

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THORNTON SAVAGE	:	CIVIL ACTION
	:	
v.	:	
	:	
ALEX BONAVIDACOLA. et al.	:	NO. 03-0016
	:	
O'NEILL, J.	:	MARCH 9, 2005

MEMORANDUM

Plaintiff, Thornton Savage,¹ pro se, filed a complaint against defendants, Alex Bonavitacola--President Judge of the Court of the Court of Common Pleas of Philadelphia County, Louise Mascilli--Court Administrator, Janet Fasy Dowds--Deputy Court Administrator, and Lynne Abraham--District Attorney, in their individual capacities, alleging a violation of his civil rights under 42 U.S.C. § 1983. Before me now is defendants' motions to dismiss for failure to state a claim and plaintiff's "motions in opposition" thereto.

BACKGROUND

In 1985, Savage shot and killed a sixteen year old boy as the boy was attempting to run from him. Savage was convicted on charges of first degree murder, criminal conspiracy, and possessing an instrument of crime, and was sentenced to life imprisonment by Judge George Ivins of the Court of Common Pleas of Philadelphia County. Commonwealth v. Savage, No. 8512-1098-1101. Savage alleges that during voir dire Assistant District Attorney Jack McMahon used his peremptory challenges to exclude African-Americans from the jury to create an "all white systematically picked jury" and thereafter was reprimanded by Judge Ivins for making

¹Thornton Savage is a prisoner confined at the State Correctional Institution at Dallas, Pennsylvania.

references to evidence not in the record during his closing arguments. Savage filed an appeal and requested that the notes of testimony be transcribed.

On October 24, 1986, Savage filed a pro se “Petition for Transcripts,” which did not specify his desire for a transcript of the voir dire and the closing arguments. Savage also mailed an improperly addressed letter, dated November 5, 1986, to the Court Administrator, Joseph Harrison, requesting copies of all of his court proceedings. In addition, Savage filed an appeal on April 30, 1987, in which his counsel allegedly requested notes of testimony to be transcribed. However, Savage’s appeal was dismissed on July 27, 1987 allegedly due to his counsel’s failure to file a brief. Savage further alleges that he filed a petition to restore his appeal rights, which was granted nunc pro tunc.

Savage filed an appeal nunc pro tunc with the Pennsylvania Superior Court, which affirmed his sentence on December 18, 1989. Commonwealth v. Savage, 571 A.2d 505 (Pa. Super. Ct. 1989). The Pennsylvania Supreme Court affirmed the Superior Court’s judgment on January 27, 1992. Commonwealth v. Savage, 602 A.2d 309 (Pa. 1992). An examination of the Supreme Court’s published opinion reveals that the notes of testimony of plaintiff’s trial had been transcribed.

Savage alleges that he filed two petitions to secure the notes of testimony with the Court Reporter’s office, on March 31, 1991 and June 4, 1992, respectively. Savage allegedly did not receive any response.

On November 23, 1992, Savage filed a pro se petition for post-conviction relief under Pennsylvania’s Post Conviction Relief Act, 42 Pa. Cons. Stat. § 9541 et seq. After counsel was appointed, Savage filed an amended petition, which was dismissed by Court of Common Pleas

on April 22, 1996, the dismissal being affirmed by the Superior Court on May 27, 1997.

Commonwealth v. Savage, 698 A.2d 1349 (Pa. Super. Ct. 1997). The Pennsylvania Supreme Court denied appeal on December 8, 1997. Commonwealth v. Savage, 705 A.2d 1307 (Pa. 1997).

On June 18, 1997, Savage mailed a letter to Abraham's office requesting portions of the transcribed notes of testimony including voir dire as well as opening and closing arguments. Abraham allegedly did not respond.

On December 1, 1998, Savage filed his first petition for writ of habeas corpus in this Court alleging ineffectiveness of counsel at trial and counsel in his PCRA petition. Savage v. Larkins, No. 98-6257, 1999 WL 744446 (E.D. Pa. September 24, 1999) (Padova, J.). During the pendency of that claim, Savage sent a letter to Fasy Dowds on June 2, 1999 requesting his voir dire and closing argument transcripts; Fasy Dowds allegedly did not respond. Savage's petition was dismissed on September 24, 1999. Id. Savage, now pro se, filed a motion for reconsideration on October 15, 1999, alleging that his counsel failed to claim that he had been denied due process because he had not been provided with the notes of testimony from the voir dire and the closing arguments at his trial.² This motion was denied and Savage did not appeal.

²In his motion for reconsideration, Savage asserted:

Petitioner was denied his right to fundamental due process of law by state officials depriving him of a copy of closing arguments (transcript) so that petitioner could properly raise and present an adequate argument [of] prosecutorial conduct, where, the assistant district attorney, Jack M. McMahon improperly made reference in his closing argument to evidence not in record, which statement influenced the jury to render a verdict greater and more severe than the evidence presented against petitioner.

Defendant's Motion for Reconsideration at 6 (October 15, 1999), Savage v. Larkins, No. 98-6257, 1999 WL 744446 (E.D.Pa. Sep 24, 1999).

