No.

IN THE
Supreme Court of the United States

RICHARD WERSHE, Jr.

Petitioner

v.

CITY OF DETROIT, MICHIGAN; WILLIAM JASPER; KEVIN GREENE; HERMAN GROMAN; UNKNOWN FORMER ASSISTANT UNITED STATES ATTORNEY; CARROL DIXON, as Representative of the estate of James Dixon; EDWARD JAMES KING; LYNN HELLAND, the UNITED STATES of America, jointly and severally

Respondents

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

PETITION FOR WRIT OF CERTIORARI

Nabih H. Ayad
Counsel of Record
William D. Savage
Ayad Law, PLLC
645 Griswold St., Ste. 2202
Detroit, MI 48226
P: 313.983.4600

QUESTIONS PRESENTED

1. Does the two-factor equitable tolling test supplied by this Court in *Holland v. Florida*, 560 U.S. 631, 649 (2010) apply to all federal equitable tolling cases, all prisoner cases, or only habeas cases, and was the Sixth Circuit correct to reject it in favor of its own five-factor test in *Zappone v. United States*, 870 F.3d 551, 559 (6th Cir. 2017)?

2. Should this Court formalize and standardize the emerging 'prisoner-fear-of-retaliation doctrine' among the circuits, which is available in other circuits but which the Sixth Circuit declined to adopt?

3. Is review required to clarify the distinction between the federal equitable tolling doctrine and equitable estoppel doctrine, where both lower courts applied the 'estoppel' requirement that *a defendant* be the cause of Petitioner's extraordinary circumstances (*i.e.*, his fear of retaliation) to warrant equitable tolling?

4. Did the lower courts err requiring review in ruling that diligence is lacking, where, upon a prisoner's release from prison after 32 years, he promptly found an attorney, began working with said attorney to bring his claims, and brought said claims the day before his one-year probationary release period had ended (to ensure those he feared could not falsely convict him, which would his life sentence)?

5. Did the lower courts err requiring review in ruling that Respondents would be prejudiced by the age of Petitioner's claims, where Petitioner would have access to only the same evidence and it would be Petitioner who carries the burden of proof at trial?

LIST OF PROCEEDINGS IN FEDERAL TRIAL AND APPELLATE COURT

This petition arises out of the United States District Court for the Eastern District of Michigan, cases *Richard Wershe, Jr. v City of Detroit, et al*. and *Richard Wershe, Jr. v United States*, nos. 21-cv-11686 and 22-cv-12596. The district court consolidated the cases and issued a single decision. Petitioner appealed the dismissal of those cases to the United States Sixth Circuit Court, appeal nos. 23-1902 and 23-1903, which affirmed the district court in a single, consolidated, decision.

The district court dismissals and circuit court affirmations are the subject of this petition.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. PETITION FOR WRIT OF CERTIORARI

Richard Wershe, Jr. petitions the Court for a writ of certiorari to review two judgments of the United States Court of Appeals for the Sixth Circuit.

II. OPINIONS BELOW

The district court's Opinion and Order Granting Warren City Council's and Macomb County Clerk's Motions to Dismiss is unpublished. *Wershe v. City of Detroit*, No. 21-11686, 2023 WL 6096558, at *1 (E.D. Mich. Sept. 18, 2023), *aff'd sub nom. Wershe v. City of Detroit, Michigan*, 112 F.4th 357 (6th Cir. 2024). (**Appx. A., a. 1.**) The circuit court's Opinion affirming the district court's dismissal is reported. *Wershe v. City of Detroit, Michigan*, 112 F.4th 357 (6th Cir. 2024). (**Appx. B., a. 28.**)

III. JURISDICTION

This petition requests review of the Sixth Circuit's April 2, 2024 Opinion and Judgment (**Appx. B, a. 28.**) It is brought pursuant to Supreme Court Rule 13.

This Court has jurisdiction pursuant to 28 USC § 1254.

IV. STATUTES INVOLVED

Federal Torts Claims Act. 28 U.S.C. §§ 1346, 2671 *et seq*.

Civil Rights Act of 1871. 42 U.S.C. § 1983.

V. STATEMENT OF THE CASE

All of the facts stated herein have been verified before the lower courts via multiple affidavits, verified pleadings, and the 2017 “White Boy” documentary.

Petitioner Mr. Richard Wershe, Jr. ("Petitioner") spent 32 years and 7 months in prison, which makes him the longest-serving person convicted as a minor for a nonviolent offense in the history of the State of Michigan. He was arrested in 1987 and released on July 20, 2020. Effectively, Petitioner spent his entire adult life in prison.

In 1984, FBI Agents began using Petitioner as an informant when he was just 14 years of age; making him the youngest FBI informant ever known. Petitioner was, even at that age, instilled with the fear of law enforcement common to East-side Detroiter's at that time and felt compelled to do as he was told by these literal authority figures. At this tender young age, the FBI gave Petitioner hard drugs, money, a fake ID.

These FBI Agents' would accost Petitioner at random, unannounced, times. This could be while he walked to or from school, or even at his home.

In August of 1984, different FBI agents began using Petitioner in more dangerous undercover operations such as drug buys. The law enforcement acted with impunity. Petitioner through the law enforcements meddling, rose in the ranks of an infamous Detroit drug gang amidst the height of Detroit's gangland turf war and the government's war on drugs.

In November of 1984, there was an attempted assassination of Petitioner whereby he was shot at point blank range with a .357 magnum, cutting his

large intestine in half, with Petitioner only surviving by the grace of God. In what can only be described as child abuse, law enforcement (including Detroit Police) went to see Petitioner in the hospital for the sole purpose of coercing him into not "snitching" on his would-be assassin, to increase Petitioner's 'street cred' and his value to law enforcement. Instead of pulling him out, they further endangered him by coercing him to stay a confidential informant. They gave him money, and sent him to Las Vegas alone, at age 15, to mingle with drug kingpins.

As Petitioner became more and more notorious as the 'white boy' drug dealer, the racial tension between blacks and whites in Detroit, and the country, was at a highpoint. Coleman A. Young was the first black mayor of Detroit and finding dirt on him or his family that led to a conviction would bring glory to any law enforcement officer or team who did it. As it was a known fact that Mayor Young's niece was married to Johnny Curry, the leader of the dangerous Curry Gang, law enforcement pushed Petitioner in that direction, until Petitioner was close to Johnny Curry's inner circle.

When the Curry Gang was implicated in a shooting that killed a 13-year-old Detroiter, the killing made national news. Detroiters were furious. If Johnny Curry went down for such a crime, so would Mayor Young, *via* his connection to the crime: his niece. Accordingly, Petitioner believes he learned that Mayor Young called in a favor with then head of Detroit homicide investigations, Gil Hill (of Beverly Hills Cop fame). The favor was to frame and ensure the conviction of a decoy; a fall guy, for the shooting of the 13-year-old Detroiter, so that Johnny Curry and, by extension, his uncle-in-law Coleman A. Young,

would remain unimplicated and be saved from ruination.

It was after Petitioner expressed his belief that he had learned that Gil Hill had done the above, that two more assassination attempts were made on him.

First, a drive-by shooting in which his father nearly died when bullets whizzed past his head. Second, was an attempted shooting by hit-man Nate Boon Craft, in which a van pulled up alongside Petitioner, opened its sliding door, and Craft attempted to fire on Petitioner but, fortunately, his gun jammed, and Petitioner's car sped off and escaped.

Nate Boon Craft is on camera admitting that he was paid by Gil Hill to assassinate Petitioner. Petitioner was aware of this while he was imprisoned.

However, law enforcement without interpersonal motivation were also after Petitioner, and he was eventually arrested and charged. Petitioner was set up by police.

When Petitioner was arrested, he had no drugs on him, in his vehicle, etc. He fled on foot empty handed and upon being caught the Detroit police beat him so badly that he had to be hospitalized. After Petitioner was charged, he learned that he was accused of possessing a large box of cocaine that had supposedly been found under a porch near where he had fled police, and police were supposedly alerted to the box by a 9-1-1 call, which was somehow never recorded (the prosecutor told the court that the call had occurred just as the 9-1-1 operator was changing tapes). Petitioner maintains this was all a set-up by law enforcement and that he did not possess such a box.

Prior to his trial, Petitioner and his family were approached by two high-profile Detroit attorneys, initials: E.G. and E.B. Attorneys E.G. and E.B were black, and convinced Petitioner and his family that it would be better for him to have black attorneys than his then white attorney. Accordingly, Petitioner accepted those two attorneys, who withdrew pending pretrial motions to suppress evidence and to allow evidence of Petitioner's having been a law enforcement informant prior to trial. No law enforcement made a single statement on behalf of Petitioner during his trial. It was not until after his conviction that Petitioner learned of his attorneys' close connection to Gil Hill.

In 1978, Michigan passed what became known as the 650-lifer law (MCL 333.7401) which, before its revision, mandated that anyone convicted of possessing 650 grams of cocaine or more be sentenced to life without the possibility of parole. At his trial, Petitioner was alleged to have possessed more than 650 grams of cocaine with an intent to distribute it. In 1987, while still a minor, Petitioner was convicted and sentenced to life without parole and he very much felt that that was because he was set-up and taken down by members of law enforcement, especially Gil Hill, whose career would have been ruined if Petitioner was able to show that he had worked to cover up the Curry Gang members' murder of a 13-year-old boy (something also later admitted by Johnny Curry).

On his first day in prison, while on the phone with his mother, Petitioner witnessed an attempted retaliatory assassination, as one prisoner stabbed another in the neck. After which, a guard said to him, approximately: 'get ready, Wershe, that happens every day in here.'

While he was in prison, fully knowing that Detroit law enforcement and political figures had set him up and were keeping him there, federal law enforcement and Assistant United States Attorneys (including the former AUSA respondents in this case) approached Petitioner for help. Petitioner agreed on the condition that they help him if he ever became eligible for parole. They agreed. Yet they also moved Petitioner to a higher security federal prison and gave him a false identity for fifteen (15) years, because, as they stated, they were afraid that members of Detroit law enforcement or politics would try and have him killed if they found out he was working against them. During that difficult time, Petitioner was estranged from his family. His father died and he was not allowed to attend the funeral. He saw his mother only twice.

After having to be relocated into the witness protection program Petitioner has stated that his attorney William Bufalino's advice to not attempt legal action against any of the law enforcement (for fear of retaliation in the form of losing any chance at release or being killed) that had caused his imprisonment made sense in an entirely more serious way. Petitioner was terrified of his captors. And the hopelessness inevitably instilled by his sentence of life without parole sapped the 'fight' out of him the entire time he was incarcerated.

Petitioner successfully helped law enforcement with their operations, leading to the conviction of 12 high-ranking members of Detroit law enforcement. Then, the federal law enforcement came to Petitioner again for help. They asked him to testify against dangerous criminals that he had interacted with while on the outside. Petitioner was resistant but they

assured him that his testimony would remain sealed forever (as, if his testimony ever got out, it would both expose Petitioner to retaliatory killing by one of the gangs he was testifying against and portray him in a very negative light by making it appear as if Petitioner was associated in largescale drug sales/buys). Petitioner's important testimony ultimately led to the breaking up of the dangerous Best Friends gang by law enforcement. Accordingly, Petitioner truly believed that Respondents would help him with his parole when the time came.

When Petitioner finally became eligible for parole in approximately 2003, instead of helping him, the federal law enforcement he worked with refused and, in violation of the law actually leaked the "sealed" testimony that he had agreed to give to a grand jury, to his parole board and the Wayne County Prosecutor's Office, which caused a letter to be sent to from the Wayne County Prosecutor's office to his parole board, stating emphatically that Petitioner was a dangerous criminal who should never be free again. Incredibly, that letter was signed by E.G., one of Petitioner's former attorneys in his criminal case who had since become employed at the Wayne County Prosecutors office. This multi-layered betrayal only reinforced Petitioner's fear of retaliation by the Detroit law enforcement community (city and federal). As stated above, Petitioner was now aware of his former attorneys E.G.'s and E.B.'s close association with Gil Hill and Mayor Young. Petitioner has stated a very clear and realistic vision of why he believes that powerful people in Detroit law enforcement worked successfully to keep him in prison.

In the mid-2000's, Petitioner was, unbelievably, charged with running a car theft ring in Florida from

a federal prison. He was extradited to Florida and members of the Detroit law enforcement community contacted the Florida prosecutors and told them to do whatever they had to do to convict Petitioner.

Petitioner was put in "the hole," or solitary confinement, for 16 months straight, which itself is illegal in Florida as the maximum number of days one is allowed to be in the hole is 30. This was to coerce a confession out of him, as there was apparently not enough to convict him on the trumped-up charges. Petitioner only took a plea when they told him that they were going to arrest his mother and sister if he did not.

On February 29, 2016, Gil Hill passed away. Soon thereafter, in August of 2016, without prompting by Petitioner or anyone he knew, the Wayne County Prosecutors office inexplicably officially released a letter stating that they were reversing their position on Petitioner Wershe, and that they now supported his release from prison. The timing of this is strong evidence that Gil Hill or his friends had a strong, undue, influence over Petitioner's circumstances, and an untoward interest in them.

In 2017, Petitioner was finally paroled by the Michigan Parole Board. He never left government custody, however. Instead, Petitioner was transferred immediately to a Florida prison, where he served five years. Petitioner was finally released from prison on July 20, 2020. Petitioner had spent 32 years and 7 months in prison, effectively, his entire adult life.

Petitioner filed his verified complaint on July 20, 2021, one day before his parole ended. District Court case no. 21-cv-11686.

The Detroit respondents and Bivens respondents filed separate motions to dismiss *in lieu*

of answers on September 30, 2021, and April 22, 2022, respectively.

Multiple judges were removed or recused themselves from the district court case. On February 15, 2022, there was an order of reassignment from District Judge Laurie J. Michelson to District Judge Shalina D. Kumar. On April 22, 2022, Magistrate Judge Elizabeth A. Stafford recused herself and Magistrate Judge Kimberly G. Altman was assigned in her place. On February 6, 2023, there was an order of reassignment from District Judge Shalina D. Kumar to District Judge F. Kay Behm (a relatively new judge).

The hearing on Respondents' motions to dismiss *in lieu* of answer—and the first hearing of the case—was not held until a day shy of two years later, on July 19, 2023. The motions were decided September 18, 2023, when all of Petitioner's claims were dismissed with prejudice. **9/18/2023 Consolidated District Court Opinion & Order Dismissing, Appx. A, a 1**.

Petitioner timely appealed to the United States Court of Appeals for the Sixth Circuit. Oral arguments were had for Petitioner and all Respondents on July 18, 2024. The Sixth Circuit issued its decision on August 8, 2024. **8/8/2024 Consolidated Circuit Court Opinion & Order Affirming, Appx. B, a 28**.

VI. ARGUMENT

1. Review is required clarify to the circuits that this Court's equitable tolling test in *Holland v Florida* supersedes others, to resolve the circuit split regarding whether a prisoner may be entitled to

equitable tolling based on a reasonable fear of retaliation, and then to clarify whether that tolling requires a direct threat from each defendant (like equitable estoppel).

As an adolescent, Petitioner was indoctrinated into criminality by certain Respondents (James Dixon, Herman Groman, William Jasper, Kevin Greene). While still an adolescent, Petitioner was arrested for a crime related to cocaine trafficking—a trade the skills and connections for which the adolescent Petitioner only obtained through the tutelage of the above-mentioned Respondents. Petitioner was a prisoner for 32 years and 7 months, holding the record for longest conviction of a minor for a nonviolent offense. Eventually, his original sentence was ruled unconstitutional by the Supreme Court in 2010, yet Petitioner remained in prison for 10 more years. Respondents Herman Groman, Lynn Helland, and E. James King are culpable for Petitioner's 10 years of additional incarceration.

As is detailed in Petitioner's complaint, Respondents Herman Groman, Lynn Helland, and E. James King made and broke promises to support Petitioner at his parole hearings.

Petitioner ultimately seeks only justice, and understands that—if his claim were to proceed to trial—all of the above-mentioned respondents would be released from suit after the United States is substituted for them as the sole respondent, by operation of law (28 U.S.C. §1346(b), etc. Federal

Torts Claims Act).[1] But, in order to achieve any justice at all, the FTCA first required that Petitioner sue the individual respondents.[2] Respondents Dixon's, Jasper's, and Greene's tortious conduct towards Petitioner took place in the 1980's, and Respondents Groman's, King's, and Helland's in the 2000's. Petitioner therefore addressed the statute of limitations in his original Petitioner therefore addressed the statute of limitations in his original July 20, 2021 verified complaint where it states:

> [T]he undersigned counsel has done extensive research as to [the statute of limitations] issue, and feels confident in bringing this action based on the relatively recent (and commendable) trend of federal courts to apply equitable tolling of limitation periods in cases brought by recently released prisoners against the criminal justice system and those that had the power to keep them imprisoned. … *Davis v Jackson*, No. 15-CV-5359 (KMK), 2016

---

[1] Based on the undersigned's experience with FTCA claims, and the fact that, at the time's alleged in the complaint, the individual Detroit defendants were working with federal agents, it is all but certain that they were federally deputized and, therefore, subject to the FTCA's substitution of the United States for them as defendants, as well.

