No. _____

In the
Supreme Court of the United States

KEVIN JONES,

Petitioner,

v.

MARK FROST; GARY DUNN; JAMES BACON; and CITY OF RUSSELLVILLE, ARKANSAS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does Supreme Court precedent acknowledge that the Rules Enabling Act, gives procedural rules promulgated by the Supreme Court, Article I, United States Constitution, legislative status?

2. Whether a constitutional issue is suggested when an appellate court patently abrogates precedential Rule 56, Fed. Rules Civ. Proc., summary judgment guidelines, albeit beyond Article III, U.S. Constitution, judicial powers, or is such a mere erroneous departure from precedent policy.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Kevin Jones respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in *Jones v. Frost et al.*, No. 13-3094.

OPINIONS BELOW

The memorandum opinion of the Court of Appeals was entered October 30, 2014 and is reported at 770 F.3d 1183. The Appellate Court denied Petitioner Jones' petition for panel and en banc rehearing by an order entered by the Clerk at the direction of the court on December 05, 2014.

JURISDICTION

District Court jurisdiction was predicated upon 28 U.S.C. § 1343 for a 42 U.S.C. §§ 1983 and 1985 suit. The Court of Appeals entered its judgment affirming the district court's summary judgment on October 30, 2014. The appellate court entered its order denying petitioner's petition for panel and en banc rehearing on December 05, 2014. Supreme Court jurisdiction is predicated upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

Article I, Section 1 – All legislative power herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Article III, Section 1 – The judicial powers of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior Courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a Compensation which shall not be diminished during their continuance in office.

STATUTORY PROVISIONS

Title 28 U.S.C. § 331 appears in the appendix at **App. 22**.

Title 28 U.S.C. § 2072(a)

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.

STATEMENT OF THE CASE

The appellate court affirmed summary judgment and dismissed petitioner Jones' §§ 1983 and 1985 damage suit claims upon *Brady* violations and malicious prosecution against respondents Frost, Dunn, Bacon, and the City of Russellville, Arkansas. Jones claimed that all participated in a conspiracy to cause his prosecution that involved, inter alia, concealing from the prosecutor and thus Jones, exculpatory evidence that Dunn, a convicted woman-assaulting felon on parole, had lied in his alibi that accounted for his whereabouts during the time range that Nona Dirksmeyer was murdered. Title 28 U.S.C. § 1343 conferred district court jurisdiction.

Jones was acquitted by jury verdict after a ten-day trial and contends in his civil suit that had Frost disclosed Dunn's false alibi to the prosecutor instead of advising in his formal "Prosecutors Report" that the alibi cleared Dunn, then the truth would have led to the discovery of Dunn's DNA on a crime scene condom wrapper before Jones was tried instead of afterwards, which in turn would have caused a reasonable prosecutor to dismiss murder charges against him at the pre-trial juncture. Jones further contends that he was deprived of a fair trial and maliciously prosecuted.

Dunn was subsequently tried twice (Dunn I and Dunn II), resulting in hung jury mistrials, wherein Frost testified that the crime scene appeared to have been staged by Jones.

Nineteen-year-old Nona Dirksmeyer, sophomore beauty queen at Russellville's Arkansas Tech, was bludgeoned to death with the base of a pole lamp in her apartment December 15, 2005, between 10:00 a.m. and 12:30 p.m. Detective Frost led the Russellville police investigation and reported to Chief Bacon who found Jones' bloody palm print on the lamp bulb, he described as "tacky" or not dry. Jones denied touching the lamp when he said he discovered the nude body at 5:30 p.m. and attempted to give aid. Frost and Bacon concluded that the palm print was deposited when Nona was killed by Jones, her long time boyfriend, while in a jealous rage rather than five or more hours later and that he staged a rape crime scene by placing an opened condom wrapper on the room-divider counter.

Frost and Bacon visited Nona's mother and stepfather the evening of December 21st and told them Jones killed Nona. The next day, Nona was buried and Prosecutor David Gibbons, Frost and Bacon announced at a press conference the investigation had narrowed to one suspect – the unnamed Jones. The murder was a high profile event of local and statewide interest.

On December 20, 2005, after Frost and Bacon had already concluded Jones killed Nona, Parole Officer Titsworth phoned and advised Russellville policeman Michael Joe Hemmer that Gary Dunn lived across the way in the same complex as Nona and he had been released from prison and was on parole for assaulting a female jogger. Dunn came in

on December 29th and gave an alibi that he was sick that day and went to his mother's (Martha) and accompanied her on errands about town. Bill Glover, Arkansas State Police polygrapher (identified as a co-conspirator but not sued), who had previously driven from the Jones house to Nona's apartment route in a time-line investigation, passed Dunn as truthful, after Frost suggested that Dunn's "deceptive" breathing pattern was attributable to a heart condition. Later, in a routine review, Dr. Richard Poe, the Arkansas State Police's expert polygraph consultant, opined that Gary Dunn caused the death of Nona Dirksmeyer. Frost reported to the prosecutor, David Gibbons, that Dunn had passed and the prosecutor only learned of Poe's opinion almost seven years later during his deposition taken in this case. Gibbons takes polygraph results into account in making his charging decisions.

Frost, sometime before January 17, 2006, investigated Dunn's and Martha's alibi that they visited and made transactions at four businesses on December 15, 2005 during Nona's time of death range. Frost determined that the transactions occurred at: Lowes, on December 14, 2005 at 11:42 a.m.; AutoZone, on December 13, 2005 at 11:11 a.m.; Dardanelle Veterinarian on December 13, 2005 at 3:49 p.m.; and B&W Supply, on December 13, 2005 at 2:55 p.m. Although Martha's bank records showed debit postings on the 15th, the business transactions actually occurred on the 13th and 14th. Frost indicated on his field notes "no transactions on 12/15." Frost, in his January 17,

2006 "Prosecutors Report" he authored, advised the prosecutor that the alibis of seven persons of interest, including Dunn, were investigated and all could account for their time except Jones, who was only supported by "family members." Frost advised that Jones flunked the polygraph and that Dunn passed. Frost urged the prosecutor to file murder charges against Jones. The report was not disclosed in discovery. Frost falsely stated in his subsequent probable cause affidavit that Jones' fingerprints were on the lamp's bloody and battered base.

