

No. _____

IN THE
Supreme Court of the United States

JOHNNIE LEE SAVORY II,
Petitioner,

v.

KEVIN W. LYONS, ET AL.,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

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QUESTIONS PRESENTED

This case presents a question of “fundamental . . . constitutional principle” and “extraordinary practical significance,” *McKithen v. Brown*, No. 03-0168-pr, 2007 WL 744728, at *1 (2d Cir. Mar. 13, 2007): the scope of any time limits on a Section 1983 action in which a convicted person seeks to compel access to physical evidence used to convict him so that he may, at his own expense, conduct DNA testing with the goal of establishing actual innocence. The questions presented are:

1. Does 42 U.S.C. § 1988 require that the state-law borrowing rule, adopted in *Wilson v. Garcia* and *Owens v. Okure* for actions brought under 42 U.S.C. § 1983, remain subject to a consistency-with-federal-interests analysis, and does the federal interest involved in an action seeking post-conviction access to evidence for DNA testing require the statute of limitations to be equitably tolled?

2. Should laches be the only timeliness limitation on a § 1983 action asserting a right to access biological evidence for post-conviction DNA testing and for which equitable relief is the only possible remedy?

3. Does a § 1983 claim alleging the state has an affirmative duty, under the U.S. Constitution, to provide access to evidence for purposes of post-conviction DNA testing state a continuing violation of the plaintiff’s constitutional rights such that the statute of limitations accrues anew each day the state fails to provide access?

PARTIES TO THE PROCEEDING

Petitioner Johnnie Lee Savory II was the appellant below. The respondents in this Court, appellees below, are Kevin W. Lyons, State's Attorney for Peoria County, Illinois, in his official capacity; the City of Peoria, Illinois; Gary Poynter, Chief of Police of the City of Peoria, Illinois, in his official capacity; Robert Spears, Clerk of the Peoria County Circuit Court, in his official capacity; and Peoria County, Illinois (collectively, the "Defendants").

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PETITION FOR WRIT OF CERTIORARI

Petitioner Johnnie Lee Savory II respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in *Savory v. Lyons*, No. 06-1296, 469 F.3d 667. The judgment affirmed the dismissal by the United States District Court for the Central District of Illinois of Mr. Savory's claims, brought under 42 U.S.C. § 1983, on the grounds that the claims were barred by the applicable statute of limitations.

OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (Kanne, J.) is reported at 469 F.3d 667 and reprinted at Appendix A. The opinions of the United States District Court for the Central District of Illinois (McCuskey, C.J.), No. 05-2082, are not reported but are reprinted at Appendices B-D at 14a - 18a. The reports and recommendations of the magistrate judge (Bernthal, M.J.) are not reported but may be found at Appendices E-G at 19a - 52a. The Seventh Circuit order denying rehearing is not published but is reprinted at Appendix H at 53a.

STATEMENT OF JURISDICTION

This petition is filed within 90 days of December 19, 2006, the date on which the United States Court of Appeals for the Seventh Circuit denied Mr. Savory's petition for rehearing of its November 29, 2006 judgment. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part, that "No state shall...deprive any person of life, liberty, or property without due process of law" U.S. CONST. amend. XIV.

42 U.S.C. § 1983 provides, in relevant part, that "Every person who, under color of [State law], subjects, or causes to be subjected, any citizen of the United States ... 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"

42 U.S.C. § 1988 states in pertinent part:

The jurisdiction in civil and criminal matters conferred on the district courts...by the provisions of titles...shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, ... the common law, ... so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause...

18 U.S.C. § 3600 states in relevant part:

(a) In general – Upon a written motion by an individual under a sentence of imprisonment or death pursuant to a conviction for a Federal offense..., the court that entered the judgment of conviction shall order DNA testing of specific evidence if the court finds that all of the following apply:

... (10) The motion is made in a timely fashion, subject to the following conditions:

(A) There shall be a rebuttable presumption of timeliness if the motion is made within 60 months of enactment of the Justice For All Act of 2004 ... or within 36 months of conviction, whichever comes later. Such presumption may be rebutted upon a showing –

(i) that the applicant's motion for a DNA test is based solely upon information used in a previously denied motion; or

(ii) of clear and convincing evidence that the applicant's filing is done solely to cause delay or harass.

(B) There shall be a rebuttable presumption against timeliness for any motion not satisfying subparagraph (A) above. Such presumption may be rebutted upon the court's finding –

(i) that the applicant was or is incompetent and such incompetence substantially contributed to the delay in the applicant's motion for a DNA test;

(ii) the evidence to be tested is newly discovered DNA evidence;

(iii) that the applicant's motion is not based solely upon the applicant's own assertion of innocence and, after considering all relevant facts and circumstances surrounding the motion, a denial would result in a manifest injustice; or

(iv) upon good cause shown. ...

725 ILCS § 5/116-3 provides in pertinent part:

... A defendant may make a motion before the trial court that entered the judgment of conviction in his or her case for the performance of fingerprint or forensic DNA testing ... on evidence that was secured in relation to the trial which resulted in his or her conviction, but which was not subject to the testing which is now requested because the technology for the testing was not available at the time of trial....

725 ILCS § 5/116-4 states in pertinent part:

.... (b) After a judgment of conviction is entered, the evidence shall either be impounded...or shall be securely retained by a law enforcement agency. Retention shall be permanent in cases where

a sentence of death is imposed. Retention shall be until the completion of the sentence, including the period of mandatory supervised release for the offense....

735 ILCS § 5/13-202 states in relevant part:

Personal injury – Penalty. Actions for damages for an injury to the person ... shall be commenced within 2 years next after the cause of action accrued

STATEMENT OF THE CASE

I. Introduction.

At first blush, this case involves three issues regarding the application of a statute of limitations to § 1983 claims. But petitioner Johnnie Lee Savory's claim is no ordinary § 1983 claim. Instead of the typical claim for damages for past state conduct in violation of his constitutional rights, his claim demands a very different – and much more important – form of relief: access to the evidence used to convict him for purposes of subjecting that evidence to DNA testing. It is *this* relief the Seventh Circuit found barred by the statute of limitations. And it is *this* relief that, if granted, could provide Mr. Savory his only opportunity to demonstrate he is innocent of the crimes of which he was convicted nearly thirty years ago.

What is crucial to understand – and too easily disregarded in an unthinking, mechanical application of the statute of limitations – is that the relief of post-conviction access to evidence makes this petition and this § 1983 claim about much more than time limits. A claim like Mr. Savory's is really about the justice system's procedural mechanisms that can enable – or disable – innocent persons from ever obtaining relief from their wrongful convictions. In this way, the three issues raised by this petition, although ostensibly concerning the statute of limitations, are crucial to whether Mr. Savory and others like him will be denied even the *opportunity* to show they are victims of miscarriages of justice.

II. Statement Of Facts.

Mr. Savory's attempt to secure the release of evidence to subject it to DNA testing arises out of his 1981 convictions for two murders that occurred in 1977 in Peoria, Illinois. (Am Compl. ¶¶ 11-12, App. J at 68a-69a.) On January 18, 1977, James Robinson, Jr. and Connie Cooper were found dead in their Peoria home. (*Id.* ¶ 12, at 68a-69a.) Mr. Savory happened to be an acquaintance of both victims. (*Id.*) Though he was just 14 years old at the time, police quickly focused their attention on Mr. Savory. (*Id.*) Less than six months later, Mr. Savory found himself tried and convicted of both murders. (*Id.* ¶ 13, at 69a.)

In 1980, the Illinois Appellate Court reversed Mr. Savory's convictions. *People v. Savory*, 403 N.E.2d 118 (Ill. App. Ct. 1980); (Am. Compl. ¶¶ 13-14, App. J at 69a-70a). The court agreed that Mr. Savory's confession – obtained after prolonged questioning by police, which continued even after the 14-year-old Savory expressly stated that he did not want to talk to police – was involuntary and in violation of the *Miranda* rule. *Id.* Though Peoria prosecutors subsequently declared publicly that they had no case against Mr. Savory without the inadmissible confession, they again subjected him to trial in 1981. (Am. Compl. ¶ 15, App. J at 70a.)

As in Mr. Savory's earlier trial, the key issue at the 1981 trial was the identity of the killer. (*See id.* ¶¶ 20-31, at 71a-74a.) To connect Mr. Savory to the crime, the state presented no eyewitness testimony and instead relied entirely on the following circumstantial evidence: (1) evidence that Mr. Savory had exercised his right to remain silent during his interrogation; (2) the testimony of three of Mr. Savory's young friends – Frank, Tina, and Ella Ivy – that Mr. Savory allegedly had made inculpatory statements; (3) a pocketknife that may have been owned by Mr. Savory or his father and that may have contained trace amounts of blood; (4) hairs found at the scene that were allegedly “similar” to Mr. Savory's hair; and (5) a pair of pants allegedly worn by Mr. Savory and containing a small bloodstain of the same blood type as that of the

female victim. (*Id.* ¶ 20, at 71a.) Despite the lack of direct proof or hint of a motive, Mr. Savory was convicted of both murders and sentenced to 40 to 80 years in prison. (*Id.* ¶ 15, at 70a.)

