

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 07-2104

JOSEPH D. AMRINE,
Plaintiff-Appellant,

v.

GEORGE R. BROOKS, *et al.,*
Defendant-Appellees.

Appeal from the United States District Court
Western District of Missouri, Western Division
The Honorable Nanette K. Laughrey, District Judge
No. 2: CV-04-4300 NKL

APPELLANT'S BRIEF

Todd Kennedy
Quinn Emanuel Urquhart
Oliver & Hedges, LLP
50 California Street, 22nd Floor
San Francisco, California 94111
Tel: (415) 875-6600
Fax: (415) 875-6700

Arthur A. Benson II
Jamie Kathryn Lansford
4006 Central Avenue
(Courier Zip: 64111)
P.O. Box 119007
Kansas City, Missouri 64171
Tel: (816) 531-6565
Fax: (816) 531-6688

Counsel for Plaintiff-Appellant Joseph D. Amrine

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

Appellant Joseph D. Armine was convicted in 1986 for a murder he did not commit and was sentenced to death. After Armine spent 17 years on death row, the Missouri Supreme Court reversed his conviction in 2003, granting his petition for a writ of habeas corpus and finding “clear and convincing evidence of Armine’s innocence.” *Armine v. Roper*, 102 S.W.3d 541, 548-49 (Mo. 2003).

Appellees, prison investigator George Brooks and deputy sheriff John Hemeyer, are responsible for this miscarriage of justice. Brooks and Hemeyer approached their investigation of the murder with reckless haste. They ignored the reliable eyewitness testimony of the only corrections officer at the murder scene, and instead relied on the inconsistent, biased, and plainly false statements of two inmates. Only an hour and a half after the murder, the investigative record was replete with inconsistencies and gaping holes. Instead of investigating further, however, Brooks and Hemeyer were so determined to condemn Armine that they sought to ask him questions designed to qualify him for the death penalty. Their actions and omissions shock the conscious.

Armine sued Brooks and Hemeyer in the district court pursuant to 42 U.S.C. § 1983. The court granted summary judgment in their favor, finding that they are entitled to qualified immunity. Armine appeals and respectfully requests 30 minutes of oral argument to address the complex issues raised in this brief.

JURISDICTIONAL STATEMENT

The district court exercised jurisdiction over this case pursuant to 28 U.S.C. § 1331. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291, *et seq.*

The district court granted summary judgment in favor of the defendants on February 6, 2007. On February 21, 2007, Amrine filed a timely Motion to Alter or Amend Judgment pursuant to Federal Rule of Civil Procedure 59(e). The court denied that motion on May 4, 2007. Amrine filed his timely Notice of Appeal on May 7, 2007.

STATEMENT OF ISSUES FOR REVIEW

- I. Whether the district court erred in determining that Brooks and Hemeyer are entitled to qualified immunity.

Kuehl v. Burtis, 173 F.3d 646, 650 (8th Cir. 1999)

- II. Whether the district court clearly erred in determining that only Amrine had a motive to murder Barber.

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000)

- III. Whether Amrine should be permitted to amend his Complaint to assert his substantive due process claim.

Buder v. Merrill Lynch, Fenner & Smith, 644 F.2d 690 (8th Cir. 1981)

Popp Telecom v. Am. Sharecom, Inc., 210 F.3d 928 (8th Cir. 2000)

Dennis v. Dillard Dep't Stores, Inc., 207 F.3d 523 (8th Cir. 2000)

Foman v. Davis, 371 U.S. 178 (1962)

STATEMENT OF FACTS

A. THE FIGHT AND OFFICER NOBLE'S OBSERVATIONS

On October 11, 1985, in the Missouri State Penitentiary, inmates Terry Russell and Gary Barber got in a fight. Russell had accused Barber of spreading a rumor that he had raped inmate Joseph Amrine. When Barber denied it, Russell called him a “punk-ass nigger,” and the two fought. (J.A. 1295). Guards broke up the fight and sent Russell and Barber to separate detention cells, where they were confined for a week. (J.A. 381-82). On October 18, at 10:00 a.m., they were released from confinement. *Id.*

A few hours after being released from their cells, Russell and Barber joined about 40-50 other inmates in a multipurpose room for a 2-hour recreational period. (J.A. 1162 ¶ 96; J.A. 1275). The room was supervised by corrections officers John Noble and Thomas Smith. (J.A. 1273). Officer Noble guarded a locked door, the only way into or out of the room. (J.A. 1273; 1698). Officer Noble held the key to the door. (J.A. 1698, 1621).

Around 2:25 p.m., Noble saw Barber chasing Russell, brandishing a weapon that looked like an ice pick. (J.A. 1273). The two inmates were running toward the door that Noble was guarding. *Id.* As Barber got close to Noble, he dropped the weapon and collapsed to the floor. *Id.*

Noble retrieved the weapon from the floor, opened the locked door, and called out to Corrections Officer David Dobson, who was stationed just outside the multipurpose room. (J.A. 1164 ¶105; J.A. 1273). Officer Dobson entered the room, heard the door close behind him, and ordered that the door be secured. (J.A. 1621). Dobson then radioed for a stretcher and ordered an immediate “lockdown.” (J.A. 1165 ¶106; J.A. 1611).

Pursuant to the penitentiary’s policy and practice, “lockdown” meant that no inmate could enter or leave the multipurpose room or any other part of the unit. (J.A. 1575). In addition, no inmate was allowed to enter or leave the locked room until a list of those present had been obtained. *Id.* In this case, the lockdown lasted for at least an hour. (J.A. 1165 ¶106; J.A. 1611).

After lockdown went into effect, Corrections Officer Danny Bowers entered the room. (J.A. 1273). Officer Noble identified Russell as being the inmate Barber had been chasing. *Id.* Bowers searched Russell, and Russell was escorted to the Captain’s Office. (J.A. 1275; 1299).

B. APPELLEES’ INVESTIGATION

Defendant George Brooks, an investigator for the Missouri Department of Corrections, learned of the stabbing at 2:30 p.m., when it was first reported. (J.A. 1298). He went to the corridor outside the multipurpose room, where he spoke with Officer Noble. *Id.* Noble told Brooks that Barber had been chasing Russell

before he collapsed. (J.A. 1299). Brooks also learned about the fight between Russell and Barber, and the fact that they had just been released from in-cell confinement earlier that day. *Id.* Brooks was informed that Russell had been escorted to the Captain's Office. *Id.*

THE CRIME SCENE -- The multipurpose room was searched several times, and no blood or other physical evidence was found anywhere except where Barber had collapsed. Corrections Officer Kenneth McDaniel searched the room and found nothing. (J.A. 1299). After McDaniel told Brooks that no blood or other physical evidence had been found, Brooks performed his own search of the room, while the inmates were still there, but found nothing. (J.A. 1300).