In the meantime, Russellville Mayor Raye Turner instructed Chief Bacon to take action to allay a rumor around town that her son "Bubba" Turner was involved in the murder. Bacon issued a press release on March 31, 2006 expressing that Bubba wasn't involved and that the police had requested that charges be filed against the unnamed Jones. Mayor Turner talked to the prosecutor, expressed her concern and requested that he make "a statement" about Bubba. Gibbons filed charges immediately against Jones on March 31, 2006, the same day of Bacon's press release. There had been no evidentiary developments implicating Jones for over three months and Gibbons was under pressure. The Jones defense developed the DNA evidence on the condom wrapper, which ultimately proved to be a mixture of DNA from Nona, Dunn and another unknown male. Jones was excluded as were all persons of interest, except Dunn, whose DNA wasn't gathered until after Jones was acquitted, and then it was by Dover policeman, Todd Steffy, who was investigating a theft in which Dunn was a

suspect. Curiously, Steffy is referenced as Jones' "investigator" implying that he wasn't bound by the "gag" order issued by the state court, infra, in the appellate Court's Opinion, **App. 5**. While in charge of the investigation Frost didn't attempt to gather dispositive DNA evidence.

Upon learning that Dunn's DNA was confirmed, Gibbons, the elected prosecutor, recused and special prosecutor Jack McQuary was appointed and the Arkansas State Police, led by special agent Stacie Rhoads, assisted by Dover (contiguous burg) policeman, Todd Steffy, took charge of the investigation on Dunn, who resided two blocks from the Dover School. After preparing and submitting an undated, typed version of Dunn's alibi, Frost belittled Steffy's investigative prowess and refused to further assist, as did the entire Russellville Police Department. However, Frost met with Dunn's defense counsels five times and assisted their preparation. Neither Rhoads nor Steffy knew that Frost had concluded two years earlier that Dunn's alibi was false. Like the prosecutor, Gibbons, they thought that his alibi cleared him. Steffy consequently, dug through the records of the four businesses and confirmed that the transactions occurred on December 13th and 14th, at the specific times Frost had written in his notes. Frost refused two requests from ASP Rhoads for his notes. Frost made a general testimonial reference to his notes in the Dunn prosecution. However, the trial court in the Jones prosecution and in Dunn I and Dunn II, issued gag orders preventing access to all information, not

disclosed at trial, which included, inter alia, Frost's notes (including the typed version) regarding the falsity of Dunn's alibi. Jones' Freedom of Information suit to get access was opposed by the state and relief was denied because the investigation was ongoing.

The gag order was set aside by court order on October 5, 2011. Counsel got the "alibi" field notes October 17, 2011, after special prosecutor McQuary authorized Steffy to release them and Jones filed suit two months later.

On appeal, the court: (1) determined credibility – "Frost's decision not to pass along" his January 2006 field notes that contradicted Dunn's alibi and to formally report to the prosecutor that the alibi cleared him wasn't a "positive act of fraud," and didn't toll the three-year statute of limitations Opinion, **App. 4**; (2) "weighed" the evidence and concluded that Martha Dunn's bank records showing the same four transactions on December 15, 2005, the murder day, were "inconclusive," Opinion, **App. 4**, to establish whether the debits were delayed postings of transactions on the 13th and 14th, as Frost's field notes details; and (3) drew the inference that Officer Steffy's access to Frost's undated type written version of his field notes, two years later in February 2008, could have been discovered by Jones despite the state court's gag orders prohibiting disclosure and Jones' unsuccessful Freedom of Information suit for the notes, Opinion, **App. 5**.

Jones petitioned for rehearing and raised the argument that the Court's decision eschewed settled Rule 56 precedent and its methodology functioned legislatively beyond Article III judicial powers. The Circuit Court denied the petition, hence this Petition for Writ of Certiorari.

REASONS FOR GRANTING THE PETITION SOCRATICALLY EXPRESSED

Does Supreme Court precedent acknowledge that the Rules Enabling Act, gives procedural rules promulgated by the Supreme Court, Article I, United States Constitution, legislative status?

The answer is affirmative. Congress " . . . has ultimate authority over the Federal Rules of Civil Procedure . . . ," *Shady Grove Orthopedic Assoc., P.A. v. Allstate Insurance Co.*, 559 U.S. 393, 130 S. Ct. 1431, 1438, 176 L. Ed. 2d 311 (2010) and *Sibbach v. Wilson Co.,* 312 U.S. 1, 61 S. Ct. 422, 424, 85 L. Ed. 479 (1941). The authority of the Congress to legislate is set forth in Article I, U.S. Constitution, supra. The current Rules Enabling Act [relevant part 28 U.S.C. § 2072(a) **page 2**, supra], is the legislative authority for the Supreme Court to promulgate procedural rules which contain Rule 56, Fed. Rules Civ. Proc. Rule 56 precedent sets clear guidelines relating to the propriety of granting summary judgment and dispensing with jury trial.

Historically, the Congress has established, via 28 U.S.C. § 331, **App. 22**, and similar antecedent statutory enactments, The Judicial Conference of the United States and tasked it to " . . . carry on a continuous study of the operation and effect of the general rules of practice and procedure . . .", id. The Federal Rules of Civil Procedure have an Article I (**page 2**, supra) constitutional pedigree.

