

No. 17-60291

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

THE TRAVELERS INDEMNITY COMPANY; THE TRAVELERS
INDEMNITY COMPANY OF AMERICA; UNITED STATES FIDELITY AND
GUARANTY COMPANY; ST. PAUL FIRE & MARINE INSURANCE
COMPANY,

Plaintiffs - Appellants

v.

ETHEL MITCHELL, Executrix of the Estate of Phillip Bivens; THE ESTATE OF
LARRY RUFFIN; THE ESTATE OF BOBBY RAY DIXON; LATURAS
SMITH; CARRIE STRONG,

Defendants - Counter Plaintiffs - Counter Defendants - Appellees

v.

SCOTTSDALE INSURANCE COMPANY
Counter Defendant - Counter Plaintiff - Appellant

On Appeal from the United States District Court
Southern District of Mississippi, Eastern Division
No. 2:14-cv-22

BRIEF FOR APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in 5th Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

Appellants believe that oral argument is warranted. This appeal involves determining what insurance policies respond to lawsuits where plaintiffs allege civil rights violations based upon wrongful arrest, prosecution and incarceration. Although this is a matter of first impression under Mississippi law, it has received extensive treatment in other jurisdictions. Appellants believe that oral argument will assist the Court's evaluation of these issues.

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STATEMENT OF JURISDICTION

The United States District Court for the Southern District of Mississippi, Eastern Division (“District Court”) had original subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 1332(a)(1). Complete diversity existed and the amount in controversy exceeded \$75,000. This Court has jurisdiction over this appeal under 28 U.S.C. § 1291 because this appeal is from a Final Judgment entered by the District Court on March 30, 2017. The District Court is within the jurisdiction of the Fifth Circuit Court of Appeals.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the District Court err when it applied a “continuous trigger” theory to hold that there was a duty to defend under the Travelers’ LEL Policies based upon “false imprisonment” caused by law enforcement activities that took place in 1979 and 1980?

2. Did the District Court err when it held that the Travelers’ LEL Policies were triggered by Forrest County’s failure to come forward with exonerating evidence during Dixon’s parole hearings on February 14, 2006 and December 9, 2009?

STATEMENT OF THE CASE

This insurance coverage dispute arises out of the 1979 and 1980 alleged wrongful arrests, interrogations, convictions and incarcerations of three men – Phillip Bivens, Larry Ruffin and Bobby Ray Dixon (collectively, the “Claimants”) – for the May 4, 1979 rape and murder of a woman in Forrest County, Mississippi. In 2010, they were exonerated. ROA.119-ROA120. Following exoneration, the Claimants (or their estates and family members) (collectively, the “*Bivens* Plaintiffs”) initiated a lawsuit in the District Court against Forrest County, the City of Hattiesburg, and a number of their employees (the “*Bivens* Lawsuit”). ROA.12763.

A. The Bivens Lawsuit

The original complaint in the *Bivens* Lawsuit was filed on January 16, 2013. ROA.119. The complaint was amended three times. The third amendment took place after summary judgment briefing was completed requiring the Parties to “refile” their summary judgment motions based upon the new complaint. ROA.9858-ROA.9859. The third amended complaint (“Third Amended Complaint” or “TAC”) was the operative pleading when the District Court granted summary judgment to the *Bivens* Plaintiffs. ROA.12763-ROA.12841. The Third Amended Complaint contained the following allegations:

Ruffin was arrested on May 29, 1979; gave a coerced and fabricated

confession on May 30, 1979; charged on May 30, 1979; indicted on August 2, 1979; and convicted and sentenced to life imprisonment on December 5, 1980. ROA.12776; ROA.12778; ROA.12782. Dixon was arrested in September 1980 on an unrelated matter; gave a coerced and fabricated confession to being an accomplice to the rape/murder on October 3, 1980; and plead guilty and was sentenced to life imprisonment on October 22, 1980. ROA.12785; ROA.12787. Bivens was arrested in October 1980; gave a coerced and fabricated confession to being an accomplice to the rape/murder on November 1, 1980; and plead guilty and was sentenced to life imprisonment on November 4, 1980. ROA.12787-ROA.12789.

The TAC contains the following additional allegations:

Mr. Ruffin, Mr. Bivens, and Mr. Dixon were only imprisoned because the individual Defendants used racially-charged threats and violence to coerce their false confessions, fabricated evidence, ignored evidence that pointed away from these men as suspects, withheld exculpatory and impeachment evidence, and conspired to prosecute them without probable cause.

ROA.12765.

As a direct result of Defendants' misconduct, Mr. Ruffin, Mr. Dixon, and Mr. Bivens sustained injuries and damages including bodily and personal injuries; pain and suffering; physical assault; mental anguish; emotional distress; loss of income; infliction of physical illness; inadequate medical care; humiliation of themselves and of their families; degradation; restrictions on all forms of personal freedom including but not limited to diet, sleep, personal contact, educational opportunity, and family relations, which began in 1979, and continued until the date of their untimely deaths.

ROA.12765.

The individual Defendants affirmatively concealed or otherwise failed to come forward with the truth about their own unconstitutional conduct in connection with the investigation, the coerced confessions, and the trial, despite the fact that this evidence could have been used at any time to demonstrate that Mr. Ruffin, Mr. Dixon, and Mr. Bivens were innocent and to secure their release on parole.

ROA.12791.