Brooks instructed the officers to have the inmates leave the room one by one, and to search each inmate as he left. (J.A. 1300). After all the inmates had left the room, it was secured and searched yet another time, but nothing was found. (J.A. 1167 ¶¶ 115-117; J.A.1300). In addition, corrections officers searched the area outside the room, but nothing was recovered. (J.A. 1167 ¶¶116-117; J.A. 1276).

No blood was found anywhere except where it had pooled on the floor around Barber's nose and mouth after he had collapsed. (J.A. 1167 ¶115; J.A. 1299; J.A. 1680-81; J.A. 1711). Even the weapon that Barber had dropped and that Officer Noble recovered showed no blood. *Id.* Nor was there any blood inside

the pants pocket where Noble had held the weapon until turning it over to Brooks. *Id.*

Brooks returned to the Captain's Office. (J.A. 1299). As he would later state in his final investigative report, a "confidential source" informed him that the fight between Russell and Barber involved rumors about Amrine, and that "there was talk" that Amrine had intended to stab Barber. (J.A. 1300). Brooks instructed that Amrine be brought to the Captain's Office. *Id.*

THE FIRST AMRINE INTERVIEW -- Amrine arrived at the Captain's Office at 3:50 p.m. (J.A. 1300). Brooks strip searched him and noticed "a red spot appearing to be blood" on his pants. *Id.* Brooks also noticed three "small red spots" on Amrine's undershirt. *Id.* Brooks took Amrine's clothing into custody, but these spots were never confirmed to be blood, much less Barber's blood. (J.A. 1169, J.A. 1300).

Shortly after Brooks seized Amrine's clothing, Defendant John Hemeyer, Cole County Deputy Sheriff, arrived at the Captain's Office. (J.A. 1301). Brooks told Hemeyer about the information he had received from the "confidential source" and the stains he had observed on Amrine's clothing. *Id.*

After Amrine was read his Miranda rights, Brooks and Hemeyer questioned him at 4:04 p.m. (J.A. 1169 ¶128; J.A. 1301). By this time—only about an hour and a half after the stabbing—Brooks and Hemeyer were so determined to

condemn Amrine that they intended to ask him questions designed to qualify him for the death penalty. (J.A. 1644).

Amrine denied stabbing Barber. (J.A. 1170 ¶129; J.A. 1301). He explained that at the time of the stabbing, he was playing cards at a table with inmates Willis, Jordan, Ball, and Crume. (J.A. 1303). Amrine also explained that the red spots on his clothing could not possibly be Barber's blood, because he was never near Barber. *Id.* Brooks instructed that Amrine be detained in a cell for "investigation of murder." (J.A. 1170 ¶131; J.A. 1302).

THE RUSSELL INTERVIEW -- At 5:35 p.m., Brooks and Hemeyer interviewed Russell. (J.A. 1170 ¶133; J.A. 1302). Russell confirmed that he had called Barber a "punk ass nigger," that they had fought, and that they had been placed in confinement as punishment. (J.A. 1170 ¶133; J.A. 1302). Russell also said that Amrine had intended to stab Barber, but could not because Barber was locked up for the fight with Russell. (J.A. 1302). Despite the fact that Officer Noble had told Brooks only three hours earlier that Barber was chasing Russell before he collapsed, Brooks and Hemeyer did not even broach the subject with Russell. *Id.*

At 8:00 p.m., Brooks and Hemeyer took a formal statement from Russell. (J.A. 1170 ¶134; J.A. 1302). Russell admitted that he was in the multipurpose room at the beginning of the recreation period. (J.A. 1278). Russell claimed, however, that he was not in the room at the time of the stabbing. According to

Russell, about 15 minutes into the period, he asked Officer Noble for permission to leave the room to get some aspirin. *Id.* Russell claimed that Noble gave him permission and opened the door for him. *Id.* Russell then went to the control center, where the aspirin was kept. *Id.* Russell claimed that a sergeant at the control center gave him aspirin in a brown medicine bag. *Id.* According to Russell, he then began talking to inmate “Pebbles.” Russell then heard Officer Dobson yelling for a stretcher. *Id.* Russell claimed that he went to the door of the multipurpose room, but that Officer Noble refused to let him in. *Id.* Russell claimed that Noble finally let him reenter the room “once everybody left.” (J.A. 1279). Russell claimed that he approached Amrine and asked him why he stabbed Barber. (J.A. 1279). Amrine allegedly replied, “I had to do it.” (J.A. 1279).

Several facts made Russell’s alleged alibi suspicious. Russell’s story directly contradicted Officer Noble’s observation that, within seconds of the stabbing, Barber was chasing Russell immediately before Barber collapsed. Russell’s alibi was undermined by two additional facts. First, it would have been impossible for Russell to move from the control center to the multipurpose room during lockdown, as he claimed. To do so, Russell would have had to pass through locked gates manned by officers who would not allow any unescorted inmate to pass. (J.A. 1163 ¶¶ 100-102, 140; J.A. 1611-12). Second, if Officer Noble had really (i) let Russell out of the multipurpose room to get aspirin; (ii) refused to let

Russell back into the multipurpose room after the stabbing; and (iii) later allowed Russell to reenter the room, it would not have made any sense for Noble to have reported that Russell was the one being chased by Barber. If Officer Noble had actually had that much contact with Russell during that short time, Noble would have known without a doubt that Russell was outside the room at the time of the stabbing. Brooks and Hemeyer failed to investigate these contradictions.

Brooks and Hemeyer also failed to perform even a minimal investigation of other key aspects of Russell's alibi. They failed to talk to the sergeant at the control center who allegedly supplied Russell with aspirin. They failed to locate the brown paper bag that allegedly held the aspirin. They even failed to ask Russell what he did with the bag. They failed to identify the inmate "Peebles" that Russell claims he was talking to during the stabbing. (At trial Russell stated that the inmate he was talking to was Harry Heard—another inmate who was never interviewed.) (J.A. 1171 ¶ 139; J.A. 1702-1703). And, despite the glaring contradiction between Russell's story and Officer Noble's statement, Brooks and Hemeyer never questioned Noble about the inconsistencies. To this day, Officer Noble has steadfastly stuck to his identification of Russell as the inmate whom Barber was chasing. (J.A. 1171-72 ¶ 139; J.A. 1710).