[2] Under ideal circumstances, a plaintiff brings a claim against a federal actor or suspected federal actor, and the government promptly intervenes and substitutes itself as defendant pursuant to the FTCA. Here, no such prompt substitution was forthcoming, and Plaintiff was compelled to bring the second suit against the United States out of the FTCA's statute of limitations concerns.

WL 5720811, at *11 (SDNY, September 30, 2016).

When the district court dismissed Petitioner's claims, it noted that its "opinion should not be taken as a ruling on the merits…" **9/18/2023 Consolidated District Court Opinion & Order Dismissing, Appx. A, a 26**. Petitioner's claims were instead dismissed only "insofar as Petitioner's claims are barred by the statute of limitations." *Id*. So too, in the circuit court. "Under both this Circuit's five-factor test and under Michigan law, Wershe cannot avail himself of equitable tolling, and his claims are therefore time-barred. We thus need not consider several additional arguments…" **8/8/2024 Consolidated Circuit Court Opinion & Order Affirming, Appx. B, a 54**. Petitioner's case therefore began and ended in the district and circuit courts with statute of limitations considerations.

Much briefing was done in the district court as to what statute of limitations applied and what law, state or federal, may apply to toll it.[3] In the end, the district court correctly ruled that, in regard to Petitioner's claims, federal "equitable tolling is available '[if his] failure to meet a legally-mandated deadline unavoidably arose from circumstances beyond [his] control.' " **9/18/2023 Consolidated District Court Opinion & Order Dismissing, Appx. A, a 15**. Quoting *Doe v. United States*, 76 F. 4th 64, 71 (2d Cir. 2023).

---

[3] Although the circuit court's opinion implied that perhaps Michigan tolling laws are consistent with federal policy and, therefore, not superseded by federal tolling principles, it is not. All parties agreed that Michigan abolished equitable tolling.

Despite references in the lower courts to this Court's equitable tolling test in *Holland v. Florida*, 560 U.S. 631, 649 (2010), it used the clunky and outdated five-factor test set out in *Zappone v. United States*, 870 F.3d 551, 559 (6th Cir. 2017).

> [T]he Supreme Court has applied a different, two-element equitable tolling test to habeas cases. See *Holland*… That test equitably tolls a habeas petitioner's claims when the petitioner shows "'(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." … However, our Circuit continues to apply the above five-factor equitable tolling test to … other civil claims "[b]ecause the Supreme Court has never expressly adopted the *Holland* test outside of the habeas context."

In light of the crippling fear which Petitioner felt, yet was essentially completely ignored by the circuit court, and the clearly extraordinary circumstances he faced which caused his fear, Petitioner would have met this Court's equitable tolling test handed down in *Holland v. Florida*, 560 U.S. 631, 649 (2010), and which should be mandated as the only fair standard when prisoner's rights, equity, and justice are on the line.

A. The prisoner fear of retaliation doctrine and equitable tolling versus equitable estoppel.

As recently as the early 2000's, equitable estoppel could not be applied in this Circuit, or the Second Circuit, to excuse a prisoner-plaintiff's failure to exhaust his or her administrative remedies under the Prison Litigation Reform Act; A prerequisite under the Act for bringing a lawsuit against one's jailors. "Although Larkin supports the decision below, the Seventh Circuit did not squarely address the issue of whether fear of retaliation will excuse the failure to exhaust. We need not address the issue either, because even assuming that a fear of retaliation might excuse a prisoner's duty to exhaust…" *Boyd v. Corr. Corp. of Am.*, 380 F.3d 989, 997–98 (6th Cir. 2004) (emphasis added). "In light of the cited case law, it is highly questionable whether threats of retaliation could in any circumstances excuse the failure to exhaust administrative remedies." *Umstead v. McKee*, No. 1:05-CV-263, 2005 WL 1189605, at *2 (W.D. Mich. May 19, 2005). If, at that time, a prisoner-plaintiff pled facts which would show that their jailors deterred them from exhausting their administrative remedies with direct threats or intimidation, the prisoner-plaintiff lost out, and his or her claims would have been dismissed.

In 2004, the Second Circuit, very wisely and compassionately changed its thinking on the issue, and held that a prisoner's fear of retaliation could excuse his or her failure to exhaust their administrative remedies prior to filing suit.

> As a matter of first impression in this circuit, we now adopt the holding of *Wright,* 260 F.3d at 358 n. 2, and hold that the affirmative defense of

> exhaustion is subject to estoppel. Accordingly, because the district court erroneously did not address Ziemba's claim that defendants' actions may have estopped the State from asserting the exhaustion defense, we vacate and remand the decision of the district court.
>
> *Ziemba v. Wezner*, 366 F.3d 161, 163 (2d Cir. 2004).

This Circuit eventually followed the Second Circuit's lead: "Similarly, the Sixth Circuit has held that exhaustion may be excused where a prisoner presents concrete and specific facts showing intimidation that would deter a person of ordinary firmness from continuing to use the prison's grievance process. *Himmelreich v. Fed. Bureau of Prisons*, 766 F.3d 576, 577–78 (6th Cir. 2014)." *Sango v. Kennsey*, No. 1:19-CV-1047, 2021 WL 2535538, at *2 (W.D. Mich. Apr. 19, 2021), *report and recommendation adopted*, No. 1:19-CV-1047, 2021 WL 2533160 (W.D. Mich. June 21, 2021).[4] Eventually, so too did the State of Michigan. "Similarly, prisoners who make such allegations claim fear of retaliation by corrections

[4] The embracing of principles of equity for prisoner's is an ongoing process, with the Fourth and Tenth Circuit's only following suit as recently as 2019 and 2020, respectively. "Virginia's no-tolling rule, as applied to prisoners seeking to bring § 1983 claims, frustrates the goals of § 1983 and is thus clearly "inconsistent" with settled federal policy." *Battle v Ledford*, 912 F3d 708, 715 (CA 4, 2019). "[W]e conclude that Oklahoma's lack of a tolling provision to allow for the exhaustion of mandatory prison grievances is contrary to § 1983's goals. In so holding, we join several other circuits." *Johnson v Garrison*, 805 Fed Appx 589, 594 (CA 10, 2020).

staff." *Nowacki v. Dep't of Corr.*, No. 361201, 2023 WL 6170172, at *5 (Mich. Ct. App. Sept. 21, 2023).

Yet, the equitable estoppel, discussed above, is not the same as the equitable tolling at issue here. The two concepts are distinct, with equitable estoppel requiring connivance on the part of the defendant(s), and equitable tolling requiring nothing of the defendant(s).

> "Equitable estoppel applies where ... the defendant engages in intentional misconduct to cause the plaintiff to miss the filing deadline." *English v. Pabst Brewing Co.*, 828 F.2d 1047, 1049 (4th Cir. 1987) …
>
> As for equitable tolling, there are two elements: (1) diligent pursuit of the claim and (2) "extraordinary circumstances" impeding the claimant's timely filing the claim. *Menominee Indian Tribe of Wisconsin v. United States*, 136 S. Ct. 750, 755 (2016) (quoting *Holland v. Florida*, 560 U.S. 631, 649 (2010)). … "Equitable tolling does not require any misconduct on the part of the defendant." *Casey v. United States*, 161 F. Supp. 2d 86, 95 (D. Conn. 2001) (citing *Canales v. Sullivan*, 936 F.2d 755, 758 (2d Cir. 1991)).
>
> *Gabbidon v. Wilson*, No. CV 1:19-00828, 2021 WL 625232, at *7 (S.D.W. Va. Feb. 17, 2021) (emphasis added).

With the above-discussed distinction in mind, in 2016, the *equitable tolling* prisoner fear of retaliation doctrine was created. [5, 6]

---

[5] *Davis v Jackson* has been cited as authority since its issuing and up until the present. *Stone #1 v Annucci*, No. 20-CV-1326 (RA), 2021 WL 4463033, at *12 (SDNY, September 28, 2021); *Philips v Smith*, No. 19-CV-2019 (CS), 2021 WL 4224957, at *6 (SDNY, September 15, 2021); *Junior v Erie Co Med Ctr Corp*, No. 18-CV-01014-LJV-JJM, 2019 WL 4279949, at *10 (WDNY, August 19, 2019), report and recommendation adopted No. 18-CV-1014, 2019 WL 4276613 (WDNY, September 9, 2019); *Funk v Belneftekhim*, No. 14-CV-0376 (BMC), 2019 WL 3035124, at *2 (EDNY, July 11, 2019); *Wheeler v Slanovec*, No. 16-CV-9065 (KMK), 2018 WL 2768651, at *6 (SDNY, June 8, 2018); *Brown v Smithem*, No. 15-CV-1458 (BKS/CFH), 2017 WL 1155825, at *7 (NDNY, February 28, 2017), report and recommendation adopted No. 915CV01458BKSCFH, 2017 WL 1155827 (NDNY, March 27, 2017).

[6] *Davis v Jackson* is also highly cited as authority for its holdings on law unrelated to equitable tolling: *Morrow v Bauersfeld*, No. 919CV1628DNHCFH, 2020 WL 3118520, at *4 (NDNY, June 12, 2020); Fowler v City of New York, No. 19 CIV. 4703 (LGS), 2020 WL 1151297, at *2 (SDNY, March 10, 2020); *Hamilton v Edwards*, No. 14-CV-6308 CJS, 2019 WL 1862828, at *4 (WDNY, April 25, 2019); *Fabricio v Griffin*, No. 16 CV 8731 (VB), 2019 WL 1059999, at *8 (SDNY, March 6, 2019); *Marhone v Cassel*, No. 16-CV-4733 (NSR), 2018 WL 4189518, at *5 (SDNY, August 31, 2018); *Abujayyab v City of New York*, No. 15 CIV. 10080 (NRB), 2018 WL 3978122, at *3 (SDNY, August 20, 2018); *Ennis v New York Dept of Parole*, No. 518CV00501GTSTWD, 2018 WL 3869151, at *4 (NDNY, June 12, 2018), report and recommendation adopted No. 518CV0501GTSTWD, 2018 WL 3862683 (NDNY, August 14, 2018); *Wallace v Warden of MDC*, No. 14CIV6522PACHBP, 2016 WL 6901315, at *4 (SDNY, November 23, 2016); *Lehal v Cent Falls Det Facility Corp*, No.

> [I]n the prison context, it is already settled that fear of retaliation can excuse an inmate's failure to exhaust administrative remedies. See *Ross*, 136 S. Ct. at 1860 (holding that administrative exhaustion is not required "when prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation"); see also *Williams v. Priatno*, 829 F.3d 118, 123–24 (2d Cir. 2016) (same). But this exception is not derived from principles of equitable tolling; it is instead based on the Prison Litigation Reform Act, 42 U.S.C. § 1997 et seq., which requires only exhaustion of "such administrative remedies as are available," id. § 1997e(a); see also Ross, 136 S. Ct. at 1856–57. Because the Prison Litigation Reform Act does not control the question of whether threat of retaliation is a valid ground for equitable tolling, the case law discussing the exhaustion of administrative remedies is of little help.
>
> Instead, the Court turns to the underlying principles of equitable tolling and the realities that inmates like

13CV3923 (DF), 2016 WL 7377238, at *10 (SDNY, November 21, 2016).

> Plaintiff face in seeking to assert their rights.
>
> ***
>
> Thus, the Court concludes that in the prison context, reasonable fear of retaliation may be sufficient to constitute extraordinary circumstances warranting equitable tolling, particularly if the person threatening retaliation is a defendant or another official who could be or was influenced by a defendant.
>
> ***
>
> [Therefore] inmates may show extraordinary circumstances for purposes of equitable tolling where they allege specific facts showing that a reasonable fear of retaliation prevented them from filing a timely complaint…
>
> *Davis v. Jackson*, No. 15-CV-5359 (KMK), 2016 WL 5720811, at *10-11 (S.D.N.Y. Sept. 30, 2016) (emphasis added).

In its final order, in this case, the district court cited to *Clark v. Hanley*, No. 3:18-CV-1765, 2022WL124298, at *5 (D. Conn. fan 13, 2022). That case was later resolved in the Second Circuit Court of Appeals, where *Davis v. Jackson*'s equitable tolling prisoner fear of retaliation doctrine was ratified.

> [T]he law is clear that non-defendants can equally contribute to extraordinary circumstances for equitable tolling

> purposes. [T]he district court did not… proceed under a rule that fear of retaliation from a non-defendant cannot support equitable tolling. Rather, the district court, relying on *Davis v. Jackson*, No. 15 Civ. 5359 (KMK), 2016 WL 5720811, at *11 (S.D.N.Y. Sept. 30, 2016), simply explained that [it may be warranted] "*…particularly if the person threatening retaliation is a defendant or another official who could be or was influenced by a defendant*." *Clark*, 2022 WL 124298, at *4 (emphasis added). The court specifically considered the "other correctional officials," *id*… This was not legal error.
>
> *Clark v. Hanley*, No. 22-302, 2023 WL 8792031, at *18 (2d Cir. Dec. 27, 2023) (emphasis in original).

Notably, it is the Second Circuit's equitable tolling 'test' that was adopted by the Supreme Court in *Holland v Florida*, 560 US 631, 655; 130 S Ct 2549, 2566; 177 L Ed 2d 130 (2010) and passed down to this Circuit. (See *Zappone v United States*, 870 F3d 551, 556 (CA 6, 2017).)

B. This Court should use this opportunity to establish the much-needed Second Circuit's prisoner fear of retaliation doctrine as the law in this country.

Exceedingly important is that all parties argued, and the Court discussed, Petitioner's claims in terms of the prisoner fear of retaliation doctrine. As the district court states in its final order: "[B]ecause neither the Sixth Circuit nor the Michigan courts have directly addressed the issue of equitable tolling due to a fear of retaliation, the reasoning in *Davis* [*v. Jackson*, No. 15-CV-5359 (KMK), 2016 WL 5720811, at *10-11 (S.D.N.Y. Sept. 30, 2016)] is persuasive." **9/18/2023 Consolidated District Court Opinion & Order Dismissing, Appx. A, a 21** (emphasis added).

The district court made that ruling after all the parties had, either expressly or implicitly, stipulated that the *Davis* prisoner fear of retaliation doctrine should apply.

> "[T]he parties to a lawsuit can, within broad limits, stipulate to the law governing their dispute." See *Cates v. Morgan Portable Bldg. Corp*., 780 F.2d 683, 687 (7th Cir.1985) (holding that "the parties here have impliedly stipulated to the application of Illinois law; and an implied stipulation is good enough"). To that end, Defendants cite *Anderson v. Franklin*, No. 2:09–CV–11096, 2010 WL 742765, at *7 (E.D.Mich. Feb. 26, 2010), where a magistrate judge's report and recommendation made an often repeated observation in this district: "By arguing solely in terms of Michigan, the parties have implicitly stipulated that Michigan law is controlling."

Glob. Fleet Sales, LLC v. Delunas, 203 F. Supp. 3d 789, 805 (E.D. Mich. 2016).

The *Bivens* Respondents stipulated to application of the *Davis* prisoner fear of retaliation doctrine early on in their motion to dismiss, where they write: "We assume for argument that *Davis* is valid and applicable. The two *Davis* opinions present detailed facts and extensive caselaw and policy review. Ahead, we summarize the *Davis* principles… [and argue] under *Davis* and equity principles that Wershe also is not qualified for equitable tolling…" And, at oral argument: "[Counsel of *Bivens* Respondents:] I begin with three essential prerequisites for equitable tolling… The prerequisites come from the *Davis* case…" July 19, 2023, hearing.

The Detroit Respondents agreed. "[Counsel for Detroit Respondents:] As noted in our supplemental brief, we join and concur with the arguments made by codefendants and presented by Mr. Israel." July 19, 2023, hearing. Respondent United States similarly concurred with the *Bivens* Defendants arguments. Defendant United States also argued in its motion to dismiss in case no 22-cv-12596 that Petitioner's facts were distinct from the *Davis* facts.

C. This Court should clarify for the lower courts the difference between equitable tolling and equitable estoppel, as the lower courts wrongfully believed that Petitioner was required to identify a direct threat from each defendant in order to be considered for equitable tolling.