In each and every year of Mr. Ruffin's, Mr. Bivens's and Mr. Dixon's combined 83 years of wrongful incarceration, from 1979 to 2010, Defendants breached their legal and constitutional duties to remedy the dangerous situation they created for Plaintiffs and to come forward with evidence of the Wrongfully Convicted Plaintiffs' innocence. If Defendants had been truthful about their conduct, Mr. Ruffin, Mr. Bivens, and Mr. Dixon would never have been arrested, detained, and coerced into confessing; Mr. Bivens and Mr. Dixon would never have pleaded guilty and spent decades in prison for a crime they did not commit; Mr. Ruffin would never have been tried, convicted, and spent decades in prison for a crime he did not commit; and Nikki and Carrie would never have been deprived of a relationship with their father. Even after their arrests and convictions, Mr. Ruffin, Mr. Bivens, and Mr. Dixon all could have used the information possessed by Defendants in post-conviction motions for relief and petitions for parole. Instead, each time Mr. Ruffin, Mr. Dixon and Mr. Bivens came up for parole, Defendants said nothing as many people signed petitions opposing their release and the parole board denied the petitions.

ROA.12800-ROA.12801.

This action seeks damages for the period from May 5, 1979 through each and every year to the present. Defendants' unlawful, intentional, willful, deliberately indifferent, reckless, and racially motivated acts and omissions caused Larry Ruffin, Phillip Bivens, and Bobby Ray Dixon to be wrongly seized, wrongfully convicted, falsely imprisoned, subjected to illegal searches and cruel and unusual

punishment during the course of their incarceration, and forced to serve decades of prison time for crimes they did not commit, and ultimately led to the untimely deaths of Mr. Ruffin, Mr. Dixon, and Mr. Bivens who lived for years in unhealthy conditions and were consistently deprived of necessary medical treatment.

ROA.12805.

Defendants' unlawful, intentional, willful, deliberately indifferent, and reckless acts and omissions caused Larry Ruffin, Phillip Bivens, and Bobby Ray Dixon the following injuries and damages, which were foreseeable to Defendants at the time of their acts and omissions, and continued to the date of their untimely deaths: multiple physical assaults and batteries and other physical injuries, some of which caused permanent disfigurement; pain and suffering; severe mental anguish; emotional distress; loss of family relationships; severe psychological damage; loss of educational opportunity; loss of professional opportunity, loss of income, out-of-pocket legal expenses for appellate representation; infliction of physical illness; inadequate medical care; humiliation, indignities and embarrassment; degradation; permanent loss of natural psychological development; and restrictions on all forms of personal freedom including but not limited to diet, sleep, personal contact, educational opportunity, vocational opportunity, athletic opportunity, personal fulfillment, sexual activity, family relations, reading, television, movies, travel, enjoyment, and expression, for which they are entitled monetary relief.

ROA.12805-ROA.12806.

Larry Ruffin's liberty was curtailed upon his arrest and jailing on May 29, 1979. Bobby Ray Dixon's liberty was curtailed upon his arrest and jailing in September 1980. Phillip Bivens's liberty was curtailed upon his arrest and later forcible removal from California to Mississippi on an airplane in October of 1980. All three were remanded to Parchman prison upon sentencing.

ROA.12806.

The *Bivens* Lawsuit contains the following 42 U.S.C. §§ 1983 and 1985

claims: Violation of the Right Against Self-Incrimination under the Fifth and Fourteenth Amendments; Deprivation of Liberty Without Due Process of Law under the Fourteenth Amendment; Violation of Due Process that Shock the Conscience under the Fourteenth Amendment; Unlawful Seizure and Detention in Violation of the Fourth and Fourteenth Amendments; Failure to Intervene; Conspiracy; Supervisory Liability; Violation of the Right of Familial Association under the First and Fourteenth Amendments; *Monell* Claims; Violation of the Right to be Told about Exculpatory Evidence throughout their Legal Proceeding; and Deprivation of Liberty and Property Without Due Process, Failure to Intervene, and Violations of Due Process that Shock the Conscience under the Fourteenth Amendment. *See* ROA.12810-ROA.12838.

B. The Travelers Policies

Travelers issued Law Enforcement Liability coverage with effective dates of February 18, 2005 to February 18, 2011¹ to Forrest County (“LEL Policies”). The LEL Policies were issued to the Forrest County Board of Supervisors. *See* ROA.298; ROA.305-ROA.315. Under the section entitled, “Who Is Protected Under This Agreement,” LEL Coverage is afforded to the Forrest County public entity, its elected and appointed officials, and its employees and volunteer workers.

¹ Ruffin died in 2002. ROA.12807. Dixon was released in August 2010 and Bivens was released in September 2010. ROA.12800. The Claimants were exonerated on December 14, 2010. ROA.12800. Therefore, any policies issued by Travelers after that date are not implicated.

See ROA.310. The LEL Policies' insuring agreement provides:

We'll pay amounts any protected person is legally required to pay as damages for covered injury or damage that:

- *results from law enforcement activities or operations by or for you;*
- *happens while this agreement is in effect; and*
- *is caused by a wrongful act that is committed while conducting law enforcement activities or operations.*

Injury or damage means bodily injury, personal injury, or property damage.

Bodily injury means any harm to the health of other persons. It includes care, loss of services, or death that results from such harm.

Harm includes any of the following:

- *Physical harm, sickness, or disease.*
- *Mental anguish, distress, injury, or illness.*
- *Emotional distress.*
- *Humiliation.*

Personal injury means injury, other than bodily injury, caused by any of the following wrongful acts:

- *False arrest, detention, or imprisonment.*
- *Malicious prosecution.*
- *Wrongful entry or wrongful eviction.*
- *Invasion of the right of private occupancy of a room, dwelling, or premises that a person occupies.*
- *Libel or slander.*
- *Making known to any person or organization written or spoken material that belittles the products, work, or completed work of others.*
- *Making known to any person or organization written or spoken material that violates an individual's right of privacy.*
- *False or improper service of process.*

- *Violation of civil rights protected under any federal, state, or local law.*

ROA.307-ROA.308.

