

HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

VLADIMIR SYVYY and LYDIA SYVYY,  
individuals,

Plaintiffs,

v.

MICHAEL WAWRZYCKI, in his individual  
and official capacity; UNKNOWN  
IMMIGRATION AND CUSTOMS AGENTS  
JOHN DOE 1-10, in their individual capacity;  
PIERCE COUNTY; UNKNOWN PIERCE  
COUNTY SHERIFF'S DEPUTIES JOHN  
DOE 1-10, in their individual capacity; KING  
COUNTY; UNKNOWN KING COUNTY  
SHERIFF'S DEPUTIES JOHN DOE 1-10, in  
their individual and official capacity; CITY OF  
ORTING; MATTHEW ELLER, in his  
individual and official capacity,

Defendants.

No. C10-5073-RBL

ORDER ON DEFENDANT  
WAWRZYCKI'S MOTION TO  
DISMISS [Dkt. #23]

**I. INTRODUCTION**

THIS MATTER is before the Court upon Defendant Wawrzycki's Motion to Dismiss Plaintiffs' Complaint pursuant to Fed. R. Civ. P. 12(b)(6) [Dkt. #23]. Defendant argues that Plaintiffs' claims are time-barred by the three year statute of limitations period applied to *Bivens* actions in Washington state. In response, Plaintiffs argue that the statute of limitations was tolled pursuant to RCW 4.96.020(4) and, therefore, the claims are timely. For the following reasons, Defendant Wawrzycki's Motion to Dismiss is granted in part and denied in part.

1 **II. BACKGROUND**

2 Plaintiffs Vladimir and Lydia Syvvy assert that on December 7, 2006, Federal Officer  
3 Defendant Wawrzycki, along with two other United States Immigration and Customs  
4 Enforcement Agents and additional county officers, entered Plaintiffs' personal residence  
5 illegally and without authority. Plaintiffs also assert that Defendants seized them illegally and  
6 without authority and used excessive force on Plaintiff Vladimir Syvvy.

7 On December 4, 2009, Plaintiff Vladimir Syvvy<sup>1</sup> filed and served several pre-suit tort  
8 claim forms. The tort claim forms included 1) Standard Form 210, served on the Office of  
9 Financial Management Risk Division pursuant to Chapter 4.92 RCW; 2) King County Electronic  
10 Claim for Damages Form, served on the Department of Executive Services Risk Management  
11 Division pursuant to Chapter 4.96 RCW; 3) Pierce County Claim Form, served on the Pierce  
12 County Risk Management Department pursuant to Chapter 4.96 RCW; and 4) Standard Form 95,  
13 served on the Department of Homeland Security, U.S. Immigration & Customs Enforcement  
14 pursuant to 28 C.F.R. § 14.2. Defendant Wawrzycki worked for U.S. Immigration and Customs  
15 Enforcement.

16 On February 3, 2010, Plaintiffs filed this lawsuit, asserting a 42 U.S.C. § 1983<sup>2</sup> claim  
17 against Defendant Wawrzycki as joint actor with state law enforcement acting under color of  
18 state law, and a *Bivens*<sup>3</sup> claim against him individually for violation of Plaintiffs' Fourth and  
19 Fifth Amendment rights.

20 **III. ANALYSIS**

21 Dismissal under Rule 12(b)(6) may be based on either the lack of a cognizable legal  
22 theory or absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v.*  
23 *Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). Review is limited to the content of the  
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25 <sup>1</sup> The court has no record of Plaintiff Lydia Syvvy submitting any pre-suit tort claim forms.

26 <sup>2</sup> In the Complaint [Dkt. #1], Plaintiffs specifically assert a claim under 42 U.S.C. § 1981 against Defendant  
27 Wawrzycki, and generally assert a claim under § 1983.

28 <sup>3</sup> *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 392, 393, 91 S.Ct. 1999  
(1971).

1 complaint [and properly incorporated documents], and all allegations of material fact must be  
2 taken as true, and construed in the light most favorable to the non-moving party. *Fed'n of*  
3 *African Am. Contractors v. City of Oakland*, 96 F.3d 1204, 1207 (9th Cir. 1996). Under *Bell*  
4 *Atlantic Corp. v. Twombly*, a litigant cannot simply recite the elements of a cause of action to  
5 avoid dismissal under this Rule. *See* 550 U.S. 554, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929  
6 (2007). He must instead “provide the grounds of his entitlement to relief, which requires more  
7 than labels and conclusions.” *Id.* at 555. The litigant must plead a claim that moves “across the  
8 line from conceivable to plausible.” *Id.* at 570.