Petitioner pled the following specific allegations giving rise to his fear of retaliation in multiple briefs to the district court. In each of them, either one or more respondents were directly involved or other individuals who acted with impunity were involved. Keeping in mind that Petitioner was 17 when originally put away:

1) As a 15-year-old working for Detroit and federal law enforcement, Petitioner was shot and nearly killed by an agent of then Mayor Coleman A. Young's nephew-in-law, John Curry, and law enforcement acted with impunity to keep Petitioner in their control.

2) Convicted Detroit hit-man Nate Boon Craft admitted to accepting a payment from top Detroit law enforcement Gil Hill to kill Petitioner and, indeed, Petitioner narrowly escaped his own murder when Boon pulled up alongside his friends car and attempted to shoot him, with Petitioner being saved by his friend speeding away.

3) Petitioner's conviction was the result of falsified evidence planted under a porch and attributed to him.

4) Upon his arrest, Petitioner was beaten so brutally by law enforcement that he had to be hospitalized.

5) Petitioner's first day in prison, he witnessed a fellow inmate get 'hit,' *i.e*, an attempted retaliatory murder, by being stabbed in the neck, to which the prison guard made the threatening comment: "Get ready, Wershe, that happens every day in here".

6) After Petitioner was approached by the FBI to use him for information and connections as part of Operation Backbone to discover police corruption,

former Detroit mayor Coleman Young attempted to reveal his cooperation and endangered Petitioner's life by calling him a "stool-pigeon" an archaic term for a police informant.

7) In approximately 1991, federal law enforcement had already made Petitioner aware that, based on what he knew about the law enforcement he had worked with could endanger his life, and required his being placed in the prisoner witness protection program, relocated, and given a fake identification for fifteen (15) years.

8) Petitioner's former attorneys each instructed Petitioner to not sue Respondents for the stated reason that it could get him killed or ruin his chances of ever being released from prison.

9) When Petitioner was finally eligible for parole, unknown corrupt law enforcement took direct action against him by releasing to Petitioner's parole board Petitioner's sealed grand jury testimony (used in the conviction of multiple murderous Detroit gangsters), which Petitioner had only given based on law enforcement's promises that it would always remain sealed so as never to endanger his life. Once again, increasing the knowledge among the general populace that he had cooperated with law enforcement.

10) Former head of Detroit Police's homicide unit, William Rice, testified that he was ordered by his superiors in the City of Detroit to falsely testify against Petitioner at his parole hearing.

11) Petitioner's own former attorney at his criminal trial, Edward Gardner, drafted and signed a letter from the Wayne County Prosecutor's office emphatically arguing that Petitioner must never be released.

12) Respondent Lynn Helland explicitly told Petitioner that he was unlawfully reneging on his agreement with Petitioner to aid in his parole, because his superiors wanted Petitioner to remain incarcerated.

13) Petitioner was indicted on trumped-up charges in Florida of running an auto-theft ring from prison, and members of the Detroit law enforcement community contacted prosecutors in Florida to request that they do everything in their power to convict Petitioner.

14) Petitioner was unconstitutionally and horrifically placed in solitary confinement for fifteen (15) months to elicit a confession regarding the Florida charges and, in the end, Petitioner took a plea deal when Florida prosecutors threatened to charge his mother and sister.

15) Petitioner's former attorneys each instructed Petitioner to not sue Respondents for the stated reason that it could get him killed or ruin his chances of ever being released from prison.[7]

Petitioner extraordinary abuse by the justice system thus alleged more than enough facts to show that he had a reasonable fear of retaliation, not only because it would be easy to have him harmed in prison, but because he was a lifer on parole from 2017 until the very day after he filed his complaint. (Petitioner was paroled in 2017, sent to Florida to serve 5 years in prison, and then sent back to

---

[7] Clearly, Wershe *did* allege that "he was at risk of retaliatory violence from another prisoner or guard [] more than the average prisoner," making the district court's ruling that he "has not alleged he was at [such] risk" incredible. Final Order, APPX. 73, PageID 1433-1434.

Michigan, where he was released on parole and closely monitored for one year.) It would be even very easy for a corrupt law enforcement (or former law enforcement with connections, such as all Respondents) to have his parole revoked based on trumped-up charges, until his parole period ended. The district court even recognized that Petitioner had a genuine fear. "Plaintiff demonstrated that he *subjectively* feared retaliation by the Respondents and other individuals in the Detroit law enforcement community…" **9/18/2023 Consolidated District Court Opinion & Order Dismissing, Appx. A, a 24**.

At the July 19, 2023 hearing, Petitioner correctly summarized to the district court the prisoner fear of retaliation doctrine that was incorrectly applied to this case.

> [Petitioner's Counsel:] Your Honor, *Davis*, and other fear of retaliation doctrine cases[--]which Defendants basically adopted[--]in the *Davis* case, stand for the principle that inmates may show extraordinary circumstances for purposes of equitable tolling where they allege specific facts show[ing] that a reasonable fear of retaliation prevented them from filing a timely complaint.
>
> Defendants do not challenge this legal premise, your Honor. Therefore, if the Plaintiff alleges facts, viewed in the light most favorable to this Plaintiff, that alleges a reasonable fear, then he is entitled to equitable tolling so long as he acted as diligently as reasonable could

> have been expected under the circumstances…

Similarly, Petitioner emphasized to the district court in additional supplemental briefing done after the oral arguments that the *Davis* doctrine did not require explicit threats from defendants (which any retaliator intending to not be discovered would not do). As Petitioner pointed out to the Court, in the *Davis* case, only one out of the four 'articulable facts' which the court found sufficient to cause a reasonable fear in *Davis* for purposes of the fear-of-retaliation doctrine were attributed to a defendant in the six-defendant action:

> (1) that one Defendant told Plaintiff not to "get comfortable" upon his return to Sing Sing; (2) that a false misbehavior report was filed against Plaintiff (and subsequently dismissed) upon his return to Sing Sing; (3) that one correction officer frisked Plaintiff and told him, "I hope your [sic] not gonna write me up for this because I know about you"; and (4) that following a search of Plaintiff's cell, another correction officer told Plaintiff not to "be writing a bunch of shit up around here," and told Plaintiff that "you know weapons can be found in your cell."
>
> *Davis v Jackson*, No. 15-CV-5359 (KMK), 2016 WL 5720811, at *11 (SDNY, September 30, 2016).

The district court, however, erroneously and reversibly conflated equitable estoppel and equitable tolling, stating numerous times at the July 19, 2023 hearing that Petitioner was required to plead specific threats made by each respondent.

> You're telling me that your client's entitled to equitable tolling because he had a reasonable fear of retaliation, and *Davis* says that that's possible that doctrine would be available to your client if the person threatening retaliation is a defendant. So what I'm asking you is, how did these Defendants… threaten retaliation?

In its order, the district court made the same error by noting Petitioner's specific and particularized allegations giving rise to his fear yet, then, ruling that the fear could not constitute the 'exceptional circumstances' element as defined by *Davis* and the Supreme Court.

> Plaintiff alleges, consistent with the holding in *Davis*, he suffered from a reasonable fear of retaliation "based on actual threats and instances of retaliation" … Plaintiff also alleges that, after agreeing to assist with "Operation Backbone," he was moved to a higher security prison and given a false identity for fifteen years because even the AUSAs "were afraid that members of Detroit law enforcement or politics would try and have him killed if they found out he was

> working against them." *Id*., PageID.246. Plaintiff claims [in an affidavit attached to his verified complaint] that his attorney, William Bufalino, told him directly not to attempt legal action against any of the law enforcement officers for fear of retaliation in the form of losing any chance at being released from prison or direct violence.
>
> ***
>
> Plaintiff also points to a number of alleged threats from … law enforcement officers in the City of Detroit, including his attempted assassination … However, Plaintiff has failed to establish how any of these actions could be directly attributed to the Defendants…

9/18/2023 Consolidated District Court Opinion & Order Dismissing, Appx. A, a 21-22 (emphasis added).

Based on this misunderstanding of the *Davis* doctrine, the district court ruled that: "While the court recognizes the complicated and unique nature of Petitioner's circumstances, his allegations do not rise above a 'generalized fear of retaliation' such that he should be entitled to equitable tolling. See *Davis*, 2016 WL 5720811, at *11." *Id*.

The district court's ruling was plain error as Petitioner's history clearly could and did create in him a reasonable fear of retaliation which he pled with specificity. The district court should not have required Petitioner to plead a specific threatening statement made by each respondent, as Petitioner was not

required to do that. "Sango specifically alleged that prison officials … actively recruited other prisoners to physically harm him before Sango filed his complaint. And although these allegations lack specificity, the Court agrees with the magistrate judge's conclusion that these allegations are 'distinct from a 'mere allegation of a generalized fear of retaliation.' (*Id*. quoting *Briscoe v. D'Agata*, 2016 WL 3582121 at *8 (S.D.N.Y., June 27, 2016))." *Sango v. Brandt*, No. 1:19-CV-58, 2020 WL 1814111, at *1 (W.D. Mich. Apr. 9, 2020).

This Circuit has very distinctly held that a genuine issue of fact is created even when a non-defendant causes a reasonable fear of retaliation in a prisoner-plaintiff.

> In *Gilmore v. Ormond*, No. 19-5237, 2019 WL 8222518 (6th Cir. Oct. 4, 2019), the Sixth Circuit concluded that the plaintiff's allegation that his case manager threatened to show other inmates documents indicating that the plaintiff had cooperated with law enforcement … created a genuine issue of material fact … The court observed that "[e]xposing *Gilmore* as an informant would have put him in serious jeopardy of physical harm from other inmates, and for purposes of summary judgment, this alleged threat was sufficient…" *Id*.
>
> *Sango v. Kennsey*, No. 1:19-CV-1047, 2021 WL 2535538, at *3 (W.D. Mich. Apr. 19, 2021), *report and recommendation adopted*, No. 1:19-CV-

> 1047, 2021 WL 2533160 (W.D. Mich. June 21, 2021).

Therefore, the district court erred reversibly when it ruled that Petitioner could not show 'extraordinary circumstances' for purposes of equitable tolling, because Petitioner should not have been required to show explicit threats by any respondent, as would be required for equitable estoppel to apply.

2. Review is required to clarify the meaning of 'diligence' for the lower courts, which ruled Petitioner lacked diligence despite that upon his release from prison after 32 years he promptly found an attorney, began working with said attorney to bring his claims, and brought said claims the day before his one-year probationary release period had ended (abating his fear of being returned to finish his life sentence for a trumped-up, retaliatory, charge).

The district court found that Petitioner did not meet the "reasonable diligence" prong of both the Supreme Court's and Sixth Circuit's equitable tolling tests.

> The court finds that Plaintiff has not met his burden to show that he acted "as diligently as reasonably could be expected," where he did not take any action to file a claim or seek protection from the alleged threats of retaliation

> during his lengthy prison sentence. Plaintiff has not provided any evidence that he discussed his fear of retaliation or any concrete threats with his attorneys,[8] prison officials, or any other individuals from various state or federal law enforcement agencies. In fact, Defendants highlighted that Plaintiff filed a number of other lawsuits against "powerful individuals" while he was in prison, including an unsuccessful appeal of his 1988 cocaine conviction, a lawsuit against the parole board, and a lawsuit against his Michigan prison warden.
>
> **9/18/2023 Consolidated District Court Opinion & Order Dismissing, Appx. A, a 19**.

A. Diligence should not require prisoners to seek protection, when there is no one who can reasonably protect them.

This Court, in *Holland v Florida*, disagreed with the Eleventh Circuit's conclusion that a prisoner

---

[8] Contrary to the district court's statement in its final order, Petitioner absolutely *did* "share with his attorneys his fears." In Plaintiff's affidavit which was attached to his complaint, he states: "I shared with Ralph my desire to take legal action … and his advice to me was very similar as attorney Bufalino's. Ralph told me to keep my head down and not rock the boat, to not try to sue any law enforcing on the outside because there was a high chance that they would retaliate against me and make sure I stayed in prison forever."

seeking habeas relief was required to seek outside help in the context of attorney negligence.

> But the court rested its holding on an alternative rationale: It wrote that, even if Collins' "behavior could be characterized as an 'extraordinary circumstance,' " Holland "did not seek any help from the court system to find out the date [the] mandate issued denying his state habeas petition, nor did he seek aid from 'outside supporters.' " Hence, the court held, Holland did not "demonstrate" the "due diligence" necessary to invoke "equitable tolling."
>
> *Holland v. Fla.*, 560 U.S. 631, 643–44, 130 S. Ct. 2549, 2559, 177 L. Ed. 2d 130 (2010) (citations removed).

Yet, here, the lower courts required Petitioner to have sought *protection* against corruption from unidentified sources. Petitioner was convicted on trumped-up charges of running a car theft ring from prison while in Florida and he was placed in solitary confinement ("the hole") for 15 months—a blatant violation of constitutional law—in an attempt to extort him into taking a plea. He was the victim of multiple assassination attempts, for which the culprits were never punished. He was, while a prisoner, placed in a witness protection program with a fake identity for a decade-and-a-half because of his involvement in bringing corrupt law enforcement to justice. His own former criminal trial attorney wrote his parole board advocating against his parole.

Information from his sealed grand jury testimony was shared with his parole board.

These facts raise the question: Who was Petitioner supposed to feel he could write to, to protect himself from retaliation? Petitioner's warden certainly could not have prevented the above-harms. In the equitable estoppel fear of retaliation context, circuit courts have recognized that not all feared retaliation can be abated by officials which prisoners have access to.

> In some instances, a warden may refuse or be unable to protect a prisoner from retaliation by lower prison officials. Further, … it is unclear where an inmate faced with threats by the warden or other ranking prison official can turn for redress.
>
> We are thus not persuaded that the CDOC emergency procedure eliminates an inmate's fear of retaliation. In reaching this determination, we once more align ourselves with the other circuits that have contemplated this issue. See *Turner*, 541 F.3d at 1083–84 (rejecting the argument that the plaintiff "should have filed an emergency grievance"); see also *Kaba*, 458 F.3d at 681–82 (acknowledging that there was a special grievance procedure in place, but according it no consideration in the analysis).

> *Tuckel v. Grover*, 660 F.3d 1249, 1255 (10th Cir. 2011).

Therefore, it was error and an egregious injustice, having broad implication on prisoner-tolling cases, for the lower courts to have found Petitioner dilatory because he did not seek protection from nonexistent protectors.

B. The lower courts erred requiring review by holding that a prisoner lacks "fear" if he has previously filed other lawsuits against "powerful individuals," even if those other lawsuits were formalities which did not name defendants in their individual capacities, sue for money damages, or accuse the defendants in those matters of scandalous abuses of power.

The three lawsuits which the district court weighed against Petitioner did not bring claims against individuals which would have held them liable for money damages; Let alone potentially millions of dollars' worth. This Circuit has distinguished such lawsuits from those warranting reasonable fears of retaliation, in an opinion affirmed by the Supreme Court.

> [W]e reject the government's argument that Himmelreich's filing of other administrative complaints and the FTCA lawsuit near the time that he claims to have been threatened prevents

> a finding of intimidation. … Complaints and grievances related to petty requests and those related to prison-official misconduct are wholly different … In our view, this retaliation and intimidation—if proven true—would render the grievance process functionally unavailable for a person of ordinary firmness. Thus, we **VACATE** the district court's grant of summary judgment on the basis of a failure to exhaust.
>
> *Himmelreich v. Fed. Bureau of Prisons*, 766 F.3d 576, 578 (6th Cir. 2014), *aff'd and remanded sub nom. Simmons v. Himmelreich*, 578 U.S. 621, 136 S. Ct. 1843, 195 L. Ed. 2d 106 (2016).

Therefore, the district court erred when it found Petitioner lacked diligence because he was unafraid to bring three, petty, lawsuits attempting to gain his freedom.

3. This Court should clarify to the lower courts what it is to be "unfairly prejudiced" by the age of a petitioner's claims, where a petitioner would have access to only the same evidence yet would bear the burden of proof at trial.

At the accrual date of each of Petitioner's claims, that is, when they actually occurred, they were, in effect, undocumented violations of Petitioner's constitutional rights. Petitioner pled as much, in his verified complaint, where he alleges that

there was no record made of his being an informant: "Knowing how fundamentally wrong and outrageous it was to endanger a child, Dixon and the taskforce hid this fact in their official files by using Petitioner's father's name, Richard J. Wershe, Sr., in their reporting, instead of Petitioner's name: Richard J. Wershe, Jr. Likewise, the enforceable promises made and broken by Respondents Groman, Helland, and King were never written down. "Although Plaintiff initially did not want to participate, Hellend persisted and persuaded the then 20-year-old Plaintiff that if he helped them, they would always do everything in their power to get Plaintiff released from prison." "King agreed to do everything in his power to get Plaintiff's sentence commuted in exchange for his grand jury testimony against the very dangerous and deadly 'Best Friends' gang." Finally, Petitioner highly doubts that, when the federal respondents disclosed some or all of his sealed grand jury testimony to his March 2003 parole board, they made a paper trail. And, if they had and those documents were lost, it would only prejudice Petitioner, not Respondents.

