

**IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF MISSOURI  
CENTRAL DIVISION**

<b>JOSEPH D. AMRINE,</b>	)	
	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	<b>Case No: 2:04-CV-04300NKL</b>
	)	
<b>MARILYN SCHMUTZLER, et al.,</b>	)	
	)	
	)	
<b>Defendants.</b>	)	

**MOTION FOR SUMMARY JUDGMENT AND  
SUPPORTING SUGGESTIONS**

Defendant Thomas Brown, Richard Lee and John Hemeyer, through counsel, move for summary judgment pursuant to Fed.R.Civ.P. 56. Defendants are entitled to summary judgment because there exists no genuine issue of material fact and they are entitled to judgment as a matter of law. Defendants Brown and Lee are protected from liability and suit by the doctrine of absolute prosecutorial immunity. All defendants are also entitled to judgment on the basis of qualified immunity. The undisputed material facts show that plaintiff's constitutional rights were not violated. Further, plaintiff's constitutional claims have been raised in prior post-conviction proceedings and plaintiff is collaterally estopped from asserting those same claims in a civil rights action. In support of this motion, defendants refer the court to the following suggestions.

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### **INTRODUCTION**

Joseph Amrine was convicted of the 1985 murder of a fellow inmate, Gary Barber. *State v. Amrine*, 741 S.W.2d 665 (Mo. Banc 1987). Thereafter, plaintiff brought post-conviction challenges to his conviction and sentence in both state and federal court. Each court that addressed plaintiff's claims found that his constitutional rights were not violated. See, e.g. *State v. Amrine, supra*; *Amrine v. State*, 785 S.W.2d 531 (Mo. banc 1990); *Amrine v. Bowersox*, 128 F.3d 1222 (8<sup>th</sup> Cir. 1997); *Amrine v. Bowersox*, 238 F.3d 1023 (8<sup>th</sup> Cir. 2001); *Amrine v. Bowersox*, 1996 WL 33370754 (W.D. Mo. Feb. 26, 1996); *Amrine v. Bowersox*, 90-0940-CV-W-2 (W.D. Mo. Oct. 29, 1998).

In 2003, the Missouri Supreme Court, in a 4-3 decision, reversed plaintiff's conviction and sentence, but did so "independent of any constitutional violation at trial." *Amrine v. Roper*, 102 S.W.3d 541, 543 (Mo. banc 2003). The court noted that, because of witness recantations, plaintiff presented a "rare" situation "of actual innocence independent of any constitutional violation at trial." *Id.* at 547. The Missouri Supreme Court specifically found that "the evidence at trial was constitutionally sufficient to support the conviction." *Id.* at 548. Plaintiff was not exonerated and can be tried again for the Barber murder. *Id.* at 549.

**STATEMENT OF FACTS**

1-47. Defendants Brown, Lee and Hemeyer adopt and incorporate herein the statement of facts contained in defendant Schmutzler's motion for summary judgment. These defendants also adopt and incorporate herein Exhibits A through O submitted in support of defendant Schmutzler's motion for summary judgment. These defendants submit the following additional facts for consideration in support of their motion for summary motion.

48. John Hemeyer was deputy sheriff of Cole County in October 1985 at the time of the Barber murder and became sheriff in February 1986 upon the death of Sheriff Wyman Basinger. Exhibit P, p. 5.

49. As deputy sheriff on October 18, 1985, Deputy Hemeyer's duties were assigned by Sheriff Basinger and Hemeyer acted pursuant to Sheriff Basinger's instructions. Exhibit P, pp. 2, 66, 127, 129, 283, 285.

50. Deputy Hemeyer generated an offense report for the purpose of providing information to Sheriff Basinger. Exhibit P, pp. 82, 89; Exhibit Q (Hemeyer's Offense Report).

51. The purpose of the offense report was to document Deputy Hemeyer's involvement in the investigation and provide information to the sheriff. Exhibit P, p. 89.

52. Plaintiff admits that many of the statements contained in the offense report and attributed to plaintiff were accurately recorded. Exhibit R, pp. 56-60.

53. Richard Lee was employed as an investigator for the Cole County Prosecuting Attorney in October 1985. Exhibit S, p. 10.

54. Mr. Lee understood his job responsibilities were to act as a liaison between the prosecutor's office and the law enforcement community and assist in preparing cases for trial. Exhibit S, p. 10.

55. Mr. Lee's first involvement with the Barber murder was in April 1986, just a few weeks before trial, when he was directed by Prosecutor Tom Brown to re-interview witnesses. Exhibit S, p. 42.

56. The purpose of Mr. Lee's involvement just prior to trial was to assist the prosecutor in preparing the case for trial. Exhibit T, p. 64.

57. Mr. Lee's instructions from the prosecutor were to get the case ready for trial and to interview the inmates. Exhibit S, p. 47.

58. Mr. Lee interviewed Randy Ferguson on April 8<sup>th</sup> or 9<sup>th</sup>, 1986 with George Brooks, investigator for Department of Corrections. Exhibit S, p. 73.

59. Ferguson first denied having any information but then admitted to Mr. Lee and George Brooks that he had seen the stabbing and he would testify. Exhibit S, p. 73.

60. Mr. Lee informed the prosecutor that Ferguson was a potential witness and Ferguson was transferred to Cole County jail, where Ferguson gave a written statement. Exhibit S, pp. 78 -79; Exhibit I.

61. Tom Brown is currently the Circuit Judge of Cole County. In October 1985 through 1986, he was the prosecuting attorney of Cole County. Exhibit T, pp. 6-9.

62. Mr. Brown testified that Richard Lee's primary duties for the prosecuting attorney were assisting the various prosecutors, helping them in preparing and presenting cases at trial. Exhibit T, p. 43.

