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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

THOMAS MOORE, INDIVIDUALLY AND ON BEHALF OF ALL WRONGFUL DEATH BENEFICIARIES AND HEIRS AT LAW OF CHARLES MOORE, DECEASED

THELMA COLLINS, INDIVIDUALLY AND ON BEHALF OF ALL WRONGFUL DEATH BENEFICIARIES AND HEIRS AT LAW OF HENRY DEE, DECEASED **PLAINTIFFS**

V. **CIVIL ACTION NO.: 5:08CV258-DCB-JMR**

FRANKLIN COUNTY, MISSISSIPPI

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR OPPOSITION TO THE MOTION TO DISMISS

COME NOW, Thomas Moore, individually and on behalf of all the wrongful death beneficiaries and heirs at law of Charles Moore, deceased, and Thelma Collins, individually and on behalf of all the wrongful death beneficiaries and heirs at law of Henry Dee, deceased, by and through their undersigned counsel, pursuant to the Federal Rules of Civil Procedure, and in support of their Opposition to Franklin County's Motion to Dismiss, this memorandum:

STANDARD OF REVIEW

A 12(b)(6) motion to dismiss for failure to state a claim is "rarely granted." *Myers v. Guardian Life Ins. Co. of Am.,* 5 F.Supp 2d 423 (D.Miss. 1998), citing *Clark v. Amoco Prod. Co.,* 794 F.2d 967, 970 (5th Cir. 1986); *Sosa v. Coleman,* 646 F.2d 991, 993 (5th Cir. 1981). The Court must construe the complaint in favor of the plaintiff and assume the truth of the facts pleaded. *Brown v. Nationsbank Corp.*, 188 F. 3d 579, 586 (5th Cir. 1999). The complaint should not be dismissed unless "it is clear that no relief could be granted under any set of facts

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that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). In a civil rights action, the court should not frustrate the broad remedial purpose of the statute by narrowly applying the exceptions to the limitations period. *Briley v. State of Cal.*, 564 F.2d 849, 855 (CA Cal. 1977).

INTRODUCTION AND PROCEDURAL HISTORY

On August 5, 2008, Plaintiffs, Thomas Moore and Thelma Collins, brother and sister, respectively, of Charles Eddie Moore and Henry Hezekiah Dee, deceased, filed this action, naming Franklin County as a defendant and alleging that the actions of the County deprived Plaintiffs of their First Amendment right to access to the courts; Fourth Amendment right to be free from unlawful search and seizure; Fifth Amendment right to due process; Thirteenth Amendment right to enjoy equal benefit of the laws; Fourteenth Amendment right to equal protection; and deprived Plaintiffs of their constitutional right to enjoy a familial relationship with their loved ones, all in violation of 42 U.S.C. §§ 1981(a), 1983, and 1985(3).

Plaintiffs allege that Charles Moore and Henry Dee were kidnapped and murdered by members of the White Knights of the Ku Klux Klan on May 2, 1964. The men were kidnapped in Franklin County and thrown into the Old Mississippi River where they drowned. Two men, James Seale and Charles Edwards were arrested in connection with the crime and then released.

The Department of Justice opened a fresh investigation into the crime in 2007. This investigation revealed for the first time that Franklin County Sheriff Wayne Hutto aided and abetted the crime against Dee and Moore. Charles Edwards, one of the conspirators, told the government that county law enforcement officers were in contact with the perpetrators on the day of the crime. On January 24, 2007 Sheriff Hutto was named as an un-indicted co-

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conspirator in a federal indictment of James Seale for the kidnapping. Plaintiffs' complaint alleges that Sheriff Wayne Hutto and Deputy Sheriff Kirby Shell misled federal and state investigators in the immediate aftermath of the crime and thereby successfully thwarted its timely prosecution. Plaintiffs allege that the statute of limitations accrued on, or was tolled until, January 24, 2007, the date of the indictment of Seale. Plaintiffs could not have known of the facts establishing the County's liability without Charles Edwards' testimony, and that testimony only became available when the Justice Department protected him from prosecution by granting him immunity in connection with the 2006-2007 investigation.