Hemeyer acknowledges that he had "doubts" about Russell's story. (J.A. 1651). However, Hemeyer felt that it was not his "function" to talk to Noble or

investigate the inconsistencies. *Id.* Rather, according to Hemeyer, his job “was to get the information and give it to the prosecutor, lies, rumors, innuendos, everything.” *Id.* However, Sheriff Basinger, who had the legal responsibility to conduct the murder investigation under Missouri law, delegated that responsibility to Hemeyer. *See* Mo. Rev. Stat. 57.100. A minimal further investigation of Russell’s alibi would have demonstrated that Russell was lying, that his alibi was false, and that Officer Noble was telling the truth. Amrine would have been exonerated.

THE SECOND AMRINE INTERVIEW -- At 10:30 p.m., Brooks and Hemeyer interviewed Amrine again, this time asking him the death-qualifying questions they had forgotten to ask earlier. (J.A. 1303). Amrine again denied stabbing Barber, and stated that he was playing cards with inmates Willis, Jordan, Ball, and Crume. (J.A. 1303).

THE POE INTERVIEW -- On October 21, 1985, Brooks and Hemeyer interviewed inmate Jerry Poe, who claimed that he had information about the murder. *Id.* Poe, a slightly built white male, was afraid that black inmates were going to kill “all the white boys that was there as witnesses to Barber’s murder.” (J.A. 1290, 1501-02). Poe agreed to give a statement in exchange for being moved into protective custody. (J.A. 1303).

Poe said that he was playing cards in the multipurpose room at the time of the stabbing. (J.A. 1284). He said that he saw Barber walk toward the table where Poe was sitting. *Id.* When Barber neared the table, an inmate came up behind him, stabbed him in the back with a “shank,” and then “pulled the shank back out of Barber.” *Id.* Barber then began chasing the stabber toward the other end of the room. As the stabber turned to the left, Poe “heard a piece of metal hit the floor.” (J.A. 1285). Barber then “started clutching at his heart” and “pulling at the chest area of his shirt approximately three times,” before falling to the floor. *Id.* Poe said that an inmate squatted down next to Barber, “rolled him over onto his back,” and “wiped the blood away from Barber’s mouth” with a white bath towel. *Id.*

Poe’s statement contradicted the evidence that Brooks and Hemeyer had obtained. First, Poe’s statement that the stabber pulled the shank out of Barber’s back was completely wrong. Officer Noble had seen Barber carrying the weapon that stabbed him as he chased Russell. (J.A. 1273). Indeed, Noble retrieved the weapon after Barber had dropped it. *Id.* Therefore, it would have been impossible for the stabber to have pulled the “shank” out of Barber’s back before the chase, as Poe claimed. Second, no one else had reported that Barber had clutched his chest and pulled at his shirt before collapsing. Finally, no bloody towel was ever found, despite multiple searches of the room, and a search of every inmate who was in the room. Nor had anyone else reported that an inmate had used a towel to wipe blood

from Barber's mouth. As Warden Bill Armontrout himself testified, if no bloody towel was found after searching the inmates and the room, it simply did not exist. (J.A. 1593-94).

Brooks and Hemeyer showed Poe a set of 23 pictures of inmates. (J.A. 1304). The pictures were not uniform—it included pictures of both blacks and whites. (J.A. 1177). Some of the pictures were recent, and others were several years old. *Id.*

An 8-year-old picture of Amrine was included in the set. (J.A. 1179 ¶167). When Poe was shown Amrine's picture, he said "I want to say that he's the one that stabbed Barber, but I can't be positive from this picture." (J.A. 1287). Brooks then asked Poe to identify the date of the picture, requiring Poe to flip over the picture. *Id.* On the back of the picture, Poe saw Amrine's name, institutional number, and date of photograph. (J.A. 1176-7, 1287). Three days earlier, Poe had seen guards taking Amrine from his cell shortly after the murder occurred. (J.A. 1290). Poe and all the inmates in the unit knew that Amrine was a suspect for the murder, and Amrine's face was fresh in Poe's memory.

Poe was new to the Missouri State Penitentiary, having been transferred there in June 1985 from the Missouri Eastern Correctional Center, a lower-security facility. (J.A. 1506). Poe was transferred to the MSP because he was unable to get along with the staff at the MECC. (J.A. 1517, 1530). Only about a month before

Brooks and Hemeyer interviewed him, Poe had undergone a psychiatric evaluation as part of his transfer to the penitentiary. (J.A. 1530). Poe's Axis I diagnosis was "schizophrenia, unspecified, pseudo-psychopathic, suspected." *Id.* Poe was prescribed Mellaril, an antipsychotic drug used to lessen the psychotic symptoms of schizophrenia. (J.A. 1196 ¶229).

The same day Poe spoke to Brooks and Hemeyer, he was rewarded by being transferred to the Cole County Jail. (J.A. 270).

THE RUSSELL POLYGRAPH -- On October 22, Brooks and Hemeyer escorted Russell to the Missouri State Highway Patrol Headquarters to take a polygraph test. (J.A. 1180 ¶173; J.A. 1304). Russell was asked during that test whether he was in the room at the time of the murder. (J.A. 959). Russell failed that question. As Russell would later testify, there was "a conflict" on the polygraph test regarding the question. *Id.* Nevertheless, Brooks claimed in his final investigative report that the polygraph examiner said that "Russell was being truthful as to his statement." (J.A. 1304). Brooks decided not to mention in his report that Russell failed the question of whether he was in the room, or even that the question was asked. *Id.*

Russell's location at the time of the murder was a critical issue, and Brooks and Hemeyer knew it. On the day of Amrine's trial, when Russell expressed reluctance to testify against Amrine, Brooks and Hemeyer threatened to charge

Russell with the murder because Officer Noble had seen Barber chasing him after being stabbed. (J.A. 943, 945).