All of this means that there simply is no direct documentary evidence of Petitioner's claims. The trial in this matter would be almost purely testimonial, with the witnesses being Petitioner and Respondents. Because Petitioner has the burden of proof and brings his claims, essentially without documentation or the belief that there is much documentation to be discovered, the loss of any evidence prejudices him more so than it does the Respondents. Petitioner argued this to the district court in his first brief.

Yet, the district court erroneously ruled (and circuit court agreed) that: "While some of the relevant evidence will be easy to find, and has since been

provided to this court, there is likely a substantial amount of evidence that will be extremely difficult, if not impossible, to uncover given the length of time since Defendant's injuries. Likewise, this factor weighs against applying equitable tolling." **9/18/2023 Consolidated District Court Opinion & Order Dismissing, Appx. A, a 18**.

It is important to keep in mind that the Respondents have not forcibly denied Petitioner's allegations in the district court that he was used as an adolescent drug informant. Respondent Groman appears in the *White Boy* documentary stating his support of Petitioner.

Because the lower courts erred in imagining documentary evidence and witnesses where the pleadings showed none ever existed in the first place, it erred in weighing this factor against Petitioner.

CONCLUSION

For the above reasons and more, the petition for certiorari should be granted.

Respectfully Submitted,

Nabih H. Ayad
Counsel of Record
William D. Savage
645 Griswold St., Ste. 2202
Detroit, MI 48226
P: (313) 983-4600

APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

RICHARD WERSHE, JR,

Plaintiff,

vs.

Case No. 21-11686
F. Kay Behm
United States District Judge

THE CITY OF DETROIT, *et. al.,*

Defendants.
_____/

RICHARD WERSHE, JR,

Plaintiff,

vs.

Case No. 22-12596
F. Kay Behm
United States District Judge

UNITED STATES OF AMERICA,

Defendant.
_____/

CONSOLIDATED ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS (*Wershe I*, ECF Nos. 8, 34; *Wershe II*, ECF No. 6) AND DENYING AS MOOT ALL OTHER PENDING MOTIONS (*Wershe I*, ECF Nos. 48, 55; *Wershe II, ECF No. 10)*

I. INTRODUCTION AND PROCEDURAL HISTORY

This consolidated opinion is issued in two separate cases filed by Plaintiff Richard Wershe Jr.: *Wershe v. City of Detroit* ("*Wershe I*"), 21-11686, and *Wershe v. United States* (*"Wershe II"*), 22-12596. Because these two cases arise from the same set of relevant facts and involve overlapping issues of law, they have been consolidated for the limited purpose of issuing this opinion[1].

Plaintiff filed his case, *Wershe I,* On July 20, 2021, in the U.S. District Court for the Eastern District of Michigan. (*Wershe I*, ECF No. 1). In his first amended complaint, filed on September 14, 2021, Plaintiff brings a number of claims under 42 U.S.C. § 1983 and *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics,* 403 U.S. 388 (1971), for violations of his constitutional rights. (ECF No. 4). *Wershe I* was originally before District Judge Laurie J. Michelson, but was reassigned to District Judge Shalina D. Kumar on February 15, 2022, and

[1] The parties were asked at the July 19, 2023, hearing whether they had any specific objections to consolidating these cases for the purposes of issuing this opinion. No objections were raised.

subsequently assigned to the undersigned on February 6, 2024. Plaintiff filed his second case, *Wershe II*, on October 28, 2022, in the U.S. District Court for the Eastern District of Michigan. (*Wershe II*, ECF No. 1). In this case, Plaintiff brought seven tort claims under Michigan law pursuant to the Federal Tort Claims act (FTCA), 28 U.S.C. § 1346(b). *Id.* *Wershe II* was originally before District Judge Denise Paige Hood, but was reassigned to District Judge Shalina D. Kumar on November 8, 2022, and subsequently assigned to the undersigned on February 6, 2023.

Those cases are now before this court on a number of pending motions. In *Wershe I*, Defendant City of Detroit filed a motion to dismiss on September 30, 2021. (*Wershe I*, ECF No. 8). Defendant's Kevin Greene and William Jasper filed a notice of joinder/concurrence in this motion on October 21, 2021. (*Wershe I*, ECF No. 14). On April 22, 2022, Defendants Carol Dixon, Herman Groman, Lynn A. Helland, and Edward James King (the "*Bivens* Defendants") filed a motion to dismiss the relevant counts against them. (*Wershe I*, ECF No. 34). On July 6, 2022. Plaintiff filed a motion to amend/correct Plaintiff's verified complaint seeking to add the United States as a Defendant. (*Wershe I*, ECF No. 8). On November 2, 2022, the *Bivens* Defendant's filed a supplemental brief in response to the filing of *Wershe II*, (*Wershe I*, ECF No. 54), and Plaintiff filed a motion to strike their supplemental brief on November 10, 2022. *Wershe I*, ECF No. 55). In *Wershe II,* Defendant filed a motion to dismiss on January 17, 2023. *Wershe II*, ECF No. 6). On April 17, 2023, Plaintiff filed a motion for leave to file an exhibit in the traditional

manner. (*Wershe II*, ECF No. 10). These motions are all currently pending before the court.

On July 19, 2023, the court held a hearing in both cases. *Wershe I* and *Wershe II*. Oral argument was "limited in scope to the statues of limitations applicable to Plaintiff's claims." (*See Wershe I*, ECF No. 58; *Wershe II*, ECF No. 12). Following the hearing, Plaintiff filed a letter with the court "correct[ing] an assertion…made during oral argument." (*Wershe I*, ECF No. 64; *Wershe II*, ECF No. 16). The partie were given an opportunity to file a response to Plaintiff's letter (*See Wershe I*, ECF Nos. 68, 70; *Wershe II*, ECF No. 18), and Plaintiff filed a reply on August 14, 2023, (*Wershe I*, ECF No. 72). The court has considered all of the arguments presented in the written motions, supplemental briefs, and oral argument. And finds that Plaintiff's claims were untimely and are barred by the relevant statutes of limitations. Likewise, Defendants' motions to dismiss (*Wershe I*, ECF Nos. 8, 34; *Wershe II*, ECF No. 6) are **GRANTED.**

II. FACTUAL BACKGROUND

As discussed in more detail below, this case is before the court on a number of motions to dismiss brought pursuant to Fed. R. Civ. P. 12(b)(6). Because all facts must be viewed in the light most favorable to Plaintiff, the court will rely on Plaintiff's statement of the lengthy facts of this case. [2] *See Directv v. Treesh*,

[2] Plaintiff urges the court to review his submitted Exhibit F, the "White Boy" documentary, which was cited numerous times by both Plaintiff and Defendants in their Pleadings. (ECF No. 72, PageID.

487 F.3d 471, 476 (6th Cir. 2007). (" In reviewing a motion to dismiss, we construe the complaint in the light most faovrable to the Plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the Plaintiff.").

Plaintiff Richard Wershe Jr., known widely in the media as "White Boy Rick," alleges he was "indoctrinated into criminal society" as a child by officers from the Federal Bureau of Investigation (FBI) and the Detroit Police Department (DPD). (*Wershe I,* ECF No. 4, PageID.105). The facts relevant to Plaintiff's claims begin in the 1980s, when Plaintiff was recruited by FBI agents to serve as a confidential informant through his father, Richard Wershe Sr. *Id.*, PageID.87. Plaintiff was subsequently introduced to officers from the DPD and began working as a confidential informant for a joint FBI/DPD "taskforce" tackling the drug trade in Detroit. *Id.*, PageID.88. When he was 15 years old, Plaintiff alleges that taskforce officers began sending him to drug houses to "purchase drugs…return with the drugs, allow them to take a small sampling of the drugs, and then leave with the remainder of the drugs, with instructions to sell them." *Id.*, PageID.90.

As his involvement in the drug trade increased, Plaintiff alleges he was "shot at point blank range with a .357 magnum, cutting his large intestine in half." in an attempt to assassinate him. *Id.*, PageID.91. Even after this assassination attempt, Plaintiff alleges that the FBI

1399). The court emphasizes that it has not viewed this documentary and does not believe that it can be relied upon to provide an objectively reliable retelling of Plaintiff's story. Likewise, the court will solely consider the facts provided in Plaintiff's complaint.

and DPD officers continued to ask him to go undercover to sell drugs, both in Detroit and, on one occasion, Las Vegas. *Id.*, PageID.92. By 1987, media coverage of his involvement in the drug trade exploded, with reporters coining the name "White Boy Rick." *Id.*

On May 22, 1987, Plaintiff, at the age of 17, was arrested after a 911 call suggested he was in possession of a large box of cocaine. *Id.*, PageID.94. Later that year, Plaintiff was convicted of possessing 7,933.8 grams (17.45 pounds} of cocaine. (*Wershe I,* ECF No. 34, PageID.434). Pursuant to Michigan's "650-lifer law," Mich. Comp. Laws § 333.7401, Plaintiff was sentenced to life in prison without the possibility of parole.[3] (Wershe I, ECF No. 4, PageID.95).

While he was in prison, Plaintiff was again solicited to assist in a large-scale sting operation intended to take down corrupt DPD officers and politicians, "Operation Backbone." *Id.*, PageID.96. Plaintiff alleges he was told by Defendant Helland that, if he agreed to help them, "they would always do everything in their power to get Plaintiff released from prison." *Id.* Plaintiff agreed to help. *Id.* As a result of his participation in "Operation Backbone," Defendant Helland arranged to have Plaintiff placed in the prisoner witness protection program "out of fear that elements of the corrupt Detroit Police Department that he

---

[3] At the time of Plaintiff's sentencing, the 650-lifer law mandated that anyone convicted of possessing 650 grams of cocaine or more be sentenced to life without the possibility of parole. (*Wershe I,* ECF No. 4, PageID.95). However, after Plaintiff's sentencing, the 650-lifer law was amended to change the mandatory sentence requirement to 20 years to life, with the possibility of parole. *Id.* n.3.

had helped to strike a blow, would be able to retaliate against him while he was imprisoned." *Id.* Plaintiff was given a fake identity and was relocated to an unknown prison facility. *Id.*

In 1992, Plaintiff was asked by federal agents from the Drug Enforcement Agency (DEA) and Assistant United States Attorneys (AUSAs) from the Eastern District of Michigan to testify before a grand jury against members of the Best Friends Gang. *Id.*, PageID.97. Plaintiff agreed on the condition that "[Defendant] King do everything in his power going forward to assist Plaintiff in getting his sentence commuted." *Id.*, PageID.98. Plaintiff alleges he was told that his testimony "would always be sealed and never be released." *Id.*, PageID.97.

Following amendments to the 650-lifer law, Plaintiff became eligible for parole in 2002. *Id.*, PageID.98. In 2003, Plaintiff was scheduled for a hearing before the Michigan Parole Board. *Id.* At his hearing, despite what he had been told earlier about the Defendants' commitment to advocating for his parole, he was informed that the U.S. Attorney's office no longer supported his release. *Id.*, PageID.99-100. Further, at his parole hearing DPD officers testified and quoted directly from his sealed grand jury testimony. *Id.*, PageID.100. Plaintiff argues that this information from his grand jury testimony was "the dispositive factor in the Board's decision not to allow Plaintiff parole, as it associated Plaintiff with the very dangerous "Best Friends gang network." *Id.* After his hearing, Plaintiff was denied parole. *Id.*

In 2005, Plaintiff was charged with racketeering for "attempt[ing] to facilitate the purchase of a car for his

mother from Florida while in prison."[4] *Id.*, PageID.103-04. Plaintiff eventually pleaded guilty and was sentenced to five years imprisonment in Florida. *Id.*, PageID.104. In 2017, Plaintiff was granted parole by the Michigan Parole Board, and was immediately transferred to a Florida prison to serve his sentence on the Florida charges. *Id.*, PageID.105. Plaintiff was released from prison on July 20, 2020, after 32 years and 7 months. *Id.*

III. RELEVANT LEGAL STANDARDS

A. Rule 12(b)(6)

A motion to dismiss brought under Federal Rule of Civil Procedure 12(b)(6) alleges that a complaint fails to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). Although the statute of limitations is typically raised as an affirmative defense, and "a plaintiff generally need not plead the lack of affirmative defenses to state a Valid claim," the court may dismiss a claim under Fed. R. Civ. P. 12(b)(6) if "the allegations in the complaint affirmatively show that the claim is time-barred." *Cataldo v. U.S. Steel Corp.*, 676 F.3d 542, 547 (6th Cir. 2012). In considering a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), a complaint may be dismissed "only if it is clear that no relief could be granted under any set of facts that could be proved

---

[4] Defendants contest Plaintiff's characterization of these charges, arguing they actually arose out of Plaintiff's involvement in a large-scale "auto theft ring" from prison. (*Wershe I,* ECF No. 6, PageID.77).

consistent with the allegations." *Morgan v. Church's Fried Chicken*, 829 F.2d 10, 12 (6th Cir. 1987). The court must "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." *DirectTV v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007).

Generally, if a court considers matters outside of the pleadings, the motion must be converted into one for summary judgment under Rule 56. *Ashh, Inc. v. All About It, LLC*, 475 F. Supp. 3d 676, 679 (E.D. Mich. 2020}. However, a court may consider certain exhibits in a motion to dismiss, including "the Complaint and any exhibits attached thereto, public records, items appearing in the record of the case and exhibits attached to defendant's motion to dismiss so long as they are referred to in the Complaint and are central to the claims contained therein." *Id.* at 678 (citing *Bassett v. Nat'l Coll. Athletic Ass'n*, 528 F.3d 426, 430 (6th Cir. 2008)). Plaintiff has filed a number of exhibits in response to the Various motions to dismiss including: (1) the affidavit of Richard Wershe Jr., (2) the second affidavit of Richard Wershe, Jr., (3} the November 17, 2021 report of Dr. Larry Friedberg, PhD, (4} the curriculum vitae of Dr. Larry Friedberg, PhD, (5) excerpts of the transcript from the "White Boy" documentary, (6) the "White Boy" documentary DVD, (7) an order from the Michigan Court of Appeals regarding his sentencing, (8} the affidavit of Michelle MacDonald, and (9} the affidavit of Lynne Hoover. (*Wershe I*, ECF No. 19-1; *Wershe II*, ECF No. 9-1). Additionally, the *Bivens* Defendants submitted a lengthy list of materials from the other legal actions in which Plaintiff was a party as an attachment to their motion to dismiss. (*Wershe I*, ECF No. 34-1). Because this case is before the court as a motion to dismiss, the court will rely only on the information

contained in the two complaints and pleadings, as well as any exhibits "referred to in the Complaint [that] are central to the claims contained therein." *Ashh, Inc.*, 475 F. Supp. 3d at 678. Given that many of the submitted exhibits provide information that is well outside of the complaint's central claims, they will be disregarded at this stage.

B. **Applicable Statutes of Limitations**

Generally, a plaintiff's claims against a defendant must be filed within a reasonable time after their injury occurred or was discovered. For this reason, the law creates certain statutes of limitations establishing the time limit for bringing a lawsuit, based on when the claim accrued. STATUTE OF LIMITATIONS, Black's Law Dictionary (11th ed. 2019}. Plaintiff brings a number of claims against the relevant Defendants in both *Wershe I* and *Wershe II*, which fall into one of three categories: (1) § 1983 claims, (2) Bivens claims, and (3) claims brought pursuant to the Federal Tort Claims Act. (See *Wershe I*, ECF No. 4; *Wershe II*, ECF No. 1). Each type of claim is subject to different rules governing the relevant statute of limitations.

i. Section 1983 and Bivens Claims

Title 42 U.S.C. § 1983 provides a federal remedy when state officials act to deprive an individual of "any rights, privileges, or immunities secured by the Constitution and laws." *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 105 (1989). Section 1983 does not have a defined limitations period and, thus, the Supreme Court has held that the statute of limitations for

§ 1983 claims is governed by the relevant state statute of limitations for personal injury claims. *See Wilson v. Garcia*, 471 U.S. 261, 272 (1985). Under Michigan law, a claim for injury to person or property must be filed within "3 years after the time of the death or injury for all actions to recover damages for the death of a person or for injury to a person or property." Mich. Comp. Laws § 600.5805(2); *see also Rapp v. Putman*, 644 F. App'x 621, 626 (6th Cir. 2016) (holding the statute of limitations for § 1983 claims in Michigan is "the three-year statute of limitations for personal injury claims.").