On March 21, 2000, Savage filed a second PCRA petition, in which he raised a Batson violation and claimed that prior PCRA counsel failed to secure a transcript of the voir dire and the closing arguments and that such ineffectiveness prevented plaintiff from raising his Batson claim in a timely manner. Savage sent another letter to Fasy Dowds on May 19, 2000, requesting his voir dire and closing argument transcripts. On July 26, 2000, while this petition was pending, Savage received a letter in response to his request for the transcripts from the Court Reporter Administration informing him that the voir dire transcripts could not be found because Judge Ivins had apparently not asked for them to be transcribed.³ The PCRA court dismissed plaintiff's petition as untimely and without merit on November 7, 2000. The Superior Court affirmed that judgment on September 13, 2001. Commonwealth v. Savage, 788 A.2d 1033 (Pa. Super. Ct. 2001). In his appeal, Savage alleged that Pennsylvania's one year limitation period for PCRA petitions, 42 Pa. Cons. Stat. Ann. § 9545(b)(1)(i), should have been tolled because defendants prevented him from securing the voir dire and closing argument transcripts. Rejecting this argument, the Superior Court held, inter alia, that Savage had waived any potential Batson claim because he had not raised it in his first PCRA petition and that the claim was time-barred under the PCRA because he failed to raise it "within sixty days of the first date that the claim could

³The text of the July 26, 2000 letter is as follows:

Dear Mr. Savage:

I am sorry to inform you that the "Voir Dire" that you requested from us can not be found. We have the notes, but apparently the judge didn't ask for the "Voir Dire" to be transcribed so that part of the transcripts wasn't taken.

Sorry for the wait and inconvenience.

Court Reporter Administration

have been presented.” Id. With respect to the voir dire, which apparently was not transcribed, the Court noted that when a transcript allegedly necessary to an appeal is missing it is appellant’s burden to take steps to reconstruct the record. Id. Thus, the fact that the transcript of the voir dire was unavailable did not entitle plaintiff to relief. On March 25, 2002, Savage wrote another letter to District Attorney Abraham and Mascilli requesting transcripts of his closing arguments; District Attorney Abraham and Mascilli allegedly did not respond. The Pennsylvania Supreme Court denied plaintiff’s petition for allowance of appeal on March 27, 2002. Commonwealth v. Savage, 796 A.2d 981 (Pa. 2002).

Savage filed a second habeas petition with the Court of Appeals on May 2, 2002, which was denied on May 15, 2002 for failure to make a prima facie showing that his claim rested on a rule of constitutional law or on a qualifying factual predicate that could have been discovered previously through the exercise of due diligence. In re Savage, No. 02-2177. Savage sent another letter to Mascilli, on September 9, 2002, requesting his voir dire and closing argument transcripts; Mascilli allegedly did not respond.

Savage filed the instant complaint, on January 2, 2003, alleging that Judge BonavitaCola wrongfully failed to require that plaintiff’s trial proceedings be transcribed and provided to him and that the other defendants acted in concert to maintain a policy that deprived plaintiff of his voir dire and closing argument transcripts in violation of his civil rights under 42 U.S.C. § 1983.⁴ Savage alleges that since 1991 he made numerous written requests for his voir dire and closing

⁴Savage does not allege that defendant District Attorney Abraham was responsible for his inability to obtain the voir dire and closing argument transcripts from his trial as Abraham did not become District Attorney until 1991. Rather, Savage generally avers that all defendants acted in concert to maintain a policy that deprived him of his constitutional right to a meaningful appellate review of his conviction.

argument transcripts from defendants. Defendant Abraham filed a motion to dismiss for lack of subject matter jurisdiction or, in the alternative, for failure to state a claim on July 28, 2003. Defendants Bonavitacola and Dowds filed a parallel motion to dismiss on December 15, 2003. Plaintiff filed two “motions in opposition” to defendants’ motions to dismiss on January 12, 2004 and January 15, 2004, respectively. On February 4, 2004, I granted defendants’ motions to dismiss and dismissed plaintiff’s complaint, holding that I lacked subject matter jurisdiction pursuant to the Rooker-Feldman doctrine. Savage v. Bonavitacola, No. 03-0016 (E.D. Pa. February 4, 2003). On appeal, the Court of Appeals held that Rooker-Feldman was not a bar to subject matter jurisdiction in this case, vacated my Order, and remanded this matter for consideration of the merits. Savage v. Bonavitacola, 112 Fed. Appx. 867 (3rd Cir. 2004). Therefore, I will now consider defendants’ motions to dismiss for failure to state a claim, and plaintiff’s “motions in opposition” thereto.⁵

STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(6) permits a court to dismiss all or part of an action for “failure to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6) (2004). In ruling on a 12(b)(6) motion, I must accept as true all well-pleaded allegations of fact, and any reasonable inferences that may be drawn therefrom, in plaintiffs’ complaint and must determine whether “under any reasonable reading of the pleadings, the plaintiff may be entitled to relief.” Nami v. Fauver, 82 F.3d 63, 65 (3d Cir.1996) (citations omitted). Nevertheless, in evaluating

⁵Savage also filed a motion to expedite proceedings on January 18, 2005 requesting that I issue an order “directing the Defendants to address the question of preclusion and dismissal of this § 1983 Civil Action under Fed. R. Civ. P., Rule 12(b)(6)” within 30 days of the disposition of defendants’ motions to dismiss. Savage’s motion will be denied as moot.

plaintiffs' pleadings I will not credit any "bald assertions." In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1429 (3d Cir. 1997). Nor will I accept as true legal conclusions or unwarranted factual inferences. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). "The complaint will be deemed to have alleged sufficient facts if it adequately put the defendant on notice of the essential elements of the plaintiff's cause of action." Nami, 82 F.3d at 65. However, when considering a Rule 12(b)(6) motion I do not "inquire whether plaintiff[] will ultimately prevail, only whether [he is] entitled to offer evidence to support [his] claims." Nami, 82 F.3d at 65 citing Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). Thus, a Rule 12(b)(6) motion may be granted "only if it appears that plaintiff[] could prove no set of facts that would entitle [him] to relief." Id. citing Conley v. Gibson, 355 U.S. 41 (1957).⁶

DISCUSSION

Savage alleges in his Section 1983 complaint that: (1) Judge Bonavitacola failed in his duty to insure that plaintiff's trial court proceedings be transcribed and provided to him; and (2) the other defendants acted in concert to maintain a policy that deprived plaintiff of his voir dire and closing argument transcripts in violation of his Due Process, Equal Protection, and First Amendment rights to a meaningful appellate review of his conviction.