ADDITIONAL INTERVIEWS -- Brooks and Hemeyer also interviewed inmates Dodson, Willis, Jordan, Crume, Ball, and Hines. (J.A. 1304). None of them had seen the stabbing. *Id.* Their reports contradicted each other and were also inconsistent with the evidence already obtained. Willis said that he saw Barber carrying a “knife” and walking toward a group of inmates including Amrine, saying “You know I’m going to kill you.” *Id.* Crume and Hines said that they saw Barber chase Amrine. *Id.*

In contrast, Ball said that Amrine was playing poker and was still at the poker table when Barber collapsed. *Id.* Jordan agreed that Amrine was not near Barber when he collapsed. Instead, Amrine was standing next to Jordan at the poker table at the time. Dodson did not know what had happened. *Id.*

C. APPELLEES’ FINAL REPORT

As of October 22, 1985, the investigative record was replete with inconsistencies. Officer Noble had reported that Barber was chasing Russell before he collapsed, but Russell said that he was not even in the room when the stabbing occurred. (J.A. 1273, 1278). Poe said that the stabber pulled a shank out of Barber’s back, but Noble said that Barber was carrying the weapon as he chased Russell. (J.A. 1273). Poe claimed that there was a bloody towel, but no towel was

recovered. And inmates Poe, Willis, Crume, Hines, and Jordan had wildly different accounts of what happened.

Prisoners often lie. They lie to each other and to prison guards and officials. (J.A. 1156 ¶ 60; J.A. 1690, 1641). They have incentives to lie, and they lie to get what they perceive as benefits. (J.A. 1156 ¶61; J.A. 1623). Thus, corrections officers must be skeptical about what prisoners say. *Id.* An officer needs to be “just about as conwise as the inmate is.” (J.A. 1623).

Despite the many inconsistencies in the investigative record, as well as the gaping evidentiary holes, Brooks and Hemeyer made no effort to investigate further. The record is completely devoid of any meaningful investigative activity after October 22. (J.A. 1305). Instead, Brooks and Hemeyer did nothing until Brooks prepared his final investigative report on December 2. In that report, Brooks stated: “It appears that inmate Amrine did stab Barber, causing Barber’s death. The motive for the assault was apparently Amrine’s belief that Barber was telling other inmates that he had attempted to have sex with Amrine while the two inmates were cell-mates in general population.” (J.A. 1305).

D. AMRINE’S CONVICTION AND EVENTUAL RELEASE

At trial, the prosecution relied on the results of Brooks and Hemeyer’s investigation, including the statements of Russell and Poe. The jury never heard the evidence that Russell had lied on the polygraph test about his alibi. “Poe was

not asked to describe the murder and testified only that he witnessed Amrine stab Barber.” *Amrine v. Roper*, 102 S.W.3d at 544. Amrine was convicted of murder on April 30, 1986, and was sentenced to death on May 1, 1986. (J.A. 1190 ¶212; J.A. 1555-57). Amrine, who otherwise would have been released from prison in two years, was placed on death row. He was later transferred to the Potosi Correctional Facility, where he remained until 2003. (J.A. 1191 ¶214; J.A. 1565-57).

While Amrine was on death row, Russell and Poe recanted their testimony. On April 29, 2003, the Missouri Supreme Court granted Amrine’s motion for habeas corpus, finding that he had provided “clear and convincing evidence of actual innocence.” *Amrine*, 102 S.W.3d at 548. After having spent over 17 years in prison for a murder he did not commit, Amrine was released from custody on July 28, 2003. (J.A. 1192 ¶221; J.A. 1565).

E. THE PROCEEDINGS BELOW

On December 2, 2004, Amrine sued Brooks and Hemeyer in the Western District of Missouri.¹ Amrine asserted three counts against them: violation of Procedural Due Process under 42 U.S.C. § 1983; conspiracy under section 1983; and malicious prosecution under Missouri law. (J.A. 61).

¹Brooks is deceased. Defendant Marilyn Schmutzler is the personal representative of his estate.

Brooks and Hemeyer moved for summary judgment in August 2006. In a footnote of his supporting suggestions, Brooks stated that “Amrine has not plead a substantive due process claim.” (J.A. 118). Amrine later attempted to amend his Complaint to clarify that he sought relief under a substantive due process theory, but the court denied the motion on February 6, 2007. (J.A. 2878-2902, 2959-2965). On the same day, the court granted the defendants’ motions for summary judgment. (J.A. 2929-2958).²

In its summary judgment order, the district court held that Brooks and Hemeyer’s actions were supported by probable cause. The district court found that “[n]o one other than Amrine appeared to have a motive” to murder Barber. (J.A. 2950). The court did not acknowledge the fact that Russell had a motive to kill Barber in revenge for the fight. Nor did the court acknowledge that Russell had lied during the polygraph examination regarding his alibi. (J.A. 2937). The district court further held that Brooks and Hemeyer had probable cause based on events that occurred months after the investigation, such as the grand jury indictment and the conviction. The court concluded that there was no genuine issue of material fact as to probable cause.

²The court also granted summary judgment in favor of defendants Lee and Brown. Amrine abandons his claims against Lee and Brown, and appeals only the summary judgment in favor of Brooks and Hemeyer.

Amrine filed a Motion to Alter or Amend Judgment pursuant to Federal Rule of Civil Procedure 59(e). (J.A. 2969-2975). The court denied that motion on May 4, 2007. (J.A. 3029-3035). Amrine filed his timely Notice of Appeal on May 7, 2007. (J.A. 3036).

SUMMARY OF THE ARGUMENT

Only an hour and a half after the murder, the only reliable evidence showed that Amrine was innocent. Nevertheless, Brooks and Hemeyer arrested Amrine without probable cause, and sought to ask him questions to qualify him for the death penalty. The doctrine of qualified immunity was not designed to protect officers who engage in this kind of reckless behavior. The district court erred in finding otherwise.

The district court also erred when it denied Amrine's motion to amend his Complaint to assert a substantive due process claim based on the defendants' reckless investigation. The claim would not prejudice the defendants. No further discovery would be required, and Amrine's original Complaint makes clear that his theory of recovery is based on the defendants' reckless investigation.

STANDARD OF REVIEW

This Court reviews *de novo* a grant of summary judgment. *Murphy v. Missouri Dep't of Corrections*, 372 F.3d 979, 982 (8th Cir. 2004). Summary judgment is proper if, after viewing the evidence and construing it in a light most favorable to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*; Fed. R. Civ. P. 56(a). This Court reviews the district court's findings of fact for clear error, and its conclusions of law *de novo*. *Deal v. Consumer Programs, Inc.*, 470 F.3d 1225, 1229 (8th Cir. 2006).

This Court reviews the district court's denial of Amrine's motion to amend for abuse of discretion. *Buder v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 644 F.2d 690, 694 (8th Cir. 1981).

ARGUMENT

I. **BROOKS AND HEMEYER ARE NOT ENTITLED TO QUALIFIED IMMUNITY.**

Qualified immunity shields state officers from liability for civil damages only when “their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Wertish v. Krueger*, 433 F.3d 1062, 1066 (8th Cir. 2006) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). An officer is not immune from a section 1983 claim if “the facts alleged, construed in the light most favorable to the party asserting the claim, show that the officer violated a constitutional right.” *Id.* Brooks and Hemeyer are not entitled to qualified immunity because they violated Amrine’s clearly established right not to be arrested without probable cause.