On October 29, 2008, Franklin County filed its Motion to Dismiss on the grounds that the statute of limitations expired in July 1967. Defendant argues that the complaint should be dismissed at this early stage in the proceedings because the claims are legally deficient.

THE CLAIMS ASSERTED BY THE PLAINTIFFS SHOULD NOT BE DISMISSED PURSUANT TO RULE 12(B) OF THE FEDERAL RULES OF CIVIL PROCEDURE

Factual Background[1]

Plaintiffs' complaint avers that on May 2, 1964, the decedents, two 19 year old African-Americans, were kidnapped from the open road in the middle of the day in Franklin County, taken to the Homochitto National Forest, where they were beaten, and then, hours later, thrown in the Old Mississippi River alive to drown. Their bodies were discovered in the river in July 1964. On November 6, 1964 Charles Edwards and James Ford Seale were arrested by state officials and charged in connection with the murder of Dee and Moore. In January 1965 the charges against Edwards and Seale were dropped by the Franklin County district attorney.

[1] These facts are drawn from the Complaint.

Forty-two years later, in January 2007 a federal indictment charging Seale with kidnapping of Dee and Moore was returned; the indictment named Franklin County Sheriff Wayne Hutto as an un-indicted co-conspirator. When Seale was tried on the federal charge in 2007, Edwards testified against him.[2] Edwards implicated himself in the crime. He testified that after the men were kidnapped, but before they were killed, the kidnappers went to the Sheriff's office and, with the sheriff's aid but without a search warrant, searched the Roxie First Baptist Church in Franklin County.[3] After the church was searched, the law enforcement officers left the scene without investigating the case or assisting Dee and Moore in any manner. The kidnappers then stuffed Dee and Moore into the trunk of a car and transported them across the river to Louisiana, where they were drowned. The Sheriff did nothing to secure the release of the men in the several hours that elapsed between the search and the drowning in Louisiana.

The Federal Bureau of Investigation thoroughly investigated the murders at the time they occurred in 1964. Their investigation included repeated interviews with Franklin County Sheriff Wayne Hutto and an interview with Deputy Sheriff Kirby Shell. At no time did Sheriff Hutto or Deputy Shell ever reveal to the federal authorities that they possessed information that was highly pertinent to the investigation. On July 13, 1964 Hutto was interviewed by the FBI and deliberately misinformed them of the facts. On November 4, 1964, Hutto and Shell were again interviewed by the FBI. Neither disclosed their participation in the events leading to the murders. On November 9 and November 12, Hutto was again interviewed by the FBI, and again failed to disclose his knowledge of the case. On

[2] James Seale was convicted of kidnapping and conspiracy to kidnap and sentenced to life in prison on August 24, 2007. His conviction was reversed by a panel of the circuit court, *US v. Seale*, 542 F.3d 1033 (2008), on grounds that do not bear on Charles Edwards' credibility or the factual merits of the Government's case.

[3] The kidnappers claimed to be searching for guns at the church.

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November 6, 1964, when Seale and Edwards were charged with the crimes, FBI Director J. Edgar Hoover issued a press release stating that the arrests "climaxed an extensive and lengthy investigation by FBI Agents and local authorities."

In January 1965, before the charges against Edwards and Seale were dropped, Sheriff Hutto met with the county district attorney to discuss the evidence in the case. He did not reveal the role of his office in the search of the church on the day in question. Such information, if known to the assistant district attorney, would have implicated the Sheriff in the killings and provided critical evidence in the state's case against Edwards and Seale.

After the decedents went missing in May 1964, their relatives sought the assistance of their sheriff, Hutto. On or about May 9 he informed them that they were in Louisiana. On May 16, when the men could not be found in Louisiana, the relatives returned to visit Hutto. The sheriff told them he did not know their whereabouts but that he would try to locate them. That was the last contact the family members had with Sheriff Hutto about the matter. Thereafter, in July, the FBI took charge of the investigation.

