

No. _____

In the Supreme Court of the United States

SCOTT CARPENTER, in his individual capacity,
Petitioner,

v.

DOUGLAS JORDAN,
Respondent.

*On Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit*

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The accrual of a cause of action under 42 U.S.C. § 1983 for a constitutional violation for withholding exculpatory evidence as recognized by Brady v. Maryland, 373 U.S. 83 (1963) is governed by this Court's decision Heck v. Humphrey, 512 U.S. 477 (1994). In Heck, this Court held that a cause of action for an "unconstitutional conviction" "accrues" when the "outstanding judgment" has been "invalidated" by being "reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such a determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254." 512 U.S. at 486-487 & 489-90.

Based on Heck, Courts are split on whether the statute of limitations for a § 1983 wrongful conviction claim based on a Brady and other like violations commences to run after only an "invalidation" or after both an "invalidation" and a "favorable termination." The Sixth Circuit, in this case, provided that the statute of limitations for Jordan's commenced after both an "invalidation" and a "favorable termination."

The Question Presented is:

Does a 42 U.S.C. § 1983 wrongful conviction claim for unconstitutionally withholding exculpatory evidence "accrue" and thus the statute of limitations commence to run when (1) a conviction is "invalidated" by the post-conviction procedures set out in Heck or when (2) a conviction is "invalidated" and the plaintiff is no longer subject to criminal prosecution due to a "favorable termination?"

PARTIES TO THE PROCEEDING

Mr. Douglas Jordan was the plaintiff-appellant below. Blount County, Tennessee, Mr. Scott Carpenter, in his individual capacity, and Mr. James Brooks, in his individual capacity, were the defendants-appellees below. Mr. Jordan is the respondent here. Mr. Carpenter, in his individual capacity, is filing this *petition for writ of certiorari*.

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PETITION FOR A WRIT OF CERTIORARI

Mr. Carpenter, in his individual capacity, respectfully petitions for a *writ of certiorari* to the review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The decision of a panel of the Court of Appeals for the Sixth Circuit is reported with a citation of Jordan v. Blount County, 885 F.3d 413 (6th Cir. 2018) and is reproduced in the Appendix at 1a-6a. The decision of the United States District Court for the Eastern District of Tennessee is reported at 2017 U.S. Dist. LEXIS 118433 (E.D. Tenn. July 28, 2017) and is reproduced in the Appendix at 7a-14a. The denial for a *Petition for Rehearing En Banc* hearing is reported at 2018 U.S. App. LEXIS 94449 (6th Cir. Apr. 13, 2018) and is reproduced in the Appendix at 15a-16a.

JURISDICTION

The Court of Appeals for the Sixth Circuit issued its judgment on defendants' *Petition for Rehearing En Banc* on April 13, 2018. Pet App. 15a-16a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The statute involved is the Civil Rights Act of 1871, which provides in relevant part as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of

the United States or other person with the jurisdiction therefore 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 proceeding for redress . . .

42 U.S.C. § 1983.

STATEMENT OF THE CASE

Douglas Jordan’s 2002 conviction for murder was “invalidated” per Heck in 2011 when he was granted post-conviction relief by an authorized state tribunal based on a purported violation of his constitutional rights under Brady related to an alleged failure to disclose exculpatory evidence. A jury acquitted him on a subsequent retrial in 2015. Plaintiff filed his *Complaint* within one year of the acquittal at retrial but four years after he was granted post-conviction relief.

Based on precedent from the First, Second, Eighth, Tenth, and Eleventh Circuits, Jordan’s 42 U.S.C. § 1983’s claim for the defendants’ purported failure to disclose exculpatory evidence would be barred by the statute of limitations because it would have accrued in 2011 when his claim was “invalidated” as specified in Heck. In the Third and Fourth Circuits, Plaintiff’s claim would be deemed timely because it would have accrued in 2015 when he was subsequently acquitted. The Fifth, Sixth, Seventh, and Ninth Circuits have decisions providing seemingly different results. The facts of this case provide a compelling vehicle for the Court to resolve the splits and provide uniformity for the parties involved in 42 U.S.C. § 1983 claims based

on a wrongful conviction due to a purported failure to disclose exculpatory evidence.

In October 2002, a jury convicted Jordan of second-degree murder for the 1998 death of Jennifer Byerly. Pet. App. 8a. The purported withholding of exculpatory evidence that allegedly violated Plaintiff's constitutional rights occurred in between March 1998 and October 2002. Pet. App. 8a.

In 2011, the Tennessee Court of Criminal Appeals granted Jordan post-conviction relief¹ by “vacating and setting aside” Jordan’s 2002 conviction based on a “denial or infringement” of his due process rights recognized under Brady. Pet. App. 2a.

