No. 19-1360

In the
Supreme Court of the United States

WILLIAM CANNON, SR., *et al.*,
Petitioners,
v.
JOHNNIE LEE SAVORY,
Respondent.

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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

Plaintiff's brief did nothing to dispel the fact that application of the favorable-termination rule to ex-prisoners is an impermissible exhaustion of state remedies requirement that is bad for plaintiffs and defendants alike, and that the circuit split on the issue is pervasive and intractable. Further, Plaintiff's attempt to muddy a clean record to avoid review is baseless.

I. APPLYING *HECK'S* FAVORABLE-TERMINATION RULE TO EX-PRISONERS IS AN IMPERMISSIBLE EXHAUSTION OF STATE REMEDIES REQUIREMENT.

A. Plaintiff Offers No Reasoned Opposition on the Question of Exhaustion.

Plaintiff's opposition to the exhaustion issue is limited to citing *Heck*'s declaration that applying favorable-termination to *incarcerated prisoners* does not "engraft an exhaustion requirement upon §1983, but rather den[ies] the existence of a cause of action." (Brief in Opposition (Opp.), at 22 (citing *Heck v. Humphrey*, 512 U.S. 477, 489 (1994)). Plaintiff offers no analysis and entirely ignores the fact that constitutional rights do not function in a vacuum, and the mere fact that favorable-termination might not constitute exhaustion in one context does not mean that is the case in all contexts. *See Carey v. Piphus*, 435 U.S. 247, 254 (1978) ("Rights, constitutional and otherwise, do not exist in a vacuum. Their purpose is to protect persons from injuries to particular interests, and their contours are shaped by the interests they

protect."). Thus, the glaring irony of Plaintiff's reliance on *Heck*, to demonstrate that favorable-termination is not exhaustion, is that was the specific reason *Heck* applied the rule to prisoners—to effectuate the exhaustion requirement of the *habeas corpus* statute. *See Heck*, 512 U.S. at 480-484. While favorable-termination makes sense in that context, it evolves into exhaustion on steroids by requiring ex-prisoners to not only pursue, but to prevail, in a state forum, in order to ever access §1983. That is the identical quandary the Court condemned last year in *Knick v. Twp. of Scott, Pa.*, 139 S. Ct. 2162, 2167 (2019), a case which Petitioners prominently highlighted and which Plaintiff completely ignored.[1] (*See* Petition (Pet.), at 10-17).

Following *Knick's* overruling of *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), it is obvious *Heck*'s footnote response to Justice Souter's concurrence on the reach of the *Heck* bar cannot conceivably be considered as having resolved the exhaustion question. *See Knick*,

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[1] Ironically, under the lower court's rule, only constitutional injuries that are lower on the spectrum of injuries do not require favorable-termination. *See Defining the Reach of Heck v. Humphrey: Should the Favorable Termination Rule Apply to Individuals Who Lack Access to Habeas Corpus?*, 121 HARV. L. REV. 868, 889 (2008) ("[W]hen Heck is invoked to bar claims by individuals who no longer have access to habeas corpus, a curious remedial oddity results: less serious constitutional claims [like Fourth Amendment claims] remain cognizable in §1983, while more serious constitutional claims—those that would necessarily imply the invalidity of petitioner's conviction—go unremedied entirely.").

139 S. Ct. at 2174. Initially, neither the concurrence, nor footnote 10, nor the *Heck* parties, addressed, let alone resolved, the exhaustion question.[2] And, aside from exhaustion, footnote 10's reference to the advisability of applying a favorable-termination rule to ex-prisoners (also never raised by the parties or addressed to the *Heck* Court) strayed well beyond the questions presented and did not "test the logic of the [favorable-termination] requirement or consider its implications" as applied to ex-prisoners. *Id.*

Rote application of common-law elements—like favorable-termination—onto §1983 claims is disfavored. *See Manuel v. City of Joliet, Ill.*, 137 S. Ct. 911, 921 (2017) (quoting *Hartman v. Moore,* 547 U.S. 250, 258, (2006)) ("Common-law principles are meant to guide rather than to control the definition of §1983 claims, serving 'more as a source of inspired examples than of prefabricated components.'"). Here, a favorable-termination rule adds nothing to the factual or legal sufficiency of ex-prisoner §1983 claims; it simply imposes an impermissible exhaustion of state remedies rule of accrual. *See Knick*, 139 S. Ct. at 2172-2173 (explaining plaintiffs may generally bring §1983 claims "without first bringing any sort of state lawsuit, even when state court actions addressing the underlying behavior are available.") (internal quotations omitted); *McNeese v. Board of Ed. for Community Unit School Dist. 187*, 373 U.S. 668, 672 (1963) (observing it would defeat the purpose of §1983 "if we held that assertion

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[2] *See, Heck v. Humphrey*, Petitioner's Brief, 1994 WL 190979; Respondent's Brief, 1994 WL 123760; Petitioner's Reply Brief, 1994 WL 13382; Oral Argument, 1994 WL 665259.

of a federal claim in a federal court must await an attempt to vindicate the same claim in a state court").

B. Petitioners Preserved Their Exhaustion of State Remedies Argument.

Plaintiff wrongly asserts "[P]etitioners failed to raise this argument at all in the lower courts." (Opp., at 21.) To be sure, Petitioners explicitly raised the exhaustion issue both in their *en banc* briefing and ensuing oral argument. *See* App. 100 ("Consistently, §1983 does not condition the right to file suit on the approval of state officials (*Patsy v. Bd. of Regents*, 457 U.S. 496, 501 (1982)), yet as explained below, the panel decision will require just that…by necessitating that released prisoners first obtain a gubernatorial pardon from a state governor before being allowed to pursue a §1983 action"); App. 150 ("[The favorable-termination rule] would force such an aggrieved plaintiff to first secure a gubernatorial pardon before having access to federal court, in contravention of the Civil Rights Act"); and Reply App. A, at 21, 24-25, 30-31, 33-34 (addressing favorable-termination rule's infringement on prohibition against exhaustion of state remedies).

That Petitioners did not explicitly address exhaustion to the district court or the panel below is irrelevant. Petitioners argued successfully to the district court that Seventh Circuit precedent, drawing on *Spencer*, required dismissal. (App. 87-88.) Petitioners also advanced the same argument in defense of that victory to the panel below. (App. 69-70.) Only *after* the panel departed from circuit precedent did Petitioners explicitly cite exhaustion as a reason the panel was wrong and the *en banc* court should hear

the case. Plaintiff has no basis to contend Petitioners were obliged to raise the issue sooner.

In any event, a petitioner can reframe issues, enhance and enlarge arguments, and incorporate new or previously uncited legal authority in a petition for writ of certiorari. *See Yee v. Esconido*, 503 U.S. 519, 535 (1992) ("The petitioner can generally frame the question as broadly or as narrowly as he sees fit."); *Citizens United v. Federal Election Com'n*, 588 U.S. 310, 331 (2010) (Finding "a new argument to support what has been a consistent claim" is properly before the Court) (quotation omitted).

Finally, even if waiver was in play, the Court can and should consider the issue because it was fully advanced in the Petition, addressed by Plaintiff, and is an issue of grave importance. *See PGA Tour, Inc. v. Martin*, 532 U.S. 661, n.27 (2001) (Despite possible waiver, the argument was advanced in the petition, and given its importance, "we exercise our discretion to consider it.")

II. AN INTRACTABLE CIRCUIT SPLIT REQUIRES THE COURT'S INTERVENTION.

A. The Circuit Split Remains Deep and Pervasive.

Despite Plaintiff's best efforts to paint a picture to the contrary, a deep and intractable circuit split on the application of *Heck* to ex-prisoners lacking access to habeas is obvious. Over the past decade alone, each circuit has recognized the conflict, and most have expressed the need for the Court's intervention. Indeed, the 22 cases examined in the Petition demonstrate the

depth of the split. (Pet., at 23-29.) *Accord Muhammad v. Close*, 540 U.S. 749, n.2 (2004); *Spencer v. Kemna*, 523 U.S. 1, 18-22, 25 n.8 (1998) (Souter, J., joined by O'Connor, Ginsburg, and Breyer, J.J., concurring; Stevens, J., dissenting). Moreover, the Court's own docket reveals 17 petitions for writs of certiorari in the past 10 years on the question presented here—including three filed in just the past eight months.

B. *McDonough v. Smith* Did Not Address, Let Alone Resolve, the Pervasive Split.

Plaintiff's insistence that *McDonough v. Smith,* 139 S. Ct. 2149 (2019) resolved the circuit split (Opp., at 19-21) is a non-starter. *McDonough* never addressed the application of *Heck* to ex-prisoners, never discussed *Spencer*, and concerned only whether the favorable-termination rule barred claims from accruing *during* an ongoing criminal prosecution. And, *McDonough* made clear it was not addressing accrual for any other claim. *Id.* at 2155 n.2, 2160 n.10. Instead, *McDonough* provided just a morsel of guidance by reaffirming that "pragmatic considerations discussed in *Heck* apply generally to civil suits within the domain of habeas corpus"—considerations which are absent in the context of ex-prisoners whose claims, by nature, are undeniably *not* within the domain of habeas. 139 S. Ct. at 2158.

C. Cases Decided Since *McDonough* Have Not Eased the Circuit Split.

Contrary to Plaintiff's contention, cases since *McDonough* have not moved the ball and no amount of further "percolation" will clarify the quarter-century intractable split. Indeed, the goal of percolation—to allow various perspectives on a legal issue to develop nationwide before the Court engages—has already been accomplished by virtue of every circuit repeatedly expressing its uncertainty about the question presented here. *See Smith v. Murray*, 477 U.S. 527, 528 (1986) (novelty does not exist where an issue has percolated for years at the time of appeal). As evidenced by several post-*McDonough* district court cases, further percolation will only delay the inevitable: a declarative ruling from the Court as to whether *Heck* applies to ex-prisoners. *See, e.g., Foster v. Lofton*, 2020 WL 247082, at *13 (N.D. Ga. Jan. 16, 2020) (discussing continued lack of clarity as to ex-prisoners no longer in custody; Eleventh Circuit), *appeal dismissed*, 2020 WL 2630778 (11th Cir. Apr. 8, 2020); *Rusielewicz v. NYS Dep't of Corr. & Cmty. Supervision*, 2019 WL 6879258, at *3 (S.D.N.Y. Dec. 10, 2019) ("scope of any exception for cases where the plaintiff is not in custody on the challenged conviction is unclear"; Second Circuit); *Jae Jeong Lyu v. Hight*, 2020 WL 1052583, at *4 (C.D. Cal. Jan. 29, 2020) ("under certain circumstances, a plaintiff who has completed his sentence, and can thus no longer seek habeas relief, may bring Section 1983 claims notwithstanding *Heck*"; Ninth Circuit); *Kammerdiener v. Armstrong Cty.*, 2019 WL 5075686 (W.D. Pa. Aug. 7, 2019) (while the court has "observed" the *Spencer* concurrence, the "Supreme Court ha[s] not

squarely held post-*Heck* that favorable-termination does not apply to defendants no longer in custody" and, thus, the court is hesitant to do so on its own; Third Circuit), *report and recommendation adopted in relevant part, rejected in part,* 2019 WL 4071736 (W.D. Pa. Aug. 29, 2019).[3]

III. PLAINTIFF'S DIRE PREDICTIONS ARE INCORRECT AND BASELESS.

A. Petitioners' Rule Better Serves Comity and Prevents the Misuse of *Heck* as an Offensive Tool to Circumvent Traditional Preclusion Doctrines.