Just as constitutional errors had tarnished Mr. Savory's first trial, constitutional errors also tainted his second trial. (*Id.* ¶¶ 16, 21, App. J at 70a-71a); see *People v. Savory*, 435 N.E.2d 226 (Ill. App. Ct. 1982). This time, the Illinois Appellate Court again identified constitutional errors in the prosecutor's substantive use of Mr. Savory's invocation of his right to remain silent and the admission of several custodial statements made without *Miranda* warnings, but the court held the errors harmless in light of the remaining evidence and upheld Mr. Savory's convictions. *Id.* After the court's decision, one of the witnesses against Mr. Savory, Tina Ivy, recanted her trial testimony, prompting Mr. Savory to petition for post-conviction relief in Illinois courts. (Am. Compl. ¶¶ 17, 24, App. J at 70a, 72a); see *People v. Savory*, No. 77-CF-565 (Ill. Cir. Ct. for Peoria County Dec. 6, 1983). Mr. Savory later amended his petition to include the fact that another state witness, Frank Ivy, also had recanted his testimony. *Savory*, No. 77-CF-565. Despite the recanted testimony, the trial court dismissed Mr. Savory's petition. *Id.* After Mr. Savory's counsel filed an *Anders* brief to withdraw as counsel, the Appellate Court affirmed. *People v. Savory*, No. 3-84-0008 (Ill. App. Ct. July 30, 1984); (Am. Compl. ¶ 17, App. J at 70a).

Having been denied relief in Illinois courts, Mr. Savory sought, and in 1985 was denied, habeas corpus relief in the United States District Court for the Northern District of Illinois. (Am. Compl. ¶ 18, App. J at 70a); see *Savory v. Lane*, No. 84-8112, 1985 WL 2108 (N.D. Ill. July 25, 1985). In 1987, the United States Court of Appeals for the Seventh Circuit agreed with the Illinois Appellate Court that the admission of the custodial statements and the substantive use of Mr. Savory's decision to remain silent constituted constitutional errors. (Am. Compl. ¶ 19, 22, App. J at 70a-72a); see *Savory v. Lane*, 832 F.2d 1011, 1017-18 (7th Cir. 1987). Rejecting as

flawed the harmless error analysis employed by the Illinois Appellate Court on direct review, the Seventh Circuit held the constitutional errors harmless in part by reasoning that the “damning” physical evidence presented at trial provided necessary corroboration for the dubious (and now recanted) testimony of the Ivys. *Savory*, 832 F.2d at 1019-20. That physical evidence is among the evidence sought for DNA testing in this § 1983 action.¹

In 1998, Mr. Savory filed a motion in the Illinois Circuit Court for Peoria County based on a new Illinois statute, 725 ILCS § 5/116-3, which allows defendants to seek a court order granting DNA or other modern forensic testing of physical evidence used in their criminal trials. (Am. Compl. ¶ 37, App. J at 74a-75a.) The circuit court held that testing was not warranted under the statute, *People v. Savory*, No. 77-CF-565 (Ill. Cir. Ct. for Peoria County July 7, 1998), and the Illinois Appellate Court affirmed. (Am. Compl. ¶ 38, App. J at 75a); *see People v. Savory*, 722 N.E.2d 220 (Ill. App. Ct. 1999). On April 5, 2000, the Illinois Supreme Court affirmed on different reasoning. (Am. Compl. ¶ 38, App. J at 75a); *see People v. Savory*, 756 N.E.2d 804 (Ill. 2001). That court denied Mr. Savory’s petition for a rehearing on October 1, 2001. (Am. Compl. ¶ 38, at 75a.)

Mr. Savory then filed a *pro se* motion in the Illinois Supreme Court on September 30, 2003, seeking leave to file a petition for a writ of mandamus to compel DNA testing. On January 27, 2004, the court denied leave. (Am. Compl. ¶ 39, App. J at 75a); *see Savory v. McMorrow*, No. M 11055 (Ill. 2004). Mr. Savory also filed a petition for executive clemency on

¹ In the continued assertion of his innocence, Mr. Savory also filed a second post-conviction petition in Illinois state court, alleging various errors and the ineffective assistance of counsel on his prior post-conviction petition. *People v. Savory*, No. 3-90-0059 (Ill. App. Ct. July 21, 1991). The court denied the petition in 1990, and the Illinois Appellate Court affirmed in 1991. *Id.* Mr. Savory later sought habeas corpus relief in the Northern District of Illinois, but that court denied the writ in 1995. *Savory v. Peters*, No. 94-2224, 1995 WL 9242 (N.D. Ill. Jan. 9, 1995).

November 21, 2003. (Am. Compl. ¶ 49, App. J at 76a.) As of this petition, the Illinois governor's office has taken no action on clemency. (*See id.* ¶ 49 at 76a.)

III. The Proceedings Below.

In this action, which Mr. Savory filed on April 4, 2005, Mr. Savory seeks only the right to perform DNA testing on the physical evidence collected by Peoria police during their 1977 homicide investigation. (Am. Compl. ¶¶ 27-36, App. J at 73a-74a.) Specifically, Mr. Savory seeks to test (1) a bloodstained pair of pants, (2) hairs found at the crime scene, (3) a pocketknife alleged to contain blood stains, (4) hair and fingernail scrapings from the victims, and (5) samples taken from Mr. Savory, his father, and other individuals potentially connected to the crimes. (*Id.*) Mr. Savory's supporters have indicated they will pay for testing, avoiding any expense to the state. (*Id.* ¶ 48, at 76a.) Mr. Savory seeks such testing so that he can effectively mount a challenge to his conviction in court or through the executive clemency process and prove his longstanding claims of innocence.

Mr. Savory's complaint alleged seven different constitutional claims under 42 U.S.C. § 1983, including claims based on substantive and procedural due process, the denial of access to the courts, and the denial of the opportunity to show actual innocence. (Am. Compl. ¶¶ 51-64, App. J at 76a-79a.) Defendants Kevin Lyons, Robert Spears, and Peoria County filed motions to dismiss, in which they argued Mr. Savory failed to state a claim in part because of Illinois' two-year personal injury statute of limitations, 735 ILCS § 5/13-202, barred his claims. (8/25/05 Magistrate's Rep. & Rec., App. E at 19a-28a.) On August 25, 2005, Magistrate Judge Bernthal issued a report and recommendation that recommended the district court (1) reject Mr. Savory's arguments regarding the accrual of his claims, the continuing violation doctrine, and equitable tolling and (2) conclude that the statute of limitations barred his claims. (*Id.*) District Court Judge McCuskey then issued an opinion adopting the August 25 report and recommendation in its

entirety and dismissing Mr. Savory's claims against defendants Kevin Lyons, Robert Spears, and Peoria County. (9/28/05 Dist. Ct. Opinion, App. B at 14a-15a.)

Defendants Gary Poynter and the City of Peoria filed two sets of motions to dismiss. The first set alleged, among other things, that Mr. Savory's claim of denial of access to the courts was barred by the statute of limitations. (10/5/05 Magistrate's Rep. & Rec., App. F at 29a-48a.) The second set purported to adopt the County's previous motion to dismiss based on the statute of limitations. (12/13/05 Magistrate's Rep. & Rec., App. G at 49a-52a.) On October 5, 2005, Magistrate Judge Bernthal issued a report and recommendation addressing the first set of motions to dismiss and recommending in relevant part that the district court dismiss Mr. Savory's claim for denial of access to the courts based on the statute of limitations. (10/5/05 Magistrate's Rep. & Rec., at 7, 12-20, App. F at 35a, 40a-48a.) Judge McCuskey issued an opinion adopting that recommendation in full. (11/7/05 Dist. Ct. Opinion, App. C at 16a-17a.)

On December 13, 2005, Magistrate Judge Bernthal filed a report and recommendation on the City's second set of motions to dismiss, in which he recommended the district court dismiss the remaining claims against the City of Peoria as barred by the statute of limitations. (12/13/05 Rep. & Rec., App. G at 49a-52a.) Judge McCuskey adopted the recommendation in full on December 28, 2005. (12/28/05 Dist. Ct. Opinion, App. D at 18a.)

The Seventh Circuit affirmed the judgment of the district court. *See Savory v. Lyons*, 469 F.3d 667 (7th Cir. 2006) (App. A at 1a-13a). Specifically, the court agreed with Mr. Savory that his claims are cognizable under § 1983 and that he was not restricted to seeking relief through a petition for a writ of habeas corpus. *Id.* at 670-72 (App. A at 3a-8a). In assessing the district court's decision that Mr. Savory's claims were time-barred, the court concluded that state law

governs both tolling rules and the statute of limitations applicable to actions filed under § 1983, but that federal law governs the accrual of a plaintiff's claims. *Id.* at 672 (App. A at 7a-8a).

Without considering whether the nature of Mr. Savory's claims affected how his claim accrued for statute of limitations purposes, the court then held that Mr. Savory's claims accrued on July 7, 1998 – when the Illinois circuit court initially denied Mr. Savory's request for DNA testing. *Id.* Then, the court evaluated whether his claims were timely under the continuing violation doctrine. *Id.* at 672-73 (App. A at 7a-10a). Explaining that the doctrine applies “when the plaintiff could not reasonably be expected to perceive the alleged violation before the limitations period has run,” “when the violation only becomes apparent in light of later events,” or “when the state actor has a policy or practice that brings with it a fresh violation each day,” the court held the doctrine did not apply to Mr. Savory's claims. *Id.* at 672 (App. A at 7a-8a). In so doing, the court failed to consider how the nature of the constitutional violation Mr. Savory alleged affected the application of the continuing violation doctrine and declined to adopt his argument that each day the Defendants deny him access to evidence brings a fresh violation of his rights. *See id.* at 673 (App. A at 8a-10a). Instead, the court classified Mr. Savory's “continued lack of access” to evidence as “the natural consequence of the discrete act that occurred when Peoria first denied access to the evidence.” *Id.*

Next considering whether it should equitably toll the statute of limitations, the court held that Mr. Savory did not present the “extraordinary circumstances” necessary to justify equitable tolling. *Id.* at 673-74 (App. A at 8a-12a). Although it acknowledged Mr. Savory's diligence in pursuing DNA testing, the court declined to apply equitable tolling. *Id.* at 674 (App. A at 10a-12a). The court did not address Mr. Savory's argument that no statute of limitations would apply to his claims, which sought only equitable relief. *See id.*

After rejecting the application of the continuing violation and equitable tolling doctrines, the court affirmed the district court's decision that Mr. Savory's claims were barred by the statute of limitations. *Id.* at 674-75 (App. A at 10a-13a). For this reason, despite acknowledging that his underlying constitutional claims raised "important" issues, the court declined to address the merits of Mr. Savory's claims for a post-conviction right of access to evidence for DNA testing. *Id.* at 675 (App. A at 12a-13a).