On this evidence, the Defendant seeks to dismiss the complaint, arguing that the Plaintiffs should have known that Sheriff Hutto inflicted an injury upon them when, in July, the bodies of the men were dredged from the river. They should have drawn two conclusions after the discovery of the bodies: (i) the sheriff was mistaken when he said the men went to Louisiana; and (ii) the County might be implicated in the killings. In other words, the sheriff's misleading statements – which were, it could be inferred, intended to, and did, throw them off the path - should have put the Plaintiffs on notice of the County's involvement in the crime. On the Defendant's theory, then, the statute of limitations began to run in July 1964.

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STATUTE OF LIMITATIONS

Franklin County contends that the complaint must be dismissed because the Plaintiffs' federal claims are barred by the statute of limitations. Civil actions brought under Section 1983 borrow the state limitations period for personal injury actions. *Owens v. Okure,* 488 U.S. 235, 249-50 (1989). In Mississippi the general jurisdiction statute is three (3) years. Miss. Code Ann. Sec. 15-1-49; *James v. Sadler* 909 F.2d 834, 836 (5th Cir. 1990).

Franklin County's position is that the event triggering accrual occurred in July 1964 when the bodies of the deceased were discovered. At that point, Franklin County claims Plaintiffs should have suspected the sheriff was involved and initiated an investigation. Plaintiffs argue that the statute of limitations did not accrue until, at the earliest, the federal investigation that culminated in the January 24, 2007 indictment that revealed the essential facts supporting their claim. Alternatively, Plaintiffs assert that the limitations period was tolled because of the fraudulent concealment of the Defendant or under the equitable tolling rule.

A. The Statute of Limitations Did Not Accrued Before January 24, 2007

Although state law establishes the length of the limitations period, federal law determines when the limitations period accrues.[4] *Wallace v. Kato,* 549 US 384, 127 S.Ct. 1091, 1095 (2007), *Walker v. Epps,* ___F.Supp. 2d ___, 2008 WL 2788074 (N.D.Miss. July 15, 2008), *Motion for Stay Pending Appeal Den'd, Walker v. Epps,* 2008 WL 2796878 (5th Cir.(Miss.) July 21, 2008). "Under federal law the [limitations] period begins to run 'the moment the plaintiff *becomes aware* that he has suffered an injury or has sufficient

[4] In *Matter of Swift,* 129 F.3d 792 (5th Cir. 1997) Judge Wisdom draws a distinction between the accrual of a cause of action and the running of the limitations period. Accrual is triggered, the court there reasoned, when the plaintiff has the right to institute and maintain the suit, while the limitations period begins to run when the plaintiff discovers or with the exercise of due diligence should have discovered that an injury had occurred and its causation.

information to know that he has been injured." *Russell v. Board of Trustees,* 968 F.2d 489, 493 (5th Cir. 1992) (*emphasis added)*(quoting *Helton v. Clements*, 832 F.2d 332, 335 (5th Cir. 1987). There are two prongs to the test to determine whether the claimant is aware of an injury: (1) existence of the injury; and (2) causation. "The statute of limitations period commences once the plaintiff acquires possession of two critical facts: (1) an injury has occurred; and (2) the identity of the person who inflicted the injury." *Stewart v. Parish of Jefferson*, 951 F. 2d 681, 684 (5th Cir). The statute does not start to run until Plaintiffs are aware of the injury and of the responsible party. *See Harris v. Hegmann,* 198 F. 3d 153 (5th Cir. 1999). As to the second prong of the test, although the plaintiff need not realize that a legal cause of action exists, the plaintiff must know the facts that would support a claim. *Harrison v. United States,* 708 F.2d 1023, 1027 (5th Cir. 1983).

In the case at bar, although the Plaintiffs obviously knew an injury had occurred when the bodies of Dee and Moore were pulled from the river in July 1964, they were not aware of the facts that would support the claims asserted in this case until 2007. They did not know that Sheriff Hutto authorized the search of the church right in the midst of the kidnap-murder. They did not know that Sheriff Hutto was in a position to, but did not, intervene to protect Dee and Moore. And they did not know that Sheriff Hutto concealed his involvement from state and federal law enforcement officers. These facts were not only unknown to the Plaintiffs – and to the federal government – until Edwards testified to them, but they were also incapable of detection by the Plaintiffs through the exercise of reasonable diligence.