C. Procedural History

Travelers initiated this lawsuit against the Claimants and the Forrest County Defendants seeking a declaration and judgment that policies of insurance issued by Travelers do not provide coverage in relation to the *Bivens* Lawsuit. ROA.115-ROA.116. The *Bivens* Plaintiffs and the Forrest County Defendants filed counterclaims against Travelers, and other insurers, seeking declarations of coverage for defense and indemnity in relation to the *Bivens* Lawsuit. ROA.822; ROA.854. Travelers, the *Bivens* Plaintiffs and the Forrest County Defendants (“Parties”) filed cross motions for summary judgment on the issue of trigger to determine which, if any, policies are implicated by the *Bivens* Lawsuit. ROA.12757; ROA.13964. In a June 29, 2016 order (“June 29 Order”), the District Court held that the Travelers LEL Policies were triggered and that Travelers had a duty to defend the Forrest County Defendants in relation to the *Bivens* Lawsuit. ROA.16354. Indemnity was not ripe at that time as the *Bivens* Lawsuit was still pending. ROA.16370-ROA.16371. The Parties subsequently engaged in Court ordered settlement discussions, which lead to a settlement of both the *Bivens* Lawsuit and this coverage action. Pursuant to that settlement agreement, Travelers preserved its right to appeal the June 29 Order. ROA.16648; ROA.16658. The

District Court entered final judgment against Travelers on March 30, 2017 and Travelers initiated this appeal.

SUMMARY OF THE ARGUMENT

The *Bivens* Lawsuit is entirely based upon alleged civil rights violations that took place in 1979 and 1980 and alleged injuries flowing from those violations. It was in 1979 and 1980 that the Claimants were arrested, charged, convicted and incarcerated. All of the injuries alleged in the *Bivens* Lawsuit were caused by the alleged civil rights violations that took place in 1979 and 1980. The *Bivens* Plaintiffs alleged that all their injuries and damages, including bodily and personal injuries, began in 1979 or 1980 and continued throughout their imprisonment. Travelers did not insure Forrest County at the time the alleged wrongful acts were committed and the injuries manifested. The first Travelers LEL Policy was not in effect until 2005 – over 26 years after the alleged wrongful conduct that caused all the alleged injuries. The Travelers LEL Policies are simply not triggered.

The District Court acknowledged that the Claimants' injuries were caused by the 1979 and 1980 conduct. Despite this acknowledgment, it held that the LEL Policies were triggered because the Claimants were "falsely imprisoned" during those policies. The District Court applied a "continuous trigger" theory to reach this result. The District Court did not rely on Mississippi precedent. Instead, it made an "*Erie* guess." The District Court's guess places Mississippi in a minority of one. No other court has applied a "continuous trigger" in a wrongful imprisonment case. In fact, every other court to address this issue has resoundingly

rejected the “continuous trigger” theory. Those cases acknowledged that the “continuous trigger” theory was developed to address latent injury claims such as asbestos bodily injury where there is a long latency period between exposure to injurious conditions and manifestation of the injury. In wrongful imprisonment cases there is no latency. Injury – loss of liberty and exposure to prison conditions – is immediately manifested. Therefore, the “continuous trigger” theory has no application in these types of cases and the District Court erred in applying it.

The District Court mentioned one other possible cause of the Claimants’ injuries – the failure to come forward with exonerating evidence in connection with parole proceedings in 2006 and 2009. The District Court did not explain how the passive failure to come forward with exonerating evidence triggered the LEL Policies and once again, this conclusion is not supported by Mississippi or other law. Courts addressing this issue have held that passive conduct is not a triggering event. Indeed, courts have held that even active prosecution in years subsequent to the initial incarceration does not trigger subsequent policies. Those actions, whether passive or active, relate to the original wrong doing and are just a continuation of the original injury. They are not new independent acts causing new injury warranting triggering additional policies. The majority rule, based upon decades of case law, is that only the policies in effect at the time the wrongful

prosecution and/or legal process are commenced are triggered. This Court should apply this majority rule here.

The Bivens Plaintiffs alleged that all of the injuries were part of an unbroken continuum that began with the initiation of the prosecutions. These alleged injuries were immediately manifested in 1979 and 1980 – 26 years before the first LEL Policy. Based on these allegations, the Travelers LEL Policies were not triggered and there was no duty to defend the Forrest County Defendants. The District Court erred when it held otherwise and should be reversed.

ARGUMENT

I. Standard of Review

The Fifth Circuit reviews a district court's grant of summary judgment de novo. *Admiral Ins. Co. v. Ford*, 607 F.3d 420, 422 (5th Cir. 2011); *Century Sur. Co. v. Hardscape Constr. Specialties, Inc.*, 578 F.3d 262, 265 (5th Cir. 2009). Additionally, interpretation of insurance policies is a question of law that this Court reviews under a de novo standard. *Admiral Ins. Co.*, 607 F.3d at 422. When cross-motions for summary judgment exist, the Court reviews each party's motion independently. *Id.* (citing *Ford Motor Co. v. Tex. Dep't of Tramp.*, 264 F.3d 493, 498 (5th Cir. 2001)). When determining whether an insurer has a duty to defend, courts must overlay the language of the policy with the facts alleged in the complaint. *Auto. Ins. Co. of Hartford v. Lipscomb*, 75 So.3d 557, 559 (Miss. 2011). “These allegations, and particularly the conduct alleged in the complaint, determine whether an insurer is required to defend an action.” *Id.* No duty arises when the alleged conduct falls outside the policy's coverage. *Id.*

II. The District Court’s Use of the Continuous Trigger Theory to Trigger Insurance Policies in Wrongful Imprisonment Cases based solely on False Imprisonment is not Supported by Mississippi Law and has been Rejected by Every Other Jurisdiction to Address this Issue.

