-*McNeil* cases it cites rely primarily on McNeil); *Toomey v. United States*, No. CIV.A. 5:10-260, 2012 WL 876801, at *4 (E.D. Ky. Mar. 14, 2012) (not controlling but acknowledging that institution by amendment occurred in *Duplan v. Harper*, 188 F.3d 1195, 1199 (10th Cir. 1999)); *Booker v. United States*, No. CIV.A. 13-1099, 2015 WL 3884813, at *4 (E.D. Pa. June 24, 2015) (again, unpublished and relying on *McNeil*, but also "the Court proceeded to hear the evidence regarding Plaintiff's [] claims on the understanding that [] the evidence in this case would become part of the record in the federal case to be filed after exhaustion of administrative remedies." *Id*. at 6-7).

Wherefore, when the district court reversed its prior order **(Appx. A)** which found that, as a matter of law, Petitioners had timely exhausted their administrative remedy, thus "curing" any potential technical defect with their complaint, it ignored this Court's precedent in *Arbaugh* and when the Sixth Circuit affirmed it ignored its own precedent in *Copen;* Requiring review.

4. The lower courts erred requiring review in ruling that a remand of the dismissal of Petitioners' FTCA excessive force claim

did not also necessarily remand the issue of excessive force.

In the district court, Petitioners brought two counts for the same excessive force; the fatal shooting of Terrance Kellom by agent Quinn. The first pursuant to *Bivens v Six Unknown Named Agents of Fed Bureau of Narcotics*, 403 US 388, 389; 91 S Ct 1999; 29 L Ed 2d 619, 622 (1971), in which the United States Supreme Court created a cause of action against individual federal agents who violate an individual's constitutional rights. A *Bivens* claim is a claim cannot be brought against the United States.

The second was the FTCA claim. When suing the United States for the conduct of one of its agents, plaintiffs such as Petitioners must bring suit pursuant to the FTCA. Petitioners' FTCA claim stated, in pertinent part:

> 78. As a direct and proximate result of… **the United States through its agent Defendant Quinn's use of Excessive Force** in shooting the unarmed Terrance Kellom…, Plaintiffs' Decedent, Terrance Kellom, suffered his traumatic, painful, untimely, and wrongful death in front of his father and sister.
>
> First Amended Complaint, (emphasis added).

As can be plainly seen, the two claims were both excessive force claims for the fatal shooting of Terrance Kellom by agent Quinn, *i.e.*, the exact same issue. One was brought against Quinn individually,

and one was brought against the United States. Because the FTCA allows the United States to be "substituted" as defendant for a federal agent, Petitioners could not succeed on both counts.

The two claims did, however, rely on the exact same facts and a finding that Agent Quinn did not commit excessive force would preclude Petitioners from recovery on either claim as the United States government's liability under the FTCA is premised on the liability of the individual federal actor whose conduct caused the alleged injury. "It bears repeating that the FTCA does not create liability, it merely waives sovereign immunity to the extent that state-law would impose liability on a 'private individual in similar circumstances.'" *Myers v United States*, 17 F3d 890, 899 (CA 6, 1994), citing 28 U.S.C. § 2674; see also *Sea Air Shuttle Corp v United States*, 112 F3d 532, 536 (CA 1, 1997).

The "reasonableness" standard used in both a *Bivens* excessive force claim and an FTCA claim are the same. The FTCA applies the substantive law of the state where the alleged negligence occurred ["The extent of governmental tort liability is 'determined in accordance with the law of the state where the event giving rise to liability occurred.'" *Milligan v United States*, 670 F3d 686, 692 (CA 6, 2012), quoting *Young v. United States*, 71 F.3d 1238, 1241 (6th Cir. 1995); see also *Portenier v United States*, 520 F App'x 707, 711 (CA 10, 2013). That law is the same as the law applied to Petitioner's *Bivens* excessive force claim because Michigan courts apply federal standards to excessive force claims. "Excessive-force claims are analyzed under the Fourth Amendment's reasonableness standard. *Graham v Connor*, 490 U.S. 386, 395; 109 S Ct 1865; 104 L Ed 2d 443 (1989)."

Cummings v Lewis, ___NW2d___; 2012 Mich. App. LEXIS 1308, at *6 (Ct App, July 3, 2012).

> "Plaintiff Darlene VanVorous appeals by right orders dismissing her claims… filed on behalf of her decedent, John VanVorous, after he was shot and killed by defendant police officers. In this case, we are asked to determine whether the doctrine of collateral estoppel precludes plaintiff's state law claims where her Fourth Amendment excessive force claim has been adjudicated in federal court… Because we agree with the trial court that the determination of plaintiff's state law claims rests on an identical issue decided by the federal court…, we affirm."
>
> *VanVorous v Burmeister*, 262 Mich App 467, 469; 687 NW2d 132 (2004) (emphasis added).

In the original proceeding, the district court dismissed the FTCA excessive force claim, and allowed the *Bivens* excessive force claim to proceed to trial. A jury found no excessive force on the part of Agent Quinn. Petitioners appealed both the final judgment of the original proceeding and the earlier dismissal of its FTCA claim against the United States. The Sixth Circuit then issued a remand, specifically stating "we remand the FTCA claims…" **The Sixth Circuit's 09/03/21 Opinion remanding the case, Appx. C, a. 132 (emphasis added)**.

Because the FTCA excessive force claim would be completely precluded by a prior finding that Agent Quinn's use of force was not excessive, the Sixth Circuit's remand was a remand of the excessive force issue—necessary for a redetermination of Petitioner's FTCA claim—which includes the jury's determination as to agent Quinn's use of force. Respondent United States apparently understood this connection between the issue of Quinn's excessive force and the FTCA claim for excessive force, stating in their renewed summary judgment motion on remand: "[T]he undisputed facts show that **Agent Quinn was acting in self-defense; therefore, the government is entitled to summary judgment** in its favor." (Emphasis added).

The District Court, however, read the Sixth Circuit's remand too narrowly. Although Petitioner argued in the lower courts that the remand of the FTCA excessive force claim was also, necessarily, a remand of the excessive force issue that went to trial, the District Court ruled differently. "Plaintiffs further assert that the remand is not confined to their FTCA claims and contend that their 'excessive force claim,' the one that proceeded to a jury trial, is also 'now pending' in this case." **The district court's 06/21/22 Opinion & Order on Renewed Summary Judgment Motions, Filed Following Remand, Appx. D, a. 141**. "Contrary to Plaintiffs' assertion,… the Sixth Circuit did not remand… the excessive-force claim against Defendant Quinn." ***Id.***[7]

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[7] The District Court opinion also seems to contradict itself at times. "This Court fails to see that the Sixth Circuit vacated any ruling in Kellom I or remanded any issues in Kellom I back to the this Court." ***Id.*****, a. 145**. And Petitioner is left uncertain if the

Yet it was obvious to both Petitioners' counsel and Respondent's counsel that the Court of Appeals could not have remanded the FTCA without remanding the issue of excessive force, because there simply is no FTCA liability without excessive force liability. Put another way, although there could be individual liability without government liability, there could be no government liability without individual liability.

Therefore, the question of whether or not the killing of Terrance Kellom was excessive force was originally remanded to the trial court, and that was of no small significance to Petitioners. For that remanded issue to then simply have been waived off by the trial court and lost in the procedural reeds is a travesty, requiring review by this Court. It cannot be said, based on the record, that the trial court's decision on remand to dismiss again Petitioners' FTCA claim was influenced by its mistaken belief that it was futile for lack of excessive force.

5. The lower courts erred requiring review when it was ruled that the plain language of 28 U.S. Code § 2679(d)(5) did not apply to Petitioners' FTCA claims and that the claims were, accordingly, time-barred.

a. Petitioners are entitled to statutory tolling of their FTCA claims by the plain and unambiguous language of 28 USC § 2679(d)(5), for which judicial

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District Court felt it was not bound by the Sixth Circuit's rulings regarding Petitioner's FTCA excessive force claim.

interpretation was unnecessary and, therefore, not permitted.

Petitioners' claims were dismissed as untimely under 28 USC § 2401(b) when Petitioners' claims should have found timely pursuant to 28 USC § 2679(d)(5). The lower courts' error occurred because they unnecessarily read additional meaning into 28 USC § 2679(d)(5) that was not present in its plain language.

The Federal Torts Claims Act ("FTCA") has both a jurisdictional administrative-exhaustion requirement, set forth in 28 USC § 2675(a), and a non-jurisdictional two-year/six-month statute of limitations, set forth in 28 USC § 2401(b).[8] "Combined, these provisions act as chronological bookends to an FTCA claim, marking both a date before which a claim may not be filed and a date after which any filing is untimely." *Barnes v United States*, 776 F3d 1134, 1139 (CA 10, 2015). There is a statutory caveat to these "bookends," however. 28 USC § 2679(d)(5) allows a plaintiff whose claim is dismissed from a case in which the United States is substituted as the defendant 60 days from the dismissal to exhaust the administrative process and re-bring their claim. It states, in pertinent part:

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[8] *Copen v. United States*, 3 F.4th 875, 882 (6th Cir. 2021). [In summary, neither governing precedent nor the structure of the statute support the conclusion that Congress has plainly attached a jurisdictional label to the sum certain requirement in § 2675(b). The reference to chapter 171 in § 1346(b) is simply not clear enough to "turn a rule that speaks in nonjurisdictional terms into a jurisdictional hurdle." [*Gonzalez v.*]*Thaler*, 565 U.S. at 147, 132 S.Ct. 641.]

> Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if—
>
> > (A)the claim would have been timely had it been filed on the date the underlying civil action was commenced, and (B)the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

Terrance Kellom was fatally shot on April 27, 2015. Within two years of the shooting, a civil action was filed by the Estate of Terrance Kellom in federal court against the individual defendant who shot Terrance. (*I.e.,* the Complaint in case no. 17-cv-11084.) Because the civil action was filed within two years of the shooting, it was filed timely pursuant to § 2401(b) and § 2679(d)(5). The non-estate Petitioners (the parents, siblings, and children of Terrance Kellom) added their claims to that timely civil action.[9] (*Via* the Amended Complaint in case no. 17-cv-11084.) The United States was substituted as the Defendant in that action pursuant to an "Order Reflecting Substitution of United States of America for Defendant Quinn as to Count IV Only" (ECF 23 of case no. 17-cv-11084) and Petitioners claims were

[9] Within three years—which is the Michigan Wrongful Death statute of limitations period—of the shooting.

dismissed "for failure to exhaust."[10] **The district court's 08/29/18 Opinion & Order Granting in part and Denying in part Defendants' Motions to Dismiss, Appx. A, a. 3**. On October 3, 2018, 'within 60 days after dismissal' of their claims, Petitioners submitted an administrative claim to the appropriate federal agency. On June 2, 2019, within six months of Petitioners' administrative claims being denied, Petitioners filed civil action no. 19-cv-11622 from which appeal 22-1592 (as opposed to 22-1591) arose.

Accordingly:

• The underlying civil action was timely [as required by § 2679(d)(5)(A)], for all the reasons stated in the appellants' brief in the concurrent appeal and companion case, 22-1591.

• On March 22, 2018, the District Court issued an order reflecting the substitution of the United States as defendant in case no. 17-cv-11084, satisfying the substitution requirement of § 2679(d)(5).

• The District "Court's August 29, 2018 Opinion & Order dismissed the FTCA claims of the Non-Estate Plaintiffs for failure to exhaust [pursuant to § 2675(a)]" satisfying that element of § 2679(d)(5).

• Petitioners' claims were then submitted to appropriate federal agency within 60 days, satisfying § 2679(d)(5)(B).

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[10] The Estate's FTCA claims were not dismissed at that time and the civil action continued.

• And they then filed suit within six months, meeting the requirement of § 2401(b).

Because Petitioners' met every element of 28 USC § 2679(d)(5), the lower courts should have considered Petitioners' claims in 19-cv-11622 timely pursuant to the plain language of the statute. They should not have read words or meanings into the statute that simply are not present.

b. The meaning of 28 USC § 2679(d)(5) is plain and unambiguous, and does not speak of amendments to complaints but only commencement of civil actions.

The District Court, however, read into § 2679(d)(5) meaning that is not there, namely, the District Court concluded that where a claim was asserted via amendment, that the date of the amendment is the date that "the underlying civil action was commenced" under the statute. As the district court's stated in its 01/08/20 Opinion & Order Granting Defendant's Motion to Dismiss**:**

> The Non-Estate Plaintiffs did not assert any claims in Kellom I until May 4, 2018, when an Amended Complaint was filed that added them as plaintiffs in that case. Thus, the Non-Estate Plaintiffs did not assert claims in Kellom I until after two-years of the accrual date of April 27, 2015.
>
> ***
>
> Rule 15(c)(1)(C) permitting relation back of an amendment changing a party or its

> name applies, by its plain language, to changes to defendants—not plaintiffs.
>
> ***
>
> Accordingly, the Non-Estate Plaintiffs are not entitled to statutory tolling [under § 2679(d)(5)] and their FTCA claims are time-barred.

For the following reasons, the District Court's supplanting the plain language of § 2679(d)(5) with Fed. R. Civ. P. 15: Amended and Supplemental Pleadings, was error.

> [I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. See, *e. g., United States v. Ron Pair Enterprises, Inc*., 489 U.S. 235, 241-242, 103 L. Ed. 2d 290, 109 S. Ct. 1026 (1989); *United States v. Goldenberg*, 168 U.S. 95, 102-103, 42 L. Ed. 394, 18 S. Ct. 3 (1897); *Oneale v. Thornton*, 10 U.S. 53, 6 Cranch 53, 68, 3 L. Ed. 150 (1810). When the words of a statute are unambiguous, then, this first canon is also the last: "judicial inquiry is complete." *Rubin v. United States*, 449 U.S. 424, 430, 66 L. Ed. 2d 633, 101 S. Ct. 698 (1981); see also *Ron Pair Enterprises, supra*, at 241.

> *Conn Nat'l Bank v Germain*, 503 US 249, 253-54; 112 S Ct 1146; 117 L Ed 2d 391, 397-98 (1992).

The statute does not list any other requirement and certainly does not speak of 'amendments' or 'relation back.' Yet, the timing of the filing of the amended complaint in the underlying civil action was the basis for the District Court's dismissal of Petitioners claims. "The Non-Estate Plaintiffs did not assert any claims in *Kellom I* until May 4, 2018, when an Amended Complaint was filed that added them as plaintiffs in that case. ***Id.* a. 112**.) A plain reading of § 2679(d)(5) reveals, however, that the timing of the amended complaint which brought Petitioners' claims into the underlying civil action should never have been a consideration. Trimmed down to its operative terms, the statute says:

> [Whenever a] proceeding in which the United States is substituted… is dismissed for failure first to present a claim pursuant to [the administrative exhaustion requirement], such a claim shall be deemed to be timely presented under [the two-year/six-month statute of limitations] if—
>
> (A)the claim would have been timely had it been filed on the date the underlying [] action was commenced, and
>
> (B)the claim is presented… within 60 days after dismissal…

Note Congress's deliberate distinctions in their word choice. To the uninitiate, the three terms may seem interchangeable. But the statute was not written: 'Whenever an action for which the United States is substituted is dismissed… such an action shall be… timely… if… the underlying action was…' The statute does not read: 'Whenever a proceeding for which the United States is substituted is dismissed… such a proceeding shall be… timely… if… the underlying proceeding was…' Likewise, the statute does not read: 'Whenever a claim for which the United States is substituted is dismissed… such a claim shall be… timely… if… the underlying claim was…' None of these terms are interchangeable. It is a "canon [of statutory interpretation] that different words in a statute have different meanings." *Tomaszczuk v Whitaker*, 909 F3d 159, 166 (CA 6, 2018). "[W]hen we're engaged in the business of interpreting statutes we presume differences in language like this convey differences in meaning." *Henson v Santander Consumer USA Inc*, ___US___; 137 S Ct 1718, 1723; 198 L Ed 2d 177, 182 (2017).

The FTCA does not define the terms 'proceeding,' 'claim,' or 'action.'[11] Yet, these terms have well-defined plain meanings as is apparent from federal jurisprudence.

> [T]he terms "claims," "suits," and "proceedings" each "describe pre-judgment events." See Claim, *Black's Law Dictionary* (10th ed. 2014) (defining

[11] 28 USC § 2671 (Defines "federal agency," "employee of the government," and "acting within the scope of his office or employment" for purposes of §§ 1346(b) and 2401(b) but not "proceeding.")

"claim" as a "demand for money, property, or a legal remedy to which one asserts a right"); Proceeding, *Black's Law Dictionary* (10th ed. 2014) (defining "proceeding" as "[a]ny procedural means for seeking redress from a tribunal or agency")

Vazquez v. TriAd Media Sols., Inc., 797 F. App'x 723, 726 (3d Cir. 2019) (citations to record removed).

Black's Law Dictionary defines a proceeding as, in part, "any procedural means for seeking redress from a tribunal or agency." *Black's Law Dictionary* 1221 (7th Ed.1999); see also *Black's Law Dictionary* 1368 (4th Ed.1968) (defining a proceeding as "any application to a court of justice, however made, for aid in the enforcement of rights, for relief, for redress of injuries, for damages, or for any remedial object"). A [] motion certainly falls within Black's definition of a proceeding.

We therefore conclude that the filing of a [] motion is a separate "proceeding…"

United States v. Moreno, 364 F.3d 1232, 1235 (11th Cir. 2004) (citations to record removed).

Black's Law Dictionary defines "civil action" by cross reference to "action." See

> Civil Action, *Black's Law Dictionary* (10th ed. 2014). It defines "action" broadly as:
>
> > A civil or criminal judicial proceeding.
> >
> > "An action … is defined to be any judicial proceeding, which, if conducted to a determination, will result in a judgment or decree. The action is said to terminate at judgment." *Morris M. Estee, Estee's Pleadings, Practice, and Forms* § 3, at 1 (Carter P. Pomeroy ed., 3d ed. 1885).
>
> *United States v. Searcy*, 880 F.3d 116, 126 (4th Cir. 2018).

Therefore, the statute states that a "claim" (demand for money) brought through any "proceeding" (which could be an amended complaint, motion, *etc.*) shall be timely if it would have been timely if brought on the date the "civil action" (a lawsuit) which contains the dismissed "proceeding" which contains the plaintiff's "claim," was commenced. § 2679(d)(5). Pursuant to Fed. R. Civ. P. 3: "A civil action is commenced by filing a complaint with the court."

There is nothing in the Federal Rules of Civil Procedure that equates the term "commence" to the phrase "relate back." In fact, Fed. R. Civ. P. 15:

Amended and Supplemental Pleadings, does not use any form of the word "commence" even once. Respondent has certainly conceded many times over that the two concepts are distinct, with their arguing that the Estate of Terrance Kellom's amendments to its complaint in 17-cv-11084 did not affect the date that the action was commenced for purposes of § 2675(a) (requiring plaintiffs to "have first presented the claim to the appropriate Federal agency…").

> In its motion to dismiss, the United States argued that the Estate's FTCA claim lacked subject matter jurisdiction because the Estate filed suit alleging a tort claim against a federal agent before exhausting the FTCA's mandatory administrative tort claims process and that an amended complaint could not cure that defect. (US MTD, ECF No. 35).
>
> United States Re-Brought (as opposed to having withdrawn and renewed or filed a motion for reconsideration) Motion for Summary Disposition, Case no. 17-cv-11084, ECF No. 80, PageID.1646-7.

Here, Petitioners' claims were contained in the amended-complaint (proceeding) of civil action no. 17-cv-11084. Civil action 17-cv-11084 was "commenced" on April 6, 2017; The addition of Petitioners' claims did not change that fact. Petitioners' claims would have been timely presented had they been presented on April 6, 2017.

The District Court, however, interpreted § 2679(d)(5) to mean that an "action" shall be timely if

it would have been timely brought on the date the underlying "proceeding" was brought. (The proceeding being the amended complaint in civil action 17-cv-11084, which contained Petitioners' claims.) In this way, the District Court essentially got the meaning of the statute backwards. § 2679(d)(5) says nothing about 'amended complaints' or 'relation back,' nor can those concepts be read into it without changing its plain meaning. Accordingly, the District Court's dismissal of Petitioners' claims was error and should be reversed.

CONCLUSION

For the above reasons and more, the petition for certiorari should be granted. Terrance Kellom was in his father's home, when it was stormed by Detroit police and federal agents. He was shot and killed in front of his father and sister by an Immigrations and Customs Enforcement agent, despite he and his parents being born in the United States. He left behind three siblings, and two young children. He did not have a hammer in his hand when he was shot in the back. His life mattered, and his family's lives matter.

Respectfully submitted,

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APPENDIX

APPENDIX

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APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 17-cv-11084

[Filed: August 29, 2018]

NELDA KELLOM, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF TERRANCE KELLOM, DECEASED,

PLAINTIFFS,

V.

MITCHELL QUINN, *ET AL.*,

DEFENDANTS.

OPINION & ORDER
GRANTING IN PART AND DENYING IN PART
DEFENDANT'S MOTION TO DISMISS

Plaintiff Nelda Kellom is the personal representative of a man who was allegedly shot and killed when a United States Marshal Detroit Fugitive Apprehension Team was attempting to arrest him at a house in Detroit, Michigan on April 27, 2015.

After one motion to dismiss was ruled upon, Plaintiff's Counsel filed a First Amended Complaint, that added both named parties and claims. The matter is currently before the Court on a second round of motions to dismiss, as the following three motions to dismiss challenge the First Amended Complaint: 1) a Motion to Dismiss filed by Defendants City of Detroit, Craig, Eaton, and Fitzgerald (D.E. No. 34); 2) a Motion to Dismiss filed by the United States (D.E. No. 35); and 3) a Motion to Dismiss Certain Counts filed by Defendant Quinn (D.E. No. 36). The motions have been fully briefed and the Court heard oral argument on August 23, 2018. For the reasons set forth below, the Court GRANTS IN PART AND DENIES IN PART each of these motions.

More specifically, the Court DENIES the motions filed by Defendants to the extent that the Court:

1) concludes that the Estate exhausted administrative remedies before filing its FTCA claims against the United States;

2) declines to dismiss the Steagald claim asserted by the Decedent's parents in Count VII, as to Defendants Quinn and Eaton, on the ground that exigent circumstances warranted entry without a search warrant, based on the pleadings;

3) declines to dismiss the municipal liability count against the City

and Chief Craig (in his official capacity) based on the pleadings.

The Court GRANTS the three motions to dismiss filed by Defendants to the extent that the Court:

1) dismisses Count VII against the United States because the United States has not waived sovereign immunity as to alleged violations of the Constitution;

2) dismisses Counts V & VI without prejudice, as to the "Non-Estate Plaintiffs" because they failed to exhaust administrative remedies prior to filing FTCA claims against the United States;

3) dismisses Count IV (the Bivens Conspiracy claim) because that claim is not cognizable as to the Estate, as the First Amended Complaint expressly alleges that the conspiracy began after the Decedent's death;

4) dismisses all "Non-Estate Plaintiffs" from all remaining counts, except Count VII, because they lack standing to assert those claims, because unlike the Estate they cannot assert a claim based on a violation of the Decedent's constitutional right;

5) dismisses Counts II & VIII as to

Eaton and Fitzgerald as Plaintiffs now agree that should be done;

6) dismisses Count III for failure to identify a racial or other class-based invidious or discriminatory animus underlying the alleged conspirators' actions;

7) dismisses any claims asserted against Chief Craig in his individual capacity because the First Amended Complaint includes no allegations as to his personal involvement, and because Plaintiffs' Counsel stated during oral argument that no claims are brought against Craig in his individual capacity; and

8) dismisses Count VIII (municipal liability claim) against officers Eaton and Fitzgerald because, as Plaintiffs' Counsel agreed during oral argument, there is no basis for a municipal liability claim to be asserted against them.

BACKGROUND

On April 6, 2017, Plaintiff Nelda Kellom, as Personal Representative of the Estate of Terrance Kellom, Deceased ("the Estate"), filed this action. The Estate's original complaint named the following Defendants: 1) Immigration and Customs Enforcement Agent Mitchell Quinn; 2) Detroit Police

Officer Darell Fitzgerald; and 3) Detroit Police Officer Treva Eaton. Plaintiff's original complaint included the following four counts: 1) "Bivens Claim" (Count I); 2) "42 U.S.C. § 1983 – Excessive Force and/or Unlawful Use of Deadly Force" (Count II); 3) "§ 1983 Conspiracy by Defendants" (Count III); and 4) "Wrongful Death [under] Michigan Wrongful Death Act, Mich. Comp. Laws § 600.2922 et seq," (Count IV).

On February 6, 2018, this Court issued the Scheduling Order in this matter that provides, among other things, that: 1) that amendments to pleadings were to be made by April 16, 2018; 2) that discovery would close on November 16, 2018; and 3) dispositive motions had to be filed by December 16, 2018. (D.E. No. 21).

In an Opinion & Order issued on March 27, 2018, this Court granted a Motion for Partial Dismissal filed by Defendant Quinn. The Court: 1) granted the motion to the extent that it dismissed that portion of Count I that asserted a claim against Quinn based upon an alleged violation of the Fourteenth Amendment; and 2) granted the motion as to Count III, dismissing the § 1983 claim against Quinn. In addition, the parties stipulated that the United States would be substituted for Quinn as to the wrongful death claim. On April 16, 2018, Plaintiff's Counsel filed a motion seeking leave to file an amended complaint. Thereafter, Defendants filed responses indicating that, while they do not concede that the claims asserted against them are valid and that they may file motions challenging the claims asserted against them, they do not oppose the motion to amend. Thus, on May 3, 2018, the Court issued an order

granting leave to file a First Amended Complaint.

On May 4, 2018, Plaintiff filed a First Amended Complaint (D.E. No. 32) which added named parties and claims.

In addition to the Estate, seven of the Decedent's family members now assert claims in Plaintiffs' First Amended Complaint. Those "Non-Estate Plaintiffs" include: 1) the Decedent's mother in her individual capacity (Nelda Kellom); 2) the Decedent's father, Kevin Kellom; 3) the Decedent's two adult sisters (Teria Kellom and Lawanda Kellom) and his adult brother (Terrell Kellom); and 4) the Decedent's two minor children, joined in the lawsuit through their mother and personal representative, Janay Williams.

The parties later agreed that the United States would be substituted for Defendants Eaton and Fitzgerald at to Counts V and VI. (See D.E. No. 41).

Accordingly Plaintiffs' First Amended Complaint now asserts the following claims: 1) a Bivens claim, asserted by the Estate and the Non-Estate Plaintiffs, against Defendants Eaton, Fitzgerald, and Quinn (Count I); 2) a § 1983 excessive force claim, asserted by the Estate, against Defendants Eaton and Fitzgerald (Count II); 3) a § 1985 conspiracy claim, asserted by the Estate and the Non-Estate Plaintiffs, against Defendants Eaton and Fitzgerald; 4) a Bivens conspiracy claim, asserted by the Estate and the Non-Estate Plaintiffs, against Defendants Eaton, Fitzgerald, and Quinn (Count IV); 5) a wrongful death claim under Michigan law, asserted by the Estate and the Non-Estate Plaintiffs,

against the United States (in place of Defendants Quinn, Eaton, and Fitzgerald) (Count V); 6) an intentional infliction of emotional distress claim under Michigan law, asserted by the Estate and the Non-Estate Plaintiffs, against the United States (in place of Defendants Quinn, Eaton, and Fitzgerald) (Count VI); 7) a *Steagald* violation claim, asserted by Plaintiffs Kevin Kellom and Teria Kellom, against all Defendants (Count VII); and 8) a § 1983 Monell Liability claim, asserted by the Estate and the Non-Estate Plaintiffs, against Craig, Eaton, Fitzgerald, and the City of Detroit (Count VIII).

There are currently three motions to dismiss pending before the Court, that were all heard by the Court on August 23, 2018.

ANALYSIS

I. The Motion To Dismiss Filed By The United States

The United States filed a Motion to Dismiss, pursuant to Fed. R. Civ. P. 12(b)(1) (lack of subject matter jurisdiction.). In this motion, the United States presents two issues.

A. Should The Court Dismiss The *Steagald* Claim (Count VII) Against The United States Because The United States Has Not Waived Sovereign Immunity As To Alleged Violations Of The Constitution?

Noting that the First Amended Complaint

asserts Count VII against "all defendants," the United States construes it as being asserted against it. The United States now asks the Court to dismiss Count VII as to it, asserting as follows:

> The United States is immune from suit unless it waives its sovereign immunity, *Lehman v. Nakshian*, 453 U.S. 156, 160-61 (1981), and The Supreme Court has explicitly held that the United States has not waived its immunity from suits for damages based on constitutional violations. *F.D.I.C. v. Meyer*, 510 U.S. 471 (1994).

Accordingly, the United States is immune from plaintiffs' *Steagald* claim, which is based on an alleged violation of the Fourth Amendment. (D.E. No. 35 at Pg ID 328).

Plaintiffs' response states that they "disagree with Defendant United States' argument that Claim VII must be dismissed." (*Id*. at Pg ID 471). Plaintiffs' brief then states "Plaintiffs do not bring their *Steagald* claim under the Federal Tort Claims Act" and then claims that the "United States entered into this lawsuit but is now trying to have its cake and eat it too." (*Id*. at Pg ID 471). That argument goes nowhere because: 1) Plaintiffs do not dispute that Count VII asserts a claim for a constitutional violation; and 2) Plaintiffs do not provide any authority to establish that the United States has waived sovereign immunity for such claims.