Defendant argues Plaintiffs should have suspected that their sheriff was involved in the crime when, in July, the bodies of Dee and Moore were found because that should have led them to conclude that the Sheriff lied to them when, in May, he told them that the men had

gone to Louisiana. But the discovery of the bodies in July was not inconsistent with the men having gone to Louisiana on their own free will on May 2, the date of the murder. Moreover, later in May, the Sheriff also told the family members that he did not know where the men were but assured them that he would investigate their disappearance. Plaintiff had no basis to suspect that either statement was untrue and deceptive until Edwards' astonishing confession many years later.

Without the information about Hutto's involvement that became available in 2007, the most one could conclude from these two acts – the May statement that the men were in Louisiana, and the July discovery of the bodies – was that the sheriff may have been, but was not necessarily, mistaken about the location of the men. This was hardly sufficient evidence to lead the Plaintiffs to suspect the sheriff was in on the crime. It did not, as Franklin County argues, give Plaintiffs "every reason to suspect some liability existed in 1964." Defendant's Mem. p. 8.[5]

Indeed, for all that appeared, once the bodies surfaced, the Sheriff was working collaboratively with the FBI to solve the crime. On or about October 31, 1964, Sheriff Hutto visited two relatives of Henry Dee to discuss the FBI investigation with them. A few days after that visit, on or about November 6, 1964, Seale and Edwards were arrested for the crimes, providing Plaintiffs with a wholly reasonable and final explanation for the cause of their injuries. Yet Franklin County contends Plaintiffs should have looked beyond this explanation – the arrest of two Klan members – and focused their attention on the Sheriff. On defendant's account, statements made by the sheriff that - in the light of the subsequent

[5] Indeed, this statement that "every reason to suspect some liability existed in 1964" misstates the accrual rule. The plaintiff must know that she has a claim against the defendant, not a claim against another party, to commence the running of the statute. Here plaintiffs clearly knew they had a claim against the murderers of the decedents; what they did not know – and could not have known - was that the law enforcement officers upon whom they were relying to investigate the murders were complicit.

information from coconspirator Edwards - were clearly intended to discourage them from pursuing their right of injury should be construed as triggering the limitations period.

The discovery of the bodies prompted what FBI Director Hoover characterized as an "extensive and lengthy" investigation. It is reasonably inferable that that investigation failed to produce evidence of the complicity of County officials in the crime. Although an FBI investigation worthy of national attention did not reveal the Sheriff's role, defendant argues that Plaintiffs should have known they had a claim against the County in July 1964. Like the FBI, the Plaintiffs were in the dark regarding the Sheriff's involvement. It would have been absurd for them to file a claim against the County based solely on the Sheriff's report that their relatives were in Louisiana, particularly where the FBI's "extensive" investigation resulted in the arrest of two Klansmen. If they had pursued an investigation of the Sheriff's involvement at that time, to whom would they have turned? The Sheriff?. The FBI, which was already involved in investigating the matter?. Certainly the government is not required to provide citizens with information about ongoing criminal investigations. Would a private detective have been able to uncover what the FBI had not? It is simply not plausible to conclude, as defendant does, that the Plaintiffs should have suspected that their Sheriff had formed an alliance with private criminals when this information was unknown to the FBI, and when a sheriff is commonly seen to be a law enforcement officer, not a law-breaker.