Similarly, Bivens actions allow individuals to bring claims against federal agents when they, "acting under color of [their] authority," violate an individual's Constitutional rights. *See Bivens*, 403 U.S. at 489; *Vector Rsch., Inc. v. Howard & Howard Att'ys P.C.*, 76 F.3d 692, 698 (6th Cir. 1996). *Bivens* claims are "governed by the same statute of limitations as [ ] claim[s] under 42 U.S.C. § 1983." *Zappone v. United States*, 870 F.3d 551, 559 (6th Cir. 2017). Likewise, Plaintiff's *Bivens* claims are also subject to Michigan's three-year statute of limitations for personal injury. In this case, "all parties appear to agree that MCL 600.5805(2) is the source of the three-year limitations period for Plaintiff's §1983 and Biven's [sic] claims." (*Wershe I*, ECF No. 63, PageID.1354).

ii. FTCA Claims

Although sovereign immunity generally shields the United States from being sued directly, the Federal Tort Claims Act (FTCA) waives that immunity for certain tort claims. *Zappone*, 870 F.3d at 555 (citing *Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 260 (1999)). Specifically, a plaintiff may sue the federal government

"for personal injury or property damage 'caused by the negligent or wrongful act or omission' of government employees acting within the scope of their employment." *Id.* (citations omitted). To bring a timely claim under the FTCA, a plaintiff must first present an administrative claim "in writing to the appropriate Federal agency within two years after such claim accrues." 28 U.S.C. § 2401(b). Then, the Plaintiff must file their FTCA claim "within six months after the date of mailing." *Id.* "If he fails to meet either of these time constraints, his 'tort claim against the United States shall be forever barred.'" *Id.*; *Zappone*, 870 F.3d at 555.

C. Accrual of Plaintiff's Claims

Generally, a statute of limitations begins to run at the point in time when a claim "accrues," "that is, when a plaintiff is aware or should be aware of being injured by the defendant's wrongful act." *Singleton v. City of New York*, 632 F.2d 185, 191 (2d Cir. 1980); *see also Kelly v. Burks*, 415 F.3d 558, 561 (6th Cir. 2005). A *Bivens* claim or a claim brought under 42 U.S.C. § 1983 accrues when a plaintiff "ha[s] reason to know of the alleged [ ] injury." *Kelly*, 415 F.3d at 561. Similarly, a claim brought under the FTCA generally accrues "at the time of the plaintiff's injury." *Amburgey v. United States*, 733 F.3d 633, 637 (6th Cir. 2013) (citing *United States v. Kubrick*, 444 U.S. 111, 111 (1979)).

In both complaints, Plaintiff alleges he has suffered a number of injuries, including "[being] shot in the abdomen at point blank range," "residual physical and psychological injuries…including but not limited to [ ] severe anxiety, severe depression, severe paranoia, severe digestive issues, and incurable abdominal pains," and his

incarceration for "32 years and 7 months," 17 months of which were allegedly the result of Defendants' refusal to advocate for his release. (*See Wershe II*, ECF No. 1, PageID.23-38). The vast majority of these injuries accrued in the 1980s, including Plaintiff's alleged physical and psychological injuries and his sentencing and incarceration in 1987. Plaintiff's latest claim accrued in 2003, when he "would have been released on parole... if it had not been for the United State [sic] attorney letter and the unsealing of [his] grand jury testimony." (*Wershe II*, ECF No. 9-1, PageID.47, Wershe Affidavit).[5]

Likewise, for Plaintiff's *Bivens* and § 1983 claims to be timely, they must have been filed by 2006, three years after the accrual of his latest injury in 2003. *Zappone*, 870 F.3d at 559. *Wershe I* was not filed until July 20, 2021. (*See Wershe I*, ECF No. 1). For Plaintiff's FTCA claims to be timely, an administrative claim must have been presented to the appropriate Federal agency by 2005, two years after the accrual of his latest injury in 2003. 28 U.S.C. § 2401(b); *Zappone*, 870 F.3d at 555. Plaintiff did not file an administrative claim until July 19, 2021, and *Wershe II* was not filed until October 28, 2022. (*Wershe II,* ECF No. 1; ECF No. 6, PageID.88). Likewise, Plaintiff's claims under the FTCA are untimely. Because Plaintiff's claims in both *Wershe I* and *Wershe II* were untimely under the relevant statutes of limitations, they are barred and must be dismissed unless equitable tolling applies.

---

[5] Plaintiff's affidavit mirrors many of the central claims included in his complaint and, therefore, the court will consider this exhibit. *See Ashh, Inc.*, 475 F. Supp. 3d at 678.

D. Equitable Tolling

Even if a plaintiff's claims are untimely under the relevant statute of limitations, they may still be brought if they meet the standards for equitable tolling. *Zappone*, 870 F.3d at 556; *see also Doe v. United States*, 76 F.4th 64, 71 (2d Cir. 2023) ("Under federal law… the accrual of FTCA and *Bivens* claims may be subject to equitable tolling."). In general, equitable tolling is available "when a litigant's failure to meet a legally-mandated deadline unavoidably arose from circumstances beyond that litigant's control." *Id.* (citations omitted). However, equitable tolling is available only in "rare and exceptional circumstances." *Doran v. Birkett*, 208 F.3d 213 at *2 (6th Cir. 2000). The plaintiff bears the heavy burden of showing he is entitled to equitable tolling. *Davis*, 2016 WL 5720811 at *8 (citing *Abbas v. Dixon*, 480 F.3d 636, 642 (2d Cir. 2007) ("The plaintiff bears the burden of showing that the action was brought within a reasonable period of time after the facts giving rise to the equitable tolling or equitable estoppel claim have ceased to be operational.")).

Historically, the Sixth Circuit has utilized a five-factor test to determine whether equitable tolling applies to a claim. *Zappone*, 870 F.3d at 556. These factors are:

> (1) the plaintiff's lack of notice of the filing requirement;
> (2) the plaintiff's lack of constructive knowledge of the filing requirement;
> (3) the plaintiff's diligence in pursuing [their] rights; (4) an absence of prejudice to the defendant; and

> (5) the plaintiff's reasonableness in remaining ignorant of the particular legal requirement."

Jackson v. United States, 751 F.3d 712, 719 (6th Cir. 2014); *Zappone*, 870 F.3d at 556. While these five factors are important considerations, they are neither "comprehensive nor material in all cases." *Zappone*, 870 F.3d at 556. The Sixth Circuit has further stated that "'a litigant's failure to meet a legally mandated deadline' due to 'unavoidab[le]…circumstances beyond that litigant's control' is often the most significant consideration in courts' analyses, rather than any particular factor of the five part standard." *Id.*; *see also Graham-Humphreys v. Memphis Brooks Museum of Art*, 209 F.3d 552, 560-61 (6th Cir. 2000).

The Supreme Court has recently created a more streamlined, two-factor test for equitable tolling in the habeas context. *Holland v. Florida*, 560 U.S. 631, 649 (2010). Under the *Holland* test, an individual is entitled to equitable tolling only if he shows: "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Id.* The Supreme Court has not definitively ruled on whether this test applies outside of the habeas context. *See Menominee Indian Tribe of Wisconsin v. United States*, 577 U.S. 250, 257 n.2 (2016) ("*Holland v. Florida*... is a habeas case, and we have never held that its equitable-tolling test necessarily applies outside the habeas context… because we agree that the Tribe cannot meet *Holland*'s test, we have no occasion to decide whether an even stricter test might apply to a nonhabeas case."). However, other circuits, including the Second Circuit, have directly applied this test to equitable tolling claims involving a reasonable fear of retaliation.

Doe, 76 F.4th at 71 ("Before a court may exercise discretion to grant equitable tolling, a litigant must demonstrate as a factual matter the existence of two elements: first, 'that some extraordinary circumstance stood in [her] way' and second 'that [she] has been pursuing [her] rights diligently.'") (citations omitted).

The Sixth Circuit has expressly declined to adopt the *Holland* test more broadly, noting that the Supreme Court has never adopted it outside of the habeas context. *Zappone,* 870 F.3d at 556. In *Zappone v. United States,* the Sixth Circuit noted that, because they had previously utilized the five-factor test, the "law-of-the-circuit doctrine" precluded them from replacing it with the Supreme Court's new two-factor standard. *Id*. The Sixth Circuit has also recognized that equitable tolling "must necessarily be determined on a case by case basis" and held that "both standards can inform our evaluation" because "the two approaches are quite compatible and may often lead to the same result." *Id*.

Likewise, the court will analyze all of the relevant factors from both tests to address the timeliness of Plaintiff's claims. Because these factors all weigh against equitable tolling, Plaintiff's claims indeed fail under either approach. *See id*. at 557 ("under either approach, the Zappones fail to meet the requisite burden to excuse the untimeliness of their state-law claims.").

i. Knowledge and Notice

The court will first look at the knowledge and notice factors of the Sixth Circuit's five-factor test: factors one, two and five. Factor one asks the court to consider "the plaintiff's lack of notice of the filing requirement," factor two asks the court to consider "the plaintiff's lack

of constructive knowledge of the filing requirement," and factor five asks the court to consider "the plaintiff's reasonableness in remaining ignorant of the particular legal requirements." *Jackson*, 751 F.3d at 719. Defendant United States argues "Wershe cannot argue that he was unaware of the requirement to file a… claim until July 2021, because he's had multiple attorneys who were aware of his allegations regarding Dixon, Groman, Helland, and King." (*Wershe II*, ECF No. 6, PageID.89). The court agrees. Plaintiff has never suggested that he was unaware of the required deadlines or timing requirements. *See Jackson*, 751 F.3d at 719 (finding these factors weighed against equitable tolling when the court could reasonably ascertain that "[plaintiff] and her counsel were aware of the relevant provisions in the FTCA governing when a claim could be filed."). Rather, he has emphasized that he failed to file his cases earlier because he was "terrified of his captors...and the hopelessness inevitably instilled by his sentence of life without parole sapped the 'fight' out of him the entire time he was incarcerated." (*Wershe I*, ECF No. 4, PageID.97). Accordingly, these three factors weigh against equitable tolling.

ii. Prejudice

Factor two of the Sixth Circuit's test asks the court to analyze whether there is an "absence of prejudice to the defendant." *Jackson*, 751 F.3d at 719. Defendant United States specifically argues: "[t]here is undeniably prejudice to the United States by Wershe's delay since his claims are now decades old. It is unlikely that Defendant will be able to find relevant documents, or that witnesses, if still alive and able to be located, will recall details to rebut Wershe's

allegations." (*Wershe II,* ECF No. 6, PageID.89). Again, the court agrees. The individually named *Bivens* Defendants have all since retired or passed away, and any other parties who may have witnessed actions relevant to this case are likely to be difficult to locate. The key allegations in this case occurred in the 1980s, over 40 years ago. Even the most recent alleged injuries occurred 20 years ago. While some of the relevant evidence will be easy to find, and has since been provided to this court, there is likely a substantial amount of evidence that will be extremely difficult, if not impossible, to uncover given the length of time since Defendant's injuries. Likewise, this factor weighs against applying equitable tolling.

iii. Diligence

Under both the Sixth Circuit's five-factor test and the Supreme Court's two- factor test, the court must determine whether a plaintiff "has been pursuing his rights diligently." *Jackson*, 751 F.3d at 719; *Holland*, 560 U.S. at 649. The diligence required for equitable tolling is "reasonable diligence. not maximum feasible diligence." *Holland*, 560 U.S. at 653. Additionally, when a claim for equitable tolling is based on a reasonable fear of retaliation, the diligence prong also asks whether the plaintiff acted diligently to seek protection from the feared individuals. *Davis*, 2016 WL 5720811, at *11 ("The court would be hard pressed to conclude that Plaintiff exercised reasonable diligence in pursuing his rights if, for the entire time Plaintiff alleges he faced a threat of retaliation, he did nothing to seek protection from that threat of retaliation."); *see also Clark v. Hanley*, No. 3:18-CV-1765, 2022 WL 124298, at *5 (D. Conn. Jan 13, 2022) (finding plaintiff did not meet the diligence prong where she "never

reported any of the alleged insults made to her by any officers.").

Plaintiff argues that he acted diligently because he "filed this action almost one day before his parole officially ended." (*Wershe I*, ECF No. 40, PageID.826). However, Plaintiff has failed to allege any additional facts showing he acted diligently over the course of his 32-year incarceration when he allegedly suffered a fear of retaliation "from Defendant's [sic] who could influence his situation, no matter what prison he was in." (*Wershe II*, ECF No. 9, PageID.123).

The court finds that Plaintiff has not met his burden to show that he acted "as diligently as reasonably could be expected," where he did not take any action to file a claim or seek protection from the alleged threats of retaliation during his lengthy prison sentence. Plaintiff has not provided any evidence that he discussed his fear of retaliation or any concrete threats with his attorneys, prison officials, or any other individuals from various state or federal law enforcement agencies. In fact, Defendants highlighted that Plaintiff filed a number of other lawsuits against "powerful individuals" while he was in prison, including an unsuccessful appeal of his 1988 cocaine conviction, a lawsuit against the parole board, and a lawsuit against his Michigan prison warden. (*Wershe I,* ECF No. 34, PageID.457-58). While these lawsuits did not directly involve any of the named Defendants and did not allege a similar theory of liability, they indicate that Plaintiff had access to the legal system and did not fear bringing cases against individuals in power.

In analyzing diligence, "[w]hat could reasonably be expected from a plaintiff depends, of course, on the nature of the circumstances [he] faces." *Doe*, 76 F.4th at 73. Plaintiff argues that, under the circumstances of this case,

his fear not only existed while he was incarcerated, but "continued for one year thereafter while Plaintiff was on parole." (*Wershe II,* ECF No. 9, PageID.123). Likewise, because he filed *Wershe I* "the day before (not after} his Michigan probationary period ended and his 'reasonable fear of retaliation' abated," he acted diligently. (*Wershe I,* ECF No. 72, PageID.1402). However, the filing of his case one day before the end of his parole does not excuse 32 years of general inaction. As such, this factor weighs against equitable tolling.

iv. Extraordinary Circumstances

The Supreme Court's two-factor test next asks the court to consider whether "extraordinary circumstances" stood in the plaintiff's way and prevented timely filing. *Holland*, 560 U.S. at 649. Plaintiff relies heavily on *Davis v. Jackson* to argue that his claims should be subject to equitable tolling due to the extraordinary circumstances surrounding his reasonable fear of retaliation. (*Wershe I*, ECF No. 4, PageID.83). In *Davis*, the plaintiff sought to challenge the outcome of his prison disciplinary hearings wherein he was found guilty of drug possession and various other offenses. *Davis*, 2016 WL 572081 at *2-3. The plaintiff conceded that his claims were not timely, but argued they should be subject to equitable tolling because "he was in 'fear of retaliation by… [D]efendants [which] prevented him from filing his [claims] in a timely fashion." *Id.* at *8. The court held that "in the prison context, reasonable fear of retaliation may be sufficient to constitute extraordinary circumstances warranting equitable tolling, particularly if the person threatening retaliation is a defendant or another official who could be or was influenced by a defendant." *Id.* at *11. However, the

court also cautioned that "…certainly not all inmates are entitled to equitable tolling. Generalized allegations of fear of retaliation, therefore, are not sufficient to establish 'extraordinary circumstances' warranting application of equitable tolling." *Id.* (citing *Nicoloudakis v. Bocchini*, No. 13-CV-2009, 2016 WL 3617959, at *3 (D.N.J. July 1, 2016) ("Generalized fear of reprisal is not enough to warrant equitable tolling."). As an initial matter, *Davis* is an unpublished case from the Southern District of New York and is not binding on this court. However, because neither the Sixth Circuit nor the Michigan courts have directly addressed the issue of equitable tolling due to a fear of retaliation, the reasoning in *Davis* is persuasive. *See U.S. v. Flores*, 477 F.3d 431, 433-34 (6th Cir. 2007); *Smith v. Astrue*, 639 F. Supp. 2d 836, 841 (W.D. Mich. 2009) ("like judges throughout the Sixth Circuit, this court regularly discusses nonprecedential decisions when they can illuminate an issue.").

Plaintiff alleges, consistent with the holding in *Davis*, he suffered from a reasonable fear of retaliation "based on actual threats and instances of retaliation" from a number of the Defendants. (*See Wershe I,* ECF No. 19, PageID.240). On his first day in prison, Plaintiff alleges that he witnessed an attempted retaliatory assassination when one prisoner stabbed another prisoner in the neck. *Id.*, PageID.245. After the stabbing, a guard allegedly said to him "get ready, Wershe, that happens every day in here." *Id.* Plaintiff also alleges that, after agreeing to assist with "Operation Backbone," he was moved to a higher security prison and given a false identity for fifteen years because even the AUSAs "were afraid that members of Detroit law enforcement or politics would try and have him killed if they found out he was working against them." *Id.*, PageID.246. Plaintiff claims that his attorney,

William Bufalino, told him directly not to attempt legal action against any of the law enforcement officers for fear of retaliation in the form of losing any chance at being released from prison or direct violence. *Id.* Defendant has repeatedly emphasized that the "powers that be" in the Detroit political community could have retaliated against him at any time.[6] (*See Wershe I*, ECF No. 70, PageID.1377).