"The United States as a sovereign is immune from suit for money damages unless it unequivocally

has waived such immunity." *Blakely v. United States*, 276 F.3d 853, 870 (6th Cir. 2002). This Court lacks jurisdiction over Plaintiffs' claim against the United States in Count VII. The United States has not waived sovereign immunity in Bivens-type actions brought against the United States, and thus the constitutional tort claim asserted in Count VII against the United States is precluded by sovereign immunity. *FDIC v. Meyer*, 510 U.S. 471, 477-78 (1994); *Blakely*, 276 F.3d at 864-65; *Nuclear Transport & Storage, Inc. v. United States*, 890 F.2d 1348, 1352 (6th Cir. 1989); *Fountain v. West Point Military Academy*, 892 F.2d 1043 (6th Cir. 1990); *Jackson v. United States*, 114 F.3d 1187 (6th Cir. 1997).

B. Should The Court Dismiss The Wrongful Death And IIED Claims (Counts V & VI) Against The United States For Failure To Exhaust Administrative Remedies Under The FTCA?

As noted above, sovereign immunity prevents suits against the United States without its consent. "The Federal Tort Claims Act ('FTCA') waives sovereign immunity for certain actions in tort by giving district courts exclusive jurisdiction over those types of civil actions." *Premo v. United States*, 599 F.3d 540, 544 (6th Cir. 2010).

It is well-established, however, that the "FTCA bars claimants from bringing suit in federal court until they have exhausted their administrative remedies." *McNeil v. United States*, 508 U.S. 106, 113

(1993). There are several basic concepts as to exhaustion under the FTCA that are relevant here.

The FTCA provides that "[a]n *action shall not be instituted* upon a *claim against the United States* for money damages for injury or loss of property or personal injury or death cause by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, *unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency* in writing and sent by certified or registered mail." 28 U.S.C. § 2675(a) (emphasis added); *see also* 28 U.S.C. § 2401(b) ("A tort claim *against the United States* shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues . . .") (emphasis added).

The statute further provides, however, that the "failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim." *Id*. But once there has been an actual denial of the administrative claim, the claimant must file suit in federal court within six months. 28 U.S.C. § 2401(b).

When a claimant "prematurely" files a FTCA lawsuit (ie., when the claimant files it before the denial of an administrative claim), then the federal court lacks subject matter jurisdiction over the action and it must be dismissed. *McNeil v. United States*, 508 U.S. 106 (1993).

In McNeil, the plaintiff filed suit asserting a

FTCA claim on March 6, 1989. Four months later, on July 7, 1989, he submitted his administrative claim. The district court dismissed for failure to exhaust and the Ninth Circuit affirmed noting that the complaint filed on March 6, 1989 was "too early" and explaining that "[u]nless McNeil began a *fresh suit* within six months after July 21, 1989, he loses." *Id*. at 110 (emphasis added). Because some circuits were permitting "a prematurely filed FTCA action to proceed if no substantial progress has taken place in the litigation before the administrative remedies are exhausted," the Supreme Court granted certiorari to resolve the conflict. Id. The Court held that the statute requires complete exhaustion of administrative remedies "before invocation of the judicial process," and explained that "[e]very premature filing *of an action under the FTCA* imposes some burden on the judicial system and on the Department of Justice which must assume the defense of such actions." *Id*. at 113 (emphasis added).

Following *McNeil*, several courts have ruled that "premature" FTCA suits cannot be cured by virtue of filing an amended complaint in the same action, after the administrative claim is denied. Rather, in such situations, a new lawsuit must be initiated within the applicable six- month time period for filing suit after the denial. *See, e.g., Duplan v. Harper*, 188 F.3d 1195, 1199 (10th Cir. 1999) ("as a general rule, a premature 'complaint cannot be cured through amendment, but instead, plaintiff must file a new suit."); *Sherman v. United States*, 48 F. Supp.3d 1019, 1024 (E.D. Mich. 2014); *VanHorn v. Walton*, 2013 WL 119252 at *2 (E.D. Mich. J. Steeh); *Sparrow*

v. USPS, 825 F.Supp. 252, 254-55 (E.D. Calf. 1993).

The Government asserts that Plaintiffs failed to exhaust the FTCA's administrative 8 remedies for their tort claims against the United States (Counts V & VI) before filing this suit, when the Estate did not submit an administrative claim until a month after filing this suit and the remaining plaintiffs have never initiated the administrative process. (D.E. No. 35 at Pg ID 318).

In response to the Government's motion, Plaintiffs take the position that: 1) their original complaint did not assert a FTCA claim or name the United States as a Defendant; and 2) only Plaintiffs' filing of the First Amended Complaint on May 5, 2018 asserted a FTCA claim or names the United States and that they had exhausted their administrative remedies before that date. (D.E. No. 44 at Pg ID 472).

This Court agrees that if the original complaint filed by the Estate asserted a FTCA claim against the United States, then it would have been premature because it was filed on April 6, 2017, before the Estate had even filed its administrative claim. If such a premature complaint had been filed by the Estate, then the Estate would have to file a new lawsuit after the denial of its administrative complaint, not an amended complaint in this action. In addition, if that were the case, because the Estate's administrative denial occurred on February 1, 2018, a new lawsuit would have had to have been filed by the Estate by August 1, 2018. Accordingly, if the Estate's original complaint asserted a FTCA against the United States, the Court would have to dismiss this action for lack of

subject matter jurisdiction and, because August 1, 2018 has now passed, the Estate's wrongful death claim would be time-barred.

That brings us what appears to be the real issue – whether the Estate's original complaint asserted FTCA claims against the United States.

Again, Plaintiffs' Counsel asserts that the Estate's original complaint did not assert FTCA claims or name the United States as a Defendant. He contends that the Estate exhausted its administrative remedies prior to the filing of the First Amended Complaint, which did name the United States as a Defendant and did invoke jurisdiction under the FTCA. The Estate therefore takes the position that its FTCA claims against the United States were first raised in the First Amended Complaint, after exhaustion, and therefore the Estate was not required to file a new action after the denial of the Estate's administrative claim.

In its Reply Brief, the Government takes the position that "the Estate's initial complaint contained an FTCA claim, although the Estate pleaded it improperly." (D.E. No. 47 at 499).

This Court has not found any Sixth Circuit cases directly on point as to this issue. However, a published Ninth Circuit case, *Valadez-Lopez v. Chertoff*, 656 F.3d 851 (9th Cir. 2011), and a decision by Judge Ludington that relies on it, *Walters v. Mercy Hospital Grayling*, 2013 WL 5775367 (E.D. Mich. 2013), addressed this same scenario and support the Estate's position.

In *Valadez-Lopez*, the Ninth Circuit considered "whether plaintiff properly exhausted his administrative remedies" under the FTCA "where the federal agencies denied the plaintiff's administrative tort claims before he amended his complaint in an ongoing civil action to name the United States as a party and allege a new cause of action under the Act." *Id*. at 854. In that case, the plaintiff "initially filed suit against local officials under § 1983 and federal officials under *Bivens*" and "separately filed administrative tort claims with the appropriate federal agencies, pursuant to the FTCA's exhaustion requirement." *Id*. When the plaintiff had not received a decision as to his administrative claims within six months, he deemed them denied and "amended his complaint to name the United States as a defendant and allege liability under the FTCA." The district court granted a motion to dismiss filed by the Government and dismissed the FTCA claims for failure to exhaust. The plaintiff appealed.

The Ninth Circuit held that the district court erred in concluding that the plaintiff failed to exhaust administrative remedies. In doing so, the court explained that the plaintiff's "original complaint *neither named the United States as a defendant nor stated a claim under the Act*. He only amended his complaint to name the United States and include an FTCA cause of action after the government had failed to respond to his administrative claims within six months." *Id*. at 855 (emphasis added). It found that, under the plain language of the statute, the plaintiff "exhausted his administrative remedies before instituting "a claim against the United States" under

the FTCA. As such, the plaintiff's claims were administratively exhausted. *Id*.

The Ninth Circuit further rejected the government's argument "that the court is required to dismiss the FTCA claim in the amended complaint and to require the plaintiff to file an entirely new lawsuit founded on the same nucleus of facts." *Id*. at 856. The court found that position without support in either the plain language of the statute or Ninth Circuit case law and explained:

> There is nothing in the statute or our case law that would prevent a plaintiff from *amending an existing complaint asserting non-FTCA claims to name the United States as a defendant and include FTCA claims* once those claims have been administratively exhausted. The cases cited by the government are inapposite, because they involve the circumstance in which a plaintiff filed an FTCA lawsuit before exhausting his or her FTCA administrative remedies.
>
> . . . .
>
> *McNeil* does not control the outcome here, where [the plaintiff] "invoked the federal court's jurisdiction under the FTCA" in his amended complaint after he exhausted his administrative remedies. *Id*. At 108, 113 S.Ct. 1980.

Id. (emphasis added). In a footnote, the court explained that the government was incorrect to rely on a series of cases, including one relied on by the Government here, as in each of those cases, "the plaintiff's original complaint, filed before administrative remedies were exhausted, sought 'redress from the government pursuant to the FTCA.'" *Id*. at 856 n.1.

In *Walters*, Judge Ludington relied on *Valadez-Lopez* in concluding that the plaintiff had exhausted her administrative remedies under the FTCA. There, the plaintiff filed suit against her doctors and their employers in state court on June 19, 2013. "While Plaintiff's case was pending in state court, HHS denied her administrative claim on July 1, 2013." *Id*. * 2. At the end of July, the United States filed a notice of removal. *Id*. "Although not identified as a defendant, the United States filed a notice of removal pursuant to 42 U.S.C. § 233 and 28 U.S.C. § 2679(d). The United States removed the case because Defendants Jeffrey D. Strickler and Dana R. Brackins were 'deemed' employees of the United States and thus eligible for coverage under the Federal Tort Claims Act." *Id*. at *1. "Because the United States is the only proper defendant in an FTCA action," the district court "accepted the parties' stipulation substituting the United States as a defendant in place of" the federal employees and entities on August 8, 2013. *Id*. at * 2

The government filed a motion to dismiss, asserting that the plaintiff has failed to exhaust her administrative remedies. The district court denied the motion, explaining:

> Here, Plaintiff properly exhausted her administrative remedies as required by the FTCA. Plaintiff's original state-court complaint *neither named the United States as a defendant nor stated a claim under the FTCA*. Rather, the original complaint alleged state law negligence claims against Plaintiff's doctors and their employers. Plaintiff's administrative complaint was "finally denied by" HHS on July 1, 2013, more than a month before the original parties substituted the United States as a Defendant. Only after HHS's final denial did the Plaintiff assert an FTCA claim against the United States. Therefore, Plaintiff properly exhausted her administrative remedies before instituting an action against the United States pursuant to FTCA. *See Valadez-Lopez v. Chertoff*, 656 F.3d 851 (9th Cir. 2011).

Id. at * 3 (emphasis added). The district court further noted that the "Government's reliance on *McNeil* is inapposite because that case involved a plaintiff that filed an FTCA claim before exhausting his FTCA administrative remedies. In *McNeil*, the Supreme Court explained that "[e]very premature filing of *an action under the FTCA* imposes some burden on the judicial system." *McNeil* at 112 (emphasis added)." *Id*. When, as here, the plaintiff "invoked the federal court's jurisdiction under the FTCA" after she exhausts her administrative remedies, McNeil does

not control." *Id*.

There is a rather long sequence of events in this case that relate to this issue, but the Court ultimately concludes that the Estate exhausted its claims.

The Estate filed the original complaint on April 6, 2017. Notably, it did not name the United States as a defendant and it did not assert any claims under the FTCA. It asserted claims against federal and state officers, and included a wrongful death claim under Michigan law.

On April 25, 2017, the Estate filed an administrative claim. (*See* Ex. 2 to the Govt.'s Br.). That claim was asserted on behalf of "Nelda Kellom, as personal representative of Deceased Terrance Kellom," and did not assert claims on behalf of any other parties.

On October 16, 2017, Defendant Quinn filed a Motion for Partial Dismissal, and attached a Certificate of Scope of Employment as to Quinn as an exhibit to the motion. The motion asserted that the United States should be substituted for Quinn as to the wrongful death claim.

As of October 25, 2017, six months had passed since the Estate filed its administrative claim. As such, by statute, the Estate can deem it denied as of October 25, 2017.

On November 17, 2017, the Estate filed a response in opposition to Defendant Quinn's motion, *disputing* that Quinn was acting within the scope of his employment as it relates to his alleged actions in shooting an unarmed man. The Estate argued that the

United States *should not* be substituted for Quinn, and noting that certificates are conclusive for purposes of removal but are rebutable for purposes of defendant substitution. *See Arbour v. Jenkins*, 903 F.2d 416, 421 (6th Cir. 1990).

On February 1, 2018, the Estate's administrative claim was actually denied. Thus, the Estate had until August 1, 2018 to file a FTCA claim against the United States.

On March 9, 2018 – after the Estate's administrative complaint had been deemed denied and had actually been denied – a Notice of Substitution was filed on the docket by the United States, stating that the United States is hereby substituted for Defendant Quinn as to the wrongful death claim. (D.E. No. 22). At that time, the Estate still disputed the requested substitution.

But on March 22, 2018, the Court held a hearing on Defendant Quinn's Motion for Partial Dismissal, at which time Counsel for the Estate agreed that the United States should be substituted for Quinn as to the wrongful death claim, and a stipulated order to the effect was entered that same day. (D.E. No. 23). Thus, as of March 22, 2018, the Estate was asserting the wrongful death claim against the United States. That was *after* the Estate's administrative claim had been both constructively and actually denied.

On May 4, 2018, Plaintiffs filed a First Amended Complaint, that named the United States as a Defendant and invoked jurisdiction under the FTCA. It included the wrongful death claim (Count V)

and also added another tort claim, a claim for intentional infliction of emotional distress (Count VI).

On June 22, 2018, the parties stipulated to substituting the United State for Defendants Fitzgerald and Eaton as to Counts V & VI.

Accordingly, after the Estate's administrative claim had been denied, but before the August 1, 2018 deadline for filing a FTCA action based on its administrative claim, the Estate asserted FTCA claims against the United States. Based on this sequence of events, the Court will not dismiss the Estates's claims in Counts V & VI for failure to exhaust administrative remedies.

Nevertheless, the Court concludes that all Non-Estate Plaintiffs failed to exhaust their administrative remedies prior to filing the First Amended Complaint. Thus, as Plaintiffs' Counsel acknowledged at the hearing, Counts V & VI must be dismissed as to the Non-Estate Plaintiffs for failure to exhaust administrative remedies.

II. Defendant Quinn's Motion To Dismiss.

In a Motion to Dismiss brought under Fed. R. Civ. P. 12(b)(6), Quinn recognizes that the Estate's *Bivens* claim against him in Count I should proceed to discovery, but he asserts that the remaining claims against him should be dismissed. Quinn also asserts that the "Non-Estate Plaintiffs" lack standing to assert claims under Counts I and IV.

A. Does The *Bivens* "Cover-Up" Conspiracy Claim Fail Because Such Claim on Behalf of Decedents Are

Not Legally Valid?

In Count IV, the *Bivens* Conspiracy Claim brought by the Estate and the other Plaintiffs, Plaintiffs alleges as follows:

> 72. *Upon Defendants realizing that Terrance Kellom was unjustly murdered, they intentionally conspired with each other and possibly others to cover- up their unlawful and unconstitutional acts* by providing false and fictitious information to the authorities and to the media regarding the shooting of Terrance, including falsely claiming that warrants were presented, that Terrance threatened Defendant Quinn with a hammer, and that the discharge of the firearm was the result of a reasonable fear of harm.
>
> 73. Defendants acted in concert to cover-up the facts and circumstances of the fatal shooting of Terrance Kellom.
>
> 74. *As soon as Defendants realized that they had wrongfully killed Terrance, they mutually, either tacitly or overtly, agreed to commence a conspiracy to cover-up the facts of what they had done.*
>
> 75. Defendants' conspiracy sought to

> deprive Plaintiff Terrance Kellom and his family of their constitutional rights.
>
> 76. At all times herein, the aforementioned conspiracy had among its purpose to violate Plaintiffs' constitutional and/or common law rights. As a consequence, Plaintiffs claim a violation of their rights pursuant to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 US 388, 91 S. Ct. 1999 (1971).

(First Am. Compl., D.E. No. 32, at Pg ID 258-59) (emphasis added).

In the pending motion, Defendant Quinn asserts that the cover-up conspiracy claim asserted in Count IV must be dismissed because such claims on behalf of decedent's are not legally valid. Citing several cases, Quinn argues that "the constitutional rights of a decedent end at his death, and as a result, allegations of a conspiracy to cover-up the nature of a person's death are legally deficient in the context of Bivens and 42 U.S.C. § 1983." (Quinn's Br., D.E. No. 36, at Pg ID 368). Quinn directs the Court to *Silkwood v. Kerr-McGee Corp.*, 637 F.2d 743, 748-49 (10th Cir. 1980); *Guyton v. Phillips*, 606 F.2d 248, 250-51 (9th Cir. 1979); and *Ford v. Moore*, 237 F.3d 156, 165 (2d Cir. 2001).

In *Guyton*, the Ninth Circuit considered the issue of whether § 1983 "affords a cause of action on

behalf of a deceased for acts occurring after the death of that person," and held that it does not. *Guyton*, 606 F.2d at 250. The court explained:

> We find that the Civil Rights Act, 42 U.S.C. Ss 1983 and 1985, does not provide a cause of action on behalf of a deceased based upon alleged violation of the deceased's civil rights which occurred after his death. A "deceased" is not a "person" for the purposes of 42 U.S.C. ss 1983 and 1985, nor for the constitutional rights which the Civil Rights Act serves to protect.

Id. The Ninth Circuit affirmed the dismissal of a conspiracy claim against the officers, explaining that "all of the alleged actions" of the defendant officers "occurred after [1] [the decedent's] death and thus were not violations of a 'person's' civil rights." *Id*. at 251. Thus, it ruled that "inasmuch as [the decedent's] civil rights must terminate with his death, so must any conspiracy to deprive him of those rights."

In *Silkwood*, the estate of a decedent asserted a *Bivens* claim against F.B.I. agents, alleging that they became involved in a conspiracy only after the

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[1]The court noted that "the situation presented by this appeal should not be confused with that presented when a plaintiff, on behalf of a deceased, challenges actions committed *Before* the deceased's death as violations of the Civil Rights Act" as in the latter case, the cause of action may survive the decedent's death. *Guyton*, 606 F.2d at 250-51 (italics added for emphasis; capitalization of "b" in appearing in original).

decedent's death, the purpose of which was to cover-up their actions that led to her death. The district court granted summary judgment on that claim, "because the FBI allegedly became involved in the conspiracy only after the death of Karen Silkwood," the decedent, and therefore could not have violated the decedent's rights. *Silkwood*, 637 F.2d at 748-49. In a published opinion, the Tenth Circuit affirmed the dismissal, stating that "[w]e agree with the Ninth Circuit that the civil rights of a person cannot be violated once that person has died." Id. (Citing *Guyton, supra*, and other cases). The Tenth Circuit explained that "[i]t is clear that the FBI agents could not have violated the civil rights of [the decedent] by cover-up actions taken after her death." *Id.*

In *Ford,* the Second Circuit also rejected, as legally deficient, "cover-up" conspiracy claims, where the alleged actions taken by the conspirators were all alleged to have occurred after the decedent's death.

Based on the allegations in Plaintiffs' First Amended Complaint, Quinn asserts that the cover-up conspiracy claim asserted in Count IV fails to state a claim against him and the other officers, because the complaint expressly alleges that the conspiracy did not begin until after the decedent's death.

In response to this motion, Plaintiffs' Counsel asserts that "Plaintiffs allege that Defendants' began conspiring immediately after the shooting of Terrance Kellom, before he was placed in an ambulance, before he was pronounced dead at the hospital, and before one of the Defendants' present at the scene told

Plaintiff Kevin Kellom that his son was in 'critical condition.'" (Pls.' Br., D.E. No. 42 at Pg ID 442-43). *But there are no such allegations in Plaintiffs' First Amended Complaint.*

Although this is a motion to dismiss brought under Fed. R. Civ. P. 12(b)(6) that is based on the sufficiency of the pleadings, Plaintiffs' Counsel also asserts that Defendants "have shown absolutely *no evidence* that Terrance Kellom was dead before the conspiracy began." (*Id*. at 443) (emphasis added).

In his Reply Brief, Defendant Quinn notes that Plaintiffs' argument "ignores the exact words of their amended complaint," explaining:

> They do not allege that while Terrance Kellom was alive, Defendants conspired to cover up the nature of the shooting. Instead, they state, "[u]pon [] realizing that Terrance Kellom was unjustly murdered, they intentionally conspired with each other and possibly others to cover-up their unlawful and unconstitutional acts . . ." (Dkt. #31, Am. Compl., ¶ 72). Plaintiffs further claim, "[a]s soon as Defendants realized they had wrongfully killed Terrance, they mutually, either tacitly or overtly, agreed to commence a conspiracy . . ." (*Id*. at ¶ 74). Hence, according to the amended complaint, the conspiracy did not begin until after Terrance Kellom was deceased, and the Court should dismiss Count IV.

(D.E. No. 46 at Pg ID 487-88).

The Court shall dismiss Count IV as to Defendant Quinn, as the First Amended Complaint expressly alleges that the conspiracy did not begin until after the decedent's death.

Silkwood, 637 F.2d at 748-49; *Guyton*, 606 F.2d at 250-51. Because Defendants Eaton and Fitzgerald raise this same issue, as explained later in this Opinion & Order, that Count must also be dismissed as to them for this same reason.

B. Should The Court Dismiss Count VII Against Quinn (And Eaton) Because Exigent Circumstances Existed For Quinn (And Eaton)To Enter The Kellom House Without A Search Warrant?

In *Steagald*, the United States Supreme Court addressed the issue of whether a "law enforcement officer may legally search for the subject of an arrest warrant in the home of a third party without first obtaining a search warrant." *Steagald v. United States*, 451 U.S. 204, 205-06 (1981). The Supreme Court held "that a search warrant must be obtained absent exigent circumstances or consent." *Id.*

In Count VII, the Decedent's parents (Kevin and Teria Kellom) assert a "*Steagald*" claim. That is, they allege that their home was impermissibly entered by the officers on the date of the incident without a search warrant, even though the officers had an arrest warrant for Terrance Kellom (the Decedent). In Plaintiffs' First Amended Complaint, they allege that on April 27, 2015, various members of

the US Marshall Detroit Fugitive Apprehension Team ("DFAT") arrived at the house and set up a perimeter around the house. (First Am. Compl. at ¶¶ 23-25). They allege the house is owned by Kevin Kellom, that Kevin and Teria Kellom reside there, and that Terrance did not reside there. They allege that Officer Fitzgerald and an unknown officer knocked on the door and asked about Terrance's whereabouts. (*Id.* at ¶ 29). They allege that Fitzgerald demanded to search the house, that Kevin and Teria Kellom did not consent to entry, and that Fitzgerald told them he had a search warrant although the officers had no search warrant. (*Id.* at ¶ 30-32). Two other officers of the DFAT then entered the house, and headed upstairs while Fitzgerald remained downstairs. Plaintiffs allege that after the two officers located Terrance in the attic, "they called for backup." (Id. at ¶ 35). There are no other allegations as to what was said by the officers who requested backup or even how the request for backup was communicated. After that, officers Quinn and Eaton are alleged to have entered the house and Plaintiffs allege that Quinn ultimately shot the Decedent while inside the house. The First Amended Complaint acknowledges that the officers had an arrest warrant for the Decedent, but there are no details about it.

In his motion, Quinn argues that Count VII should be dismissed as to him because, even under the facts alleged in the First Amended Complaint, exigent circumstances existed for him to enter the house once the other officers called for backup. Defendant Eaton makes the same argument in the motion filed by the City of Detroit Defendants. The Court will address

both challenges together. Defendants Quinn and Eaton direct the Court to: 1) *Spriggs v. Shanlian*, 2014 WL 1304910 (E.D. Mich. 2014); 2) *Cook v. O'Neill*, 803 F.3d 296 (7th Cir. 2015); and 3) *Ewolski v. City of Brunswick*, 287 F.3d 492 (6th Cir. 2002).

Here, Plaintiffs' First Amended Complaint alleges that the officers had an unspecified arrest warrant for Terrance and that they entered the home of third parties (Kevin and Teria Kellom) without a search warrant. If true, the entry is unlawful under Steagald, absent exigent circumstances or consent. The First Amended Complaint alleges that consent was not given. Thus, if the facts alleged by Plaintiffs are true, the entry by Quinn and Eaton[2] was unlawful unless exigent circumstances existed at the time of entry.

"Three types of circumstances have traditionally been found to constitute exigent circumstances:" 1) when the officers were in hot pursuit of a fleeing suspect; 2) when the suspect presented an immediate threat to the arresting officers and the public; or 3) when immediate police action was necessary to prevent the destruction of vital evidence or thwart the escape of known criminals. *Ewolski*, 287 F.3d at 501.

In their motions, Defendants Quinn and Eaton assert that exigent circumstances justified their warrantless entry into the home because they entered after other officers entered the house and they were

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[2]Defendant Fitzgerald does not seek dismissal of Count VII.

responding to a "call for back up."

None of the cases cited by Defendants support their position that Count VII should be dismissed against these two officers on a motion to dismiss based upon the pleadings. Both *Cook* and *Ewolski*, were decisions that involved *motions for summary judgment*, not a request for dismissal based upon the allegations in the complaint.[3]

The Sixth Circuit case cited by Defendants notes that "the determination of exigent circumstances is normally a question for the jury," but went on to state that in a case where the underlying facts are undisputed, "and where a fact finder could reach but one conclusion," the issue may be decided by the court as a matter of law. *Hancock v. Dodson*, 958 F.2d 1367, 1375 (6th Cir. 1992). Here, however, the only allegations that Quinn and Eaton direct the Court to in order to establish that exigent circumstances existed are that they were responding to a call for back up. The Court concludes that Count VII should not be dismissed, as to either Quinn or Eaton, based on the allegations in the First Amended Complaint alone.

C. Should The Court Dismiss The Non-Estate Plaintiffs Because They Lack Standing?

Defendant Quinn also asserts that as to Count I (and Count IV, if it stays in the case), all of the "Non-Estate Plaintiffs" (ie., all Plaintiffs except Nelda

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[3] In addition, in *Cook,* one panel member concluded that exigent circumstances did not exist.

Kellom in her capacity as Personal Representative of the Estate of Terrance Kellom) should be dismissed because they lack standing to assert constitutional claims. This is the same issue as presented by the City of Detroit Defendants, which is discussed below in Section III. A. and the Court will address Quinn's arguments on this issue in that section.

III. The Motion To Dismiss Filed By The City Of Detroit Defendants.

In a Motion to Dismiss brought under Fed. R. Civ. P. 12(b)(6), the City of Detroit Defendants raise several challenges to the claims asserted in Plaintiffs' First Amended Complaint.

A. Should Counts I-IV Be Dismissed As To All Non-Estate Plaintiffs Because The Fourth Amendment Rights Allegedly Violated Are Personal And May Not Be Vicariously Asserted?

In the pending motion, the Detroit Defendants assert that Counts I, II, III, and IV should be dismissed against all of the Non-Estate Plaintiffs because the Fourth Amendment rights allegedly violated are personal and may not be vicariously asserted.

Count II, however, is only asserted by "Plaintiff Terrance Kellom," who is the Decedent. (*See* D.E. No. 32 at Pg ID 255). And Plaintiffs' Counsel states on page 5 of their response brief that Count II is only asserted by the Estate. Thus, the Court does not have to consider this argument as to that count.

In addition, because Count III should be dismissed for independent reasons discussed in Section III. C., and Count IV should be dismissed for reasons discussed in Section II. A and Section III. D, the Court need only consider this argument as it relates to Count I (*Bivens* claim based on alleged Fourth Amendment violations).

In Count I, Plaintiffs allege that the "actions of Defendants resulting in Terrance Kellom's death without just cause violated *his rights* under the Fourth and Fourteenth Amendment to the United States Constitution as to Defendants Eaton and Fitzgerald, and to be secure in his person against unreasonable search and seizure, excessive force, and the unlawful use of deadly force under the Fourteenth Amendment to the United States, and cause the injuries set forth above. *As well, Plaintiffs with parent-child relations (Nelda and Kevin Kellom, and T.D.K. (minor son) and T.D.K. (minor daughter)) had their rights under the Fourteenth Amendment violated, and all other Plaintiffs had their right to equal protection violated*." (First. Am. Compl. at ¶ 53) *(emphasis added).*

In his motion, Defendant Quinn notes that the Non-Estate Plaintiffs have not plausibly alleged how their personal rights under the Constitution were violated by him; they have only alleged how the Decedent's rights were violated and the Estate represents the Decedent's interest. He contends that the other named Plaintiffs have no standing to assert claims for the denial of his rights. Quinn directs the Court to *Brown v. United States*, 411 U.S. 223, 230 (1973) and *Reinbold v. Evers*, 187 F.3d 348, 357 n.8

(4th Cir. 1999).

The Detroit Defendants make the same arguments, citing additional cases that support their position that the Non-Estate Plaintiffs have not asserted a viable claim based upon the alleged loss of familial relationships.