63. In a prison homicide case, Mr. Brown would typically ask Richard Lee to assist him in preparation for the trial in the time frame immediately before trial. Exhibit T, p. 64.

64. Before trial, Mr. Brown would typically send his investigator to interview witnesses listed as defense witnesses or reinterview witnesses who initially refused to give a statement to see if they had changed their mind. Exhibit T, pp. 66-67.

65. Mr. Lee's effort in regard to interviewing witnesses was purely in preparation for trial. Exhibit T, p. 77.

66. In October 1985, plaintiff was incarcerated at Missouri State Penitentiary (MSP) as a result of several charges, including robbery first degree, burglary and stealing. Exhibit R, p. 16.

67. While in prison, plaintiff entered a guilty plea for unlawful use of a weapon or possession of a weapon in a prison. Exhibit R, p. 17.

68. The weapon was a homemade knife, similar to the weapon used to kill Gary Barber. Exhibit R, p. 17, 95-97; Exhibit BB.

69. On the day of the murder, October 18, 1985, plaintiff was housed in the supermax unit at MSP, also known as the Special Management Facility. Exhibit R, p. 17.

70. Plaintiff admits that he was in the recreation room at the time of the Barber murder. Exhibit R, p. 27.

71. After the murder, when the inmates were allowed to leave the room, the inmates were searched by the corrections officers and a metal detector was used. Exhibit R, pp. 37-38, 42.

72. Plaintiff admits that Barber had been spreading rumors that Barber had sex with plaintiff when plaintiff was drunk. Exhibit R, pp. 51-53.

73. Regarding the statements contained in Deputy Hemeyer's offense report (Exhibit Q) plaintiff admits that most of the statements contained therein were accurately reported. Exhibit R, pp. 56-60.

74. Plaintiff was offered a polygraph examination and refused to take the test. Exhibit R, p. 66.

75. Plaintiff admitted that prior to the Barber murder, he volunteered to take a polygraph examination if requested by prison investigators. Exhibit R, p. 67.

76. In prison, plaintiff was known as "Broadway Joe" and "Joe the Boss." Exhibit R, p. 92.

77. Plaintiff admits that he was known as a predator inmate while in prison. Exhibit R, p. 94.

78. Plaintiff was involved in three or four stabbings prior to 1985 and it was easy for plaintiff to get a shank or a knife. Exhibit R, p. 95.

79. Plaintiff was caught with a knife on at least two occasions while in the supermax unit at MSP. Exhibit R, pp. 95-97; Exhibit BB; Exhibit CC.

80. Even in supermax, plaintiff would typically have a knife and it was easy to sneak things by the officers. Exhibit R, p. 98.

81. Prior to the Barber murder, plaintiff was also involved in several assaults and stabbings. Exhibit R, pp. 99-103; Exhibit DD.

82. Plaintiff knows of no reason why Richard Lee would want to frame him for murder. Exhibit R, p. 74.

83. Plaintiff knows of no reason why Tom Brown would want to frame him for murder. Exhibit R, p. 74.

84. Plaintiff knows of no reason why George Brooks would want to frame him for murder. Exhibit R, p. 74.

85. After plaintiff's conviction was reversed, Jerry Poe was interviewed by Bill Tackett, Cole County Prosecutor, and Maureen Monaghan, assistant prosecutor of Cole County. Exhibit X, pp. 8-9.

86. The interview was conducted in Florence, Colorado, where Poe was in prison and the interview was memorialized through a memo by Mrs. Monaghan. Exhibit X, p. 9; Exhibit Y.

87. Poe told Mr. Tackett and Mrs. Monaghan that he had testified truthfully at plaintiff's criminal trial when he testified that Joe Amrine stabbed Barber. Poe also said he later recanted his testimony because he was mad at the state. Exhibit Y.

88. Plaintiff was charged with capital murder through a grand jury indictment. Exhibit HH.

89. Plaintiff's claims regarding inmates Terry Russell and Randall Ferguson were addressed in evidentiary hearings in both state and federal court. Exhibit NN (partial transcript of Feb. 16, 1989 hearing in *Amrine v. State*, CV188-597CC); Exhibit MM (transcript of June 24, 1998 hearing in *Amrine v. Bowersox*, 90-0940-CV-W-2).

90. Plaintiff's claims regarding inmate Jerry Poe were addressed in an evidentiary hearing in federal court. Exhibit NN.

91. George Brooks died on January 11, 2005. See Suggestions of Death (Doc. No. 7) filed on January 13, 2005.

**SUGGESTIONS IN SUPPORT OF DEFENDANTS'**  
**MOTION FOR SUMMARY JUDGMENT**

Standard for Summary Judgment

In determining whether summary judgment should issue, the facts and inferences from the facts are viewed in the light most favorable to the nonmoving party, and the burden is placed on the movant to establish both the absence of a genuine issue of material fact and that it is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). Once the movant has met this burden, the nonmoving may not rest on the allegations in its pleadings, but set forth specific facts showing that a genuine issue of material fact exists. Fed.R.Civ.P. 56(e). The nonmoving party must do more than simply show that there is some metaphysical doubt as to the material facts. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). Instead, the nonmoving party bears the burden of setting forth specific facts showing that there is sufficient evidence in its favor to allow a reasonable jury to return a verdict for it. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

## ARGUMENT

### Absolute Prosecutorial Immunity

Defendant Tom Brown was the elected prosecutor of Cole County, Missouri in 1985. Defendant Richard Lee was an investigator assigned to the Cole County prosecutor. At the time of plaintiff's criminal prosecution, Mr. Brown and Mr. Lee were acting in a prosecutorial capacity as all actions taken were done in preparing the criminal case for trial. Therefore, both Mr. Brown and Mr. Lee are entitled to summary judgment on the basis of prosecutorial immunity.