Plaintiff's contention that dropping *Heck* after release undermines comity (Opp., at 29-30) is as notable for the critical points it ignores as for its distortions. In proclaiming that *Heck* is needed to forestall an inevitable flood of ex-prisoner §1983 collateral attacks on valid convictions, Plaintiff simply ignores the fact that robust traditional preclusion doctrines, like *res judicata,* have always adequately deterred ex-prisoners from such futile initiatives after they have completed their sentences and regained their freedom. (Pet., at 20 n.12.) *Heck* was never needed nor intended to bolster preclusion defenses to address a

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[3] Plaintiff's citation to 1st, 3rd, 5th and 9th circuit decisions to support his claim that "courts of appeals since *McDonough* have rightly viewed favorable termination as a requirement in all cases" is grossly misleading (Opp., at 19). As explained in the Petition (Pet., at 27-28) those four circuits already applied *Heck* to ex-prisoners before *McDonough*, and Plaintiff has cited no case suggesting that circuits in other camps might waver from their more limited views of *Heck* because of *McDonough*.

lurking "flood" of §1983 litigation by ex-prisoners, nor have the courts ever identified the proliferation of such litigation as a problem deserving of, or requiring the intervention of, the courts or the legislature. (*See* Pet., at 20-23; App. 107-109; App 130-131.) Indeed, Plaintiff has not identified a single authority that suggests any such problem ever existed.

And, even if floodgates were a true concern, that would be a matter for Congress to address, as it did in enacting habeas to prevent *incarcerated* prisoners from undermining comity through collateral attacks. (Pet., at 13-14.) The fact is that Plaintiff's expressed concern for comity rings hollow. As Plaintiff's own case strongly demonstrates, the lower court's rule only serves to undermine comity by permitting the wholesale circumvention of traditional preclusion doctrines through the expedience of a state executive's unreviewable and unrestricted discretion to issue a pardon for any reason. (Pet., at 20-21.) Sanctioning the lower court's rule eliminates finality and perpetually exposes putative defendants to liability. (Pet., at 19, 21.)

B. Plaintiff's Illusory Concern that *Heck* is Needed to Preserve Meritorious Civil Rights Claims is Baseless.

Plaintiff's declaration that dropping *Heck* upon release "would forever bar meritorious civil rights claims" (Opp., at 30-32) is sophistry. As pointed out in the Petition, and ignored by Plaintiff, only by retaining *Heck* after release will deserving litigants be forever denied a federal forum at the discretion of state executives. (Pet., at 15-19.) Case in point: by retaining

Heck, an ex-prisoner, upon learning a police officer made a deathbed confession to fabricating a case against him, must first convince an elected executive or state tribunal to vacate his conviction in order to sue under §1983. Plaintiff's brief never disputed that requiring a person so situated to first secure State relief, under pain of being forever denied a federal forum, cannot be squared with last year's decision in *Knick*.

Critically, if that same deathbed confession surfaced while a plaintiff was incarcerated, he could access habeas remedies which, even with statutory exhaustion, require federal oversight of the adequacy of state remedies. (Pet., at 15-16.) The point is that a victim of such misconduct should be entitled to *some* federal review or remedy. But absent statutory exhaustion, the federal courts cannot, consistent with the remedial purposes of §1983, bless a framework under which the will of a governor or state court is the determinative factor on access to §1983. And, it is well worth emphasizing that, unlike traditional preclusion doctrines, *Heck* speaks of no equitable exceptions which would allow federal courts to relax its impenetrable bar to §1983 in the absence of a pardon or vacatur.

Plaintiff's own case is, perhaps, the best illustration. He complains that, without *Heck*, "for the vast majority of ex-prisoners, their convictions would forever remain intact and thus forever precluded." (Opp., at 31); *see also* App. 18-19 (applying *Heck* to ex-prisoners is necessary to ensure that Plaintiff, "who obtained a pardon several years after release from custody and who may have the most meritorious claims[,]" would

not be barred by preclusion if he filed before obtaining favorable-termination). But this reasoning fundamentally distorts the interplay between *Heck*, preclusion doctrines, and §1983. Indeed, *Heck* was intended to prevent premature §1983 challenges to valid convictions (*see* 512 U.S. at 499), not as an offensive tool for plaintiffs to circumvent preclusion. In that respect, the lower court was correct when it emphasized that, without *Heck*, *res judicata* would render claims like Plaintiff's "dead on arrival" if filed within two years of release. (App. 17.) But that is as it should be because, as the lower court recognized, the rejection of all of Plaintiff's state and federal challenges to his conviction entitled those final judgments to the same full faith and credit in federal court that they would have received in state court. (App. 17 (citing *Allen v. McCurry*, 449 U.S. 90, 96 (1980)).

C. This is an Ideal Vehicle for Review.

To muddy a clean record, and draw Petitioners into a non-material factual dispute to suggest this is not a good vehicle for review, Plaintiff contended in his brief that he has been "exonerated on the basis of his new evidence," implying he does not need his pardon to trigger accrual.[4] But even accepting that newly

[4] *See* Opp., at 1 ("DNA testing…conclusively proved his innocence [and] as a result…Savory was pardoned and his wrongful conviction was finally set aside,"); Opp., at 10 ("the Governor of Illinois se[t] aside his conviction[.]"). The first time this position surfaced was in Plaintiff's *en banc* oral argument. (Reply App. A, at 47-48.)

asserted position as true[5] makes no difference to this case qualifying as an excellent vehicle to determine whether *Heck* applies after release from custody. The issue is clean and straightforward: do prohibitions against exhaustion of state remedies require the dropping of *Heck* upon release from custody, as set forth in cases such as *Monroe*[6]*, Patsy,* and *Knick,* or can *Heck* be applied post-release without violating those principles? If the former, the district court on remand can determine whether Plaintiff has any basis, such as newly-discovered evidence, to claim equitable tolling. If the latter, the case can progress unimpeded. Either way, this petition is important, long overdue, and straightforward.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

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[5] Plaintiff's contention that he was declared innocent due to "new DNA evidence" directly contravenes (1) the district court's unrebutted finding that Plaintiff did not rely on DNA evidence to invoke equitable tolling and, thus, forfeited any claim to equitable tolling (App. 88); (2) the unrebutted evidence cited by Petitioners at all three levels of this case that Plaintiff was not pardoned on the basis of innocence, but rather as an act of mercy which left his conviction intact, (Pet., at 6 n.2; App. 42; App 110; Reply App. C, at 72-74); and (3) Plaintiff's counsel's own public statements that the 2015 pardon was not a recognition of his innocence and he would continue to pursue such a declaration. *See* Andy Kravetz, *Johnnie Lee Savory receives pardon in 1977 Peoria double murder case*, PEORIA JOURNAL STAR, Jan. 13, 2015, accessible at: http://www.pjstar.com/article/20150113/News/150119658.

[6] *Monroe v. Pape*, 365 U.S. 167 (1978).

Respectfully submitted,

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APPENDIX

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 17-3543

[Dated September 24, 2019]

JOHNNIE LEE SAVORY,

Appellant-Plaintiff,

vs.

CHARLES CANNON, et al.,

Appellees-Defendants.

REHEARING EN BANC

September 24, 2019

McCorkle Litigation Services, Inc.
Chicago, Illinois (312) 263-0052

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PROCEEDINGS

FEMALE JUDGE: Ladies and gentlemen, we are here this morning to hear argument in the case of Savory against Cannon.

Mr. Art.

MR. ART: Good morning, Your Honors and may it please The Court. Supreme Court precedents dictate the result in this appeal. As the panel correctly recognized, Heck (phonetic) directs that Section 1983 damages claims that impugn the validity of a state criminal conviction accrue only once the conviction has been set aside. Since the panel's decision, The Supreme Court in McDunna (phonetic) has reiterated and expanded Heck's rule, holding that Section 1983 claims must await favorable termination whenever the suit impugns a state criminal proceeding or it's resulting judgments. McDunna says only once the criminal proceeding ends in the defendant's favor or resulting conviction has been invalidated, does the statute of limitations begin to run. That rule controls the results here. Savory's claims each impugn the validity of his state criminal convictions and the proceedings that gave raise to them. Savory did not obtain a favorable termination until his conviction was set aside by his pardon in 2015.

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FEMALE JUDGE: Has any federal court gone so far as to rely any defendant to file Section 1983 claim

merely because that defendant has been released from custody and -- is no longer available.

MR. ART: The answer is no, as far as I can tell. And the Defendants certainly have not cited such a case in this court. And no question that the precedents of The Supreme Court make perfectly clear that such a suit cannot be filed. This Court's analysis should begin and with express language of majority opinions of The U.S. Supreme Court. The Court repeatedly has held that Section 1983 suits cannot be used to impugn extent convictions. Hecks said to recover damages for an unconstitutional conviction or sentence, the Section 1983 plaintiff must show that the conviction or sentence has been set aside on direct appeal expunged by executive order as was the case here, set aside by a state tribunal or called into question by a writ of habeas corpus. Release from custody is not in that list of events that cause the claims to accrue. And Heck --

JUDGE WOOD: Let me ask you this, Mr. Art, once somebody is released from custody though, the concern about conflicting judgments, somebody who's in custody pursuant to a state conviction versus somebody who's

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not, it evaporates. So where is the conflict at that point?