The District Court improperly utilized “false imprisonment” and the “continuous trigger theory” to conclude that Travelers was required to defend the Bivens Defendants under the Travelers LEL Policies. This erroneous conclusion

appears to be based upon a misunderstanding of “false imprisonment” and the origin, purpose and proper application of the “continuous trigger” theory. To reach its conclusion, the District Court first noted that the Travelers Policies apply to injury during the policy period. ROA.16361-ROA.16362. The Court then held that false imprisonment is “injury” within the scope of the Travelers LEL Policies. ROA.16363. The District Court held that the cause of the “injury” (false imprisonment) was the Forrest County Defendant’s actions in 1979 and 1980. Finally, the District Court made an “*Erie* guess” and predicted that the Mississippi Supreme Court would adopt the “continuous trigger” theory. ROA.16365-ROA.16366. Based on this “*Erie* guess” the District Court applied a “continuous trigger” theory to trigger a duty to defend under the LEL Policies.

In summary, the District Court held that false imprisonment was injury during the LEL Policies that was caused by law enforcement activities that took place in 1979 and 1980 – over 25 years before the inception of the first LEL Policy. The District Court held that the alleged “continuing injury” triggered the LEL Policies. The District Court’s decision is not supported by U.S. Supreme Court precedent or Mississippi state law. It is also contrary to the proper application of the “continuous trigger” theory, which is evidenced by the fact that it has been rejected by every other court to address this issue in the context of alleged civil rights violations resulting in wrongful imprisonment.

A. The District Court Improperly Used False Imprisonment to Trigger Coverage

The LEL Policies, as the District Court noted, are triggered by “injury.” “Injury” is defined, in part, as “personal injury.” “Personal injury” is in turn defined to mean “...injury, other than bodily injury, caused by any of the following wrongful acts:...False arrest, detention, or imprisonment.” The District Court quoted this language and then concluded that “false imprisonment” was the injury triggering the LEL Policies. It erred in reaching this conclusion. It conflated the wrongful act of “false imprisonment” (injury under the LEL Policies) with the damages caused by continued detention. “False imprisonment” is detention without legal process. *Wallace v. Kato, et al.*, 549 U.S. 384, 389 (2007). It ends when the legal process is brought to bear. *Id.* Any damages for unlawful detention occurring after the legal process commences are only recoverable as part of a malicious prosecution claim and not for false imprisonment. *Kato*, 549 U.S. 389-390. The wrongful act of “false imprisonment” was completed years before the LEL Policies. It cannot be used to trigger the LEL Policies. The District Court’s use of “false imprisonment” to trigger the LEL Policies should be reversed.

B. The District Court's Adoption of the Continuous Trigger is not Supported by Mississippi Law

The District Court did not cite any Mississippi state court precedent that has adopted or applied the “continuous trigger” theory in any context. In fact, it acknowledged that Mississippi has not addressed the issue. ROA.16365-ROA.16366. The only state case it cited is *Crum v. Johnson*, 809 So.2d 663 (Miss. 2002). However, *Crum* does not support the District Court’s conclusion. *Crum* involved determining the number of occurrences in a claim involving two victims of dog attacks. The insurer argued that the claim involved a single occurrence and; therefore, only one limit of liability even though there were two victims. The insured argued that there were multiple occurrences and multiple limits of liability available. *Crum* acknowledged that Mississippi applies the “cause test” to determine “number of occurrences.” It ultimately held that the policy language before it was ambiguous. *Crum* held that the policy did not unambiguously state that multiple injuries may not result in multiple occurrences. It then reversed summary judgment for the insurer that the claim involved only a single occurrence and one limit of liability. *Crum*, 809 So.2d at 667.

The District Court did not explain how Mississippi’s use of the “cause test” to determine the number of occurrences in a dog bite case supports its decision to apply a “continuous trigger” to wrongful imprisonment cases. There is no

discussion of any trigger theory in *Crum*. Therefore, it is not clear how that decision guided the District Court's analysis or lead to its "*Erie* guess." In fact, Mississippi's adoption of the "cause test" contradicts application of a "continuous trigger." As the District Court noted, the cause of the Claimants injury (imprisonment) was the initial arrest, conviction and incarceration in 1979 and 1980. ROA.16363. The Bivens Plaintiffs specifically allege that to be the case. Each and every cause of action and alleged injury is tied to the 1979 and 1980 events. See e.g., ROA.12765; ROA.12816-ROA.121818; ROA.12821-ROA.122822; ROA.12823-ROA.12839. By focusing on the continued imprisonment in subsequent years as triggering events, the District Court was necessarily focusing on the effects of Forrest County's alleged conduct. The District Court essentially applied the "effects test" to trigger the LEL Policies. The "effects test" test is the alternative to the "cause test" that is applied in a minority of jurisdictions. See e.g., *Ran-Nan Inc. v. General Accident Ins. Co.*, 252 F.3d 738, 740 (5th Cir. 2001); *Appalachian Ins. Co. v. Liberty Mut. Ins. Co.*, 676 F.2d 56, 61 (3rd. Dist. 1982); *Nicor, Inc. v. Associated Elec. & Gas Ins. Servs., Ltd.*, 223 Ill. 2d 407, 418, 860 N.E.2d 280, 287 (Ill. 2006). However, the "effects test" is not applied in Mississippi. See e.g., *Madison Materials Co., Inc. v. St. Paul Fire and Marine Ins. Co.*, 523 F.3d 541, 543 (5th Cir. 2008) (citing *Universal Underwriters Ins. Co. v. Ford, et al.*, 734 So.2d 173 (Miss. 1999)). The District Court's apparent

application of the “effects test” is not supported and is contrary to Mississippi law including the very case it cited.