A prosecutor enjoys absolute immunity for acts performed "in initiating a prosecution and in presenting the state's case." *Reasonover v. St. Louis County*, 447 F.3d 569, 579 (8<sup>th</sup> Cir. 2006), citing *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976). "Functions intimately associated with the judicial phase of the criminal process as opposed to investigative police work or administrative duties are absolutely shielded from liability under Section 1983 claims." *Reasonover*, 447 F.3d at 578-80 (internal quotations admitted). "Immunity is not defeated by allegations of malice, vindictiveness, or self-interest." *Id.* at 580, citing *Myers v. Morris*, 810 F.2d 1437, 1446 (8<sup>th</sup> Cir. 1987).

While plaintiff attempts to allege that prosecutor Brown acted as an investigator in this case, the record conclusively shows otherwise. Plaintiff was charged with capital murder through a grand jury indictment. Exhibit HH. Mr. Brown presented the state's case in plaintiff's criminal trial. Mr. Brown's actions in charging plaintiff and preparing the criminal case for trial, including preparing and presenting witnesses, are prosecutorial functions.

Plaintiff's claims against prosecutor Brown are similar to those claims raised against the prosecutor in the *Reasonover* case. There, Reasonover alleged that the prosecutor (Goldman) interviewed a witness and failed to investigate the witness's lengthy criminal history. The witness stated to the prosecutor that Reasonover confessed to her. 447 F.3d at 580. Reasonover also alleged that the prosecutor interviewed and met with other witnesses in preparing testimony for trial. *Id.* Reasonover also claimed that the prosecutor should have taken steps to corroborate a witness's statement beyond a polygraph test. *Id.*

The Eighth Circuit rejected Reasonover's claims, finding that the prosecutor was involved in prosecutorial functions. Specifically, the Eighth Circuit held that "Goldman's interviewing of witnesses ... was prosecutorial and not police work." 447 F.3d at 580. The court emphasized that "[n]ot all of an advocate's work is done in the courtroom. For a lawyer to properly try a case, he must confer with witnesses, and conduct some of his own factual investigation." *Id.*, citing *Cook v. Houston Post*, 616 F.2d 791, 793 (5<sup>th</sup> Cir. 1980). Finally, the Eighth Circuit held that "[e]ven if Goldman knowingly presented false, misleading, or perjured testimony, or even if he withheld or suppressed exculpatory evidence, he is absolutely immune from suit." *Id.* (emphasis added).

Plaintiff alleges that Mr. Brown knowingly used false testimony at trial, presumably referring to the testimony of inmate witnesses Jerry Poe, Randy Ferguson and Terry Russell. Exhibit A. While these claims have also been rejected by previous courts, they are still not sufficient to overcome a prosecutor's absolute immunity. In fact, this was an issue specifically addressed by the United States Supreme Court in *Imbler v. Pachtman*. There, a former death row inmate was eventually successful in having his conviction and sentence overturned based, in part, on a finding that the prosecutor (Pachtman) allowed a witness to give false testimony at Imbler's criminal trial and suppressed fingerprint expert evidence. 424 U.S. at 415-16. Further, the primary identification witness, recanted his trial identification of Imbler in the subsequent habeas corpus proceedings. *Id.* at 413.

In holding that prosecutors were entitled to absolute immunity, the Supreme Court noted that the "veracity of witnesses in criminal cases frequently is subject to doubt before and after they testify." 424 U.S. at 426. Absolute immunity allows prosecutors to exercise their judgment as to the use of such witnesses without regard to personal liability. *Id.* The Supreme Court emphasized that there are often conflicting and inconsistent evidence and that a prosecutor must be protected from personal liability when presenting witnesses and testimony in criminal cases.

A prosecutor often must decide, especially in cases of wide public interest, whether to proceed to trial where there is a sharp conflict in the evidence. The appropriate course of action in such a case may well be to permit

a jury to resolve the conflict. Yet, a prosecutor understandably would be reluctant to go forward with a close case where an acquittal likely would trigger a suit against him for damages.

*Imbler*, 424 U.S. at 426 footnote 24.

Thus, the United States Supreme Court explicitly held that a prosecutor's absolute immunity from liability for damages under Section 1983 is applicable even where it is alleged the prosecutor knowingly used perjured testimony at trial, deliberately withheld exculpatory information or failed to make a full disclosure of all facts casting doubt upon the state's case. *Id.*

These allegations are the crux of plaintiff's claims against Prosecutor Brown in this case. The record shows that plaintiff's claims of knowing use of perjured testimony have been rejected in prior court proceedings. While defendants vigorously dispute such claims, they are not sufficient to overcome a prosecutor's absolute immunity.

Plaintiff alleges generally that exculpatory and impeaching evidence was being withheld. The record shows otherwise. Plaintiff's defense attorney had access to the prosecutor's complete file, including all witness statements. Exhibit II. The defense attorney conducted numerous depositions before the criminal trial, including depositions of inmates Poe, Ferguson and Russell. Exhibits U, V and W. The defense attorney also had access to prison records, including medical records of the prosecution's witnesses. In fact, plaintiff's attorney notified the prosecutor that he might use classification and medical files of Jerry Poe and Terry Russell. Exhibit JJ. The defense attorney had the opportunity and, in fact, interviewed numerous inmate witnesses with plaintiff prior to the criminal trial.