A. **The Right Not to Be Arrested Without Probable Cause Was Clearly Established at the Time of the Investigation.**

Amrine’s right not to be arrested without probable cause was clearly established long before Brooks and Hemeyer began their investigation. Relying on a 1976 case, the Eighth Circuit held that “[i]t is well established that a warrantless arrest without probable cause violates an individual’s constitutional rights under the Fourth and Fourteenth Amendments.” *Hannah v. City of Overland, Mo.*, 795 F.2d 1385, 1389 (8th Cir. 1986) (citing *Sartin v. Comm’r of Pub. Safety*, 535 F.2d 430, 434 (8th Cir. 1976)).

B. Brooks and Hemeyer Violated Amrine’s Right Not to Be Arrested Without Probable Cause.

“Probable cause exists when the totality of circumstances demonstrates that a prudent person would believe that the arrestee has committed or was committing a crime.” *Kuehl v. Burtis*, 173 F.3d 646, 650 (8th Cir. 1999) (citing *United States v. Washington*, 109 F.3d 459, 465 (8th Cir. 1997)). To have probable cause, an officer must “conduct a reasonably thorough investigation prior to arresting a suspect.” *Id.* An officer must also consider all of the evidence available at the time of the arrest, including evidence showing that the suspect did not commit the crime. *Id.* at 650 (citing *Bigford v. Taylor*, 834 F.2d 1213, 1218 (5th Cir. 1988)). Even if competent evidence suggests that the suspect committed the crime, an officer is not permitted to arrest the suspect when there is also plainly exculpatory evidence:

[B]ecause the totality of circumstances determines the existence of probable cause, evidence that tends to negate the possibility that a suspect has committed a crime is relevant to whether the officer has probable cause. An officer contemplating an arrest is not free to disregard plainly exculpatory evidence, even if substantial inculpatory evidence (standing by itself) suggests that probable cause exists.

Kuehl, 173 F.3d at 650 (citing *Bigford*, 834 F.2d at 1218). Probable cause does not exist “when a ‘minimal further investigation’ would have exonerated the suspect.”

Id.

Brooks and Hemeyer's actions were not supported by probable cause.

Direct evidence from a credible witness showed that Amrine was not responsible for the murder of Gary Barber. Officer Noble, the only credible eyewitness, and the only corrections officer who had seen anything, said that Barber was chasing Russell after being stabbed. See supra pp. 4-6. Noble's statement was corroborated by the polygraph test, which showed that Russell was lying about being outside the room at the time of the murder. See supra pp. 14-15.

Not a single reliable eyewitness had reported that Amrine had stabbed Barber. The only "witness" who implicated Amrine was Jerry Poe, who had been diagnosed with schizophrenia only about a month before the interview. See supra pp. 11-14. Poe, who was new to the penitentiary, wanted to be transferred to protective custody. He knew that he could curry favor with prison officials by offering a story about the murder. His story, however, was rife with inconsistencies. His assertion that the stabber had pulled the shank out of Barber's back conflicted with the fact that Officer Noble had seen Barber carrying the weapon after he was stabbed. No one could corroborate Poe's assertion that Barber had clutched his chest and pulled at his shirt before collapsing. Finally, Poe's story that an inmate had used a towel to wipe blood from Barber's mouth was a complete fabrication. No bloody towel was ever found, despite multiple searches of the room and a search of every inmate in the room. See supra pp. 6-7.

Russell's claim that Amrine had admitted to stabbing Barber (see supra p. 9) was also unbelievable. First, Russell had ample incentive to lie. Russell knew that he, more than anyone else, appeared to have a motive to murder Barber, because he had just been released that day from detention for fighting with Barber. Second, because the facility was on lockdown, it would have been impossible for Russell to get into the multipurpose room, where he claimed Amrine had confessed. Third, the polygraph examination showed that Russell was lying about his location at the time of the murder. Finally, Russell's story conflicted with Officer Noble's statement, which directly implicated Russell.

In light of Noble's statement alone, Russell's alibi was unbelievable. If Noble had really (i) let Russell out of the multipurpose room to get aspirin; (ii) refused to let Russell back into the multipurpose room after the stabbing; and (iii) later allowed Russell to reenter the room, it would not have made any sense for Noble to have reported that Russell was the one being chased by Barber. If Officer Noble had actually had that much contact with Russell during that short time, Noble would have known without a doubt that Russell was outside the room at the time of the stabbing. Russell's statement did not create probable cause.

Nor did the red spots on Amrine's clothing create probable cause. The evidence that Brooks and Hemeyer had gathered clearly showed that Barber had not bled when he was stabbed. Several searches of the room failed to uncover any

blood, and not even the weapon itself had blood on it. See supra pp. 6-7. The spots were never confirmed to be human blood, much less Amrine's blood.

Brooks and Hemeyer leaped to conclusions. Only an hour and a half after the murder, and in the face of all the inconsistencies, they were so determined to condemn Amrine that they intended to ask him death-qualifying questions. See supra pp. 7-8. Because they ignored critical exculpatory evidence and failed to investigate further, they lacked probable cause.

This Court faced a similar situation in *Kuehl v. Burtis*. In that case, the defendant, Officer Burtis, investigated an assault. The evidence he gathered suggested that the plaintiff, Kuehl, had committed the assault. Seven eyewitnesses told him that they had seen Kuehl strike McBeth on the face. Burtis observed bruising on McBeth's face, confirming that Kuehl had hit him. Based on this evidence, Burtis arrested Kuehl for assault.

Burtis, however, overlooked exculpatory evidence and failed to investigate further. Kuehl's face was also bruised, Kuehl stated that McBeth had hit her, and Kuehl said that she had struck him only while reaching for a telephone to call the police. In view of this exculpatory evidence, Burtis could have investigated further. If he had done so, he might have spoken to a witness who would have corroborated Kuehl's statement. *Id.* at 648-49.

This Court held that Burtis lacked probable cause for the arrest, and therefore was not entitled to qualified immunity. This Court cited two reasons for its decision. First, Burtis failed to consider the exculpatory evidence suggesting that McBeth had hit Kuehl. Second, Burtis failed to conduct a minimal further investigation to reconcile the inconsistencies in the witnesses' statements.