¹ The Tennessee post-conviction statute, provides:

If the court finds that there was such a ***denial or infringement of the rights of the prisoner as to render the judgment void or voidable***, including a finding that trial counsel was ineffective on direct appeal, the ***court shall vacate and set aside the judgment*** or order a delayed appeal as provided in this part and shall enter an appropriate order and any supplementary orders that may be necessary and proper.

Tenn. Code Ann. § 40-30-111(a) (emphasis added). See also, Johnson v. State, 38 S.W.3d 52, 63 (Tenn. 2001) (providing that a conviction is vacated *when* a criminal defendant seeks post-conviction relief, even if he is merely granted a new capital punishment hearing).

When Jordan was retried, Jordan was found not guilty of Second Degree Murder in 2015. Pet. App. 3a.

Within a year² of the acquittal in 2015, Jordan filed this instant lawsuit asserting that he was wrongfully convicted because of alleged constitutional violations by defendant Carpenter and other defendants related to the purported withholding of exculpatory evidence. Pet. App. 3a.

Scott Carpenter and the other defendants filed dispositive motions providing that all claims against them should be dismissed because they are barred by the statute of limitations. Pet. App. 9a. Relying primarily on the Sixth Circuit decision D'Ambrosio v. Marino, 747 F.3d 378, 382 & 385-386 (6th Cir. 2014),³ the District Court agreed, holding that Jordan's claims were barred by the one-year statute of limitations. Pet. App. 10a-13a. The District Court found that claims began to accrue and thus the statute of limitations began to run in 2011 when the state court of appeals "vacated and set aside" Jordan's conviction under the state-law post-conviction procedures. Pet. App. 10a-13a.

² The statute of limitations for a § 1983 actions for an alleged civil rights actions that arises in Tennessee is one year. Tenn. Code Ann. § 28-3-104; Roberson v. Tennessee, 399 F.3d 792, 794 (2005). See, Pet. App. 3a.

³ In D'Ambrosio, 747 F.3d at 385-386, the Sixth Circuit stated that a plaintiff's cause of action for wrongful conviction based on a Brady violation accrues when the underlying conviction is reversed or vacated by a post-conviction relief proceeding, even if the plaintiff is subject to retrial.

During the pendency of Jordan's appeal, the Sixth Circuit issued the decision King v. Harwood, 852 F.3d 568, 579 (6th Cir. 2017) that provided the statute of limitations for wrongful conviction claims did not commence until a plaintiff is later acquitted after subsequent criminal prosecution. Pet. App. 4a.⁴ Relying on King, the Sixth Circuit, in this case, held that Jordan's cause of action for wrongful conviction began to accrue when he was acquitted in 2015 after being retried and not when his prior conviction was vacated, pursuant to the state-law post-conviction procedures. Pet. App. 4a.

Carpenter timely filed a *Petitioner for Rehearing En Banc* highlighting the Sixth Circuit's conflicting decisions and how the decision conflicted with certain other jurisdictions regarding this same or similar issue. Pet. App. 15a. On April 13, 2018, the Sixth Circuit denied Carpenter's *Petition for Rehearing En Banc*. Pet. App. 15a.

⁴ Seemingly contrary to the D'Ambrosio decision, the King Court held that a plaintiff's claim for wrongful conviction did not accrue when the plaintiff's "*Alford* plea was vacated" (not the conviction) under the state-law rules of civil procedure based on the discovery of another individual's confession to the crimes for which the plaintiff was convicted.

REASONS FOR GRANTING THE WRIT

This Court should grant a *writ of certiorari* because it can resolve a split between the Circuits on an important federal question regarding a statute of limitations issue under 42 U.S.C. § 1983 that will affect many litigants involved in wrongful conviction lawsuits.⁵ Wrongful conviction claims under 42 U.S.C. § 1983 based on Brady violations are brought in all Circuits. Due to the numerous exonerations,⁶ wrongful conviction claims/suits will continue to be brought and may (likely) increase. Under Heck, this Court provided that a cause of action for wrongful conviction accrues when a plaintiff's "outstanding criminal judgment" is "invalidated" by being "reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254." 512 U.S. at 486-487.

The First, Second, Eighth Tenth, and Eleventh Circuits hold that the statute of limitations commences to run when the plaintiff's criminal conviction is "invalidated" by the procedures outlined in Heck. The Third and Fourth Circuits provide that the statute of limitations begins to run after the criminal conviction

⁵ Jordan's claim is for an alleged violation of his Due Process rights under the Fourteenth Amendment because "trial has occurred." Manuel v. City of Joliet, 137 S. Ct. 911, 920 n. 8 (2017) (citing Jackson v. Virginia, 443 U.S. 307, 318 (1979)).