Plaintiffs' response to both motions is nearly identical. Plaintiffs' Counsel states that Plaintiffs are not seeking to vicariously assert constitutional violations and, instead, they seek to "assert their own claims, as their own constitutional rights to familial association were violated by the killing of Terrance Kellom." (D.E. No. 42 at Pg ID 447). "Plaintiffs argue that both the parents and minor children of Terrance Kellom had their constitutional rights to familial relations violated when Terrance was killed" and direct the Court to *Kottmyer v. Maas*, 436 F.3d 684, 689-90 (6th Cir. 2006) and *O'Donnell v. Brown*, 335 F.Supp.2d 787, 806 (W.D. Mich. 2004).

The Sixth Circuit has not squarely addressed the issue of whether a family member can assert a § 1983 or *Bivens* claim based on an alleged violation of familial relations following the death of a child who is alleged to have been killed by a state agent.

As explained below, the Court concludes that Count I should be dismissed as to all Non- Estate Plaintiffs because: 1) the Non-Estate Plaintiffs cannot assert a claim based upon an alleged violation of the Decedent's constitutional rights; they have to show a violation of their own rights; 2) although some other courts have done so, the Sixth Circuit has not recognized a § 1983 claim for loss of the right to

familial association when a child is killed by a state agent; 3) moreover, this is a *Bivens* claim, which is not as broad as a claim under § 1983, and this case involves an adult, not a child, two things that further militate against finding a cognizable *Bivens* claim in Count I for these Non-Estate Plaintiffs; and 4) even if the Court were to expand *Bivens* in order to do so in this case, the Defendant officers would nevertheless be entitled to qualified immunity as to this *Bivens* claim because the alleged constitutional violation was not "clearly established" on April 27, 2015.

1. The Non-Estate Plaintiffs Cannot Assert A Claim Based On A Violation Of The Decedent's Rights; They Have To Show A Violation Of *Their Own* Constitutional Rights.

It is well established that "Fourth Amendment rights are personal rights which, like some other constitutional rights may not be vicariously asserted." *Brown v. United States*, 411 U.S. 223, 230 (1973); *see also Purnell v. Akron*, 925 F.2d 941, 948 n.6 (6th Cir. 1991) (Noting that the Sixth Circuit had held that "section 1983 provides a cause of action which is *personal* to the injured party.") (emphasis in original). Thus, "[i]n the Sixth Circuit, a section 1983 cause of action is entirely personal to the direct victim of the alleged constitutional tort." *Claybrook v. Birchwell*, 199 F.3d 350, 357 (6th Cir. 2000). "Accordingly, only the purported victim, or his estate's representative(s), may prosecute a section 1983 claim; conversely, no cause of action may lie under section 1983 for emotional distress, loss of a loved one, or any other

consequent collateral injuries allegedly suffered personally by the victim's family members." *Id.*

Accordingly, the Defendant officers argue, *and Plaintiffs' Counsel agrees*, that the Non- Estate Plaintiffs cannot assert a *Bivens* claim based upon alleged violations of the Decedent's constitutional rights. The only way those Plaintiffs can proceed with a *Bivens* claim is if it is based upon a violation of *their own constitutional rights*.

2. Although Some Other Courts Have Done So, The Sixth Circuit Has Not Recognized A § 1983 Claim For Loss Of The Right To Familial Association When A Child Is Killed By A State Agent.

These Non-Estate Plaintiffs claim that their constitutional rights to familial association were violated by the shooting of the decedent, and rely on *Kottmyer*.

In *Kottmyer,* the plaintiffs were the parents of a deceased infant who brought § 1983 claims against a county and its social workers, who they alleged infringed upon their constitutional right to familial association without due process of law, in relation to the investigation and monitoring of the parents while the child was alive and hospitalized. The district court dismissed that claim and the parents appealed. On appeal, the Sixth Circuit considered whether the defendants' investigation of child abuse allegations constituted a violation of the parents' right to familial association.

As such, most of the opinion discusses the constitutional right to the maintenance of a parent-child relationship, and the fundamental right of parents to make decisions regarding the care, custody, and control of their children. In the context of the discussion, the Sixth Circuit noted that other courts "have recognized that the right to familial association is implicated by the killing of a child by a state agent." *Kottmyer,* 436 F.3d at 690. The court further noted that those "decisions rely on the notion that parents have a constitutionally protected liberty interest in the companionship and society of their children, which they are permanently deprived of when their children are killed by a state actor." *Id*.

As the Sixth Circuit has noted in subsequent decisions, however, that discussion *was dicta*. *See Brooks v. Knapp*, 221 F. App'x 402, 407-08 (6th Cir. 2007) (Noting that the "Sixth Circuit has briefly examined, in dicta, the right to familial association in the context of a § 1983 claim for the deprivation of the parent-child relationship" and expressing "no views about that dicta.").

Following *Kottmyer*, at least one district court in the Eastern District of Michigan has dismissed a § 1983 claim brought by a family member for interference with the right to familial relations where a decedent was allegedly killed through the use of excessive force. *Mitchell v. City of Warren*, 2012 WL 424899 (E.D. Mich. 2012). In that case, the district court explained:

> . . . *Kottmyer* does not stand directly for the proposition that the Sixth Circuit

> adopted a right of familial association "arising from the killing of a child by a state actor," as Plaintiff intimates. Pl.'s Resp. at 28; *Kottmyer v. Mass*, 436 F.3d 684, 690 (6th Cir. 2006). The *Kottmyer* court merely mentions that other circuits have recognized such a right in due process claims but does not adopt the same approach. In fact, as Defendants point out, the Sixth Circuit has specifically avoided creating such a right. *Purnell v. City of Akron*, 925 F.2d 941, 948 n.6 (6th Cir. 1991). All other precedent cited by Plaintiff is from other circuits or related to rights distinct from those of a family member surviving a decedent killed by a state actor. As such, Plaintiff fails to state a legally cognizable claim and Defendants' motion will be granted.

Id. at *6.

Another judge in this district, viewing this same issue, concluded that a "constitutional claim of deprivation of the right to familial association arising from the killing of a child by a state actor *may* be cognizable in the Sixth Circuit," although it noted it would still be "unclear whether such a right would extend to the parent of an adult child," which is what was have here. *Nelson v. City of Madison Heights*, 141 F. Supp.3d 726, 741 (E.D. Mich. 2015) (emphasis added).

In a fairly recent unpublished Sixth Circuit case, the issue also arose. *LeFever v. Ferguson*, 645 F.

App'x 438 (6th Cir. 2016). The majority dismissed a son's § 1983 claim that was based upon his alleged "right to familial integrity by trampling his mother's constitutional rights leading to her wrongful conviction." *Id*. at 448. The majority found that was a non- cognizable claim for a collateral injury.

In a separate concurring/dissenting opinion by Judge Helene White, she did not construe the son's claim as seeking relief for the violation of his mother's constitutional rights. Rather, she viewed him as claiming that his mother's wrongful conviction violated his own due-process right to family integrity. She then noted the Sixth Circuit's discussion of this issue in a number of cases, including *Purnell*. Judge White then stated "I am not convinced that [the son] failed to raise a cognizable § 1983 claim." *Id.* Nevertheless, she ultimately concluded that the officers would be entitled to qualified immunity because, in light of the uncertainty of such a claim in the Sixth Circuit, the right to family integrity was not "clearly established." *Id*.

Accordingly, although some other courts have done so, the Sixth Circuit has not yet recognized a § 1983 claim for loss of the right to familial association when a child is killed by a state agent. As such, it does not appear that Count I asserts a cognizable claim on behalf of any[4] of the Non-Estate Plaintiffs.

3. Moreover, Count I Is A *Bivens* Claim, Which Is Less Broad

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[4] Plaintiffs have provided no support or analysis as to their claim that the decedent's *adult siblings* could assert such a claim.

Than § 1983, And This Case Involves An Adult Decedent Rather Than A Child.

Moreover, there are two things that further militate against finding a cognizable *Bivens* claim in Count I for these Non-Estate Plaintiffs.

First, the Sixth Circuit has not recognized this constitutional right to familial association even in the context of § 1983 claims, and *Bivens* has a narrower reach than § 1983. That narrow reach of *Bivens* is one of the reasons why the Tenth Circuit declined to allow such a claim to proceed. *K.B. v. Perez*, 664 F. App'x 756 (10th Cir. 2016) (noting that while the "right to familial association is a constitutionally-protected liberty interest," "neither the Supreme Court nor [the Tenth Circuit] has authorized an action under *Bivens* to redress a violation of this right," and noting "extending *Bivens* would be contrary to the strong trend of limiting its reach.").

Second, while some other courts have recognized that the right to familial association is implicated by the killing of a child by a state actor, this case does not involve the death of a child. Thus, as Judge Levy noted in *Nelson*, even if the Sixth Circuit were to agree with those courts, it would still be unclear whether such a right would extend to the parent of an adult. *Nelson, supra,* at *741.

4. In Addition, Or Alternatively, The Defendant Officers Are Entitled To Qualified Immunity As To Count I Because, In Light Of The Uncertainty Of Such A

Claim, The Alleged Right Was Not "Clearly Established" On The Date Of The Shooting.

At the August 23, 2018 hearing, Counsel for Plaintiffs acknowledged that there is no Supreme Court or Sixth Circuit case that has authorized a § 1983 or *Bivens* action to redress an alleged constitutional violation of the right to familial association arising from the killing of a child by a state or federal officer. Accordingly, this Court concludes that the officers would be entitled to qualified immunity as to the claims of the Non-Estate Plaintiffs, because given the lack of case law on the issue, the alleged right was not "clearly established" on the date of the incident. As such, a reasonable officer would not have known he was violating the familial rights of Terrance Kellom's parents, adult siblings, and two children by virtue of their alleged actions taken against Terrance Kellom. *Brooks, supra; LeFever*, 645 F. App'x at 452.

B. The Parties Now Agree That Counts II & VIII Should Be Dismissed As To Eaton And Fitzgerald.

In Counts II and VIII of Plaintiffs' First Amended Complaint, Plaintiffs assert § 1983 claims against Defendants Eaton and Fitzgerald.

Defendants' motion asserts that Count II and VIII must be dismissed as to Eaton and Fitzgerald because they were both acting as Special Deputy US Marshals on the date in question and, therefore, a claim under § 1983 may not be asserted against them

for their alleged actions on that date.

In their response brief, Plaintiffs agree that Counts II and VIII of their First Amended Complaint should be dismissed, stating the issue presented and their response to it as follows:

> 2. SHOULD COUNT II AND VIII OF PLAINTIFFS' COMPLAINT BE DISMISSED AS AN ACTION MAY NOT BE BROUGHT PURSUANT TO 42 USC § 1983 AGAINST LAW ENFORCEMENT OFFICERS ACTING UNDER COLOR OF FEDERAL LAW?
>
> Plaintiffs Respond: Yes.

(D.E. No. 43 at Pg ID 451).

Accordingly, the Court shall dismiss Counts II and VIII of Plaintiffs' First Amended Complaint as to both Eaton and Fitzgerald.

C. Should Count III Be Dismissed For Failure To Identify A Racial Or Other Class-Based Invidious Or Discriminatory Animus Underlying The Alleged Conspirators' Actions?

Count III of Plaintiffs' First Amended Complaint, titled "§ 1985 Conspiracy," asserts a conspiracy claim against Defendants Eaton and Fitzgerald under "42 USC §§ 1985(2) and (3)." (D.E. No. 32 at Pg ID 257-58).

Subsection (2) of § 1985 pertains to a conspiracy "to deter, by force, intimidation, or threat, any party or witness in any court of the United States from

attending such court . . .” 42 U.S.C. § 1985(2). There are no factual allegations in Plaintiffs’ First Amended Complaint that would support a conspiracy to deter a witness from testifying in a court of the United States.

To establish a conspiracy claim under 42 U.S.C. § 1985(3), a plaintiff must prove: 1) a conspiracy involving two or more persons; 2) for the purpose of depriving a person or class of persons of the equal protection of the laws; 3) an act in furtherance of the conspiracy; 4) which causes injury to a person or property, or a deprivation of any right or privilege of citizen of the United States. *Johnson v. Hills & Dales Gen. Hosp.*, 40 F.3d 837, 839 (6th Cir. 1994). Notably, as explained by the Sixth Circuit in *Moniz v. Cox*, 512 F. App’x 495 (6th Cir. 2013):

> The plaintiff must allege that “the conspiracy was motivated by racial, or other class-based, invidiously discriminatory animus.” *Bass v. Robinson,* 167 F.3d 1041, 1050 (6th Cir.1999); *see Bray v. Alexandria Women's Health Clinic,* 506 U.S. 263, 267–68, 113 S.Ct. 753, 122 L.Ed.2d 34 (1993); *Estate of Smithers ex rel. Norris v. City of Flint,* 602 F.3d 758, 765 (6th Cir.2010) (“To sustain a claim under section 1985(3), a claimant must prove both membership in a protected class and discrimination on account of it.”).

Id. at *3; *see also* Pls.’ Br. At 21.

Accordingly, Defendants’ motion challenges Count III on the ground that it fails to state a claim

under § 1985.

In response, Plaintiffs do not dispute that Count III of their First Amended Complaint fails to state a claim under § 1985.[5] As such, the Court shall dismiss Count III of the First

Amended Complaint.

D. Should Count IV Be Dismissed As The Alleged Conspiracy Did Not Cause Plaintiffs' Alleged Injuries?

In their motion, like Defendant Quinn, the Detroit Defendants assert that Count IV must be dismissed because Plaintiffs allege that the cover-up

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[5]Rather, Plaintiffs' brief states that they "did not intend to switch their § 1983 Claim into a § 1985(3) claim, and apologize profusely . . . for the error. Plaintiffs' ask that they be allowed to correct the error and will take the necessary actions right away." (D.E. No. 43 at Pg ID 458). Nevertheless, Plaintiffs have not filed a motion seeking leave to file a second amended complaint, in order to assert a conspiracy claim under § 1983. At this stage of the litigation, and with already having filed an amended complaint, and having gone through two rounds of motions to dismiss, Plaintiffs may only amend with the opposing parties' written consent or leave of court. A request to amend in the body of a brief does not suffice. A formal motion to amend must be filed and Local Rule 15.1 of the Local Rules for the Eastern District of Michigan provide that a "party who moves to amend a pleading shall attach the proposed amended pleading to the motion." Plaintiffs' Counsel is no doubt aware of this procedure, as Counsel followed it in seeking leave to file Plaintiffs' First Amended Complaint (ie., filing a motion seeking leave to amend and attaching the proposed amended complaint).

conspiracy did not begin until after the Decedent's death. They rely on the same cases that Quinn relies upon and Plaintiffs' response to this challenge is the same as their deficient response to Defendant Quinn's motion. As such, the Court shall dismiss Count IV as to Eaton and Fitzgerald as well.

E. Should Count VII Be Dismissed As To Defendant Eaton, As Exigent Circumstances Existed For Her Entry Into The Subject Location?

Like Defendant Quinn's motion, the City of Detroit's motion asserts that exigent circumstances existed such that the Court should dismiss Count VII. For the reasons set forth in above, this Court concludes that is not an issue that can be ruled upon based on the pleadings alone.

F. Should Claims Against Chief Craig In His Individual Capacity Be Dismissed For Want Of Material Personal Involvement And/Or Because He Is Entitled To Immunity?

Notably, in both the caption and body of Plaintiffs' First Amended Complaint, Plaintiffs state that they have sued City of Detroit Police Chief James Craig in his official capacity only. (*See* D.E. No. 32 at Pg ID 243 & 249) (naming Chief Craig "in his official capacity" and alleging that "Defendant Craig was at all times relevant herein acting in his official capacity."). And the only count expressly asserted

against Craig is Count VIII, titled "§ *MONELL* Liability."

Nevertheless, in the body of Count VIII Plaintiffs include allegations as to Craig having acted "in both his official and individual capacities." (*See* D.E. No. 32 at Pg ID 264).

In addition, the First Amended Complaint states that Count VII is asserted by Plaintiffs Kevin Kellom and Teria Kellom against "all Defendants." (*Id*. at Pg ID 262-63).

As such, Defendants' pending motion asserts that any claim made against Craig in his individual capacity should be dismissed for want of any well-pled factual allegations of personal involvement by Craig and, therefore, he is entitled to qualified immunity.

In response, Plaintiffs' Counsel does not identify any factual allegations in the complaint that indicate any personal involvement by Craig in the events at issue in this case. And at the hearing, Counsel for Plaintiffs stated that the First Amended Complaint does not seek to assert any claims against Craig in his individual capacity.

Accordingly, for all these reasons, the Court dismisses any counts that purport to be asserted against Craig in his individual capacity.

G. Should Count VIII Against The City And Craig In His Official Capacity Be Dismissed?

Under § 1983, local governments are responsible only for their own illegal acts; they are not

vicariously liable under § 1983 for their employees' actions. *D'Ambrosio v. Marino,* 747 F.3d 378, 386 (6th Cir. 2014). "Instead, a municipality is liable under § 1983 only if the challenged conduct occurs pursuant to a municipality's 'official policy,' such that the municipality's promulgation or adoption of the policy can be said to have 'cause[d]' one of its employees to violate the plaintiff's constitutional rights." *Id.*

In Count VIII, Plaintiffs assert a "§ 1983 *Monell* Liability" claim against the City of Detroit and Chief Craig in his official capacity.

It also includes this claim against Defendants Eaton and Fitzgerald, although that appears to be in error as the Count simply references them as the individual officers who allegedly violated the Decedent's rights. At the hearing, Plaintiffs' Counsel agreed that this Count should be dismissed as to Eaton and Fitzgerald.

As to the remainder of the claim, while the factual allegations are rather light as to the basis for imposing municipal liability against the City/Craig in official capacity, the Court concludes that this is an issue better suited for the summary judgment phase of the case.

CONCLUSION & ORDER

For the reasons set forth above, Defendants' Motions to Dismiss are **GRANTED IN PART AND DENIED IN PART.** The motions are **DENIED** to the extent that the Court:

> **1)** concludes that the Estate exhausted administrative remedies

before filing its FTCA claims against the United States;

2) declines to dismiss the *Steagald* claim asserted by the Decedent's parents in Count VII, as to Defendants Quinn and Eaton, on the ground that exigent circumstances warranted entry without a search warrant, based on the pleadings;

3) declines to dismiss the municipal liability count against the City and Chief Craig (in his official capacity) based on the pleadings.

The Court **GRANTS** the three motions to dismiss filed by Defendants to the extent that the Court:

1) **DISMISSES** Count VII against the United States because the United States has not waived sovereign immunity as to alleged violations of the Constitution;

2) **DISMISSES** Counts V & VI **WITHOUT PREJUDICE**, as to the "Non- Estate Plaintiffs" because they failed to exhaust administrative remedies prior to filing FTCA claims against the United States;

3) **DISMISSES** Count IV (the *Bivens* Conspiracy claim) because that claim is not cognizable as to the Estate, as the First Amended Complaint

expressly alleges that the conspiracy began *after* the Decedent's death;

4) DISMISSES all "Non-Estate Plaintiffs" from all remaining counts, except Count VII, because they lack standing to assert those claims, because unlike the Estate they cannot assert a claim based on a violation the Decedent's constitutional rights;

5) DISMISSES Counts II & VIII as to Eaton and Fitzgerald as Plaintiffs now agree that should be done;

6) DISMISSES Count III for failure to identify a racial or other class-based invidious or discriminatory animus underlying the alleged conspirators actions;

7) DISMISSES any claims asserted against Chief Craig in his individual capacity because the First Amended Complaint includes no allegations as to his personal involvement, and because Plaintiffs' Counsel stated during oral argument that no claims are brought against Craig in his individual capacity; and

8) DISMISSES Count VIII (municipal liability claim) as to officers Eaton and Fitzgerald because, as Plaintiffs' Counsel agreed during oral argument, there is no basis for a

municipal liability claim to be asserted against them.

IT IS SO ORDERED.

s/Sean F. Cox
Sean F. Cox
United States District Judge

Dated: August 29, 2018

I hereby certify that a copy of the foregoing document was served upon counsel of record on August 29, 2018, by electronic and/or ordinary mail.

s/Jennifer McCoy

Case Manager

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 17-cv-11084

[Filed: May 21, 2019]

NELDA KELLOM, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF TERRANCE KELLOM, DECEASED, *ET AL.*

PLAINTIFF,

V.

MITCHELL QUINN, *ET AL.,*
DEFENDANTS.

OPINION & ORDER
ON DEFENDANT'S SUMMARY JUDGEMENT MOTIONS

Terrance Kellom was shot and killed when a United States Marshal Detroit Fugitive Apprehension Team was attempting to arrest him at a house in Detroit, Michigan on April 27, 2015. Thereafter, his Estate and his relatives filed this action, asserting

multiple claims against several Defendants. A number of claims have since been dismissed. Following the close of discovery, Defendants filed summary judgment motions as to the remaining claims. The parties have fully briefed the issues and the Court heard oral argument on May 2, 2019.

As explained below, the Court shall GRANT the City of Detroit Defendants' summary judgment motion to the extent the Court rules that: 1) Defendants Eaton and Fitzgerald are entitled to qualified immunity as to the *Bivens* excessive force claims asserted against them in Count I; 2) the *Steagald* claims in Count VII are only cognizable as *Bivens* claims, not § 1983 claims, because the officers were acting under federal and not state law, and they only remain as to the officers in their individual capacities; 3) Defendants Eaton and Fitzgerald (and Quinn) are entitled to qualified immunity as to the *Steagald* claims asserted in Count VII; and 4) the *Monell* liability count, Count VIII, fails as a matter of law because there is no basis for imposing municipal liability in this action that has no viable § 1983 claims.

In addition, the Court shall GRANT the summary judgment motion filed by the United States because the Court concludes that it lacks subject matter jurisdiction over the Estate's Federal Tort Claims Act claims in this action.

Finally, the Court shall GRANT IN PART AND DENY IN PART the summary judgment motion filed by Defendant Quinn. The Court grants the motion to the extent that the Court rules that Defendant Quinn is entitled to qualified immunity as to the *Steagald* claims asserted by Kevin and Teria Kellom. The motion is DENIED as to the Estate's excessive force

claim, asserted under *Bivens,* in Count I. As to that claim, construing the evidence in the light most favorable to Plaintiffs, there is a genuine issue of material fact as to whether Defendant Quinn committed a constitutional violation by virtue of having used excessive force. That claim shall proceed to a jury trial.

BACKGROUND

On April 6, 2017, Plaintiff Nelda Kellom, as Personal Representative of the Estate of Terrance Kellom, Deceased ("the Estate"), filed this action. The Estate's original complaint named the following Defendants: 1) Immigration and Customs Enforcement Agent Mitchell Quinn; 2) Detroit Police Officer Darell Fitzgerald; and 3) Detroit Police Officer Treva Eaton. Plaintiff's original complaint included the following four counts: 1) "*Bivens* Claim" (Count I); 2) "42 U.S.C. § 1983 – Excessive Force and/or Unlawful Use of Deadly Force" (Count II); 3) "§ 1983 Conspiracy by Defendants" (Count III); and 4) "Wrongful Death [under] Michigan Wrongful Death Act, Mich. Comp. Laws § 600.2922 *et seq*," (Count IV).

On April 16, 2018, Plaintiff's Counsel filed a motion seeking leave to file an amended complaint. Thereafter, Defendants filed responses indicating that, while they do not concede that the claims asserted against them are valid and that they may file motions challenging the claims asserted against them, they do not oppose the motion to amend. Thus, on May 3, 2018, the Court issued an order granting leave to file a First Amended Complaint.

On May 4, 2018, Plaintiff filed a First Amended Complaint which added named parties and claims. In addition to the Estate, seven of the Decedent's family members asserted claims in Plaintiffs' First Amended Complaint. Those "Non-Estate Plaintiffs" included: 1) the Decedent's mother in her individual capacity (Nelda Kellom); 2) the Decedent's father, Kevin Kellom; 3) the Decedent's two adult sisters (Teria Kellom and Lawanda Kellom) and his adult brother (Terrell Kellom); and 4) the Decedent's two minor children, joined in the lawsuit through their mother and personal representative, Janay Williams.

The First Amended Complaint included the following eight counts: 1) a *Bivens* excessive force claim (Count I); 2) a § 1983 excessive force claim (Count II); 3) a § 1985 conspiracy claim (Count III); 4) a *Bivens* conspiracy claim (Count IV); 5) a wrong death claim under Michigan law (Count V); 6) a claim for intentional infliction of emotional distress under Michigan law (Count VI); 7) a *Steagald* claim (Count VII); and 8) a § 1983 *Monell* liability claim (Count VIII).

The parties later agreed that the United States would be substituted for Defendants Eaton and Fitzgerald at to Counts V and VI. (*See* ECF No. 41).

In May of 2018, Defendants filed motions to dismiss. In an Opinion and Order issued on August 29, 2018, this Court: 1) dismissed Count VII against the United States because the United States has not waived sovereign immunity as to alleged violations of the Constitution; 2) dismissed Counts V and VI without prejudice, as to the "Non-Estate Plaintiffs" because they failed to exhaust administrative remedies prior to filing Federal Tort Claims Act

claims against the United States; 3) dismissed Count IV (the *Bivens* Conspiracy claim) because that claim is not cognizable as to the Estate, as the First Amended Complaint expressly alleges that the conspiracy began *after* the Decedent's death; 4) dismissed all "Non-Estate Plaintiffs" from all remaining counts, except Count VII, because they lack standing to assert those claims, because unlike the Estate they cannot assert a claim based on a violation of the Decedent's constitutional rights; 5) dismissed Counts II and VIII as to Eaton and Fitzgerald as Plaintiffs agreed that should be done; 6) dismissed Count III for failure to identify a racial or other class-based invidious or discriminatory animus underlying the alleged conspirators actions; 7) dismissed any claims asserted against Chief Craig in his individual capacity because the First Amended Complaint includes no allegations as to his personal involvement, and because Plaintiffs' Counsel stated during oral argument that no claims are brought against Craig in his individual capacity; and 8) dismissed Count VIII (the municipal liability claim) against officers Eaton and Fitzgerald because, as Plaintiffs' Counsel agreed during oral argument, there is no basis for a municipal liability claim against them. (ECF No. 52).

Following the close of discovery, Defendants filed summary judgment motions as to the remaining claims in this action.

As to the City of Detroit Defendants, there are three counts that remain as to them: 1) the *Bivens* excessive force claim (Count I), asserted against Defendants Eaton and Fitzgerald; 2) the *Steagald* claims asserted by Kevin and Teria Kellom against Defendants Eaton and Fitzgerald (Count VII); and the

Monell liability count, asserted against Chief Craig and the City of Detroit (Count VIII). The pending motion seeks summary judgment as to all of those claims.

As to the United States, the following claims remain against it in this action: 1) the Estate's Wrongful Death claim under Michigan law (in place of Quinn, Eaton, and Fitzgerald); and 2) the Estate's Intentional Infliction of Emotional Distress claim under Michigan law (in place of Quinn, Eaton, and Fitzgerald). The United States seeks summary judgment in its favor as to both counts.

Finally, as to Defendant Quinn, the following claims remain against him: 1) the *Bivens* excessive force claim asserted in Count I; and 2) Kevin and Teria Kellom's *Steagald* claims in Count VII. Quinn filed his own summary judgment motion, seeking summary judgment in his favor as to both claims.

After the motions were fully briefed[6] by the parties, the Court heard oral argument on all three of the summary judgment motions on May 2, 2019.[7]

The following material facts are gleaned from the evidence submitted by the parties, *viewed in the*

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[6] Plaintiffs requested, and were granted, approximately 30 additional days to respond to the motions. (*See* ECF No. 87). Although Defendants filed briefs within the page limitations set forth by the local rules, the Court also allowed Plaintiffs to file briefs with an additional five pages for each of their three response briefs. (ECF No. 92).

[7]Prior to the hearing, the Court ordered counsel for the parties to be prepared to discuss two relevant cases at the hearing. (*See* ECF No. 109).

light most favorable to Plaintiffs, the non-moving party.

On April 27, 2015, the United States Marshals Service's Detroit Fugitive Apprehension Team ("DFAT"), including Immigration and Customs Enforcement Agent Mitchell Quinn ("Quinn"), and City of Detroit Police Officers Darell Fitzgerald ("Fitzgerald") and Treva Eaton ("Eaton") was conducting an investigation as to the whereabouts of Terrance Kellom. (Defs.' & Pls.' Stmts. at ¶ 6). "Terrance Kellom was wanted on an arrest warrant for armed robbery and for a weapons offense." (*Id*. at ¶ 7).

On the date of the incident, Terrance Kellom was 20 years old and weighed 145 pounds. (Autopsy Report, Ex. B to Pls.' Br.).

Officers on the DFAT conducted an investigation, in order to locate Terrance Kellom. Fitzgerald's Report of Investigation indicates that on April 27, 2015, he and other officers first went to the Terry Street address in Detroit, Michigan that was listed on Terrance Kellom's driver's license. (ECF No. 79-12). There, they spoke with a woman who stated that she was a new tenant at that address, and that she had never seen or heard of Terrance Kellom.

Then, based on contacts that Terrance Kellom had while at a correctional facility, the officers learned the name and address of Terrance's girlfriend, Janay Williams, who lived on Princeton Street in Detroit. (*Id*.). While Fitzgerald was en route to that address, another team member, Brian Behrend, advised that there was a black male fitting the description of Terrance Kellom walking out the front door at the Princeton Street address, with an unknown black

female who was sweeping glass from around a green Impala. Once officers arrived there, they spoke with Janay Williams and Adrienne Williams. Adrienne told the officers that Terrance Kellom had broken the window to her vehicle and that Terrance might be staying with his father on Evergreen. Janay made statements confirming that she was Terrance's girlfriend, and told the officers that when Terrance left he was angry and told her he was going to burn her house down. Janay, who the officers spoke with separately, told them that Terrance was staying with his father on Evergreen. Janay added that Terrance drove a four door Ford Taurus with a green sticker in the rear window. (*Id*.).