MR. ART: I don't think that -- it evaporates at all, Judge Wood. I think if -- if we look at the federal habeas regime in it's statutory form, what Congress has determined is that the general default rule of no federal interference with state judgments gives way in a very limited circumstance, and that's when somebody

is in custody. For a long time the lower federal courts had no power at all to issue writs to examine state judgments. In 1867 they got that power to a very limited extent, and since then that's been the only way to set aside a conviction. A suit under Section 1983, The Supreme Court recognized in Allen versus McCurry (phonetic) is not a substitute for a federal writ of habeas corpus. And so allow a Section 1983 suit with plenty review, with a preponderance of the evidence standard, every time a criminal is released from prison would completely uphand the federal habeas regime, and it would do great offense to state functions. The Defendants take the position that state interests suddenly evaporate after release from custody, but the opposite is true. What The Supreme Court recognized in cases like Calderone (phonetic) versus Thomas is that when this -- when the federal

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habeas proceeding comes to an end, the state is entitled to a presumption that their judgment -- that it's judgment is going to be final. That finality is important to the state sovereign interest in administering their own criminal law. It's essential to retribution and to deterrence in criminal law.

JUDGE SYKES: It's also a principal of the law of preclusion and Heck is not just concerned about habeas exclusivity as I read the case. There are two rationals, one is habeas exclusivity, the other derives from the common law, tort law, of malicious prosecution that requires as an element of the claim that there be a favorable termination of the criminal proceeding, and

that tort principal derives from the law of preclusion which is concerned about discordant judgments.

MR. ART: I absolutely agree with that, Judge Sykes. So what The Supreme Court has confirmed again in McDunna is when it comes to damages suits that are -- that might impugn a criminal proceeding or a resulting judgment, the accrual rule is determined by analogy to common law torts because the chief principal --

FEMALE JUDGE: There are two rules of Heck. There's a Heck bar which is a rule of preclusion, and there's the Heck rule deferred accrual. So there are

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two principals at that play in Heck, and the difficulty in application that we have encountered and many courts have encountered, is the interplay between those two rules. The rule of preclusion, the Heck bar, is applied defensively to avoid the suit, to get it kicked. The rule of deferred accrual is used offensively by a plaintiff to overcome a statute of limitations argument.

MR. ART: Yes, Judge. And I would say that the -- the latter rule, the rule of deferred accrual, is a rule that is designed to avoid the preclusion issues that would otherwise happen. And so --

FEMALE JUDGE: It implements the Heck bar.

MR. ART: Absolutely. And so if you're in a situation where you're -- you're designing an accrual rule, The Supreme Court has said, do it by analogy to common law torts and malicious prosecution is

obviously the most analogous common law tort to each and every one Savory's claims. But if you're in that situation, you can't design an accrual rule that requires the filing of a large swap of suits that are dead on arrival in federal court because of preclusion principals that Allen against McCurry in 1738 would otherwise apply. And so even if this court doesn't take the express language of Supreme Court decisions

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applied them and say, Savory suit was bared until he achieved favorable termination of his criminal case, The Supreme Court's method for determining accrual rules by analogy to common law torts leads to that result anyway. The -- the --

FEMALE JUDGE: But what about the situation that Justice Suiter was worried about, once someone has been released from custody and they have no option of habeas to challenge the conviction, but yet no recourse to 1983 if there is a favorable termination requirement?

MR. ART: So I -- I suppose I have two responses to that. The first response is that, that really is an issue for Congress, and not an issue for the Court's designing accrual rules in civil tort cases. But even if there -- there was an opportunity to devise an exception to Heck in narrow circumstances where collateral relief was impossible, and I think that -- The Supreme Court concurring opinions and all of this court's cases -- have mentioned such an exception, are really concerned with that situation where there never was the opportunity to perceive any -- to receive any of collateral review in

state or federal courts. Savory doesn't fit that box anyway. So if there's a case that comes along to create a suiter type exception, it's not this one. Savory obviously had

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ample opportunity in both federal and state court to pursue post-conviction remedies. And even once those were exhausted, he had state remedies still available to him and as this court observed in Manns (phonetic) and in the Matt case, if you have an opportunity to seek relief from your conviction, any exception to -- to Heck that might purportedly exist --

MALE JUDGE: Why -- why would having an opportunity to seek relief matter -- if footnote ten of Heck is controlling, what role does opportunity play?

MR. ART: None, Your Honor.

MALE JUDGE: None. And what role if footnote ten is controlling, what role would it play that the evidence of misconduct didn't come to light until after the Defendant was released from prison?

MR. ART: None, Your Honor.

MALE JUDGE: None.

MR. ART: Our --

MALE JUDGE: And so the upshot of that would be that persons who don't get definitive proof of wrongdoing until they're out of prison just can never bring 1983 suits unless they manage to get a pardon from the governor.

MR. ART: Or secure --

MALE JUDGE: And if they don't, most people don't,

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they're just -- they're goose is cooked.

MR. ART: Yes, Your Honor, and -- and that is the system --

FEMALE JUDGE: Well, wait a minute, Mr. Art. I was looking cause another possibility is relief from the state tribunal authorized to give this relief, and in Illinois at least, as I read the post-conviction act, there is no time limitation on a petition advancing a claim of actual innocence. So it does seem to me that people may not be exclusively relying on a governor's good graces, but perhaps under state law, I'm not talking about federal law now, but under state law there may be an avenue.

MR. ART: Surely. And so Illinois if you're in custody you can take -- you can file a successive post-conviction petition under that act. You can also file under the civil act that offers relief from judgments, what -- what we call a 2-1401 petition, in the case, for example, of newly discovered evidence. So I don't mean to suggest that these people are without a remedy entirely, states may provide all kinds of remedies.

JUDGE SYKES: Well, and the federal court can provide remedies as well for the circumstances that we've just been dissing. Limitations law as equitable

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exceptions, equitable tolling for cases in which the defendants are responsible for the -- for suppressing the information that would have lead to a timely claim, and the law of preclusion also has a proud exception if the judgment that is having -- giving -- would otherwise have preclusive effect in the federal action was obtained by fraud, a Brady violation for example, or some other suppression of evidence, then that would overcome the Heck bar.

MR. ART: It might well, Judge Sykes. And I -- I think the point is this, when we're examining what accrual rule should apply in this case, the exceptions and whether people can seek relief from a judgment under state law or federal law in particular circumstances are well and good, but the idea -- Justice Suiters's idea in concurrence in Heck and in Spencer that there is this all purpose exception has not won the day. The Supreme Court majority in Heck and in Spencer -- and in fact, the debate continues in Wallace has said that's not the way that we determine accrual rules.

JUDGE WOOD: Well, doesn't -- doesn't The Supreme Court in Heck say the -- the notion that -- for every wrong there is a remedy, to use a common law way of putting it, isn't right --

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MR. ART: Right. And -- and The Supreme Court has said that not only in Heck, but in Allen against McCurry and countless other cases, when it comes to the --

JUDGE WOOD: Isn't it strange for you to be standing arguing that position though?

MR. ART: The point -- the point is made -- I don't think so at all, Chief Judge Wood and here's the reason. Meritorious civil rights claims that come to federal court come after the favorable termination requirement with some merits to them, right, that's what the favorable -- what the favorable termination requirement really does. Is it says, there's really two ways that you can come to federal court and seek relief. Way number one is through the federal habeas regime and those type -- those type channels while you're in custody. And way number two is when you've done something in some other court to show that your suit has a lot of merit. When somebody has their suit terminated favorably, that means it's a good suit to pursue in federal court. And of course as we're pursuing federal civil rights claims, that's what we're looking for. On the -- on the flip side, preclusion and abstention would cause problems across the board if these suits were filed upon release. If Savory had

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filed his suit upon release, it would have had to be dismissed for a lack of jurisdiction. He would have been saying to this court as the defendant coming from a state court with a judgment, final judgment, against him, please put my wrongful conviction to -- to the side, or let me impugn it to an extent that this court has recognized in Hill against Murphy and the Court in Heck recognize is -- an amount to collateral attack. If it wasn't dismissed for a lack of jurisdiction all of the claims would be issued -- all of his claims that he would

bring in this suit would either be issue or claim precluded. The Supreme Court in Allen said issue preclusion of the -- of Illinois applies in this case and Megra (phonetic) said that the claim preclusion principals would apply, so the suit would be dead on arrival. And so that's another reason that -- that we're arguing against the rule that wouldn't require favorable termination. I also think it's the -- it's important to point out that the Defendant's rule undermines every single principal that animates the Heck/McDunna case line. So McDunna reminds that there are four related principles at stake when designing an accrual rule in these cases. Avoiding conflicting state and federal judgments in parallel proceedings, preventing collateral attacks on a state judgment using

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a civil suit, ensuring the finality of state criminal judgments in proceedings and protecting the exclusive realm of habeas corpus. The favorable termination requirement promotes every single one of those things and the Defendant's rule undermines them all. If Savory had filed his suit upon release, there would be a possibility of conflicting federal and state judgments putting aside the preclusion and abstention problems I just talked about. There would also be a suit that is tantamount to a collateral attack on his conviction. McDunna affirmed that such an attack is untenantable, full stop. If he had filed his suit upon release, he would have undermined the finality of state judgments, which I discussed earlier, are critical to the states. And the states are entitled to a presumption

that their judgments are final as soon as the mandate issues in the federal habeas case --

FEMALE JUDGE: How important -- how important is it that consequences from the criminal judgment survive beyond surface of a sentence?

MR. ART: I mean, it's important to the state's interest -- I mean, it's part of the state's interest in the finality of it's judgments, right. The state's interest in finality promotes it's ability to administer it's criminal law and -- and, you know, make

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it have a fact and mean it when it says, you know, you're convicted of this crime. But then the states variously attach all kinds of civil disabilities to a person who has an outstanding criminal judgment. And to say that a -- a litigant could come to federal court with that valid state judgment in place and say to the federal court, please reexamine this judgment and reexamine whether the state should -- should be able to -- this way is completely offensive to principals of comity and federalism that -- that have guide this --

JUDGE EASTERBROOK: I'm -- I'm a little puzzled by your reliance on the judgment. Under 1738 the force of the states judgment is a matter of state rather than federal law. So I assume that no matter what the Heck Doctrine does, one has to show that as a matter of Illinois law it's permissible to bring this suit consistent with the criminal judgment. But why is that a matter that is related to Heck?

MR. ART: So -- so --

JUDGE EASTERBROOK: Heck is federal law, under 1738 the effect of the state judgment is a matter of state law.

MR. ART: Right. So the -- so the effect of the state judgment doesn't dictate when the claims should accrue as matter of federal law. The -- the state

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judgment is important to the extent that an accrual rule that would require a filing while there was a state judgment extant which we think contradicts Heck completely as matter of federal law. It's important just --

JUDGE EASTERBROOK: I could imagine a rule that says if there is a state judgment which is a matter of state law cannot be disturbed, then the claim does not accrue as matter of federal law. But my -- my question is, why would one incorporate the validity of the state judgment independently into federal law, rather than leaving it as a matter of law state under 1738?