Plaintiff's expert identifies only two instances of exculpatory evidence being withheld. He states that a statement by an inmate named Ronnie Ross was not provided to the defense and Ross was not called to provide testimony at trial. Exhibit FF, p. 10. Plaintiff's expert also states that notes allegedly written by Randy Ferguson were not properly investigated. Exhibit FF, p. 10. However, inmate Ronnie Ross was identified as a potential witness whose name was provided to Amrine's defense attorney. Exhibit II. The defense attorney had ample opportunity to interview Ross prior to trial and, in fact, subpoenaed Ross to appear as a witness. Exhibit

GG. Likewise, the notes allegedly written by Ferguson were allegedly written after Amrine's criminal trial had concluded. These notes were thoroughly investigated and, in fact, a thorough evidentiary hearing was conducted by the state trial judge. Exhibit O.

Again, the record shows that exculpatory and impeaching evidence was not withheld but was fully available to plaintiff and his defense attorney. Absolute immunity, however, protects defendants from liability for these claims.

Plaintiff cannot overcome a prosecutor's absolute immunity by simply framing his claim as a conspiracy charge. *Reasonover* also held that a prosecutor is absolutely immune from a civil conspiracy charge when his alleged participation in the conspiracy consists of otherwise immune acts. 447 F.3d at 580, citing *Rowe v. City of Fort Lauderdale*, 279 F.3d 1271, 1282 (11<sup>th</sup> Cir. 2002). Because Mr. Brown is absolutely immune from liability for prosecuting plaintiff, he cannot be held liable for conspiring to violate plaintiff's constitutional rights by prosecuting him.

Likewise, Richard Lee is also entitled to absolute prosecutorial immunity as he worked under the direction of the prosecutor in preparing plaintiff's criminal case for trial. The Eighth Circuit has recognized that absolute prosecutorial immunity is available to investigators working for state prosecutors in connection with a criminal prosecution. *Keating v. Martin*, 638 F.2d 1121, 1122 (8<sup>th</sup> Cir. 1980). Mr. Lee's involvement in this case was limited to approximately three weeks before trial when, as part of the prosecutorial process and at the direction of the prosecutor, Mr. Lee began re-interviewing potential trial witnesses. It was during this process, that inmate Randy Ferguson came forward with additional evidence against plaintiff. Because this process involved preparation of the criminal case under the direction of the prosecutor, Richard Lee is entitled to absolute prosecutorial immunity.

Collateral Estoppel

Collateral estoppel principles are applicable in Section 1983 litigation. *Migra v. Warren City School Dist. Bd. Of Education*, 465 U.S. 75, 83-86 (1984). Plaintiff is collaterally estopped from relitigating his claims in this civil rights suit because he had a full and fair opportunity to litigate those claims at trial and in his post-conviction proceedings. *Allen v. McCurry*, 449 U.S. 90 (1980). A party receives a full and fair opportunity to litigate his claim, so long as “the minimum procedure requirements of the Fourteenth Amendment’s Due Process Clause” have been satisfied. *Guenther v. Holmgreen*, 738 F.2d 879, 885 (7<sup>th</sup> Cir. 1984); see also *Willard v. Pearson*, 823 F.2d 1141, 1149 (7<sup>th</sup> Cir. 1987)(holding that state criminal court afforded full and fair opportunity to litigate Fourth Amendment claims).

In Missouri, a party is collaterally estopped from relitigating an issue decided in a prior suit when: 1) the issue decided in the prior adjudication is identical to the issue in the present action; 2) the prior adjudication resulted in a judgment on the merits; 3) the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication; and 4) the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior suit. *Stine v. Warford*, 18 S.W.3d 601, 606 (Mo. App. 2000).

Plaintiff has had the opportunity to raise his civil rights claims in numerous previous proceedings. Throughout his post-conviction proceedings, plaintiff, in fact, has raised in one form or another, virtually every claim that he now asserts in this civil rights claim. For example, in *State v. Amrine*, his direct appeal of his criminal conviction, plaintiff alleged error in the identity and use of a confidential informant. 741 S.W.2d at 670. The Missouri Supreme Court held that the identity of the informant was insignificant and that failure to disclose the name did not deprive plaintiff of a fair trial. *Id.* at 671. Plaintiff also raised an issue involving Randall Ferguson’s credibility pointing to handwritten letters allegedly written by Ferguson after plaintiff’s criminal trial. The Missouri Supreme Court rejected this claim also. *Id.* at 674-75.

Subsequently, plaintiff filed a motion for post-conviction relief raising other issues. An

evidentiary hearing was conducted and the denial of plaintiff's post-conviction motion was affirmed by the Missouri Supreme Court. See *Amrine v. State*, 785 S.W.2d 531 (Mo. banc. 1990). In the post-conviction case, plaintiff, claiming his constitutional rights were violated by ineffective assistance of counsel, alleged that Terry Russell testified falsely at trial, Ferguson was not adequately cross-examined at trial, inmate witness Jerry Poe was not adequately cross-examined regarding his background, the prosecutor knowingly destroyed evidence, the state allegedly destroyed blood stained evidence found on plaintiff's pants, reference was made by one of the state's witnesses (Russell) to a polygraph examination, and other issues. Again, plaintiff's claims were all rejected by the Missouri Supreme Court. *Amrine v. State*, 785 S.W.2d 531.

Plaintiff also brought these claims before the federal court in federal habeas proceedings. Among the thirty-three claims for relief plaintiff brought in his habeas corpus action were (1) Terry Russell's claims that he had been threatened by George Brooks and John Hemeyer to testify against plaintiff, (2) Ferguson's recantation of his testimony, (3) inmate Jerry Poe's history of mental illness and unusual deviant behavior, (4) the state's use of and refusal to identify a confidential informant, (5) inmate Russell's reference to a polygraph examination during his trial testimony, (6) counsel's failure to investigate alibi statements of Russell, (7) counsel's failure to properly investigate and cross-examine inmate Ferguson, (8) counsel's failure to investigate and effectively cross-examine Poe regarding mental illness and false statements to authorities. These claims were all rejected by Judge Gaitan. Exhibit AA – *Amrine v. Bowersox*, 1996 WL 33370754 (W.D. Mo. Feb. 26, 1996).