⁶ National Registry of Exonerations, Newkirk Center for Science and Society 1 & 3 (2018), <http://www.law.umich.edu/special/exoneration/Documents/ExonerationsIn2017.pdf>.

has been “invalidated” and the plaintiff is no longer subject to criminal prosecution due to a “favorable termination.” The Fifth, Sixth, Seventh, and Ninth Circuits are seemingly split within their respective jurisdiction on this issue.

This case permits the Court to resolve this important federal question and provide uniformity for all litigants involved in 42 U.S.C. § 1983 wrongful conviction claims based on Brady and other like constitutional violations.

I. The Circuits are Divided on the Accrual of a § 1983 Claim that is based on a Constitutional Violation due to a purported Withholding of Exculpatory Evidence.

The Circuits are split based on their differing interpretations of this Court’s findings in Heck. To appropriately consider this issue, a brief overview of this Court’s relevant precedent is provided.

A. Overview of the Delayed Accrual Rule under Heck that has caused a Split in Authority over the Commencement of the Statute of Limitations for a § 1983 Claim based on a purported Failure to Disclose Exculpatory Evidence.

Since Brady, this Court has helped define the contours of a 42 U.S.C. § 1983 claim based on purported Brady and other like constitutional violations. Relevant to this case, the issue before the Heck Court was whether a plaintiff who has not received habeas relief has a “cognizable claim” under 42 U.S.C. § 1983 for a Brady violation when the claim for damages “challenges” or “calls into question the

lawfulness of [the] conviction or confinement.” 512 U.S. at 483.

Looking “first to the common law,” the Heck Court used the comparison of a malicious prosecution to a Brady violation claim to help avoid what it called a “collision” between § 1983 and the federal habeas statute. 512 U.S. at 483-484. In doing so, the Heck Court provided that

We think the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of ***outstanding criminal judgments*** applies to § 1983 damages actions that necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement, just as it has always applied to actions for malicious prosecution.

512 U.S. at 486 (emphasis added). Based on this principle, this Court held that a wrongful conviction claim accrues under § 1983 when the plaintiff’s “outstanding judgment” is “invalidated” by being “reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court’s issuance or a writ of habeas corpus, 28 U.S.C. § 2254.” 512 U.S. at 486-487.

Of note, the Heck Court did not state that a plaintiff must prove that he received a “favorable termination” of any criminal prosecution in order to have a § 1983 claim for a wrongful conviction—or that the case has been terminated at all. Rather, the Heck Court provided the plaintiff must “demonstrate the ***invalidity of any outstanding criminal judgment.***”

512 U.S. at 487 (emphasis added). Significantly, in concluding its discussion about the accrual of a § 1983 wrongful conviction claim, this Court specifically used different language from the “favorable termination” rule for a malicious prosecution claim when it stated:

Just as a cause of action for malicious prosecution does not accrue until the criminal proceedings have ***terminated in the plaintiff's favor***, 1 C. Corman, Limitation of Actions § 7.4.1, p. 532 (1991); Carnes v. Atkins Bros. Co., 123 La. 26, 31, 48 So. 572, 574 (1909), so also a § 1983 cause of action for damages attributable to an unconstitutional conviction or sentence ***does not accrue until the conviction or sentence has been invalidated.***

512 U.S. at 489-490 (emphasis added).

In his concurring opinion in Heck, Justice Souter spoke against the prospect of the use of the “common law” and ultimately the elements of a malicious prosecution as a “destination” in deciding the contours of a wrongful conviction claim under 42 U.S.C. § 1983. 512 U.S. at 492-494. However, when defining the “delayed accrual rule,” the Heck Court did avoid using elements of a malicious prosecution claim as a “destination” when it adopted the “invalidation” of an “outstanding criminal judgment” language instead of the “favorable termination” requirement language of a malicious prosecution claim.

Although addressing false arrest/false imprisonment claims, the Wallace v. Kato, 549 U.S. 384 (2007) decision provided guidance that Carpenter submits should have made this principle clear.

Specifically, the Wallace Court stated that the “deferred accrual” rule under Heck is “called into play only when” there is an “invalidation of an “outstanding criminal judgment.” 549 U.S. at 393. As such, “It [the delayed accrual rule] delays what would otherwise be the accrual date of a tort action until setting aside *of an extant conviction*.” 549 U.S. at 393 (emphasis in original). Based on this principle, the Wallace Court found that any deferred accrual of a claim based on a threat of a § 1983 claim invalidating a *future conviction* is not proper because there is “no criminal conviction that the cause of action would impugn.” 549 U.S. at 393.

Despite the Heck and the Wallace decisions, the Heck Court’s comparison to the malicious prosecution claim and the plain language of the Heck “deferred accrual rule” regarding “invalidation” (not necessarily favorable termination) has caused Circuits and courts within certain jurisdictions to split over when a cause of action for a Brady or other like violations accrue and thus when the statute of limitations commences to run.