MR. ART: I think it is left as a matter of state law and I didn't mean to confuse the issue, Judge Easterbrook. I think that -- that as matter of federal law, the Heck Doctrine is -- is determined simply by the rules that The Supreme Court has set out, namely the analogy to common law torts, and ensuring that a federal civil suit is never used to collaterally attack a extant state judgment.

FEMALE JUDGE: But it's up to the state to --

MALE JUDGE: Except to the extent that state law allows that attack on a judgment because then it's not dispositive, right. Heck says we have to take account of the rule, that you can't use 1983 to contest on

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going custody, and you can't use 1983 to contest the state judgment. But if state law itself allows the state judgment to be contested, what is left for federal law? What remaining role is there for federal law?

MR. ART: Well, I mean, I -- the -- the -- the federal accrual principal still must be based on The Supreme Courts method of determining those accrual rules. So it -- I don't think that the federal rule in any circumstance can turn on how 1738 says a state rule of preclusion should be applied. The -- the federal rule --

JUDGE EASTERBROOK: But suppose state law -- just take as an example, suppose state law says as soon as a prisoner walks out the prison door, he is free to file a damages action contesting the validity of that conviction, what effect does that have on federal law?

MR. ART: Well, I --

JUDGE EASTERBROOK: Right, there's no longer a rule of preclusion barring an attack on the judgment.

MR. ART: So I think as -- as matter of federal law and federal prerogatives, that kind of challenge on an extant judgment is always preserved by statute and by a long history to federal habeas corpus. So there wouldn't be room -- I mean, I think what --

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JUDGE EASTERBROOK: No -- you -- you may say Illinois doesn't have that principal, but if a state has a principal that says once a prison term ends, the former prisoner is free to litigate the validity of the conviction, then how does one say that bringing a 198 suit is an improper collateral attack on the judgment? Under 1738 it's something the state allows.

MR. ART: Well, I --

FEMALE JUDGE: Let me -- let me also throw in the -- the -- this is, again, the intersection between state law and federal law. And if the state wants to be more generous about collateral attacks, then perhaps the state is entirely free to do that if The Supreme Court said in Heck, you know, we don't care when the state made this attackable, we are just saying that we're not going to entertain -- we're not going to say that federal claim accrues until it's really been set aside by the state. In other words, we want a higher bar than the state. Is there any reason why that system couldn't work?

MR. ART: No, I mean, I think that makes perfect sense. The rule that Judge Easterbrook is describing is essentially a rule that would set aside the judgment upon release from custody. So thought of that way -- saying that this judge -- this -- this judge -- state

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judgment no longer has any preclusive effect as a matter of law is essentially the same as saying, you know, we're going to vacate the conviction of every

person who walks out of prison, and then that circumstance I don't think that Heck would have a problem. I --

JUDGE EASTERBROOK: It's not that clear. But the reason I'm bringing this up is our holding in Sanchez against Chicago which we certainly need to be thinking about saying that the way Heck works, depends on the state rule of preclusion. And we need to be thinking about that as a possible option. The panel didn't mention Sanchez, but absolutely it's before us and we have to think about it.

MR. ART: So here's the way that I read Sanchez and I think that Sanchez was read this way in -- in this court's recent decision -- decision in Green against Junaez (phonetic), Sanchez is a 4th Amendment claim as a matter of federal law governed by Wallace against Cato (phonetic) that goes to trial and the question is, what jury instructions should be given so that plaintiff doesn't contest the validity of the judgment, and I think there it should be limited just to a question of preclusion. If the claim isn't barred by Heck because it's governed by Wallace, then the

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claim can proceed and the jury instructions given at trial under -- under Sanchez and Gilbert and Green, are all just jury instructions that are about preclusion, forget about Heck. So and I -- and I think a lot of this court's cases that are cited by the Defendants are cases where the issue really is whether Heck applies at all, not whether there's an exception to Heck. And I think that that's where the -- this court's cases to the extent

that there are some -- in the cases that -- that might get cleaned up have gone a tiny bit astray. This court's cases are all, as far as their holdings are concerned, completely consistent with Heck and McDunna.

JUDGE HAMILTON: Can I just ask you whether you -- you've taken the position I think throughout this litigation that in essence accrual rules ought to be fairly clear and easy to follow. Would it be in your view a manageable rule of law to decide that the federal -- federal rule of accrual -- the federal clocks starts ticking when the state courts would -- could be shown a successful challenge to claim or issue preclusion, would that be a practical and manageable rule?

MR. ART: Not at all, Judge Hamilton. I think that the only real manageable rule in this context is

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the favorable termination requirement. I mean, I think that's why The Supreme Court in -- in Heck and in Wallace and in McDunna has opted for that requirement because it keeps the coordination of state and federal claims completely simple and makes sure that federal claims frankly -- state claims frankly rarely come to federal court, and when they come, they come in good stead. At -- at bottom the -- our view is that the Defendant's approach to this case is deeply flawed. They spend a lot of time arguing that the relevant case line simply doesn't apply, that's wrong. But if it wasn't wrong, they're not pointing to any real authority that supports them. They have to explain why this release from custody rule is consistent with Heck and McDunna and the rest of the cases in the

line. They have to explain how that rule can possibly be fashioned based on The Supreme Court's repeated admonition that accrual rules are determined by analogy to common law torts. You cannot get a rule that a claim accruals -- accrues upon release from custody if you're using an analogy to common law torts. Unless you make the analogy to the wrong common law tort. The only common law tort that required release from custody is an accrual proposition is false imprisonment. And that's the claim at issue in Wallace against Cato

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(phonetic and most certainly not the claim at issue in this case. And finally --

JUDGE SYKES: And Sanchez, that's what distinguishes Sanchez from this case. It wasn't a wrongful conviction claim, it was a wrongful arrest claim and excessive force in course of the arrest claim.

MR. ART: Absolutely, Judge Sykes. And -- and that principal again of Wallace versus Cato survives Heck and McDunna --

JUDGE SYKES: So ordinary preclusion rules under state law apply there --

MR. ART: Absolutely.

JUDGE SYKES: -- under the full faith and credit, not Heck.

MR. ART: Absolutely, Your Honor.

MALE JUDGE: Mr. Art, can you go back to the point you made a minute ago, and that is you -- you said looking at our case law you think a lot of our holdings would remain intact consistent with the propositions that you're advancing today. A lot of those cases as you know arise in the prison disciplinary context, and do I understand your position right to be -- or to be that Heck is really neither here nor there so long as the 1983 plaintiff is not challenging the underlying

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conviction or seeking a restoration of good time credits that would effect their -- their time in custody?

MR. ART: Absolutely.

MALE JUDGE: So -- so the 1983 plaintiff that is, you know, seeking money damages for, you know, some type of disciplinary measure that was imposed; I was sent to solidary confinement because I exercised free speech rights or because of my race or because of something like that, Heck is just NA --

MR. ART: Absolutely. And I think this court said that in the Simpson case. I'm -- what -- what these cases involve challenges to conditions of confinement say are, we don't need to consider Heck at all because it doesn't apply because you're not seeking relief from a judgment or a speedier release from custody. And The Supreme Court affirmed that proposition in Mohammed, and so most of this cases fall in that category. There are a couple of cases that fall in that category of challenging the length of custody where this court has said, once released from custody you may file

that suit so long as you are not attacking a state judgment also. But --

MALE JUDGE: Do you think though, in keeping in your comments here, can you identify any case along --

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along the lines of the rule that you're advancing that are overruling?

MR. ART: No. I think that all of this court's holdings are consistent with the framework that -- that we have set out, and that framework is threefold. First, if you are challenging a state judgment you must wait until the state judgment is set aside and Wallace -- I'm sorry, McDunna extends that into the pretrial period. Two, if you're challenging custody only but not a judgment, you have to wait till the custody has come to an end. And three, if you're not challenging a judgment or a custody, Heck has absolutely no role to play. And if there are no further questions, I'll reserve the remainder.

FEMALE JUDGE: Mr. -- what about Bird (phonetic), would that survive?

MR. ART: So the holding of Bird is that Heck bars the suit. I think that the discussion in Bird about there being an exception in Heck and an exception to the exception, shouldn't survive for a number of reasons. Most prominently by saying there's an exception to Heck and then an exception to that exception for somebody who has not exhausted post-conviction remedies thoroughly enough, that -- that's in serious tension with The Supreme Court's

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admonition as recently as this term that there is no exhaustion requirement for Section 1983 so that aspect of Bird certainly couldn't survive. And I think that the fact that Bird said perhaps there's an exception to Heck, an exception where you haven't done enough in state court, shows that the first exception isn't really grounded on any legal principle that has a lot course. Thank you, Your Honors.

FEMALE JUDGE: All right. Thank you very much, Mr. Art.

Mr. Sotos?

MR. SOTOS: May it please The Court. Good morning, Your Honors. One thing we agree on is that the issue is whether Heck applies at all in this context. And we believe that lifting the Heck bar at the time of a prisoner's release from custody is the best and the only way to accommodate The Supreme Court's prohibition on exhaustion of state remedies with limiting principals of federalism and comity while still at least giving some effect to impugn the defendant's right to rely upon an already significantly extended statute of limitations in reverse convictions cases.

FEMALE JUDGE: You know in McDunna The Supreme Court expressly reject the work -- seems to me, that

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you suggest that we use here, mainly filing and then staying suits. And -- by direct courts finding that the

dissolutions would be -- could you address the practical effects of forcing convicted defendants --

MR. SOTOS: Certainly, Judge, and --

FEMALE JUDGE: -- filed Section 1983 suits within two years of the release whether or not they have obtained the evidence of innocence that would help them overcome res judicata, Rooker-Feldman and --

MR. SOTOS: Certainly, Your Honor. McDunna is a much different case than here, and -- and, you know, context matters, and in this case, in this matter, context is everything. So McDunna was a case where the issue was whether or not a cause of action would accrue during a -- the pendency of a criminal prosecution, and the likelihood of interference with that prosecution is likely at it's height there, I mean, that is something that is always done. Criminal defendants routinely file Section 1983 cases against pending criminal prosecutions, and defense lawyers are always seeking to stay those cases. So it made perfect sense for The Supreme Court to say in McDunna, we're not going to leave that to the discretionary decisions of this district courts to have to decide in every case, well, are we going to stay the case completely, are we going

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to stay at all, are we going to stay part of it; that's not the case here.