While the court recognizes the complicated and unique nature of Plaintiff's circumstances, his allegations do not rise above a "generalized fear of retaliation" such that he should be entitled to equitable tolling. *See Davis*, 2016 WL 5720811, at *11. While Plaintiff may have witnessed a retaliatory stabbing on his first day in prison, the guard's statements did not directly implicate or threaten Wershe personally and he has not alleged he was at risk of retaliatory violence from another prisoner or guard any more than the average prisoner. This stands in

---

[6] Plaintiff also points to a number of alleged threats from prominent politicians and law enforcement officers in the City of Detroit, including his attempted assassination, the fact that his conviction was the result of allegedly falsified evidence, the fact that he was "beaten [ ] brutally" by law enforcement upon his arrest, and the fact that Detroit Mayor Coleman Young called Plaintiff a "stool pigeon." (*Wershe I,* ECF No. 19, PageID.269-70). However, Plaintiff has failed to establish how any of these actions could be directly attributed to the Defendants in this case or how the responsible individuals could have been directly influenced by the Defendants.

contrast to the facts of *Davis*, where the plaintiff was directly warned by a defendant to "not to get comfortable" upon his return to the prison. *See Davis*, 2016 WL 5720811, at *11. The plaintiff in *Davis* also alleged that a false misbehavior report was filed against him, he was told by one prison official "I hope you're not going to write me up for this because I know about you," and he was threatened by another prison official who told him "you know weapons can be found in your cell." *Id.* Additionally, the fact that Plaintiff participated in a prison witness protection program, was relocated to an unknown prison, and was given a pseudonym that would have been unknown to the Defendants, actually makes it less likely that he would have been retaliated against. Finally, while Plaintiff alleges that his attorney counseled him against filing any claims for fear of retaliation, reliance on an attorney's advice in these situations has previously been found to be insufficient for equitable tolling purposes. *See Fox v. Lackawanna Cnty.*, No. 3:16-CV-1511, 2017 WL 5007905, at *10 (M.D. Pa. Nov. 2, 2017); *Rockmore v. Harrisburg Prop. Serv.*, 501 Fed. Appx. 161, 164 (3d Cir. 2012} ("Attorneys' mistakes are generally attributable to their clients, and mere negligence by an attorney is not generally found 'to rise to the 'extraordinary' circumstances required for equitable tolling.'").

Plaintiff has also not alleged any facts tending to show that he was still at risk for retaliation after he was granted parole, released from the Michigan prison system, and transferred to the Florida prison system in 2017. Plaintiff argues that he technically remained in custody by way of his parole while he was in prison for five years in Florida and was "afraid that he could be 'reimprisoned' at any time after his release, on falsified charges." (*Wershe I,* ECF No. 40, PageID.835). Plaintiff also claims his fear

of retaliation persisted because "the powers that be" ensured he was placed in solitary confinement for 16 months in the Florida prison. *Id*. However, he provides no plausible facts to suggest any of the Defendants could have exerted control in the Florida prison system or had any means to retaliate against Plaintiff while he was incarcerated there. While Plaintiff demonstrated that he *subjectively* feared retaliation by the Defendants and other individuals in the Detroit law enforcement community[7], he has not alleged any actual threats or circumstances that would create an *objectively* reasonable fear of retaliation. *See Goodlow v. Camacho*, No. 3:18-CV-0709-CAB- MDD, 2020 WL 5709255, at *9 (S.D. Cal. Sept. 24, 2020) ("a plaintiff must show both an objective and subjective basis for a reasonable fear of retaliation.").

Plaintiff argues that the fact that he cannot point to direct threats made by any of the Defendants is not fatal, because *Davis* merely stands for the principle that "inmates *may* show extraordinary circumstances for purposes of equitable tolling where they allege specific facts showing that a reasonable fear of retaliation prevented them from filing a timely complaint." (*Wershe I*, ECF No. 72, PageID.1396; *Wershe II,* ECF No 9, PageID.123). However, other courts that have analyzed equitable tolling based on a reasonable fear of retaliation

---

[7] Defendant relies heavily on a report completed by Dr. Larry M. Friedberg, Ph.D. to argue that his fear of retaliation was real. (*See Wershe I,* ECF No. 19-3). However, because this report presents information that is outside the central allegations of his complaint, it cannot be considered at the motion to dismiss stage. *See Ashh, Inc.*, 475 F. Supp. 3d at 678.

have specifically looked for actual threats or instances of harm at the hands of the defendants. *Doe,* 76 F.4th at 72 (finding a reasonable fear of retaliation where Plaintiff "testified that [Defendant] violently raped her on a regular basis for a period of seven years, scarred her with acts of physical violence, treated her like his 'slave,' and threatened to further harm and even kill her."); *Gabbidon v. Wilson*, No. CV 1:19-00828, 2021 WL 625232, at *9 (S.D.W. Va. Feb 17, 2021) (finding equitable tolling applied where the plaintiff alleged "defendant threatened plaintiff in an effort to ensure her silence, which included gathering data on her family and stating that he could affect her immigration status," and telling plaintiff "to stop whatever it is that she's filing… because they [were] watching [her]…"). Allowing an individual to satisfy the test for equitable tolling based solely on their subjective fear of retaliation without any concrete evidence of threats or actual retaliatory actions on behalf of the defendants would impermissibly broaden the equitable tolling analysis. *See Doran*, 208 F.3d at *2 (emphasizing that equitable tolling is available only in "rare and exceptional circumstances.").

The court agrees with Plaintiff that the circumstances underlying his case are unique. However, "[w]hether a plaintiff faced extraordinary circumstances depends not on 'the uniqueness of a party's circumstances,' or the outrageousness of what they endured, 'but rather... the severity of the obstacle impeding compliance with a limitations period.'" *Doe*, 76 F.4th at 72 (citing *Smalls v. Collins*, 10 F.4th 117, 145 (2d Cir. 2021) (quoting *Harper v. Ercole*, 648 F.3d 132, 137 (2d Cir. 2011))). The crux of the extraordinary circumstances test is whether a plaintiff can allege "specific facts showing that a reasonable fear of retaliation prevented them from filing a timely

complaint." *Davis*, 2016 WL 572081, at *11; *see also Stone #1 v. Annucci*, No. 20-CV-1326) RA, 2021 WL 4463033, at *12 (S.D.N.Y. Sept. 28, 2021). Plaintiff has failed to do so.

Deciding whether equitable tolling applies in a case is a "discretionary 'exercise of a court's equity powers.'" *Doe*, 76 F.4th at 71 (citing *Holland*, 560 U.S. at 649}. The law prohibits a judge from exercising their discretion to find equitable tolling where required elements, including extraordinary circumstances and diligence, are missing. */d.* As discussed above, all of the factors in both the Sixth Circuit's test and the *Holland* test weigh against finding equitable tolling. Despite Plaintiff's request, the court cannot forego the legal requirements and grant relief where it is not merited.

IV. CONCLUSION

Plaintiff's allegations affirmatively show that his claims are time-barred and must be dismissed. *See Cataldo v. U.S. Steel Corp.*, 676 F.3d 542, 547 (6th Cir. 2012}. Likewise, Defendants' motions to dismiss (*Wershe I,* ECF Nos. 8, 34; *Wershe II*, ECF No. 6) are **GRANTED** as to the statute of limitations issue, and both *Wershe I* and *Wershe II* are **DISMISSED** with prejudice.[8] The remaining motions in both cases (*Wershe I*, ECF Nos. 48, 55; *Wershe II*, ECF No. 10) are **DENIED** as moot.

---

[8] Defendants' motions to dismiss are granted insofar as Plaintiff's claims are barred by the statute of limitations. This opinion should not be taken as a ruling on the merits of any of the other substantive claims included in these motions.

SO ORDERED.

Date: September 18, 2023

s/ F. Kay Behm
F. Kay Behm
United States District Judge

APPENDIX B

RECOMMENDED FOR PUBLICATION

Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 24a0168p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

RICHARD WERSHE, JR., *Plaintiff-Appellant,* *v.* CITY OF DETROIT, MICHIGAN; WILLIAM JASPER; KEVIN GREENE; HERMAN GROMAN; UNKNOWN FORMER ASSISTANT UNITED STATES ATTORNEY; CARROL DIXON, as Representative of the estate of James Dixon; EDWARD JAMES KING; LYNN HELLAND, *Defendants-Appellees.*	No. 23-1902

RICHARD WERSHE, JR., *Plaintiff-Appellant,* *v.* UNITED STATES OF AMERICA, *Defendants-Appellees.*	No. 23-1903

Appeal from the United States District Court for the Eastern District of Michigan at Flint.
Nos. 4:21-cv-11686; 4:22-cv-12596—F. Kay Behm, District Judge.

Argued: July 18, 2024

Decided and Filed: August 8, 2024

Before: CLAY, McKEAGUE, and READLER, Circuit Judges.

COUNSEL

Case No. 23-1902

ARGUED: Nabih H. Ayad, AYAD LAW, PLLC, Detroit, Michigan, for Appellant. John G. Adam, LAW OFFICE OF JOHN G. ADAM, PLLC, Berkley, Michigan, for Appellees Dixon, Groman, Helland, and King. Cheryl L. Ronk, CITY OF DETROIT LAW DEPARTMENT, Detroit, Michigan, for Appellees

Jasper, Green, and City of Detroit. **ON BRIEF**: Nabih H. Ayad, AYAD LAW, PLLC, Detroit, Michigan, for Appellant. John G. Adam, LAW OFFICE OF JOHN G. ADAM, PLLC, Berkley, Michigan, Stuart M. Israel, STUART M. ISRAEL, PLLC, Farmington Hills, Michigan, for Appellees Dixon, Groman, Helland, and King. Cheryl L. Ronk, Gregory B. Paddison, CITY OF DETROIT LAW DEPARTMENT, Detroit, Michigan, for Appellees Jasper, Green, and City of Detroit.

Case No. 23-1903

ARGUED: Nabih H. Ayad, AYAD LAW, PLLC, Detroit, Michigan, for Appellant. Jennifer L. Newby, UNITED STATES ATTORNEY'S OFFICE, Detroit, Michigan, for Appellee. **ON BRIEF**: Nabih H. Ayad, AYAD LAW, PLLC, Detroit, Michigan, for Appellant. Jennifer L. Newby, UNITED STATES ATTORNEY'S OFFICE, Detroit, Michigan, for Appellee.

OPINION

CLAY, Circuit Judge. Plaintiff Richard Wershe, Jr., appeals the district court's dismissal of his complaints in two lawsuits pursuant to Federal Rule of Civil Procedure 12(b)(6). On July 20, 2021, Wershe sued the City of Detroit and federal and state law enforcement officials for violations of his constitutional rights under 42 U.S.C. § 1983 and *Bivens*, see *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics,* 403 U.S. 388 (1971). Based on the same underlying

facts, on October 28, 2022, Wershe also sued the United States for violations of the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq*. In a consolidated order, the district court dismissed Wershe's complaints with prejudice because Wershe's claims were time-barred. For the reasons set forth below, we **AFFIRM** the district court's order.

I. BACKGROUND

A. Factual Background

We draw the following facts from Wershe's complaints and take them to be true at the motion to dismiss stage. *See Marvaso v. Sanchez*, 971 F.3d 599, 605 (6th Cir. 2020).

In 1984, when Wershe was fourteen years old, his father contacted the Federal Bureau of Investigation ("FBI") about a known drug dealer who had begun dating Wershe's sister. FBI Agent James Dixon met with Wershe's father about the dealer, and Wershe's father brought Wershe along. At the meeting, Dixon showed Wershe and his father photographs of neighborhood individuals who were of interest to the FBI, and Wershe was able to identify most of them.

Based on Wershe's ability to identify neighborhood individuals of interest to the FBI, Dixon began using fourteen-year-old Wershe as a drug informant for a joint task force between the FBI and the Detroit Police Department. To solicit information from Wershe, FBI agents would show up unannounced while Wershe walked to school, to his home, and to other locations, sometimes several

times a week or daily. Because Wershe was a juvenile and afraid of law enforcement, he felt he could not refuse. Over the following year, Wershe's involvement with the task force deepened. Federal and state officers, including Defendants Groman, Jasper, and Greene, instructed Wershe to buy and sell drugs, at one point sending him to another state with thousands of dollars to do so.

Wershe's work as a juvenile drug informant placed him in very dangerous situations. As a fourteen- and fifteen-year-old, Wershe was put in proximity to drug trafficking gangs and, by the age of seventeen, experienced multiple attempted shootings. In November 1984, someone shot and nearly killed Wershe, requiring him to be hospitalized and causing injuries to his large intestine. After using Wershe as an informant for a couple of years, Defendants Groman, Jasper, and Greene then cut off contact with him. By 1987, Wershe no longer worked as an informant.

On May 22, 1987, Wershe was arrested after officers received a tip connecting Wershe to a large box of cocaine. Subsequently, Wershe was convicted by a jury of possession with intent to distribute 650 grams or more of cocaine, in violation of Michigan Compiled Laws § 333.7401(2)(a)(i) (amended 2002). *See People v. Wershe*, No. 107785, at 1 (Mich. Ct. App. Apr. 30, 1990). For this conviction, Wershe—then seventeen years old—received the statutorily mandated sentence of life imprisonment without parole, see Mich. Comp. Laws § 333.7401 (1978), although he later became parole eligible based on changes to state law, see Act to Amend 1953 PA 232,

Pub. L. No. 314, Mich. Comp. Laws § 791.234 (1998) (amending Michigan's drug laws to establish parole eligibility for individuals who had been sentenced to life imprisonment without parole).

While Wershe was incarcerated, law enforcement approached him multiple times about cooperating with ongoing investigations. In 1991, Defendants Groman and Helland approached Wershe to participate in "Operation Backbone," an investigation into corruption within the Detroit Police Department and among Detroit politicians. Because Defendant Helland stated that he and Defendant Groman would do everything in their power to get Wershe released if he cooperated, Wershe agreed to participate. After Operation Backbone resulted in the arrest of multiple Detroit police officers and public officials, Defendant Helland arranged for Wershe to be placed in a witness protection program while incarcerated. Through this program, Wershe was relocated within the state prison system and received a fake identity.

In 1992, Wershe was again approached by law enforcement officials, including Defendant King, this time to testify before a grand jury against the "Best Friends" gang. Wershe ultimately agreed to participate based on King's promises that Wershe's grand jury testimony would remain sealed and on the condition that King would do everything in his power to get Wershe's sentence commuted.

Wershe became eligible for parole in 2002, and his parole hearing was scheduled for March 2003.

Ahead of Wershe's parole hearing, Defendant Helland informed Wershe that neither he nor Defendant King could advocate for Wershe's parole because their office did not support Wershe's release. Wershe was denied parole at the 2003 hearing. At the hearing, Wershe observed law enforcement officers reading from his grand jury testimony regarding the Best Friends gang, contrary to his belief that his testimony would remain sealed.

In 2017, Wershe was ultimately granted parole by the Michigan Parole Board. Thereafter, Wershe was immediately transferred to a Florida prison to serve a sentence for an unrelated racketeering charge. Wershe was released from prison on July 20, 2020.

B. Procedural History

Based on the above facts, Wershe brought two lawsuits. On July 20, 2021, Wershe brought his first lawsuit, in which he sued: (1) the City of Detroit, (2) two former Detroit police officers (William Jasper and Kevin Greene), (3) two former FBI agents (Herman Groman and the Estate of James Dixon, via its representative Carol Dixon), and (4) several former assistant U.S. attorneys (Lynn Helland, Edward James King, and Unknown Former Assistant U.S. Attorney). Wershe sued the City of Detroit and the former municipal officials (the "City Defendants") under 42 U.S.C. § 1983, and he sued the former federal officials (the "individual federal Defendants") under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* which recognizes a cause

of action for damages against federal officials. *See* 403 U.S. at 389.

Wershe alleged that while he was a juvenile informant in the 1980s, the former police officers and FBI agents violated his Fifth Amendment substantive due process rights, his Fourth Amendment right to be free from government seizures, and his First Amendment right to family integrity.[1] He also asserted that the former assistant U.S. attorneys had violated and conspired to violate his Fifth Amendment due process rights by allegedly circulating his sealed grand jury testimony ahead of his 2003 parole hearing. Wershe additionally claimed that several Defendants breached a promise to advocate for him at his 2003 parole hearing, in violation of his Fifth Amendment due process rights. Finally, Wershe alleged that the City of Detroit was liable for its police department's conduct based on *Monell* liability. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978).