B. First, Second, Eighth, Tenth, and Eleventh Circuits: § 1983 Claims Accrue and the Statute of Limitations Commences to Run when the Conviction is “Invalidated” by Post-Conviction Procedures highlighted in Heck.

Since the Heck decision, courts have considered the issue of the accrual of § 1983 wrongful conviction claims based on purported Brady violations within the context of both a statute of limitations defense and also whether the plaintiff has prematurely brought a claim due to a Heck bar.

In one of the first cases to deal the specific issue of accrual, the Tenth Circuit held that a § 1983 action based on a Brady violation accrues and thus the statute of limitations begins to run when the plaintiff's conviction is deemed "invalid" through a state habeas proceeding. Smith v. Gonzalez, 222 F.3d 1220, 1222 (10th Cir. 2000). Importantly, the Smith Court found that the Heck Court's concerns about a civil action "invalidating any outstanding criminal judgment" are not implicated after a criminal conviction is invalidated (even if subject to retrial) because there is no outstanding judgment to impugn. 222 F.3d at 1222.

Citing the Smith decision, the Second Circuit found that a claim for a wrongful conviction accrues when the "conviction is no longer 'outstanding'" because, due to the "vacatur" of the conviction, a § 1983 suit could not "demonstrate the invalidity of the vacated conviction" and thus could not "impeach [impugn] the new trial's result." Poventud v. City of New York, 750 F.3d 121, 134 (2nd Cir. 2014). Other Second Circuit Courts have barred claims based on the statute of limitations because the causes of action began to accrue when a conviction was invalidated, even when the plaintiff was subject to subsequent criminal prosecution. Jeanty v. City of Utica, 2018 U.S. Dist. LEXIS 87867, at *8-13 (N.D.N.Y. May 25, 2018); Smalls v. City of New York, 181 F. Supp. 3d 178, 185-186 (E.D.N.Y. 2016).⁷

⁷ See also, Johnson v. New York City Police Department, 651 Fed. Appx. 58, 59 (2nd Cir. 2016) (finding that the plaintiff did not have a cognizable § 1983 claim because his underlying conviction had not been invalidated).

Recently, the Eight Circuit held that the statute of limitations for a Brady claim accrues and thus the statute of limitations commences to run when the claim is “invalidated.” Buckley v. Ray, 848 F.3d 855, 867 (8th Cir. 2017), certiorari denied, 2017 U.S. LEXIS 4206 (U.S. June 26, 2017). In so holding, the Buckley Court explained that:

The Supreme Court’s decision in Wallace controls [the plaintiff’s] [Brady] claim. The trial court invalidated [plaintiff’s] conviction on November 1, 2010. No extant conviction exists for his § 1983 claims to impugn. The possibility that the State may have re-tried and convicted him of the cocaine charges—“*an anticipated future conviction*”—does not implicate the Heck rule.

848 F.3d at 867 (emphasis in original).

In the First Circuit, a District Court held that the statute of limitations for a Brady claim for withholding exculpatory evidence accrued when the plaintiff was granted a new criminal trial and not when the prosecutors decided not to retry the plaintiff. Ecvhavarria v. Roach, 2017 U.S. Dist. LEXIS 144589, at *16-19 (D. Mass. Sept. 7, 2017). In the Eleventh Circuit, a District Court found that the plaintiff’s wrongful conviction claim accrued and thus the statute of limitations began to run when his conviction was vacated in a state-law post-conviction proceeding, despite the plaintiff being subject to retrial. Rowe v. City of Fort Lauderdale, 8 F. Supp. 2d 1369, 1375 (S.D. Fla. 1998).

C. Third and Fourth Circuits: § 1983 Wrongful Conviction Claims Accrue and the Statute of Limitations Commences to Run when the Conviction is “Invalidated” and then is no longer Subject to Criminal Prosecution due to a “Favorable Termination.”

The Third Circuit, in Smith v. Holtz, 87 F.3d 108, 110 & 113 (3rd Cir. 1996), states that “so long as success on such a claim would necessarily imply the invalidity of a conviction that is pending criminal prosecution, such a claim does not accrue so long as the potential for a judgment in the pending criminal prosecution continues to exist.” As such, based on this language, the Third Circuit provides that the accrual of a § 1983 claim for a Brady violation does not accrue until there is no longer a threat for criminal prosecution. See, Dinicola v. DiPaolo, 945 F.Supp. 848, 858-860 (W.D. Penn. 1996) (finding that plaintiff’s claims related to concealment of exculpatory evidence did not accrue until he was acquitted at his retrial).⁸

The Fourth Circuit holds that the statute of limitations for a claim based on a Brady violation begins to accrue when there is no possibility of a conviction and not just based on a vacatur of the original conviction. Owens v. Balt. City State’s Attys.