Whether a constitutional issue is suggested when an appellate court patently abrogates precedential, Rule 56, Fed. Rules Civ. Proc., summary judgment guidelines in violation of Article III, U.S. Constitution, or is such a mere erroneous departure from precedent policy.

The seminal precedent most often cited that mandate the standards to be followed Rule 56 summary judgment procedure is *Anderson et al. v. Liberty Lobby, Inc.,* 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). It counsels that the reviewing court must not make credibility determinations, nor weigh the evidence and not draw unreasonable inferences adverse to the non-movant:

"Our holding [is that] credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. . . . The evidence of the non-movant is to be believed, and all reasonable inferences are to be drawn in his favor.", id. at 255.

Yet, the appellate court patently: (1) made credibility determinations – "[Detective] Frost's decision not to pass along notes . . . does not show that he conspired with Dunn . . . to commit a positive act of fraud.", Opinion, **App**. **5**; (2) weighed the evidence, " . . . Frost's field notes ['no transactions on 12/15'] cannot reasonably be read to contradict the report that he provided to the state prosecutor.", Opinion, **App**. **4**; and (3) determined and resolved the issue that " . . . [Jones] could have discovered the contents of Frost's [undated type written] notes . . . " before the limitations statute had run, Opinion, **App**. **5**. The appellate court made no mention of the three court gag orders that prohibited Jones' access and his unsuccessful Freedom of Information suit to get Frost's notes (rehearing petition, **App**. **27**). Also, it is apparent that the court "weighed" the evidence when it determined that the undated typed notes generated in February 2008, by Frost were equally as probative to show when Frost learned Dunn's alibi was false as his handwritten notes made in January 2006.[1]

[1] Deduced from the date of January 17, 2006, the date of Frost's "Prosecutors Report" wherein Frost reported to the state prosecutor, David Gibbons, that Dunn was shopping with his mother on the murder date of December 15, 2005. Frost's field notes show the shopping excursion was on the 13th and 14th and that there were "no transactions on 12/15."

The Appellate Court's Failure To Adhere To Rule 56 Standards Is An Exercise Of Power Beyond Article I Judicial Powers.

Jones has established that the Federal Rules of Civil Procedure have legislative origin, supra. It follows that circuit courts' procedure in summary judgment review must conform to that branch's procedural standards, as established by Supreme Court precedent. Failure to do so is more than error occasioned by a decision not in conformity to precedent, *Willy*, infra.

Supreme Court Precedent Fixes Rule 56, Fed. Rules Civ. Proc., Standards To Be Applied In A Summary Judgment Determination.

It is not only the Supreme Court policy that mandates the doctrine of precedent but also Article III of the Constitution (**page 2**, supra), which limits judicial powers. Justice Joseph Story warned of inherent dangers posed by a union of legislative and judicial powers:

> "A more alarming doctrine could not be promulgated by any American court, than that it was at liberty to disregard all former rules and decisions, and to decide for itself, without reference to the settled course of antecedent principles.
>
> This known course of proceeding, this settled habit of thinking, this conclusive effect of judicial adjudications, was in the full view of the framers of the constitution. It

> was required, and enforced in every state in the Union; and a departure from it would have been justly deemed an approach to tyranny and arbitrary power, to the exercise of mere discretion, and to the abandonment of all the just checks upon judicial authority."

Commentaries on the Constitution of the United States §§ 377-78 (1833)

The Supreme Court agrees. Appellate courts are not free to extend judicial power described in Article III of the Constitution:

"The Rules Enabling Act, 28 U.S.C. § 2072, authorizes the Court to 'prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts [and courts of appeals]. . . . In response, we have adopted the Federal Rules of Civil Procedure. . . . The rules, then must be deemed to apply only if their application will not impermissibly expand the judicial authority conferred by Article III. . . .'"

Willy v. Coastal Corp., 503 U.S. 131, 134-35, 112 S. Ct. 1076, 117 L. Ed. 2d 280 (1992)

The appellate court expanded its discretion and exercised Article I powers when it deprived Jones of Rule 56 procedure due him. Issues of constitutional dimension are evident.

———♦———

CONCLUSION

The circuit court's Opinion, **App. 4** referencing Jones' allegation of conspiracy at the "highest levels" of local government is an accurate statement. But, it must be taken into account that the venue is a small town where gossipy rumors can excite a mayor's protective maternal instincts. Coupled with the prideful ego of subordinate policemen, justice in this case has been mediated toward those ends and Kevin Jones heretofore has wrongfully suffered. The Circuit Court should be reversed. Its methodology violates Constitutional separation of powers as well as precedent.

Respectfully submitted,

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United States Court of Appeals
for the Eighth Circuit

No. 13-3094

Kevin Jones

Plaintiff-Appellant

v.

Mark Frost; Gary Dunn; James Bacon;
City of Russellville, Arkansas

Defendants-Appellees

Appeal from United States District Court
for the Eastern District of Arkansas – Little Rock

Submitted: September 10, 2014
Filed: October 30, 2014

Before WOLLMAN, LOKEN, and MURPHY, Circuit Judges.

MURPHY, Circuit Judge.

Kevin Jones filed this action four years after an Arkansas jury acquitted him of murdering Nona Dirksmeyer. Jones alleges that the City of Russellville,

two police officers named Mark Frost and James Bacon, and Gary Dunn, another man suspected of the murder, conspired to frame him for the crime. The district court[1] concluded that the statute of limitations on Jones' claims had run and granted summary judgment for the defendants. We affirm.