Eaton then established surveillance at the home on Evergreen and advised the team that Terrance Kellom was seen entering and exiting the house and that his car was parked in the driveway. (*Id*.). Defendant Eaton continued surveilling the house on Evergreen, and saw Terrance Kellom enter the house again and remain inside. (*Id*.; *see also* Eaton Dep. at 36-37).

The decision was made to approach the house in an attempt to make contact with Terrance Kellom. (Behrend Decl. at 1).

The officers had an arrest warrant for Terrance Kellom but did not have a search warrant for the home on Evergreen Street.

Eaton testified that she believed that Terrance Kellom lived at the house on Evergreen and, therefore, the officers could enter the house because they had an arrest warrant for Terrance, who was inside the house:

Q. So for all intents and purposes when you went to the Evergreen address, you thought that Mr. Kellom lived at that address?
A. Yes.
Q. So if you're armed with an arrest warrant and you believe that Mr. Kellom lived at that address, did you believe that you don't need a search warrant?
MR. HELMS: Object to form.
MR. PADDISON: Foundation.
You can answer.
A. No. We had filed an arrest warrant.
. . . .
Q. You first surveilled, surveilled Terrance Kellom, correct?
A. Yes I saw him come out of the house.
Q. Okay. And you saw him go back in the house; --
A. Yes.
Q. – is that correct?
Is there any reason why you didn't just sit there and wait until the judge or magistrate entered a search warrant?
MR. PADDISON: Objection, form, foundation. You can answer.
A. There is no reason.
Q. (Continuing by MR. AYAD): Okay. And there was no reason because you believed he lived there?
A. Correct.

(Eaton Dep. at 35-36).

Terrance's father, Kevin Kellom, answered the door when the officers approached the front door of the house on Evergreen.

Kevin Kellom's Statement And Deposition Testimony Relating To Officers Entering His House

In an interview with police officers on April 27, 2015, the date of the incident, Kevin Kellom testified as follows regarding the officers' entry into his house:

OFCR SANCHEZ: Can you tell me what happened today at your house?

KEVIN KELLOM: Me, my son, my fiancé, my daughter and my son-in-law was upstairs and we was talking.

OFCR SANCHEZ: When you say your – your son and your fiancé, can you name who, who they were?

KEVIN KELLOM: Okay. Me, Yvette Johnson, Terrance Kellom, Teria Kellom, Anthony Coleman and Vonnie. I don't know her last name.

And we was upstairs and we was talking. And I see a dri – a car pull up in my driveway. I've got cameras on my house. I see a car pull up in my – a truck pull up in my driveway and

almost hit my fence. . . .

So I come downstairs. I look, I see some guys looking in my window. I saw the vest that said "Police." I'm thinking the police ain't got no business being at my house, you know, so I opened the door.

He says, "Who all here with you?" And I started naming who all was here with me. *He break out and says, "Open the door."*

I said, "Open the door for what?" I said, "You got a search warrant?"

He said, "Open your door, sir."

I opened the door.

. . . .

OFCR SANCHEZ: And how many did you see at that time?

KEVIN KELLOM: It was one, two – it was three on the porch, it was two in front of the house and there was one right here on the side of the house.

OFCR SANCHEZ: And you're saying all of them had police stuff, vests?

KEVIN KELLOM: All of them had "Police" on, yes, yes.

OFCR SANCHEZ: And at that time you said you answered the door?
KEVIN KELLOM: I opened the door, yes. I answered the door.
OFCR SANCHEZ: Is there two parts to your door or how many –
KEVIN KELLOM: No. There's two. It's – no, one part. It's on the front door. I open the first door.
OFCR SANCHEZ: Okay.
KEVIN KELLOM: And I still had the screen door closed.
OFCR SANCHEZ: All right.
KEVIN KELLOM: *And he said, "Open your door"*

I said, "Open my door for what? I said, "What's the problem?" I said "I didn't call the police."

And the other guy said "Open the motherfucking door or I'm going to tear it down"

I opened the door and I let them in. I ain't got nothing to hide from the police. I let them in. I mean my --
OFCR SANCHEZ: Do you remember what they looked like?

KEVIN KELLOM: It was – one of them was the guy who shot my son.

(Defs.' Ex. 6 at 1-3; 10-11) (emphasis added).

During his September 14, 2018 deposition in this case, Kevin Kellom testified that he did not give the officers consent to enter his home:

Q. Before they entered the house did any of the officers ask for consent to enter your house?
A. No. No.
Q. They didn't even ask you?
A. No. They kept asking me was Terrance there.
Q. Did you ever tell them they could come in?
A. No, of course not.

(Defs.' Ex. 7 at 25).

Kevin testified that he answered the door when the police arrived at the house. (Kevin Kellom Dep. at 16-17). He testified that the officers indicated they were looking for Terrance. Kevin testified that he asked the officers if they had a warrant and they responded that they had a warrant to enter the house. Kevin testified that he asked to see it and then he and the officers argued back and forth. Kevin testified that an officer "snatched" the door open and the officers entered and went up stairs. (*Id*. at 18-21).

Agent Quinn's Deposition Testimony Regarding His Entry Into The House

Quinn's motion asserts that other officers entered the house before he did and that he only entered the house after he heard a call for backup. During his deposition in this case, Quinn testified as follows:

Q. There came a time that you went in to the house; is that correct?
A. Only after I was called in to the house, after the other officers had already entered the home.
Q. What were you called? How were you called to enter the home?
A. Via radio, Mr. Kellom had been found hiding on the second floor of the home in an attic, a crawl space.
Q. Okay. Well, who called you and what did they say on the radio?
A. I cannot recall what was said on the radio. Assistance was asked and the other officer was asked to come into the home, because the subject was being noncompliant, making threats.
Q. You don't know who called, though?
A. If I had to assume, I want to say, it was Officer Baron. I'm not for certain.
Q. Okay. And you were called to provide assistance?
A. Yes.
Q. *What – you know, in your law enforcement wordage, what does*

"assistance" mean?

A. *Assistance could mean anything. You could provide medical assistance. You could provide support for someone that's hostile. Assistance is anything.*

. . . .

Q. Okay. That's what I wanted to get to. Thank you.
So, you heard over the radio that you needed – that someone needed assistance, correct, sir?

A. No. What I heard over the radio was somebody requesting an additional body. They asked for another person.

Q. Well, then please tell me exactly what you heard, because I thought, you said, you heard that they needed assistance.

A. Sir, exactly what I told you was that I can't recall what was said over the radio.
What was asked for – what our – what I remember is they asked for another person. They asked for another body. Asking for another body, another person, you are requesting assistance in asking for an additional body or another person.

Q. I want to know exactly how you heard it; now how transcribed (sic) – What exactly did you hear over the radio?

MR. TOOMEY: Objection, asked and answered.

THE WITNESS: I cannot tell you what was exactly said over the radio. What I can tell you is they asked for an additional person for

assistance.

. . . .

Q. So, your answer is you don't know exactly what was said, but you understood it that you needed another person or assistance in that situation; is that a correct statement?

A. Yes.

Q. Okay. Thank you.
What did you do then, Agent Quinn, right immediately after that?

A. Proceeded in to the house.

Q. When you proceeded in to the house, did you think that this was a situation that could be hostile?

A. Any situation that you dealing with in law enforcement has the potential to be hostile. You have to take every situation seriously.

(Quinn Dep. at 87-93). Later, while examined by his own counsel, Quinn testified as follows:

Q. At some point, there was a request for backup while you were still outside?

A. Yes.

Q. And I can't remember – Can you recall who made that request?

A. Not offhand. I know Deputy Baron was the one that was engaging with Mr. Kellom. Adam, it may have been him.

Q. I think, you said, you can't recall whether you heard it over the radio?

A. Everything is broadcast over the radio.

> Going back to his objection, when the floors are being cleared in a home, it's broadcast over the radio. The level three is clear. Level two is clear. Moving to his level, going here, all that information is broadcast over the radio, so, we know where people's relative location is inside of the home. Once they got up to the second floor of the house, it was called out that he was found in the attic.
>
> Q. "He" being Mr. Kellom?
>
> A. Mr. Kellom.
>
> Q. When the request for backup was made, what tone of voice was the person using?
>
> A. It was an excited voice. I mean, "We need somebody else in here!" *And later on, I discovered, I do not recall if it was going into the house or once I got in the house* that Mr. Kellom was claiming he had a weapon.

(Quinn Dep. at 145-46) (emphasis added).

Kevin Kellom's April 27, 2015 Interview Regarding The Shooting

On the date of the incident, Kevin Kellom was interviewed. (Defs.' Ex. 6). During that interview, Kevin Kellom stated that a few officers initially entered the house and went upstairs looking for Terrance, while Kevin remained on the main floor. He said the events leading to the shooting unfolded very quickly. (*Id.* at 54-55). He said that he heard commotion coming from upstairs, hearing things like

"show me your hands motherfucker," "freeze mother fucker," etc. More officers then entered the house, including the officer who ultimately shot his son, who quickly ran upstairs. Kevin heard what he thought was officers coming down the stairs with his son. (*Id.* at 40, "I just heard them coming down the stairs" and 42; *Id.* at 39 "All I know is that somehow they got from upstairs, downstairs . . . "). Then Terrance and some officers were in the hallway on the main floor, while Kevin was in the dining room with an officer. Terrance called out for his father and reached for him. Kevin heard a pop, pop, pop, as shots were fired. Kevin saw the shots strike Terrance, and saw his body jerk. Terrance backed up as he was shot. Terrance fell to his knees. More shots were fired after that. Kevin stated that Terrance did not have anything in his hands when he was shot and that his hands were upwards and open. (*Id.* at 27-28 & 37). After the shooting, Kevin heard a female officer say out loud, "Why did he shoot? Why did he shoot him?" (*Id.* at 47).

Kevin Kellom's September 14, 2018 Deposition Testimony Regarding The Shooting

Kevin Kellom was deposed in this action on September 14, 2018 – more than three years after the shooting. Kevin testified that officers entered the house and two went upstairs looking for Terrance. (Kevin Kellom Dep. at 26). Kevin again testified that the events unfolded very quickly. (*Id.* at 57). Kevin heard commotion coming from upstairs, things like "freeze mother fucker." (*Id.* at 27-28). Kevin testified

that he heard officers bringing Terrance down the stairs:

Q. At this point in time you can't see anything you are hearing things?

A. Yeah, I'm hearing the intensity coming downstairs like bumping, you know like bumping.

. . . .

Q. Can I stop you there? While your son is on the stairs with the officers –

A. Bringing him downstairs.

Q. – can any nonofficer see him on the stairs?

A. It was two officers in front and two officers in back of him that was bringing him down.

Q. How do you know that?

A. Because when they came downstairs and the shooting started two of the officers ducked off into those two back bedrooms right there and one officer ducked off in the bedroom.

Q. Could your daughter or Fonnie see Terrance as he was on the stairs?

A. Yes. We all saw him when they brought him down the stairs.

Q. No.I'm asking while he's still on the stairs.

A. *No, No. No one could see him on the stairs because we as like the way my stairs is there's a hallway and then my stairs, the living room and the dining room (indicating). Can no one see nobody on the stairs.*

Q. *Were you able to see your son when he first left the stairs and entered the hallway?*
A. *Yes. Yes.*

(*Id.* at 29-30) (emphasis added). But at another point during his deposition, Kevin testified that he saw his son walking down the stairs. (*Id.* at 107).

Kevin testified that Terrance's hands were free and that while Terrance was cussing at the officers, he was not struggling or resisting. (*Id.* at 31). Kevin told his son to "lay it on down" (ie., go with the officers). His son shrugged his shoulders and said "but dad," when Kevin suddenly heard the "pop, pop, pop" of shots ring out. (*Id.* at 33). Kevin testified that Terrance was in the hallway and Kevin was still in the dining room when the shooting occurred. Kevin testified that Terrance's hands were upwards and out when he was hot and that Terrance had nothing in hands. (*Id.* at 39-40 & 99 &100). His son fell to his knees and more shots were fired.

Although he did not include such a statement during his interview on the day of the incident, Kevin testified that Terrance was shot from point-blank range as the last shot:

Q. What I'm trying to figure out was he still in this hallway or has he entered the living room?
A. No. He's in the hallway. He never got a chance to enter the living room. My son died in the hallway.
Q. It was only one shooter?
A. Yes.
Q. The shots that the officer fired when

your son was on his knees, were those the last shots fired?

A. No.

Q. So what happens next?

A. He had one more – my son was laying on the floor as if he was trying to crawl. The officer put his boot to his shoulder and he says, freeze, I said freeze mother fucker, and shot one more time. That one hit I don't know maybe, I can't say exactly what side, but the bullet hole in back shoulders, that's the last time I saw him shoot.

Q. Your son is –

A. Lying on the ground.

Q. – now lying on the ground face down?

A. Yes, sir.

Q. And he's trying to crawl?

A. He's like on his stomach like daddy, daddy, and spitting up blood. He put his boot on his shoulder and he says I said freeze mother fucker, pow, that was it.

(Kevin Kellom Dep. at 42-43).

Kevin testified that, after the shooting, a female officer on the scene asked out loud, "why did you even fucking shoot?" and the shooter did not respond. (*Id.* at 52).

Kevin testified that the hammer photographed at the scene had not been in the house and he does not know how it got in the house. (*Id*. at 56).

Summary Of Quinn's Testimony Regarding Shooting

The DFAT officers testified that Terrance was located hiding in the second floor attic crawl space and refused to come out peacefully, shouting things like "shoot me, bitch," "I have a gun," and "You're gonna have to kill me." Defendants contend that Terrance had a hammer and was tearing a hole through the attic floor, so that he could escape from the attic crawl space by going through that hole and dropping down onto the main floor. They claim that Quinn descended the stairs, hoping to catch Terrance where he would land on the first floor. (Defs.' Br. at 9). Quinn testified that Terrance came out of the back, left bedroom, that had a blanket draped where a door would normally be, holding a hammer and approaching him aggressively. Quinn ordered Terrance to drop the hammer but he did not comply. Quinn testified he shot Terrance once or twice, to protect himself and fellow officers, hoping that Terrance would stop coming towards him. Quinn testified that Terrance kept advancing towards him, making him question whether he was hitting him with his shots because he did not stop. (Quinn Dep. at 111-16).

Defendant Fitzgerald's Report And Deposition Testimony

Defendant Fitzgerald's Report of Investigation included the following narrative regarding the shooting:

After several minutes I could hear loud banging coming from upstairs and Mr. [Kevin] Kellom is starting to get physical with me. TFO Brian Behrend then stated "he's going through the floor, be advised he going through the floor." At that point, *I observed TFO Mitchell Quinn start walking toward the narrow hallway but quickly stop. When I turned around towards the hallway I could see Terrance with a hammer raised above his shoulder and I believed he was about to strike myself and TFO Quinn. I then saw TFO Mitchell Quinn reach for his duty weapon, drawing it from his holster while Terrance was quickly advancing towards TFO Mitchell Quinn and rapidly closing the space between them with hammer in right hand raised above head.* I pushed Mr. [Kevin] Kellom to the ground while drawing my department weapon when *I observe TFO Mitchell Quinn fired one shot at Terrance. At the time TFO Quinn shot Terrance was approximately 7FT away and still closing the distance between them*. Mr. [Kevin] Kellom and the others inside the living room went to the ground after hearing the gun shot. *I observed TFO Mitchell Quinn fired several more shots at Terrance while TFO Quinn was falling backwards away from Terrance who was then an arms length [sic] away. At that time I saw Terrance fall to his knees then fall face down with hammer still in right hand.*

(ECF No. 77-5 at PageID959-60) (emphasis added).

Defendant Fitzgerald was deposed in this action on November 26, 2018. Fitzgerald testified as follows regarding the shooting:

> Q. Okay. Did there come a time where you seen Terrance Kellom?
> A. Yes, there was.
> Q. Okay. When was that, sir?
> A. *That was after first couple of shots. That's when I saw him*.
> . . . .
> Q. So you, you hear a couple shots? I'm sorry, I'm not trying to put words in your mouth, but you heard a couple shots first and then you seen Terrance Kellom?
> A. Yes.
> . . . .
> Q. So when you first seen him where were you standing, Officer Fitzgerald?
> A. When I first saw – you got the, the diagram?
> Q. Yes, sir. And I'm going to show you the – it's number six on the deposition of Ms. – Officer Eaton but we can use it as well here too.
> A. Where's the front door. Oh, right here. I saw – I finally saw Terrance when he was on his knees almost in the front of the, the door, door frame here – witness indicating –
> . . . .

Q. Okay. And when you first observed Terrance Kellom, was he still standing, was he on his knees; what, what did you observe?
A. *He was on his knees when I saw him.*
Q. Okay. And when he was on his knees, *did you see him holding anything?*
A. *No, I did not.*
Q. And did you see him fall forward?
A. Yes.
Q. To the ground?
A. Yes, I did.
Q. Okay. *Now after you seen him fall forward to the ground did you see anything in his hands then?*
A. *No, I didn't.*
Q. *Or anything near his hand?*
A. *No.*
Q. *So I want to take you to again your statement of Exhibit F-2. Did you ever see Terrance Kellom with a hammer in his hand?*
A. *No.*
Q. Is there any reason why, sir, that you said in this statement when I – quote, when I turned around towards the hallway, I could see Terrance with hammer raised above his shoulder and I believed he was about to strike myself and TFO Quinn. Is there any reason why you made that statement, sir, on 4-29-2015?
A. Yes, I do see it.

Q. Okay. So which is it, sir, did he have a hammer or did he not have a hammer?

A. Well, my statement said that he had a hammer, the one that wrote down or it was taken on the 29th.

Q. But today as you sit here, you're under oath, sir, do you remember him having a hammer?

A. That was without, like I say, recollection of this, like I say, so . . .

Q. So your testimony today, sir, again you're under oath, Officer –

A. Correct.

Q. – Fitzgerald, do you remember Terrance Kellom having a hammer in his hand or not?

A. Well, like I say, I couldn't recollect if he had a, a hammer in his hand.

Q. I want to take you to Exhibit 7 of the Eaton deposition. And this is the title, Darrell Fitzgerald and Trevor Eaton's Responses to Plaintiff's First Set of Interrogatories and Request for the Production of Documents. *And in answer to question number 19 and 20, number 19 says, did you see the victim, Mr. Kellom, wielding a hammer at any time during the incident? It says that Defendant, Darrell Fitzgerald, did not personally observe plaintiff wielding a hammer from his vantage point, but was informed that it was the case following the incident.*

So again this document, which was on January of 2018, about 10

months ago, *you said he didn't have a – you didn't see a hammer in his possession, in his hand – in , in holding a hammer; is that correct?*

A. *Correct.*

Q. *And you also – did you see the victim was found with a hammer immediately after he was shot? Your answer was, Darrell Fitzgerald did not personally observe plaintiff with a hammer from the vantage point, but was informed that was the case following the incident.*
Again so you did not see a hammer in his hand; is that correct, --

A. *Correct.*

Q. – agent? I mean officer, I'm sorry.
Did you see Agent Quinn shoot – no. Did you see Agent Quinn's – any of
Agent Quinn's shooting of Mr. Kellom?
A. *No, I didn' t.*

Q. Did you know whether there was any officers or agents around Mr. Kellom when the shooting took place?

A. Were there any other officers?

Q. Yes.

A. No.

Q. Do you know whether anyone was in the bathroom or on the stairs or anything of that nature?

A. That I don't know.

Q. *Did you see any hammer that evening at the house?*

A. *No.*

(Fitzgerald Dep. at 23-28) (emphasis added).

When examined by his own counsel, Defendant Fitzgerald testified that his memory of the events was a little hazy and that he would not have put anything in his report if it was not true or accurate. (Fitzgerald Dep. at 40-45).

Evidence Regarding Where Terrance Lived On The Date Of Incident

Officer Brian Behrend's Report of Investigation states that the last address on Terrance Kellom's drivers license was an address on Terry Street in Detroit, Michigan. (ECF No. 77-5). It also states that the officers learned that Terrance Kellom's girlfriend lived on Princeton Street and that his father lived on Evergreen Street, both in Detroit. (*Id.*).

During his deposition, Kevin Kellom first appeared to concede that Terrance Kellom was living with him in his house on Evergreen Street on April 27, 2015, the date of the shooting:

> Q. When did your son, Terrance, first arrive at your house at [XXXX] Evergreen?
>
> MR. AYAD: Counsel, object as to foundation and form. What do you mean by arrive? Are you saying that date arrive on that date, that particular date on April 27th?
>
> MR. HELMS: Yes.
>
> MR. AYAD: Okay. Go ahead.
> THE WITNESS: What time was it? It would be like about between, probably between like five,

I say like between three and maybe six a.m., something like that, between those hours.
BY MR. HELMS:
Q. Was he living with you at the time?
A. Yes.
Q., So he was staying at that house on Evergreen?
A. We had just moved there.
Q. Just to clarify, when had you moved into the house?
A. We moved into that house on that would be January of 2014 – September of 2014 so that would be January 15th of 2015, I'm sorry, 2015.
Q. So did your son, Terrance, primarily live with you at that house between January of 2014—
A. 2015.
Q. Oh, 2015?
A. Yeah.
Q. – 2015 and April? Let me ask the question again. Did Terrance live with you between January 2015 and April of 2015?
A. Yes, he did.
Q. Do you know why he had been out?
A. Why? He was with his girlfriend. They just out I guess with his girlfriend, out with his girlfriend
Q. Let me ask the full question before you answer. He had been out that night. He had been out the evening of April 26th?
A. 27th.

Q. Let me ask the question. He had been out the evening of April 26th and returned the morning of April 27th because he had been out with his girlfriend?
A. Yes. Yes.
Q. How did you know he came in between three and six?
A. Because I opened the door.
Q. You were awake?
A. No, I wasn't awoke, but he called me and told he was on his way home, him and his girlfriend, then I open the door. He always called me when he get to the door and I open the door.

(Kevin Kellom Dep. at 9-10). Later, during that same deposition, however, Kevin testified:

BY MR. AYAD:
Q. I have a few questions. Mr. Kellom, remember the direct question by Mr. Helms asking you about whether your son Terrance lived with you in 2015?
A. Uh-huh. Yes.
Q. You remember that?
A. Yes.
Q. Now, was he living with you on April 27, 2015?
A. Okay. I say like this, his belongings and everything there, no. Only belongings there was me, Yvette, Teria, Anthony, but as far as his belongings there, no.

Physically he hadn't really got his key and moved all his stuff there, he hadn't.

Q. Is it your testimony he did not live there?

A. He didn't live there, no.

Q. Where did he live if he didn't live at your house?

A. Um, I don't know. Probably with his girlfriend or his mother.

Q. So when counsel showed you this document saying that, in the Complaint on Page of Exhibit 4 Paragraph 27, upon information and belief [XXXX] Evergreen was not Terrance Kellom's residence-

A. No. No.

MR. HELMS: Objection, asked and answered.

BY MR. AYAD:

Q. When you answered the question as you did with Mr. Helms is that what you meant --

MR. HELMS: Objection, leading.

BY MR. AYAD:

Q. What did you mean by that when you told him that he lived there?

A. Well, I thought by him being there with me means he lived there with me.

Q. But he didn't physically live there with you?

A. Not physically, no.

Q. Do you know what his drivers license said? Did he have a drivers license, let me ask you?

A. Did he have a drivers license? His I.D. read his mother's house.
Q. Did you know if he got any mail to that address on April 27th, 2015?
A. My house?
Q. Yeah.
A. No.
Q. You said he had no clothing over there?
A. No clothing was there, no. Only one that had clothing there was me, Teria, Yvette and Anthony.

(*Id.* at 96-97).

Terrance Kellom's mother, Nelda Kellom, testified that Terrance Kellom lived with her on the date of the shooting but that he sometimes stayed overnight at various places, including his girlfriend's house, his dad's house, and his cousin's house:

Q. Do you know whether or not Terrance lived at that house on Evergreen before April 27th, 2015?
A. You said before that? No.
Q. At any point in time – so he never lived at that house, is that accurate?
A. No.
Q. Where was he living?
A. With me.
Q. He was with me, he was in and out. You know he would stay here. He would stay with his girlfriend. He would go spend the nights with his dad because he had called me a lot of times he had spent the

> night with his dad and he may be over his cousin's house. Majority of the time he would be on Englewood, that's majority of the time if he wasn't home. He would come home, shower, sleep, eat.

(Nelda Kellom Dep. at 18-19).

STANDARDS OF DECISION

Summary judgment is proper where the record shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). A dispute is genuine only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has done so, the non-moving party must point to evidence supporting its position that is "significantly probative." *Liberty Lobby*, 477 U.S. at 249. The mere existence of a "scintilla of evidence" in support of the plaintiff's position is insufficient to defeat a motion for summary judgment. *Id.*

Among other things, the individual Defendants in this action assert that they are entitled to qualified immunity with respect to the remaining claims against them.

"The doctrine of qualified immunity is an affirmative defense to *Bivens* and § 1983 claims." *Robertson v. Lucas*, 753 F.3d 606, 614-15 (6th Cir.

2014). Under the doctrine of qualified immunity, government officials performing discretionary functions generally are shielded from liability from civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Phillips v. Roane County*, 534 F.3d 531, 538 (6th Cir. 2008). Determining whether government officials are entitled to qualified immunity generally requires two inquiries: 1) whether, viewing the facts in the light most favorable to the plaintiff, the plaintiff has shown that a constitutional violation occurred; and 2) whether the right was clearly established at the time of the violation. *Id.*

There are three individual Defendants in this case (Eaton, Fitzgerald, and Quinn). "Each defendant's liability must be assessed individually based on his [or her] own actions." *Binay v. Bettendorf*, 601 F.3d 640, 650 (6th Cir. 2010).

Qualified immunity is an affirmative defense and, once raised, the plaintiff bears the burden of showing that the defendant is not entitled to qualified immunity. *Garretson v. City of Madison Heights*, 407 F.3d 789, 798 (6th Cir. 2005); *see also Barber v. Miller*, 809 F.3d 840, 844 (6th Cir. 2015) ("Once a defendant invokes qualified immunity, the plaintiff bears the burden of showing that (1) the defendant's acts violated a constitutional right and (2) the right at issue was clearly established at the time of the defendants's alleged misconduct."). If the plaintiff fails to carry this burden as to either element of the analysis, qualified immunity applies and the official is immune to the plaintiff's suit. *Cockrell v. Cincinnati*, 468 F. App'x 491, 494 (6th Cir. 2012).

ANALYSIS

In the pending summary judgment motions, the remaining Defendants challenge each of the remaining claims against them.

I. *Steagald* Claims Asserted By Kevin And Teria Kellom Against Defendants Eaton, Fitzgerald, And Quinn

Count VII of Plaintiffs' First Amended Complaint is titled, "*STEAGALD* VIOLATION (State supplemental claim)" and it asserts, in its entirety:

As to Plaintiffs Kevin and Teria Kellom and as to all defendants

> 90. Plaintiffs incorporate by reference their allegations contained in Paragraphs 1 through 89, above, as though fully set forth herein.
> 91. Upon information and belief, on the date of the incident, Terrance Kellom's official residence was not [XXXX] Evergreen, but elsewhere, where he lived with his girlfriend, Janay Williams, and their two minor children.
> 92. The house which Defendants unlawfully entered was the residence of Plaintiffs Kevin Kellom and Teria Kellom.
> 93. Plaintiffs Kevin Kellom and Teria Kellom had an expectation of privacy in their home under the Fourth

> Amendment (made applicable to State-actors by the Fourteenth Amendment**)** which was violated, unlawfully, by officers entering without a proper warrant and without consent in search of his son, Terrance.
>
> 94. Plaintiffs Kevin Kellom and Teria Kellom never consented to any Defendants entering and searching the house.
>
> 95. Defendant officers had only an arrest warrant for Terrance Kellom, as opposed to a search warrant and, therefore, violated Kevin Kellom's right to privacy by entering his home. *Steagald v. United States*, 451 U.S. 204 (1981).

(First Am. Compl. At 20-21) That count does not reference § 1983 or *Bivens*. Although the First Amended Complaint indicates this is a "State supplemental claim," this count does not reference any state statutes or constitutional provisions. Rather, it references *Steagald,* a United States Supreme Court case, and the Fourth and Fourteenth Amendments of the United States Constitution.

A. To The Extent Count VII Purports To Assert A § 1983 Claim Against The Individual Defendants, That Count Is Dismissed.

Before analyzing the first ground for relief in the City of Detroit Defendants' motion, the Court

includes here some background information regarding § 1983 and *"Bivens* claims" (i.e., claims brought under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971)).

Section 1983 of Title 42 of the United States Code provides for a civil cause of action for persons "who are deprived of any rights, privileges, or immunities secured by the Constitution or federal laws by those acting under color of *state law*." *Gillis v. Miller*, 845 F.3d 677, 693 (6th Cir. 2017) (emphasis added). "In *Bivens*, the Supreme Court held that individuals could 'recover money damages for any injuries [they have] suffered as a result of [a federal agent's] violation of the [Constitution]." *Baranski v. Fifteen Unknown Agents of Bureau of Alcohol, Tobacco and Firearms*, 452 F.3d 433, 438 (6th Cir. 2006). Thus, when *state* officers violate your federal constitutional rights you can sue them under § 1983, and when *federal* agents violate your federal constitutional rights you can sue them under *Bivens*. They are simply parallel claims that are differentiated based on whether the officer was a state or federal officer, and they are analyzed the same way:

> We review *Bivens* and § 1983 actions under the same legal principles, except for the requirement of federal action under *Bivens* and state action under § 1983. A plaintiff must prove two elements to prevail on either type of claim: (1) that he was deprived of a right secured by the Constitution or laws of the United States; and (2) that the

> deprivation was caused by a person acting under color of law.