On December 7, 2007 Mr. Savory filed a petition for rehearing noting that the Seventh Circuit had failed to address Mr. Savory's argument that laches, and not the statute of limitations, should apply to his action, which sought only equitable relief. The court denied rehearing on December 19, 2006. (Denial of Petition for Rehearing, App. H at 53a.) This petition followed.

REASONS FOR GRANTING THE WRIT

The Constitution establishes, without question, that fairness is the ultimate touchstone of the procedures the government can apply when depriving a person of his or her liberty. As a consequence, this Court has recognized that fundamental fairness requires the courthouse door to remain open to allow convicted persons to prove their innocence. Evidence pointing to actual innocence, combined with constitutional error at trial, can pave the way to demonstrating an erroneous conviction, even after federal post-conviction rights have been defaulted. *House v. Bell*, 126 S. Ct. 2064 (2006); *Schlup v. Delo*, 513 U.S. 298 (1995). Indeed, while disagreement exists, continued punishment despite verifiable factual innocence may offend the Constitution and, at the least, should be sufficient to invoke the final safeguard of executive clemency. *Herrera v. Collins*, 506 U.S. 390 (1993).

These post-conviction procedures for reversing erroneous convictions have become even more important with the advent of DNA testing, which is perhaps the most significant advance in forensic science, even eclipsing the fingerprint. As Judge Luttig has recognized, DNA testing

technology is “no ordinary development[], even for science.” *Harvey v. Horan*, 285 F.3d 298, 305 (4th Cir. 2002) (“*Harvey II*”) (Luttig, J., respecting the denial of rehearing *en banc*). At last count, post-conviction DNA testing had positively exonerated 197 individuals in this country, including 26 in Mr. Savory’s home state of Illinois and 6, already, in 2007. *See* The Innocence Project, <http://www.innocenceproject.org> (last visited Mar. 15, 2007). DNA testing is a major breakthrough in forensic science precisely because it is capable of doing what was once impossible: positively identifying a perpetrator or positively excluding the accused – even years after the crime was committed. *Harvey II*, 285 F.3d at 305 n.1 (Luttig, J.) (stating that DNA has the capacity to “exonerate[e] defendants (or those wrongly convicted) to a practical certainty”).

DNA testing now is both a mainstay of investigations of current crimes and a powerful tool for identifying the perpetrators of older crimes who have long eluded prosecution. Recognizing its power, police and prosecutors often voluntarily consent to DNA testing of the evidence used in old cases, and many states and the federal government have enacted statutes permitting DNA testing in long-closed cases, under certain circumstances. *See* 18 U.S.C. § 3600 (federal prisoners); The Innocence Project, Access to Post-Conviction DNA Testing, <http://www.innocenceproject.org/Content/304.php> (last visited Mar. 15, 2007) (discussing state statutes providing procedures for obtaining post-conviction testing).

But there will always be instances where the state refuses to embrace the power of DNA testing to correct past error. The question posed by these cases is the extent to which the Constitution itself demands that persons like Mr. Savory – faced with the state’s continued failure to provide access to evidence to conduct DNA testing – be given access to evidence that may help affirmatively prove innocence. Perhaps unsurprisingly, federal courts wrestling with

this issue have come to various conclusions.² Others have found such claims procedurally barred – under *Heck v. Humphrey*, 512 U.S. 477 (1994) for instance, *see, e.g., Kutzner v. Montgomery County*, 303 F.3d 339, 340-41 (5th Cir. 2002),³ or, as in Mr. Savory’s case, by the statute of limitations.⁴ *Savory v. Lyons*, 469 F.3d 667, 675 (7th Cir. 2006) (App. A at 1a-13a).

The existence of a constitutional right to post-conviction access to evidence for purposes of DNA testing is not directly before the Court in this petition. Instead, this petition raises procedural issues that are equally as crucial: how the statute of limitations applies to § 1983 claims seeking access to evidence for DNA testing. That question is important precisely because the vast majority of cases in which the need for DNA testing arises are old cases – cases in which convictions were obtained long before the advent of DNA. The age of these cases means that traditional avenues of challenging these convictions – direct and habeas corpus review – are no longer available, and the remaining procedures for reversing a wrongful conviction are limited and often require new evidence unavailable at the time of trial. *See Schlup*, 513 U.S. at 327-32.

DNA evidence can be just that sort of powerful new evidence – and potentially the only hope for

² Compare *Grayson v. King*, 460 F.3d 1328 (11th Cir. 2006) (declining to recognize a constitutional right to DNA testing under the facts of that case), *cert. denied*, 127 S. Ct. 1005 (2007); *Alley v. Key*, Nos. 06-5552 & 06a0345n.06, 2006 WL 1313364 (6th Cir. May 14) (unpublished) (same), *cert. denied*, 126 S. Ct. 2973 (2006); *Harvey v. Horan*, 278 F.3d 370 (4th Cir. 2002) (“*Harvey I*”) (same), *with Bryson v. Macy*, No. CIV-05-1150-F, 2007 WL 682030 (W.D. Okla. Mar. 1, 2007) (recognizing a constitutional right to DNA testing); *Breest v. N.H. Att’y Gen.*, No. 06-CV-361-SM, 2007 WL 29070 (D.N.H. Jan. 3, 2007) (same); *Wade v. Brady*, 460 F. Supp. 2d 226 (D. Mass. 2006) (same); *Osborne v. Dist. Attorney’s Office*, 445 F. Supp. 2d 1079 (D. Alaska 2006) (same); *Moore v. Lockyer*, No. C 04-1952 MHP, 2005 WL 2334350 (N.D. Cal. Sept. 23, 2005) (same); *Godschalk v. Montgomery County Dist. Att’y*, 177 F. Supp. 2d 366 (E.D. Pa. 2001) (same).

³ *See also Harvey I*, 278 F.3d at 370-79. Other courts, including the Seventh Circuit in Mr. Savory’s case, have rejected any bar under *Heck*. *Savory*, 469 F.3d at 670-72 (App. A at 3a-8a); *Grayson*, 460 F.3d at 1336; *Osborne v. Dist. Attorney’s Office*, 423 F.3d 1050, 1054-55 (9th Cir. 2005); *Bradley v. Pryor*, 305 F.3d 1287, 1290 (11th Cir. 2002).

⁴ Federal courts also have grappled with other potential defenses, such as whether the claims are barred by the Rooker-Feldman doctrine, and various forms of claim preclusion. *McKithen v. Brown*, No. 03-0168-pr, 2007 WL 744728 (2d Cir. Mar. 13, 2007); *Moore*, 2005 WL 2334350.

the wrongfully convicted of ever proving their innocence. For this reason, a statute of limitations imposed on § 1983 claims seeking DNA testing operates, effectively, as a time limit for proving innocence. Accordingly, the Seventh Circuit's mechanical application of the statute of limitations rules ignored the real question: whether and how the statute of limitations should be applied to this specific class of cases, given the nature and importance of the relief sought. For three reasons, Mr. Savory believes that the Seventh Circuit got it wrong.

First, contrary to the Seventh Circuit's assumption, no statute of limitations should apply to § 1983 claims seeking access to evidence for purposes of DNA testing. This Court has instructed that to determine the statute of limitations applicable to a § 1983 claim, courts must examine analogous laws and consider the overriding federal interest. Here, analogous laws allowing DNA testing have no statute of limitations, and the federal interest in freeing the wrongfully convicted overrides any interest in applying a statute of limitations because the normal justification for such time limits – avoiding prejudice to the defendant – is not present. Thus, either no statute of limitations should apply to § 1983 claims seeking post-conviction access to evidence for DNA testing, or the federal interest requires the statute be equitably tolled.

Second, there is also substantial authority that because Mr. Savory's action is equitable, laches, rather than a statute of limitations, applies. Accordingly, the proper test of timeliness is laches, and Mr. Savory's diligence in pursuing DNA testing makes his case timely.

Third, in determining that the continuing violation doctrine did not apply, the Seventh Circuit ignored the nature of Mr. Savory's underlying claims, which allege the Defendants have failed to act in accordance with their *affirmative duty* to provide post-conviction access to evidence for DNA testing. Given that affirmative duty, Mr. Savory and those bringing similar claims allege not a single violation but, rather, that a fresh violation occurs each day the state

fails to act. Consequently, the continuing violation doctrine governs the accrual of a § 1983 claim for access to evidence for DNA testing, and Mr. Savory's suit is timely.