Nona Dirksmeyer, a nineteen year old student at Arkansas Tech University, was murdered in her Russellville, Arkansas apartment on December 15, 2005. She died after someone bludgeoned the back of her head with a lamp. Working under police chief James Bacon, officer Mark Frost investigated her murder and suspected that the crime was committed by either Kevin Jones, Dirksmeyer's boyfriend, or Gary Dunn, a parolee who lived across the street from her. After investigating both Jones and Dunn, Frost presented his findings in a report to the state prosecutor. His report stated that Jones had failed a polygraph exam and had given conflicting accounts about where he was at the time of the murder. According to the report, Dunn had passed his polygraph exam and claimed he had been shopping with his mother at the time Dirksmeyer was killed. Frost examined bank records that apparently confirmed where Dunn's mother had been on December 15, but a bank employee later told him that the records might not be accurate. As a result Frost decided not

[1] The Honorable James M. Moody, United States District Judge for the Eastern District of Arkansas.

to include the bank records in his report to the prosecutor.

Based in part on Frost's report, the state charged Jones with murder. He went to trial, and a jury acquitted him in July 2007. A few months later, the state linked DNA evidence found in Dirksmeyer's apartment to Dunn. The state then prosecuted Dunn, who argued that Jones had committed the murder. Two different juries deadlocked over Dunn's guilt, and the charges against him were dropped after the second mistrial.

Over four years after his acquittal, Jones brought the present action alleging that Frost, Bacon, Dunn, and the City of Russellville had conspired to conceal evidence and deprive him of his constitutional right to a fair trial. He seeks relief under 42 U.S.C. §§ 1983 and 1985 and alleges malicious prosecution claims under federal and state law. The district court concluded that these claims were time barred by the relevant statutes of limitations and granted summary judgment to the defendants. Jones appeals.

We review the district court's grant of summary judgment de novo, viewing all evidence and drawing all reasonable inferences in favor of the nonmoving party. *Baye v. Diocese of Rapid City,* 630 F.3d 757, 759 (8th Cir. 2011). Summary judgment is proper when there is no genuine dispute of material fact and the prevailing party is entitled to judgment as a matter of law. *Id.*

The Arkansas personal injury statute of limitations applies to Jones' claims under 42 U.S.C. § 1983 and 1985. *See Morton v. City of Little Rock,* 934 F.2d 180, 182 (8th Cir. 1991). Arkansas provides a three year statute of limitations for state malicious prosecution claims. Ark. Code Ann. § 16-56-105. Jones admits that he filed his suit outside the applicable statutes of limitations, but he argues that he is entitled to equitable tolling based on fraudulent concealment. He asserts that the defendants concealed a portion of Frost's handwritten field notes which incriminated Dunn and which should have been disclosed to the state prosecutor. Jones claims that this omission was part of a conspiracy extending to the highest levels of the city government, which only came to his attention after the limitations period had run.

To establish equitable tolling, a party must show "some positive act of fraud, something so furtively planned and secretly executed as to keep the plaintiff's cause of action concealed." *Varner v. Peterson Farms,* 371 F.3d 1011, 1016 (8th Cir. 2004). Even viewing the evidence here in the light most favorable to Jones, Frost's field notes cannot reasonably be read to contradict the report that he provided to the state prosecutor. The notes indicate that bank records could not confirm the location of Dunn's mother on the day of the murder. Frost's report to the prosecutor said that Dunn had passed a polygraph test and given a statement that he was with his mother on the day of Dirksmeyer's death. These documents do not

conflict with one another. Frost's decision not to pass along notes regarding inconclusive bank records does not show that he conspired with Dunn and the Russellville city government to commit a "positive act of fraud." *Id.* at 1017.

Furthermore, even if Frost had fraudulently attempted to conceal his field notes, that action would not have tolled the statutes of limitations if Frost "could have discovered the fraud or sufficient other facts on which to bring [a] lawsuit, through a reasonable effort." *Varner,* 371 F.3d at 1017. Jones' investigator testified that in February or March of 2008 he had access to a typed copy of Frost's field notes. The investigator also testified that around the same time he conducted an independent investigation of the transactions mentioned in Frost's notes. This testimony shows that Jones could have discovered the contents of Frost's notes more than three years before he filed his complaint in December 2011.

Jones offers additional evidence to support his conspiracy claims, but this evidence was similarly available to him more than three years before he filed his complaint. Jones' counsel knew that the police had investigated Dunn as a potential suspect in Dirksmeyer's murder before Jones was acquitted of the crime. DNA evidence found in Dirksmeyer's apartment that indicated Dunn had been at the scene of the crime was available to Jones in December 2007. Even if the statutes of limitations were tolled until Jones' investigator undertook an independent examination of Dunn's alibi in March 2008,

Jones still failed to file his complaint within the applicable three year time period. His claims are time barred.

For these reasons we affirm the judgment of the district court.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

KEVIN JONES **PLAINTIFF**

VS. **NO. 4:11CV00889**

MARK FROST, GARY DUNN, JAMES BACON and CITY OF RUSSELLVILLE, ARKANSAS **DEFENDANTS**

ORDER

Pending are Plaintiff's amended motion for partial summary judgment, docket # 125; Separate Defendant, Gary Dunn's motion for summary judgment, docket # 131; and the motions of Separate Defendants, James Bacon, Mark Frost and the City of Russellville, Arkansas to strike, docket # 100, and for summary judgment, docket # 132. For the reasons set forth herein, the Defendants' motions for summary judgment, docket #'s 131 and 132, are GRANTED. The remaining motions are DENIED as moot.

Facts

Plaintiff, Kevin Jones, filed his Complaint on December 15, 2011 against Defendants Mark Frost, Gary Dunn and James Bacon. The facts as alleged in Plaintiff's complaint are as follows: On December 15, 2005, Nona Dirksmeyer, a nineteen year old Arkansas Tech University student, was attacked and murdered in her apartment in Russellville, Arkansas. In 2006, Plaintiff, who had been dating Ms. Dirksmeyer at the

time of her death, was charged with her murder. Plaintiff went to trial and was acquitted.