9 **A. Claims Brought Under 42 U.S.C. § 1983 and *Bivens***

10 Plaintiffs bring claims against Defendant Wawrzycki under both 42 U.S.C. § 1983 and  
11 *Bivens*. “Actions under § 1983 and those under *Bivens* are identical save for the replacement of a  
12 state actor under § 1983 by a federal actor under *Bivens*.” *Id.* Therefore, § 1983 applies only to  
13 actions against state actors. The relevant portion of § 1983 reads as follows:

14 Every person who, under color of any statute, ordinance, regulation, custom, or usage, of  
15 any State...subjects, or causes to be subjected, any citizen of the United States or other  
16 person within the jurisdiction thereof to the deprivation of any rights, privileges, or  
17 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....

18 42 U.S.C. § 1983. Federal actors may be sued in their individual capacity under *Bivens*.  
19 *See Van Strum v. Lawn*, 940 F.2d 406, 409 (9th Cir. 1991).

20 Although claims under 42 U.S.C. § 1983 apply only to individuals acting under color of  
21 state law, federal employees can act under color of state law if they conspire or act in concert  
22 with state officials to deprive a person of his or her rights. *Billings v. United States*, 57 F.3d 797,  
23 801 (9th Cir. 1995). The Ninth Circuit defines actions under color of state law as “[m]isuse of  
24 power, possessed by virtue of state law and made possible only because the wrongdoer is clothed  
25 with the authority of state law...” *Scott v. Rosenberg*, 702 F.2d 1263, 1269 (9th Cir. 1983), *cert.*  
26 *denied*, 465 U.S. 1078, 104 S.Ct. 1439, 79 L.Ed.2d 760 (1984) (quoting *United States v. Classic*,  
27 313 U.S. 299, 326, 61 S.Ct. 1031, 1043, 85 L.Ed. 1368 (1941)).

1 Plaintiffs argue that both § 1983 and *Bivens* claims apply because, although Defendant  
2 Wawrzycki is a federal officer, he acted as a joint actor with state law enforcement and,  
3 therefore, acted under color of state law. Defendant Wawrzycki argues that only *Bivens* applies  
4 because he was a federal officer acting under color of federal law. Because Plaintiffs claim that  
5 Defendant Wawrzycki acted under color of state law, the court will look individually at  
6 Plaintiffs' *Bivens* and § 1983 claims to determine if either are time-barred.

7 **B. Statute of Limitations and Tolling Under *Bivens***

8 Under *Bivens*, the federal courts have inherent authority to award damages to plaintiffs  
9 whose federal constitutional rights were violated by federal officers. 403 U.S. at 395. The law  
10 of the forum state determines the statute of limitations for a *Bivens* action. *Papa v. United*  
11 *States*, 281 F.3d 1004, 2009 (9th Cir. 2002). The applicable statute-of-limitations for a *Bivens*  
12 action arising in Washington State is the three year limitations period under RCW 4.16.080(2).  
13 *See Bagley v. CMC Real Estate Corp.*, 923 F.2d 758, 760 (9th Cir. 1991). The law of the forum  
14 state also provides tolling provisions for a *Bivens* action. *Papa*, 281 F.3d at 1009. Under federal  
15 law, “[a] *Bivens* claim accrues when the plaintiff knows or has reason to know of the injury.” *W.*  
16 *Ctr. For Journalism v. Cederquist*, 235 F.3d 1153, 1156 (9th Cir. 2002).

17 Here, Plaintiffs filed their *Bivens* claim against Defendant Wawrzycki on February 3,  
18 2010, which was after the lapse of the three year statute of limitations provided by RCW  
19 4.16.080(2). However, because federal courts also borrow tolling provisions from the forum  
20 state, the question becomes whether the statute of limitations for the *Bivens* action against  
21 Defendant Wawrzycki was tolled. Plaintiffs do not specifically identify which tolling provision  
22 they claim applies.