⁸ But see, Wright v. City of Philadelphia, 229 F. Supp. 3d 322, 331-332 n. 5 (E.D. Pa. 2017) (finding that it did not need to determine whether the plaintiff’s malicious prosecution claim and other like claims accrued because they were timely whether they accrued when the “threat of future prosecution ceased upon [the plaintiff’s] acquittal” or when there was a “vacatur of his conviction”).

Office, 767 F.3d 379, 389-392 (4th Cir. 2014), cert. denied, 135 S. Ct. 1893 (2015).⁹

D. Fifth, Sixth, Seventh, and Ninth Circuits: Conflicting Decisions about when a § 1983 Wrongful Conviction Claim Accrues.

The Fifth Circuit has differing decisions on the issue. In at least two cases, the Fifth Circuit held that a § 1983 wrongful conviction claim accrues based on the reversal of the original conviction due to a constitutional violation, even when the plaintiff faces a pending criminal prosecution/trial. Clay v. Allen, 242 F.3d 679, 681-682 (5th Cir. 2001);¹⁰ Davis v. Zain, 79 F.3d 18 (5th Cir. 1996).¹¹ However, the Fifth Circuit and its Courts have also held that a wrongful conviction claim accrues when there is a final favorable termination in the plaintiff's favor and not just when a conviction is invalidated. Brandley v. Kesshan, 64 F.3d 196, 199 (5th Cir. 1995) (finding that the “reversal of a conviction and remand for new trial is not, in and of itself, a termination”); Brown v. City of Houston, 297 F. Supp. 3d 748, 762 (S.D. Tex. 2017) (holding that a

⁹ In Owens, the post-conviction relief was based on new DNA testing not matching and not based on an intentional withholding of exculpatory evidence. 767 F.3d at 389-392.

¹⁰ In Clay, the original conviction was reversed based on a constitutional violation related to excessive bail. 242 F.3d at 681-682.

¹¹ In Davis, the original conviction was reversed based on a constitutional violation related to prosecutorial misconduct and suborned perjury. 79 F.3d at 19.

claim for Brady violations does not accrue when the plaintiff's conviction had been vacated pursuant to a federal habeas corpus petition but when there is a decision not to re-prosecute him).

When first confronted with this issue, the Sixth Circuit stated a plaintiff's cause of action for wrongful conviction based on a Brady violation accrues when the underlying conviction is reversed or vacated by a post-conviction relief proceeding, even if the plaintiff is subject to retrial. D'Ambrosio, 747 F.3d at 382 & 385-386. However, since this finding, the Sixth Circuit has provided that a plaintiff's cause of action accrues and thus the statute of limitations begins to run when the plaintiff is no longer subject to criminal prosecution, even if the plaintiff's conviction has already been vacated. Jordan, 885 F.3d at 413 (finding that plaintiff's cause of action accrued after he was acquitted after retrial); Mills v. Barnard, 869 F.3d 473, 479 (6th Cir. 2017), reh'g denied, 2017 U.S. App. LEXIS 19999 (6th Cir. Oct. 12, 2017),¹² King v. Harwood, 852 F.3d 568, 579 (6th Cir. 2017), cert. denied, 2018 U.S. LEXIS 378 (U.S. Jan. 8, 2018)¹³.

¹² In Mills, the Sixth Circuit (relying on King) held that the plaintiff's lawsuit alleging fabrication of and withholding of evidence did not accrue when he was granted relief under the statutory *writ of error coram nobis* but when the trial court later entered a *nolle prosequi* order. 869 F.3d at 479.

¹³ In King, the Sixth Circuit held that a plaintiff's claim for wrongful conviction did not accrue when the plaintiff's "*Alford* plea was vacated" (not the conviction) under the state-law rules of civil procedure based on the discovery of another individual's confession to the crimes for which the plaintiff was convicted. 852 F.3d at 579.

The Seventh Circuit first held that a plaintiff's claim for a Brady violation begins to accrue when a plaintiff is acquitted after being granted a motion for a new trial (not after any post-conviction relief). Johnson v. Dossey, 515 F.3d 778, 781-782 (7th Cir. 2008). Contrary to this position, the Seventh Circuit has since issued decisions consistent with the First, Second, Eighth, Tenth, and Eleventh Circuits. Specifically, in Nat'l Cas. Co v. McFartridge, 604 F.3d 335, 344 (7th Cir. 2010), the Seventh Circuit held that a plaintiff's claim for wrongful conviction based on Brady violations accrues when he is granted post-conviction relief, as the initial conviction is already invalidated.¹⁴

Like the Fifth, Sixth, and Seventh Circuits, the Ninth Circuit seemingly has a split of authority within its jurisdiction. In Jackson v. Barnes, 749 F.3d 755 (9th Cir. 2014), cert. denied, 2015 U.S. LEXIS 234 (U.S. Jan. 12, 2015), the Ninth Circuit held that the plaintiff's cause of action for a wrongful conviction for a violation of his Miranda rights accrued when his first conviction was vacated and set-aside and not after he was retried. However, in Bradford v. Scheerschlight, 803 F.3d 382, 387-389 (9th Cir. 2015), the Ninth Circuit held that the plaintiff's claim for wrongful conviction based on a "fabrication of evidence" (newly tested DNA evidence) accrued when he was acquitted at retrial and not when the plaintiff's conviction was vacated.