Defendant Mark Frost was the Russellville Police Department's lead criminal investigator on the Dirksmeyer murder and Defendant James Bacon was the Chief of the Russellville Police Department. Plaintiff alleges that Defendant Gary Dunn was the person who murdered Dirksmeyer and the Defendants violated his constitutional rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution by conspiring to withhold evidence and falsifying information in an effort to have Plaintiff prosecuted for the murder of Ms. Dirksmeyer.

On June 25, 2012, the Court entered an Order dismissing Plaintiff's Fifth and Sixth Amendment claims. Finding no Eighth Circuit case directly on point, the Court was not persuaded that the Eighth Circuit would refuse to recognize a § 1983 action based upon a *Brady* violation in the absence of a conviction. Accordingly, the Court refused to dismiss Plaintiff's claim based upon a violation of his Fourteenth Amendment rights.[1] In the same order, construing Plaintiff's allegations as truthful, the Court found that Plaintiff had alleged sufficient facts to

[1] This issue has now been resolved by the Eighth Circuit Court of Appeals. On November 8, 2012, the Court held that even "assuming [a defendant] failed to disclose exculpatory evidence, there was no Brady violation" where the accused was not convicted. *Livers v. Schenck,* 700 F. 3d 340, 359 (8th Cir. 2012).

support an argument that the statute of limitations should be tolled. Additionally, the Court held that upon the facts alleged, Defendants were not entitled to qualified immunity. Although the Court stated, "Defendants' Motion to Dismiss based upon qualified immunity is denied and Plaintiff's Motion for Partial Summary Judgment on the basis of qualified immunity is granted" the record is clear that the Court applied the standard applicable to motions to dismiss and did not rule on the qualified immunity issue based upon the summary judgment standard.

On July 30, 2012, Plaintiff filed an amended complaint adding the City of Russellville, Arkansas as a Defendant. Plaintiff affirmatively states that he seeks recovery for two causes of action pursuant to 42 U.S.C. § 1983: (1) the defendants engaged in a conspiracy to deprive him of his Fourteenth Amendment right to a fair trial effected through *Brady* violations and, (2) the defendants' conspiracy caused him to be maliciously prosecuted. (ECF No.126, p.1). In a later pleading, Plaintiff states that he also seeks relief based upon a state law claim for malicious prosecution. (ECF No. 150, p. 15). Defendants claim that summary judgment is proper at this time.

Standard for Summary Judgment

Summary judgment is appropriate only when there is no genuine issue of material fact, so that the dispute may be decided solely on legal grounds. *Holloway v. Lockhart,* 813 F.2d 874 (8th Cir. 1987);

Fed. R. Civ. P. 56. The Supreme Court has established guidelines to assist trial courts in determining whether this standard has been met:

> The inquiry performed is the threshold inquiry of determining whether there is a need for trial – whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986).

The Eighth Circuit Court of Appeals has cautioned that summary judgment should be invoked carefully so that no person will be improperly deprived of a trial of disputed factual issues. *Inland Oil & Transport Co. v. United States,* 600 F.2d 725 (8th Cir. 1979), *cert. denied,* 444 U.S. 991 (1979). The Eighth Circuit set out the burden of the parties in connection with a summary judgment motion in *Counts v. M.K. Ferguson Co.,* 862 F.2d 1338 (8th Cir. 1988):

> [T]he burden on the moving party for summary judgment is only to demonstrate, *i.e.,* [to] point out to the District Court,' that the record does not disclose a genuine dispute on a material fact. It is enough for the movant to bring up the fact that the record does not contain such an issue and to identify that part of the record which bears out his assertion. Once this is done, his burden is

> discharged, and, if the record in fact bears out the claim that no genuine dispute exists on any material fact, it is then the respondent's burden to set forth affirmative evidence, specific facts, showing that there is a genuine dispute on that issue. If the respondent fails to carry that burden, summary judgment should be granted.

Id. at 1339 (quoting *City of Mt. Pleasant v. Associated Elec. Coop.,* 838 F.2d 268, 273-274 (8th Cir. 1988) (citations omitted) (brackets in original)). Only disputes over facts that may affect the outcome of the suit under governing law will properly preclude the entry of summary judgment. *Anderson,* 477 U.S. at 248.

Discussion

Plaintiff's *Brady* claim fails. In *Livers v. Schenck* the Eighth Circuit Court of Appeals held that no cause of action exists under §1983 based upon a *Brady* violation absent a conviction. *Livers,* 700 F.3d at 359, *citing, Strickler v. Greene,* 527 U.S. 263, 281, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999) (holding *Brady* is violated only when "there is a reasonable probability that the suppressed evidence would have produced a different verdict"); *Morgan v. Gertz,* 166 F.3d 1307, 1310 (10th Cir. 1999) (explaining that where "all criminal charges were dismissed prior to trial[,] . . . courts have held universally that the right to a fair trial is not implicated and, therefore, no cause of action exists under § 1983"), and *Flores v. Satz,* 137 F.3d 1275, 1278 (11th Cir. 1998) (refusing to

find a *Brady* violation where the criminal defendant "was never convicted and, therefore, did not suffer the effects of an unfair trial"). Because Jones was acquitted of the charges against him, he has no *Brady* violation claim.