All defendants argue that Savage's Section 1983 complaint should be dismissed for failure to state a claim because: (1) Savage's Section 1983 complaint is barred by the statute of limitations; and (2) the doctrine of Heck v. Humphrey precludes Savage from challenging the validity of his conviction, which has not been reversed or otherwise called into question. District

⁶Because plaintiff filed his complaint pro se, I will construe his pleadings liberally. Moreover, I will apply the applicable law, irrespective of whether Savage has mentioned it by name. Higgins v. Beyer, 293 F.3d 683, 688 (3d Cir. 1999).

Attorney Abraham further argues that with respect to her: (1) Savage has failed to allege that she violated any of his constitutional rights; and (2) she is absolutely immune from liability for the prosecutorial decisions that Savage attempts to challenge. Defendants' motions to dismiss will be granted in part and denied in part.

I. Defendants' Motions to Dismiss

A. Statute of Limitations

Defendants collectively argue that Savage's Section 1983 action is barred by the statute of limitations because he failed to file his claim within the two year statute of limitation period provided by 42 Pa. Cons. Stat. Ann. § 5524(2). E.g., Bougher v. Univ. of Pittsburgh, 882 F.2d 74, 78 (3d Cir. 1989). Under Pennsylvania law, this limitation period begins to run when the cause of action accrues. See 42 Pa. Cons. Stat. Ann. § 5524 (2004); S.T. Hudson Eng'rs, Inc. v. Camden Hotel Dev. Assocs., 747 A.2d 931, 934 (Pa. Super. Ct. 2000). However, the question of when a Section 1983 action accrues is determined by federal law. Genty v. Resolution Trust Corp., 937 F.2d 899, 919 (3d Cir. 1991). Under federal law, an action accrues "when the plaintiff knew or should have known of the injury upon which its action is based." Samerica Corp. of Del., Inc. v. City of Phila., 142 F.3d 582, 599 (3d Cir. 1998); see also Lake v. Arnold, 232 F.3d 360, 366 (3d Cir. 2000) (holding that a cause of action accrues when "the first significant event necessary to make the claim suable" occurs) quoting Ross v. Johns-Manville Corp., 766 F.2d 823, 826 (3d Cir. 1985) (internal quotations omitted); Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1386 (3d Cir. 1994) ("A claim accrues in a federal cause of action as soon as a potential claimant either is aware, or should be aware, of the existence of and source of an injury.").

Defendants argue that Savage knew or should have known that the voir dire and closing argument transcripts were unavailable at four different points in time. First, they argue that Savage knew or should have known that the transcripts were unavailable in July 1986, because Savage claims to have exercised due diligence since July 1986 in an attempt to obtain these transcripts. Second, they assert that Savage knew or should have known about the unavailability of the transcripts on April 30, 1987, when he filed his direct appeal to the Superior Court and his counsel failed to secure the notes of testimony. These arguments are not convincing. The fact that Savage attempted to obtain the transcripts in July 1986 and failed to obtain them when he filed for appeal does not, ipso facto, mean that he knew or should have known that they were unavailable at that time. Third, defendants argue that Savage knew or should have known that the transcripts were unavailable on October 15, 1999, when he filed a motion for reconsideration in connection with the dismissal of his habeas petition, alleging that his counsel had failed to claim that he had been denied due process because he had not been provided with the transcribed notes of testimony. Fourth, defendants assert that Savage knew or should have known that the transcripts were unavailable on July 26, 2000, at the very latest, when he received a letter from the Court Reporter Administration, which listed Judge Bonavitacola and Fasy Dowds in the heading and advised him that the voir dire and closing argument transcripts were not available because the notes had not been transcribed following his trial.

Defendants' arguments are not properly asserted in a motion to dismiss. Typically, the Federal Rules of Civil Procedure require that affirmative defenses, such as the statute of limitations, be pleaded in the answer because Rule 8(c) so requires and Rule 12(b) does not list a statute of limitations defense as an exception to the Rule. See Fed. R. Civ. P. 8(c) (2004) ("In

pleading to a preceding pleading, a party shall set forth affirmatively . . . statute of limitations . . . and any other matter constituting an avoidance or affirmative defense.”); Fed. R. Civ. P. 12(b) (“Every defense . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion”). The Court of Appeals has created an exception to this rule, however. The so-called “Third Circuit Rule” permits affirmative defenses, such as the statute of limitations, to be raised by motion under Rule 12(b)(6), if “the time alleged in the statement of a claim shows that the cause of action has not been brought within the statute of limitations.” Robinson v. Johnson, 313 F.3d 128, 136 (3d Cir. 2002) quoting Hanna v. U.S. Veterans’ Admin. Hosp., 514 F.2d 1092, 1094 (3d Cir.1975) (internal quotations omitted). If, on the other hand, “the bar is not apparent on the face of the complaint, then it may not afford the basis for a dismissal of the complaint under Rule 12(b)(6).” Robinson, 313 F.3d at 136 quoting Bethel v. Jendoco Constr. Corp., 570 F.2d 1168, 1174 (3d Cir.1978) (internal quotations omitted). See also Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1384 (3d Cir. 1994) (“While the language of Fed.R.Civ.P. 8(c) indicates that a statute of limitations defense cannot be used in the context of a Rule 12(b)(6) motion to dismiss, an exception is made where the complaint facially shows noncompliance with the limitations period and the affirmative defense clearly appears on the face of the pleading.”).