Moreover, the “cause test” has been cited as confirming that injuries flowing from wrongful convictions trigger only the policy in effect at the time of the cause of those injuries. *Indian Harbor Ins. Co. v. City of Waukegan*, 33 N.E.3d 613, 623 (Ill. Ct. App. 2015) (citing *Nicor*). In *Nicor*, the Illinois Supreme Court, like the Mississippi Supreme Court, applied the “cause test” to determine the number of occurrences under an insurance policy. *Indian Harbor* cited *Nicor* when it held that injuries stemming from wrongful incarceration:

presented a single cause and therefore a single occurrence. The alleged Brady violations that contributed to Rivera's arrest and convictions might have had an ongoing effect over a period of time, but Rivera's injury resulted from the “same conditions and was inflicted as part of an unbroken and uninterrupted continuum.” *Nicor*, 223 Ill.2d at 419, 307 Ill.Dec. 626, 860 N.E.2d 280.

Indian Harbor, 33 N.E.3d at 623.

The only trigger decision the District Court cited to support application of a “continuous trigger” is its own precedent. *Essex Ins. Co. v. Massey Land & Timber, LLC*, 2006 WL 1464767 (S.D.Miss). In *Massey*, the District Court made its first “*Erie* guess” that Mississippi would adopt the “continuous trigger” theory. However, *Massey* involved very different facts and types of claims. *Massey* involved a residential construction project. The insured performed the earth movement and compaction work. That work was performed improperly resulting

in subsidence and damage to homes and other property. The damage took place over two policy periods before it was discovered that the insured's defective work was the cause of the ongoing damage. *Massey* adopted and applied the "continuous trigger" theory to trigger the second policy. *Massey* describes the various trigger theories adopted by different jurisdictions – exposure, injury-in-fact and continuous. *Massey*, 2006 WL1464767 at *3. *Massey* explains that the "continuous trigger" applies to trigger all policies in effect from exposure to manifestation. *Id.* *Massey* describes the continuous trigger as the "majority" view on trigger and concludes that Mississippi would adopt this majority view. *Massey* then applied the "continuous trigger" theory to trigger the second policy, which was in effect when the damage caused by the insured's conduct manifested. *Id.*²

Even if the District Court guessed correctly that Mississippi would adopt the "continuous trigger", its analysis demonstrates that it misapplied it. As described by *Massey* and in the District Court's opinion, the "continuous trigger" theory is used to trigger all policies in effect from exposure to **manifestation** of injury or damage. *Massey* at *3; ROA.16365-ROA.16366. (emphasis added). This description establishes exactly why the "continuous trigger" theory does not apply to the *Bivens* Lawsuit. The injury used by the District Court to trigger the Travelers

² The District Court's "Erie guess" is contradicted by Mississippi law. See e.g., *Stevens, et al. v. Lake, et al.*, 615 So.2d 1177 (Miss. 1993). *Stevens* held that a statute of limitations was not tolled by continuing ill effects stemming from an original remote act of negligence. *Id.* at 1183. *Stevens* indicates that Mississippi would not apply a "continuous trigger" here as the alleged wrongful acts took place in 1979 and 1980 and not during the LEL Policies.

LEL Policies was “false imprisonment.” This injury “manifested” immediately upon incarceration. It was not an unknown or latent injury caused by a hidden source -- as was involved in *Massey* and the other cases that have adopted a “continuous trigger.” This is precisely why the “continuous trigger” theory has been rejected by every other court to address this issue.

C. The Continuous Trigger Theory has been Universally Rejected and Does not Apply to Cases of Wrongful Incarceration

The “continuous trigger” theory has not been applied to wrongful incarceration cases because of the theory's origin and purpose. “Continuous trigger” developed to address the unique circumstances of long term toxic exposure cases – asbestos exposure in particular. Such cases involve latent injuries, where there is a considerable time lapse between the initial injurious exposure and eventual manifestation of injury or disease. *City of Erie v. Guaranty Nat’l Ins. Co.*, 109 F.3d 156, 164 (3d Cir. 1997). During this latency period, plaintiffs are often unaware of the injury or development of disease. It can also be difficult to determine the precise time that injury took place or the amount of injury that may have occurred at any specific time. *See e.g., Sarsfield v. Great Am. Ins. Co.*, 833 F.Supp.2d 125, 131 (D. Mass. 2008). The “continuous trigger” theory was developed to address these unique circumstances. Conversely, wrongful conviction and incarceration causes instantaneously manifested harm. *See Genesis Ins. Co. v.*

City of Council Bluffs, 677 F.3d 806, 804 (8th Cir. 2012)(stating that in the malicious prosecution context, “[t]he wrong and damage are practically contemporaneous”). As a result, in the context of wrongful incarceration cases, courts have universally held that ongoing or subsequent injury from civil rights violations cannot trigger coverage under policies in effect after the conviction. *See e.g., City of Erie*, 109 F.3d at 165 (rejecting application of a continuous or multiple trigger because there is no interval between arrest and injury, “The plaintiff faces incarceration, humiliation, and damage to reputation as soon as charges are filed. Perhaps for this reason, no federal or state court has adopted the multiple trigger theory in malicious prosecution cases.”); *Town of Newfane v. Gen. Star Nat’l Ins. Co.*, 14 A.D.3d 72, 80 (NY Sup. Ct. 2004)(holding that the offense of malicious prosecution and injuries therefrom occur contemporaneously with the initiation of the criminal prosecution).