Plaintiff's allegation of malicious prosecution pursuant to § 1983 also fails as the Eighth Circuit "has uniformly held that malicious prosecution by itself is not punishable under § 1983 because it does not allege a constitutional injury." *Kurtz v. City of Shrewsbury,* 245 F.3d 753, 758 (8th Cir. 2001). Plaintiff claims that the defendants' conspiracy to violate his Fourteenth Amendment right to a fair trial effected through *Brady* violations caused him to be maliciously prosecuted. Plaintiff contends that this *Brady* violation satisfies the required constitutional injury to support his malicious prosecution claim. However, as set forth above, because Plaintiff was acquitted of the charges against him, he has no *Brady* violation claim. Accordingly, Plaintiff's malicious prosecution claim pursuant to § 1983 also fails.

Plaintiff's causes of action pursuant to 42 U.S.C. § 1983, § 1985 in addition to his state law claim for malicious prosecution are barred by the statute of limitations. Plaintiff was acquitted of the first degree murder of Ms. Dirksmeyer by jury verdict and judgment entered July 19, 2007 and October 2, 2007. Plaintiff filed this action on December 15, 2011 more than four years later. In Arkansas, the statute of limitations for Section 1983 and Section 1985 claims is three years. *Morton v. City of Little Rock,* 934 F.2d

180 (8th Cir. 1991) and *Housley v. Erwin,* 2008 WL 176388 (W.D.Ark. 2008), *citing, Bell v Fowler,* 99 F.3d 262, 265-66 (8th Cir. 1996). Plaintiff's state law claim for malicious prosecution is governed by a three year statute of limitations, Ark.Code Ann. § 16-56-105, which applies to all tort actions not otherwise limited by law. *Delaney v. Ashcraft,* 2006 WL 2265228 (W.D.Ark. 2006) *citing, O'Mara v. Dykema,* 328 Ark. 310, 317, 942 S.W.2d 854 (1997). Plaintiff argues that the statute should be tolled based upon fraudulent concealment.

Affirmative acts concealing a cause of action will bar the start of the statute of limitations until the time when the cause of action is discovered or should have been discovered by reasonable diligence. *O'Mara v. Dykema,* 328 Ark. 310, 942 S.W.2d 854 (1997). A plaintiff's ignorance of his rights or the "mere silence of one who is under no obligation to speak will not toll the statute." *Gibson v. Herring,* 63 Ark. App. 155, 158, 975 S.W.2d 860, 862 (Ark. App. 1998) *citing Wilson v. General Electric Capital Auto Lease, Inc.,* 311 Ark. 84, 841 S.W.2d 619 (1992). "There must be some positive act of fraud, something so furtively planned and secretly executed as to keep the plaintiff's cause of action concealed, or perpetrated in a way that it conceals itself." *Id.* "Although the question of fraudulent concealment is normally a question of fact that is not suited for summary judgment, when the evidence leaves no room for a reasonable difference of opinion a trial court may resolve fact issues as a matter of

law." *Varner v. Peterson Farms,* 371 F.3d 1011, 1017 (8th Cir. 2004).

Here, Plaintiff argues that Frost concealed his field note which stated, "No transaction on 12/15" and that he was not able to discover this note until October 17, 2011. Plaintiff contends that this note reveals that Frost knew that Dunn's alibi was false but he fraudulently cleared Dunn in a written "Prosecutors Report." Plaintiff presents the affidavit of James M. Pratt, Jr., Prosecuting Attorney for the 13th Judicial District of Arkansas from January 1, 1999 to December 31, 2006. Pratt opines that assuming a prosecutor had known that Dunn's alibi was false, and:

> Once it was established that Kevin Jones was excluded as a donor of the DNA found on the crime scene condom wrapper, a minimal further investigation would include obtaining Gary Dunn's DNA for comparison to the DNA already found on the condom wrapper. Given the fact that Dunn was subsequently included as a donor, any reasonable prosecutor would then begin the process of examining other pertinent information bearing on probable cause to suspect that someone other than Mr. Jones had killed Nona. The following information was known by law enforcement and documented in their files:
>
> - Dunn and his mother lied about his whereabouts during Nona's time of death range;
> - Dunn's apartment faced Nona's across a parking lot in the same complex;

- Dunn was on parole at the time having been convicted of assaulting a female jogger;
- Dunn's modus operandi in the jogger attack was similar to the modus operandi used in Nona's murder; both women appeared to be pointedly struck in the throat and both were hit or bludgeoned with a club of opportunity, a tree limb for the jogger and Nona's pole lamp in her apartment;
- the female jogger's recollection that Dunn said "I'll f'ing kill you" during his attack on her; and
- Dunn's predatory stalk of Sarah Campbell on February 24, 2007 from the Wal-Mart parking lot for several miles.

(ECF No.121, exhibit 5).

"Concealment of facts, no matter how fraudulent or otherwise wrongful, has no effect on the running of a statute of limitations if the plaintiffs could have discovered the fraud or sufficient other facts upon which to bring their lawsuit, through a reasonable effort on their part." *Varner v. Peterson Farms,* 371 F.3d at 1017. It is undisputed that DNA testing which excluded the Plaintiff as the donor of the DNA substance found on the condom wrapper was reported on January 4, 2007. (ECF No. 144, p.2). Further, Plaintiff admits that DNA testing which identified Dunn as a potential donor of the DNA substance found on the condom wrapper was reported on December 18, 2007. (Id.) Jones defense team was aware of Dunn's name prior to the criminal trial of Jones: they knew

that Dunn had possibly been polygraphed by the Russellville Police Department, that he had previously been prosecuted for attacking a woman at Bona Dea trail in Russellville and, that he had been convicted of battery. (ECF No. 153, exhibit 1). Plaintiff concedes that on June 5, 2008, additional DNA testing confirmed that Nona Dirksmeyer's DNA was mixed the DNA of potential donor Dunn on the condom wrapper. (ECF No. 144, p.3). Further, on August 14, 2008, Dunn denied ever being in Dirksmeyer's apartment. (ECF No. 67, exhibit 8). Finally, the contents of the field note were available to Jones team in typed memorandum form in February 2008.[2] (ECF No. 153, exhibit 4 and 5).