This Court should grant this petition not only to correct these errors of the Seventh Circuit, but also to address the important national issue of whether and in what circumstances a statute of limitations, laches, and the continuing violation doctrine can apply to a § 1983 claim seeking DNA testing – particularly when such a claim most often functions as a gateway to establishing actual innocence.

I. This Court Should Grant Certiorari To Clarify That § 1988 Requires The *Wilson v. Garcia* State-Law Borrowing Rule For § 1983 Actions To Remain Subject To A Consistency-With-Federal-Interests Analysis.

Mr. Savory asserts a federal constitutional right to access biological evidence for the purpose of conducting post-conviction DNA testing to prove his innocence of the murders for which he stands convicted. Affirming the district court, the Seventh Circuit held Mr. Savory's action barred under 735 ILCS § 5/13-202, Illinois' two-year statute of limitations for personal injury actions. *Savory*, 469 F.3d at 672, 675 (App. A at 7a-8a, 12a-13a).⁵ In so doing, the Seventh Circuit reflexively applied this Court's general rule from *Wilson v. Garcia*, 471 U.S. 261 (1985), that § 1983 actions borrow the statute of limitations from the general personal injury law in the state where the injury occurred. *Id.* at 672 (citing *Kelly v. City of Chi.*, 4 F.3d 509, 510 (7th Cir. 1993)); see *Owens v. Okure*, 488 U.S. 235, 236 (1989) (refining *Garcia* to require courts to apply states' residual or general personal injury statutes of limitations to § 1983 claims).

Although the narrow question of whether a § 1983 action seeking post-conviction access to biological evidence for DNA testing can be barred by a statute of limitations is fairly new, it has already divided the courts to consider it. Compare *Savory*, 469 F.3d at 672 (App. A at 7a-8a)

⁵ The Seventh Circuit opinion cites to 725 ILCS § 5/13-202 rather than 735 ILCS § 5/13-202. This appears to be a typographical error.

(holding the statute of limitations applied and determining the action accrued at the time the state trial court initially denied a post-conviction DNA testing application brought under state law) *with Moore*, 2005 WL 2334350, at *5-6 (holding the statute of limitations applied but was defeated by California’s equitable tolling rules), *and Wade*, 460 F. Supp. 2d at 233-36 (noting the difficulty of the accrual question, but declining to resolve statute of limitations issues on a motion to dismiss). In this case, the fact that the Seventh Circuit ignored the complexity of the statute of limitations question and instead reflexively applied the *Garcia* borrowing rule points toward the courts’ general confusion on how to safeguard federal interests when determining statute of limitations rules.

A. Under Either The First Or Third § 1988 Steps, No Statute of Limitations Applies To A § 1983 Claim Seeking Access To Evidence For Post-Conviction DNA Testing.

The issue of what statute of limitations applies to § 1983 actions is a question of federal law, and this Court has looked to 42 U.S.C. § 1988 to guide its determinations. *See Burnett v. Grattan*, 468 U.S. 42, 47 (1984) (“The century-old Civil Rights Acts do not contain every rule of decision required to adjudicate claims asserted under them. In the absence of specific guidance, Congress has directed federal courts to follow a three-step process to borrow an appropriate rule.” (citing 42 U.S.C. § 1988)). In *Garcia*, this Court explicitly applied § 1988’s three-step process to determine what statute of limitations should generally apply to civil rights claims brought under § 1983. 471 U.S. at 267. Although *Garcia* itself “principally involve[d] the second step,” both the first and third steps require analysis of federal interests. *See id.* at 267-69. Specifically, the first step – search for a “suitable” federal rule – requires that no state-law borrowing occur “before principles of federal law are exhausted.” *Id.* at 268 (quoting 42 U.S.C. § 1988). Thus, where “a rule from elsewhere in federal law clearly provides a closer analogy,” that rule should be applied. *Reed v. United Transp. Union*, 488 U.S. 319, 324 (1989) (quoting

DelCostello v. Teamsters, 462 U.S. 151, 172 (1983) (addressing statute of limitations rules for claims brought under the Labor Management Reporting & Disclosure Act of 1959)). The third step – ensure the borrowed rule is “not inconsistent with the Constitution and laws of the United States” – emphasizes “‘the predominance of the federal interest’ in the borrowing process, taken as a whole.” *Garcia*, 471 U.S. at 269 (quoting *Burnett*, 468 U.S. at 48).

In this case, Mr. Savory presented a novel question of federal law – whether there exists a post-conviction constitutional right to access evidence for DNA testing to prove innocence – that the Seventh Circuit recognized was “important.” *Savory*, 469 F.3d at 675 (App. A at 12a-13a); *see Harvey II*, 285 F.3d at 304 (Luttig, J., respecting the denial of rehearing *en banc*) (noting that the existence of a post-conviction right to access evidence for DNA testing is “one of the most important criminal law issues of our day”). Despite the importance of the novel federal constitutional issue, and in contravention of § 1988’s command, the Seventh Circuit failed to analyze the federal interest involved in Mr. Savory’s claims before applying Illinois’ personal injury limitations period. *See Savory*, 469 F.3d at 672 (App. A at 7a-8a). This failure to scrutinize the federal interest led the Seventh Circuit to apply a statute of limitations to Mr. Savory’s claims – even though doing so is inconsistent with federal interests and federal law.

Initially, an examination of federal law reveals Congress’ preference that post-conviction DNA testing to prove innocence not be subjected to a strict limitations period. Mr. Savory’s suit seeks relief essentially identical to the remedy granted federal prisoners in the Innocence Protection Act of 2004 (the “IPA”). *See* 18 U.S.C. § 3600. Because Mr. Savory is not a federal prisoner, he cannot turn to the IPA for relief. *See id.* However, the IPA is “a rule from elsewhere in federal law [that] clearly provides a closer analogy” to his § 1983 claims than do state personal injury statutes. *See Reed*, 488 U.S. at 324 (quoting *DelCostello*, 462 U.S. at 172).

Critically, Congress imposed no statute of limitations on post-conviction DNA applications. *See* 18 U.S.C. § 3600. Because the federal law has no statute of limitations, it defies logic to strictly apply a limitations period – intended by each state legislature to apply only to state personal injury actions – to a § 1983 action premised on a federal right to obtain the exact same relief.

Congress is not the only branch of government that has spoken to the federal interest in refusing to impose a statutory time limit on post-conviction DNA testing. Successive presidential administrations also have recognized that DNA has had a revolutionary impact on this country’s criminal justice system precisely because its value does not fade over time. Because DNA test results are more objective, discriminating, and accurate than lay evidence, access to post-conviction DNA testing has overridden the ordinary rules of the “finality” of convictions. As the Justice Department’s National Commission on the Future of DNA Evidence noted in 1999:

The results of DNA testing do not become weaker over time in the manner of testimonial proof. To the contrary, the probative value of DNA testing has been steadily increasing as technological advances and growing databases amplify the ability to identify perpetrators and eliminate suspects. . . . The strong presumption that verdicts are correct, one of the underpinnings of restrictions on post-conviction relief, has been weakened by the growing number of convictions that have been vacated because of exclusionary DNA test results.

NAT’L INST. JUST., U.S. DEP’T OF JUST., POSTCONVICTION DNA TESTING: RECOMMENDATIONS FOR HANDLING REQUESTS 9-10 (Sept. 1999). For this reason, former Attorney General John Ashcroft observed five years ago that “DNA can operate as a kind of truth machine, ensuring justice by identifying the guilty and clearing the innocent.” Jonathan Peterson, *Funds for DNA Testing of Criminals are Diverted*, L.A. TIMES, Dec. 27, 2001, at A22.

Of course, the Seventh Circuit did not dispute the power of DNA to prove innocence. Rather, in Mr. Savory’s case, it reflexively applied *Garcia*’s general borrowing command without reference to the federal interest. Although Mr. Savory suggests this was incorrect as a

matter of law, the Seventh Circuit's decision can be seen as symptomatic of a greater confusion as to whether § 1988 still applies to statute of limitations questions for § 1983 actions. Outside the statute of limitations context, courts still recognize the importance of § 1988's command to let the federal interest govern the rules of decision for § 1983 claims. *See, e.g., Wilson v. Morgan*, Nos. 05-5615 & 05-5616, 2007 WL 268245, at *3 (6th Cir. Feb. 1, 2007) (applying § 1988's inconsistent-with-federal-interests test to a choice-of-law question presented in a § 1983 action); *Davis v. Rodriguez*, 364 F.3d 424, 433 & n.7 (2d Cir. 2004) (same); *Andrews v. Neer*, 253 F.3d 1052, 1056-57 (8th Cir. 2001) (applying the § 1988 test to a choice-of-plaintiff question in a § 1983 action where an injured plaintiff had died); *Allen v. City of Portland*, 210 F.3d 381, *2 n. 3 (9th Cir. 2000) (unpublished table decision) (applying § 1988 test to a choice-of-law question raised in a § 1983 action); *Tinch v. City of Dayton*, 77 F.3d 483, *1-3 (6th Cir. 1996) (unpublished table decision) (applying the § 1988 test to a damages question in a § 1983 action).