Webb v. United States, 789 F.3d 647, 659 (6th Cir. 2015); *see also Robertson v. Lucas*, 753 F.3d at 613.

As their first ground for relief, the City of Detroit Defendants assert that Count VII "should be dismissed as the alleged constitutionally abhorrent conduct occurred at the hands of law enforcement officials acting under color of federal, rather than state law." (Defs.' Br. at 5).

To the extent that Count VII purports to assert a *Steagald* claim against Eaton or Fitzgerald under § 1983, that claim must be dismissed because it is undisputed that at the time of the events in this case these officers were acting as federal, not state officers. Thus, a claim against them is not cognizable under § 1983. That also means that there could be no possible municipal liability, as to Chief Craig or the City of Detroit, stemming from this count.

Because these Defendants were acting as federal officers, this *Steagald* violation count is only cognizable against Eaton and Fitzgerald, by virtue of a *Bivens* (as opposed to § 1983) claim. Moreover, such a claim is only cognizable against them in their individual[8] capacity.

B. Qualified Immunity

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[8] That is because, as explained in this Court's prior Opinion and Order, the United States has not waived sovereign immunity as to alleged violation of the Constitution. (*See* ECF No. 52 at PageID.556-57).

The individual Defendants also assert that they are entitled to qualified immunity as to the *Steagald* claims in Count VII because, even construing the evidence in the light most favorable to Plaintiffs Kevin and Teria Kellom, they cannot establish that a constitutional violation occurred. More specifically, the individual officers assert that no constitutional violation occurred because: 1) Kevin Kellom gave consent for the officers to enter the house; 2) exigent circumstances permitted a warrantless entry into the house; and 3) the officers had a reasonable belief that Terrance Kellom lived at, and was present inside, the house at the time of entry. The Court will address each of these arguments.

1. Consent To Enter The Home

Among other things, the individual officers assert that there was no constitutional violation because Kevin Kellom consented to the officers entering the house.

For example, Defendant Quinn's motion asserts that Kevin Kellom consented to the officers' entry into the house, stating:

> First, the evidence demonstrates Kevin Kellom consented to officers entering his home. On the day of the shooting, April 27, 2015, Kevin told police officers in a recorded interview that he went down the stairs so "you know, I can let [the officers] in." (SOF, ¶ 15). He elaborated he "opened the door and I let them in. I

> ain't got nothing to hide from the police. I let them in." (*Id.*). At his deposition in September 2018, Kevin changed his story and said he did not give consent. (*Id.* at ¶ 80). However, his new version of the story is contradicted by every member of the DFAT team that came to his house. (*Id.* at ¶ 16). While the Court ordinarily accepts the facts alleged by the nonmovant as true, Kevin's self-serving claim that he did not consent is not entitled to such deference in light of his inconsistent statement made at the time of the shooting, and thus the Court should dismiss Count VII against Quinn. *See Bruederle*, 687 F.3d at 779) (quoting *Chappell*, 585 F.3d at 906) ("The court is not obliged to, and indeed should not, rely on the nonmovant's version of the facts where it is 'so utterly discredited by the record' as to be rendered a 'visible fiction.'").

(Quinn's Br. at 3).

As Plaintiffs' response brief notes, Quinn has selectively quoted portions of Kevin Kellom's statement, such that it does not show the full context of his testimony as to the entry by the officers. Notably, in his statement, Kevin Kellom stated that the officers who came to his door told him to "open the motherfucking door or I'm going to tear it down," and that after he asked if they had a search warrant, the

officers directed him to "Open your door, sir" and he then opened the door.

Kevin Kellom's deposition testimony was consistent in that he testified he did not give consent for the officers to enter the house and that he asked if they had a search warrant. He testified that the officers never asked him for consent to enter and that he did not tell them they could enter the home. It is somewhat inconsistent in that, in his statement, Kevin Kellom said that he opened the door when directed to do so and in his deposition, three years later, he testified that one of the officers "snatched" the door open.

Nevertheless, construing the evidence in the light most favorable to Plaintiffs, the Court concludes that a genuine issue of material fact exists as to whether Kevin Kellom consented to the officers entering his home.

2. Exigent Circumstances

The individual officers also assert that they are entitled to qualified immunity as to the *Steagald* claims because their entry was justified by exigent circumstances. For example, Defendant Quinn argues:

> Second, even if the Court finds there is a genuine dispute over whether consent was granted, exigent circumstances justified Quinn's entry. Exigent circumstances are measured by a "standard of objective reasonableness" and are typically present in three

circumstances: "(1) when the officers were in hot pursuit of a fleeing suspect; (2) when the suspect represented an immediate threat to the arresting officers and public; [or] (3) when immediate police action was necessary to prevent the destruction of vital evidence or thwart the escape of known criminals." *Ewolski v. City of Brunswick*, 287 F.3d 492, 501 (6th Cir. 2002).

On April 27, 2015, DFAT members were looking for fugitive Terrance Kellom to arrest him for armed robbery and a weapons violation. (SOF ¶¶ 6–7). They learned Terrance was likely staying in his father Kevin's house on Evergreen Road, and one DFAT member then observed Terrance walk into the house. (*Id.* at ¶¶ 10–11). Several DFAT officers approached the house and spoke to Kevin, and then they entered. (*Id.* at ¶ 12–14). Once they located Terrance on the second floor, they radioed for backup. (*Id.* at ¶¶ 17, 20); (*see also id.* at ¶¶ 18–23). Quinn entered the house only after the call for backup. (*Id.* at ¶ 21). Kevin himself corroborates that Quinn did not enter the house until after Terrance had been found, and after officers said Terrance was armed. (*Id.* at ¶¶ 82–84, 89). To summarize, Quinn only entered the house after officers found a dangerous fugitive in a house and requested assistance in arresting him.

> Thus, by all accounts, Quinn entered the house when exigent circumstances necessitated his entry, and, therefore, he did not violate Kevin or Teria's Fourth Amendment rights. *See Cook v. O'Neill*, 803 F.3d 296, 298–99 (7th Cir. 2015) (noting that exigent circumstances existed to enter an apartment where officers, having approached the apartment to question a witness, became aware that a violent, dangerous criminal was inside). *Cf. Spriggs v. Shanlian*, No. 12-14918, 2014 WL 1304910, at *9–10 (E.D. Mich. Mar. 11, 2014) (Edmunds, J.) (adopting magistrate's holding that even where one officer allegedly entered a house in violation of the Fourth Amendment, the specific conduct of other officers must be evaluated); *see also Dorsey v. Barber*, 517 F.3d 389, 399 n.4 (6th Cir. 2008) ("Each defendant's liability must be assessed individually, based on his or her own actions.") The Court should dismiss Count VII against Quinn.

(Quinn's Br. at 4-5).

"Federal courts have traditionally found exigent circumstances in the following three instances: (1) when the officers were in hot pursuit of a fleeing suspect; (2) when the suspect represented an immediate threat to the arresting officers and public; and (3) when immediate police action was necessary

to prevent the destruction of vital evidence or thwart the escape of known criminals." *Hancock v. Dodson*, 958 F.2d 1367, 1375 (6th Cir. 1992).

Here, the officers were not in hot pursuit of a fleeing suspect and do not argue that their entry was necessary to prevent the destruction of evidence. Rather, they appear to assert that entry was necessary because Terrance Kellom "represented an immediate threat" to the officers inside the house.

"In a civil action" such as this, the Sixth Circuit has explained that "the determination of whether exigent circumstances exist is properly resolved by the jury." *Hancock*, 958 F.2d at 1375 (citations omitted); *see also Jones v. Lewis*, 874 F.2d 1125, 1130 (6th Cir. 1989) (The determination of whether exigent circumstances existed is a question for the jury provided that, given the evidence on the matter, "there is room for a difference of opinion.")

However, "in a case where the underlying facts are essentially undisputed, and where a finder of fact could reach but one conclusion as to the existence of exigent circumstances, the issue may be decided by the trial court as a matter of law." *Hancock,* 958 F.2d at 1375. That was the situation in *Hancock*, where the undisputed evidence established that the officers "received a call over the police radio that there existed a situation involving a suicidal and possibly homicidal gunman. The dispatch reported that shots had been fired. At least one of the radio communications indicated that the subject had threatened to kill any police officer who arrived on the scene." *Hancock*, 958 F.2d at 1375. Given that undisputed evidence, the Sixth Circuit affirmed the trial court's grant of summary judgment because those facts established

the situation as one representing an immediate threat to the arresting officers and public. *Id*. As such, the officers could enter the house without a warrant.

Here, in contrast, Quinn testified during his direct examination that, while he cannot remember exactly what was said over the radio, the call was just a request for another officer.

Defendant Eaton similarly argues that exigent circumstances allowed her to enter the house because she heard "calls for back-up" from fellow officers. (Detroit Defs.' Br. at 25).

Construing the evidence in the light most favorable to Plaintiffs, there is room for a difference of opinion on this issue.

3. Reasonable Belief That Terrance Kellom Lived At, And Was Present Inside, The House At The Time Of Entry.

Defendants note that "Count VIII of Plaintiffs' Complaint asserts a *Steagald* claim, alleging that without consent or exigent circumstances, the DFAT Officers entered their home with only an Arrest Warrant, rather than a Search Warrant." (Detroit Defs.' Br. at 21). They note that "[a]bsent consent or exigent circumstances, entry into a home to search or make an arrest is unreasonable under the Fourth Amendment unless done pursuant to a warrant. *Payton v. New York*, 445 U.S. 573 (1980)." (Defs.' Br. at 21). "If, however, officials possess an arrest warrant, they may enter a house in which the suspect lives when there is also reason to believe the suspect is within. *Id.* at 603. Officials may not, however, enter

the residence of a third party in the belief that the fugitive they seek may be inside absent a valid search warrant. *Steagald v. United States*, 451 U.S. 204, 212 (1981)." (*Id.*).

The individual Defendants assert that, based on the information they learned during their investigation, the DFAT team members reasonably believed that Terrance Kellom was residing at his father's house on Evergreen on the date of the incident. (*See, e.g.*, Detroit Defs.' Br. at 22). They assert that, even if Terrance Kellom did not actually live at the Evergreen house, they are "entitled to qualified immunity, based upon a reasonable belief that Terrance had taken up residence in his father's home." (*Id.*). They assert that "[b]ecause the DFAT Officers reasonably believed that Terrance was a co-resident at the subject location, Plaintiff's Fourth Amendment rights were not violated even if Terrance did not live there." (*Id.* at 23).

This argument has merit. *See, eg.*, *Valdez v. McPheeters*, 172 F.3d 1220 (10th Cir. 1999); *El Bey v. Roop*, 530 F.3d 407, 416 (6th Cir. 2008).

Valdez involved the same type of situation that is presented here. In that case, the mother of a criminal suspect brought a civil action alleging that police officers and a federal agent violated her Fourth Amendment rights when they entered her residence based on an arrest warrant for her son. As is the case here, the mother claimed that she told the officers that they could not search for her son without a search warrant. The mother brought suit after the officers entered the house, claiming a *Steagald* violation. The district court granted summary judgment in favor of

the officers and the mother appealed. The Tenth Circuit affirmed. In doing so, it noted:

> One of the circumstances which may permit an entry into a residence without a search warrant is the existence of a valid arrest warrant for a suspect who is believed to live in the residence. This is because "an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within." *Payton*, 445 U.S. at 603, 100 S.Ct. at 1388. "Because an arrest warrant authorizes the police to deprive a person of his liberty, it necessarily also authorizes a limited invasion of that person's privacy interest when it is necessary to arrest him in his home." *Steagald*, 451 U.S. at 214 n.7, 101 S.Ct. at 1649 n.7. Absent exigent circumstances, however, an arrest warrant by itself does not authorize entry into the home of a third party. *Id.*, at 215, 101 S.Ct. 1642.

Valdez, 172 F.3d at 1224. The Tenth Circuit then explained that "[t]he majority of circuits which have addressed the issue have agreed that, under *Payton*, police officers entering a residence pursuant to an arrest warrant must demonstrate a reasonable belief that the arrestee lived in the residence, and a reasonable belief that the arrestee could be found

within the residence at the time of the entry." *Id.* (collecting cases). The Tenth Circuit agreed with those authorities, holding that the defendant officers "were entitled to enter the [plaintiff's] residence if there was a reasonable basis for believing that [the plaintiff's son] both (1) lived in the residence and (2) could be found within at the time of entry." *Id.*

In so holding, the Tenth Circuit explained that "requiring actual knowledge of the suspects true residence would effectively make *Payton* a dead letter. In the real world, people do not live in individual, separate, hermetically-sealed residences. They live with other people, they move from one residence to another. Requiring that the suspect actually reside at the residence entered would mean that officers could never rely on *Payton*, since they could never be certain that the suspect had not moved out the previous day and that a *Bivens* or a 42 USC § 1983 claim would then be made against them by another resident." *Id.* at 1225. "Thus, entry into a residence pursuant to an arrest warrant is permitted when 'the facts and circumstances within the knowledge of the law enforcement agents, when viewed in the totality, must warrant a reasonable belief that the location to be searched is the suspect's dwelling, and that the suspect is within the residence at the time of entry.'" *Id.*

El Bey appears to indicate that the Sixth Circuit takes the same view. In that case, the officers claimed "that they believed that they were actually entering the residence of Ray, the subject of the arrest warrant." *El Bey*, 530 F.3d at 415 ((citing *United States v. Bervaldi*, 226 F.3d 1256, 1267 n.11 (11th Cir. 2000) and "noting that the officers had a reasonable

belief that the residence searched was the residence of the subject of the arrest warrant, 'not some third party's residence as in *Steagald'* and explaining that *Steagald* was therefore inapplicable."). The Sixth Circuit further stated that "the two components to the reasonable-belief standard can be stated as follows: the officers must have had a reasonable belief both (1) that Ray lived at the 1580 Greenlake Drive residence, and (2) that Ray was inside the residence at the time that they entered." *Id.* at 416.

This Court concludes that, under this line of authority, the three individual Defendants are entitled to qualified immunity as to the *Steagald* claims asserted by Kevin and Teria Kellom.

The first step in the qualified immunity analysis is to consider whether, viewing the facts in the light most favorable to Plaintiffs, could they establish a Constitutional violation with respect to any of the three officers (Eaton, Fitzgerald, and Quinn).

Based on the above authorities, the defendant officers were entitled to enter the house on Evergreen if there was a reasonable basis for believing that: 1) Terrance Kellom lived there; and 2) Terrance Kellom could be found inside the house at the time of entry. *Valdez, supra; El Bey, supra.*

On April 27, 2015, the DFAT conducted an investigation to determine where Terrance Kellom was living and the team members were in communication with each other throughout that investigation. They eliminated the address that was listed on his driver's license and then, based on records from a corrections facility, went to the address where they believed Terrance's girlfriend lived.

Terrance's girlfriend, and her mother, told the officers Terrance was staying at his father's house on Evergreen. Terrance's girlfriend gave the officers a detailed description of Terrance's car (ie., a silver, four-door Taurus with a green sticker in the back window). Eaton then surveilled the house on Evergreen, where she saw Terrance's car parked in the driveway. Eaton also saw Terrance exit and re-enter the house. After Eaton observed Terrance enter and remain inside the house, she so advised the team. Based on this evidence, the officers had a reasonable basis for believing that Terrance Kellom lived at the house on Evergreen with his father. *See, e.g., Harris v. Smith*, 390 F. App'x 577, 579 (6th Cir. 2010) (officers had reason to believe that suspect lived at the home, where an employee of a state agency told officers, in connection with their investigation, that the suspect and his girlfriend were living at the house and the officers then surveilled the house and saw the suspect's girlfriend drive up and go inside.).

The second inquiry is also satisfied – as Plaintiffs' Counsel acknowledged at the May 2, 2019 hearing. It is undisputed that Officer Eaton conducted surveillance at the Evergreen House prior to the search on April 27, 2015 and personally observed Terrance Kellom enter the house and remain inside. Thus, all of the officers on the DFAT had a reasonable basis for believing that Terrance Kellom could be found inside the house at the time of entry on April 27, 2015.

Accordingly, the Court agrees with Defendants that Kevin and Teria Kellom cannot establish that a constitutional violation occurred. Thus, the three

officers are entitled to qualified immunity as to the *Steagald* claims asserted in Count VII.

II. The Estate's *Bivens* Excessive Force Claims Against Defendants Eaton, Fitzgerald And Quinn

The Estate's excessive force claims, brought as *Bivens* claims in Count I, are asserted against three individual Defendants: 1) Eaton; 2) Fitzgerald; and 3) Quinn. All three officers contend that they are entitled to summary judgment in their favor as to the excessive force claims against them.

A. Defendants Eaton And Fitzgerald

In addition to Defendant Quinn, the sole officer who is alleged to have shot Terrance Kellom, the Estate also asserts its excessive force claims against Defendants Eaton and Fitzgerald. Eaton and Fitzgerald assert that, regardless of the outcome of the excessive force claim against Quinn, they are entitled to qualified immunity because they are only liable for their own conduct and the undisputed evidence reflects that they had no opportunity to intervene to prevent the shooting. As such, they assert they committed no constitutional violation and are therefore entitled to qualified immunity as to Count I.

The Court agrees that Eaton and Fitzgerald are entitled to qualified immunity as to the excessive force claims asserted against them.

"Liability for excessive force requires a showing that the defendant either (1) actively participated in the use of excessive force, (2) supervised the officer

who used excessive force, or (3) owed the victim a duty of protection against the use of excessive force." *Pennington*, 644 F. App'x at 547; *see also Turner v. Scott*, 119 F.3d 425, 429 (6th Cir. 1997); *Ontha v. Rutherford Cty., Tennessee*, 222 F. App'x 498, 505 (6th Cir. 2007).

Here, the Estate does not allege that either Defendant Eaton or Fitzgerald used any excessive force themselves or that they supervised Defendant Quinn. Rather, the Estate alleges that "Defendants Eaton and Fitzgerald had the duty and opportunity to intervene" to protect Terrance Kellom and "prevent the shooting" by Defendant Quinn. (First Am. Compl. at 10).

"An officer may be liable for failing to prevent an act of excessive force if he or she: (1) observed or had reason to know that excessive force would be or was being used, and (2) had both the opportunity and means to prevent the harm from occurring." *Pennington,* 644 F. App'x at 547-48; *Turner*, 119 F.3d at 429.

"Where an act of excessive force unfolds in a matter of seconds, the second requirement is generally not satisfied." *Pennington,* 644 F. App'x at 548. That is because the Sixth Circuit "has reasoned that it demands too much of officers to require that they intervene within a sudden and quickly-expired moment of opportunity." *Id.*

Defendants Eaton and Fitzgerald assert that they are entitled to qualified immunity because the Estate cannot present evidence to establish that either of them had reason to know that Defendant Quinn was going to shoot or that either officer had the

opportunity and means to prevent Agent Quinn from shooting Terrance Kellom.

Notably, Plaintiffs' response brief does not respond to this argument. Thus, the Estate's response brief does not direct the Court to any evidence that could establish a constitutional violation by Eaton or Fitzgerald for having failed to prevent any excessive force used by Quinn.

At the hearing, the Estate's Counsel failed to direct the Court to evidence that could establish that either Eaton or Fitzgerald had reason to know that Defendant Quinn was going to shoot or that either officer had the opportunity or means to prevent the shooting. Rather, counsel suggested that Eaton and Fitzgerald could have waited for a search warrant before entering the house. Plaintiffs have failed to meet their burden of establishing that Defendants Eaton and Fitzgerald are not entitled to qualified immunity.

Moreover, Defendants, have directed the Court to evidence that supports their position on this issue. Kevin Kellom testified that the events "happened so quick," and unfolded in a matter of seconds. (Kevin Kellom Dep. at 57; Kevin Kellom Interview at 54-55). Kevin Kellom also testified that the officer who shot his son did so without any kind of warning that he was about to do so:

Q. Before the officer shot did he say anything or give any warning?
A. No.
Q. As far as you can tell he just walked into the house and shot?
A. Yes.

(Kevin Kellom Dep. at 45).

Kevin Kellom also testified that Quinn shot his son while Terrance Kellom was in the downstairs hallway. It is undisputed that "[a]t all times during the DFAT presence inside the home, Officer Fitzgerald remained in the living room, monitoring Teria and Kevin Kellom. (ECF No. 104 at PageID.2626; ECF No. 107 at PageID2747).

Eaton testified that she was on the front porch when she heard the shots and then saw Terrance Kellom in the downstairs hallway as he was shot and fell to his knees. (Eaton Dep. at 50-52). She testified that there was just a slight pause between the initial shot and the remaining shots. (*Id*. at 55). Eaton did not come back in the house until after the shots had ended. (*Id*.)

Thus, neither Fitzgerald nor Eaton were even in the same room as Quinn and Terrance Kellom just before or at the time of the shooting. Thus, the Court shall grant summary judgment in favor of Eaton and Fitzgerald as to the Estate's excessive force claims against them because they are entitled to qualified immunity as to those claims.

B. Defendant Quinn

As to the excessive force claim asserted against him, Quinn's motion asks the Court to grant summary judgment in his favor because he did not use excessive force when he defended himself from the attack of a dangerous fugitive. In making this argument, Quinn asserts that: 1) the evidence establishes that he reasonably acted in self defense; 2) the case law

supports granting summary judgment as to Quinn; 3) the deposition testimony of Kevin Kellom and Teria Kellom should be discredited because of their inconsistencies, implausability, and lack of corroborating evidence; and 4) courts have granted summary judgment to *Bivens* and § 1983 defendants in similar scenarios where the plaintiff's testimony was discredited.

The only way this Court could grant summary judgment in favor of Defendant Quinn on this claim is if this Court discredits the testimony of Kevin Kellom.

Again, the parties have divergent versions of the facts. The officers have testified that Terrance was located hiding in the second floor attic crawl space and refused to come out peacefully, shouting things like "shoot me, bitch," "I have a gun," and "You're gonna have to kill me." Defendant Quinn contends that Terrance had a hammer and was tearing a hole through the attic floor, so that he could escape from the attic crawl space by going through that hole and dropping down onto the main floor.

Quinn's motion asserts that Quinn descended the stairs, hoping to catch Terrance where he would land on the first floor. (Defs.' Br. at 9). Quinn testified that Terrance came out of the back, left bedroom, that had a blanket draped where a door would normally be, holding a hammer and approaching him aggressively. Quinn ordered Terrance to drop the hammer but he did not comply. Quinn testified he shot Terrance once or twice, to protect himself and fellow officers, hoping that Terrance would stop coming towards him. Quinn testified that Terrance kept advancing towards him, making him question whether he was hitting him with

his shots because he did not stop. (Quinn Dep. at 111-16).

Quinn's motion contends that "[a]ll of the physical evidence in this case corroborates the account of Quinn and his fellow DFAT officers. For example, the pictures show (1) the damage to the attic ductwork, attic floor, and closet ceiling; (2) the blanket on the floor near the back left bedroom; and (3) the hammer near where Terrance fell to the floor – all of which bolster Quinn's version of the events." (Defs.' Br. at 10-11). The motion further states that: 1) there is a video, during an interview with Kevin Kellom, that shows a hole in the floor large enough for a man to go through (ie., the "Charlie LeDuff Video"); 2) that forensic testing show fibers on Terrance's clothes matched fibers from the drywall and insulation at the house; and 3) the autopsy noted Terrance had abrasions on his body that would be consistent with him dropping down through the ceiling.

Quinn's motion contends that the deposition testimony of Kevin Kellom (and Teria Kellom) should be entirely discredited because of their inconsistencies, implausability, and lack of corroborating evidence. (Defs.' Br. at 14). He asserts that the "Court should not rely on Kevin and Teria Kellom's version of the shooting because they have no evidence other than their testimony, and that testimony is implausible on its face and is utterly discredited by the record, including by their own previous statements." (*Id.*).

In so asserting, Defendants direct the Court to *Bruederle v. Louisville Metro Gov't*, 687 F.3d 771, 779 (6th Cir. 2012) and *Chappell v. City of Cleveland*, 585 F.3d 901, 906 (6th Cir. 2009). In those cases, the Sixth

Circuit recognized that a district court "is not obliged to, and indeed should not, rely on the nonmovant's version [of the events] where it is 'so utterly discredited by the record' as to be rendered a 'visible fiction.'" *Chappell,* 585 F.3d at 906 (quoting *Scott v. Harris*, 550 U.S. 372, 378-80 (2007)*; see also Pennington v. Terry*, 644 F. App'x 533, 538 (6th Cir. 2016) (explaining that while the court is generally required to adopt the plaintiff's version of the facts, that is not so when the plaintiff's version is "blatantly contradicted by the record," and noting that "exception most commonly applies where the record contains a videotape depicting the disputed facts and contradicting one party's version of events.").

This Court does not believe this is one of those rare cases where the testimony of the plaintiff is so utterly contradictory, or so discredited by the record evidence, that the Court can simply discredit it for purposes of summary judgment. This is not a case where there is video evidence of the events, that expressly discredits the plaintiff's version of events. There is no video evidence of the shooting, or of any events that occurred inside the house.

While there are some inconsistencies and differences between Kevin Kellom's statement given on the day of the event, and his deposition taken three years later, that is not that unusual, especially given the time gap. Moreover, his basic version of the key facts remains fairly consistent: once the officers and Terrance were downstairs in the hallway, Terrance was cussing at the officers but was not resisting. At the time he was shot by Quinn, Terrance had his hands upwards and open and he was not holding anything, including a hammer.

In addition, the versions of events are not so contradictory as to be totally discredited by the physical evidence. It appears that one of two things happened on the day of the shooting: 1) Terrance broke a hole in the attic crawl space and came through the floor to the downstairs bedroom, and then entered the hallway; or 2) Terrance came down the stairs with officers, and then entered the hallway. (*See* Diagram of House, Defs.' Ex. 10). Regardless of how Terrance got downstairs, the key facts are what occurred while Terrance was in the hallway on the main floor, right before he was shot. If Terrance was not resisting, and had his hands up and open, and had no weapon, then a reasonable jury could find that Quinn used excessive force. Terrance could have come through the floor, leaving fibers on his clothes and abrasions on his body, and yet entered the hallway without a hammer, and had his hands upwards and open at the time he was shot.

For this Court to simply discredit all of Kevin Kellom's testimony would be for the Court to improperly make a credibility determination at the summary judgment stage. This is especially so in light of other evidence, such as Fitzgerald's deposition testimony, that when construed in the light most favorable to Plaintiffs, could support Kevin Kellom's testimony that Terrance was not wielding a hammer at the time he was shot. Defendant Quinn is not entitled to qualified immunity as to the Estate's excessive force claim against him. That claim shall proceed to a jury trial.

III. The *Monell* Liability Count Against The City And Chief Craig

The City of Detroit Defendants also ask the Court to dismiss Count VIII because there can be no basis for municipal liability in this action because there are no remaining § 1983 claims in this case:

> [B]efore a *Monell* claim may be made, Plaintiffs must establish that § 1983 has been implicated; and a § 1983 claim cannot be made without showing that an officer deprived a person of a Constitutional right, while acting under color of State law. Hence, because the alleged conduct occurred at the hands of officers acting under color of Federal law, § 1983 is not implicated and Summary Judgment for City of Detroit and Chief Craig is appropriate.

(Defs.' Br. at 8-9).

The Court agrees that the *Monell* liability count must be dismissed because there can be no basis for municipal liability in this case, given the claims that remain.[9]

IV. The Estate's FTCA Claims Against The United States

[9] Following the Court's ruling on the motions to dismiss, the City of Detroit Defendants filed a motion seeking reconsideration, asking the Court to rule that there can be no municipal liability as to the City. In light of this ruling, that motion is moot.

There are two separate tort claims pending against the United States: 1) a claim under Michigan's wrongful death statute (Count V); and 2) a claim for intentional infliction of emotional distress under Michigan law (Count VI). In the summary judgment motion filed by the United States, it challenges both of those claims.

A. Subject Matter Jurisdiction Challenge To The Estate's FTCA Claim

The Government asserts that the Estate's FTCA claims must be dismissed because the Estate did not exhaust its administrative remedies and this Court therefore lacks subject matter jurisdiction. The Government notes that the way the issue was briefed by the parties, at the motion-to-dismiss phase, the issue presented was whether the Estate's original complaint asserted FTCA claims against the United States. (Def.'s Br. at 2). The Government's motion asserts that "by framing the issue in this manner, defendant United States inadvertently mischaracterized the jurisdictional issue" and, in this motion, seeks to clarify and re-assert its jurisdictional argument. (*Id.*).

In response, Plaintiffs' brief complains that the Government is raising an issue that the Court has already considered. Plaintiffs assert that it is improper for the Government to raise this argument.

As the Government's reply brief notes, however, this is a challenge to the Court's *subject matter jurisdiction*. A challenge to subject matter

jurisdiction can be raised at any time and can never be waived. *See, e.g., Herr v. U.S. Forest Serv.*, 803 F.3d 809, 813-14 (6th Cir. 2015) ("In the absence of subject-matter jurisdiction, a federal court must dismiss the lawsuit – no matter how far along the litigation has progressed (including to the last-available appeal), no matter whether the parties forfeited the issue, no matter indeed whether the parties have waived it."). As such, the Court will consider this challenge to this Court's subject-matter jurisdiction over the FTCA claims in this case.