Defendants’ statute of limitations defense does not qualify for this exception. Savage’s complaint states that he exercised due diligence in attempting to obtain his voir dire and closing argument transcripts during the period of July 1986 to May 15, 2002. Thus, the face of Savage’s complaint can reasonably be read as asserting that he became aware of the existence and source of his alleged constitutional injury on May 15, 2002. Savage filed his complaint approximately

six months later, on January 2, 2003. If Savage did, in fact, become aware of the alleged constitutional injury on May 15, 2002, and should not have discovered it earlier, his Section 1983 claim was filed well within the two year limitation period. Although certain facts, which have come to light in defendants' motions to dismiss and plaintiff's "motions in opposition," may support defendants' arguments that Savage knew or should have known that the transcripts were unavailable much earlier than May 15, 2002, those facts and the statute of limitations defense are not appropriate for adjudication on a motion to dismiss, where the face of the complaint does not show a failure to comply with the statute of limitations.

Defendants direct my attention to Savage's October 15, 1999 motion for reconsideration and the Court Reporter Administration's July 26, 2000 letter, attached to District Attorney Abraham's motion to dismiss as Exhibits "A" and "C", respectively. However, courts may not ordinarily consider materials outside the pleadings on a motion to dismiss. Federal Rule of Civil Procedure 12(b) provides that if on a 12(b)(6) motion to dismiss, "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Fed. R. Civ. P. 12(b). See generally Rose v. Bartle, 871 F.2d 331, 340-43 (3d Cir. 1989). Nevertheless, as with most rules, there is an exception: the Court of Appeals has held that "a court may consider certain narrowly defined types of material without converting the motion to dismiss." In re Rockefeller Center Props. Inc. Sec. Litig., 184 F.3d 280, 287 (3d Cir. 1999). For example, a court may consider: (1) "a document integral to or explicitly relied upon in the complaint," In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1426 (3d Cir. 1997); or (2) "an undisputedly

authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document," Pension Benefit Guaranty Corp. v. White Consol. Indus., 998 F.2d 1192, 1196 (3d Cir. 1993). This avenue is foreclosed in the instant case. Although Savage admits in his "motions in opposition" that he filed the October 15, 1999 motion for reconsideration (which as a public record is undisputedly authentic, see id.) and that he received the Court Reporter Administration's July 26, 2000 letter those documents are not integral to or explicitly relied upon by Savage in his complaint. Rather, it is defendants who base their statute of limitations defense on these documents.

I, therefore, have two remaining courses of action. Rycoline Prods., Inc. v. C&W Unlimited, 109 F.3d 883, 886 (3d Cir. 1997). First, I may deny defendants' motions to dismiss without prejudice to the renewal of the statute of limitations defense in a summary judgment motion. Id. Second, I may convert defendants' motions to dismiss into a motion for summary judgment and give all parties a reasonable opportunity to present all material pertinent to the summary judgment motion. Id. Because defendants have asserted other defenses in their motions to dismiss which require disposition in this opinion, I will choose the first course of action. Defendants may renew their statute of limitations defense in their answers and motions for summary judgment.

B. Heck v. Humphrey Doctrine

Defendants also collectively argue that the doctrine of Heck v. Humphrey precludes Savage from challenging the validity of his conviction, which has not been reversed or otherwise called into question. In Heck, the Supreme Court held that a Section 1983 plaintiff seeking “to recover damages for [an] allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court’s issuance of a writ of habeas corpus.” Heck v. Humphrey, 512 U.S. 477, 486-87 (1994). The Court further held that “[a] claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983.” Id. at 487. Thus, I must determine “whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence.” Id. If a judgment in favor of Savage would necessarily imply the invalidation of his conviction, “the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated.” Id. However, if I determine that Savage’s action, “even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit.” Id.

Defendants argue that Savage’s Section 1983 complaint, if successful, would necessarily imply the invalidation of his conviction because his “claim that he has been denied ‘meaningful Appellate review’ of his ‘unconstitutional conviction’ amounts to an attempt to overturn his conviction, which has not been invalidated or otherwise called into question.” Defendants argue

that, in fact, Savage’s conviction has been upheld by the Pennsylvania “courts, in numerous appeals and PCRA petitions, and by this Court in two Habeas Corpus petitions.”

Although it is plain that Savage is searching for avenues that would allow him to overturn his conviction, his access to the voir dire and closing argument transcripts would not *necessarily* imply the invalidation of his conviction. Even if Savage succeeds in obtaining the transcripts of voir dire and closing arguments, it is not certain that these transcripts will demonstrate that the prosecutor struck African Americans from the jury or made impermissible arguments in his closing, as Savage alleges. As the Court of Appeals noted in their September 29, 2004 opinion: “Armed with the transcript, Savage might be in a position to seek reconsideration of the state court’s ruling that his Batson claim lacked adequate factual support (or he might not).” Savage v. Bonavitacola, No. 04-1752 (No. 03-0016), 112 Fed. Appx. 867, *8 (3d Cir. 2004).⁷ Therefore, I will not dismiss Savage’s Section 1983 claim on grounds of Heck v. Humphrey.