This case is indistinguishable. As in *Kuehl*, some evidence pointed to Amrine. Russell claimed that Amrine had confessed; Amrine had red spots on his clothing; and Poe said that Amrine was responsible. However, as in *Kuehl*, the more powerful evidence was exculpatory. Officer Noble said that Barber was chasing Russell, not Amrine, after being stabbed. This direct, exculpatory evidence was also the only credible eyewitness testimony available. Like the evidence Officer Burtis ignored, Noble's statement was also corroborated by other evidence: Russell could not have moved into the multipurpose room during lockdown as he claimed, and his lies were confirmed by the polygraph examination. Poe's testimony was also inconsistent with Officer Noble's observations and with the physical evidence at the crime scene, and his motive for fabricating the story as well as his mental illnesses were clear.

As in *Kuehl*, Brooks and Hemeyer ignored the exculpatory evidence and failed to investigate further. Like Officer Burtis, they should have, but did not, take minimal investigatory measures that would have made all the difference in the

outcome. Despite Hemeyer's admission that he had doubts about Russell's story, he and Brooks failed to (i) talk to the sergeant at the control center who allegedly supplied Russell with aspirin; (ii) locate the brown paper bag that allegedly held the aspirin, or even ask Russell what he did with the bag; (iii) identify the inmate "Peebles" that Russell claims he was talking to during the stabbing; and (iv) have even a follow-up conversation with Officer Noble about the inconsistencies between his statement and Russell's alibi. Brooks and Hemeyer failed to recognize what would have been obvious to any minimally prudent investigator—that, based on the irreconcilable inconsistencies between Russell's unlikely story and the report of a credible corrections officer, Russell was lying. Like Officer Burtis, Brooks and Hemeyer reacted with constitutionally impermissible haste, leaping to conclusions and seeking to ask Amrine death-qualifying questions only an hour and a half after the murder.

If anything, Amrine's case is stronger than Kuehl's. In *Kuehl*, seven eyewitnesses said they had seen Kuehl hit McBeth. Three of these eyewitnesses were either unbiased or presumptively biased in Kuehl's favor, as they included two store customers and one of Kuehl's own employees. In Amrine's case, only one person claimed to be an eyewitness to the murder—Jerry Poe, a diagnosed schizophrenic with an incentive to lie and whose story was outlandish and full of inconsistencies.

Amrine's case is also stronger than Kuehl's because there was probable cause that Russell was the murderer: Russell had a motive to murder Barber, Noble saw Russell being chased by Barber seconds after the stabbing, and Russell lied to the polygraph examiner about his location at the time of the murder. This probable cause as to Russell was guilt-excluding as to Amrine. Brooks and Hemeyer, who ignored this evidence and failed to investigate further, lacked probable cause.

C. The District Court Erred in Finding No Genuine Issue of Material Fact as to Probable Cause.

The district court's finding of probable cause was precipitated by its clearly erroneous finding that "[n]o one other than Amrine appeared to have a motive" to murder Barber. (J.A. 2950). Terry Russell had an obvious motive to murder Barber. (J.A. 1174 ¶146). In fact, after Russell called Barber a "punk-ass nigger" on October 11, 1985, the two had fought. Guards had to break up the fight, and Russell and Barber were sent to separate detention cells, where they were confined for one week. The facts, interpreted in Amrine's favor, show that Russell had a clear motive—revenge against Barber for the fight, and for having to spend a week in the detention cell—and that the murder occurred as soon as Russell had the opportunity. Moreover, Russell and Barber were released from detention on October 18 at 10:00 a.m., only a few hours before the murder. This evidence is

more than sufficient to allow a reasonable fact finder to conclude that Amrine had a motive to murder Barber.

This error was crucial. Amrine's theory of the case is that Brooks and Hemeyer ignored critical evidence showing that Russell, not Amrine, was responsible for the murder, and that, instead of considering that evidence, Brooks and Hemeyer engaged in a reckless and hasty campaign to pin the murder on Amrine. Obviously, the fact that Russell had a motive to murder Barber is central to that theory of the case.

The district court further erred by failing to view the evidence regarding Russell's motive in the light most favorable to Amrine, the non-moving party, as it was required to do. *See, e.g., Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000) (on summary judgment courts must interpret the facts in the non-moving party's favor, and "must disregard all evidence favorable to the moving party that the jury is not required to believe."). The court stated: "Even assuming the Defendants also could or should have developed a reasonable basis to believe that Russell was the killer, there is nothing in the record suggesting that Amrine and Russell could not have collaborated." (J.A. 3031). In making that statement, not only did the district court interpret the facts in the *defendants'* favor, but the court also invented its own factual theory for the defendants. The defendants themselves presented no evidence that Amrine and Russell

collaborated, let alone evidence that would require a juror to conclude that they did.

The district court also failed to acknowledge that the record, interpreted in Amrine's favor, shows that Russell was lying when he claimed to be outside the room at the time of the murder, and that Brooks and Hemeyer knew it. As Russell would admit years after Amrine was sentenced to death, "there was a conflict" during his October 22 polygraph on the question of whether he was in the room at the time of the murder. See supra pp. 14-15. Russell's untruthfulness as to the central fact of his alibi is strong evidence pointing to his guilt. However, Brooks failed to mention in his report that Russell failed that question, or even that the question was asked. Instead of making those findings, however, the district court stated that "[t]here is some evidence" supporting that interpretation of the facts, but that "the list of questions asked [on the polygraph examination] is incomplete in the record." (J.A. 2937).

The district court further erred in holding that Brooks and Hemeyer had probable cause based on events that occurred *after* the arrest. First, the district court held that Brooks and Hemeyer had probable cause "as evidenced by the grand jury indictment." (J.A. 2948). Second, the district court held that Brooks and Hemeyer's probable cause determination was "bolstered" by evidence they obtained long after Amrine had been referred to the prosecutor, including the

“eventual statements” made by inmates. (J.A. 2949-50). Third, the district court held that Brooks and Hemeyer had probable cause “as evidenced by the guilty verdict returned at Amrine’s criminal trial.” *Id.*

All of these statements are legally erroneous. Probable cause is determined according to the facts and circumstances within the officer’s knowledge “at the moment the arrest was made,” and is not affected by what might happen afterwards. *See United States v. Rivera*, 370 F.3d 730, 733 (8th Cir. 2004) (citing *United States v. Wajda*, 810 F.2d 754, 758 (8th Cir. 1987)).³

II. AMRINE SHOULD BE ALLOWED TO ASSERT HIS SUBSTANTIVE DUE PROCESS CLAIM.

Amrine’s original Complaint included what was labeled a “procedural due process” claim. (J.A. 36). Under that claim, Amrine alleged that the defendants’ actions were “reckless,” and that he “was denied due process by . . . [t]he failure of [the defendants] to conduct an adequate or appropriate investigation,” and for the “willful suppression by [the defendants] of both exculpatory and impeaching evidence.” (J.A. 36-37). These allegations, of course, state a claim for violation of substantive, not procedural, due process. *See Wilson v. Lawrence County*, 260

³The district court’s reliance on the grand jury indictment is particularly ingenuous. As Edward Bennett Williams famously said, “a prosecutor can indict a ham sandwich if he chooses.”