FEMALE JUDGE: But that's not what The Supreme Court said in McDunna, that's the problem.

MR. SOTOS: I think it --

FEMALE JUDGE: What The Supreme Court said in McDunna was that the critical fact was that McDunna's acquittal which is part of the Heck list. And a simple rule like that -- I mean, I'm very wary of statute of limitation rules that require extensive examination of factual records, both defendants and plaintiffs, ought to have some clarity in this respect. And the McDunna court is absolutely clear that the critical fact was the acquittal, it wasn't -- deference to ongoing state court proceedings, that sort of takes care of itself when you have to wait until there's acquittal.

MR. SOTOS: Certainly. In the context of a case where the issue is whether or not the cause of action should accrue against a pending prosecution. It's not difficult to imagine all the problems with the Plaintiff in such a case getting a judgment under Section 1983, then walking back into the criminal court and saying, I have this judgment, this is --

FEMALE JUDGE: And that's why you wait for favorable disposition, and -- and I just don't see -- I

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mean, actually, another thing that worries me about your position is I do see very clear language in Heck itself saying our rule does not depend on the whether the defendant has subsequently been released. And I'm very wary of piecing together this vote and that vote from people's concurring opinions when The Supreme Court repeatedly tells us it's not our job to do that.

MR. SOTOS: And we're not asking this court to do that. We think that the --

FEMALE JUDGE: Most of your briefing does. Your briefing counts Justice Suiters and who is with him and Spencer --

MR. SOTOS: Well --

FEMALE JUDGE: -- and who shifts around.

MR. SOTOS: Certainly before the panel we -- we did have the position that this -- that the panel was bound by a series of decisions from different panels in this court which drew on Justice Suiters concurrence. At this point I think our argument to this court is that Justice Suiters concurrence makes perfect sense, and it's the only --

FEMALE JUDGE: Except that it wasn't excepted --

FEMALE JUDGE: Right.

FEMALE JUDGE: -- by the majority, that's the problem.

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MR. SOTOS: But it's also the only way that The Court can accommodate The Supreme Court's prohibition on exhaustion of administrative remedies with Heck.

FEMALE JUDGE: I don't see that. What -- what is wrong other than your championing the rights of potential criminal defendants who were done wrong by the system to bring a lawsuit ever they've finished serving their sentence, I mean, it's very admirable for you to worry about them, but in -- in a system where we have to have finality, why don't we just let the state

courts do their thing and if somebody can amass the kind of evidence that would persuade either a state court or a governor or perhaps a federal court under some equitable tolling principle to grant relief and set aside the state conviction, then and only then is it really ripe to think about whether the conviction is procured in a way that violated the constitution.

MR. SOTOS: Because that defies exhaustive of state remedies.

FEMALE JUDGE: Why? That -- if that does exhaust state remedies it means that the state criminal conviction is left alone, it means that you have found some legitimate way to attack the state judgment --

MR. SOTOS: And The Supreme --

FEMALE JUDGE: -- and you got rid of it.

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MR. SOTOS: And The Supreme Court has said in Monroe and Patsy (phonetic) that the courts aren't permitted to require the states to -- or excuse me, to require exhaustion of administrative remedies.

FEMALE JUDGE: What -- what -- but the thing is when does the -- when does the claim accrue that your treatment by the police, your prosecution, your right to exculpatory evidence, whatever it happens to be, your right to not have fabricated -- when does that claim accrue? That's not exhaustion so much as, when do we actually have an actionable claim?

MR. SOTOS: Judge, the claim accrues upon release. The problem --

FEMALE JUDGE: Why? You're -- you're saying -- you can say that all day, but why, because the other potential time is when that judgment has been found not to be binding anymore.

MR. SOTOS: I don't agree with that because under those circumstances --

FEMALE JUDGE: You don't --

MR. SOTOS: Well, under those circumstances what you're doing is deferring to the states forever, there is no federal remedy, once somebody is released their cause of action may accrue. Now, in this particular case --

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FEMALE JUDGE: What do you mean? I don't understand you.

MR. SOTOS: -- Mr. Savory is -- I'm saying that Mr. Savory's case here would have been barred most likely by res judicata or collateral estoppel, but that's is as it should be. All of his claims were rejected --

FEMALE JUDGE: Right. And then once the judgment is gone, maybe his claims have no merit, I have no idea. I mean, they got cut off on this limitations point so we're certainly not here to adjudicate his claims, but I don't see anything to be gained. Actually -- actually, I take some exception to the idea that there is such broad exceptional exceptions to claim and issue preclusion and that's going to depend on the law of the state. Some states particular with this claim preclusion are less likely to do that --

MR. SOTOS: I think they are narrow, Judge.

FEMALE JUDGE: Well, in other words you want people to clutter up the courts with a lot of cases challenging convictions so that the district courts then have to look at them and evaluate Illinois's or Indiana's or Nebraska's or somebody else's claim preclusion rules, and only then --

MR. SOTOS: It's --

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FEMALE JUDGE: -- dismiss them?

MR. SOTOS: It's never been an issue, Judge. There's never been an issue with floodgates in cases filed by released prisoners --

FEMALE JUDGE: Because Heck has been the rule, that's why there's not a floodgate issue.

MR. SOTOS: Before Heck, after Heck, after this court's decisions into Walters, there's never been an issue. No one has ever raised an issue about release --

FEMALE JUDGE: -- conditions of confinement.

MR. SOTOS: -- about released prisoners filing -- filling up the courts with lawsuits and there's a good reason for it because res judicata and collateral estoppel do bar those claims. So unless somebody has a really good exception, like, let's say Bell versus City of Milwaukee, it's a shooting case but a good example, where someone finds evidence, new evidence, police officer admits that I planted evidence 20 years ago, that claim is supposed to be able to be brought in

federal court. But under the -- the Plaintiff's view and the panel's view, that case could never be brought in federal court unless the plaintiff first got the governor to pass on the sufficiency of the --

FEMALE JUDGE: Or it's not just the governor, you

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say that, but as I pointed out in Mr. Art's time, many states, Illinois included, have their own state post-conviction remedies. Some of those state post-conviction remedies are, in fact, more generous than 2254 in that they allow for an actual innocence of freestanding actual innocence claim. It's up to the state, you know, but if the state has an avenue available, somebody is not left only to persuade a governor, they can certainly try a state process --

MR. SOTOS: In Illinois -- in Illinois they can file a 1401 petition --

FEMALE JUDGE: I know, that's my point.

MR. SOTOS: And -- and if they lose, then they can start asking the governor every single year in a secret process --

FEMALE JUDGE: But if they lose -- at some point, you know, not everybody has a meritorious claim. If there is this avenue available, they've tried it, they've presented their issues, they got the DNA testing -- you know, the Illinois courts are pretty generous about allowing that --

MR. SOTOS: But then what is the principle basis on which to say there is never federal review? See, in every other case --

FEMALE JUDGE: Until the conviction has been set

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aside.

MR. SOTOS: Well, in Heck and McDunna you're talking about cases that are within the domain of habeas corpus. If everything doesn't work out in the state, they at least get an attempt to bring their case in federal court. Now, it may well be rejected for some of the preclusion doctrines we've talked about, but under what the panel did here and what the Plaintiffs are arguing, there's never ever an opportunity to review the governor's -- the pardon --

FEMALE JUDGE: Right.

MR. SOTOS: -- or the 1401 petition, and that is directly --

FEMALE JUDGE: You're right. And I agree with you that under the view that the Plaintiff is urging, that the Appellant is urging, there are going to be some cases that are too late for habeas corpus because the person fails the in custody requirement and that do -- do not have the ability to go forward under 1983 because the conviction is extant. Absolutely. That's discussed in Heck, The Supreme Court said, so be it --

MR. SOTOS: It --

FEMALE JUDGE: -- so why can we say differently?

MR. SOTOS: Because we don't think The Supreme Court said that. We don't think The Supreme Court can

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say that without overruling the doctrine of exhaustion of state remedies. They can say --

FEMALE JUDGE: -- The Supreme Court did say it in --

MR. SOTOS: They can say it --

MALE JUDGE: The Court made no connection to exhaustion of state remedies. It was focusing on accrual of claims.

MR. SOTOS: Because of the fact that the defendant --

MALE JUDGE: Do you think that they would just overlook the fact that they were unfamiliar with Patsy and the key doctrines of 1983 law?

MR. SOTOS: Not at all, Judge. The defendant was in custody so habeas corpus was available if the state remedies didn't work out. That exhaustion is required by the habeas corpus statute. So we know that there is habeas corpus that has to be exhausted under for people who are in custody or for people like in McDunna who are trying to challenge pending cases in which their claims eventually would either end up in habeas corpus, or if they're acquitted then they can sue under Section 1983. But once that person is released

and they're not in custody and they can't file habeas corpus, what this court would be saying is that, that individual has no

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remedy under federal law and that was the whole purpose of Section 1983 to begin with. So if The Court is going to limit that, what this court -- what The Supreme Court said in Patsy and in Monroe versus Pape (phonetic) is that Congress has to do that.

FEMALE JUDGE: Well --

MALE JUDGE: Am I remembering correctly that Patsy was not cited in your original brief, was it?

MR. SOTOS: We did cite Patsy below, Judge. I can probably tell you what page in a minute. But we cited both -- oh, I think --

MALE JUDGE: I don't see it --

MR. SOTOS: We cited Patsy and -- before the panel, I don't know if we cited it again.

MALE JUDGE: I don't see it in your red brief.

MR. SOTOS: I know we cited Monroe. So -- and the principle --

MALE JUDGE: Actually, no, you didn't. I'm looking at your table of authorities. This exhaustion of administrative remedies theory seems fairly novel.

MR. SOTOS: Well, I know we've cited it before The Court.

MALE JUDGE: Okay.

MR. SOTOS: -- looking for the citation and the page number.

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FEMALE JUDGE: The more fundamental problem with your focus on exhaustion is that it ignores all the language in Heck itself which makes favorable termination an element of the 1983 claim for wrongful conviction.

MR. SOTOS: Judge, it didn't --

FEMALE JUDGE: My analogy to the tort of malicious prosecution. It's an element of the claim.

MR. SOTOS: It's -- I disagree, Your Honor. It's not an element of the claim. In fact --

FEMALE JUDGE: -- precisely what the opinion says --

MR. SOTOS: No.

FEMALE JUDGE: -- the plaintiff must prove favorable termination, that's an element of the claim.