The way this issue unfolded at the motion-to-dismiss phase, the Court considered whether the Estate's original complaint asserted FTCA claim or named the United States as a Defendant:

> This Court agrees that if the original complaint filed by the Estate asserted a FTCA claim against the United States, then it would have been premature because it was filed on April 6, 2017, before the Estate had even filed Its administrative claim. If such a premature claim had been filed by the Estate, then the Estate would have to file a new lawsuit after the denial of its administrative complaint, not an amended complaint in this action. In addition, if that were the case, because the Estate's administrative denial occured on February 1, 2018, a new lawsuit would had to have been filed by the Estate by August 1, 2018. Accordingly, if the Estate's original

> complaint asserted a FCTA claim against the United States, the Court would have to dismiss this action for lack of subject matter jurisdiction and, because August 1, 2018 has now passed, the Estates wrongful death claim would be time-barred.
>
> That brings us what appears to be the real issue – whether the Estate's original complaint asserted FTCA claims against the United States.

(ECF No. 52 at PageID.560). This Court then stated that while it was not aware of any Sixth Circuit cases directly on point as to this issue, a published Ninth Circuit case, *Valadez-Lopez v. Chertoff,* 656 F.3d 851 (9th Cir. 2011), appeared to support the Estate's position that the original complaint did not assert FTCA claims because it did not name the United States as a Defendant or reference the Federal Tort Claims Act. As such, this Court declined to dismiss the Estate's FTCA claims at the motion-to-dismiss phase.

The Government's current motion contends the inquiry before the Court is "whether the Estate had exhausted its administrative remedies before the Attorney General first certified under the Westfall Act that the employee was acting within the scope of his employment at the time of the alleged negligence." (Govt.'s Br. at 2). As explained below, the Government has now set forth a cogent argument, supported by on-point references to Sixth Circuit and Supreme Court authority, that the Estate failed to exhaust administrative remedies and, therefore, this Court lacks subject matter jurisdiction over the FTCA

claims asserted against the United States. The Government's current motion makes two critical points that change the outcome here.

Before getting to those two critical points, an overview of the relevant concepts is provided here.

Under the FTCA, lawsuits against governmental employees acting in their official capacities are treated as suits against the United States. *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). The FTCA, however, requires a plaintiff to exhaust administrative remedies prior to instituting such a lawsuit. 28 U.S.C. § 2675; *McNeil v. United States*, 508 U.S. 106, 113 (1993).

An administrative claim is deemed denied if six months pass without a decision. *Id.* Once there has been a denial of claim, the claimant must file suit in federal court within six months. 28 U.S.C. § 2401.

When a claimant "prematurely" files a FTCA lawsuit (ie., when the claimant files it before the denial of an administrative claim), then the federal court lacks subject matter jurisdiction over the action and it must be dismissed. *McNeil, supra.* Following *McNeil*, several courts have ruled that premature FTCA suits cannot be cured by virtue of filing an amended complaint in the same action, after the administrative claim is denied. Rather, in such situations, a new lawsuit must be initiated within the applicable six-month time period for filing suit after the denial. *See, e.g., Duplan v. Harper*, 188 F.3d 1195, 1199 (10th Cir. 1999); *Sherman v. United States*, 48 F.Supp.3d 1019, 1024 (E.D. Mich. 2014); *VanHorn v. Walton*, 2013 WL 119252 at *2 (E.D. Mich. 2013); *Brown v. United States*, 2010 WL 11610545 at * 2 (N.D. Ohio 2010).

"The Federal Employees Liability Reform and Tort Compensation Act of 1988, commonly known as the Westfall Act, accords federal employees absolute immunity from common-law tort claims arising out of acts they undertake in the course of their official duties." *Osborn v. Haley*, 549 U.S. 225, 229 (2007) (citing 28 U.S.C. § 2679(b)(1)). When a federal employee such as Quinn is sued for wrongful or negligent conduct, the Westfall Act "empowers the Attorney General to certify" that he "'was acting within the scope of his office or employment at the time of the incident out of which the claim arose.'" *Id.*

1. The Estate's Original Complaint Is Deemed To Have Asserted A FTCA Under Sixth Circuit Authority, And It Was Prematurely Filed Before The Estate Filed An Administrative Claim.

In its motion, the United States directs the Court to a Sixth Circuit case that reflects that when a plaintiff asserts any tort claim against a federal employee alleged to have occurred while the employee was acting in his official capacity – which is the situation here as to Quinn – that is considered a FTCA claim for purposes of administrative exhaustion regardless of whether it was labeled as such in the complaint. In *Harris*, the Sixth Circuit stated:

> [Plaintiff's] second amended complaint *included allegations of torts committed by governmental employees acting in*

> *their official capacities. [Plaintiff's] claims are cognizable, if at all, under the FTCA.* Accordingly, the district court properly applied FTCA law to its decisions regarding those claims. In particular, the district court found [Plaintiff] had not conformed to the administrative exhaustion requirement of the FTCA, under which he should have filed a claim with the appropriate federal agency and waited for the claim to be denied before filing suit.

Harris v. City of Cleveland, 7 F. App'x 452, 458 (6th Cir. 2001) (emphasis added). The United States asserts that "[a]s a result, the holding in *Harris* indicates that the Sixth Circuit considers any tort claim against a federal employee alleged to have occurred while the employee was on duty and performing his or her job duties to be an FTCA claim for purposes of administrative exhaustion, whether or not the plaintiff labeled it as such. Because this precedent conflicts with the Ninth Circuit's assumptions in *Valdez-Lopez*, this Court should follow *Harris* and not *Valdez-Lopez*." (Def.'s. Br. at 13).

The Estate's original complaint was filed on April 6, 2017. That complaint did not name the United States as a Defendant and did not reference the Federal Tort Claims Act. But it identified Defendant Quinn as a "federal law enforcement agent employed by Immigration and Customs Enforcement, a federal agency organized and existing under the laws of the United States" and expressly alleged that Quinn acted "within the course and scope of his employment, and

under color of federal law." (ECF No. 1 at PageID.4). The original complaint included a wrongful death claim against Quinn under Michigan law.

As such, the Estate's claim against Quinn in the original complaint was one under the FTCA, even though Plaintiffs' Counsel did not label it as such. It is undisputed that the Estate did not file an administrative claim prior to filing this action. Accordingly, the Estate's counsel filed this FTCA action prematurely.

2. In Addition, Even If The Original Complaint Were Not Deemed To Have Asserted A FTCA Claim At The Time Of Filing, As Of October 16, 2017, The United States Was Deemed Substituted For Quinn In This Action By Virtue Of The Certification, Which Would Also Make This Action Prematurely Filed.

The second critical point that the Government's motion makes is that upon the Attorney General's certification under the Westfall Act, this action is automatically deemed to be brought against the United States (not the named employee) and the litigation is thereafter governed by the FTCA. *Osborn*, 549 U.S. at 228 & 230; 28 U.S.C. § 2679*; see also Harbury v. Hayden,* 522 F.3d 413, 416 (D.C. Cir. 2008) ("Upon the Attorney General's certification, the tort suit automatically converts to an FTCA" action against the United States and the FTCA's

requirements apply to the case.); *Zolman v. United States*, 170 F.Supp.2d 746, 748 (W.D. Mich. 2001) (Upon certification, "the United States was automatically substituted as the party defendant.").

Here, on October 16, 2017, Defendant Quinn filed a Motion for Partial Dismissal and attached a Certificate of Scope of Employment as to Quinn as Exhibit 2 to the motion (ECF No. 12-3) and the motion stated that the United States should be substituted for Quinn as to the wrongful death claim.

Accordingly, even if the original complaint were not deemed to have been brought under the FTCA by virtue of *Harris*, then "by automatic action of the Westfall Act and the Attorney General's certification, the Estate asserted an FTCA claim against the United States" as of October 16, 2017. (Defs.' Br. at 5).

The Estate did not file an administrative complaint until April 25, 2017 – after it filed this case. That claim was deemed administratively denied six months later, on October 25, 2017. Thus, that would be the earliest date which the Estate could have filed this action. As such, even if this case were not deemed to be a FTCA action until October 16, 2017, it still would have been prematurely filed.

3. Because The Estate Prematurely Filed This Action, Before The Actual Or Constructive Denial Of Its Administrative Claim, This Court Must Dismiss The FTCA Claims In This Action For

Lack Of Subject Matter Jurisdiction.

As noted above, and as explained in this Court prior Opinion & Order, when a premature FTCA case is filed, it cannot be cured by virtue of filing an amended complaint in the same action, after the administrative claim is denied. Rather, in such situations, the case must be dismissed for lack of subject matter jurisdiction. The Court concludes that it lacks subject matter jurisdiction over the Estate's FTCA claims in this action and shall dismiss them.

CONCLUSION & ORDER

For the reasons set forth above, **IT IS ORDERED** that the City of Detroit Defendants' summary judgment motion is **GRANTED** to the extent the Court **RULES** that: 1) Defendants Eaton and Fitzgerald are entitled to qualified immunity as to the *Bivens* excessive force claims asserted against them in Count I; 2) the *Steagald* claims in Count VII, are only cognizable as *Bivens* claims, not § 1983 claims, because the officers were acting under federal and not state law, and they only remain as to the Agents/Officers in their individual capacities; 3) Defendants Eaton and Fitzgerald (and Quinn) are entitled to qualified immunity as to the *Steagald* claims asserted in Count VII; and 4) the *Monell* liability count, Count VIII, fails as a matter of law because there is no basis for imposing municipal liability in this action that has no viable § 1983 claims.

IT IS FURTHER ORDERED that the court **GRANTS** the summary judgment motion filed by the

United States because the Court concludes that it lacks subject matter jurisdiction over the Estate's Federal Tort Claims Act claims in this action.

IT IS FURTHER ORDERED that the summary judgment motion filed by Defendant Quinn is **GRANTED IN PART AND DENIED IN PART.** The motion is **GRANTED** to the extent that the Court **RULES** that Defendant Quinn is entitled to qualified immunity as to the *Steagald* claims asserted by Kevin and Teria Kellom in Count VII. The motion is **DENIED** in all other respects.

Accordingly, the Estate's excessive force claim asserted against Defendant Quinn is the sole remaining claim in this action. That claim shall proceed to a jury trial.

IT IS SO ORDERED.

s/Sean F. Cox
Sean F. Cox
United States District
Judge

Dated: May 21, 2019

APPENDIX C

NOT RECOMMENDED FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Appellate Case Nos. 20-1003/1222

[Filed: September 3, 2021]

NELDA KELLOM, Individually and as Personal Representative Of the Estate of TERRANCE KELLOM, Deceased; LAWANDA KELLOM, TERRELL KELLOM, KEVIN KELLOM, and TERIA KELLOM, Individually; JANAY WILLIAMS, as personal representative of Terrance Kellom's two minor children, son, T.D.K., and daughter, T.D.K.,
Plaintiff-Appellants,

v.

MITCHELL QUINN, Immigration and Customs Enforcement Agent; UNITED STATES OF AMERICA,
Defendants-Appellees (20-1003/1222)

DARRELL FITZGERALD and TREVA EATON, individually and in their offical capacities as Detroit Police Officers; CITY OF DETROIT, MICHIGAN; JAMES E. CRAIG, in his official capacity, jointly and severally,
Defendants-Appellees (20-1003)

OPINION

BEFORE: SILER, MOORE, and THAPAR, Circuit Judges.

THAPAR, Circuit Judge. This case involves the fatal shooting of Terrance Kellom during an attempted arrest. A jury decided that the shooting was justified. But Kellom's estate and family now challenge various pre-trial rulings by the district court, plus evidentiary rulings at trial. We affirm in part, reverse in part, and remand some issues to the district court.

I.

Terrance Kellom had outstanding arrest warrants for armed robbery and unlawful possession of a firearm. So law enforcement deployed a federal task force to find him. As part of their search, task force members visited the home of Kellom's girlfriend. She told them that Kellom had recently shattered her car windows with a hammer and threatened to burn down her house. She also told police that Kellom was living at his father's house and described his car.

Officer Treva Eaton, a Detroit police officer and member of the federal task force, went to Kellom's father's house to conduct surveillance. She observed Kellom's car in the driveway and watched him come in and out of the house. Having located Kellom, the task force set up outside the house to arrest him.

Officer Darell Fitzgerald, another Detroit police officer on the federal task force, knocked on the front door. When Kellom's father answered, Fitzgerald explained that Kellom had outstanding warrants and that police were there to make an arrest. Fitzgerald continued to speak with Kellom's father while other officers began searching for Kellom inside the home. A task force member found Kellom in the upstairs attic, identified himself as law enforcement, and ordered Kellom to show his hands. Kellom did not comply. Instead, he warned the officer that he had a gun and that the police would "have to kill [him]." R. 234, Pg. ID 5296. The officer radioed for backup.

Agent Mitchell Quinn, an Immigration and Customs Enforcement officer and a third member of the federal task force, heard the call for assistance and entered the home. Meanwhile, officers upstairs observed Kellom attempting to escape through the attic's floor with a hammer. Quinn positioned himself in a first-floor hallway beneath the attic where he thought Kellom would land. When Kellom eventually breached the attic's floor, he fell into a bedroom off the hallway near Quinn. Quinn heard the fall, but his view inside the bedroom was obstructed. So he drew his service pistol and began stepping backward.

Moments later, Kellom exited the bedroom with the hammer raised above his head and started towards Quinn. Quinn fired once, hitting Kellom, but

Kellom continued to advance. Quinn tripped while stepping back, firing several more shots as he fell, and Kellom collapsed forward onto the floor. Kellom died from his injuries.

Kellom's estate and family sued. Their complaint raised four counts: (1) a *Bivens* claim against Quinn, Eaton, and Fitzgerald for excessive force in violation of the Fourth Amendment;[10] (2) a federal civil rights claim against Eaton and Fitzgerald for excessive force in violation of the Fourteenth Amendment; (3) a federal civil rights conspiracy claim against Quinn, Eaton, and Fitzgerald alleging a cover-up of the events leading to Kellom's death; and (4) a state-law tort claim for wrongful death against Quinn, Eaton, and Fitzgerald.

About three weeks after filing the complaint, the Estate filed an administrative claim for damages with the federal agency in charge of the task force. The agency denied the claim.

After the administrative claim was denied, the Estate amended its complaint. The amended complaint added Kellom's father and other family members as plaintiffs and raised some new claims. Among other changes, the amended complaint added a state-law claim for intentional infliction of emotional distress against Eaton, Fitzgerald, and the United States, a state-law wrongful death claim against the United States, and a Fourth Amendment claim for unlawful search. The plaintiffs also raised a

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[10] *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

municipal liability claim against the City of Detroit and various Detroit officers.

The district court dismissed every claim before trial except the excessive force claim against Quinn. A jury found that Quinn's actions were justified. Now on appeal, the plaintiffs challenge the district court's dismissal of some claims. They also challenge various evidentiary rulings at trial. We address each issue in turn.

II.

FTCA Claims. We review de novo the district court's dismissal of the plaintiffs' tort claims for lack of jurisdiction. *Jackson v. United States*, 751 F.3d 712, 716 (6th Cir. 2014).

Under the doctrine of sovereign immunity, courts lack jurisdiction to hear claims for damages against the United States. *FDIC v. Meyer*, 510 U.S. 471, 475 (1994). The only exception is where the government specifically consents to suit by waiving sovereign immunity. The government did just that when it passed the Federal Tort Claims Act (FTCA), which waives the government's immunity from certain state-law tort claims. *See* 28 U.S.C. § 1346(b).

But there's a catch. Before plaintiffs can sue a federal employee, the FTCA requires them to exhaust administrative remedies. *See McNeil v. United States*, 508 U.S. 106, 112 (1993). That means plaintiffs must first present their damages claim to the relevant governmental agency and pursue that claim until the agency renders a final decision. 28 U.S.C. § 2675(a). If the agency doesn't resolve the claim to the party's

satisfaction within six months, the plaintiffs can bring a lawsuit. *Id.*

Not all plaintiffs must follow this rule: The exhaustion requirement applies only to suits against a federal employee acting within the scope of her employment. If a federal employee commits a tort *outside* the scope of her employment, she is no different than any other defendant and a plaintiff can sue the employee without going to her agency first.

The problem for plaintiffs is that it's not always clear whether a defendant is a federal employee, and if she is, whether the tort occurred within the scope of her employment. So how does a plaintiff know to exhaust?

As an initial matter, plaintiffs must always exhaust if they allege in their complaint that a defendant is a federal employee acting within the scope of her employment. For all other plaintiffs, the Westfall Act provides some guidance. Under the Westfall Act, the Attorney General can certify that a defendant was a federal employee acting within the scope of her employment. That makes the FTCA the exclusive remedy for the torts that occurred, and it shields the employee from personal liability. It also puts the plaintiffs on notice that they must exhaust administrative remedies before filing a lawsuit.

What if the Attorney General certifies *after* the plaintiffs have already filed suit? Under the FTCA and the Westfall Act, the court must dismiss the case against the employees. And the plaintiffs can try again by suing the United States after exhausting. But the plaintiffs' second attempt must "institute" an "action." 28 U.S.C. § 2675(a).

The plaintiffs here allege that Quinn, Eaton, and Fitzgerald committed torts in the scope of their federal employment. Thus, under the FTCA, the plaintiffs had to exhaust their administrative claims before filing a lawsuit. But the plaintiffs filed suit first. So the district court dismissed the plaintiffs' FTCA claims for lack of jurisdiction.

Under long-standing Sixth Circuit precedent, that made sense: We've previously held that the FTCA's exhaustion requirement is jurisdictional. *See Exec. Jet Aviation, Inc. v. United States*, 507 F.2d 508, 514–15 (6th Cir. 1974). But while this appeal was pending, the Sixth Circuit changed course and held that failure to exhaust under the FTCA does *not* deprive a court of jurisdiction. *Copen v. United States*, 3 F.4th 875 (6th Cir. 2021). To be sure, *Copen* dealt with a different aspect of the FTCA's exhaustion requirement. The court in *Copen* considered the FTCA's requirement that a plaintiff specify the dollar amount he seeks to recover in his administrative claim, while the plaintiffs here failed to make any administrative claim at all before filing suit. *Compare* 28 U.S.C. § 2675(b), *with id.* § 2675(a). But *Copen*'s reasoning is still instructive. In *Copen*, we followed the Supreme Court's instruction to look for a clear statement by Congress before treating a statutory requirement as a jurisdictional rule. 3 F.4th at 880–81 (citing *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515–16 (2006)). The FTCA's dollar-amount requirement does not explicitly limit our jurisdiction. So we held that failure to satisfy it does not deprive us of jurisdiction. *Id.* at 882.

The same is true here. The FTCA's provision requiring plaintiffs to first file an administrative

claim does not say anything about a court's jurisdiction. So consistent with *Copen*, failure to satisfy that requirement does not deprive a court of jurisdiction.

Because the exhaustion requirement is not jurisdictional, the procedural history in this case matters. When the United States moved for summary judgment based on lack of jurisdiction, the plaintiffs responded that the government's motion was untimely. Of course, that wouldn't matter if the failure to institute a new action had deprived the court of jurisdiction. Jurisdictional rules limit a court's power to hear a case, and they cannot be forfeited or waived. So a party can seek dismissal for jurisdictional defects at any point in the litigation. But claim-processing rules like this one are not jurisdictional and don't always mandate dismissal. *See Henderson v. Shinseki*, 562 U.S. 428, 435 (2011). Moreover, the government's motion was filed after the Estate had exhausted its administrative remedies and had filed an unopposed amended complaint. Thus, if the government's motion was truly too late, that could have consequences. We will leave it for the district court to decide in the first instance whether to excuse any delay and whether the amended complaint filed post-exhaustion cures any defect.

Municipal Liability Claim. The plaintiffs next claim that the City of Detroit and its police chief (in his official capacity) violated Kellom's federal rights by, among other things, failing to properly train and supervise their officers. *See Monell v. Dep't of Soc. Servs. of N.Y.*, 436 U.S. 658 (1978). To make out a claim for municipal liability, a plaintiff must show "(1) that a violation of a federal right took place, (2) that

the defendants acted under color of state law, and (3) that a municipality's policy or custom caused that violation to happen." *Bright v. Gallia Cnty.*, 753 F.3d 639, 660 (6th Cir. 2014) (citation omitted). Here, the plaintiffs' municipal liability claim fails at step two: Kellom died during a federal law enforcement operation, so the individual defendants acted under color of *federal*, not state, law. *See Burley v. Gagacki*, 729 F.3d 610, 619 (6th Cir. 2013). Since the plaintiffs failed to show a necessary element of their municipal liability claim, we affirm summary judgment on that claim.

Fourth Amendment Claim. We next consider the plaintiffs' claim that Quinn, Eaton, and Fitzgerald violated the Fourth Amendment by entering their home to arrest Kellom without a search warrant or consent. The district court disagreed and granted summary judgment for the defendants. We affirm.

When police have an arrest warrant, they may enter a home upon reasonable belief that (1) it is the residence of the subject of the arrest warrant, and (2) the subject is present. *El Bey v. Roop*, 530 F.3d 407, 416 (6th Cir. 2008). That rule applies even if someone else owns the home. *Id.* at 415–16. So long as police reasonably believe that the suspect lives there and is present, an arrest warrant will suffice. Thus, to avoid summary judgment, the plaintiffs must point to evidence that would allow a jury to conclude that Quinn, Eaton, and Fitzgerald did not reasonably believe that Kellom lived in his father's home or was present when they entered to make the arrest. *See id.* at 418–19.

The plaintiffs haven't done that. Instead, they point to evidence that the task force visited two other

homes before they eventually found Kellom at his father's house. But that does nothing to raise a fact dispute over whether police reasonably believed Kellom lived there. The first place the task force looked was the residence Kellom listed on his prison records. When they didn't find him there, the task force went to Kellom's girlfriend's house. She told police that Kellom was living at his father's house and provided a detailed description of his car. The task force then surveilled his father's house, saw Kellom's car, and observed Kellom coming in and out of the house. That's enough for the police to form a reasonable belief that Kellom lived there and was there when they entered. *See, e.g.*, *Harris v. Smith*, 390 F. App'x 577, 579 (7th Cir. 2010) (finding reasonable belief on similar facts). And the plaintiffs cite no evidence, and make no argument, for why a jury might see it differently in this case. Thus, the district court did not err in granting summary judgment on the plaintiffs' Fourth Amendment claim.

Evidentiary Rulings. Finally, the plaintiffs challenge several evidentiary rulings from Quinn's excessive-force trial. We review these evidentiary rulings for abuse of discretion. *See Frye v. CSX Transp., Inc.*, 933 F.3d 591, 598 (6th Cir. 2019).

We start by laying out the pertinent rules of evidence. First, testimony that recounts another person's out-of-court statements is excludable on hearsay grounds if it is offered to prove that the out-of-court statements are true. *Biegas v. Quickway Carriers, Inc.*, 573 F.3d 365, 378 (6th Cir. 2009). But that testimony is admissible if offered for a different purpose—for example, to show the effect of the statements on the listener. *Id.* at 379. Second,

testimony is irrelevant, and thus excludable, if it lacks "the slightest probative worth" in resolving the case. *United States v. Whittington*, 455 F.3d 736, 739 (6th Cir. 2006) (cleaned up). Third, relevant testimony may be excluded if its probative value is "substantially outweighed by the danger of unfair prejudice." *Id.* (cleaned up). And finally, relevant testimony that is "needlessly cumulative" may be excluded. *Ayers v. City of Cleveland*, 773 F.3d 161, 169 (6th Cir. 2014).

The plaintiffs here contest the district court's decisions: (1) to allow task force members to recount statements by Kellom's girlfriend that Kellom had recently acted violently and threatened future violent acts; (2) to allow task force members to testify to the facts underlying Kellom's arrest warrants; and (3) to limit the plaintiffs' counsel's cross-examination of Quinn. Their arguments are unavailing.

Start with the testimony concerning Kellom's girlfriend. The plaintiffs argue that the district court should have excluded as hearsay all testimony by task force members relaying statements made by Kellom's girlfriend. But as the trial judge explained, that testimony was not offered to prove that what Kellom's girlfriend said was true—namely, that Kellom had recently destroyed her car and threatened to burn down her house. Instead, that testimony was offered to show the effect on the task force members: Leading up to the attempted arrest, the task force members believed Kellom had recently engaged in violent behavior. That is a proper, non-hearsay purpose. So the district court did not abuse its discretion by allowing the testimony.

Nor did it err by rejecting the plaintiffs' relevancy objection to that same testimony. The jury's

task was to determine whether Quinn's actions were objectively reasonable under all of the circumstances surrounding his use of force. *See Graham v. Connor*, 490 U.S. 386, 397 (1989). Information that Kellom had recently engaged in violent behavior would inform a reasonable officer standing in Quinn's shoes on whether and how much force was necessary. And though other task force members also testified to Kellom's girlfriend's statements, their testimony could help the jury decide whether Quinn's actions were reasonable because these officers told Quinn what they learned prior to the shooting. And their testimony is also relevant for a second reason: It corroborated Quinn's account. *See United States v. Flores*, 488 F. App'x 68, 71 (6th Cir. 2012). Allowing the testimony for those purposes was not an abuse of discretion.

For their part, the plaintiffs respond that even if the task force members' testimony was relevant to Quinn's state of mind, and thus admissible, the testimony was still needlessly cumulative. We disagree. Just because multiple witnesses testify to the same facts does not make the testimony impermissibly cumulative. *Ayers*, 773 F.3d at 169–70. Rather, the plaintiffs must establish that the duplicative evidence confused or misled the jury or otherwise adversely affected their case. *See id.* They didn't, so we defer to the district court's ruling.

The plaintiffs next attack the district court's decision to allow task force members to testify to the facts underlying Kellom's arrest warrants. They claim that testimony is unfairly prejudicial and impermissible character evidence. But that misunderstands character evidence. Evidence of prior

bad acts is excludable as character evidence only if it is used to show that a person acted in accord with his criminal past. Fed. R. Evid. 404(a)(1), (b)(1). Here, Quinn's defense offered that testimony for a different purpose: To explain the basis of the arrest warrant and to show what a reasonable officer would have known going into the operation to arrest Kellom. So the district court did not err in allowing the testimony.

One evidentiary challenge remains. The plaintiffs argue that the district court erred by stopping plaintiffs' counsel from asking Quinn if he thought Kellom was attempting to escape when Quinn fired the fatal shots. The district court excluded the question since plaintiffs' counsel had asked, and received answers to, that line of questioning "four and five times." R. 235, Pg. ID 5502–05. The district court's decision was within its discretion. District courts have broad authority to conduct trials in a way that ensures fairness to both sides. And that includes the authority to stop lawyers from repeatedly asking the same question. We will not disturb the district court's decision on appeal.

Sanctions Order. Finally, the plaintiffs contend that the district court erred by sanctioning their attorney for violating a protective order. We review a district court's imposition of sanctions for an abuse of discretion. *Rolex Watch U.S.A., Inc. v. Crowley*, 74 F.3d 716, 721 (6th Cir. 1996).

At the outset of this case, the parties drafted and stipulated to a protective order limiting the public dissemination of discovery materials and other related records. The scope of the protective order is broad. It governs the "production and disclosure of any documents, electronically stored information,

materials, things, discovery material (including responses to interrogatories, depositions, and requests to admit), materials filed with the Court, or testimony in this action." R. 29, Pg. ID 232. The order states that the parties "shall not disclose" covered information "to any person unless the disclosure is reasonably and in good faith calculated to aid in the preparation and/or prosecution of this case." *Id.*, Pg. ID 233.

After entry of the protective order, the plaintiffs' attorney disclosed discovery materials to the public on two occasions. First, he participated in a televised interview where he described the contents of Fitzgerald's deposition and provided photographs and other documents to reporters.[11] Second, he held a press conference where he discussed and criticized the deposition testimony of another officer involved in Kellom's case.

The district court concluded these disclosures violated the protective order and ordered the plaintiffs' attorney to pay $2,000 as a sanction. In reviewing that ruling, we must determine whether the material disclosed by the plaintiffs' attorney is covered by the protective order.

The protective order is not a model of clarity. For example, paragraph 5 states that "*[a]ny* discovery materials disclosed to plaintiff under this order shall be used only to prepare for and to prosecute this action." R. 29, Pg. ID 234 (emphasis added). Yet paragraph 6 states that "[a] disclosing party shall only

[11] When the district court asked the plaintiffs' counsel whether he disclosed the documents, counsel said that he did not know. The district court did not find that response credible. *See* R. 127, Pg. ID 3062 n.1.

designate records as subject to this order that the disclosing party reasonably believes warrant such treatment . . ..." *Id.* So it's not clear whether the parties agreed to restrict the dissemination of materials that were not specifically designated. What is clear, however, is that designated materials may not be disclosed. But from the record, we cannot determine if the sanctions were imposed because the attorney disclosed designated materials. If he did, sanctions are appropriate. If not, the district court must answer the harder question: whether the best reading of the protective order bars disclosure of materials not specifically designated under paragraph 6. Thus, we vacate the district court's sanctions order and remand for fact-finding on the nature of the materials the plaintiffs' attorney disclosed and such further proceedings as are appropriate.

III.

Having considered the plaintiffs' many objections to the district court's rulings, we remand the FTCA claims, affirm in part, and vacate the sanctions order.

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case Nos.: 17-cv-11084/19-cv-11622

[Filed: June 21, 2022]

NELDA KELLOM, *ET AL.*,

PLAINTIFFS,

V.

MITCHELL QUINN, *ET AL.*,

DEFENDANTS.