¹⁴ See also, Del Real v. Gomez, 330 F.App'x 110, 111 (7th Cir. 2009) (finding that "What might happen in a subsequent prosecution is neither here nor there; the claim accrues as soon as the only obstacle to the litigation – the adverse judgment- has been lifted").

II. The Statute of Limitations for a § 1983 Wrongful Conviction Claim based on a Brady and other like Violations should Commence when the Plaintiff's Conviction is "Invalidated."

A rule where the statute of limitations commences to run when a conviction is "invalidated" by a post-conviction procedure is consistent with the findings and principles of the Heck and Wallace decisions. In Heck, this Court did not state that a plaintiff must prove that he received a "favorable termination" of any criminal prosecution in order to have a § 1983 claim for a wrongful conviction. Rather, the Heck Court provided the plaintiff must "demonstrate the *invalidity of any outstanding criminal judgment*." 512 U.S. at 487 (emphasis added). As such, the plain language of Heck's findings provides that the statute of limitations should commence when the "outstanding criminal judgment" has been "invalidated."

The principles underlying Heck, likewise, support this position. Under its ruling, the Heck Court established that a § 1983 action based on a wrongful conviction that has already been "invalidated" cannot attack the validity of a "outstanding" conviction and thus is cognizable. 512 U.S. at 486-487. Following this principle, the commencement of the statute of limitations based on the "invalidation" date does not threaten the validity of any conviction because the "outstanding criminal judgment" has already been invalidated through a post-conviction proceeding.

Although in the context of a false imprisonment/false arrest claim, the Wallace decision supports that the statute of limitations should

commence on the “invalidation” date based on the principles of Heck. The Wallace Court stated that the “deferred accrual” rule under Heck is “called into play only when” there is not an “invalidation” of an “outstanding criminal judgment.” 549 U.S. at 393. As explained by the Wallace Court, any deferred accrual of a claim based on a threat of a § 1983 claim invalidating a “*future anticipated conviction*” is not proper when there is “no criminal conviction that the cause of action would impugn.” 549 U.S. at 393 (emphasis in original). As such, per Wallace, the reason for the “deferred accrual” rule under Heck (preventing an attack of an “outstanding criminal judgment” through a § 1983 action) is not relevant when an “outstanding criminal judgment” has already been “invalidated.”

Accordingly, the findings and the principles underlying Heck and Wallace provide that the statute of limitations for a § 1983 claim for Brady violations and other like violations should commence to run when the “outstanding criminal judgment” has been “invalidated.”

The purpose of § 1983 supports that the statute of limitations should commence when the underlying criminal conviction is “invalidated.” § 1983 was enacted as a “species of tort liability in favor of persons who are deprived of ‘rights, privileges, or immunities secured’ to them by the Constitution.” Carey v. Piphus, 435 U.S. 247, 253 (1978) (citing Imbler v. Pachtman, 424 U.S. 409, 417 (1976)). To further this purpose, § 1983 gives plaintiffs a vehicle to be awarded damages for compensable injuries. Carey, 435 U.S. at 253.

Carpenter submits that any plaintiff that is subject to a purported Brady violation suffers compensable injuries from the first criminal proceeding in the form of attorney fees, the distress of the judicial process, and the distress associated with being subject to Brady violations. Carey, 435 U.S. at 266; Poventud, 750 F.3d at 135; Olson v. Correiro, 189 F.3d 52, 55 & 69 (1st Cir. 1999).¹⁵ Furthermore, as stressed by the Carey Court, damages (even if nominal) should be awarded based on certain due process violations due to the “importance to organized society that procedural due process be observed.” Carey, 435 U.S. at 266 (citing Boddie v. Connecticut, 401 U.S. 371, 375 (1971)).

When a serious case is “invalidated,” the State could prevent a cause of action from accruing simply by not re-trying the matter. Where an offense carries a lengthy statute of limitations or no statute of limitations, a State could manipulate the procedure in order to prevent a “favorable termination.” State post-conviction orders, unlike most federal habeas corpus conditional release orders, often do not require retrial to occur within a specified time.

¹⁵ See also, United States v. Marion, 404 U.S. 307, 320 (1971); Goodwin v. Metts, 885 F.2d 157, 163 (4th Cir. 1989) (citing Jennings v. Shuman, 567 F.2d 1213, 1220 (3rd Cir. 1977)). In Marion, this Court stated that a prosecution is:

[A] public act that may seriously interfere with the defendant’s liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family, and his friends.