MR. SOTOS: I disagree, Judge. That's for purposes of accrual, that's not an element of the claim. And in fact, in McDunna the government asked The Supreme Court to make favorable termination an element of the claim and The Supreme Court didn't do that. That's a far cry -- you know, the Brady claims and the fabrication claims, coerced confession claims here, they do not if they are filed without this Heck issue require

proof of favorable termination. Defense lawyers would probably like it if that were the case,

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it would make it more like --

FEMALE JUDGE: -- saying about footnote ten and Heck. I mean, as Judge Sykes says Heck does characterize this as an element of the claim, and footnote ten takes on Justice Suiters's point which is your point --

MR. SOTOS: Well, I think --

FEMALE JUDGE: Is that dicta?

MR. SOTOS: Well, I think it is dicta. I think that both Justice Suiters's concurrence is obvious, it has to be dicta, and I think that Justice Scalia's (phonetic) one sentence response where he said that we think that it would apply outside -- outside of custody, has to be dicta. And of course it's been treated by dicta by several courts throughout the country including several times by this court, when the court has -- by -- by different panels in this court, which have recognized that custody is --

MALE JUDGE: But in Heck -- in Heck The Court says declaratively, we hold that a 1983 plaintiff must prove, et cetera. I mean, how can that not be a characterization of what's required as an element of the 1983 claim?

MR. SOTOS: Because it's in the context of what The Court identified as an effort to circumvent the

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exhaustion of remedy requirement of habeas corpus which is not present when a person is released. So we do think that context is everything in this case and that you can't analogize a case that was rendered in the context of somebody being in custody where they had federal remedies ultimately available upon the exhaustion of state remedies, and a case where the person doesn't have any federal relief. The only federal remedy, the only one, under these circumstances for the most egregious kind of state misconduct you could ever imagine, would be a Section 1983 claim once the person is released. And I think --

FEMALE JUDGE: Anyway, Mr. Soto said a plaintiff could ever win that Section 1983 without favorable termination of it's underline conviction?

MR. SOTOS: Sure he could. He would --

FEMALE JUDGE: -- going to have issue preclusion as you've already conceited in every case.

MR. SOTOS: And that's the point. Issue preclusion and -- and res judicata --

FEMALE JUDGE: How does he win?

MR. SOTOS: Because if he came up with new evidence or some other -- you know, res judicata and collateral estoppel are equity based doctrines. They don't apply if justice requires, they don't apply. One

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of the best examples is a case where someone comes up with new evidence --

FEMALE JUDGE: You would have to ask what the state said about that. You just said across the board they don't apply, but the states have elaborately developed rules of claim and issue preclusion which actually are not willy-nilly, you know, a subject to equitable exceptions to my recollection, you know, but every state has got its own rules. Here we're dealing with Illinois, but, you know, I would be careful about assuming that they're all meaningless.

MR. SOTOS: Res judicata and collateral estoppel are both broad doctrines, which are intended to be broad to protect state judgments, but they do not apply -- they are equity based doctrines, and some of exceptions are, they don't apply if they didn't -- if there wasn't a full and fair opportunity to be heard.

FEMALE JUDGE: And how could you possibly say that of Mr. Savory who had -- who, you know, used many, many mechanisms to try to bring his claim? He certainly had an opportunity to be heard, maybe nobody was listening, but he definitely had opportunities.

MR. SOTOS: Judge, to say that nobody was listening, his -- all of the claims that he had -- he advances in this court, everything that allowed him to

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say the things he said in his complaint is because of this pardon. All of his claims were rejected or were not raised before. Over 30 judges over the last 30 years in the state and federal system, two decisions by this court, one on review of habeas corpus, one review of the denial of DNA testing, over 30 judges have reviewed his claims and found that there was nothing there. Now --

FEMALE JUDGE: -- you agreed that -- you agreed with Mr. Art that his 1983 suit would have been dead on arrival when he filed it under your accrual rules --

MR. SOTOS: Absolutely. And that's with respect to the claims arising from the second conviction because he did have a Miranda claim that was upheld on appeal from his first conviction, the conviction was overturned, he was retried and then convicted. So I do think that all of his claims from his second convictions would have been defeated, but again, that is how we believe it is supposed to be. That is -- but to -- but to say that we're --

FEMALE JUDGE: There's new evidence now. I mean, he has, in fact, developed new evidence since the pardon which makes this a different case.

MR. SOTOS: His complaint doesn't allege any new evidence, Judge. And -- and before I say anything

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further about that I want to -- just one final part -- point. The way that the discussion is kind of going it

suggests that Heck was somehow supposed to be a doctrine that provides another opportunity for people to do kind of an end run around, res judicata or collateral estoppel, but that's not the -- that's not the point of Heck at all.

FEMALE JUDGE: But there's no res judicata effect left of a judgment that's been set aside or otherwise disposed of, that's why the doctrines of preclusion don't come into play if you follow the Heck rule as written by The Supreme Court in Heck.

MR. SOTOS: And that's the problem with applying Heck to a situation outside of custody. It permits an end run around res judicata and collateral estoppel in situations where it's supposed to apply. And -- and Chief Judge Woods --

FEMALE JUDGE: -- supposed to apply if the conviction has been set aside by a competent authority in this state?

MR. SOTOS: This conviction has never been set aside.

FEMALE JUDGE: Yes, it has. He got a pardon, and whether he's entitled to compensation in addition to that, he -- he's done, he's pardoned, his conviction

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isn't on the books.

MR. SOTOS: Disagree, Your Honor. It was a general pardon and --

FEMALE JUDGE: I know that, but I'm saying that doesn't mean that it wasn't a pardon.

MR. SOTOS: Your Honor, under Illinois law the issue of a -- of a general -- under this court's decision in Bone versus Quinn (phonetic), a general pardon is distinguished from a pardon based on innocence. And let me briefly say that he's been pursuing pardons based on innocence back to the --

FEMALE JUDGE: Anyone who is acquitted isn't found innocent either. The only thing an acquittal means is that the jury didn't find you guilty beyond a reasonable doubt.

MR. SOTOS: I disagree, Your Honor --

FEMALE JUDGE: -- innocence --

MR. SOTOS: I disagree, Your Honor. Under Illinois law a general pardon implies guilt, that -- this court said that in Bone versus Quinn and that it is a forgiving kind of a document, rather than forgetting, and it specifically said that, that pardon applies guilt. There has never been a determination by anyone that -- that Mr. Savory is innocent.

FEMALE JUDGE: So you're saying he can't satisfy

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the favorable termination requirement even if we were to -- even if the panel opinion stayed in place, you're saying that this general pardon doesn't satisfy the favorable -- favorable termination requirement --

MR. SOTOS: That -- that's true and that would be another argument that would have to be --

FEMALE JUDGE: But you haven't made that argument. The only thing Heck asks for is expunge by executive order. It doesn't say on grounds of innocence or on grounds of anything else in particular, it just says expunge by executive order, that happened.

MR. SOTOS: Judge, it's undisputed in this case, I believe, that this was not a pardon based on innocence --

FEMALE JUDGE: I know. I'm saying so what basically? Expunged by executive order -- it doesn't -- The Supreme Court could have easily added on grounds of innocence, and there are circumstances in which they care about the grounds.

MR. SOTOS: Well, you know, that's -- our argument is that Heck doesn't apply because of custody and that gives these defendants the right to rely on the fact that they can finally put this matter behind them. But if that position wouldn't be sustained on remand, there would definitely be a strong argument that the

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difference between a pardon based on innocence and one based on a general pardon makes all the difference in the world. Judge --

MALE JUDGE: I'm finding to make that argument in the district court.

FEMALE JUDGE: Yeah.

MR. SOTOS: I'm sorry, Judge?

MALE JUDGE: I hope you're not planing to make that argument in the district court.

MR. SOTOS: Well, Judge --

MALE JUDGE: The world still has penalties for frivolous litigation.

MR. SOTOS: Well, that is the precise issue that Judge Castillo addressed in the Waldon (phonetic) case, Waldon versus City of Chicago, when he said that a part -- a general pardon that the plaintiff received in 1978 was not a favorable termination of his case, but the certificate of innocence that he received in 2003 was a favorable termination of his case and triggered his right to file a lawsuit. We did make that argument in the district court with respect to the malicious prosecution claim pointing out the difference between the general pardon and the certificate of innocence. And again, we think if The Court looks to its decision in Bone versus Quinn, it will see quite strikingly the

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difference between the two pardons. And -- and I think this feeds into another aspect of the argument, you know, the -- the idea that after all of this litigation, after 30 years of litigation, every imaginable claim raised in the state court and in the federal court, all of them rejected, the notion that we're talking about whether there should be federal jurisdiction based on what we think a governor may have meant in a secret process that no one had -- knows anything about, again in the Bowers -- Bone versus Quinn case, this court

said that the governor doesn't even have to address it, he can just ignore the request for a pardon. But the notion that the federal jurisdiction in Section 1983 claim would somehow be dependent on the outcome and the ponderings and thoughts about what --

FEMALE JUDGE: What do you -- I mean, I've heard enough of this dissertation. What do you think The Supreme Court meant then when they included in Heck expunge by executive order? That's the whole phrase, expunge by executive order.

MR. SOTOS: They --

FEMALE JUDGE: All pardon procedures perhaps could be described the way that you do, whether it's the president of the United States deciding to pardon

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somebody in his discretion, or whether it's a governor deciding to pardon somebody, that's the nature of expungement by executive order. And The Supreme Court said, but it's an expungement. The conviction is gone, the underlying thing to which you have attack -- would have attached force under either the claim or issue preclusion doctrines has gone away. And so now the slate is clean and if there are remaining constitutional issues, somebody within two years of that date, it's not like forever. I think your forever scenario is a little exaggerated, from two dates of that, two years in Illinois, of that time, you can bring a lawsuit.

MR. SOTOS: Judge, I -- I really don't think it's exaggerated because under Illinois law you can seek a

pardon every year forever. So I don't think it's exaggerated. In terms of what The Supreme Court meant --

FEMALE JUDGE: But you're --

MR. SOTOS: -- The Court didn't define that --

FEMALE JUDGE: But you're not getting it expunged every time.

MR. SOTOS: But to your point about expungement --

FEMALE JUDGE: You're -- so you think saying no, we're not going to grant you a pardon is one of the

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things The Supreme Court is talking about in the Heck list? I don't see how no, we're not granting you a pardon is an expungement of the judgment.

MR. SOTOS: I didn't -- I didn't say that.

FEMALE JUDGE: It isn't, it's a refusal to expunge the judgment.