C. Sufficiency of Savage’s Section 1983 Claim

1. Section 1983 Claim

District Attorney Abraham argues that Savage’s complaint should be dismissed because it fails to allege adequately that Savage suffered the deprivation of any constitutional right. Section 1983 is not a source of substantive rights; rather, Section 1983 authorizes a person to file a private cause of action against state actors for a deprivation of rights protected by a federal statute or the United States Constitution. 42 U.S.C. § 1983 (2004); West v. Atkins, 487 U.S. 42,

⁷Defendants also rely upon Tedford v. Hepting, 990 F.2d 745, 750 (3d Cir. 1993) (affirming no relief under Section 1983 for fraudulently altered criminal trial transcripts absent successful challenge to underlying conviction). However, this case pre-dates the Supreme Court’s opinion in Heck v. Humphrey.

48 (1988).⁸ Thus, in order to state a claim under Section 1983, plaintiff must allege: (1) a violation of a right secured by the Constitution or the laws of the United States; and (2) that the deprivation was committed by a person acting under the color of state law. Abraham v. Raso, 183 F.3d 279, 287 (3d Cir. 1999). In the present case, it is undisputed that defendants were acting under color of state law in their responses to Savage’s attempts to obtain his voir dire and closing argument transcripts. I will, therefore, focus on the sufficiency of Savage’s claim that defendants violated his constitutional rights.

District Attorney Abraham argues that Savage fails to allege that he has been deprived of a constitutionally protected right. In satisfying the constitutional violation requirement “it is not enough for plaintiff to show that [he] suffered a deprivation. A plaintiff must allege that [he] was deprived of a constitutionally protected interest without due process of law.” Hammond v. Creative Fin. Planning Org., Inc., 800 F. Supp. 1244, 1248 (E.D. Pa. 1992) citing Parratt v. Taylor, 451 U.S. 527, 535 (1981). Therefore, Savage will be “entitled to relief [only] if [his] complaint sufficiently alleges deprivation of any right secured by the Constitution.” Nami v. Fauver, 82 F.3d 63, 65 (3d Cir. 1996).

⁸Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

42 U.S.C. § 1983 (2004).

Savage asserts in his “motions in opposition” that, by not receiving the transcripts of the voir dire and the closing arguments, he has been deprived of his constitutional right to “adequate, effective and meaningful” access to the courts. See *Bounds v. Smith*, 430 U.S. 817, 821 (1977). He argues that the First Amendment right to petition for redress of grievances provides him with the right of access to the courts via the Due Process Clause, see *Bieregu v. Reno*, 59 F.3d 1445, 1453 (3d Cir. 1995), and that providing transcripts, or their equivalent, is central to a prisoner’s right to meaningful access to the courts. See *Johnson v. Miller*, 925 F. Supp. 334, 340 (E.D. Pa. 1996) (concluding that an inmate’s need for transcripts in order to pursue an appeal is central to the right of court access) citing *Roberts v. LaValee*, 389 U.S. 40 (1967) (holding that indigent inmate is entitled to receive free transcripts of his criminal proceedings, or their functional equivalent, in order to appeal or collaterally attack his conviction); *Draper v. Washington*, 372 U.S. 487 (1963) (holding that the transcripts or their functional equivalent were necessary for the defendants to have a basis for appeal). See also *Griffin v. Illinois*, 351 U.S. 12 (1956) (holding that the equal protection clause requires a transcript to be furnished to an indigent defendant free of charge). Savage argues that because the transcripts are central to his right to meaningful access to the courts and he has been denied those transcripts he has been denied a central aspect of his meaningful access to the courts and, therefore, has properly alleged a deprivation of his constitutional rights.⁹ See *Johnson v. Miller*, 925 F. Supp. 334, 340 (E.D. Pa. 1996) (“Since the

⁹District Attorney Abraham further argues that Savage has no basis for alleging a violation of his constitutional rights because he did not attempt to reconstruct the record from his recollection of trial proceedings, and that of his attorney, in formulating his appellate claim. See Pa. R. App. Proc. 1923 (“If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including his recollection.”). However, the persuasive value of actual trial transcripts greatly exceeds that of a pro se litigant’s recollection

court has concluded that the matter complained of in this case is central, the plaintiff need not establish an actual injury in order to maintain his cause of action”) citing Bieregu v. Reno, 59 F.3d 1445, 1455 (3d Cir. 1995).¹⁰

District Attorney Abraham next argues that Savage fails to allege any specific conduct on her part.¹¹ A Section 1983 complaint must “contain a modicum of factual specificity, identifying the particular conduct of defendants that is alleged to have harmed plaintiffs.” Freedman v. City of Allentown, Pa., 853 F.2d 1111, 1114 (3d Cir. 1988). “A civil rights complaint that relies on vague and conclusory allegations does not provide ‘fair notice’ and will not survive a motion to dismiss.” Dist. Council 47, Am. Fed’n of State County and Municipal Employees, AFL-CIO v. Bradley, 795 F.2d 310, 313 (3d Cir. 1986). However, where “sufficient facts are alleged in the complaint so that the court is satisfied that the complaint is not frivolous and that the defendants have been provided with adequate notice so that they can answer the complaint, then the complaint will be deemed sufficient and will be sustained.” Id.

on appeal. The centrality of trial transcripts to Savage’s constitutional claim for meaningful access to the courts cannot be refuted merely because there is a Pennsylvania Rule of Appellate Procedure which provides an alternative method for supporting a claim on appeal.