F.3d 946, 955-56 (8th Cir. 2001). On January 26, 2007, Amrine moved to amend his Complaint to remove the word “procedural,” and conform the label for his claim to its substance. (J.A. 2893). The court denied the motion, holding that the amendment was untimely, prejudicial to the defendants, and futile. (J.A. 2962-2964). The court erred in making each of these findings.

Under the Federal Rules, leave to amend “shall be freely granted when justice so requires.” Fed. R. Civ. P. 15(a); *see also Popp Telecom v. Am. Sharecom, Inc.*, 210 F.3d 928, 943 (8th Cir. 2000) (recognizing the “courts’ liberal viewpoint toward leave to amend.”). “If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits.” *Foman v. Davis*, 371 U.S. 178 (1962).

Amrine should be permitted to amend his Complaint to seek relief under substantive due process. The amendment would not have required any further discovery, nor would it prejudice the defendants, who were on notice from Amrine’s original Complaint that he sought recovery under a reckless investigation theory. Any inconvenience that the defendants might face in permitting the amendment is outweighed by the substantial hardship Amrine would face in being precluded from asserting his original theory of the case.

A. The Defendants Would Not be Prejudiced by a Substantive Due Process Claim.

To determine whether leave to amend should be granted, the critical question is whether the defendants would be prejudiced. To justify a denial of leave to amend, the delay must have prejudiced the defendant. *Buder v. Merrill Lynch, Pierce, Fenner & Smith*, 644 F.2d 690, 694 (8th Cir. 1981).

Amrine's proposed amendment would not have prejudiced the defendants. The proposed substantive due process claim is based on facts already alleged and known to the parties, and therefore no further discovery would have been required. (J.A. 2904-05). "Where the facts on which a previously unasserted claim is based are all known or available to all parties, there is no prejudice in allowing an amended [pleading.]" *Buder*, 644 F.2d at 694; *see also Popp Telecom*, 210 F.3d at 943 ("The inclusion of a claim based on facts already known or available to both sides does not prejudice the non-moving party."). "Generally speaking, reviewing courts have found an abuse of discretion in cases where the district court denied amendments based on facts similar to those comprising the original complaint." *Popp Telecom*, 210 F.3d at 943 (citing cases).

Tellingly, in their suggestions in opposition to Amrine's motion to amend, none of the defendants argued that the amendment would require further discovery. Nor did the district court find that the amendment would require such discovery. Instead, the defendants argued that the amendment would prejudice them in only

one way: they would be denied “the opportunity to file a summary judgment motion attacking the legal sufficiency of Amrine’s new legal theory.” (J.A. 2916). The district court agreed, holding that the amendment “substantially prejudices the Defendants by forcing them to incur the expense of trial to defend against a claim they had no opportunity to dispose of at summary judgment.” (J.A. 2962).

The district court, however, could have simply allowed the defendants to file supplemental briefs on the new substantive due process claim. This Court has held that the district court abuses its discretion when it fails to adjust its trial schedule to allow a plaintiff to amend the complaint. *See Buder*, 644 F.2d at 694 (district court abused its discretion in denying motion to amend; even if amendment would require additional discovery, court could have granted an extension of time); *see also Dennis v. Dillard Dep’t Stores, Inc.*, 207 F.3d 523, 526 (8th Cir. 2000) (same).

From the very beginning of the lawsuit, the defendants were on notice that Amrine was seeking to recover from them based on their reckless investigation. Amrine alleged in his original Complaint that the defendants’ actions were “reckless,” and that he “was denied due process by . . . [t]he failure of [the defendants] to conduct an adequate or appropriate investigation,” and for the “willful suppression by [the defendants] of both exculpatory and impeaching evidence.” (J.A. 36-37). Those are precisely the theories of recovery that Amrine

seeks to assert under substantive due process. Allowing Amrine to proceed with his substantive due process claim would not surprise or prejudice the defendants, who have known all along that their reckless investigation is the reason for the lawsuit.

True, Amrine did not attempt to amend his Complaint until late in the litigation, after summary judgment briefing was complete. However, “[d]elay alone is insufficient to deny a motion for leave to amend.” *Dennis*, 207 F.3d at 525 (citing *Buder*, 644 F.2d at 694). To deny leave to amend, the delay must have prejudiced the defendants. *Id.* In *Buder*, this Court held that the district court abused its discretion in denying a motion to amend, despite the fact that the motion was filed after summary judgment briefing was complete. *Id.* at 694. This Court held that the district court could alleviate any burden on the defendants “by granting a continuance or compensating them for any loss occasioned by the plaintiffs’ delay.” *Id.*

All of the parties, as well as the district court, were on notice that Amrine sought to recover from the defendants for their reckless investigation. Because there is no prejudice, Amrine should not be punished for putting the wrong label on his reckless investigation theory.

B. The Hardship to Amrine Outweighs Any Inconvenience to the Defendants.

The district court further erred in failing to consider the hardship that Amrine would face from denying his motion to amend. The district court is required to weigh the prejudice suffered by the adverse party against the hardship that would be suffered by the moving party if the request to amend were denied. *Buder*, 644 F.2d at 694-95.

Amrine's hardship outweighs any prejudice to the defendants. The defendants would face no prejudice because the facts were already known to them and no further discovery would have been needed. *See Buder*, 644 F.2d at 694; *see also Popp Telecom*, 210 F.3d at 943. In contrast, there is substantial hardship to Amrine. Until Amrine is afforded the opportunity to assert a substantive due process claim, no court or jury will ever be able to consider the merits of his reckless investigation theory of recovery. *See Wilson*, 260 F.3d at 955-56 (reckless investigation is a violation of substantive due process). No court or jury will ever be able to consider the allegations Amrine made in his original Complaint that his due process rights were violated by the defendants' reckless investigation.

C. Amrine's Substantive Due Process Claim is Meritorious.

The district court held that it would be futile to entertain Amrine's substantive due process claim, because the facts do not support that claim. (J.A.