404 U.S. at 320.

Accordingly, if a plaintiff's cause of action accrues and thus the statute of limitations commences to run when his conviction is "invalidated," the plaintiff will have a recourse for the injuries (even if nominal) that he suffered because of the due process violations under Brady. Otherwise, if the plaintiff has to receive a "favorable termination" for his § 1983 to accrue, the plaintiff may never recover for the injuries he suffered due to a violation of his Due Process rights recognized under Brady. As an example, a criminal defendant could be convicted of first-degree murder based on a Brady violation. Then a retrial could result in a conviction for criminally negligent homicide. Surely, there has been a deprivation of a constitutional right, but there may not have been a favorable termination.

As such, the purpose of § 1983 to permit persons to vindicate violations of their Due Process Rights supports permitting a plaintiff to file a wrongful conviction claim when his wrongful conviction is "invalidated."

Closely related, a plaintiff lacking knowledge of the full extent of his damages does not support the use of the "favorable termination" requirement rule. The Wallace Court stated that, under the "traditional rule of accrual," a "the statute of limitations commences to run, when the wrongful act or omission results in damages. The cause of action accrues even though the full extent of the injury is not then known of predictable." 549 U.S. at 391 (citing 1 C. Corman, Limitation of Actions § 7.4.1, pp. 526-527 (1991) (footnote omitted)). As noted above, a plaintiff suffers injuries (even if nominal) from a wrongful conviction based on a Brady violation even if convicted in a subsequent criminal prosecution. Carey,

435 U.S. at 266; Poventud, 750 F.3d at 135-136 (citing Brody v. Village of Port Chester, 345 F.3d 103, 121 (2nd Cir. 2003)). As such, even if the “full extent of his damages” (i.e., damages from the number of years incarcerated) is not yet known or established, the plaintiff has suffered injuries from which he can recover. Wallace, 549 U.S. at 391. Thus, the traditional rules regarding accrual espoused in Wallace supports that a wrongful conviction claim should accrue when the conviction is “invalidated.”

Moreover, the uncertainty of a conviction in subsequent criminal conviction and the concern with the prospect of parallel criminal and civil litigation does not support that a § 1983 should accrue only after a “favorable termination.” This Court has made clear that a Court’s ability to issue a “stay” in a § 1983 action eliminates any concern that a § 1983 action would interfere with a subsequent criminal prosecution, will hinder a proper determination of the full extent of the plaintiff’s damages, or “imply the invalidity of any outstanding future conviction.” Wallace, 549 U.S. at 393-394 (citing Heck, 512 U.S. at 487-488).

Lastly, the commencement of the statute of limitations based on the “invalidation” date best serves the purpose of the statute of limitations to “promote justice.”¹⁶ Defendants in § 1983 claims for Brady

¹⁶ See CTS Corp. v. Waldburger, 134 S. Ct. 2175, 2183 (2014) (quoting Railroad Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 348-349 (1944)) (finding that the “Statutes of limitations ‘promote justice by preventing surprises through [plaintiffs] revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared’”).

violations have an interest in timely notice of these claims so as to “preserve beyond the normal limitations period evidence that will be need for their defense” and so that the governmental entities have “timely notice of alleged misconduct by their agents.” Wallace, 549 U.S. at 395 & 397.

Like in this case, post-conviction procedures can span over many years due to the nature of such proceedings. During this time, the individual defendants may not have knowledge of the post-conviction proceedings or otherwise may not have the same invested interest. As with Carpenter in this case, the individual defendant may have changed careers or employment and therefore would not have the same ability, capacity, or interest to preserve evidence that would be relevant to a § 1983 claim against him. Furthermore, defendants will likely lose memory of the underlying facts.

Thus, as with Carpenter in this case, individual defendants involved in § 1983 wrongful conviction claims already face a substantial burden related to the preservation of evidence. If the accrual date was further delayed until after a “favorable termination” of a subsequent criminal prosecution, these individual defendants would encounter a substantial likelihood of undue prejudice. However, if the accrual date was on the “invalidation” date, this prejudice would be lessened. Accordingly, the purpose of a statute of limitations supports that the accrual date for a § 1983 wrongful conviction claim should be based on the “invalidation” date.

III. This Case is Appropriate to Resolve the Split of Authorities as to the Commencement of the Statute of Limitations of a § 1983 Wrongful Conviction Claim for Brady and like Constitutional Violations.