¹⁰If Savage’s allegations are found to be true, the denied voir dire and closing argument transcripts, which allegedly demonstrate that the prosecutor struck African Americans from the jury and made impermissible arguments in his closing, would be substantial enough to question the validity of the appellate process in the state courts (although not conclusively enough to implicate the preclusive effect of Heck) because they would allow him to seek reconsideration of the state court’s ruling that his Batson claim lacked adequate factual support.

¹¹District Attorney Abraham’s factual allegations that she could not have prevented Savage from obtaining the transcripts because: (1) she did not become District Attorney until 1991; (2) she does not have control over the court reporters who record and transcribe notes of testimony; and (3) the transcripts of voir dire and closing arguments from Savage trial either no longer exist, were never recorded, or were never transcribed, are not properly raised in a motion to dismiss.

Savage's specific allegations in his "motions in opposition" appear to stem from a belief that the voir dire and closing argument transcripts are, or were, in two different locations: the District Attorney's Office and the Court Reporter's Office. With respect to the District Attorney's Office, Savage alleges that all of the trial transcripts, including the voir dire and closing arguments, have been available in the District Attorney's Office since the time of his state court appeals. Savage further alleges that District Attorney Abraham failed to respond to two letters requesting the transcripts. Moreover, Savage alleges that because District Attorney Abraham concealed the existence of the transcripts he relaxed his vigilance in pursuing his claim. In the alternative, Savage asserts that if the transcripts are no longer available District Attorney Abraham failed in her responsibility to preserve the records for review on appeal. With respect to the Court Reporter's Office, Savage argues that Judge BonavitaCola has the duty "to preside over and administer the judicial district division of the Court of Common Pleas and to have administrative supervision over maintaining records of Trial." Similarly, Savage alleges that Fasy Dowds and Mascilli have the duty:

to assure the maintaining and supervision of recording or reducing to notes of testimony of the voir dire examination of jurors, opening and closing statements of both counsels, the Trial-Court proceedings, the reading into the record any written documents accepted into evidence as an exhibit, and shall be promptly transcribed or arrange [sic] for transcription of such records, when Ordered by the Court upon requests for transcripts of all of the notes of testimony by the Defendant or the District Attorney's Office.

Savage alleges that despite the letter which informed him that the transcripts were not available Judge BonavitaCola, Fasy Dowds, and Mascilli breached these duties and caused him to suffer a deprivation of his constitutional right of meaningful appeal and access to the courts.

District Attorney Abraham also argues in a two sentence footnote that Savage does not properly state a claim against her in her individual capacity because he does not allege that she had personal involvement with the alleged deprivation of Savage's constitutional rights. This argument presumes a claim by Savage that District Attorney Abraham is liable under a theory of supervisory liability. Although a supervisory liability claim is not apparent in Savage's pleadings, I will address this argument.

A supervisor may be liable if he personally participated in a violation of plaintiff's rights. See generally Rode v. Dellarciprete, 845 F.2d 1195, 1207 (3d Cir. 1988). Allegations of personal involvement by a supervisor can be shown in one of three ways: (1) direct participation on the part of a defendant; (2) personal direction to subordinates; or (3) actual knowledge and acquiescence in subordinate's violations. See Baker v. Monroe Township, 50 F.3d 1186, 1190-91 (3d Cir. 1995). Any allegations of participation, direction, or actual knowledge and acquiescence must be made with appropriate particularity. Andrews v. City of Phila., 895 F.2d 1469, 1478 (3d Cir. 1990). Therefore, under this theory, Savage must allege that Abraham held a supervisory role and engaged in some affirmative conduct that played a role in the violation of his constitutional rights.¹² Savage alleges in his "motions in opposition" that Abraham's personal

¹²There is a second theory of supervisory liability under Section 1983. See A.M. v. Luzerne County Juvenile Detention Ctr., 372 F.3d 572, 586 (3d Cir. 2004). Under this theory, a supervisor may be liable as a policy maker for failing to exercise his supervisory authority if he "exhibited deliberate indifference to the plight of the person deprived." Sample v. Diecks, 885 F.2d 1099, 1118 (3d Cir.1989). A plaintiff asserting a failure to supervise claim under this theory must first "identify a specific supervisory practice that the defendant failed to employ," and second "allege both (1) contemporaneous knowledge of the offending incident or knowledge of a prior pattern of similar incidents, and (2) circumstances under which the supervisor's inaction could be found to have communicated a message of approval." C.H. v. Oliva, 226 F.3d 198, 202 (3d Cir. 2000). The Court of Appeals has emphasized that under this theory "it is not enough for a plaintiff to argue that the constitutionally cognizable injury would not have occurred

conduct prevented him from obtaining the trial transcripts by failing to respond to two requests for the transcripts and, if the transcripts are no longer available, by failing to preserve them for review on appeal.¹³

Ultimately, “the sufficiency of a civil rights complaint must be determined on a case-by-case basis.” Freedman v. City of Allentown, Pa., 853 F.2d 1111, 1114 (3d Cir. 1988). On the one hand, courts have held a Section 1983 complaint to be sufficient where the court is “satisfied from the factual scenario alleged that the [defendants’] conduct could have violated plaintiff’s rights.” Id. On the other hand, courts have dismissed Section 1983 complaints where the court has “concluded that the plaintiff could not allege a viable civil rights complaint.” Id. at 1115. Moreover, the considerations underlying the factual specificity requirement “must be balanced against the equally important policies that pro se litigants not be denied the opportunity to state a civil rights claim because of technicalities, and that litigation, when possible, should be decided on the merits.” Kauffman v. Moss, 420 F.2d 1270, 1276 (3d Cir. 1970).