The Court finds that Plaintiff should have been aware through due diligence and reasonable effort on his part of his potential cause of action well before December 15, 2008, (three years prior to the filing of Plaintiff's complaint). Accordingly, Plaintiff's causes of action are barred by the statute of limitations.

Finally, Plaintiff's claims of malicious prosecution fail as a matter of law. Plaintiff concedes that probable cause existed for his arrest. He claims that the Defendants failed to "maintain probable cause" throughout his trial. Plaintiff argues that the

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[2] The type written form of the notes was provided to Arkansas State Police Investigator Stacie Rhoads in February 2008 and Plaintiff's investigator, Todd Steffy was aware of the memo around the same time.

"continuation of a prosecution in the face of facts that undermine probable cause can support a claim of malicious prosecution." *Coombs v. Hot Springs Village Property Owners Ass'n,* 98 Ark. App. 226, 233, 254 S.W.3d 5, 11 (Ark. App. 2007). Plaintiff, however, does not claim that the initial probable cause which existed for his arrest was undermined during his trial, yet the prosecution maliciously continued. Instead, relying on *Kuehl v. Burtis,* 173 F.3d 646, 650 (8th Cir. 1999), Plaintiff argues that probable cause should be determined by considering evidence that a further minimal investigation would have revealed. Plaintiff contends that this "minimal investigation" would have included testing Dunn's DNA to the condom wrapper, revealing him has a potential donor.

Plaintiff's reliance on *Kuehl* is misplaced. *Kuehl* establishes that police officers have a duty to conduct a reasonably thorough investigation prior to arrest and cannot disregard plainly exculpatory evidence. The Court explained that probable cause to arrest does not exist when a minimal further investigation would have exonerated the suspect. *Id.* A "minimal investigation" includes interviewing witnesses readily available at the scene, investigating basic evidence and inquiring if a crime has been committed. Plaintiff does not cite to any authority to support his contention that the Defendants continued to have a duty to investigate following an arrest based on probable cause. *See, Olinger v. Larson,* 134 F.3d 1362, 1367 (8th Cir. 1998) citing with approval, *Brodnicki v. City of Omaha,* 75 F.3d 1261, 1264 (8th Cir. 1996)

(recognizing that a police officer need not investigate a suspect's alibi and "conduct a mini-trial before arresting [the suspect]"); *Thompson v. Olson,* 798 F.2d 552, 556 (1st Cir. 1986) (providing that "following a legal warrantless arrest based on probable cause, an affirmative duty to release arises only if the arresting officer ascertains beyond a reasonable doubt that the suspicion (probable cause) which forms the basis for the privilege to arrest is unfounded"). Even if a duty to continue to investigate existed following probable cause to arrest, "minimal investigation" does not include obtaining DNA testing.

Plaintiff also fails to support his claim for conspiracy to deprive him of his civil rights under Section 1985. In order to prevail on his civil rights conspiracy claim, Plaintiff must provide some facts suggesting a mutual understanding between the Deendants to commit unconstitutional acts. *Smith v. Bacon,* 699 F.2d 434, 436 (8th Cir. 1983). Plaintiff offers no evidence to support such a "meeting of the minds." *Barstad v. Murray County,* 420 F.3d 880 (8th Cir. 2005).

For these reasons, Defendants' motions for summary judgment are granted, docket #'s 131 and 132. The remaining motions are denied as moot.

IT IS SO ORDERED this 10th day of September, 2013.

/s/ James M. Moody
James M. Moody
United States District Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

KEVIN JONES **PLAINTIFF**

VS. **NO. 4:11CV00889**

MARK FROST, GARY DUNN, JAMES BACON and CITY OF RUSSELLVILLE, ARKANSAS **DEFENDANTS**

JUDGMENT

Consistent with the Order entered on this date, it is CONSIDERED, ORDERED, and ADJUDGED that this case is DISMISSED, WITH PREJUDICE.

DATED this 10th day of September, 2013.

/s/ James M. Moody
James M. Moody
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 13-3094

Kevin Jones

Appellant

v.

Mark Frost, et al.

Appellees

Appeal from U.S. District Court
for the Eastern District of Arkansas – Little Rock
(4:11-cv-00889-JMM)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

December 05, 2014

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

28 U.S.C.A. § 331

Judicial Conference of the United States

The Chief Justice of the United States shall summon annually the chief judge of each judicial circuit, the chief judge of the Court of International Trade, and a district judge from each judicial circuit to a conference at such time and place in the United States as he may designate.

* * *

The Conference shall make a comprehensive survey of the condition of business in the courts of the United States * * * . It shall also submit suggestions and recommendations to * * * . The Conference is authorized to exercise the authority provided in chapter 16 of this title as the Conference * * *

* * *

The Conference shall also carry on a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use as prescribed by the Supreme Court * * *

* * *

The Chief Justice shall submit to Congress an annual report of the proceedings of the Judicial Conference and its recommendations for legislation.

* * *

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

KEVIN JONES, **Plaintiff-Appellant** **vs.** **MARK FROST; GARY DUNN; JAMES BACON; CITY OF RUSSELLVILLE, ARKANSAS,** **Defendant-Appellees**	**Case No.: 13-3094** **PETITION FOR REHEARING AND REHEARING EN BANC**

FED. R. APP. P. 35(b) STATEMENT

The Panel's affirmance of the district court's grant of summary judgment, in it's published decision, conflicts with Supreme Court and this court's standards for review of summary judgment *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed2d 202 (1986) and *Conolly v. Clark,* 457 F.3d 872, 876 (8th Cir. 2006) . The Panel also overlooked material matters of law and facts which, had it given due consideration, would have brought about a different result. Further, the Panel's disregard of established precedent requires the attention of the full court because the Panel facially weighed the evidence, determined credibility and resolved disputed material facts in the moving appellees' favor, albeit deleterious to intra-circuit conformity and beyond conferred judicial powers, Article III, United States Constitution.