B. Uncertainty Exists As To Whether *Garcia's* Third Step Still Can Apply To § 1983 Statute of Limitations Questions.

When evaluating the federal interest in order to select the appropriate statute of limitations rule, most courts consider *Garcia* to have answered the question completely for all § 1983 actions. *See, e.g., Sulik v. Taney County*, 393 F.3d 765, 766-67 (8th Cir. 2005) (relying on *Garcia* and adopting a state's personal injury limitations period); *Sain v. City of Bend*, 309 F.3d 1134, 1139 (9th Cir. 2002) (same). However, the First Circuit has recognized that *Garcia* does not permit application of a state personal injury law limitations period if doing so would be "contrary to federal law." *Poy v. Boutselis*, 352 F.3d 479, 483 (1st Cir. 2003) (concluding that the state limitations period for personal injury claims was "the appropriate analogue" to a § 1983 complaint alleging excessive force, assault, and battery). Moreover, in *Arnold v. Duchese County*, the Tenth Circuit took pains to analyze the federal interest when confronted with a state

law enacted specifically to provide for a two-year limitations period to govern § 1983 suits brought in Utah. *See* 26 F.3d 982, 984-87 (10th Cir. 1994). The *Arnold* court emphasized that § 1983, “a uniquely federal remedy,” needs to be given “a sweep as broad as its language.” *Id.* at 986 (quotations and citations omitted). The court then rejected the application of the state law as placing an artificial limitation on § 1983 actions, relying in part on suggestions that the Utah legislature was impermissibly motivated in part by a goal of reducing the number of civil rights lawsuits brought under § 1983 in that state. *Id.* at 988 & n.9.

This Court should grant certiorari to clarify that the approaches of the First Circuit in *Poy* and the Tenth Circuit in *Arnold* are correct: that an inquiry into the federal interest is essential, and that a reflexive application of the *Garcia* rule is not always appropriate. Although the *Garcia* Court strove to find a general solution to the problem then-dividing the circuits of which statute of limitations to apply to § 1983 actions, the Court recognized that its “simple, broad characterization of all § 1983 claims” could yield a different conclusion in the “most unlikely [event] that the period of limitations applicable to [general personal injury] claims ever was...fixed in a way that would discriminate against federal claims or be inconsistent with federal law in any respect.” *Garcia*, 471 U.S. at 272, 279.

The instant case presents just such an “unlikely” event, and the Seventh Circuit improperly failed to analyze the federal interest at stake in § 1983 actions, like Mr. Savory’s, that seek post-conviction DNA testing. Not only have Congress and the Executive Branch clearly indicated that a federal interest in broadly allowing DNA testing exists, *see supra* p. 17-18, but the policy considerations that warrant imposing a statute of limitations, as explained in *Garcia*, also do not counsel in favor of imposing a strict limitations period. *See* 471 U.S. at 271. In the DNA context, it simply cannot be said that “because of the passage of time, the memories of

witnesses have faded or evidence is lost” such that “[j]ust determinations of fact cannot be made” and a statute of limitations is warranted. *See id.* The passage of time also imposes no prejudice on the state in opposing actions like Mr. Savory’s.⁶ The fundamental question raised by this kind of action is purely legal – whether a convicted individual has a right to post-conviction DNA testing to prove his or her innocence. Thus, these are not the kind of actions where the “[d]efendants need to be on notice to preserve beyond the normal limitations period evidence that will be needed for their defense.” *Wallace v. Kato*, 127 S. Ct. 1091, 1099 (2007). The Defendants here do not need to call witnesses or argue facts; rather, the question is purely legal and based upon the materiality of DNA evidence to the trial record.

C. The Seventh Circuit’s Ruling on Equitable Tolling Highlights The Need To Consider Federal Interests.

The need to consider the federal interest in deciding how the statute of limitations applies to this case, if at all, is further highlighted by the anomalous treatment of Mr. Savory in this case and a prisoner pursuing a nearly identical § 1983 claim. In Mr. Savory’s case, the Seventh Circuit rejected the application of equitable tolling based on the fact that his claim relates to his actual innocence of the crimes of which he was convicted. *Savory*, 469 F.3d at 673-74 (App. A. at 8a-12a). In contrast, in a case involving a nearly identical § 1983 claim, the United States District Court for the Northern District of California determined that under the equitable tolling principles supplied by California law, the petitioner’s claim of actual innocence made the claim timely. *Moore*, 2005 WL 2334350, at *5-6. The reason for such different results can only be that California has a relatively well developed body of law on equitable tolling while, as the Seventh

⁶ Regarding the Defendants here, Illinois law requires the state to preserve the evidence Mr. Savory seeks to access. *See* 725 ILCS § 5/116-4(b) (“...Retention shall be until the completion of the sentence, including the period of mandatory supervised release...”).

Circuit has noted,⁷ Illinois courts have said very little. But, as the Seventh Circuit itself has noted elsewhere, a lack of developed state law on tolling principles cannot defeat the federal interest. *Heck v. Humphrey*, 997 F.2d 355, 358-59 (7th Cir. 1993), *aff'd*, 512 U.S. 477 (1994).⁸

Of course, it is true that the very existence of a constitutional right to testing is controversial and has divided the courts. *See supra* note 2. The existence of this controversy, however, only further supports the necessity of the courts' careful review of the federal interest involved, rather than an unthinking borrowing of state law. Accordingly, this Court should grant certiorari to establish that the federal interest must take precedence when courts decide the rules of decision to apply to § 1983 claims – particularly those claims asserting the uniquely important federal constitutional right to access evidence for post-conviction DNA testing.

II. This Court Should Grant Certiorari To Clarify That Laches Is The Only Timeliness Limitation On A § 1983 Action That By Necessity Seeks Only Equitable Relief.

Mr. Savory asserts a federal constitutional right to access evidence for DNA testing, and the only relief he seeks by his § 1983 action is to access evidence for DNA testing. (Am. Compl. at p. 14, App. J at 79a.) In other words, the right he asserts is coextensive with the remedy he seeks. His action proceeds entirely and purely in equity. After receiving injunctive relief, this § 1983 action would come to an end; there is no possibility of damages if Mr. Savory prevails.

As this Court has recognized, “where the equity jurisdiction is exclusive and is not exercised in aid or support of a legal right, state statutes of limitations barring actions at law are

⁷ *See, e.g., Clark v. City of Braidwood*, 318 F.3d 764, 767 (7th Cir. 2003) (noting that it is unsettled whether equitable tolling exists under Illinois law).

⁸ There is further conflict on whether, under federal principles, actual innocence should toll the statute of limitation applicable to habeas corpus petitions. *Compare Souter v. Jones*, 395 F.3d 577, 588-89 (6th Cir. 2005) (holding that actual innocence would toll the statute of limitations on habeas corpus petitions), *with Escamilla v. Jungwirth*, 426 F.3d 868, 871-72 (7th Cir. 2005) (holding that actual innocence without a fresh discovery of new evidence does not toll the statute of limitations).

inapplicable.” *Russell v. Todd*, 309 U.S. 280, 289 (1940) (citations omitted); see *Holmberg v. Ambrecht*, 327 U.S. 392, 396 (1946) (“Traditionally and for good reasons, statutes of limitation are not controlling measures of equitable relief.”). Unsurprisingly, the identical principle holds true under Illinois law. See *Meyers v. Kissner*, 594 N.E.2d 336, 340 (Ill. 1992) (“[S]tatutes of limitations, applicable in legal actions, are not directly controlling in suits seeking equitable relief.”) (citing *McDiarmid v. McDiarmid*, 15 N.E.2d 493, 495 (Ill. 1947)).

Of course, the fact that no statute of limitations applies to actions seeking only equitable relief does not mean that no timeliness limitation exists. It does, through the doctrine of laches. See *Russell*, 309 U.S. at 289 (collecting cases); *Union Carbide v. State Bd. of Tax Comm’rs*, 992 F.2d 119, 123 (7th Cir. 1993) (explaining that where “the only relief that *can* be sought is equitable, laches should apply” (quoting *Cannon v. Univ. of Health Sci./Chi. Med. Sch.*, 710 F.2d 351, 359 (7th Cir. 1983)). The question of whether laches applies to bar the cause of action is necessarily fact-dependent and does not turn on a mechanical test. See *Ambrecht*, 327 U.S. at 396 (“[L]aches is not, like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced.” (quoting *Gallihier v. Cadwell*, 145 U.S. 368, 373 (1892)). Rather, a laches inquiry considers the plaintiff’s diligence and weighs the possibility of prejudice to the defendants arising from the passage of time.⁹ See *id.*; *Russell*, 309 U.S. at 287; *Union Carbide*, 992 F.2d at 123-24.

The IPA requires a laches-type inquiry to determine the timeliness of federal prisoners’ motions for post-conviction DNA testing. Distinctly equitable in character, the IPA’s timeliness assessment turns on such factors as whether “the applicant’s filing is done solely to cause delay

⁹ Although the courts below did not conduct a laches analysis, the Seventh Circuit recognized Mr. Savory’s diligence in seeking DNA testing. *Savory*, 469 F.3d at 674 (App. A at 10a-12a). Moreover, the passage of time has not prejudiced the Defendants’ ability to contest this action. See *supra* p. 21 & note 6.

or harass,” 18 U.S.C. § 3600(a)(10)(A)(ii), or whether “considering all relevant facts and circumstances..., a denial would result in a manifest injustice.” 18 U.S.C. § 3600(a)(10)(B)(iii). Because both the Illinois state legislature and Congress recognize that post-conviction DNA testing actions should not be subject to a statute of limitations, *see* 18 U.S.C. § 3600; 725 ILCS § 5/116-3, the Seventh Circuit’s decision to apply a statute of limitations to this action makes little sense. This Court should grant certiorari to bring sense and logic to the timeliness inquiry for § 1983 actions premised on a federal constitutional right to post-conviction access to evidence for DNA testing.