This case is not unlike *Bennett v. F.B.I.*, 278 F. Supp.2d 104 (D. Mass. 2003), where, in 2001, Plaintiffs sued the FBI for wrongful death in connection with a 1967 murder based on the agency's involvement in a cover up of the crime. The perpetrators were indicted in 1969, two years after the murder, but the charges were later dropped. In 2001, Plaintiffs filed a claim under the Federal Tort Claims Act. The court found that the claim was not time

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barred where the arrests of private parties could have led the Plaintiffs reasonably to conclude that the investigation had successfully identified the wrongdoers. The court observed that "the knowledge of the identity of the immediate tortfeasors did not then put the plaintiff . . . on notice that the FBI might have some responsibility for [the] death. After all, the FBI is generally thought to be concerned with *law enforcement* and not an outlaw itself." *Bennett,* 278 F. Supp. 2d at 110 (emphasis in original).

To prevail on its motion, Franklin County must establish that as of July 1964 Plaintiffs could have filed suit and obtained relief against the County. *See*, *e.g. Cooey v. Strickland,* 479 F.3d 412 (6th Cir. 2007). There is no support for that proposition, for the essential facts were neither known nor reasonably discoverable at that time. Plaintiffs assert that, indeed, the statements were actionable, but Plaintiffs could not have known that they were fraudulent until Edwards' testimony.

Nor can Defendant prevail on its argument that where the plaintiff's claim is in part based on a civil conspiracy, the overt acts of any conspirator are sufficient to commence the limitations period. (Def. memo. P. 8) *Helton v. Clements,* 832 F. 2d 332 (5th Cir. 1987) is inapposite. Defendant cites the *Helton* case for the proposition that where Plaintiffs allege a civil rights conspiracy, the time of the injury and not the time of the last conspiratorial act determines the accrual date. In *Helton* the plaintiff alleged many actors conspired to deprive him of his constitutionally protected right to freedom of speech by terminating him from his position at a state hospital. Plaintiff did not claim those responsible for his termination acted within the limitations period. However, he alleged that the denial of unemployment insurance after his termination violated his constitutional rights, and he argued that the action accrued at the time his benefits were denied. The *Helton* court made clear that the injury to the plaintiff

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resulting from his termination occurred at the time of the termination and not at the later date when he was denied benefits. Helton "knew or had reason to know" of all the acts resulting in his termination within the statutory period. *Helton,* 832 F.2d However, the court reasoned that, standing on its own, the denial of benefits was not time-barred and could constitute an actionable civil rights claim.

In the case at bar, Plaintiffs assert that they had no knowledge of the acts committed by Franklin County officials until after the federal indictment on January 24, 2007. Unlike *Helton,* where the court found plaintiff knew who the conspirators were at the time of his termination, here the Plaintiffs did not know about the unconstitutional acts of the County until the federal investigation revealed the role of the sheriff.

In sum, the facts make clear that the Plaintiffs were not aware that the acts of the County caused their injury until, at the earliest, January 24, 2007, and therefore, as to the County, the statute of limitations did not commence before that date.

B. <u>The Doctrines of Equitable Tolling and Fraudulent Concealment Apply</u>

Equitable tolling or fraudulent concealment toll the statute of limitations. The statute is said to be equitably tolled if the plaintiff could not have discovered the facts essential to the claims. Fraudulent concealment is established on a showing that the Defendant concealed the facts from the plaintiff. The factual allegations of the plaintiff's complaint meet both of these exceptions to the limitations period.

When a statute is tolled is a question of state law. *Hardin v. Straub,* US 536, 538039 (1989); *Gartrell v. Gaylor,* 981 F.2d 254, 257 (5th Cir. 1993) (forum state's limitations period applies to Section 1983 actions). Mississippi statutory law establishes that fraudulent concealment tolls a limitations period "if a defendant commits affirmative acts intended to,

and which actually do, prevent discovery of the claim despite the plaintiff's due diligence." *Walker v. Epps*, 2008 WL 2788074 at para. 11 (ND Miss July 15, 2008), citing *Andrus v. Ellis,* 887 So.2d 175, 181 (Miss.2004); Miss. Code Ann. Sec. 15-1-67. *See also Reich v. Jesco, Inc.* 526 So.2d 550, 553 (Miss. 1988) (plaintiff must show "some act or conduct of an affirmative nature designed to prevent and which does prevent discovery of the claim."); *Ross v. Citifinancial, Inc.,* 344 F.3d 458, 463 (5th Cir. 2003) The Mississippi Court of Appeals recently had occasion to interpret Miss. Code Ann. Sec. 15-1-67; it opined that "proof of fraudulent concealment establishes the time which a cause of action accrues to that point in time when the offended knew, or with reasonable diligence, might have known of the fraud." *Windham v. Latco of Mississippi, Inc.* 972 So.2d 652 (Miss.App. 2007).