OPINION & ORDER
ON RENEWED SUMMARY JUDGEMENT
MOTIONS, FILED FOLLOWING REMAND

A young man named Terrance Kellom was shot and killed in 2015, when a United States Marshal Detroit Fugitive Apprehension Team was attempting to arrest him in Detroit, Michigan. Thereafter, an attorney filed two federal cases on behalf of his estate and relatives. The first case was filed in 2017 and the second was filed in 2019.

In the 2017 case, an excessive-force claim against Defendant Agent Mitchell Quinn was the only claim that proceeded to a jury trial in October of 2019, and the jury decided the shooting was justified. All other claims, including claims brought under the Federal Tort Claims Act (FTCA), were dismissed in connection with pretrial motions.

The 2019 case was short-lived, with this Court dismissing the untimely FTCA claims asserted by Terrance's relatives approximately six months after the case was filed.

Plaintiffs filed a notice of appeal in each case. The United States Court of Appeals for the Sixth Circuit ordered the two appellate cases consolidated for purposes of briefing and submission. It issued an unpublished decision on September 3, 2021 – that it filed in both cases.

But that opinion discusses this 2017 case exclusively. It affirmed the majority of this Court's rulings, but issued a limited remand as to two things. Following remand, the Government filed a renewed summary judgment motion in each of these cases.

For ease of reference, this Court addresses both motions in this same Opinion and Order, that it issues in both cases.

For the reason set forth below, this Court grants the Government's Renewed Motion for Summary Judgment filed in the 2017 Case, to the extent that this Court re-affirms the dismissal of the prematurely-filed FTCA claims in this case under the circumstances presented here.

In light of the fact that the Sixth Circuit's opinion does not address the 2019 case at all, does not specify any rulings in that case that were vacated, or

any claims or issues that were remanded, it does not appear that anything was remanded in the 2019 case. Nevertheless, this Court agrees with the Government that the claims in *Kellom II* should be dismissed notwithstanding *Copen*. Accordingly, to the extent that anything was remanded in the 2019 case, this Court reaffirms its dismissal of Plaintiffs' claims.

BACKGROUND

Terrance Kellom had outstanding arrest warrants for armed robbery and unlawful possession of a firearm. He was shot and killed on April 27, 2015, when a United States Marshal Detroit Fugitive Apprehension Team was attempting to arrest him at this father's home in Detroit, Michigan. Following the shooting, attorney Nabih Ayad filed two different federal lawsuits on behalf of the family members and Estate of Terrance Kellom that were based upon that shooting.

Kellom I (Case No. 17-11084)

On April 6, 2017, Plaintiff Nelda Kellom, as Personal Representative of the Estate of Terrance Kellom, Deceased ("the Estate"), filed the first federal case, Case Number 17-11084 (hereinafter "*Kellom I*").

The Estate's original complaint named the following Defendants: 1) Immigration and Customs Enforcement Agent Mitchell Quinn; 2) Detroit Police Officer Darell Fitzgerald; and 3) Detroit Police Officer Treva Eaton. It included the following four counts: 1) "*Bivens* Claim" (Count I); 2) "42 U.S.C. § 1983 – Excessive Force and/or Unlawful Use of Deadly Force"

(Count II); 3) "§ 1983 Conspiracy by Defendants" (Count III); and 4) "Wrongful Death [under] Michigan Wrongful Death Act, Mich. Comp. Laws § 600.2922 *et seq*," (Count IV). The Estate's complaint acknowledged Defendant Quinn's federal employment and his participation in a federal task force during the incident.

It is undisputed that the Estate did not submit an administrative claim to the Department of Homeland Security before filing Case Number 17-11084. But several weeks after filing suit, on April 25, 2017, the Estate submitted an administrative tort claim seeking fifty million dollars. (ECF No. 35-3; *see also* ECF No. 246 at 13, ¶ 72).

The Department of Homeland Security denied the Estate's administrative claim in a letter mailed on February 1, 2018. (ECF No. 7-6; *see also* ECF No. 246 at 13, ¶ 75). That letter expressly advised that, if the Estate disagreed with the denial, it could file suit in federal court "not later than sixth months after the date of mailing of this notification of denial. 28 U.S.C. § 2401(b)." (*Id.*).

In a detailed e-mail sent to the Estate's counsel on February 7, 2018, counsel for the Government explained that the Estate's lawsuit asserting a FTCA claim was prematurely file before administrative exhaustion and that the Estate's FTCA claim could only be saved by *filing a timely new lawsuit* on behalf of the Estate. (ECF No. 7-7 & 243-41). That email included the legal authority supporting the Government's statements. After receiving that email, however, the Estate's counsel did not file a new lawsuit in order to assert the Estate's then-exhausted FTCA claims.

On May 4, 2018, Plaintiff's counsel filed a First Amended Complaint, adding both named parties and claims. In addition to the Estate, seven of the Decedent's family members asserted claims in Plaintiffs' First Amended Complaint in their individual capacity (Nelda Kellom, Kevin Kellom, Teria Kellom, Lawanda Kellom, Terrell Kellom, and Janay Williams, on behalf of Terrance Kellom's two minor children). The Court will refer to these parties, collectively, as the "Non-Estate Plaintiffs." The First Amended Complaint included the following eight counts: 1) a *Bivens* excessive force claim (Count I); 2) a § 1983 excessive force claim (Count II); 3) a § 1985 conspiracy claim (Count III); 4) a *Bivens* conspiracy claim (Count IV); 5) a wrongful death claim under Michigan law (Count V); 6) a claim for intentional infliction of emotional distress under Michigan law (Count VI); 7) a *Steagald* claim (Count VII); and 8) a § 1983 *Monell* liability claim (Count VIII).

Less than two weeks later, on May 16, 2018, the United States filed a Motion to Dismiss. One of the issues presented in that motion was "Whether plaintiffs exhausted the FTCA's mandatory administrative remedies for tort claims against the United States (Claims V & VI) before filing this suit, when the estate did not submit an administrative claim until a month after filing this suit and the remaining plaintiffs have never initiated the administrative process." (ECF No. 35 at 4).

In an Opinion and Order issued on August 29, 2018, this Court made a number of rulings. This Court dismissed the FTCA count without prejudice as to the Non-Estate Plaintiffs because they failed to exhaust administrative remedies prior to filing FTCA claims

in the case. As to the Estate, however, this Court was not persuaded that its FTCA claim should be dismissed for failure to exhaust and rejected the Government's challenge to the Estate's FTCA claim.

On October 3, 2018 – nearly five months after the Government filed its motion noting the Non-Estate Plaintiffs' failure to exhaust – administrative tort claims were submitted to the Department of Homeland Security on behalf of the Non-Estate Plaintiffs. The Agency ultimately denied the claims of the Non-Estate Plaintiffs on February 1, 2019. The Non-Estate Plaintiffs did not seek leave to file another amended complaint, in order to re-assert their FTCA claims that had been dismissed in *Kellom II*. Rather, they filed a separate lawsuit (*Kellom II*) but filed it too late.

The case proceeded with the claims and Defendants that remained. Following the close of discovery, Defendants filed summary judgment motions as to the remaining claims. The Government again challenged the Estate's FTCA claims as having been prematurely filed before the Estate filed an administrative claim.

In an Opinion and Order issued on May 21, 2019, this Court denied Defendant Mitchell Quinn's request for summary judgment as to the Estate's excessive force claim. As to all remaining claims in this case, this Court granted summary judgment in favor of Defendants. As to the Government's renewed challenge to the Estate's FTCA claim, this Court concluded that it lacked subject matter jurisdiction over those claims because the Estate failed to exhaust its administrative claim before filing this lawsuit.

On June 26, 2019, this Court issued an order on Defendant Quinn's Motion for Protective Order, wherein it imposed monetary sanctions on Plaintiff's counsel for having disseminated materials to the media in violation of a stipulated protective order. (ECF No. 127).

The remaining claim against Defendant Quinn proceeded to a jury trial. On November 4, 2019, the jury returned a verdict on Plaintiff's excessive force claim against Defendant Quinn, finding no cause of action. A Judgment was issued in *Kellom I* on November 5, 2019. Plaintiffs filed a Notice of Appeal on December 29, 2019.

***Kellom II* (Case No. 19-11622)**

On June 2, 2019, while *Kellom I* was still pending, a second federal lawsuit was filed by Mr. Ayad ("Kellom II"). This second case was asserted against the United States as the sole Defendant.

The suit was originally filed on behalf of: 1) Nelda Kellom, individually and as Personal Representative of Terrance Kellom; 2) Kevin Kellom; 3) Teria Kellom; 4) Lawanda Kellom; 5) Terrell Kellom; and 6) Janay Williams, as Personal Representative of Terrance Kellom's two minor children. It included the following two counts, that were asserted by all named Plaintiffs: 1) "Wrongful Death" under Mich. Comp. Laws § 600.2922 *et seq*. (Count I); and 2) "Intentional Infliction of Emotional Distress" (Count II).

But Plaintiffs later filed an amended complaint that: 1) removed the Estate as a party, leaving only the Non-Estate Plaintiffs; and 2) asserted the

Intentional Infliction of Emotional Distress claim only on behalf of Kevin Kellom and Teria Kellom (the two family members who were present in the house on the date of the shooting).

On September 4, 2019, the United States filed a Motion to Dismiss. In an Opinion and Order issued on January 8, 2020, this Court treated that motion as a summary judgment motion, after giving both sides the opportunity to present additional materials. The Court granted summary judgment in favor of the Government as to both claims, after ruling that: 1) Plaintiffs failed to timely exhaust their administrative FTCA remedies; 2) Plaintiffs had not established that they were entitled to either statutory or equitable tolling; and 3) Plaintiffs could not assert wrongful death claims because, under Michigan's Wrongful Death Act, the Estate is the only proper plaintiff for such a claim.

Plaintiffs filed a Notice of Appeal in *Kellom II* on March 7, 2020.

The Sixth Circuit's Decision

Plaintiffs filed Notices of Appeal in both cases and the Sixth Circuit granted a motion to consolidate and ordered the two cases consolidated for purposes of briefing and submission.

On September 3, 2021, the Sixth Circuit issued an unpublished opinion that was filed in both cases. *Kellom v. Quinn*, 2021 WL 4026789 (6th Cir. 2021). The front of the decision identifies Sixth Circuit case numbers 20-1003 and 20-1222. The Sixth Circuit's docket reflects that its Case Number 20-1003 involves this Court's Case Number 17-11084 ("*Kellom I*") and

its Case Number 20-1222 involves this Court's Case Number 19-12622. ("*Kellom II*").

"A district court is limited by the scope of the remand under which it operates." *United States v. Moore*, 131 F.3d 595, 598 (6th Cir. 1997). The purpose of the appellate court's "opinion and order is to inform and instruct the district court and the parties and to outline the procedure the district court is to follow. The chain of intended events should be articulated with particularity." *United States v. Campbell*, 168 F.3d 263, 268 (6th Cir. 1999).

Unfortunately, the appellate court's decision left the parties unsure of what has been remanded.

Plaintiffs contend that the Sixth Circuit's remand was a "general remand." (Pls.' Br., ECF No. 245, at 19). Plaintiffs further assert that the remand is not confined to their FTCA claims and contend that their "excessive force claim," the one that proceeded to a jury trial, is also "now pending" in this case. (*Id.*). Plaintiffs assert that "there can be no doubt that the prior jury verdict in this case has been overturned on remand, and that, based on the strong evidence of excessive force in this case, should it be necessary, Plaintiffs are entitled to go forward to trial on their excessive force claim . . ." (*Id.* at 24).

Contrary to Plaintiffs' assertion, the Sixth Circuit's remand was not a general remand. And the Sixth Circuit did not remand for a new trial on the excessive-force claim against Defendant Quinn.

"An appellate court's remand can either be general or limited in scope, and that distinction governs the district court's authority on remand." *Monroe v. FTS USA, LLC*, 17 F.4th 664, 669 (6th Cir. 2021). "An appellate court's general remand lacks

explicit limitation; therefore, it does not limit the district court's review and allows for de novo review of the matter." *Id.* "By contrast, a limited remand 'constrains' the district court's authority to the issue or issues specifically articulated in the appellate court's order." *Id.*

As this Court reads the Sixth Circuit's unpublished decision, the remand is a limited remand. In addition, because the decision only addresses *Kellom I,* this Court concludes that limited remand is confined to *Kellom I.*

Significantly, the Sixth Circuit's opinion makes *no reference whatsoever* to the procedural history of *Kellom II,* the claims that were asserted in *Kellom II*, this Court's January 8, 2020 Opinion and Order that dismissed the claims in that second case, or this Court's reasons for doing so. And it did not reverse or vacate any rulings in that case. In fact, the opening paragraph of the decision reads as if there was only *one case – Kellom II*:

> *This case*[12] involves the fatal shooting of Terrance Kellom during an attempted

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[12] That language is in contrast to language typically used in consolidated appeals. *See, eg.*, *Brown Jug, Inc. v. Cincinnati Ins. Co.*, __ F.4th __, 2022 WL 538221 at *1 (6th Cir. 2022) ("Plaintiffs in these consolidated appeals are businesses that . . ."); *United States v. Rich*, 2021 WL 4144059 at *2 (6th Cir. 2021) ("These consolidated appeals are another prime example of . . ."); *Smyers v. Ohio Mulch Supply, Inc.*, 2021 WL 27746645 at *1 (6th Cir. 2021) ("In

> arrest. A jury decided that the shooting was justified. But Kellom's estate and family now challenge various pre-trial rulings by the district court, plus evidentiary rulings at trial. We affirm in part, reverse in part, and remand some issues to the district court.

Quinn v. Kellom, supra, at *1 (emphasis added).

The remainder of the Sixth Circuit's unpublished decision discusses and addresses *Kellom I exclusively*. The opinion discusses the complaint in *Kellom I* (ie, the complaint that "raised four counts: (1) a *Bivens* claim against Quinn, Eaton, and Fitzgerald for excessive force in violation of the Fourth Amendment;1 (2) a federal civil rights claim against Eaton and Fitzgerald for excessive force in violation of the Fourteenth Amendment; (3) a federal civil rights conspiracy claim against Quinn, Eaton, and Fitzgerald alleging a cover-up of the events leading to Kellom's death; and (4) a state-law tort claim for wrongful death against Quinn, Eaton, and Fitzgerald."). *Kellom v. Quinn, supra*, at *1. That was the complaint in *Kellom I* – not *Kellom II*. The opinion then discusses the subsequent events that occurred in *Kellom I* (not *Kellom II*):

> About three weeks after filing the complaint, the Estate filed an administrative

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this consolidated appeal, plaintiffs . . . appeal the district court's . . .").

> claim for damages with the federal agency in charge of the task force. The agency denied the claim.
>
> After the administrative claim was denied, the Estate amended its complaint. The amended complaint added Kellom's father and other family members as plaintiffs and raised some new claims. Among other changes, the amended complaint added a state-law claim for intentional infliction of emotional distress against Eaton, Fitzgerald, and the United States, a state-law wrongful death claim against the United States, and a Fourth Amendment claim for unlawful search. The plaintiffs also raised a municipal liability claim against the City of Detroit and various Detroit officers.
>
> The district court dismissed every claim before trial except the excessive force claim against Quinn. A jury found that Quinn's actions were justified. Now on appeal, the plaintiffs challenge the district court's dismissal of some claims. They also challenge various evidentiary rulings at trial. We address each issue in turn.

Id. at *2.

The decision then addresses each of the various legal challenges that were raised in relation to *Kellom I* (the FTCA exhaustion issue in *Kellom I*, the municipal liability claim in *Kellom I*, the Fourth Amendment claim in *Kellom I*, evidentiary rulings during the course of the jury trial that was held in

Kellom I, and the sanctions order that this Court issued in *Kellom I*). The opinion ends by stating: "[h]aving considered the plaintiffs' many objections to the district court's ruling, we remand the FTCA claims, affirm in part, and vacate the sanctions order." *Id*. at *6.

The Sixth Circuit's decision lacks any discussion of *Kellom II*. This Court fails to see that the Sixth Circuit vacated any ruling in *Kellom I* or remanded any issues in *Kellom I* back to this Court.

In addition, as the undersigned reads the decision, the remand as to *Kellom I* is a limited remand – as shown by the language in the opening paragraph of the opinion – "We affirm in part, reverse in part, and *remand some issues* to the district court." *Quinn v. Kellom, supra*, at *1 (emphasis added).

The Sixth Circuit affirmed with respect to most of the issues it addressed: 1) it affirmed this Court's summary judgment ruling on Plaintiffs' municipal liability claim (*Id*. at *4); 2) it affirmed this Court's grant of summary judgment as to Plaintiffs' Fourth Amendment claim (*Id*. at *4); and 3) it affirmed as to all of this Court's evidentiary rulings, made during the course of the jury trial in *Kellom I*. (*Id*. at *4-5).

But the opinion reversed this Court's ruling on the sanctions order imposed upon Plaintiffs' counsel, vacated that order, and "remand[ed] for fact-finding on the nature of the materials the plaintiff's attorney disclosed and such further proceedings as are appropriate." *Id*. at *6. At the Status Conference following remand, however, the Government advised that it does not wish to proceed any further as to the vacated sanctions order. Thus, that issue is now closed.

In addition, as will be discussed in more detail below, the decision also ordered a limited remand in this case with respect to Plaintiffs' FTCA claims in *Kellom I*. After concluding that the FTCA's exhaustion requirement is now a claims-processing rule (rather than jurisdictional), it remanded for this Court to consider: 1) whether the Government waived or forfeited the exhaustion issue by the manner and timing in which it was raised and, if so, whether to excuse any delay on the part of the Government; and 2) whether the amended complaint that Plaintiffs filed post-exhaustion "cures" any defect.

Motions Filed Following Remand

After the mandates issued, this Court held a Status Conference on November 23, 2021, in both *Kellom I* and *Kellom II*. It was during these conferences that the Government advised that it does not wish to further pursue the sanctions order that was vacated by the Sixth Circuit. The parties agreed that the Government could address any remaining issues that were remanded by filing a renewed motion for summary judgment.

Thereafter, the Government filed a Renewed Motion for Summary Judgment in both cases. The parties have fully briefed the issues and the Court heard oral argument on May 26, 2022.

STANDARD OF DECISION

The Government brought its Renewed Motions for Summary Judgment under Fed. R. Civ. P. 56.[13] Summary judgment will be granted where there exists no genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). No genuine issue of material fact exists where "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elect. Indus. Co., Ltd. v. Zenith Radio Corp*., 475 U.S. 574, 587 (1986).

ANALYSIS

I. The Government's Renewed Summary Judgment Motion in *Kellom I*

Before a plaintiff "can sue a federal employee, the FTCA requires them to exhaust administrative remedies." *Kellom v. Quinn, supra*, at *2 (citing *McNeil v. United States*, 508 U.S. 106, 112, 113 S.Ct. 1980, 124 L.Ed.2d 21 (1993)). Because the "plaintiffs here allege[d] that Quinn, Eaton, and Fitzgerald committed torts in the scope of their federal

[13] Plaintiffs' briefs in response to the Government's renewed summary judgment motions included standard-of-review sections that proceed as if the motions were either motions to dismiss brought under Fed. R. Civ. P. 12(b)(1) (an attack on subject-matter jurisdiction) (ECF No. 245 in *Kellom I*, at 2) or motions to dismiss under Fed. R. Civ. P. 12(b)(6). (ECF No. 22 in *Kellom II,* at 8). Both motions, however, were expressly brought under Fed. R. Civ. P. 56.

employment," under the FTCA, they "had to exhaust their administrative claims before filing a lawsuit." "But the plaintiffs" in *Kellom I* "filed suit first. So [this court] dismissed the plaintiffs' FTCA claims for lack of jurisdiction." *Id.* On appeal in this case, the Sixth Circuit stated that ruling "made sense" because "[u]nder long-standing Sixth Circuit precedent," it has "previously held that the FTCA's exhaustion requirement is jurisdictional." *Id.* (citation omitted).

The Sixth Circuit noted, however, that while the appeal in this case was pending, a decision was issued in *Copen v. United States*, 3 F.4th 875 (6th Cir. 2021). Although one panel does not have the authority to overrule a published decision of another panel, and although *Copen* "dealt with a different aspect of the FTCA's exhaustion requirement," the panel that heard the appeal in this case concluded that the Sixth Circuit "changed course" in *Copen*. It concluded that, "consistent with *Copen,* failure to satisfy [the exhaustion requirement] does not deprive a court of jurisdiction." *Id.* at * 3. Rather, the FTCA's exhaustion requirement is now deemed a *claims-processing rule.*

It then stated as follows, and ultimately issued a limited remand in this case, so that this Court could consider: 1) whether the Government waived or forfeited the exhaustion issue by raising it in its summary judgment motion and, if so, whether to excuse any delay by the Government; and 2) whether the amended complaint that Plaintiffs' filed post-exhaustion cures any defect:

> Because the exhaustion requirement is not jurisdictional, the procedural history in this case matters. When the United States

> moved for summary judgment based on lack of jurisdiction, the plaintiffs responded that *the government's motion was untimely*. Of course, that wouldn't matter if the failure to institute a new action had deprived the court of jurisdiction. Jurisdictional rules limit a court's power to hear a case, and they *cannot be forfeited or waived*. So a party can seek dismissal for jurisdictional defects at any point in the litigation. *But claim-processing rules like this one are not jurisdictional and don't always mandate dismissal. See Henderson v. Shinseki*, 562 U.S. 428, 435, 131 S.Ct. 1197, 179 L.Ed.2d 159 (2011). Moreover, the government's motion was filed after the Estate had exhausted its administrative remedies and had filed an unopposed amended complaint. Thus, *if the government's motion was truly too late, that could have consequences. We will leave it for the district court to decide in the first instance whether the amended complaint filed post-exhaustion cures any defect.*
>
> *Id*. at *3. (Emphasis added).

A. The Government Did Not Forfeit Or Waive Its Failure-To-Exhaust Defense To The FTCA Claims. Thus, There Is No Delay To Excuse.

Whether the FTCA's exhaustion requirement is jurisdictional, or is a claims-processing rule, is

important. That is because a district court "must raise jurisdictional defects on [its] own initiative and may not overlook them even if the parties forfeit or waive challenges to them." *United States v. Alam*, 960 F.3d 831, 833 (6th Cir. 2020). Moreover, a party can seek dismissal of a claim based on a lack of subject-matter jurisdiction at any point in the litigation. "By contrast, mandatory claims-processing rules bind the courts only when properly asserted and not forfeited." *Id.*

When properly invoked, mandatory claims–processing rules must typically be enforced by a district court. *Alam*, 960 at 834. Here, the Sixth Circuit remanded so that this Court could consider whether the Government forfeited or waived the exhaustion issue because the issue was presented in the Government's summary judgment motion**,** that was filed after Plaintiffs had filed an "unopposed amended complaint." *Kellom v. Quinn, supra*, at *3.

The Sixth Circuit, however, does not appear to have appreciated the nuanced procedural background when it referenced Plaintiffs' amended complaint as having been "unopposed" by the Government. This Court's February 6, 2018 Scheduling Order (ECF No. 21) provided that amendments to pleadings could be made by April 16, 2018. After Plaintiff's filed their motion seeking leave to file an amended complaint by that date, the Government submitted a response brief stating the it "interpret[s] the Court's prior order (Dkt. #21) as having granted plaintiff leave to amend by April 16, 2018 under" Fed. R. Civ. P. 15 but nevertheless clarifying that it wished to reserve its defenses to Plaintiffs' claims and would challenge them through a motion to dismiss. (ECF No. 30). And the Government then did so.

The Government persuasively asserts that the record establishes that it did not forfeit or waive its exhaustion defense because it raised its exhaustion defense at every stage of the case:

> Here, the government did not waive or forfeit its defense. Agent Quinn moved to dismiss the Estate's wrongful death claim because he was not the proper defendant for such a claim under the FTCA. (*See* Order, ECF Nos. 22–24). Once the United States was substituted for Agent Quinn and the Estate moved to amend its complaint, the United States explicitly preserved its defenses, (Order, ECF No. 31, PageID.241), then moved to dismiss because the Estate failed to properly exhaust before instituting suit. (US MTD, ECF No. 35). After the court denied the United States' motion, (*see* Order, ECF No. 52, PageID.560), the United States pleaded the Estate's failure to exhaust as an affirmative defense in its answer, (*see* US Answer, ECF No. 62, PageID.717) (Seventh Affirmative Defense). Once the parties completed discovery, the United States again raised the argument in its motion for summary judgment, (US MSJ, ECF No. 80), and the Court granted that motion, (Order, ECF No. 112). There is no point during this litigation when the United States was not actively asserting or preserving its failure to exhaust defense.

(Govt.'s Br. at 18).

In response to the pending motion, Plaintiffs assert that the "time to raise a failure to exhaust argument is in the motion to dismiss phase of litigation, and not the summary judgment phase." (*Id.*). But the Government *did raise* failure to exhaust in a motion to dismiss. That the Government did not ultimately prevail on that challenge until its summary judgment motion presented the issue to this Court a second time does not support either waiver or forfeiture by the Government.

This Court finds that, under the facts presented here, the Government did not waive or forfeit the exhaustion defense because it raised that defense at every available opportunity in this case. *See Alam*, 960 F.3d at 834 (Finding that the "exceptions to mandatory claim-processing rules [of] waiver or forfeiture" did not apply where the "government timely objected to [the petitioner's] failure to exhaust at every available opportunity."). Thus, there was no delay on the part of the Government to excuse.

B. Does Plaintiffs' Amended Complaint, Filed Post-Exhaustion, Cure Their Failure To Exhaust Prior To Filing This Lawsuit?

Part of the Sixth Circuit's limited remand was for this Court to decide whether "the amended complaint filed post-exhaustion cures any defect" as to *Kellom I* having been prematurely filed. *Quinn v. Kellom, supra.*

As to this issue, Plaintiffs take a strange position and argue that *they did exhaust* their administrative claims before asserting a FTCA claim in this case. Their brief states that the Government "claims in its brief that Plaintiffs initial filing, which did not include (nor intentionally omit) an FTCA [claim] or the United States as a defendant, constituted an FTCA claim before initiating an administrative claim. **Defendant relies solely on cases in which an FTCA claim was brought before the administrative claim was filed**., which make them completely distinguishable from, and inapplicable to, the present case." (*See* Pls.' Br, ECF No. 245, at 10) (bolding and underlining in original). Thus, Plaintiffs' position is that their FTCA claim was not brought in this action until after they had exhausted their administrative claims because they did not label their FTCA claim as such in their original complaint:

> In all of the above cases [relied on by the Government], the FTCA claim was initiated before the administrative complaint was filed. In the present matter, the suit was filed on April 6, 2017, however, that suit did not include (or intentionally exclude) an FTCA claim, nor did it include the United States as a defendant. Plaintiffs' administrative complaint was made on April 25, 2017, yet Plaintiffs' FTCA claim was not brought until May 5, 2018, the date on Plaintiffs' Amended Complaint. **Therefore, Plaintiffs' FTCA claim was brought well after the denial, and**

> **exhaustion, of their administrative claim**.

(Pls.' Br., ECF No. 245, at 10-11) (bolding and underlining in original). Plaintiffs' make this same argument throughout their brief. (*See, eg.,* Pls.' Br. at 13) (Wherein Plaintiffs argue that another case relied on by the Government is "**completely distinguishable from our own"** in that the initial complaint included the FTCA claim before the plaintiff filed an administrative complaint.") (bolding and underling in original).

In its decision, however, the Sixth Circuit noted that a plaintiff "must always exhaust" prior to filing suit "if they allege in their complaint that a defendant is a federal employee acting within the scope of [his or] her employment." *Kellom v. Quinn, supra,* at *2-3. Here, Plaintiffs' original complaint, filed on April 6, 2017, did precisely that. (*See e.g.*, Pls.' Compl., ECF No. 1, at ¶ 11, alleging that "at all relevant times," Defendant Quinn was a "federal law enforcement officer employed by Immigration and Customs Enforcement, a federal agency," and was acting "within the course and scope of his employment, and under color of federal law."). Because of that, the Sixth Circuit's decision *expressly acknowledged* that, under the FTCA, Plaintiffs had to exhaust their administrative remedies before filing suit *but failed to do so*:

> The plaintiffs here allege that Quinn, Eaton, and Fitzgerald committed torts in the scope of their federal employment. Thus, under the FTCA, the plaintiffs had to

> exhaust their administrative claims before filing a lawsuit. But the plaintiffs filed suit first.

Kellom v. Quinn, supra, at * 3.

Indeed, part of the Sixth Circuit's limited remand was for this Court to consider whether the "amended complaint" that Plaintiffs *"filed post-exhaustion* cures any defect." *Id.* (emphasis added). Plaintiffs ignore that the Sixth Circuit found that they prematurely filed suit before exhaustion. Thus, they make the above fatally-flawed argument, along with another one that should be rejected.[14]

Moreover, the Government's brief sets forth a logical and convincing argument as to why this Court should rule that Plaintiffs' amended complaint, filed post-exhaustion, does not cure the failure to exhaust administrative claims before filing this case.

It starts by providing context as to why the FTCA's administrative exhaustion requirement exists in the first place:

> The FTCA requires that parties strictly comply with the Act's administrative requirements before filing suit in federal court. 28 U.S.C. § 2675(a);

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[14] Beginning on page 14 of their briefs, Plaintiffs appear to argue that Plaintiffs should be deemed to have administratively exhausted their FTCA claim prior to initiating a FTCA lawsuit based on this Court's ruling on the Government's motion to dismiss the initially raised that issue. But this Court clearly had the discretion to revisit that initial ruling under the law-of-the-case doctrine. As such, this argument goes nowhere.