In a broader sense, lower courts need guidance on the application of laches to § 1983 actions that seek only equitable relief. The Seventh Circuit previously has held that laches could bar a § 1983 action that became purely equitable because no legal remedy was available to remedy the statutory violation alleged. *See Cannon*, 710 F.2d at 359 (addressing a § 1983 claim under Title IX, which provides no legal remedy for its violation). A related but distinct question is whether laches can bar a § 1983 action that would be timely under the applicable statute of limitations – a question that itself divides the courts. *Compare, e.g., Ivani Contracting Corp. v. City of N.Y.*, 103 F.3d 257, 261 (2d Cir. 1997) (holding that laches could not bar a § 1983 claim seeking legal relief before the end of the statutory period), *and Nilsen v. Moss Point*, 674 F.2d 379, 388 (5th Cir.1982) (holding that in a § 1983 claim seeking a combination of legal and equitable relief, laches could bar the equitable relief, but not the legal relief, even before the end of the limitations period), *vacated on other grounds*, 701 F.2d 556 (5th Cir.1983) (*en banc*), *with Herman v. City of Chi.*, 870 F.2d 400, 403 (7th Cir. 1989) (noting that laches is applicable to all § 1983 actions, regardless of the relief sought).

The issue of whether laches, rather than a statute of limitations, guides the timeliness inquiry in a purely equitable § 1983 action is thus ripe for this Court's review. This case is particularly suitable for consideration because the constitutional right asserted – access to biological evidence for DNA testing – is coextensive with the remedy sought. Furthermore, the right and remedy both implicate core constitutional concerns with which the federal courts are now struggling. *See supra* note 2. This Court should grant certiorari to resolve the applicability of laches to § 1983 claims seeking the purely equitable relief of post-conviction access to evidence for DNA testing.

III. Certiorari Should Be Granted To Resolve When A Claim Alleging The Continued Failure To Act In Accordance With An Affirmative Duty – Particularly The Duty To Provide Post-Conviction Access To Evidence For DNA Testing – States A Continuing Violation For Statute Of Limitations Purposes.

Even if there is a statute of limitations on seeking access to the evidence used to convict for purposes of subjecting it to DNA testing, the statute of limitations cannot be applied without reference to the nature of the right being asserted. *See, e.g., Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113-14, 117-18 (2002); *Heard v. Sheehan*, 253 F.3d 316, 319-20 (7th Cir. 2001). In particular, the nature of the right being asserted affects both the definition of the injury to be remedied and how the claim accrues. *See Morgan*, 536 U.S. at 113-14, 117-18 (distinguishing between wrongful termination and hostile environment employment discrimination claims for purposes of determining how the claims accrue and whether the continuing violation doctrine applies). In a claim like Mr. Savory's, this analysis is crucial – and it is exactly what the Seventh Circuit overlooked when it refused to apply the continuing violation doctrine in his case. *See Savory*, 469 F.3d at 672-73 (App. A at 7a-10a).

Contrary to the Seventh Circuit's conclusion, a § 1983 action seeking post-conviction access to evidence for purposes of DNA testing does not allege one distinct injury and one

distinct violation of the plaintiff's constitutional rights. *See id.* at 672 (App. A at 7a-8a). Rather, as explained below, a claim like Mr. Savory's alleges that under *Brady v. Maryland*, the Due Process Clause, and his right to meaningful access to the courts, the Defendants have an *affirmative duty* to provide access to the evidence used against him for the purposes of DNA testing. In light of this affirmative duty, the Defendants' repeated failure to act over a period of time constitutes not one injury but many injuries – even if there was only one active, initial decision to refuse to provide access to Mr. Savory. *See, e.g., Papasan v. Allain*, 478 U.S. 265, 282 (1986). In other words, each day the Defendants fail to grant access to the evidence for DNA testing constitutes a fresh violation of Mr. Savory's constitutional rights for statute of limitations purposes. *See, e.g., Heard*, 253 F.3d at 319-20. With multiple injuries, the continuing violation doctrine governs the accrual of Mr. Savory's claims, the Seventh Circuit erred in refusing to apply the doctrine, and Mr. Savory's suit is timely.

A. Where The State Has An Affirmative Duty To Act But Fails To Do So, The Statute Of Limitations Accrues Anew With Each Failure To Act.

The Seventh Circuit's error in refusing to apply the continuing violation doctrine to Mr. Savory's § 1983 claims is perhaps expected. This Court has never addressed how the continuing violation doctrine applies to a claim alleging the violation of an ongoing duty. *See, e.g., Morgan*, 536 U.S. at 113-18 (employment discrimination and hostile work environment); *Lorance v. AT&T Techs., Inc.*, 490 U.S. 900, 911 (1989) (employment discrimination); *Bazemore v. Friday*, 478 U.S. 386, 345-96 (1986) (racial discrimination through disparate employee pay structure); *Del. State College v. Ricks*, 449 U.S. 250, 257-58 (1980) (employment discrimination); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380-81 (1982) (repeated violations of the Fair Housing Act); *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 557-58 (1977) (employment discrimination).

This Court has, however, suggested reasoning that supports applying the continuing violation doctrine to claims alleging the violation of an ongoing duty. *See, e.g., United States v. Fordice*, 505 U.S. 717, 727 (1992) (reasoning that “[i]f the State has not discharged this duty [to eradicate the vestiges of its system of segregated schools], it remains in violation of the Fourteenth Amendment”); *Papasan*, 478 U.S. at 282 (holding an equal protection claim was not barred by the Eleventh Amendment, since there was an “ongoing constitutional violation” in the disparity in the distribution of school property, and the essence of the claim was the “present disparity” and “not the past actions of the State”); *Columbus Bd. of Educ. v. Penik*, 443 U.S. 449, 459 (1979) (citations omitted) (stating that “[e]ach instance of a failure or refusal to fulfill [an] affirmative duty continues the violation of the Fourteenth Amendment” in the context of a state’s continuing, affirmative duty to act to eliminate the vestiges of segregation in public schools). Moreover, because a complaint alleging the failure to comply with an ongoing duty often also will assert facts showing one or more of the defendant’s direct refusals to act in response to the plaintiff’s requests, *see, e.g., Heard*, 253 F.3d at 317 (noting that the plaintiff made repeated requests); (Am. Compl. ¶ 40, App. J at 75a) (same), it is all too easy for a court to ignore the nature of the plaintiff’s claim and mechanically assume that the “injury” must have accrued with the first refusal to act, *see Savory*, 469 F.3d at 673 (App. A at 8a-10a).

But that kind of mechanical determination of the accrual of the injury ignores what a plaintiff is really asserting when he brings a claim alleging the violation of an ongoing duty. By nature, the existence of an ongoing duty to act means the state’s failure to comply for the hundredth time is just as much a violation as its first failure to comply. *See Papasan*, 478 U.S. at 282; *Columbus Bd. of Educ.*, 443 U.S. at 459. Likewise, in a § 1983 case like Mr. Savory’s, where the plaintiff alleges the defendant has an affirmative duty to provide access to evidence for

post-conviction DNA testing, the hundredth failure to act is just as much of a violation as the first, so long as the duty to provide access continues to exist.¹⁰ *See id.*; *Heard*, 253 F.3d at 319. In such a case, deeming the “injury” to have accrued with the defendant’s first refusal to provide access ignores the nature of the right the plaintiff asserts – and insulates the defendant from having to provide a remedy for the sole and dissatisfying reason that the failure to comply with an ongoing duty started long ago. *See Palmer v. Bd. of Educ.*, 46 F.3d 682, 685-86 (7th Cir. 1995) (remarking that a defendant should not acquire an “easement across the Constitution” in the form of insulation from suit merely because it started failing to comply with the Constitution some time ago). Therefore, the fact that § 1983 claims like Mr. Savory’s allege the violation of an ongoing duty to act simply cannot be ignored when addressing statute of limitations issues.

i. The Continuing Violation Doctrine Applies Where A Defendant Continues To Affirm An Initial Wrongful Act Or Failure To Act.

Courts apply the continuing violation doctrine to characterize how particular kinds of claims accrue for statute of limitations purposes. *See, e.g., Heard*, 253 F.3d at 319 (explaining the doctrine affects accrual rather than tolling). It distinguishes between a discrete act or single occurrence that gives rise to an injury that continues to manifest over time, and repeated conduct that involves the continual *affirmation*, into the statutory period, of an initial wrongful act or wrongful failure to act. *See Morgan*, 536 U.S. at 113-14, 117-18. For the former, the injury

¹⁰ Indeed, the Seventh Circuit’s refusal to consider cases “in which the wrongful failure to release a prisoner was considered a continuing violation” demonstrates the court missed the point of Mr. Savory’s claims. *See Savory*, 469 F.3d at 673 (App. A at 10a). Mr. Savory alleges a right to post-conviction access to evidence for DNA testing; if this right exists, it continues to exist for Mr. Savory so long as he remains convicted of offenses for which post-conviction DNA testing would be appropriate. Cases involving the wrongful failure to release a prisoner are thus directly analogous to the constitutional violations here: both allege violations as a result of the state’s failure to comply with its affirmative duty to act in a given situation. *See, e.g., Abiff v. Slaton*, 806 F. Supp. 993, 996 (N.D. Ga. 1992) (applying continuing violation doctrine to § 1983 claim based on the state’s failure to release the plaintiff from prison when he was entitled to release).

accrues at the moment of the discrete act; for the latter, a continuing violation exists, and a fresh statutory period begins with each affirmation of the initial wrongful act or failure to act. *See id.*

In other words, a continuing violation involves conduct repeated over time and into the statutory period, even if there is only one initial decision to act or fail to act in a certain way. *See Bazemore*, 478 U.S. at 345-96; *Havens Realty Corp.*, 455 U.S. at 380-81; *see also Papasan*, 478 U.S. at 282 (recognizing, in finding a continuing violation for Eleventh Amendment purposes, that “[i]t may be that the current [unlawful] disparity results directly from...actions in the past..., but the essence of the equal protection allegation is the present disparity in the distribution of benefits...and not the past actions of the State”). As this Court has explained, “[the] proper focus [of the continuing violation doctrine] is upon the time of the *discriminatory acts*, not upon the time at which the *consequences* of the acts became most painful.” *Ricks*, 449 U.S. at 257-58 (quoting *Abramson v. Univ. of Haw.*, 594 F.2d 202, 209 (1979) (Court’s emphasis)). The key to the continuing violation doctrine is that, whatever decisions related to carrying out a constitutional violation may have been made in the past, a “present violation exists” that makes the claim actionable. *See id.* at 258 (quoting *United Air Lines, Inc.*, 431 U.S. at 558).