1. *Equitable tolling*

In the case at bar, the statute of limitations should, in equity, be deemed tolled because Plaintiffs could not have discovered the facts supporting their claims. These facts were in the control of law enforcement. Edwards did not reveal the facts until he obtained immunity from the prosecution; Plaintiffs could not have compelled his testimony even if they had reason to suspect – which they did not – that the testimony would implicate the County. "[W]hen a Defendant controls the facts surrounding causation such that a reasonable person could not obtain the information even with a diligent investigation, a cause of action accrues, but the statute of limitations is tolled." *Piotrowski v. City of Houston*, 51 F.3d 512, 517 (5th Cir. 1995)(dismissal affirmed on other grounds), citing *United States v.Kubrick,* 444 US 111, 122 (1979).

In *Piotrowski*, plaintiff claimed a hit man hired by her boyfriend to kill her told the police about the boyfriend's plan, but the police failed to investigate. Shortly thereafter,

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plaintiff was shot and wounded by a second hit man hired by the boyfriend and, years later, when she learned about the nature of the police involvement, she filed a 1983 action against the City. The court reasoned the statute was tolled because the police controlled the information upon which plaintiff's claim was based. Similarly, in the case at bar, the County controlled the information constituting the factual predicate for the plaintiff's constitutional claims.

2. *Fraudulent concealment*

There are two elements to a fraudulent concealment case under Mississippi law. First, "there must be shown some act or conduct of an affirmative nature designed to prevent and which does prevent discovery of the claim." *Robinson v. Cobb*, 763 So. 2d 883, 887 (Miss 2000), quoting *Reich v. Jesco, Inc.,* 526 So. 2d 550, 552 (Miss. 1988). Second, Plaintiffs must prove that despite her due diligence she could not have discovered the available claim. *Robinson v. Cobb,* 763 So. 2d at 887. Plaintiffs need only demonstrate "reasonable diligence to discover facts sooner, or show that he could not have done so." ***New York Life Ins. Co., v. Gill,*** 182 Miss. 815, 836 (1938). Moreover, Franklin County can overcome a claim of fraudulent concealment on a motion to dismiss only if "it appears certain that [the plaintiff] can prove no set of facts which support his claim that the statutes of limitations applicable to the causes of action were tolled." *Myers v. Guardian Life Co. of Am.* 5 F.Supp. 2d 423, 431 (D.Miss. 1998).

Plaintiffs' complaint alleges that Sheriff Hutto and Deputy Sheriff Shell intentionally misled the FBI and state authorities by failing to tell them what they knew of the activities of Dee and Moore's killers on the day of the crime. Continuing false representations are affirmative acts that constitute fraudulent concealment, tolling the limitations period. *Lundy v.*

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Hazlett, 147 Miss. 808, 821 (1927). On numerous occasions, they were in a position to reveal the names of the men involved in the search of the Roxie First Baptist Church, but they never did. Sheriff Hutto was interviewed by FBI agents on this case on at least seven occasions, and Deputy Shell once; plaintiff's allegations support the inference that at no time did the men inform the agents about the search by the kidnappers on the day of the killings.

Sheriff Hutto also misled state authorities by failing to reveal what he knew. On January 5, 1965, at a meeting convened by the district attorney for Franklin County to evaluate the evidence against Defendants Edwards and Seale, who were then in custody, Sheriff Hutto participated but failed to tell his colleagues that he had information about the activities of the killers on the day of the crime. Six days later, on January 11, 1965, the district attorney moved to dismiss the charges against Edwards and Seale. It is reasonable to conclude that Hutto sabotaged the prosecution to protect his penal interest.