On October 28, 2022, Wershe brought a second lawsuit, in which he sued the United States under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671 et seq. Wershe alleged that the United States was liable for the conduct of the individual federal Defendants named in the first lawsuit, which he claimed had resulted in the torts of negligence or wanton misconduct, intentional infliction of emotional

---

[1]Although Wershe's complaint alleges violations of his due process rights under the Fifth Amendment, his claims against the City Defendants fall under the Fourteenth Amendment's Due Process Clause. *See Scott v. Clay County*, 205 F.3d 867, 873 n.8 (6th Cir. 2000).

distress, fraud or negligent misrepresentation, and civil conspiracy.

Defendants in both lawsuits moved to dismiss. Thereafter, the district court issued a consolidated order in which it granted Defendants' motions to dismiss in both lawsuits and dismissed Wershe's claims with prejudice. The district court reasoned that dismissal was appropriate pursuant to Federal Rule of Civil Procedure 12(b)(6) because Wershe's claims plainly fell outside of the applicable statutes of limitations and Wershe was not entitled to equitable tolling. Wershe then timely appealed the district court's order.

II. DISCUSSION

Our legal system recognizes time limits on a party's ability to bring claims. These time limits, reflected in statutes of limitations, serve a number of purposes. They prevent parties from bringing claims long after the "evidence has been lost, memories have faded, and witnesses have disappeared." *CTS Corp. v. Waldburger*, 573 U.S. 1, 8 (2014) (quoting *Ord. of R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 349 (1944)). They bring "security and stability to human affairs" by disallowing the revival of claims in perpetuity. *Gabelli v. SEC*, 568 U.S. 442, 448–49 (2013) (quoting *Wood v. Carpenter*, 101 U.S. 135, 139 (1879)). Whether a plaintiff has a just claim or not, in light of the above considerations, "the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Ord. of R.R. Telegraphers*, 321 U.S. at 349.

Despite their value, the time limits imposed by statutes of limitations may on occasion be too

mechanical and unforgiving. *See Holland v. Florida*, 560 U.S. 631, 650 (2010). For that reason, the doctrine of equitable tolling permits a court to pause the statute of limitations when some significant impediment beyond the plaintiff's control prevented the plaintiff from filing a timely action. *See Waldburger*, 573 U.S. at 9. In other words, much of the focus of equitable tolling is the impediment to filing. Thus, the equitable tolling inquiry turns "not on the uniqueness of a party's circumstances or the outrageousness of what they endured," but instead on "the severity of the obstacle impeding compliance with a limitations period." *Doe v. United States*, 76 F.4th 64, 72 (2d Cir. 2023) (internal quotation marks and citation omitted).

These principles are implicated in the case before us today. The district court dismissed Wershe's claims as time-barred. In response, Wershe argues that his limitations periods should have been equitably tolled. He also takes issue with the district court's dismissal of his claims with prejudice, rather than without prejudice, and with the district court's treatment of materials outside the pleadings. Without reaching the merits of Wershe's case, we conclude that the district court correctly disposed of Wershe's claims.

A. Statute of Limitations

Defendants argue that Wershe's claims are barred by the statutes of limitations. Although the statute of limitations is an affirmative defense that a plaintiff ordinarily need not plead to state a claim, dismissal of the plaintiff's claim is appropriate when

"the allegations in the complaint affirmatively show that the claim is time-barred." *Baltrusaitis v. Int'l Union, United Auto., Aerospace & Agric. Implement Workers*, 86 F.4th 1168, 1178 (6th Cir. 2023) (citation omitted). We review the issue of whether a limitations period has expired *de novo*. *Durand v. Hanover Ins. Grp., Inc.*, 806 F.3d 367, 374 (6th Cir. 2015).

Wershe's complaints make clear that both his lawsuit under the FTCA and his lawsuit under § 1983 and *Bivens* were untimely. The FTCA requires plaintiffs to file administrative claims with the government "within two years" after the claims accrued and to commence any legal action "within six months" after the government denies these administrative claims. *See* 28 U.S.C. § 2401(b). Wershe's most recent FTCA claims accrued when he was denied parole shortly after his March 2003 parole hearing, at which Defendants allegedly committed torts. *See Hertz v. United States*, 560 F.3d 616, 618 (6th Cir. 2009) (stating that tort claims under the FTCA generally accrue when the plaintiff is injured). With respect to his most recent FTCA claims, Wershe was therefore required to bring administrative claims shortly after March 2005. *See* 28 U.S.C. § 2401(b). However, Wershe did not file his administrative claims until July 2021, long after the expiration of the FTCA's two-year limitations period. And many of Wershe's FTCA claims date even further back because they relate to torts allegedly committed while Wershe was a juvenile informant from 1984 to 1986.

Likewise, the limitations period for Wershe's § 1983 and *Bivens* claims expired before Wershe sued the City Defendants and individual federal Defendants. Section 1983 and *Bivens* claims lack

express statutes of limitations, and instead "borrow the personal-injury statute of limitations from the state in which the claim arose." *Zappone v. United States*, 870 F.3d 551, 559 (6th Cir. 2017). Because Wershe's § 1983 and *Bivens* claims arose in Michigan, they are subject to Michigan's three-year statute of limitations for personal-injury claims. *See Garza v. Lansing Sch. Dist.*, 972 F.3d 853, 867 n.8 (6th Cir. 2020) (citing Mich. Comp. Laws § 600.5805(2)). Wershe's most recent § 1983 and *Bivens* claims are due process claims related to his March 2003 parole hearing. These claims accrued at the time of the parole hearing or at the latest when Wershe was denied parole. *See Bannister v. Knox Cnty. Bd. of Educ.*, 49 F.4th 1000, 1010–11 (6th Cir. 2022) (observing that the accrual date for due process claims turns on several considerations and that some due process claims accrue before any adverse consequences flow from the due process violation); *see also Johnson v. Memphis Light Gas & Water Div.*, 777 F.3d 838, 843 (6th Cir. 2015) (noting that § 1983 claims accrue when a plaintiff knew or should have known of an injury); *Friedman v. Est. of Presser*, 929 F.2d 1151, 1159 (6th Cir. 1991) (same for *Bivens*). Wershe was therefore required to bring his most recent § 1983 and *Bivens* claims in March 2006 or shortly thereafter, three years from the date of the March 2003 parole hearing or the denial of his parole, but he filed his lawsuit under § 1983 and *Bivens* on July 20, 2021. His earlier claims date back to the 1980s, and those claims are therefore even more untimely.

B. Equitable Tolling

Wershe does not dispute that his claims fall outside of the applicable statutes of limitations. However, he argues that the district court erred by not equitably tolling his limitations periods. We review a denial of equitable tolling *de novo* when the underlying facts are undisputed and for abuse of discretion when there is a factual dispute. *Robertson v. Simpson*, "624 F.3d 781, 784 (6th Cir. 2010). Because we assume Wershe's facts to be true at the motion to dismiss stage, "there are no factual disputes" and *de novo* review applies to the issue of equitable tolling in this case. *Amini v. Oberlin Coll.*, 259 F.3d 493, 498 (6th Cir. 2001)."

An equitable tolling analysis generally proceeds in two steps. A court must first determine whether it has authority to equitably toll a particular statute of limitations. When interpreting federal limitations periods, the authority to equitably toll typically exists if the limitations period is not jurisdictional. *See Boechler, P.C. v. Comm'r*, 596 U.S. 199, 203, 209 (2022); *see also Irwin v. Dep't of Veterans Affs.*, 498 U.S. 89, 95–96 (1990). Wershe's limitations period with respect to his FTCA claims does not implicate this Court's jurisdiction and is therefore subject to equitable tolling. *See United States v. Wong*, 575 U.S. 402, 420 (2015). State law presumptively governs the tolling of Wershe's § 1983 claims against the City Defendants and his *Bivens* claims against the individual federal Defendants, so the availability of tolling for those claims will ordinarily depend on the contours of state law. *See Bishop v. Child.'s Ctr. for Developmental Enrichment*,

618 F.3d 533, 537 (6th Cir. 2010). If equitable tolling is available, the court must next decide whether equitable tolling is warranted based on the governing tolling rules for each claim, as discussed in greater detail for Wershe's claims below.

1. FTCA Claims

This Circuit has traditionally considered five factors to determine whether equitable tolling of an FTCA claim is warranted: whether the plaintiff (1) lacked notice of the filing requirement, (2) lacked constructive knowledge of the filing requirement, (3) diligently pursued his rights, (4) would prejudice the defendant in pursuing the claim, and (5) reasonably ignored the filing requirement.[2] *Zappone*, 870 F.3d at

---

[2] As the district court observed, the Supreme Court has applied a different, two-element equitable tolling test to habeas cases. *See Holland*, 560 U.S. at 649. That test equitably tolls a habeas petitioner's claims when the petitioner shows "'(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Id.* (*quoting Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). However, our Circuit continues to apply the above five-factor equitable tolling test to FTCA claims and other civil claims "[b]ecause the Supreme Court has never expressly adopted the *Holland* test outside of the habeas context." *Zappone*, 870 F.3d at 557; *see also Menominee Indian Tribe v. United States*, 577 U.S. 250, 257 n.2 (2016) ("[W]e have never held that

556. Although these factors are not exhaustive, and not all the factors may be applicable in every case, they serve as useful guideposts for our analysis. *See Graham-Humphreys v. Memphis Brooks Museum of Art, Inc.*, 209 F.3d 552, 561 (6th Cir. 2000). We therefore consider each factor in turn.

a. Actual Notice and Constructive Knowledge

The first and second equitable tolling factors look to whether Wershe had (1) actual notice or (2) constructive knowledge of the filing deadlines. *Zappone*, 870 F.3d at 556. The existence of a publicly available statute setting forth a filing deadline at the very least establishes constructive knowledge. *See Athens Cellular, Inc. v. Oconee County*, 886 F.3d 1094, 1101 (11th Cir. 2018); *see also Atkins v. Parker*, 472 U.S. 115, 130 (1985). Likewise, a plaintiff has constructive knowledge when his attorney should have known of the filing deadlines. *See Rose v. Dole*, 945 F.2d 1331, 1335 (6th Cir. 1991).

These factors weigh against Wershe. The FTCA contains an express statute of limitations provision, which plainly provides notice of the Act's limitations period. *See* 28 U.S.C. § 2401(b). Because

---

[*Holland*'s] equitable-tolling test necessarily applies outside the habeas context."). Regardless, applying the *Holland* test to Wershe's claims would not change the outcome of his case.

the limitations period for an FTCA claim is publicly available, and Wershe's attorneys should have known of it, Wershe was at the very least on constructive notice of his FTCA filing deadlines.

Wershe argues that two attorneys he retained—William Bufalino and Ralph Musilli—mistakenly believed that he would have one year after his release from prison to file claims. According to Wershe, that advice was based on a former Michigan law that tolled a plaintiff's limitations period while the plaintiff was incarcerated. *See* Mich. Comp. Laws § 600.5851(1) (1961) (amended 1993). Even assuming that Michigan law is relevant to the tolling of Wershe's FTCA claims, *but see Zappone*, 870 F.3d at 556–57 (applying federal law to the tolling of FTCA claims), Michigan law abolished incarceration as a ground for tolling in 1993, effective April 1, 1994, and impacted individuals were directed to bring suit by April 1, 1995. *See* Mich. Comp. Laws § 600.5851(9) (1993). At best, the legal advice Wershe received would have been mistaken after April 1, 1995.

However, an attorney's mistake is typically not grounds for equitable tolling. *See Jurado v. Burt*, 337 F.3d 638, 644–45 (6th Cir. 2003); *see also Lawrence v. Florida*, 549 U.S. 327, 336 (2007). That is because the lawyer acts as "the agent of his client," and the client therefore "must bear the risk of attorney error." *United States v. Wright*, 945 F.3d 677, 684 (2d Cir. 2019) (citation omitted); *accord Damren v. Florida*, 776 F.3d 816, 821 (11th Cir. 2015) (per curiam). And the proper remedy for attorney error "is generally a legal malpractice suit or an ineffective assistance of

counsel claim," not equitable tolling. *Jurado*, 337 F.3d at 644–45 (citations omitted).

Courts have recognized an exception to the general rule that an attorney error does not warrant equitable tolling, but that exception does not apply here. When attorney misconduct is extraordinary, as opposed to merely a form of "garden variety" negligence, equitable tolling may be warranted. *Holland*, 560 U.S. at 651–52. For example, a plaintiff might qualify for equitable tolling when his attorney repeatedly ignores his communications, *id.* at 652, refuses the plaintiff's instructions to submit filings, or never speaks or meets with the plaintiff, *Baldayaque v. United States*, 338 F.3d 145, 152 (2d Cir. 2003). However, Wershe does not plausibly allege any such extraordinary attorney conduct here. Instead, an attorney's "be[ing] unaware of the date on which the limitations period expired . . . suggest[s] simple negligence." *Holland*, 560 U.S. at 652. While it is possible that Wershe's attorneys were negligent, any such attorney negligence is not grounds for equitable tolling. *See id.* Because Wershe's attorneys should have known of his limitations periods, he had at least constructive knowledge of his filing deadlines. *See Rose*, 945 F.2d at 1335.

b. Diligence

The next factor looks to whether Wershe diligently pursued the claims he now brings. *Zappone*, 870 F.3d at 556. A plaintiff must have diligently pursued the instant claims during the

entire period over which he seeks equitable tolling. *See, e.g.*, *Medina v. Whitaker*, 913 F.3d 263, 267 (1st Cir. 2019); *Rashid v. Mukasey*, 533 F.3d 127, 132 (2d Cir. 2008); *Alzaarir v. Att'y Gen. of U.S.*, 639 F.3d 86, 90 (3d Cir. 2011) (per curiam). That means the plaintiff must have pursued his claims with "some regularity" during that period, "as permitted by his circumstances." *Smith v. Davis*, 953 F.3d 582, 601 (9th Cir. 2020) (en banc).

Consulting with legal professionals about bringing claims can certainly contribute to a plaintiff's diligence. *See Gordillo v. Holder*, 640 F.3d 700, 705 (6th Cir. 2011) (concluding that litigants diligently pursued their claims when three lawyers, a fourth legal professional, and an immigration judge told the litigants that they lacked available relief). However, the mere fact that Wershe consulted with two attorneys about his claims does not establish his diligence over the multiple decades during which he failed to bring suit.

First, Wershe admits that in 2004 he asked his then-attorney about pursuing legal action against Defendants. However, he chose not to bring suit because "there was a real possibility of him being released on parole." No. 4:22-cv-12596, Compl., R. 1, Page ID #22. Wershe therefore discussed his potential claims with an attorney and made a decision to await his parole determination. His decision to delay his lawsuits based on the possibility of parole is not the type of extraordinary circumstance that ordinarily warrants equitable tolling. *See Waldburger*, 573 U.S. at 9. Wershe also argues that while he was in prison, he feared Defendants would retaliate against him for bringing

claims, and that this excuses his delay. Some courts have recognized that a defendant's "specific and credible" threats of retaliation against a prisoner can support equitable tolling. *See, e.g.*, *Doe*, 76 F.4th at 72. As applied to our Circuit's equitable tolling test, a defendant's threats of retaliation sensibly bear on whether a plaintiff was diligent "as permitted by his circumstances," because a plaintiff's circumstances may be affected by such threats. *See Smith*, 953 F.3d at 601. And our Circuit has already acknowledged that retaliation and intimidation can excuse the failure to satisfy other requirements, such as the exhaustion requirement under the Prison Litigation Reform Act, 42 U.S.C. § 1997e *et seq*. *See Himmelreich v. Fed. Bureau of Prisons*, 766 F.3d 576, 577 (6th Cir. 2014) (per curiam).

However, while Wershe alleges he feared retaliation by other parties for other conduct, he does not allege facts that plausibly suggest that Defendants ever threatened to retaliate as a result of him bringing suit. *See Doe*, 76 F.4th at 72. For example, Wershe asserts that while incarcerated, he participated in the "Operation Backbone" investigation into political corruption and police corruption in Detroit. As a result of his participation, Wershe was placed in a witness protection program, through which he was given a fake identity and was relocated. While Wershe may have feared retaliation from individuals targeted by Operation Backbone, these allegations do not establish any threats of retaliation by Defendants at all, let alone threats targeted at Wershe bringing suit. In fact, it was Defendant Helland, a former assistant U.S. attorney,

who arranged for Wershe's placement in the witness protection program, ostensibly to protect Wershe from any retaliation. Wershe also claims that after he testified before a grand jury against the Best Friends gang, unknown officers circulated his grand jury testimony ahead of his parole hearing. But Wershe fails to demonstrate how this example points to Defendants or is connected to Wershe bringing claims.