In *City of Lee's Summit v. Missouri Pub. Entity Risk Mgmt.*, 390 S.W.3d 214 (Mo. Ct. App. 2012), the Court addressed trigger for Theodore White’s § 1983 claims for malicious prosecution, false arrest, use of unreliable and fraudulent investigatory techniques, procurement of unreliable and fabricated evidence, wrongful conviction and imprisonment, conspiracy, suppression of exculpatory evidence, and violation of policies, practices, and procedures. The City argued that based on White’s allegation that the defendants withheld exculpatory evidence at

each of his three criminal trials and his injuries were ongoing or repeated over a period of several years, there were multiple triggering events. Consistent with other courts, *Lee's Summit* rejected the multiple trigger approach for continuing or repeated injuries used in asbestosis and other latent or gradual injury cases, finding it not well-suited for deprivation of liberty cases where injury is evident from the outset. *Lee's Summit*, 390 S.W.3d at 221-22. The Court further noted that case law involving coverage for malicious prosecution were instructive in the context of a § 1983 civil rights action for deprivation of one's procedural due process, because a malicious prosecution claim is analogous to a claim for constitutional injuries arising from wrongful arrest, conviction and incarceration. *Id.* at 220.

In *Sarsfield v. Great Am. Ins. Co.*, 833 F.Supp.2d 125 (D. Mass. 2008), the Court rejected application of a continuous or multiple trigger, finding the rationale that lead to the adoption of a “continuous trigger” in cases involving asbestosis and other gradually developing long-term diseases was simply not present in the context of wrongful arrest, prosecution, and conviction. The Court concluded that “[t]he plaintiff faces incarceration, humiliation, and damage to reputation as soon as charges are filed. Perhaps for this reason, no federal or state court has adopted the multiple trigger theory in malicious prosecution cases.” *Sarsfield*, 833 F.Supp.2d at 132.

Coregis Ins. Co. v. City of Harrisburg, 2006 WL 860710 (M.D. Pa. March 30, 2006) also rejected the multiple trigger theory in the civil rights context, explaining that the Third Circuit Court of Appeals “noted that the multiple trigger theory has been adopted in very limited circumstances, such as asbestosis, where the injuries caused by exposure do not manifest themselves until a substantial time after the exposure causing the injury. *Coregis*, 2006 WL 860710 at *9 (citing *City of Erie*, 109 F.3d at 164). The court followed the majority rule and held that the insurance policies at issue were not triggered because they were not in effect until “long after [the claimant's] alleged injuries first became manifest.” *Id.* at n.8. The Court reasoned that constitutional deprivations attendant to wrongful prosecution are evident at the time of arrest and incarceration. *See also Ethicon, Inc. v. Aetna Cas. & Sur. Co.*, 688 F.Supp.119 (S.D.N.Y. 1988)(reasoning that since the filing of charges and the manifestation of injuries are contemporaneous, the circumstances justifying application of a multiple trigger are absent); *Chicago Ins. Co. v. City of Council Bluffs*, 713 F.3d 963, 971 (8th Cir. 2013)(finding no meaningful distinction between policies when rejecting a continuous or multiple trigger theory in wrongful conviction cases); *TIG Ins. Co. v. City of Elkhart*, 122 F.Supp.3d 795 (N.D. Ind. 2015) (court rejected application of a continuous trigger, noting its “universal[]-reject[ion]” in cases involving wrongful conviction claims).

The court in each of these cases rejected application of the continuous or multiple trigger despite allegations of ongoing imprisonment or constitutional violations subsequent to the initial charging and incarceration. Despite variations in claims and policy language, the conclusions reached by these courts are unanimous. The “continuous trigger” theory simply does not apply. There is no material difference in the language of the LEL Policies or the allegations in the *Bivens* Lawsuit that would justify a departure from this majority rule. The universal rejection of the “continuous trigger” theory in the context of long term wrongful incarceration claims completely discredits the District Court’s decision. The District Court not only guessed that Mississippi would adopt a minority view but that it would be the only jurisdiction to do so. The District Court’s opinion should be reversed.

III. The District Court Erred When it Triggered the LEL Policies Based Upon the Alleged Failure to come Forward with Exculpatory Evidence.

The only other basis cited by the District Court to trigger the Travelers LEL Policies was the *Bivens* Defendants’ alleged failure to come forward with exonerating evidence in connection with Dixon’s denial of parole on February 14, 2006 and December 9, 2009. ROA.16363. Other than this brief reference, the District Court did not provide any analysis or explanation for this portion of its

decision.³ The District Court did not explain how the passive failure to come forward with exculpatory evidence resulted in new injury triggering even those two policies.⁴ Moreover, the District Court did not substantively address Travelers arguments that there was no new conduct or new injury alleged but simply a continuation of the injury flowing from the original 1979 and 1980 misconduct. The District Court simply described this argument as irrelevant. ROA.16365. However, Travelers' arguments cannot be so blithely pushed aside. They are supported by decades of jurisprudence in this area including recent decisions involving the exact same policy language in the LEL Policies. Not only do these decisions hold that failure to come forward with exonerating evidence is not a new triggering event but even affirmative conduct such as active suppression of evidence or retrials based upon the original coerced confession are not new triggering events.