But just like the overall statute of limitations question, the continuing violation doctrine cannot be applied in a vacuum. Rather, a proper application of the doctrine requires consideration of the underlying right being asserted. *See, e.g., Morgan*, 536 U.S. at 113-14, 117-18 (distinguishing between two types of employment discrimination claim when deciding the continuing violation doctrine applied to one but not the other); *Heard*, 253 F.3d at 318 (distinguishing between medical malpractice and a claim for failure to provide medical treatment under the Eighth Amendment and applying the doctrine only to the latter); *Santa Fe Springs Realty Corp. v. City of Westminster*, 906 F. Supp. 1341, 1364-65 (C.D. Cal. 1995)

(distinguishing between a takings claim, which accrued immediately, and a First Amendment facial challenge to an ordinance that stated a continuing violation). For instance, if the underlying right is to be free from termination of employment based on improper discriminatory motives, the firing of an individual is the discrete actionable act that initiates the running of the statute of limitations because the violation is complete upon termination. *See Morgan*, 536 U.S. at 113-14. In the same way, if the underlying right is to be free from defamatory speech, the making of the speech is the discrete act because the defamation occurs with the initial publication and cannot be undone. *See Pitts v. City of Kankakee*, 267 F.3d 592, 595-96 (7th Cir. 2001).

By contrast, if the right is to be free from a racially discriminatory pay structure in one's job, the statute of limitations begins anew with each paycheck because, although each paycheck implements only a single, past decision to discriminate, "each week's paycheck that delivers less to a black than to a similarly situated white is a wrong actionable under Title VII." *See Bazemore*, 478 U.S. at 395-96; *see also Reese v. Ice Cream Specialties, Inc.*, 347 F.3d 1007, 1013-14 (7th Cir. 2003) (relying on *Bazemore* to find a fresh actionable wrong with each paycheck, although the initial decision to impose the discriminatory pay structure occurred outside the limitations period). Similarly, if the right involves free speech and the claim is a facial challenge to a municipal ordinance, a continuing violation exists because multiple injuries exist; each day the statute remains in effect chills the exercise of speech. *See Frye v. City of Kannapolis*, 109 F. Supp. 2d 436, 439 (M.D.N.C. 1999); *Santa Fe Realty Springs Corp.*, 906 F. Supp. at 1364-65. Finally, if the underlying right rests on the state's affirmative duty to act, such as the Eighth Amendment duty to provide necessary medical attention to a prisoner, a continuing violation exists because each day the state fails to act initiates a new statutory period. *See Heard*, 253 F.3d at 318. For the same reasons, a claim alleging the failure to provide post-conviction

access to evidence for purposes of DNA testing – resting on the state’s affirmative duty to supply such access – also states a continuing violation for statute of limitations purposes.

B. A § 1983 Claim Seeking Post-Conviction Access To Evidence For DNA Testing Alleges Injuries That Continue To Accrue So Long As The State Fails To Comply With Its Affirmative Duty To Provide Access.

When it decided the continuing violation doctrine did not govern how Mr. Savory’s claims accrued, the Seventh Circuit ignored the nature of the rights Mr. Savory seeks to enforce. To be clear: Mr. Savory suggests the Defendants have an affirmative duty, under *Brady v. Maryland*, 373 U.S. 83 (1963), or his right to meaningful access to the courts, to provide him with access to the evidence used against him for purposes of subjecting that evidence to DNA testing. Consequently, had the Seventh Circuit properly considered Mr. Savory’s allegations that the Defendants possess an affirmative duty to act, the court would have recognized that he alleges not one distinct injury but, rather, multiple injuries arising from the Defendants’ continued failure to act – each of which sets the statute of limitation running anew.

i. A § 1983 Claim Like Mr. Savory’s Alleges Multiple Injuries Because It Is Based On The State’s Affirmative Duty, Arising Under This Court’s *Brady* Jurisprudence, To Provide Post-Conviction Access To Evidence.

Mr. Savory’s § 1983 action asserts a constitutional right to post-conviction access to evidence for DNA testing that is grounded primarily in the due process principles that led this Court in *Brady* to impose on the state a pretrial duty to turn over exculpatory evidence to criminal defendants. *See* 373 U.S. at 87. From *Brady* and its progeny, it is now well-established that a prosecutor’s pretrial duty to disclose material, exculpatory evidence to a criminal defendant is an *affirmative obligation* – and thus one that applies even when the defendant or his counsel fails to request such evidence or requests exculpatory evidence only generally. *See Kyles v. Whitley*, 514 U.S. 419, 432-33, 437-40 (1995) (explaining the Court’s *Brady* jurisprudence and extending the *Brady* due process obligation to investigators and others working with

prosecutors); *United States v. Agurs*, 427 U.S. 97, 110-11 (1976) (holding that a *Brady* duty exists in certain situations even when a defendant does not request exculpatory evidence); *Brady*, 373 U.S. at 87 (recognizing an affirmative obligation to turn over exculpatory evidence). As Justice Stevens explained for the *Agurs* Court, an affirmative duty is appropriate because “there are situations in which evidence is obviously of such substantial value to the defense that elementary fairness requires it to be disclosed even without a specific request.” 427 U.S. at 111.

Brady and its progeny thus established an affirmative duty of disclosure in order to ensure criminal defendants receive fair trials, to bolster the criminal trial as a mechanism for discerning the truth, and to strengthen the public’s confidence in the integrity of guilty verdicts. *See Kyles*, 514 U.S. at 435, 437-40 (explaining that the disclosure duty “will tend to preserve the criminal trial, as distinct from the prosecutor’s private deliberations, as the chosen forum for ascertaining the truth” and requiring disclosure of those evidentiary items that would “undermine confidence in the verdict”); *Brady*, 373 U.S. at 87 (reflecting concern for providing a fair trial). In essence, this Court adopted this affirmative duty because it recognized that the Constitution is concerned not just with the bare proving of guilt, but rather with “the *justice* of the finding of guilt.” *Agurs*, 427 U.S. at 112 (emphasis added).

This concern is just as significant post-conviction as it is before and during a criminal trial. For this reason, the state’s affirmative duty to disclose does not end when a jury announces a guilty verdict. Rather, “the duty to disclose is ongoing,” *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987), and, as federal courts have recognized, continues through the post-conviction setting. *See, e.g., Yarris v. County of Delaware*, 465 F.3d 129, 142 (3d Cir. 2006) (duty to preserve exculpatory evidence extends beyond conviction) (citing *Harvey I*, 278 F.3d at 387 (King, J. concurring in part)); *Smith v. Roberts*, 115 F.3d 818, 820 (10th Cir. 1997) (duty to disclose

“extends to all stages of judicial process”); *Thomas v. Goldsmith*, 979 F.2d 746, 749-50 (9th Cir. 1992) (duty to disclose extends to evidence relevant to a habeas corpus proceeding). Such a post-conviction duty exists because “nondisclosure is as unfair where it prevents a defendant from taking full advantage of postconviction relief as it is when it results in the forfeiture of the defendant’s right to a fair trial.” *Monroe v. Butler*, 690 F. Supp. 521, 525-26 (E.D. La. 1988).

For these reasons, and particularly because DNA evidence is the kind of evidence “of such substantial value” that it is ripe for an affirmative duty of disclosure, *see Agurs*, 427 U.S. at 111, the due process right Mr. Savory claims is merely a logical – and limited – extension of *Brady*’s reasoning.¹¹ The nature of this due process right influences how Mr. Savory’s § 1983 claims accrue for statute of limitations purposes. *See, e.g., Morgan*, 536 U.S. at 113-14, 117-18; *Heard*, 253 F.3d at 318; *Santa Fe Springs Realty Corp.*, 906 F. Supp. at 1364. Because the right imposes an affirmative duty on the Defendants to provide him with access to evidence for DNA testing, the Defendants’ continued failure to act constitutes not one but many injuries that accrue separately for statute of limitations purposes.

ii. Multiple Injuries Arise From The State’s Failure To Comply With Its Affirmative Duty To Provide Meaningful Access To The Courts.

Additionally, Mr. Savory claims his constitutional right to meaningful access to the courts also supports the existence of an affirmative duty of the state to provide post-conviction access to evidence for purposes of DNA testing. However the right to meaningful access to the courts is phrased and whatever its constitutional basis,¹² this Court’s decisions enforcing that

¹¹ Federal courts are beginning to recognize this limited but important due process right. *See, e.g., Wade*, 460 F. Supp. 2d 226 (recognizing, based on *Brady*, a post-conviction right to DNA testing); *Osborne*, 445 F. Supp. 2d 1079 (same); *Godschalk*, 177 F. Supp. 2d 366 (same).