Many of Wershe's other allegations amount to a sweeping fear that someone in the justice system would retaliate against him for bringing any legal action. However, such a generalized fear of retaliation is insufficient to warrant equitable tolling. *See id.*; *Huff v. Neal*, 555 F. App'x 289, 296 (5th Cir. 2014) (per curiam); *Davis v. Jackson*, No. 15-CV-5359, 2016 WL 5720811, at *11 (S.D.N.Y. Sept. 30, 2016). Otherwise, any untimely plaintiff who asserted that he was generally fearful of bringing claims would be entitled to equitable tolling. For example, Wershe states that he "was terrified of his captors," No. 4:22-cv-12596, Compl., R. 1, Page ID #15, but such a conclusory allegation "will not suffice" at the motion to dismiss stage, *see Mezibov v. Allen*, 411 F.3d 712, 716 (6th Cir. 2005). He adds that two of his attorneys advised him to forego all legal action for fear of retaliation. However, this does little to establish specific threats of retaliation by Defendants and to turn Wershe's generalized fear of retaliation into a more concrete one.

Furthermore, Wershe's fear of retaliation is made less plausible by the fact that he pursued other legal actions while he was incarcerated,

including a suit against members of his parole board. *See Wershe v. Combs*, No. 1:12-CV-1375, 2016 WL 1253036, at *1 (W.D. Mich. Mar. 31, 2016). He also appealed his conviction and sentence and thereafter sought post- conviction relief multiple times. *People v. Wershe*, No. 107785 (Mich. Ct. App. Apr. 30, 1990) (direct appeal); *People v. Wershe*, No. 87-04902 (Mich. Cir. Ct. Apr. 1, 2003) (motion for relief from judgment); *People v. Wershe*, No. 329110 (Mich. Ct. App. Sept. 29, 2015) (motion for relief from judgment). Insofar as Wershe feared retaliation by anyone in the justice system, it did not prevent him from pursuing these actions, and such actions demonstrate that Wershe had some access to the legal system.

Lastly, Wershe claims that he was diligent because he filed his claims the day before his probation ended. Yet, by this point, Wershe had been released from prison for a year. More importantly, Wershe was required to diligently pursue the instant claims during the full period that he seeks to equitably toll. *See, e.g.*, *Medina*, 913 F.3d at 267. The fact that Wershe brought his claims a year after his release cannot establish his diligence during the multiple decades for which he seeks equitable tolling. *Cf. Capiz-Fabian v. Barr*, 933 F.3d 1015, 1018 (8th Cir. 2019) ("Large time lapses are a significant obstacle to establishing one has diligently pursued his rights.").

c. Prejudice to Defendants

The fourth equitable tolling factor considers whether Defendants would be prejudiced by

equitable tolling. *Zappone*, 870 F.3d at 556. This factor weighs strongly against Wershe. Wershe asks this Court to equitably toll his claims not for some small period of time but for decades. Defendants would be prejudiced by such a result. Defendants note that many of the relevant documents would be nearly impossible to locate, that events would be difficult to recall, and that a significant number of would-be witnesses are now dead. *See Cleveland Newspaper Guild, Loc. 1 v. Plain Dealer Publ'g Co.*, 839 F.2d 1147, 1154 (6th Cir. 1988) (en banc) (observing that a delay in filing a claim may prejudice a defendant if the delay results in the loss of potential witnesses and evidence). For example, they observe that all of the following have passed away: (1) FBI Agent James Dixon, whom Wershe sues through a representative of Dixon's estate, (2) the two attorneys who allegedly advised Wershe of his statute of limitations, (3) a Detroit police commander who allegedly ordered someone to kill Wershe, and (4) former Detroit mayor Coleman Young, who Wershe's appellate briefing claims endangered Wershe.

In fact, Wershe concedes that virtually all relevant documents would be unavailable. He observes that "no direct documentary evidence" exists in this case, that any trial "would be almost purely testimonial," and that the witnesses would be "Plaintiff and Defendants." *See* No. 23-1903, Appellant's Br. at 47. Nonetheless, because he has the burden of proof, he argues that this would prejudice him more than it would prejudice Defendants. Even assuming that is true, the fact that

all the parties would face nearly insurmountable litigation obstacles is of little help to Wershe. The potential prejudice to Defendants is that they might be forced to litigate on Wershe's terms without the help of any documentary evidence that could call his testimony into question. And the extremely limited ability to litigate this case only illustrates that, after so many years, his lawsuits may not be a suitable vehicle for the legal system's function of discerning the truth.

d. Reasonableness

The final factor asks whether Wershe's ignorance of his filing deadlines was reasonable. *Zappone*, 870 F.3d at 556. This factor, which overlaps with some of the prior factors, weighs against Wershe. Insofar as Wershe ignored the filing deadlines because of attorney error, attorney error typically is not grounds for equitable tolling. *Jurado*, 337 F.3d at 644–45. And insofar as Wershe ignored the filing deadlines because of threats of retaliation, as discussed above, his allegations do not plausibly demonstrate that Defendants threatened to retaliate or would have retaliated against him. While Wershe's circumstances are undoubtedly unique, and he alleges a number of concerning facts, his ignorance of the filing deadlines for nearly twenty years for some claims and thirty to forty years for others was not reasonable.

Wershe argues that a jury, not the district court, should have decided whether his ignorance of the filing deadlines was reasonable. At the least,

Wershe adds, he was entitled to an evidentiary hearing. However, "[t]he decision to invoke equitable tolling is a question of law for a court to answer," rather than for a jury. *Zappone*, 870 F.3d at 562. And Wershe never sought an evidentiary hearing below. The district court properly addressed the fifth factor of this Circuit's equitable tolling analysis. As the above five factors show, equitable tolling is not warranted for Wershe's FTCA claims.

2. Section 1983 and *Bivens* Claims

Michigan law presumptively governs the tolling of Wershe's § 1983 and *Bivens* claims. *See Bishop*, 618 F.3d at 537. Just as with our Circuit's five-factor test, however, Wershe is not entitled to equitable tolling under Michigan law.

Section 1983 and *Bivens* claims borrow their statutes of limitations from state law. *Zappone*, 870 F.3d at 559. And ordinarily, "[w]hen the statute of limitations is borrowed from state law, so too are the state's tolling provisions, except when they are 'inconsistent with the federal policy underlying the cause of action under consideration.'" *Bishop*, 618 F.3d at 537 (quoting *Bd. of Regents v. Tomanio*, 446 U.S. 478, 485 (1980)). Although past cases have typically applied this principle to other state grounds for tolling, *see id.* at 537–38 (involving a state statute's tolling of a limitations period while the plaintiff was a minor); *Tomanio*, 446 U.S. at 485–87 (looking to state tolling provisions to determine whether a limitations period could be tolled while the plaintiff pursued a related cause of action), our Circuit has held in multiple unpublished cases that

a state's equitable tolling principles likewise govern § 1983 claims. *See, e.g.*, *Roberson v. Macnicol*, 698 F. App'x 248, 250 (6th Cir. 2017) (considering the possibility of applying Michigan equitable tolling rules); *Helm v. Ratterman*, 778 F. App'x 359, 369 (6th Cir. 2019) (applying Kentucky's equitable tolling statute). *But cf. Martin v. Somerset County*, 86 F.4th 938, 944–45 (1st Cir. 2023) (identifying as an open question in the First Circuit whether state or federal law governs the equitable tolling of § 1983 claims). Because *Bivens* claims, like § 1983 claims, borrow state statutes of limitations, the rationale for applying state equitable tolling principles to § 1983 claims applies to *Bivens* claims as well.

Turning to Michigan's tolling rules, Wershe has not satisfied his burden of pointing to any Michigan law that persuades us to toll his § 1983 and *Bivens* claims; nor is such law apparent. *See Robertson*, 624 F.3d at 784. Wershe does not argue, nor does he appear to qualify, for any of Michigan's statutory grounds for tolling.[3] *See, e.g.*, Mich. Comp.

---

[3] Wershe previously would have qualified for two of Michigan's statutory grounds for tolling, but neither applies now. First, Michigan law formerly would have tolled Wershe's claims while he was incarcerated, but that ground was repealed in 1993, effective April 1, 1994. *See* Mich. Comp. Laws § 600.5851(1) (1961) (amended 1993). Second, when a limitations period expires while the plaintiff is a minor, Michigan law affords the minor a one-year grace period to file claims after the minor turns eighteen years old. *See id.* § 600.5851(1). However,

Laws § 600.5855 (tolling the limitations period where the defendant fraudulently conceals a claim); *id.* § 600.5854 (tolling the limitations period where the plaintiff is unable to bring suit due to war); *id.* § 600.5856(a) (tolling the limitations period where the complaint is filed but not yet served). And under Michigan law, an express statute of limitations ordinarily cannot be equitably tolled. *See Secura Ins. Co. v. Auto-Owners Ins. Co.*, 605 N.W.2d 308, 311 (Mich. 2000) (per curiam). Because Wershe's § 1983 and *Bivens* claims are governed by Michigan's express three-year statute of limitations for personal-injury claims, Mich. Comp. Laws § 600.5805(2), equitable tolling appears to be unavailable under Michigan law.

We need not decide if Michigan's tolling rules are "inconsistent with the federal policy underlying [§ 1983 and *Bivens*]" and thus require the application of federal equitable tolling rules. *See Bishop*, 618 F.3d at 537 (quoting *Tomanio*, 446 U.S. at 485); *see, e.g.*, *Battle v. Ledford*, 912 F.3d 708, 715 (4th Cir. 2019). Wershe has not made that argument on appeal. And even if federal equitable tolling principles governed Wershe's § 1983 and *Bivens* claims, we have already concluded that Wershe is

---

to the extent that any of Wershe's limitations periods expired while he was a minor, his one-year grace period has long passed because he turned eighteen years old in 1988. *See id.*

not entitled to equitable tolling under federal law. *See supra* Section II.B.1.

Under both this Circuit's five-factor test and under Michigan law, Wershe cannot avail himself of equitable tolling, and his claims are therefore time-barred. We thus need not consider several additional arguments made by Defendants, such as that Wershe's "unclean hands" preclude equitable tolling. Without reaching the merits of Wershe's claims, we conclude that it was proper for the district court to dismiss Wershe's complaints.

C. Dismissal with Prejudice

Wershe argues that even if his claims are time-barred, the district court erred by dismissing his complaints with prejudice and, therefore, without leave to amend. Rather, he claims the district court should have permitted him to amend his complaints to add allegations that Defendants directly threatened him with retaliation. Dismissal with prejudice is appropriate when "the complaint could not be saved by an amendment." *Stewart v. IHT Ins. Agency Grp., LLC*, 990 F.3d 455, 457 n.1 (6th Cir. 2021). We review the dismissal of a complaint with prejudice for an abuse of discretion but apply *de novo* review to the determination that an amendment would be futile. *See id.*

The district court did not err by dismissing Wershe's complaints with prejudice. Wershe never moved to amend his complaints for the purpose of curing his statute of limitations deficiencies before the district court. *Cf. Printup v. Dir., Ohio Dep't of Job & Fam. Servs.*, 654 F. App'x 781, 791 (6th Cir.

2016) (affirming the dismissal with prejudice of a plaintiff's time- barred complaint where the plaintiff never moved to amend the complaint and an amendment would have been futile). Furthermore, Wershe does not point to any specific allegations he could add that would change the statute of limitations or equitable tolling inquiries. *See Indep. Tr. Corp. v. Stewart Info. Servs. Corp.*, 665 F.3d 930, 943 (7th Cir. 2012) (affirming dismissal with prejudice where a plaintiff "did not offer any meaningful indication of how it would plead differently"). In fact, Wershe does not contest that the applicable statutes of limitations have expired. His claims clearly fall far outside of the applicable statutes of limitations, and any amendments to cure the statute of limitations deficiencies would plainly be futile.

Similarly, Wershe does not identify any particular allegations that could save his equitable tolling arguments. Of course, it is always possible that a plaintiff may allege some new fact, unknown to this Court now, that makes equitable tolling more compelling. But no such facts are apparent in Wershe's case, given his decades-old claims and the lack of available evidence to litigate his suits.

Wershe argues that he was caught off guard by the district court's focus on whether Defendants issued any specific threats of retaliation. Accordingly, he claims that he should be permitted to add such allegations to his complaint. However, it was Wershe's complaints that introduced the idea that equitable tolling could be based on threats of retaliation. Even on appeal, Wershe does not make any new allegations that plausibly identify specific

threats of retaliation by Defendants. He only generally remarks that he "could have obtained more affidavits and/or facts." No. 23-1902, Appellant's Br. at 59; No. 23-1903, Appellant's Br. at 58. Because no amendments appear able to save Wershe's time-barred claims, dismissal with prejudice of Wershe's complaints was proper.

D. Materials Outside the Pleadings

Lastly, Wershe challenges the district court's handling of materials outside the pleadings.If a district court considers materials outside the pleadings at the motion to dismiss stage, it must ordinarily convert the motion to dismiss into a motion for summary judgment. *Mediacom Se. LLC v. BellSouth Telecomms., Inc.*, 672 F.3d 396, 399 (6th Cir. 2012). However, the district court may consider exhibits attached to the complaint, exhibits attached to the motion to dismiss briefing, items in the record, or public records without converting the motion to dismiss when these items "are referred to in the [c]omplaint and are central to the claims contained therein." *Bassett v. NCAA*, 528 F.3d 426, 430 (6th Cir. 2008). We review the district court's treatment of materials outside the pleadings for an abuse of discretion, *see Wysocki v. Int'l Bus. Mach. Corp.*, 607 F.3d 1102, 1104 (6th Cir. 2010), which occurs when the district court "relies on clearly erroneous findings of fact, applies the law improperly, or uses an erroneous legal standard," *United States v. Pembrook*, 609 F.3d 381, 383 (6th Cir. 2010).

Wershe first takes issue with the district court's failure to consider three affidavits attached to his complaints that allegedly established his fear of retaliation, as well as other evidence attached to his motion to dismiss briefing. However, while this Circuit's case law permits the district court to consider such evidence at the motion to dismiss stage if it is central to the plaintiff's claims, nothing requires the district court to do so. *See Bassett*, 528 F.3d at 430. In this case, the district court reasonably concluded that "many of the submitted exhibits"—both those submitted by Defendants and by Wershe—fell "well outside of the complaint's central claims." No. 4:21-cv-11686, Consol. Order, R. 73, Page ID #1418; No. 4:22-cv-12596, Consol. Order, R. 20, Page ID #213. It was not an abuse of discretion for the district court to do so. In any case, these affidavits do not allege any specific threats of retaliation, and seemingly do not change the equitable tolling analysis given the strength of the factors weighing against equitable tolling.

Wershe next argues that the district court improperly considered Defendants' evidence but refused to consider Wershe's evidence. Specifically, the district court took notice that Wershe had sued his parole board and the prison warden, and had also challenged his conviction. However, unlike the affidavits and other evidentiary materials that Wershe and Defendants incorporated by reference into the pleadings, here the district court simply took notice of other judicial proceedings. And it took notice of these lawsuits "not for the truth of the facts recited therein, but for the existence of the [suits]."

Winget v. JP Morgan Chase Bank, N.A., 537 F.3d 565, 576 (6th Cir. 2008) (citation omitted). It is "well-settled" that courts may do just that, *see Lyons v. Stovall*, 188 F.3d 327, 332 n.3 (6th Cir. 1999), including at the motion to dismiss stage, *see Winget*, 537 F.3d at 576; *see also* Fed. R. Evid. 201(d). The district court did not err in doing so.

III. CONCLUSION

A number of Wershe's allegations, if true, are deeply troubling. That said, we cannot move forward with adjudicating Wershe's claims because his statutes of limitations have long expired. For the reasons set forth above, we **AFFIRM** the district court's dismissal of Wershe's complaints.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Nos. 23-1902/1903

RICHARD WERSHE, JR.,

Plaintiff-Appellant,

v.

CITY OF DETROIT, MICHIGAN; WILLIAM JASPER; KEVIN GREENE; HERMAN GROMAN; UNKNOWN FORMER ASSISTANT UNITED STATES ATTORNEY; CARROL DIXON, as Representative of the estate of James Dixon; EDWARD JAMES KING; LYNN HELLAND,

Defendants-Appellees.

RICHARD WERSHE, JR.,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendants-Appellees.

Before: CLAY, McKEAGUE, and READLER, Circuit Judges.

JUDGEMENT

On Appeals from the United States District Court for the Eastern District of Michigan at Flint.

THESE CASES were heard on the record from the district court and were argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the district court's order of dismissal with respect to both cases is AFFIRMED.

ENTERED BY ORDER OF THE COURT

_____
Kelly L. Stephens, Clerk

APPENDIX C

§ 1346. 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.

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

28 U.S.C.A. § 1346

§ 2401. Time for commencing action against United States

(a) Except as provided by chapter 71 of title 41, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

(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 or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

28 U.S.C.A. § 2401

APPENDIX D

---

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C.A. § 1983