³ At most, this would trigger coverage under the two policies in effect at those times and only in relation to Dixon's claims. It would not justify triggering each of the LEL Policies as the District Court ultimately concluded. ROA.16372.

⁴ The District Court initially held that the failure to come forward with exculpatory information in connection with petitions for parole is not new, independent "wrongful acts." See ROA.7583-ROA.7585. In so ruling, the District Court cited with approval case law that holds "an official's failure to come forward during the applicable policy period to rectify civil rights violations which occurred prior to the policy period does not trigger coverage." ROA.7583. After the District Court's ruling granting certain insurers judgment on the pleadings, the *Bivens* Plaintiffs were granted leave and filed the Third Amended Complaint in the underlying action. ROA.9858-ROA.9859. The *Bivens* Plaintiffs did not add new claims or alter the nature of the alleged injuries. Instead, they only added new factual details to augment the already existing claims and asserted injuries. The Third Amended Complaint was still premised entirely on the same original misconduct alleged in the previous complaints – all of which occurred in 1979 and 1980. There was nothing alleged in the *Bivens* Lawsuit's Third Amended Complaint that should have altered the District Court's initial ruling.

A. The Alleged “Post-Conviction Conduct” Does Not Trigger Coverage

The District Court appears to identify the *Bivens* Defendants’ alleged failure to disclose exculpatory evidence to the parole board during Dixon’s 2006 and 2009 petitions for parole as triggering events. However, the *Bivens* Plaintiffs did not allege that these post-conviction events expanded the grounds of Forrest County’s liability or caused the Claimants new and distinct injuries. Instead, the *Bivens* Plaintiffs alleged that the *Bivens* Defendants took no action to correct their 1979 and 1980 misconduct. The alleged effect in failing to disclose pertinent information in 2006 and 2009 was to ratify the misconduct in 1979 and 1980. The alleged ongoing concealment and failure to come forward is simply a continuation of the conduct that transpired in 1979 and 1980 that resulted in the wrongful imprisonment. *See e.g., Gulf Underwriters Ins. Co. v. City of Council Bluff*, 755 F.Supp.2d 988 (S.D. Iowa 2010)(holding that the post-conviction conduct was based on a failure to correct past errors and there was no evidence indicating how claimants might have gotten out of jail earlier but for the initial misconduct in 2000). The exculpatory evidence that the Forrest County Defendants allegedly refused to disclose is the same evidence that existed in 1980. Therefore, the alleged failure to come forward during the policy periods, including in Dixons’ 2006 and 2009 parole proceedings, were not new acts or new injury.

Again, there is no Mississippi precedent on point. However, other courts have held that similarly alleged post-conviction acts and omissions stem from the initial wrongful acts and injury and are merely continuations of that alleged harm and do not independently trigger coverage. *See e.g., Indian Harbor Ins. Co. v. City of Waukegan*, 33 N.E.3d 613 (Ill. Ct. App. 2015); *St. Paul Fire & Marine Ins. Co. v. City of Zion*, 2013 WL 3476145 (Ill. Cir. Ct. 2013), *aff'd*, 2014 IL App (2d) 131312 (2d Dist. 2014); *Idaho Counties Risk Mgmt. Program Underwriters v. Northland Ins. Co.*, 205 P.3d 1220 (Idaho 2009); *N. River Ins. Co. v. Broward Cnty. Sheriff's Office*, 428 F.Supp.2d 1284, 1290 (S.D. Fla. 2006).

In *Indian Harbor*, the insured argued that policies issued after the claimants' arrest and indictment were triggered by subsequent acts committed during his incarceration and prosecution including the failure to come forward with exculpatory evidence. The court first concluded that "the initiation of the allegedly malicious prosecution [was] the triggering event for coverage of a malicious-prosecution claim." *Id.* at 621. The court then determined that the trigger for claims based on post-conviction conduct, including *Brady* violations for failure to disclose exculpatory evidence after trial in an effort to keep him in prison, was the same date as the malicious prosecution claim:

We find that all of the acts or omissions alleged to have occurred after the date Rivera was charged are really continuations of the same alleged harm. The purported ongoing acts of conspiracy that

prolonged Rivera's incarceration were not new harmful acts. Instead, they were the continuing effects of Rivera's arrest and ultimately his convictions of rape and murder.

Id. at 623. The court reasoned that,

[the underlying] case presented a single cause and therefore a single occurrence. The alleged Brady violations and other acts merely contributed to the affect of Rivera's arrest, conviction and incarceration. The acts subsequent to Rivera's arrest and indictment might have had an ongoing effect over a period of time, but Rivera's injury resulted from the same conditions and was inflicted as part of an unbroken and uninterrupted continuum.

Id. (internal quotation omitted). In short, the court concluded that allegations of related, ongoing civil rights violations committed subsequent to the original arrest and indictment are just part of and a continuation of the original injury. Those subsequent acts do not create a new trigger of coverage in the years after the claimant is initially wrongfully charged, prosecuted and convicted.