Plaintiff appealed Judge Gaitan's opinion and presented new evidence to the Eighth Circuit in the form of an affidavit of Jerry Poe disavowing his prior testimony and claiming that he was coerced by George Brooks and John Hemeyer to testify falsely against Amrine. *Amrine v. Bowersox*, 128 F.3d. 1222, 1226 (8<sup>th</sup> Cir. 1997). The Eighth Circuit remanded so that an evidentiary hearing could be held to determine the impact of Poe's recantation. *Id.* 1230.

On remand, Judge Gaitan held an evidentiary hearing and addressed several issues raised by plaintiff. Exhibit O. During the evidentiary hearing, several witnesses testified

including, Terry Russell, John Noble, Tom Brown, George Brooks and Richard Lee. Exhibit O. Jerry Poe and Randall Ferguson also testified through videotaped depositions. Exhibit O. Regarding Jerry Poe's claims that he was coerced to testify, Judge Gaitan rejected that claim and found against plaintiff. Exhibit O, p. 6. Plaintiff once again appealed to the Eighth Circuit, which once again denied plaintiff's claims that the three inmate witnesses were threatened, coerced or pressured into testifying falsely against plaintiff. *Amrine v. Bowersox*, 238 F.3d. 1023 (8<sup>th</sup> Cir. 2001).

Thus, plaintiff has had a full and fair opportunity to litigate his claims that the three inmate witnesses were coerced and threatened into testifying falsely against plaintiff. Evidentiary hearings have been held and plaintiff's claims have been rejected by numerous courts. Plaintiff filed this civil rights claim to take another bite at the apple, hoping to prove that which has previously been ruled against him, i.e. that defendants violated his constitutional rights in the investigation and prosecution of the Barber murder.

The Eighth Circuit has rejected similar civil rights cases where the plaintiff raised his constitutional claims in state criminal or post-conviction proceedings. For example, in *Sanders v. Frisby*, 736 F.2d 1230 (8<sup>th</sup> Cir. 1984), plaintiff alleged that his Fourth Amendment rights had been violated during his prosecution for rape. The state trial court denied plaintiff's motion to suppress evidence. After plaintiff's conviction, he appealed but did not challenge the trial court's denial of his suppression motions. Plaintiff's criminal conviction was reversed and remanded for a new trial and plaintiff subsequently entered a plea of guilty. 736 F.2d at 1231. In a subsequent Section 1983 case, the Eighth Circuit held that plaintiff Sander's Fourth Amendment claims were barred by collateral estoppel because the issue had been adjudicated in the state trial court. *Id.* at 1232.

Similarly, in *Tyler v. Harper*, 744 F.2d 653 (8<sup>th</sup> Cir. 1984), an inmate brought a civil rights action alleging that the prosecutor, police officer and investigator interfered with plaintiff's right to a fair trial by harassing alibi witnesses and destroying exculpatory evidence. The Eighth Circuit held that plaintiff had a full and fair opportunity to litigate these claims in his state criminal proceedings and therefore was collaterally estopped from pursuing a civil

rights claim under Section 1983. 744 F.2d at 655-57.

Likewise, in *Simmons v. O'Brien*, 77 F.3d 1093 (8<sup>th</sup> Cir. 1996), an inmate brought a Section 1983 action against police officers claiming his confession was coerced through racial slurs and physical force. A Section 1983 action followed plaintiff's conviction for second-degree murder and first-degree burglary. The Eighth Circuit noted that plaintiff had a full and fair opportunity to litigate these constitutional claims in the state criminal proceedings. Therefore, the court held that plaintiff was collaterally estopped from pursuing those claims in a civil rights action. 77 F.3d at 1097.

This is the same situation with plaintiff's civil rights claims against the defendants. The claims he raises in this Section 1983 action were previously raised in his criminal trial and post-conviction proceedings, including federal habeas actions. Each time plaintiff raised his constitutional claims, the courts rejected them, finding that there was no constitutional violation in the prosecution of plaintiff for the Barber murder. While plaintiff's conviction and sentence were subsequently vacated, the Missouri Supreme Court specifically noted that its decision was "independent of any constitutional violation."

Therefore, the straightforward application of collateral estoppel principles prevent plaintiff from re-litigating his constitutional claims in a civil rights action.

Count I – Procedural Due Process

The Due Process Clause of the Fourteenth Amendment states, in relevant part, that no state shall “deprive any person of...liberty...without due process of law.” U.S. Const., Amend XIV, § 1. To establish a due process violation, plaintiff must first show that defendants infringed on a cognizable liberty interest. *Swipies v. Kojka*, 419 F.3d 709, 714 (8th Cir. 2005). Plaintiff must also show that defendants deprived him of that liberty interest without first affording him sufficient process. *Id.* at 715. Due process ensures every person subject to a deprivation, “the opportunity to be heard at a meaningful time and in a meaningful manner.” *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). The circumstances of the deprivation dictate what procedures are necessary to satisfy the guarantee. *Id.* at 333-34.

Plaintiff cannot maintain a Section 1983 action against defendants because there was probable cause to support plaintiff’s prosecution for the Barber murder. This case is similar to *Harkman v. Moore*, \_\_\_\_ U.S. \_\_\_\_, 126 S.Ct. 1695, 164 L.Ed. 2d 441 (2006). There, an acquittee in a federal fraud prosecution brought *Bivens* claims in a Section 1983 action against the federal prosecutor and postal service inspectors. The acquittee claimed that he was maliciously prosecuted and prosecuted in retaliation for his exercise of free speech rights. The United States Supreme Court, however, held that the plaintiff was required to plead and prove the absence of probable cause supporting the prosecution to support his *Bivens* claim and Section 1983 action against the prosecutor and criminal investigators. 126 S.Ct. at 1707, 164 L.Ed. 2d at 457.