MR. SOTOS: I didn't say that and I don't think that and I don't think it's relevant to the Heck analysis one way or the other. But to answer your question about the executive expunging the record, meaning that this conviction is over, that's just not true. And again, I would direct The Court to it's own decision in Bone versus Quinn, the -- the governor in Illinois doesn't even have the power to expunge the records. Once they're -- he grants a general pardon, then the party can take that into court and ask for an expungement,

but in a -- in a case where there's not a certificate of innocence, the records aren't destroyed and it's not as if the courts are saying that he's innocent. Those records are retained.

FEMALE JUDGE: Is it your position also that the pardon is not a termination in Mr. Savory's favor?

MR. SOTOS: Absolutely. In this case we are --

FEMALE JUDGE: It is a termination or it isn't? What --

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MR. SOTOS: No. No, a general pardon is not a termination in his favor. It's not the argument that we're advancing here because that gets us back to what the cause of action hasn't accrued yet and that is opposed to the cause of action is too late. And that doesn't really get us anywhere other than back in this -- where they, you know --

MALE JUDGE: If we remand -- if we remand, you want to argue the cause of action has not yet accrued; is that right?

MR. SOTOS: If -- if we had to, that's what we would do on remand yes, but --

MALE JUDGE: Interesting, okay.

FEMALE JUDGE: I thought you said accrued on release before?

MR. SOTOS: I'm sorry, Judge, I didn't hear you?

FEMALE JUDGE: Didn't you initially say that accrue on release? So is this different --

MR. SOTOS: The cause -- the cause of action, the Second 1983 claim, accrues upon release when there's no more potential for collision with habeas corpus --

FEMALE JUDGE: But you're saying that if we stand on the panel opinion that your new argument will be that it has not yet accrued because the pardon that he received doesn't count as a favorable termination.

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MR. SOTOS: If we -- if this court were to view the issue of custody as not important to the Heck analysis, then we would be back in the district court with all these additional arguments that again, wouldn't -- wouldn't relieve these -- you know, you haven't talked much about the Defendants, but I as said before, 30 judges have rejected all of these claims, there is no new evidence, and they don't ever get to have solace. So the only way we think that occurs and the only way we think that's consistent with Heck and Monroe versus Pape, is for the custody to cause Heck to drop by the wayside and to cause the -- the cause of action to accrue at that pint. When Judge Santege (Phonetic) suggested you have res judicata, collateral estoppel, those kinds of defenses, and I don't know if I adequately made the point before, but those types of defenses are so much different from Heck because Heck creates -- let's -- let's not make a mistake about it, heck creates an impenetrable bar to federal jurisdiction. After that --

MALE JUDGE: What does that have to do with federal jurisdiction? You've said that several times now.

MR. SOTOS: And I --

MALE JUDGE: It has to do with the claims accrual,

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not jurisdiction.

MR. SOTOS: And you're right, Judge. I used -- I used the wrong phrase and I apologize for that. But it -- it eliminates the possibility of any federal remedy, whereas if Heck is not applied and the lawsuit is filed because it accrues upon release, then a court can do as it's always done, res judicata apply, does collateral estoppel apply, or are there exceptions like new evidence which is the best example of a situation where res judicata doesn't apply. And the Plaintiff's position and the panel's position does not allow for that because there's no equitable exception to the Heck bar. The Heck bar say there's no cause of action that accrued so we can we can't even get to equitable exceptions. The only way --

MALE JUDGE: It's just hard for me -- it's just hard for me to look at this as Mr. Savory doing anything other than playing this straight by the book.

FEMALE JUDGE: Uh-huh.

MALE JUDGE: I mean, he -- he did everything he possibly could on direct appeal, with collateral review,

and then following the direction from The Supreme Court, sought a pardon and achieved it.

MR. SOTOS: He --

MALE JUDGE: And -- and then following the

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language in Heck, well, I'm -- 1983 action. I mean, I don't know what more you could possibly ask of an individual.

MR. SOTOS: Well, my answer to that would be, he didn't have to do all that because he could have and should have filed a lawsuit after he was released. He would have run into res judicata and collateral estoppel --

MALE JUDGE: Other than reading Heck and saying, I can't, I need -- I need to try the lottery ticket option of a pardon.

MR. SOTOS: Well, if -- if --

MALE JUDGE: -- and he got it.

MR. SOTOS: -- he read -- if he read Heck and he didn't read Waldon and all the other cases that followed after that, I would agree, but there is -- there are a number of cases that talked about the distinction between custody and not custody, and we think that for purposes of this analysis if I could briefly finish, that is again, the only way that The Court can accommodate the broad reach of Section 1983 with limiting principals of federalism and comity and still give some effect to impugn a defendant's right to rely on a significantly

already significantly extended statute of limitations. Thank you, Your Honors.

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FEMALE JUDGE: All right, thank you very much.

Mr. Art, anything further? I'll give you two minutes because we ran over a bit.

MR. ART: Thank you, Your Honors, just a few points. On -- on the point that Savory has sued both too early and too late I would say this, the issue of whether the pardon is favorable termination is conceded for purposes of this appeal, and The Court need not address it, but if The Court is interested as a matter of Illinois law, this pardon expunged Savor's conviction, that's the statute cited at the bottom of the pardon -- it provides for obliteration of his conviction as a matter of Illinois law -- law which satisfies Heck's requirement of expungement by executive order. They say that no judge has made a factual finding in Savory's favor. Savory's conviction was reversed because of an error. He is litigated the 5th Amendment claims throughout his case. He has now exonerating DNA evidence which a huge change from before.

FEMALE JUDGE: And can you remind me when that was found?

MR. ART: So the exonerating DNA evidence is just before his pardon, so it's after he's exhausted all his post-conviction remedies. So -- so the idea that these

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claims, you know, are -- are meritless is itself without merit, and the fact that they have been litigated so hard, means they would be precluded if he tried to bring them here.

MALE JUDGE: Is there anyway this court can bring an end to this litigation?

MR. ART: Bring an end?

MALE JUDGE: -- to this litigation.

MR. ART: I mean, I suppose this court could side with their accrual rule, but we don't think there is a basis in law to do that. What needs to happen now is his claims need to be litigated in the district court because he has finally achieved a favorable termination. They are -- they suggest that preclusion principles should apply here and that as it should be, but that ignores that Heck is designed to avoid those preclusion principals. Heck could have decided instead of deferring accrual that all of the claims would be jurisdictionally barred or subject to preclusion and -- and dead on arrival in federal court, but it didn't do that. Heck is establishing a favorable termination requirement to ensure that meritorious Section 1983 claims can be brought. The idea that there always has to be a federal remedy is an idea that has been rejected by The Supreme Court repeatedly, and we don't

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think there is an argue -- argument that supports the Defendant's position. McDunna has just reaffirmed

that favorable termination is required, no exceptions. It's time for Savory's day in court. This court should reverse and remand for further proceedings. Thank you, Your Honors.

FEMALE JUDGE: All right. Thank you, Mr. Art. Thank you, Mr. Sotos. We appreciate your arguments and The Court will take the case under advisement and we will be in recess.

(Thereupon, the proceedings ended.)

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CERTIFICATE OF TRANSCRIPTION

STATE OF FLORIDA:
COUNTY OF WEST PALM BEACH:

I, Tanya Diamond, certify that I was authorized to and transcribed the recording in the case of Johnnie Lee Savory versus Charles Cannon ; and that the foregoing transcript, pages 2 through 55, is a true transcript of said to the best of my ability.

I FURTHER CERTIFY that I am not a relative, employee, attorney, or counsel of any of the parties; nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

Dated this 5th day of February, 2020.

/s/Tanya Diamond
Tanya Diamond

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 17-cv-00204
Honorable Judge Gary Feinerman
JURY TRIAL DEMANDED

[Filed August 25, 2017]

JOHNNIE LEE SAVORY,	)
	)
Plaintiff,	)
	)
v.	)
	)
CHARLES CANNON, et al.,	)
	)
Defendants.	)
	)

DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Dated: August 25, 2017

Respectfully submitted,

/s/ Sara J. Schroeder
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[*Table of Contents and Table of Authorities Omitted in the Printing of this Appendix*]

All Defendants, by their attorneys, The Sotos Law Firm, P.C., move this Honorable Court pursuant to FED. R. CIV. P. 12(b) to dismiss Plaintiff's Complaint with prejudice and state:

FACTUAL BACKGROUND[1]

On January 17, 1977, Johnny Lee Savory ("Plaintiff") and his close friend, James Robinson ("James"), both 14-years-old, left their junior high school together to go to James's home. (Dkt. 1 at ¶ 27, *See also People v. Savory,* 82 Ill. App. 3d 767, 769 (1st Dist. 1980).[2] The two spent the bulk of the evening together at James's home until Plaintiff left at 11 p.m. with plans to meet up the next morning at James' home. *See People v. Savory,* 105 Ill.App. 3d 1023, 1026 (1st Dist. 1982). The next day, Noyalee Robinson ("Noyalee") and her ex-husband William Peter Douglas ("Douglas") left Noyalee's son, James, and her daughter Connie Cooper ("Connie") alive and well when they left for work, but found them murdered in their home when they returned later that afternoon. (Dkt. 1 at ¶ 21.) Defendants investigated and gathered physical evidence, including hairs from the hands of both

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[1] For purposes of this motion to dismiss only, Defendants take as true Plaintiff's well-pleaded allegations.

[2] "[A] court may consider, in addition to the allegations set forth in the complaint itself, documents that are attached to the complaint, documents that are central to the complaint and are referred to in it, and information that is properly subject to judicial notice." *Williamson v. Curan,* 714 F.3d 432, 436 (7th Cir. 2013), *citing Geinowsky v. City of Chicago,* 675 F.3d 743, 745 n. 1 (7th Cir. 2012); *Ennenga v. Starns,* 677 F.3d 766, 773 (7th Cir. 2013) (taking judicial notice of public record permissible on motion to dismiss.)

victims, blood-stained clothing and bedsheets, fingerprints from throughout the house, and blood smeared on a bathroom light switch. (*Id.* at ¶ 22.) Defendants investigated several leads and questioned several suspects; no evidence suggested any of these suspects was the murderer. (*Id.* at ¶¶ 23-25.)

One week after the murders, Defendants approached Plaintiff at his school to interview him about the crime. (*Id.* at ¶¶ 29-31.) Plaintiff voluntarily accompanied police to the police station for further questioning. *See Savory*, 82 Ill.App. 3d at 769. Defendants interrogated Plaintiff about the murders. (Dkt. 1 at ¶ 32.) Plaintiff asserts he falsely confessed to the murders as a result of Defendants' physical and psychological coercion. (*Id.* at ¶¶ 32, 51.) Shortly after confessing, Plaintiff recanted and professed his innocence. (*Id.* at ¶ 54.) Defendants documented the interrogation and confession in allegedly false police reports. (*Id.* at ¶ 52.)