23 The tolling provision under RCW 4.96.020<sup>4</sup> did not toll the statute of limitations on  
24 Plaintiffs' *Bivens* action because a *Bivens* action applies to federal actors and RCW 4.96.020  
25 applies only to state actors. In *Matthews v. Macanas*, the plaintiffs appealed dismissal of their

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26 <sup>4</sup> RCW 4.96.020(4) provides that the statute of limitations is tolled during pendency of a 60 day pre-claim notice  
27 under RCW 4.96. Plaintiffs also filed a pre-claim notice under RCW 4.92, which contains a similar tolling  
28 provision under RCW 4.92.110.

1 constitutional tort action brought against federal officers under *Bivens*. 990 F.2d 467, 468 (9th  
2 Cir. 1993), *abrogated on other grounds as stated in Pascual v. Matsumura*, 165 F.Supp.2d 1149,  
3 1151 (D.Haw. 2001). The plaintiffs filed suit after the statute of limitations period had run, but  
4 they argued that a state statute tolled the limitations period. *See id.* at 469. The statute stated  
5 that “the applicable statute of limitations shall be tolled in a related civil damage action against a  
6 ‘peace officer’ during the time the plaintiff’s criminal charges are pending.” *Id.* However, the  
7 court reasoned that because federal officers were not “peace officers” under the state law  
8 definition, the tolling provision did not apply to the federal officers. *Id.*

9 Similarly, RCW 4.96.020 applies to “claims for damages against all local governmental  
10 entities and their officers, employees, or volunteers....” RCW 4.96.020(1). The tolling  
11 provision, therefore, does not apply to a Federal Immigration and Customs Agent such as  
12 Defendant Wawrzycki, being sued as a federal officer under *Bivens*.

13 Plaintiffs also filed Standard Form 95, which is a pre-suit tort claim under 28 C.F.R. §  
14 14.2, and which applies to claims asserted against the United States under the Federal Tort  
15 Claims Act (“FTCA”). *See* 28 C.F.R. § 14.1. The applicable statute of limitations for filing  
16 Standard Form 95 reads, “[a] tort claim against the United States shall be forever barred unless it  
17 is presented in writing to the appropriate Federal agency within *two years* after such claim  
18 accrues....” 28 U.S.C. § 2401(b). Plaintiffs filed Standard Form 95 on December 4, 2009,  
19 which was more than two years after the claim accrued on December 7, 2006. Therefore,  
20 regardless whether the tolling provision under 28 C.F.R. § 14.2 may toll the limitations period on  
21 a *Bivens* action, Plaintiffs may not rely on the tolling provision because the Standard Form 95  
22 was not filed within the requisite two year statute of limitations.

23 Finally, although the statute of limitations for filing a *Bivens* action may be equitably  
24 tolled, or tolled by fraudulent concealment or equitable estoppel, those doctrines are not  
25 applicable here. Plaintiffs explicitly state that the doctrines of equitable tolling and fraudulent  
26 concealment are not at issue in this case [Dkt. #29]. Furthermore, equitable estoppel requires  
27 action taken by a defendant to prevent a potential plaintiff from filing suit. *See Johnson v.*  
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1 *Henderson*, 314 F.3d 409, 414 (9th Cir. 2002). Here, no such misconduct has been alleged, and  
2 no facts have been asserted that would make the doctrine of equitable estoppel applicable.

3 Nothing intervened to toll the applicable statute of limitations. Defendant Wawrzycki's  
4 Motion to Dismiss Plaintiffs' *Bivens* action against him is GRANTED and that claim is  
5 dismissed.

6 **C. Statute of Limitations and Tolling Under 42 U.S.C. § 1983**

7 For federal court claims brought under 42 U.S.C. § 1983, state law determines the statute  
8 of limitations. *Wilson v. Garcia*, 471 U.S. 261, 269, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985).

9 Specifically, federal courts look to the state court's "general or residual personal injury statute of  
10 limitations." *Owens v. Okure*, 488 U.S. 235, 250, 109 S.Ct. 573, 102 L.Ed.2d 594 (1989). It is  
11 undisputed that the relevant Washington statute for § 1983 actions is RCW 4.16.080(2), which  
12 provides a three year limitations period. In this case, Plaintiffs filed suit more than three years  
13 after their claims arose on December 7, 2006.