Here, there is no question that there was probable cause to prosecute plaintiff for the Barber murder. In fact, numerous courts have held that the evidence was constitutionally sufficient to support plaintiff’s conviction for capital murder. This was acknowledged by the Supreme Court of Missouri when it vacated plaintiff’s conviction. See *Amrine v. Roper*, 102 S.W.3d 549 (while not overwhelming “the evidence at trial was constitutionally sufficient to support the conviction”). See also *Amrine v. Bowersox*, 238 F.3d 1023 (8<sup>th</sup> Cir. 2001); *Amrine v. Bowersox*, 128 F.3d 1222 (8<sup>th</sup> Cir. 1997); Exhibit O – *Amrine v. Bowersox*, Number 90-0940-CV-W-2 (West. Dist. Mo. Oct. 29, 1998); Exhibit AA - *Amrine v. Bowersox*, 1996 WL 3370754

(W.D.Mo. Feb. 26, 1996). These cases address plaintiff's claims that his constitutional rights were violated at trial. The courts rejected these claims finding that plaintiff was constitutionally convicted. Because there was probable cause to prosecute plaintiff and constitutionally sufficient evidence to support his conviction, he cannot maintain a Section 1983 action against these defendants.

Further, Amrine's various negligent-investigation theories do not implicate a cognizable liberty interest. *Baker v. McCollan*, 443 U.S. 137, 145 (1979); *Wilson v. Lawrence County*, 260 F.3d 946, 955 (8th Cir. 2001). By contrast, reckless or intentional failures to investigate under at least some circumstances can offend due process rights. *Wilson*, 260 F.3d at 955 (reckless or intentional failure to investigate other leads violates due process); see also *Villasana v. Wilhoit*, 368 F.3d 976, 980 (8th Cir. 2004)(damages under § 1983 for intentional non-disclosure of materially favorable evidence by law enforcement resulting in denial of fair trial); *Whitley v. Seibel*, 613 F.2d 682, 686 (7th Cir. 1980)(deliberately ignoring exonerating information indicating wrong person arrested).

Even if there is a material dispute of fact as to whether defendants deprived plaintiff of a constitutionally-recognized liberty interest, he must still establish what process was denied him. *Swipies*, 419 F.3d at 714. And there is no evidence whatsoever that defendants deprived plaintiff of any procedural opportunities to challenge any of the matters he alleges in this case. plaintiff ignores that he received every measure of procedural due process that the criminal justice system affords. Merely because prior attempts to overturn his conviction making similar arguments (e.g., the recantations) failed, does not evidence that Amrine was denied procedural due process. And even if there were evidence that he had been denied some measure of procedural due process, there is no evidence that defendants ever suggested, attempted to or caused any such deprivation.

Plaintiff was represented by counsel and apprised of the charge, and was properly notified of all relevant evidence and witnesses. Through his attorney, plaintiff had the opportunity to conduct whatever discovery he deemed appropriate. Plaintiff's trial attorney conducted numerous depositions of the witnesses and had access to the complete prosecution

file as well as prison records involving the key witnesses. Exhibits U, V, W, II and JJ. At trial, plaintiff's attorney cross-examined the prosecution's witnesses and plaintiff had the opportunity to present witnesses on his own behalf. Following his conviction, plaintiff sought post-conviction relief in both state and federal courts, making virtually all the same arguments in those proceedings that he now advances in support of this claim for damages. In sum, there is no evidence plaintiff was denied any measure of procedural due process and, thus, defendants are entitled to judgment as a matter of law.

Count II – Conspiracy

To prove a § 1983 conspiracy claim against defendants, there must be evidence that they conspired with each other and others to deprive plaintiff of a constitutional right, that at least one of the alleged co-conspirators engaged in an overt act in furtherance of the conspiracy, and that the overt act injured plaintiff. *Askew v. Millerd*, 191 F.3d 953 (8<sup>th</sup> Cir. 1999). Plaintiff must also advance sufficient evidence showing, in fact, that he was deprived of a constitutional right. *Id.*

To advance beyond summary judgment, plaintiff must “allege with particularity and specifically demonstrate material facts that Lee, Hemeyer and Brown and the other defendants reached an agreement.” *Marti v. City of Maplewood*, 57 F.3d 680, 685 (8<sup>th</sup> Cir. 1995). “A commonly held belief that a crime has been committed is not a conspiracy. Various people engaged in investigating and reporting suspected criminal activity does not amount to a conspiracy.” *Myers*, 810 F.2d at 1445. The record contains no specific material facts, circumstantial or otherwise, that indicate Lee, Hemeyer and Brown formed an agreement to violate plaintiff’s constitutional rights. While Lee, Hemeyer and Brown were involved in the prosecution of plaintiff for Barber’s murder, that alone does not establish an unlawful conspiracy.

Defendants Brown and Lee were engaged in the common enterprise of prosecuting plaintiff for the Barber murder. Defendant Hemeyer had only limited involvement in the investigation immediately after the murder. There is no evidence in the record to suggest that they formed an unlawful agreement to violate plaintiff’s constitutional rights. In fact, plaintiff cannot identify any motive on behalf of any of the defendants to frame him for murder or to act with malicious intent. Exhibit R, page 74. Without specific evidence of an agreement, plaintiff’s conspiracy claim must fail.