INTRODUCTION

Appellant Jones appealed the district court's grant of summary judgment, finding that his §§ 1983, 1985 and malicious prosecution claims were barred by the three-year statute of limitations. Jones contended that appellee Frost's concealment of his exculpatory [*Brady* material] field notes (JT. APP. 46; ADD 12) was fraudulent and tolled the statute. Jones was charged with murdering his girlfriend, Nona Dirksmeyer, in her apartment on December 15, 2005. During Jones' trial, the DNA evidence excluded him as a donor on a crime scene condom wrapper. Jones was acquitted.

Incidental to a subsequent theft investigation, Dover policeman Steffy swabbed Dunn and his DNA was detected on the condom wrapper. It was known to Frost that Dunn lived in the same apartment complex as the murdered coed and that he was on parole for assaulting a female jogger. His alibi was that he was shopping and running errands with his mother, Martha, during the time of death range on the 15th. Martha's bank records purportedly show postings of four transactions on the 15th.

ARGUMENT

THE PANEL'S RULING CONTRADICTS SUPREME COURT AND EIGHTH CIRCUIT PRECEDENT

However, Frost's field notes show that three of the transactions actually transpired on the 13th at

11:11 a.m. (AutoZone); 2:55 p.m. (B&W Supply) and 3:49 p.m. (Dardanelle Veterinarian). The Lowes' transaction occurred on the 14th at 11:42 a.m. Frost noted "No Transactions on 12/15" yet the Panel weighed the evidence and found the very detailed field notes, supra, did not conflict with Frost's report to the prosecuting attorney that Dunn's alibi accounted for his whereabouts during the murder time range (JT. APP. 1108; ADD 17):

> "[Jones] asserts that the defendants concealed a portion of Frost's handwritten field notes which incriminated Dunn and which should have been disclosed to the state prosecutor."
>
> * * *
>
> "To establish equitable tolling, a party must show 'some positive act of fraud, something so furtively planned and secretly executed as to keep the plaintiff's cause of action concealed.' *Varner v. Peterson Farms,* 371 F.3d 1011, 1016 (8th Cir. 2004). *Even viewing the evidence here in the light most favorable to Jones, Frost's field notes cannot reasonably be read to contradict the report that he provided to the state prosecutor.*' . . . These documents do not conflict with one another. Frost's decision not to pass along notes regarding inconclusive bank records does not show he conspired[1] with Dunn and the Russellville

[1] It is not appropriate here to reiterate thirteen additional overt acts.

> city government to commit a "positive act of fraud." Emphasis Added.
>
> Decision @ pages 3, 4.

Obviously, the Panel somehow determined the 15th date wasn't a delayed posting to Martha's bank account and found that four separate business records that showed specific transaction times on previous dates (JT. APP. 1531-1532) were trumped. Neither Supreme Court precedent nor the precedents of this court permit such a resolution:

> "There is no question that "at summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed2d 202 (1986)."
>
> *Conolly v. Clark,* 457 F.3d 872, 876 (8th Cir. 2006) citing *Liberty Lobby,* supra, as authority.

Also, the Panel factually found that Frost's "decision not to pass along notes" was in good faith and credible, rather than with a purpose to deny Jones access to *Brady* material. Again, assessing credibility is a jury function, *Liberty Lobby,* supra, at 255, 106 S.Ct. 2505.

DISREGARD OF PRECEDENT EXCEEDS ARTICLE III JUDICIAL POWERS

Courts are not free to ignore applicable precedent, a principle that guides the course of appellate reviews:

> " . . . our law is justly deemed certain, and founded in permanent principles, and not dependent upon the caprice or will of judges. A more alarming doctrine could not be promulgated by any American court, than that it was at liberty to disregard all former rules and decisions, and to decide for itself, without reference to the settled course of antecedent principles."
>
> Justice Joseph Story, *Commentaries on the Constitution of the United States* §§377-78 (1833)

The doctrine of precedent is practical and limits Article III judicial powers of the courts. Here it is contended that precedent requires that a jury resolve the weight of evidence, credibility of witnesses and disputed factual issues. The Constitution requires that justice not be mediated otherwise.

THE PANEL OVERLOOKED THREE GAG ORDERS THAT PROHIBITED JONES' ACCESS TO DUNN'S FALSE ALIBI

The appellate court found that Jones could have had access to an undated "typed copy" of Frost's field

notes, he generated in February or March 2008, through connections with a law enforcement officer, and concluded "that Jones could have discovered the contents of Frost's notes more than three years before he filed his complaint in December, 2011. (Opinion, page 4). Despite the fact that the typed memorandum was created two years after Frost investigated and wouldn't show how long he had known of Dunn's false alibi, the central point of Jones' claims, the Panel never mentioned and must have overlooked that the state trial court entered three gag orders in the subsequent Dunn I and II prosecutions dated September 17, 2008 (JT. APP. 12); May 3, 2010 (JT. APP. 127) and April 5, 2011 (JT. APP. 129), all of which prohibited disclosure of Frost's notes in any form. The state court vacated the gag orders October 5, 2011 (JT. APP. 131; ADD 15) and Jones got the field notes and filed suit two months later.

In this petition Jones respectfully contends that the gag orders were not taken into consideration and had the Panel done so, the result of the decision would have been that sufficient evidence was adduced for a jury question as to whether Jones was diligent.

Your petitioner respectfully prays that his petition be granted.

Kevin Jones, Appellant

By: /s/ Charles Sidney Gibson
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