¹² As this Court explained most recently in *Christopher v. Harbury*, the constitutional right of access to the courts finds its basis in several fundamental lines of doctrine, most notably, the First Amendment right to petition for redress of grievances, the Equal Protection Clause of the

right demonstrate that, particularly in the context of prisoners' access to the courts, the right generally imposes on the state an affirmative duty to provide the procedures or other means necessary to meaningful access. *See, e.g., Bounds v. Smith*, 430 U.S. 817, 824-25 (1977) (listing several of the measures the state has an affirmative duty to undertake in order to ensure prisoners have meaningful access to the courts). Although this Court has carefully crafted that affirmative duty not to require specific measures but rather to encourage experimentation with the measures sufficient to ensure meaningful access, the state remains duty-bound both to take the steps necessary to guarantee such access and to refrain from effectively barring the courthouse door. *See, e.g., Lewis v. Casey*, 518 U.S. 343, 352-56 (1996).

Mr. Savory's § 1983 suit is based on the idea that even though the state has not physically prevented him or those like him from filing court papers, such a theoretical opportunity to seek reversal of their convictions does not constitute "meaningful" access to the courts when the state arbitrarily prevents access to the very evidence that can support claims of actual innocence under the extraordinarily high bar for such claims established in *Schlup*, 513 U.S. 298, or *Herrera*, 506 U.S. 390. DNA evidence is often highly probative to a person's innocence, and where an individual's conviction has been affirmed only on the ground of harmless error, DNA evidence can support a gateway claim leading to habeas corpus relief. *See Schlup*, 513 U.S. at 327-29 (requiring significant new evidence plus a constitutional error to surmount a procedural bar to a second habeas petition). Mr. Savory's case is instructive because he seeks to test the very evidence that helped support the Seventh Circuit's holding that the constitutional errors tainting his trial were harmless. *Savory*, 832 F.2d at 1017-18. If the Defendants are ordered to comply with their constitutional duty to provide access to the evidence used against him for purposes of

Fourteenth Amendment, and the Due Process Clauses of the Fifth and Fourteenth Amendments. *See* 536 U.S. 403, 415 n.12 (2002).

DNA testing, and assuming the results are in Mr. Savory's favor, he will have a convincing claim of actual innocence analogous to that allowed by this Court in *House*. See 126 S. Ct. at 2079. To guarantee such meaningful access to the courts, Mr. Savory contends that the Defendants have an affirmative obligation to provide post-conviction access to the evidence used against him. As with the affirmative duty under *Brady*, the Defendants' continued failure to comply with this duty generates multiple injuries for statute of limitations purposes.

C. Because A § 1983 Claim Seeking Post-Conviction DNA Testing Alleges The State's Failure To Comply With Its Duty, It States A Continuing Violation.

Evaluating the applicability of the continuing violation doctrine in light of the constitutional rights a § 1983 plaintiff such as Mr. Savory seeks to enforce, it is clear both that the Seventh Circuit erred and that the nature of the right to post-conviction DNA testing requires the doctrine's application. As stated above, and contrary to the Seventh Circuit's view, *see Savory*, 469 F.3d at 673 (App. A at 8a-10a), Mr. Savory does not allege that the Defendants violated his constitutional rights merely by their refusal to provide access to evidence in response to his 1998 request (*see* Am. Compl. ¶ 40, App. J at 75a). The fact that Illinois happens to have a statute allowing convicted individuals a limited ability to acquire access to evidence for DNA testing, *see* 725 ILCS § 5/116-3, has nothing to do with the constitutional rights Mr. Savory seeks to enforce. Rather, Mr. Savory claims that the Defendants have an affirmative duty to provide post-conviction access to evidence under *Brady* or his right to meaningful access to the courts.¹³

Consequently, even if the Defendants made one initial decision to refuse access to Mr. Savory when they contested his motion in Illinois state court, their continued failure to act in

¹³ As the Second Circuit recently recognized in another context, the claim here is not based on a prior motion for testing under state law, but on the state's underlying refusal to provide access. *McKithen*, 2007 WL 744728, at *6.

accordance with their duty is a continued affirmation of that initial decision – and each day they fail to act is a fresh violation of Mr. Savory’s constitutional rights. In this situation, a continuing violation exists because there is *both* a present constitutional violation – the state’s current failure to act – and a series of past violations consisting of past failures to act. *See Heard*, 253 F.3d at 318 (failure to provide constitutionally required medical treatment to a prisoner stated a continuing violation); *Remigio v. Kelly*, No. 04 CIV 1877JGKMHD, 2005 WL 1950138, at *9-11 (S.D.N.Y. Aug. 21, 2005) (failure to provide constitutionally required procedures after the seizure of the plaintiff’s property stated a continuing violation); *Abiff*, 806 F. Supp. at 996 (defendants’ failure to transfer the plaintiff from state prison in accordance with their duty to do so stated a continuing violation that ended only when he was finally transferred); *Fletcher v. Florida*, 858 F. Supp. 169, 171 (M.D. Fla. 1994) (“continuing wrong” in the defendants’ keeping apart and failure to reunite the two minor plaintiffs with each other and their mother). In other words, because a § 1983 claim seeking post-conviction access to evidence for DNA testing alleges a continued failure to comply with the state’s affirmative duty to provide access, such a claim states a continuing violation for statute of limitations purposes.

D. Applying The Continuing Violation Doctrine To A § 1983 Claim Seeking Post-Conviction DNA Testing Is Consistent With Public Policy.

A § 1983 action like Mr. Savory’s presents the ideal situation for the application of the continuing violation doctrine for the additional reason that doing so implicates none of the policy concerns underpinning courts’ occasional reluctance to apply the continuing violation doctrine. Therefore, this case is ideal for this Court to clarify when and under what circumstances the doctrine applies, with reference to the policy considerations that should guide courts’ analyses.

First, applying the continuing violation doctrine here would affect the relatively small but important class of cases where the state has an affirmative duty to act and yet refuses to comply

with that duty for an extended period. Not only is the application of the continuing violation doctrine appropriate under federal case law in these instances, but doing so is also strong public policy because it ensures the state is not unduly insulated from correcting long-standing constitutional violations. As Judge Easterbrook has observed in applying the continuing violation doctrine to a claim of racial discrimination in schools, no defendant should be able to acquire “an easement across the Constitution”; rather, “the fact that it is long past time to rectify such discrimination is a reason to put this case on a fast track to decision rather than to dismiss it as filed too late.” *Palmer*, 46 F.3d at 685-86.

Second, a claim like Mr. Savory’s presents one of the rare situations where the public policy concerns that ordinarily justify statutes of limitation do not exist. So, applying the continuing violation doctrine to these claims does nothing to alter the policy balance between enforcement and repose that statutes of limitation are supposed to represent. As this Court has explained, “[s]tatutes of limitations are primarily designed to assure fairness to defendants.” *Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424, 428 (1965). They protect against those situations in which “because of the passage of time, the memories of witnesses have faded or evidence is lost” and “[j]ust determinations of fact” no longer can be made. *Garcia*, 471 U.S. at 271. However, there are instances where courts are justified in setting aside a statute of limitations; in fact, the “policy of repose, designed to protect defendants, is frequently outweighed...where the interests of justice require vindication of the plaintiff’s rights.” *Burnett*, 380 U.S. at 428.

A § 1983 claim seeking access to evidence for purposes of post-conviction DNA testing presents just the sort of situation “where the interests of justice require vindication of the plaintiff’s rights.” *See id.* Because such a claim demands only equitable relief, rather than money damages, the usual concern for providing repose from the possibility of money damages does not

exist. More importantly, there is no concern for fading memories because, unlike the typical § 1983 case where the plaintiff seeks compensation for past wrongs, Mr. Savory and those like him seek only access to the evidence used to convict, not to prove that some past action on the part of state officials violated their rights. Moreover, none of the usual concerns about the spoliation of evidence exist because the Defendants have a statutory duty to preserve the evidence Mr. Savory seeks to subject to DNA testing. *See supra* note 6.

Third, the continuing violation doctrine is appropriate here because without it, Mr. Savory – and the others like him who were convicted long before the advent of DNA testing – is effectively barred from ever obtaining DNA testing, despite the fact that DNA results are just the kind of evidence most useful in supporting habeas corpus petitions or actual innocence claims. Individuals who were convicted without the benefit of DNA testing at their trials are likely to be the same individuals who, like Mr. Savory, already have exhausted their initial ability to seek direct and habeas review. Thus, these individuals now face various procedural hurdles to demonstrating their actual innocence. *See generally Schlup*, 513 U.S. 298; *Herrera*, 506 U.S. 390. Barring them from seeking DNA testing through § 1983 effectively sets a time limit on proving wrongful conviction. This is certainly an unreasonable and undue amount of power to confer on statutes of limitations originally designed only to provide repose to defendants facing run-of-the-mill personal injury claims.

For all of these reasons, the nature of the rights Mr. Savory seeks to enforce demands the application of the continuing violation doctrine. This Court should grant certiorari both to correct the error of the Court of Appeals in Mr. Savory's case and to establish the standards federal courts must look to when considering the accrual of a § 1983 claim seeking access to evidence for purposes of post-conviction DNA testing.

CONCLUSION

For all of the foregoing reasons, this Court should grant this petition for a writ of certiorari.

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Respectfully submitted,

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