### Qualified Immunity

Defendants Lee, Hemeyer and Brown are entitled to qualified immunity on all of plaintiff's claims brought under § 1983. Qualified immunity protects a government official from suit in his performance of a discretionary function, unless his conduct violated a clearly established constitutional or statutory right of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The immunity "gives ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law." *Cross v. City of Des Moines*, 965 F.2d 629, 631 (8<sup>th</sup> Cir. 1992)(citing *Hunter v. Bryant*, 502 U.S. 224, 229 (1991)).

"The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that this conduct was unlawful in the situation to be confronted." *Saucier v. Katz*, 533 U.S. 194, 202 (2001). "For a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002). Thus, the relevant inquiry is whether the state of the law at the time of defendants Lee, Hemeyer and Brown's conduct gave them "fair warning" that their actions were unconstitutional. *Id.*

Qualified immunity is analyzed in a two-step process. See *Washington v. Normandy Fire Protection Dist.*, 272 F.3d 522 (8<sup>th</sup> Cir. 2001). The first issue is whether Lee, Hemeyer and Brown's alleged actions or inactions violated a constitutional right. *Saucier*, 533 U.S. at 201. If so, then the second step is to determine whether the right was clearly established at the time the relevant acts occurred. *Id.* at 202. As to the first step in the process, Lee, Hemeyer and Brown will not restate the arguments set forth above in connection with plaintiff's claims. Those arguments are, however, incorporated herein by reference.

Qualified immunity protects Deputy Hemeyer from liability and suit in this case. At the time of the initial investigation into the Barber murder, John Hemeyer was a deputy sheriff of Cole County. Deputy Hemeyer acted at the direction and under the control of Sheriff Basinger. Deputy Hemeyer's role in the initial investigation was very limited pursuant to the direction of

Sheriff Basinger. Deputy Hemeyer assisted in the interviews of potential witnesses and suspects and prepared an offense report which was provided to the sheriff.

A reasonable officer in Deputy Hemeyer's position would not have known that he was violating plaintiff's constitutional rights by acting at the direction and under the control of Sheriff Basinger. Deputy Hemeyer was not the lead investigator and there is no evidence that he exercised control over the investigative steps.

To the extent that plaintiff alleges Deputy Hemeyer's involvement in any threats or coercion of inmate witnesses, those claims have been previously rejected and plaintiff is collaterally estopped from claiming otherwise in this civil rights action. See discussion above.

Likewise, in addition to absolute prosecutorial immunity, Richard Lee is also entitled to qualified immunity. Mr. Lee's involvement was at the direction of the prosecutor in re-interviewing potential trial witnesses in preparation for the criminal trial. He was assisting the prosecutor in preparing the case for trial. A reasonable official would not have known that re-interviewing trial witnesses and presenting that evidence to the prosecutor would violate plaintiff's constitutional rights.

Likewise, to the extent that plaintiff alleges that Mr. Lee threatened or coerced witnesses, those claims have been rejected and plaintiff is collaterally estopped from pursuing those claims. As it pertains to Randall Ferguson, however, Mr. Ferguson testified under oath that he testified truthfully during plaintiff's criminal trial. Exhibit Z, p. 924. While Ferguson subsequently recanted his testimony, his subsequent inconsistent statements cannot be used to create a dispute of fact. See e.g., *RSBI Aerospace, Inc. v. Affiliated FM Ins. Co.*, 49 F.3d 399, 402 (8<sup>th</sup> Cir. 1995) (cannot create fact dispute to avoid summary judgment by contradicting previous sworn statements).

Finally, in addition to prosecutorial immunity, Prosecutor Brown is entitled to qualified immunity. Mr. Brown prosecuted plaintiff based on sufficient evidence to believe plaintiff stabbed Barber. Mr. Brown obtained a conviction that has been repeatedly held to be supported by constitutionally sufficient evidence. Mr. Brown provided plaintiff's criminal defense lawyer with access to all witnesses. A reasonable prosecutor would not have believed

that these actions would violate plaintiff's constitutional rights.

Therefore, defendants Lee, Hemeyer and Brown are also entitled to judgment as a matter of a law on the basis of qualified immunity.

### Count III – Malicious Prosecution

A claim for malicious prosecution requires: 1) commencement of a prosecution against plaintiff, 2) instigation of that prosecution by the defendants, 3) termination of the proceeding in favor of plaintiff, 4) lack of probable cause for the prosecution, 5) evidence that the defendants' conduct was motivated by malice, and, 6) that plaintiff for harmed as a result of the malicious prosecution. *Cassady v. Dillard Dept. Stores*, 167 F.3d 1215, 1219 (8<sup>th</sup> Cir. 1999). *Burnett v. Griffith*, 769 S.W.2d 780, 783-84 (Mo. banc 1989). In Missouri, strict and clear evidence standards apply to a criminal malicious prosecution claim. *Proctor v. Stevens Employment Services, Inc.*, 712 S.W.2d 684, 685-86 (Mo. banc 1986).

The commencement of criminal charges against plaintiff for the Barber murder was initiated by the Cole County Prosecutor, Tom Brown. There is no evidence that Lee or Hemeyer instigated the prosecution. In fact, Richard Lee did not become involved in the prosecution until long after charges had been filed and just before the start of the criminal trial. Certainly, he had no role in instigating the prosecution of plaintiff. Likewise, Deputy Hemeyer's involvement was limited in that he played a limited role in the investigation of the Barber murder. Deputy Hemeyer's role and duties were directed by Sheriff Basinger and consisted of assisting in interviewing of witnesses and suspects and preparing an offense report. Deputy Hemeyer gave the offense report to Sheriff Basinger. That report and other investigative materials were presented to the prosecutor, who was solely responsible for charging plaintiff with the Barber murder.