The factual record of this case is well-developed. Jordan was convicted in 2002 for second-degree murder. Pet. App. 8a. Plaintiff challenged his conviction based on alleged Brady violations that occurred in between March 1998 and 2002 under the state-law post-conviction statutes. Pet. App. 8a. In 2011, the Tennessee Court of Criminal Appeals granted Jordan post-conviction relief by “vacating and setting aside” Jordan’s 2002 conviction based on a “denial or infringement” of his due process rights recognized under Brady. Pet. App. 2a-3a. When Jordan was retried for second-degree murder without the Brady issues, Jordan was acquitted in 2015. Pet. App. 3a. Jordan filed this instant lawsuit within a year of his acquittal. Pet. App. 3a. Based on this well-developed factual record, this case is appropriate for this Court to decide the statute of limitations issue. The factual record does not pose any concern that would prevent this Court from deciding the pertinent statute of limitations issue.

The divergent opinions between the District Court and the Sixth Circuit in this case supports that this case is appropriate to decide the pertinent statute of limitations issue. The District Court, relying on the “invalidation” rule based on certain Sixth Circuit precedent, found that dismissal of the 2016 filing of the lawsuit was proper based on the statute of limitations.

Pet. App. 10a-13a. The Sixth Circuit, however, reversed by relying on an opinion issued after the District Court's Order that required both an "invalidation" and a subsequent "favorable termination." Pet. App. 4a. Based on these different decisions, this case highlights the split in authority on the issue at bar between the Circuits and even within certain jurisdictions. Importantly, these differing decisions within this case show the uncertainty litigants and Courts face due to the lack of uniformity as to this issue.

Furthermore, the case involves relief based on post-conviction procedures outlined in Heck and a plaintiff receiving a "favorable termination" after a subsequent criminal prosecution. As such, this Court has a lawsuit wherein it can provide clear guidance to all Courts because it involves the circumstances ("invalidation" & "favorable termination") for which has caused Circuits to split. Therefore, this case is appropriate to provide uniformity and clarity on this important issue regarding the statute of limitations of a § 1983 wrongful conviction claim based on Brady and other like violations.

IV. The Issue in this Case is an Important Federal Question that will Affect Litigants involved in Lawsuits where the Plaintiff alleges a Wrongful Conviction under § 1983.

The "invalidation" of criminal convictions are numerous and may continue to rise. As reflected in the National Registry of Exonerations, there was 139 "exonerations" or "invalidations" of criminal convictions in 2017 while there was 171 in 2016. National Registry of Exonerations, Newkirk Center for Science and Society 1 & 3 (2018), <http://www.law.umich.edu/>

special/exoneration/Documents/ExonerationsIn2017.pdf. There were also 96 convicted criminals exonerated in 2017 as part of a “group exoneration.” *Id.* Of the 139 individual wrongful convictions, 84 of them involved “official misconduct,” including Brady violations. National Registry of Exonerations, Newkirk Center for Science and Society 6 (2018), <http://www.law.umich.edu/special/exoneration/Documents/ExonerationsIn2017.pdf>. Due to this large percentage, there is and is likely to be considerable § 1983 litigation over wrongful convictions. Thus, this Court needs to provide clarity on an issue for which Courts have different holdings and for which Courts will likely face an increase in litigation.

Courts dealing with the statute of limitations issue at bar have recognized that there is a split of authority. Recently, the Eighth Circuit in Buckley discussed that there is a split of authority of when a wrongful conviction action under § 1983 accrues and thus the statute of limitations commences. 848 F.3d at 867. Likewise, the Bradford Court highlighted different decisions on this issue. 803 F.3d at 387-388. Now, the Eighth Circuit explained that the principles espoused in Wallace settles this issue such that the statute of limitations commences when the conviction is “invalidated.” Buckley, 848 F.3d at 867. However, as shown above, the Courts are still divided on this issue that is of vital importance to the litigants in these cases.

Two *petitions for writ of certiorari* from the Buckley and the Owens decision further demonstrate this lack of uniformity and need for review. In Buckley, the plaintiff filed a *petition for writ of certiorari* asking this

Court to reverse the Eight Circuit's decision dismissing his claims because his claims accrued when his conviction was "invalidated." Buckley, 848 F.3d at 855, certiorari denied, 2017 U.S. LEXIS 4206 (U.S. June 26, 2017). In Owens, the defendants filed a *petition for writ of certiorari* asking this Court to reverse the Fourth Circuit's decision providing that plaintiff's claim was timely because his claims accrued after a "favorable termination" of a subsequent criminal prosecution. Owens, 767 F.3d at 379, cert. denied, 135 S. Ct. 1893 (2015).

As shown, this lack of uniformity and the significance of the issue demonstrates the importance of review by this Court. Courts need guidance on the statute of limitations regarding § 1983 claims based on Brady and other like violations. This case presents an appropriate vehicle because there is a clear factual record that involves both an "invalidation" of the underlying criminal conviction and a "favorable termination" in a subsequent criminal proceeding. Ultimately, if the *writ of certiorari* is granted, this Court can provide uniformity for federal courts on an important statute of limitations issue as to § 1983 wrongful conviction claims based on Brady and other like violations.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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