Balancing these considerations, I find that Savage has sufficiently alleged a factual and legal basis for a deprivation of his constitutional rights and, thus, has properly pleaded a Section

if the superior had done more than he or she did.” Sample, 885 F.2d 1118. Savage cannot assert supervisory liability under this theory because he has failed to identify any supervisory practice, knowledge of offending conduct by subordinates, or circumstances that could have suggested a message of approval.

¹³Savage also alleges specific facts of personal involvement by Judge Bonavita, Fasy Dowds, and Mascilli. Since these defendants have not asserted that Savage has failed to allege sufficient facts to state a claim under Section 1983, I will not address his arguments with respect to these defendants.

1983 claim.¹⁴ Moreover, I observe that because defendants were able to respond to Savage's complaint with particularized knowledge of this matter in their motions to dismiss they have been provided with adequate notice of the facts to allow them to answer the complaint.

Therefore, I will not dismiss Savage's claim for failure to state a Section 1983 claim.

2. Section 1983 Conspiracy Claim

Savage alleges in his complaint that all defendants acted in concert to pursue a policy that deprived him of his constitutional rights to meaningful appellate review by denying him his voir dire and closing argument transcripts. In order to assert a Section 1983 conspiracy action, plaintiff must allege that: "(1) defendants deprived him of a right secured by the Constitution or laws of the United States and (2) conspired to do so while acting under color of state law."

Dennison v. Pa. Dep't of Corrections, 268 F. Supp. 2d 387, 401 (M.D. Pa. 2003) citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970). As a preliminary matter, Savage must first allege a violation of Section 1983 as there can be no liability for a conspiracy to violate Section 1983 without first establishing a violation of Section 1983. As discussed above, Savage has properly alleged a violation of Section 1983.

In order to allege a conspiracy under Section 1983, plaintiff must allege "a combination of two or more persons to do an unlawful or criminal act or to do a lawful act by unlawful means or for an unlawful purpose." Ammlung v. City of Chester, 494 F.2d 811, 814 (3d Cir. 1974); Spencer v. Steinman, 968 F. Supp. 1011, 1020 (E.D. Pa. 1997) ("Agreement is the sine qua non

¹⁴District Attorney Abraham also argues in her motion to dismiss that Savage "alleges no basis for the imposition of official capacity liability," and in her supporting memorandum that Savage "makes no allegations that would give rise to an official capacity claim." I will not consider these assertions because District Attorney Abraham fails to support them with any authority.

of conspiracy.”). Moreover, “plaintiff must make specific factual allegations of combination, agreement, or understanding among all or between any of the defendants to plot, plan, or conspire to carry out the alleged chain of events.” Panayotides v. Rabenold, 35 F. Supp. 2d 411, 419 (E.D. Pa. 1999); Marchese v. Umstead, 110 F. Supp. 2d 361, 371 (E.D. Pa. 2000) (“Only allegations of conspiracy which are particularized, such as those addressing the period of the conspiracy, the object of the conspiracy, and certain other actions of the alleged conspirators taken to achieve that purpose will be deemed sufficient.”).

Savage generally asserts in his “motions in opposition” that defendants “unreasonably, obstructed and impeded him of [sic] his constitutional rights to meaningful access to the courts . . . by way of ignoring his many requests for portions of his transcripts or their equivalent.” However, Savage fails to make any specific factual allegations of combination, agreement, or understanding among all or between any of the defendants to plot, plan, or conspire to deny him the transcripts. Although the alleged actions of each defendant may have had the same effect on Savage’s ability to obtain the transcripts and pursue his Batson claim on appeal, Savage fails to allege that defendants reached a mutual understanding to deny him the transcripts. See Fullman v. Phila. Int’l Airport, 49 F. Supp. 2d 434, 444 (E.D. Pa. 1999) (“It is not enough that the end result of the parties’ independent conduct caused plaintiff harm or even that the alleged perpetrators of the harm acted in conscious parallelism. Nor is it enough to show that the private actors and the state actors might have had a common goal or acted in concert unless there is a showing that they directed themselves toward an unconstitutional action by virtue of a mutual understanding or agreement.”) (citations omitted). I will, therefore, dismiss Savage’s claim that defendants conspired to deprive him of his constitutional rights.

D. Absolute Immunity

Lastly, District Attorney Abraham argues that, with respect to her alleged conduct, she is absolutely immune from liability for allegedly withholding documents from Savage's criminal case. A prosecutor is immune from Section 1983 liability for acts "intimately associated with the judicial phase of the criminal process" such as initiating prosecutions and presenting the state's case. Imbler v. Pachtman, 424 U.S. 409, 430 (1976). This immunity covers "acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State," and extends to "the professional evaluation of the evidence assembled by the police and appropriate preparation for its presentation at trial or before a grand jury after a decision to seek an indictment has been made." Buckley v. Fitzsimmons, 509 U.S. 259, 273 (1993). Absolute immunity defeats a lawsuit at the outset, Imbler, 424 U.S. at 419 n. 13, and applies even if the prosecutor acted wilfully, maliciously, or in bad faith, see id. at 427-28.