In addition, Mr. Brown is entitled to absolute prosecutorial immunity for his decision to prosecute plaintiff. The charging decision is, of course, a prosecutorial function intimately associated with the judicial phase of the criminal process. Therefore, Mr. Brown is protected from liability and suit by absolute immunity. See, e.g. *Shaw v. City of St. Louis*, 664 S.W.2d 572 (Mo. App. 1983).

Further, plaintiff must provide evidence showing Mr. Brown lacked probable cause to believe plaintiff had killed Barber. See *Sanders v. Daniel Int'l Corp.*, 682 S.W.2d 803, 807 (Mo. banc 1984). Probable cause is determined upon the objective facts available at the time of his relevant actions and exists if the totality of facts based on reasonably trustworthy information would justify a prudent person in believing plaintiff stabbed Barber. *Smithson v. Aldrich*, 235 F.3d 1058, 1062 (8<sup>th</sup> Cir. 2000).

Plaintiff's prosecution for the Barber murder was supported by probable cause. In fact, plaintiff is collaterally estopped from arguing otherwise as the evidence supporting his conviction has been found to be constitutionally sufficient in previous judicial decisions. See, e.g., *Amrine v. Roper*, 102 S.W.3d 541, 549 (Mo. ban. 2003); *Amrine v. Bowersox*, 238 F.3d 1023 (8<sup>th</sup> Cir. 2001).

A review of the facts available to Mr. Brown clearly supports a perception that plaintiff had indeed stabbed Barber. Based on the reports and witness interviews, Mr. Brown could reasonably believe that Amrine had motive, opportunity and means to murder Gary Barber. Amrine admitted at the outset that he knew Barber had repeatedly told other inmates he had sexually assaulted Amrine. Though Amrine now denies that information motivated him to stab Barber, his denial that being labeled the victim of a homosexual prison assault did not evoke a desire for revenge is nothing short of incredible. The reports also detail that some inmates reported that Barber was chasing Amrine in the moments before Barber's collapse. In addition, Russell reported that Amrine had been planning to stab Barber in the days before the attack and that Amrine told Russell he stabbed Barber after Russell returned to the multi-purpose room following Barber's collapse. Mr. Brown was aware that both Russell and Poe successfully passed a polygraph examination indicating they were being truthful with regard to the information conveyed to Brooks. Exhibit EE. The reports also showed that Brooks offered Amrine an opportunity to buttress his denial that he had stabbed Barber by taking a polygraph examination. Amrine refused. The totality of information supports sufficient probable cause to support the conclusion that Amrine had stabbed Barber.

Further, there is no evidence whatsoever suggesting that defendants Lee, Hemeyer and

Brown took or did not take any action in connection with the Barber murder because of some malicious intent aimed at plaintiff. Plaintiff admits that he knows of no motive on behalf of any of the defendants to frame plaintiff for the Barber murder. Exhibit R, p. 74. And twenty-one years of post-conviction litigation has failed to uncover any malicious intent on behalf of defendants. In the absence of any such evidence, plaintiff cannot satisfy his evidentiary burden regarding this element of a malicious prosecution claim.

Defendants Lee, Hemeyer and Brown are also protected from liability and suit on this claim by the doctrine of official immunity. Official immunity protects state officials from liability for discretionary acts or functions performed in the exercise of official duty. *Jackson v. Wilson*, 581 S.W.2d 39, 42 (Mo. App. 1979). Certainly, the decisions made during the investigation and prosecution of plaintiff were discretionary in nature undertaken by defendants as part of their official duties. There is no evidence of malicious intent or malice. Therefore the defendants are not subject to liability under plaintiff's malicious prosecution claim.

Plaintiff's malicious prosecution claim must fail because, even today, it is undeniable that there is probable cause to prosecute plaintiff for the murder of Gary Barber. In vacating plaintiff's conviction, the Missouri Supreme Court specifically noted that the state could file new charges against plaintiff for the Barber murder. *Amrine v. Roper*, 102 S.W.2d at 549. As noted by the concurring judge, the law does not condone recantations and they are not normally recognized to overturn a lawful conviction and sentence. *Id.* at 549 (Wolff, J. concurring), citing *State v. Harris*, 428 S.W.2d 497, 502 (Mo. 1968). The three recanted witnesses' original trial testimony can be submitted as substantive evidence of the criminal offense. *Id.* at 550. The Eighth Circuit noted that there was "strong evidence" of plaintiff's guilt. *Amrine v. Bowersox*, 238 F.3d at 1030.

Further, new evidence is available to use in the prosecution of plaintiff for the Barber murder. Two prison officials have recently testified that plaintiff admitted killing Gary Barber. See Exhibit KK (Woodruff deposition), pp. 43-44, 57 (witness heard plaintiff say he stabbed Gary Barber); Exhibit LL (Dobson deposition), pp. 114-115 (witness heard Amrine say "I did not mean to kill him").

Clearly, sufficient evidence existed in 1985 and continues to exist to support probable cause to prosecute plaintiff for the Barber murder. Because the evidence available to the defendants at the time of the 1986 prosecution was constitutionally sufficient, plaintiff cannot maintain a malicious prosecution claim.

Conclusion

For the reasons set forth above, defendants Tom Brown, Richard Lee and John Hemeyer are entitled to summary judgment as a matter of law. The undisputed material facts show that these defendants did not violate plaintiff's constitutional rights. Defendants are also entitled to absolute immunity and qualified immunity. As plaintiff has had a full and fair opportunity to litigate his claims in prior litigation, he is collaterally estopped from asserting these claims now. These defendants request that the court grant their motion for summary judgment, assess costs against plaintiff and award such other relief the court deems just and proper.

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