Not only did Hutto fraudulently conceal what he knew of the murders from law enforcement personnel, but he also misled the Plaintiffs. They attempted diligently to discover the cause of their brothers' murders by cooperating with state and federal law enforcement. But Hutto did not tell them what he knew about the events of May 2 when they sought information about their relatives shortly after they went missing in May, or when their bodies were discovered in July.

Sheriff Hutto had a clear motive to engineer a cover up, for, as the federal grand jury that returned the indictment against Seale found, he was a co-conspirator in the kidnap/murder. Franklin County argues, implausibly, that Plaintiffs should have seen through the Sheriff's fraud, although the FBI was unable to do so. According to the federal indictment the sheriff conspired to commit these heinous crimes; Plaintiffs here allege that he also

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successfully conspired to obstruct justice and to deny to Plaintiffs their constitutional rights.

In sum, it is hard to imagine accusations that touch more deeply the foundations of the legal system than that of law enforcement's involvement in criminal activity. Justice has been delayed in this case not for want of alacrity on the part of Plaintiffs, but because the county officials stonewalled the criminal investigation and betrayed the mission they had sworn to uphold.

STATE LAW CLAIMS UNDER THE MISSISSIPPI TORT CLAIMS ACT

In their complaint, Plaintiffs asserted claims against Franklin County, Mississippi under the Mississippi Tort Claims Act (hereinafter referenced as the "MTCA"). The MTCA provides that actions brought under the statute shall be commenced within one (1) year after the date of the tortious, wrongful or otherwise actionable conduction on which liability is based. Miss. Code Ann. § 11-46-11(3). Franklin County claims that the instant action is outside of the limitations period, and therefore, should be dismissed.

However, on September 25, 2008, the Mississippi Supreme Court ruled that the judicially-enacted discovery rule will continue to be applied for claims filed under the MTCA. ***Caves v. Yarbrough,*** 991 So.2d. 142, 154 (Miss. 2008). The Court reasoned that the Mississippi Legislature, "acquiesced and tacitly approved and incorporated into the statute a discovery rule as announced in ***Barnes." Id.*** (referencing ***Barnes v. Singing River Hosp.,*** 733 So.2d 199, 205 (Miss. 1999)). Further, the Court held in ***Caves*** that "the limitations period for MTCA claims does not begin to run until all the elements of a tort exist, and the claimant knows or, in the exercise of reasonable diligence, should know of both the injury and the act or omission which caused it." ***Id.*** at 155.

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Defendant's position is that the event triggering accrual occurred in July 1964 when the bodies of the deceased were discovered. At that point, Franklin County claims Plaintiffs should have suspected the sheriff was involved and initiated an investigation. Plaintiffs argue that the statute of limitations did not accrue until, at the earliest, the federal investigation that culminated in the 2007 indictment that revealed the essential facts supporting their claim. Alternatively, plaintiffs assert that the limitations period was tolled because of the fraudulent concealment of the defendant or under the equitable tolling rule, and adopt those arguments previously asserted.

CONCLUSION

For the reasons herein stated, the Court should deny the Franklin County's Motion to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Further, Plaintiffs requests any and all additional relief which the Court may deem appropriate under the circumstances.

Submitted this the 12th day of November, 2008.

Respectfully submitted,

THOMAS MOORE, INDIVIDUALLY AND ON BEHALF OF ALL WRONGFUL DEATH BENEFICIARIES AND HEIRS AT LAW OF CHARLES MOORE, DECEASED; AND THELMA COLLINS, INDIVIDUALLY AND ON BEHALF OF ALL WRONGFUL DEATH BENEFICIARIES AND HEIRS AT LAW OF HENRY DEE, DECEASED

By: /s/ Dennis C. Sweet, III
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CERTIFICATE OF SERVICE

I, Dennis C. Sweet, III, do hereby certify that I have this day forwarded a true and correct copy of the above and foregoing documents, via electronic means, to the following:

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This the 12th day of November, 2008.

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