However, absolute prosecutorial immunity does not protect a prosecutor's actions outside of traditional advocacy functions, such as when the prosecutor engages in investigative or administrative functions. Imbler, 424 U.S. at 430-31. See, e.g., Buckley, 509 U.S. at 272 (denying immunity for prosecutor's false statements at press conference and fabrication of evidence prior to indictment and arrest); Burns v. Reed, 500 U.S. 478, 496 (1991) (denying immunity for prosecutor's legal advice to police during investigation); Mitchell v. Forsyth, 472 U.S. 511, 521 (1985) (denying immunity for prosecutor's involvement in illegal wiretapping). When a prosecutor serves in an investigative or administrative function, he is entitled only to qualified immunity. Buckley, 509 U.S. at 273. Thus, the question becomes whether District

Attorney Abraham's alleged withholding of the transcripts properly qualifies as a quasi-judicial function or more appropriately constitutes an administrative or investigative function.

Savage argues that District Attorney Abraham's alleged withholding of the transcripts is not sufficiently associated with her advocacy role to fall within the penumbra of prosecutorial immunity. I disagree. Judges of this Court frequently have held that a prosecutor's decision to withhold evidence from criminal defendants during the trial or pre-trial phases constitutes a quasi-judicial function and, thus, qualifies for absolute immunity. See Roberts v. Toal, No. 94-0608, 1995 WL 51678, *2 (E.D. Pa. February 8, 1995) (Rendell, J.) (“[T]he decision whether to release evidence and the determination of whether the evidence is exculpatory have been characterized as legal judgments made by a prosecutor in his capacity as advocate for the state, warranting immunity. Moreover, the withholding of exculpatory evidence during the pre-trial and trial stages has been found to be within the ‘judicial phase,’ also entitling the prosecutor to absolute immunity from suit under § 1983.”) citing Wilkinson v. Ellis, 484 F. Supp. 1072, 1081 (E.D. Pa. 1980) (Becker, J.). See also Gibbs v. Deckers, 234 F. Supp. 2d 458, 462-63 (E.D. Pa. 2002) (holding that concealment of exculpatory evidence is protected by prosecutorial immunity); Douris v. Schweiker, 229 F. Supp. 2d 391, 399 (E.D. Pa. 2002) (“withholding exculpatory evidence is a quasi-judicial act protected by absolute immunity”). Thus, prosecutors are entitled to absolute immunity for allegedly withholding evidence where the alleged withholding of evidence contributed to the prisoner-plaintiff's conviction and the prosecutor allegedly suppressed the evidence prior to or during trial. I see no material difference between withholding evidence and withholding transcripts.

Although District Attorney Abraham allegedly withheld and concealed the transcripts after Savage's trial and this conduct did not contribute to Savage's conviction, this distinction is not legally significant. Savage's Section 1983 claim still implicates the public policy considerations for granting prosecutors absolute immunity from Section 1983 claims. Prosecutors are absolutely immune for quasi-judicial actions because: "(1) a prosecutor's exercise of independent judgment would be compromised if he or she were threatened with suits for damages for actions in initiating criminal cases; (2) the prosecutor's energies would be diverted from his or her official duties if forced to defend against § 1983 actions; (3) a post-trial decision in favor of the accused might result in a § 1983 action against the prosecutor for alleged errors or mistakes in judgment." Douris, 229 F. Supp. 2d at 399 citing Imbler, 424 U.S. at 425-27.

Although District Attorney Abraham did not initiate the prosecution of Savage, she continues in her prosecutorial duties to pursue the Commonwealth's case against Savage and to prevent Savage--who the Commonwealth views as a convicted criminal--from overturning his conviction via his Batson claim. Her independent judgment would, thus, be compromised if she were threatened by this Section 1983 suit because she could not zealously argue for sustaining Savage's conviction while simultaneously defending herself against allegations that she personally withheld and concealed transcripts which may support the overturning of Savage's conviction. Similarly, District Attorney Abraham's energies would be diverted from her prosecutorial duties if she were forced to defend against this Section 1983 action. The number of defenses asserted in District Attorney's motion to dismiss suggest that such energies have already been diverted. I, therefore, hold that District Attorney Abraham's alleged conduct is "intimately

associated with the judicial phase of the criminal process,” Imbler, 424 U.S. at 430, and she is, thus, entitled to absolute immunity. Savage’s claim against District Attorney Abraham will be dismissed.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THORNTON SAVAGE	:	CIVIL ACTION
	:	
v.	:	
	:	
ALEX BONAVIDACOLA. et al.	:	NO. 03-0016

ORDER

AND NOW, this 9th day of March 2005, after consideration of defendants' motions to dismiss and plaintiff's "motions in opposition" thereto, and for the reasons set forth in the accompanying memorandum, it is ORDERED:

1. Defendants' motions to dismiss with respect to their statute of limitations defense are DENIED without prejudice.
2. Defendants' motions to dismiss with respect to plaintiff's claim that defendants conspired to deprive him of his constitutional rights are GRANTED and plaintiff's conspiracy claim is DISMISSED.
3. District Attorney Abraham's motion to dismiss is GRANTED and all claims against District Attorney Abraham are DISMISSED.
4. Defendants' motions to dismiss with respect to all other defenses are DENIED.
5. Plaintiff's motion to expedite proceedings is DENIED as moot.

s/ Thomas N. O'Neill, Jr.
THOMAS N. O'NEILL, JR., J.