> *McNeil v. United States*, 508 U.S. 106, 112–13 (1993) ("The most natural reading of [§ 2675(a)] indicates that Congress intended to require complete exhaustion of Executive remedies before invocation of the judicial process."). To initiate the FTCA's administrative process, parties must submit an administrative tort claim to the appropriate agency. 28 U.S.C. § 2675(a); *see also Allen v. United States*, 517 F.2d 1328, 1329 (6th Cir. 1975). After doing so, a party may not file suit until either six months passes or the agency issues a written denial, whichever occurs first. 28 U.S.C. § 2675(a).
>
> Congress created the FTCA's administrative exhaustion requirement to cure a flaw in the original Act. "Prior to 1966, FTCA claimants had the option of filing suit in federal court without first presenting their claims to the appropriate federal agency." *McNeil,* 508 U.S. at 113 n.7, 8. This led to an inefficient procedure for settling claims, increased litigation costs, and unnecessary congestion in the courts. *Id*. As a result, Congress amended the FTCA to require plaintiffs to submit their claims to the agency and exhaust administrative remedies prior to filing suit. *See* 28 U.S.C. § 2675(a); *McNeil,* 508 U.S. at 112 n. 8; *Mader v. United States*, 654 F.3d 794, 797 (8th Cir. 2011) (en banc).

(Govt's Br., ECF No. 244, at 9-10).

The Government stresses that regardless of whether the FTCA's exhaustion requirement is considered to be "jurisdictional" or a claims-processing rule, it is *mandatory*:

> The statute uses unequivocally mandatory language: "An action shall not be instituted . . . unless the claimant shall have first presented the claim to the appropriate federal agency . . ." 28 U.S.C. § 2675(a). Therefore, whether or not the Court considers § 2675(a) jurisdictional, plaintiffs must comply with the statute. *See, e.g., Gonzalez v. Thaler*, 565 U.S. 134, 146 (2012) ("But calling a rule nonjurisdictional does not mean that it is not mandatory . . . ."); *Copen,* 3 F. 4th at 880 (stating that § 2675(b) "is mandatory" even though it is not jurisdictional).

(Govt.'s Br. at 10).

The Government further argues that no equitable exceptions to exhaustion should be applied here and makes two related arguments.

First, the Government argues that, under *McNeil*, a premature FTCA suit cannot be "cured" by exhaustion of administrative remedies while the premature lawsuit is pending. (Govt.'s Br. at 12). It argues:

> In *McNeil*, a *pro se* plaintiff filed suit in federal court asserting a tort claim against the

> United States, but he did not submit an administrative claim to the agency before filing suit. *McNeil,* 508 U.S. at 108. The plaintiff submitted his administrative claim a few weeks later and the agency denied the claim almost immediately. *Id.* After the agency's denial, the plaintiff asked the district court to continue with the lawsuit because the litigation had not made significant progress and it would not prejudice the government. *Id.*
>
> The Supreme Court held that these reasons did not warrant an exception to the statute's exhaustion requirement and affirmed the dismissal of the plaintiff's suit. *Id.* at 109–13. In doing so, the Supreme Court identified two practical reasons why there will almost never be a circumstance warranting an exception to the FTCA's administrative exhaustion requirement. *See id.* First, it noted that the exhaustion requirement is neither burdensome nor difficult to understand and "given the clarity of the statutory text' . . . the risk that a lawyer will be unable to understand the exhaustion requirement is virtually nonexistent." *McNeil*, 508 U.S. at 113. Second, it noted that, "in the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law." *McNeil*, 508 U.S. at 113.

(*Id.* at 12-13). Thus, the Government persuasively argues that under *McNeil,* completion of the FTCA's administrative process while a prematurely-filed

lawsuit is pending does not "cure" the failure to follow the FTCA's exhaustion requirement. It also argues that, under the unique circumstances presented here (where the Government notified Plaintiffs' counsel in writing that the lawsuit was prematurely filed and gave it instructions and legal authority as to how to remedy the problem before the statute of limitations expired), no equitable exception to the statute would be warranted in any event. (*Id*. at 13-14).

Second, the Government's briefs sets forth a compelling argument that a prematurely- filed FTCA suit cannot be "cured" by virtue of filing an amended complaint in the premature action once administrative exhaustion occurs. It explains:

> The statute requires a plaintiff to completely exhaust administrative remedies before a suit is "instituted." 28 U.S.C. § 2675(a). With respect to this statute, the Supreme Court held that, "[i]n its statutory context, we think the normal interpretation of the word 'institute' is synonymous with the words 'begin' and 'commence.'" *McNeil,* 508 U.S. 106, 112 (1993).
>
> An amended complaint does not "institute," "begin," or "commence" a new action. Amended complaints are creations of the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 15. Under the Rules, "[a] civil action is commenced by filing a complaint with the court." Fed. R. Civ. P. 3. After commencing an action, a party may amend their complaint under Rule 15, but

nothing in Rule 15 indicates that an amended complaint by the same plaintiff against the same defendant based on the same events and asserting the same claim "commences" a new action. *See* Fed. R. Civ. P. 15. Instead, Rule 15 is clear that "[a] party may amend its pleading," but if the party asserts the same claim against the same defendant, the amended complaint "relates back to the date of the the original pleading." Fed. R. Civ. P. 15(a), (c)(1). Because an amended complaint relates back "to the date of the original pleading," it cannot "institute," "begin," or "commence" an action as required by § 2675(a). *See McNeil*, 508 U.S. at 112.

This is consistent with common understanding of the difference between the term "institute" as used in § 2675(a), and the term "amendment" in Rule 15. *See* Black's Law Dictionary (11th ed. 2019) (stating that to "amend" is "[t]o correct or make . . . small changes to . . ."). *See, e.g., Duplan v. Harper,* 188 F.3d 1195, 1199 (10th Cir. 1999) ("As a general rule, a premature 'complaint cannot be cured through amendment, but instead, plaintiff must file a new suit.'"); *Hoffenberg v. Provost,* 154 F. App'x 307, 310 (3d Cir. 2005) (same); *Norton v. United States,* 530 F. Supp. 3d 1, 8 (D.D.C. 2021) (same); *Toomey v. United States,* No. CIV .A. 5:10-260, 2012 WL 876801, at *4 (E.D. Ky. Mar. 14, 2012) (same); *Booker v. United States,* No. CIV .A.

> 13-1099, 2015 WL 3884813, at *4 (E.D. Pa. June 24, 2015) (same).

(Govt.'s Br. at 14-15).

The Government argues that to allow an amended complaint to cure a prematurely filed FTCA suit would defeat the purpose of the exhaustion requirement:

> The FTCA's administrative exhaustion requirement was added in 1966 to prevent plaintiffs from filing suit before attempting to settle their claim with the agency. *See McNeil*, 508 U.S. at 112–113 n.7–8. Allowing plaintiffs to file suit before exhausting, then amending their complaint to assert an identical claim would entirely defeat the purpose of § 2675(a). *See McNeil*, 508 U.S. at 112 ("Every premature filing of an action under the FTCA imposes some burden on the judicial system . . ."); *Duplan v. Harper*, 188 F.3d 1195, 1199 (10th Cir. 1999) ("[a]llowing claimants generally to bring suit under the FTCA before exhausting their administrative remedies and to cure the jurisdictional defect by filing an amended complaint would render the exhaustion requirement meaningless . . . .").

(*Id*. at 16).

This Court agrees, follows *Duplan*, and a long line of similar decisions, and holds that the amended complaint, filed in *Kellom-I* post-exhaustion, did not "cure" Plaintiffs' failure to exhaust prior to filing the lawsuit. The Court therefore re-affirms that the Government is entitled to summary judgment as to the FTCA claims for failure to exhaust.[15]

II. The Government's Renewed Summary Judgment Motion Filed in *Kellom II*

In addition to filing a Renewed Motion for Summary Judgment in *Kellom I* following remand, the Government also filed a motion in *Kellom II.* The Government's brief in support of its motion in *Kellom II* notes that the Sixth Circuit's opinion "focuses exclusively on *Kellom I* and does not address any of the procedural facts or issues in dispute in this case." (Govt.'s Br. at 8 n.1). It also notes that the Sixth Circuit did not reverse or vacate the rulings or judgment in this case. (*Id*. at 2).

Nevertheless, likely out of an abundance of caution, the Government speculates as to what the Sixth Circuit may have meant to do as to this case. (*See* Govt.'s Br. at 2, noting that the Sixth Circuit's decision did not address the rulings in *Kellom II* but speculating that, "presumably" it was to consider whether *Copen v. United States*, 3 F.4th (6th Cir. 2021) has any effect on this Court's reasoning.). The Government's motion then argues that "*Copen* does not relate to the primary basis for the Court's

[15] Given this rule, the Court need not consider the Government's additional or alternative challenges.

conclusion, it only relates to an alternative and independent reason to reach the same result; therefore, the United States respectfully requests that the Court affirm its earlier ruling and enter summary judgment in its favor." (*Id*. at 2).

Plaintiffs' brief reflects that Plaintiffs' counsel does not know what, if anything, was remanded as to this case. (*See* Pl.'s Br. at 14, asserting that the Sixth Circuit must have intended for the *Copen* case "to be applied here to some effect, otherwise there would have been no issues in need of resolutions to permit the remand in the first place."). So Plaintiff's counsel sees the remand as an open invitation for Plaintiffs to seek relief that was never referenced in the Sixth Circuit's decision. (*See* Pls.' Br. at 24, asserting that upon remand Plaintiffs should now be "allowed to amend their complaint" in this case.).

In light of the fact that the Sixth Circuit's opinion does not address this 2019 case at all, does not specify any rulings in this case that were vacated, or any claims or issues that were remanded in this case, it does not appear that anything was remanded in this case.

Nevertheless, the Government's argument, that *Copen* does not impact the rulings in this case, has merit. That is, this Court agrees with the Government that the claims in *Kellom II* should be dismissed notwithstanding *Copen*. Accordingly, to the extent that anything was remanded in the 2019 case, this Court reaffirms its dismissal of Plaintiffs' claims.

CONCLUSION & ORDER

For the reasons set forth above, IT IS ORDERED that the Government's Renewed Motion for Summary Judgment in the 2017 case is GRANTED, to the extent that this Court REAFFIRMS the dismissal of Plaintiffs' prematurely-filed FTCA claims under the circumstances presented here.

IT IS FURTHER ORDERED that the Government's Renewed Motion for Summary Judgment in the 2019 case is also GRANTED because this Court agrees with the Government that the claims in *Kellom II* should still be dismissed notwithstanding *Copen*.

IT IS SO ORDERED.

s/Sean F. Cox.
Sean F. Cox
United States District Judge

Dated: June 21, 2022

APPENDIX E

RECOMMENDED FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Appellate Case Nos. 22-1591/22-1592

[Filed: November 8, 2023]

NELDA KELLOM,
individually and as personal representative
of the Estate of Terrance Kellom, deceased;
KEVIN KELLOM, TERIA KELLOM,
LAWANDA KELLOM, and TERRELL
KELLOM, individually; JANAY WILLIAMS, as personal representative of
Terrance Kellom's two minor children, son, T.D.K., and Daughter, T.D.K.,

Plaintiffs-Appellants,

v.

MITCHELL QUINN, et al.,

Defendants,

UNITED STATES OF AMERICA,

Defendant-Appellee.

OPINION

THAPAR, Circuit Judge. These cases present two types of claims: some filed too soon, and some filed too late. After a federal officer shot Terrance Kellom, Kellom's estate and family members sued. But the estate sued before seeking administrative remedies, and the family raised their claims after the statute of limitations passed. The district court dismissed the claims as premature or untimely. We affirm.

I.

On April 27, 2015, federal agent Michael Quinn shot and killed Kellom while trying to arrest him.

Kellom's estate. Nearly two years later, Kellom's estate sued Quinn, raising tort claims under the Federal Tort Claims Act and an excessive-force claim under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). Following FTCA procedure, the United States replaced Quinn as the defendant to the tort claims. *See* 28 U.S.C. § 2679(d)(1). Then, the estate filed a claim with Quinn's employer, the Department of Homeland Security, based on Kellom's death. DHS denied the claim.

The FTCA requires plaintiffs to seek relief "first" from the relevant federal agency before suing. *Id.* The estate, however, sued before filing a claim with DHS. So, after DHS denied the estate's claim, the United States sent the estate a letter, explaining that the estate needed to bring a new lawsuit to proceed with its FTCA claims.

The estate didn't bring a new suit. Instead, in May 2018, it amended its earlier-filed complaint, continuing to assert the same FTCA claims as before. The United States moved for summary judgment, and the district court granted the motion. The district court treated the FTCA's exhaustion requirement as jurisdictional and dismissed the estate's claims for lack of jurisdiction. *See Exec. Jet Aviation, Inc. v. United States*, 507 F.2d 508, 514–15 (6th Cir. 1974). That left the estate's *Bivens* claim. The *Bivens* claim went to trial, and a jury ruled in Quinn's favor.

Kellom's family members. Meanwhile, Kellom's family members brought their own FTCA claims based on Kellom's death. They raised their claims by joining the estate's amended complaint. The amended complaint was filed in May 2018, three years after Kellom was killed. At that point, the family hadn't sought relief from DHS.

Because the family sued before exhausting administrative remedies, the United States moved to dismiss their claims. The district court granted the motion. Then—in October 2018, nearly three-and-a-half years after Kellom's death—the family filed a claim with DHS.

DHS denied the claim, and the family returned to court. Rather than rejoin the estate's lawsuit, the family started a new one. The district court again

dismissed the family's claims— this time, because the family waited too long to present their claims to DHS. *See* 28 U.S.C. § 2401(b). The FTCA gives plaintiffs two years to ask the relevant agency for relief. *Id.* The family waited three and a half.

Appeals. The estate and family each appealed. The estate argued that it cured its failure to exhaust by filing an amended complaint after exhausting administrative remedies. The estate also argued that it was entitled to a new trial on its *Bivens* claim. For their part, the family argued that their FTCA claims were timely because another statute—the Westfall Act—tolled the two-year statute of limitations.

We consolidated the two appeals. We held the estate wasn't entitled to a new trial on its *Bivens* claim. *Kellom*, 2021 WL 4026789, at *4–5. On the FTCA claims, we agreed that the estate had violated the FTCA by suing before seeking remedies from DHS. *Id.* at *3. But we held the FTCA's exhaustion requirement is a mandatory claims-processing rule, not—as the district court held—a jurisdictional rule. *Id.* Because jurisdictional rules can't be waived or forfeited, the district court never considered whether the United States waived or forfeited its exhaustion defense. *See id.* So, we remanded for the district court to decide whether the United States properly presented the defense and whether the estate's amended complaint cured its failure to exhaust. *Id.* We didn't address the family's appeal. *See id.*

On remand, the district court kept the two cases consolidated. It held that the United States properly presented the exhaustion defense. It also held that the amended complaint didn't cure the estate's failure to exhaust administrative remedies

before suing. Since we didn't address the family's case, the district court reaffirmed its prior holding in that case, dismissing the family's claims as untimely.

Plaintiffs again appeal in both cases.

II.

The estate's appeal. On remand, the district court held the United States didn't forfeit or waive the exhaustion defense. It also held the estate didn't cure its failure to exhaust by filing an amended complaint. We agree.

A.

First, the United States didn't waive or forfeit its exhaustion defense. A party waives a defense by "knowingly and intentionally" relinquishing it. *Cradler v. United States*, 891 F.3d 659, 665 n.1 (6th Cir. 2018) (quoting *Wood v. Milyard*, 566 U.S. 463, 470 n.4 (2012)). And a party forfeits a defense by failing to raise it in the answer. *See* Fed. R. Civ. P. 12(b), (h); Fed. R. Civ. P. 8(c)(1); *Wood*, 566 U.S. at 470.

The United States did neither. Instead, the United States raised the exhaustion defense at every opportunity. *See United States v. Alam*, 960 F.3d 831, 834 (6th Cir. 2020). It listed the defense in its answer to the estate's amended complaint. It raised the defense in a motion to dismiss. And, after that failed, it raised the defense again in a motion for summary judgment.

In response, the estate notes that when it asked to amend its complaint, the United States chose not to oppose the amendment. But a party doesn't forfeit a

defense by failing to oppose a motion for leave to amend. Under the Federal Rules of Civil Procedure, defendants raise defenses *after* the complaint is filed, not before. *See, e.g.*, Fed. R. Civ. P. 12(b), (h). And, in any case, when responding to the estate's motion to amend, the United States expressly reserved its defenses.

The estate also argues the United States forfeited the defense by failing to move for reconsideration when the district court denied the United States's motion to dismiss. *See Am. Auto. Ins. v. Trans. Ins. Co.*, 288 F. App'x 219 (6th Cir. 2008). But nothing in the Federal Rules suggests that a party forfeits a defense by failing to move for reconsideration of a motion to dismiss. *See* Fed. R. Civ. P. 12(h). The Rules require only that parties raise defenses in a motion to dismiss or answer. The United States did both.

B.

Next, the estate didn't cure its failure to exhaust by filing an amended complaint.

An FTCA suit "shall not be instituted" until the plaintiff "first" presents the claim to the appropriate federal agency and the agency denies the claim. 28 U.S.C. § 2675(a). In *McNeil v. United States*, the Court held that a suit is "instituted" when "a new action" is "commenced." 508 U.S. 106, 110–11 (1993). "A civil action is commenced by filing a complaint." Fed. R. Civ. P. 3. So, the Court held, a plaintiff must exhaust administrative remedies before invoking the judicial process. *McNeil*, 508 U.S. at 112. A plaintiff who fails to comply can't cure that failure by exhausting

administrative remedies while the suit is pending: the claim must be reasserted in "a new action." *See id.* at 110–12.

Here, the estate raised its FTCA claim in court before presenting it to DHS. *Kellom*, 2021 WL 4026789, at *3. Thus, after exhausting, the estate needed to dismiss its original claim and reassert it in a new action. *See McNeil*, 508 U.S. at 110–12. The estate didn't.

Instead, the estate amended its complaint. An amended complaint "supersedes an earlier complaint for all purposes." *Calhoun v. Bergh*, 769 F.3d 409, 410 (6th Cir. 2014) (quotation omitted). But that doesn't change the critical fact: the estate "instituted" an FTCA suit before presenting its claim to DHS. *See McNeil*, 508 U.S. at 111–12. The estate's FTCA proceedings were premature, and the only way to cure that defect was to "commence[] a new action." *Id.* at 110; *see also Duplan v. Harper*, 188 F.3d 1195, 1199 (10th Cir. 1999) (holding an amended complaint doesn't cure an exhaustion defect); *Hoffenberg v. Provost*, 154 F. App'x 307, 310 (3d Cir. 2005) (per curiam) (same).

In response, the estate makes three arguments. First, the estate points to several out-of- circuit decisions allowing a plaintiff to raise an FTCA claim for the first time in an amended complaint. But in these cases, plaintiffs waited to raise their FTCA claims until after exhausting administrative remedies—exactly what the FTCA requires. *See, e.g.*, *Valadez-Lopez v. Chertoff*, 656 F.3d 851, 856 (9th Cir. 2011); *Mackovich v. United States*, 630 F.3d 1134, 1135–36 (8th Cir. 2011) (per curiam); *Thomas v. Mace-Leibson*, No. 1:14-cv-2316 (SHR), 2015 WL 7736737,

at *3 (M.D. Pa. Dec. 1, 2015). None suggests that a plaintiff can bring an FTCA claim *before* exhausting and cure the defect by reasserting the same claim in an amended complaint.

Second, the estate argues that *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006), overruled *McNeil*. In *Arbaugh*, the Court criticized prior rulings for describing mandatory claims- processing rules in jurisdictional terms. *Id.* at 511. It held that these "drive-by jurisdictional rulings" should be given "no precedential effect on the question whether the federal court had authority to adjudicate the claim in suit." *Id.* (quotations omitted).

Arbaugh didn't mention *McNeil* or the FTCA. It's true—*McNeil* suggested (without addressing the question) that the FTCA's exhaustion requirement is jurisdictional. 508 U.S. at 109. But at most, *Arbaugh* prevents us from reading that suggestion to be a holding. *Arbaugh*, 546 U.S. at 511; *Copen v. United States*, 3 F.4th 875, 881 (6th Cir. 2021). It doesn't affect *McNeil*'s actual holding: a plaintiff must exhaust administrative remedies before bringing an FTCA claim. *See Copen*, 3 F.4th at 880–81 (recognizing the FTCA's exhaustion requirement is "mandatory"); *see also Kellom*, 2021 WL 4026789, at *2 (applying *McNeil* after *Arbaugh*); *Adu- Beniako v. Reimann*, No. 21-2978, 2022 WL 4538372, at *3 (6th Cir. July 12, 2022) (order) (same).

Third, because the FTCA's exhaustion requirement isn't jurisdictional, the estate argues that there can be exceptions. But the requirement is still mandatory. The FTCA says that a plaintiff "shall not" sue before exhausting remedies. 28 U.S.C. § 2675(a); *Copen*, 3 F.4th at 880–81. "Shall" means

"shall." *Miller v. French*, 530 U.S. 327, 337 (2000). Regardless, the estate doesn't identify any exceptions that apply.

In sum, the estate violated the FTCA by suing prematurely. It didn't cure that defect by filing an amended complaint.

C.

The estate raises two other issues. First, the estate argues that its original complaint didn't raise an FTCA claim, so it didn't need to exhaust administrative remedies before filing it. Second, the estate argues that it's entitled to a new trial on its *Bivens* claim.

We've already resolved these issues. The last time the estate's case was before us, we held the original complaint was subject to the FTCA. *Kellom*, 2021 WL 4026789, at *3. And we held the estate wasn't entitled to a new trial on its *Bivens* claim. *Id.* at *5. Those determinations "are binding," both on the district court "and the court of appeals upon subsequent appeal." *United States v. Campbell*, 168 F.3d 263, 265 (6th Cir. 1999).

III.

The family's appeal. Under the FTCA, claims are "forever barred" unless the claimant files them with the relevant federal agency "within two years after such claim accrues." 28 U.S.C. § 2401(b). The family didn't file a claim with DHS until three-and-a-half years after Kellom was killed. Thus, under the FTCA, their claims are "forever barred." *See id.*

There's one exception: when the district court dismisses an FTCA claim for failure to exhaust, the Westfall Act gives the plaintiff 60 days, from the date of dismissal, to file an administrative claim. *Id.* § 2679(d)(5)(B). But this is a narrow exception. It applies only when the United States substitutes itself as the defendant. *Id.* § 2679(d)(5)(A). And only if the administrative claim "would have been timely" had the plaintiff filed it "on the date the underlying civil action was commenced." *Id.* We construe these criteria "strictly." *See Sullivan ex rel. Lampkins v. Am. Comm'y Mut. Ins. Co.*, 208 F.3d 215 (table) (6th Cir. 2000) (quoting *Lehman v. Nakshian*, 453 U.S. 156, 160–61 (1981)).

The family says the Westfall Act covers their claim. But they didn't sue until three-and- a-half years after Kellom died. Thus, even if the family had filed a claim with DHS "on the date the underlying civil action was commenced," they'd be too late. 28 U.S.C. § 2679(d)(5)(A).

To avoid this obstacle, the family asks us to look at a different date. Since the family brought their FTCA claims by joining the estate's *amended* complaint, they joined an already existing civil action. So, they argue, the date the "underlying civil action was commenced" is the date of the estate's *original* complaint, not the date they joined the lawsuit. *See id.*

Generally, when an amended complaint adds claims or parties who weren't previously part of the lawsuit, the lawsuit "commence[s]" for those claims and parties when they are added. *See* Fed. R. Civ. P. 3; *United States ex rel. Statham Instruments, Inc. v. W. Cas. & Sur. Co.*, 359 F.2d 521, 524 (6th Cir. 1966). In limited circumstances, the Federal Rules treat

claims in an amended complaint as if they had been brought on the date of the original complaint. Fed. R. Civ. P. 15(c). But this "relation-back" doctrine doesn't apply when the amended complaint adds a new plaintiff. *See* Fed. R. Civ. P. 15(c)(1)(C); *Asher v. Unarco Material Handling, Inc.*, 596 F.3d 313, 318–19 (6th Cir. 2010); Wright & Miller, Federal Practice § 1501 (3d ed. Apr. 2023 update). Otherwise, an untimely plaintiff could avoid a statute of limitations simply by joining a preexisting action. *See Asher*, 596 F.3d at 318–19. The estate's amended complaint added new parties (the family), so the family's claims don't relate back.

In a final stand, the family suggests we shouldn't apply the Federal Rules' relation-back doctrine. In their view, by referencing the "date the underlying civil action was commenced," the Westfall Act creates its own relation-back doctrine: namely, FTCA claims brought in amended complaints *always* relate back to the date of the original complaint.

This argument fails. For one, we've repeatedly applied the Rules' relation-back doctrine in the context of the Westfall Act. *See Allgeier v. United States*, 909 F.2d 869, 871–75 (6th Cir. 1990); *Hart v. Tyree*, 944 F.2d 904 (6th Cir. 1991) (per curiam) (table). So have other circuits. *Mittleman v. United States*, 104 F.3d 410, 414–15 & n.3 (D.C. Cir. 1997); *Roman v. Townsend*, 224 F.3d 24, 28 (1st Cir. 2000); *see also Al-Dahir v. FBI*, 454 F. App'x 238, 243–44 (5th Cir. 2011) (per curiam). We've never doubted—and we're not aware of any circuit that has—that the Rules' relation-back doctrine applies in the context of the Westfall Act.

For another, "we do not lightly infer" that Congress displaces the Federal Rules. *United States ex rel. Polansky v. Exec. Health Res., Inc.*, 599 U.S. 419, 436 (2023); *Califano v. Yamasaki*, 442 U.S. 682, 700 (1979) (requiring "a direct expression" of intent to displace the rules). Nothing in the Westfall Act suggests that it is intended to displace Rule 15. The Act uses the date an "underlying civil action" is "commenced" as a reference point. 28 U.S.C. § 2679(d)(5). But it doesn't define those terms. It doesn't discuss amended complaints. Nor does it address when a civil action is "commenced." *See id.* That's because the Act didn't need to— the Federal Rules apply to all civil actions unless the Rules or Congress expressly provide otherwise. Fed. R. Civ. P. 1. So, it makes sense for the Westfall Act to adjust the statute of limitations while leaving the background rules to govern when a lawsuit commences. *See Polansky*, 599 U.S. at 436.

In sum, we look to the date that the family began civil proceedings to see when the family's FTCA suit "commenced." That was more than two years after Kellom was killed.

* * *

We affirm.

APPENDIX F

THE PROVISIONS OF THE FTCA (28 USC §1346(B), §1402(B), §2401(B), AND §§2671-2680)

28 U.S.C. 1346 provides in pertinent part:

United States as defendant

* * *

(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.

28 U.S.C. 2402 provides:

Jury trial in actions against United States

Subject to chapter 179 of this title, any action against the United States under section 1346 shall be tried by the court without a jury, except that any action against the United States

under section 1346(a)(1) shall, at the request of either party to such action, be tried by the court with a jury.

28 U.S.C. 2671 provides:

Definitions

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes (1) officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 115, 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation, and (2) any officer or employee of a Federal public defender organization, except when such officer or employee performs professional services in the course of providing representation under section 3006A of title 18.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of title 32, means acting in line of duty.

28 U.S.C. 2672 provides:

Administrative adjustment of claims

The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States 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 agency 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: Provided, That any award, compromise, or settlement in excess of $25,000 shall be effected only with the prior written approval of the Attorney General or his designee. Notwithstanding the proviso contained in the preceding sentence, any award, compromise, or settlement may be effected without the prior written approval of the Attorney General or his or her designee, to the extent that the Attorney General delegates to the head of the agency the authority to make such award, compromise, or settlement. Such delegations may not exceed the authority delegated by the Attorney General to the United States attorneys to settle claims for money damages against the United States. Each Federal agency may use arbitration, or other alternative means of dispute resolution under the provisions of subchapter IV of chapter 5 of title 5, to settle any tort claim against the United States, to the extent of the agency's authority to award, compromise, or settle such claim without the prior written approval of the Attorney General or his or her designee.

Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award, compromise, settlement, or determination shall be final and conclusive on all officers of the Government, except when procured by means of fraud.

Any award, compromise, or settlement in an amount of $2,500 or less made pursuant to this section shall be paid by the head of the Federal agency concerned out of appropriations available to that agency. Payment of any award, compromise, or settlement in an amount in excess of $2,500 made pursuant to this section or made by the Attorney General in any amount pursuant to section 2677 of this title shall be paid in a manner similar to judgments and compromises in like causes and appropriations or funds available for the payment of such judgments and compromises are hereby made available for the payment of awards, compromises, or settlements under this chapter.

The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter.

28 U.S.C. 2674 provides in pertinent part:

Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

* * *

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act

or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

* * *

28 U.S.C. 2675 provides:

Disposition by federal agency as prerequisite; evidence

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.

28 U.S.C. 2679 provides in pertinent part:

Exclusiveness of remedy

* * *

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

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

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

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

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person

shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

(2) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place in which the action or proceeding is pending. Such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. This certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal.

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the

United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4)[16] of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines that the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if—

> (A) the claim would have been timely had it been filed on the date the underlying civil action was commenced, and
>
> (B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

* * *

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

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[16] Probably intended to be a reference to Rule 4(i).

Exceptions

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

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

* * *

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

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