14 For § 1983 claims brought in federal court, state law also governs "closely related  
15 questions of tolling." *Wilson*, 471 U.S. at 269. Plaintiffs argue that, under RCW 4.96.020(4),  
16 serving the pre-suit forms tolled the statute of limitations for an additional sixty days and,  
17 consequently, the complaint was timely filed. The relevant portion of the statute reads as  
18 follows:

19 No action subject to the claim filing requirements of this section shall be commenced  
20 against any local governmental entity, or against any local governmental entity's officers,  
21 employees, or volunteers, acting in such capacity, for damages arising out of tortious  
22 conduct until sixty calendar days have elapsed after the claim has first been presented to  
23 the agent of the governing body thereof. The applicable period of limitations within  
24 which an action must be commenced shall be tolled during the sixty calendar day period.  
For the purposes of the applicable period of limitations, an action commenced within five  
court days after the sixty calendar day period has elapsed is deemed to have been  
presented on the first day after the sixty calendar day period elapsed.

25 RCW 4.96.020(4).

26 Defendant argues that Plaintiffs' claims were not tolled because RCW 4.96.020 is a state  
27 statute applying to state and local actors. Therefore, the issue before the Court is whether the  
28 tolling provision of RCW 4.96.020(4) applies to toll the statute of limitations of a § 1983 claim

1 when the defendant was a federal officer allegedly acting under color of state law. The Court  
2 concludes that it does.

3 Although federal courts prohibit states from imposing additional prerequisites to § 1983  
4 suits, federal courts may borrow tolling provisions from state law in § 1983 suits. *See Wyant v.*  
5 *Lynnwood*, 621 F.Supp.2d 1108, 1111 (W.D.Wash. 2008). In *Wyant*, the plaintiff filed his pre-  
6 suit tort claim under RCW 4.96.020 within the three year limitations period, and the plaintiff  
7 filed his § 1983 court claim three years and sixty-one days after his claim accrued. *See id.* at  
8 1111-12. The court held that the tolling provision of RCW 4.96.020(4) applied to § 1983 suits  
9 and, therefore, the plaintiff timely filed suit. *Id.* at 1113. The *Wyant* court relied on a Ninth  
10 Circuit decision that addressed whether tolling provisions were preempted in § 1983 federal  
11 court claims. *See Harding v. Galceran*, 889 F.2d 906, 908 (9th Cir. 1989). In *Harding*, the court  
12 concluded that the § 1983 federal action against peace officers could be tolled by a state statute  
13 that tolled the statute of limitations on civil actions until resolution of criminal charges against  
14 the plaintiff. 889 F.2d at 907-08. Here, similarly to *Wyant*, Plaintiffs also filed pre-suit tort  
15 claims under RCW 4.96.020 within the three year limitations period and filed § 1983 court  
16 claims three years and sixty-two days after their claim accrued. Therefore, because the statute of  
17 limitations on a § 1983 claim may be tolled when a pre-suit tort claim is filed under RCW  
18 4.96.020, Plaintiffs' § 1983 claim is timely.

19 While RCW 4.96.020 did not toll the statute of limitations for the *Bivens* claim because  
20 Defendant Wawrzycki was being sued as a federal actor, under the § 1983 claim he is being sued  
21 as a federal officer acting under color of state law. Therefore, because Plaintiffs argue  
22 Defendant Wawrzycki acted under color of state law, he may be considered a state actor for  
23 purposes of the tolling provision under RCW 4.96.020.

#### 24 **IV. CONCLUSION**

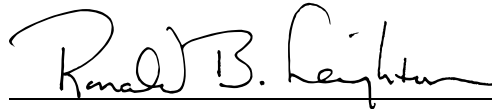
25 Plaintiffs' § 1983 claim was timely filed because the statute of limitations was tolled  
26 under RCW 4.96.020(4), and Plaintiffs' *Bivens* claim is time-barred because it was not filed  
27 within the requisite three year statute of limitations and nothing intervened to toll the limitation.  
28 Therefore, Defendant Wawrzycki's Motion to Dismiss Plaintiffs' Complaint under Fed. R. Civ.

1 P. 12(b)(6) [Dkt. #23] is GRANTED in regard to the *Bivens* claim and DENIED in regard to the  
2 § 1983 claim.

3 Defendant's Motion to Dismiss is GRANTED in part and DENIED in part.

4 **IT IS SO ORDERED.**

5 Dated this 21<sup>st</sup> day of June, 2010.

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9 RONALD B. LEIGHTON  
10 UNITED STATES DISTRICT JUDGE  
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