Indian Harbor cited to and relied on, in part, *St. Paul Fire & Marine Ins. Co. v. City of Zion*, 2013 WL 3476145 (Ill. Cir. Ct. 2013), *aff'd*, 18 N.E.3d 193 (Ill. Ct. App. 2014). This decision is instructive because it involved the very same policy language at issue here. The trial court rejected the insured's argument that the uses of a coerced confession at multiple hearings during the incarceration were separate triggering events. *City of Zion*, 2013 WL 3476145 at *30 (holding that the "continued efforts to prosecute Mr. Hobbs were one allegedly tortious cause with points along the way that increased his claimed injury, and not separate

occurrences that trigger additional policies ...”). The court concluded that those events were part of the original prosecution and a continuation of the harm commenced prior to the policies and were not new triggering events. *Id.* at *26 (“The testimony at the suppression hearing regarding the false confession continued the harm and increased the damages resulting from the original misconduct.”). In granting judgment for St. Paul, the court also stated:

This court agrees with St. Paul that all of the claims, including IIED, relate to the allegedly coerced confession and the assertedly malicious prosecution. The single overt act or series of acts resulting in damage to Mr. Hobbs was the coercion of the false confession and the filing of the allegedly malicious charges and the attendant emotional distress. All of the acts and omissions which are alleged to have occurred after the charging date are really just continuations of the same wrong. ... The court disagrees with Waukegan's contention that IIED is a continuing trigger and declines to be the first to apply the continuing tort theory in this context.

St. Paul Fire & Marine Ins. Co. v. City of Zion, 2013 WL 3476145, *25-26 (Ill. Cir. Ct. 2013), *aff'd*, 18 N.E.3d 193 (Ill. Ct. App. 2014).

Idaho Counties also addressed claims that alleged post-conviction wrongs could serve as separate triggers of coverage. In *Idaho Counties*, Donald Paradis was arrested and charged with murder in 1980. He was eventually released from prison in 2001 as a result of a habeas petition. Paradis filed suit against Kootenai County and county employees alleging violation of his civil rights, false arrest, malicious prosecution, false imprisonment, intentional infliction of emotional

distress and defamation. The insurance policies issued to the County by Northland ran from 1986 through 2001. The policies provided occurrence based coverage for bodily injury and personal injury which occur during the policy period. The Idaho Supreme Court held that the time of occurrence was when the injurious effect first manifested itself, which was in 1980-1981. *Idaho Counties*, 205 P.3d at 1226. Finding that the asserted offenses and any resulting injury occurred prior to the Northland policies, the Court concluded that Northland's policies did not provide coverage. *Id.* at 1227-28. Relevant here, the underlying lawsuit included a claim that one of the defendants assisted in suppressing Paradis' subpoena of Haws' 1980–1981 prosecution notes, which Paradis was attempting to obtain for his 1986 habeas corpus petition. The Court found that this allegation did not trigger coverage under the 1986 policy because it involved a continuation of conduct begun at the time of Paradis' trial. *See id.* at 1227 (“The alleged suppression of Paradis' subpoena in 1986 would have been a continuation of Haws' conduct begun in 1980: but for Haws' alleged non-disclosure and subsequent fabrication in 1980, there would have been nothing for Paradis to later subpoena.”). *See also Northfield Ins. Co. v. City of Waukegan*, 761 F.Supp.2d 766, 771–74 (N.D. Ill. 2010), *aff'd*, 701 F.3d 1124 (7th Cir.2012)(holding that malicious prosecution is not a continuing tort that supports a continuous trigger theory); *St. Paul Fire & Marine Ins. Co. v. City of Waukegan, et al.*, No. 15 MR 0289 (Lake County, Ill. April 22,

2016)(holding that subsequent use of coerced confession at retrials were not separate triggers of coverage). ROA.12681-ROA.12881.

These decisions refute the District Court's apparent belief that Forrest County's failure to come forward with exonerating evidence separately triggers insurance coverage. Any such allegations are really just the alleged continuation of the original wrongful conduct and harm initiated years before the LEL Policies incepted. It cannot be used to trigger the Travelers LEL Policies and the District Court's ruling should be reversed.

CONCLUSION

The District Court's ruling that the Travelers LEL Policies were triggered and that a duty to defend owed is not supported by Mississippi law and is contrary to a vast body of precedent. Travelers requests that this Court reverse the District Court's ruling and remand this case for entry of judgment for Travelers holding that it had no duty to defend.

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CERTIFICATE OF SERVICE & CM/ECF FILING

I hereby certify that I caused the foregoing brief to be served on counsel for Appellees via Electronic Mail generated by the Court's electronic filing system (CM/ECF) with a Notice of Docket Activity pursuant to Local Appellate Court 25.1. I also certify that an electronic copy was uploaded to the Court's electronic filing system.

I further certify that one of the participants in the case is not a registered CM/ECF user. Upon the Court's review and approval of the foregoing document one (1) copy will be sent via Express Mail to the following non-CM/ECF participant:

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Pursuant to Rule 32(a)(7) of the Federal Rules of Appellate Procedure and to Fifth Circuit Rule 32.2, the undersigned counsel certifies as follows:

1. The Brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 8783 words, excluding the parts of the Brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(III).
2. This Brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief was prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14 point font.

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Dated: July 25, 2017

CERTIFICATE OF ELECTRONIC COMPLIANCE

I hereby certify that, in the foregoing brief filed using the Fifth Circuit CM/ECF document filing system, (1) the privacy redactions required by Fifth Circuit Rule 25.2.13 have been made, (2) the electronic submission is an exact copy of the paper document, and (3) the document has been scanned for viruses with the most recent version of AVG Internet Security Business Edition and is free of viruses.

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