2962-4. In the court's view, Brooks and Hemeyer's investigation "was not so reckless as to shock the conscience." (J.A. 2963).

A motion to amend can be denied for futility only if the proposed amendments "assert clearly frivolous claims." *Buder*, 644 F.2d at 695. The district court's finding with respect to futility is reviewed de novo. *In re Acceptance Ins. Cos. Sec. Litig.*, 423 F.3d 899, 904 (8th Cir. 2005).

Amrine's substantive due process claim is not frivolous. To succeed, Amrine would need to show that Brooks and Hemeyer recklessly failed to investigate leads or suspects in a manner that shocks the conscience. *See Wilson*, 260 F.3d at 955-56.⁴ The facts, interpreted in Amrine's favor, support that showing. At every turn, Brooks and Hemeyer overlooked critical exculpatory evidence and failed to investigate the many inconsistencies in the evidence before them. Their actions were not mere negligence, because they approached their investigation with reckless haste. Only an hour and a half after the murder, Brooks and Hemeyer intended to ask Amrine questions designed to qualify him for the death penalty. *See supra* p. 7. They made that hasty decision despite Officer

⁴In *Wilson*, this Court held that the liberty interest involved in a reckless investigation claim is "the interest in obtaining fair criminal proceedings before being denied one's liberty in the most traditional sense." 260 F.3d at 956 n.8. That right was clearly established at the time of the murder investigation. *Id.* (citing *Brady v. Maryland*, 373 U.S. 83, 87 (1963)); *see also Clemmons*, 477 F.3d at 965-66 (also citing *Brady*).

Noble's unbiased eyewitness report that Barber was chasing Russell, not Amrine, after the stabbing, and despite the blatant contradictions between Russell's statement and the physical evidence. See supra pp. 4-5, 8-11. In addition, when Russell failed the polygraph examination question regarding where he was at the time of the murder, Brooks attempted to cover it up, omitting the incident from his report. See supra p. 14. On the day of Amrine's trial, when Russell expressed reluctance to testify against Amrine, Brooks and Hemeyer threatened to charge Russell with the murder because Officer Noble had seen Barber chasing him after being stabbed. See supra pp. 14-15. Brooks and Hemeyer's calculated campaign to qualify Amrine for execution based on a hasty and reckless investigation undermines the criminal justice system and shocks the conscious.

This case is very different from *Clemmons v. Armontrout*, 477 F.3d 962 (8th Cir. 2007), where this Court found that the defendant (once again, defendant Brooks), did not act recklessly. In *Clemmons*, a corrections officer told the defendant that he had seen Clemmons stab the victim. A prisoner disagreed, saying that he had seen other men assaulting the victim. The prisoner's statement, however, was undermined by another investigator who interviewed him and determined that he was not credible. This Court held that Clemmons, who was ultimately acquitted, could not recover from the defendant on a substantive due process claim because Clemmons failed to show that the defendant "intentionally

or recklessly failed to investigate leads or produce exculpatory information.” *Id.* at 965.

This case is different. In *Clemmons*, the defendant had reliable evidence that Clemmons was the stabber: an unbiased corrections officer had told the defendant that he had seen Clemmons stab the victim. Here, the exact opposite is true: the only credible eyewitness—Officer Noble—said that it was Russell, not Amrine. *Clemmons* is further distinguished because, in that case, the defendant relied heavily on the report of another prison investigator who had supervised the preliminary investigation. This Court held that the defendant, who “may have erroneously relied on” the report, did not act recklessly in doing so. *Id.* at 966. In Amrine’s case, Brooks and Hemeyer were involved in the investigation from the day of the murder, and have no one else to blame. Finally, *Clemmons* is inapposite because not a single credible eyewitness had made a statement in Clemmons’s favor. Although one inmate had reported that someone else had assaulted the victim, that inmate’s report was discredited by a corrections supervisor, who had performed his own investigation and had furnished a written report to the defendant stating that the inmate’s account “did not make sense,” and that “further investigation” had shown that his statement was “untrue.” *Id.* at 964. That contrasts sharply with Amrine’s case, where there was no such “further investigation.”

The district court's judgment should be reversed, and the case remanded for further summary judgment briefing.

CONCLUSION

For the foregoing reasons, appellant Joseph D. Amrine respectfully requests that this Court reverse the summary judgment of the district court and remand the case for further proceedings.

Respectfully submitted,

/s/

Todd Kennedy
Quinn Emanuel Urquhart Oliver &
Hedges, LLP
50 California Street, 22nd Floor
San Francisco, California 94111
Tel: (415) 875-6600
Fax: (415) 875-6700

Arthur A. Benson II
Jamie Kathryn Lansford
4006 Central Avenue (Courier Zip:
64111)
P.O. Box 119007
Kansas City, Missouri 64171
Tel: (816) 531-6565
Fax: (816) 531-6688

*Counsel for Plaintiff-Appellant
Joseph D. Amrine*

July 23, 2007

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 8,683 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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 has been prepared in a proportionally spaced typeface (Times New Roman, 14 point) using Microsoft Word 2003, version 11.6.

Respectfully submitted,

/s/

Todd Kennedy

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 28A(d)

A PDF digital version of this brief has been furnished on a CD-ROM and produced to this Court. Duplicate CD-ROMs have been produced to the Appellees' counsel. The PDF file has been scanned for viruses and is virus free.

Respectfully submitted,

/s/

Todd Kennedy

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JOSEPH D. AMRINE,

Appellant,

v.

GEORGE R. BROOKS, et al.,

Appellees.

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) Case No. 07-2104
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CERTIFICATE OF SERVICE

I certify that on July 23, 2007, I caused to be served two copies of Appellant's brief on counsel of record for Appellees by mailing said copies addressed to the following:

Douglas G. Leyshock Missouri Attorney General P.O. Box 899 Jefferson City, MO 65102 (573) 751-3321 <i>counsel for George R. Brooks and Marilyn Schmutzler</i>	Bruce Farmer Oliver Walker Wilson LLC 401 Locust Street, Suite 406 Columbia, MO 65205 (573) 443-3134 Robert J. Buckley Oliver Walker Wilson LLC 401 Locust Street, Suite 406 Columbia, MO 65205 (573) 443-3134 <i>counsel for John C. Hemeyer</i>
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I also served the Appellees with electronic copies of the brief on CD-ROMs enclosed in the same mailing, and served them with a courtesy electronic copy of the brief via email on this day.

/s/

Todd Kennedy