Subsequently, Plaintiff's confession was used against him in his first criminal trial where he was convicted of both murders. *See Savory*, 82 Ill.App. 3d at 775. However, Plaintiff's conviction was reversed and remanded for retrial on the basis his confession was obtained in violation of *Miranda*. (*Id.*) During Plaintiff's second trial, Plaintiff alleges that Defendants pressured and fed facts to three witnesses – Frank Ivy, Tina Ivy, and Ella Ivy – to give false statements and testimony implicating Plaintiff in the murders. (Dkt. 1 at ¶ 58.) Plaintiff also claims Defendants fabricated physical evidence, in particular a pair of blue pants with a blood stain that was

purported to be Connie's blood. (*Id.* at ¶ 63.) Plaintiff was again convicted of both murders. *See Savory,* 105 Ill.App. 3d at 1033.

Since the conclusion of the second trial, Defendants are alleged to have destroyed the hairs, fingernail clippings, and blood stain from the blue pants in order to prevent Plaintiff from conducting DNA testing which would prove his innocence. (Dkt. 1 at ¶¶ 59, 64-66.)

After nearly thirty years in prison, Plaintiff was released on parole in 2006. (*See* Ex. A, Court Order Granting Request for DNA Testing, *People v. Savory,* Case No. 77 C 565 (Aug. 6, 2013) (Khouri, J.). On December 6, 2011, Plaintiff's parole was terminated. (*Id.*) A little over four years later on January 12, 2015, then-Governor Pat Quinn issued Plaintiff a general pardon, "acquitt[ing] and discharg[ing] [him] of and from all further imprisonment" and restoring all rights of citizenship "except to ship, transport, receive or possess firearms, which were forfeited by his earlier conviction." (Dkt. 1 at ¶ 86; Ex. B, State of Illinois Clemency Certificate.) On January 11, 2017, Plaintiff filed this lawsuit.

LEGAL STANDARD

Plaintiff's Complaint must comply with FED. R. CIV. P. 8(a)(2) by providing "a short and plain statement of the claim showing that the pleader is entitled to relief," such that the defendant is given "fair notice of what the [ ] claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). To survive a motion to dismiss brought pursuant to FED.

R. CIV. P. 12(b)(6), a Complaint "must contain sufficient factual matter, accepted as true, 'to state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), *quoting Twombly*, 550 U.S. at 570, (2007). If it only offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action," the Complaint fails to satisfy the pleading requirements and dismissal is appropriate. *Id., quoting Twombly,* 550 U.S. at 555. A complaint that merely alleges facts demonstrating the *possibility*, rather than the *plausibility*, that a claim exists, therefore, is insufficient. *Twombly,* 550 U.S. at 555. Indeed, a claim containing allegations that are "*merely consistent with"* a defendant's liability "stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.* at 557; *Iqbal,* 556 U.S. at 678 (emphasis added).

When evaluating a motion to dismiss under Rule 12(b)(6), a court must accept as true all well-pleaded material facts and must draw all reasonable inferences from those facts in the light most favorable to the pleader. *Perkins v. Silverstein,* 939 F.2d 463, 466 (7th Cir. 1991). A court is not obligated, however, to accept as true a legal conclusion couched as a factual allegation or unsupported conclusions of fact. *Twombly*, 550 U.S. at 570.

Additionally, "[a]lthough the statute of limitations is ordinarily an affirmative defense that must be pleaded under FED. R. CIV. P. 8(c), a district court may dismiss under Rule 12(b)(6) something that is indisputably time barred." *Small v. Chao,* 398 F.3d 894, 898 (7th Cir. 2005); *see also Ennenga v. Starns,* 677 F.3d 766, 773 (7th Cir. 2012) ("[A] motion to

dismiss on statute of limitation grounds qualifies as a motion to dismiss for failure to state a claim.")

II. PLAINTIFF'S FEDERAL CLAIMS ARE TIME-BARRED AND FAIL TO STATE A CLAIM FOR WHICH RELIEF MAY BE GRANTED.

A. Plaintiff's Coerced Confession Claims in Counts I and II are Time-Barred.

Plaintiff coerced confession claims alleging violation of his Fifth and Fourteenth Amendment are time-barred. The statute of limitations period for a Section 1983 claim is determined by reference to state law personal injury torts. *See Wilson v. Garcia,* 471 U.S. 261, 266-76 (1985). "In Illinois, the statute of limitations for personal injury actions is two years, and so Section 1983 claims litigated in federal courts in Illinois are subject to that two year period of limitations." *Jenkins v. Village Of Maywood*, 506 F.3d 622, 623 (7th Cir. 2007). Although state law governs the statute of limitations, federal law controls when the claim accrues. *Hobbs v. Cappelluti*, 899 F.Supp.2d 738, 755 (N.D. Ill. 2012) (citing *Wallace v. Kato*, 549 U.S. 384, 388 (2007)). A Section 1983 claim accrues under federal law "when the plaintiff has a complete and present cause of action, that is, when the plaintiff can file suit and obtain relief." *Wallace*, 549 U.S. at 388 (internal quotation marks and citation omitted); *see also Kelly v. City of Chicago*, 4 F.3d 509, 511 (7th Cir. 1993) (Section 1983 claims accrue when plaintiff knows or should know her rights have been violated.)

A self-incrimination claim under the Fifth and Fourteenth Amendments accrues when the confession

is used in a criminal proceeding. *See Chavez v. Martinez,* 538 U.S. 760, 767 (2003). Here, Plaintiff's confession was used against him at his first criminal trial in 1977; consequently he was convicted of both murders. *See Savory,* 82 Ill.App. 3d at 775. Though Plaintiff should have known his constitutional rights had been violated in 1977, the principles of *Heck v. Humphrey*, 512 U.S. 477 (1994) would have prevented him from filing any Section 1983 claims based upon the confession at the time.

In *Heck,* the Court held a plaintiff may not bring a Section 1983 claim that implies the invalidity of his criminal conviction, until he can first prove the underlying conviction was "reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of *habeas corpus*[.]" *Heck*, 512 U.S. at 487. Until the plaintiff can show the underlying conviction has been favorably terminated, *Heck* defers accrual on such claims. *See Moore v. Burge*, 771 F.3d 444, 446 (7th Cir. 2014) (any claims based on proceedings in court are dismissed under *Heck* until the conviction is set aside.)

In this case, the reversal of Plaintiff's first conviction, based upon the suppression of his confession, eliminated the *Heck* bar and paved the way for a lawsuit premised upon claims of coerced confession. Plaintiff had received a favorable termination to his conviction and he was now free to bring all Section 1983 claims derivative of his coerced confession against the Defendants. *See Savory,* 82

Ill.App. 3d at 775.[3] Accordingly, Plaintiff had a two year window – from April 4, 1980 (the day his first conviction was reversed) until April 4, 1982 - to timely file these claims. He missed that window by more than thirty years when he filed his coerced confession claims on January 11, 2017. Accordingly, Counts I and II should be dismissed with prejudice.

B. Plaintiff's Federal Malicious Prosecution Claim in Count III Fails to State A Claim.

In Footnote 1 of his Complaint, Plaintiff acknowledged that the Seventh Circuit "currently holds that a so-called federal malicious prosecution claim is not actionable under 42 U.S.C. § 1983[,]" but indicated that he plead the claim to preserve the matter pending the Supreme Court's decision in *Manuel v. City of Joliet,* 137 S. Ct. 911 (2017). (Dkt.1, Count III, n.1.) The Supreme Court has since decided *Manuel*, "confirming that a Fourth Amendment claim for unlawful post-arrest, pretrial detention exists but declining to address whether such a claim resembles malicious prosecution." *Walker v. White*, 2017 WL 2653078, at *5 (N.D. Ill. June 20, 2017) (citing *Manuel*, 137 S. Ct. at 920-22). Plaintiff, however, does not state a Fourth Amendment claim for unlawful pre-trial detention; instead he has attempted to plead a Fourth Amendment violation under a theory of federal malicious prosecution.

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[3] A second criminal trial subsequently proceeded without the use of Plaintiff's confession; he was again convicted of both murders. *See Savory,* 105 Ill.App. 3d at 1027.

Thus, it is still well-settled in the Seventh Circuit, even in light of the Supreme Court's ruling in *Manuel,* that where a state law claim for malicious prosecution exists, such as in Illinois, a federal malicious prosecution claim is not cognizable under 42 U.S.C. § 1983. *See Walker,* 2017 WL 2653078 at *5 (finding "[plaintiff] pled his claim under malicious prosecution which is not entirely consistent with *Manuel*"); *see also Parish v. City of Chicago,* 594 F.3d 551 (7th Cir. 2010) (holding the existence of malicious prosecution tort claim under state law precluded any federal constitutional theory of malicious prosecution under Section 1983); *Newsome v. McCabe,* 256 F.3d 747, 751 (7th Cir. 2001) (same). Therefore, Count III should also be dismissed with prejudice.

C. Plaintiff's Due Process Claim in Count IV is both Time-Barred and Fails to State a Claim for Which Relief May be Granted.

1. Plaintiff's failure to sue within two years of his release from parole in 2011 renders his due process claim untimely.

Plaintiff's due process claim alleges that Defendants' actions deprived him of a fair criminal trial causing him to be wrongfully convicted. (Dkt. 1, ¶ 105.) It is well understood that a plaintiff asserting the unconstitutionality of his conviction must have access to a federal remedy. If the plaintiff is in-custody of the court, either through imprisonment or mandatory supervision, his exclusive federal remedy to challenge the fact or duration of his conviction or sentence is the *habeas corpus* statute, 28 U.S.C. § 2254. *See Wood v. Hale*, 2014 WL 4803107, at *1 (N.D. Ill.

Sept. 26, 2014) (A prisoner may not challenge his confinement through Section 1983 civil rights action, instead "the writ of *habeas corpus* is the exclusive civil remedy for prisoners seeking release from custody") (citing *Preiser v.Rodriguez*, 411 U.S. 475, 489 (1973)). On the other hand, a plaintiff who has been released from prison and mandatory supervision, may use 42 U.S.C. § 1983 to challenge the constitutionality of his conviction, without satisfying *Heck's* requirement that his conviction be "reversed, expunged, declared invalid, or called into question by a writ of *habeas corpus*," *Heck,* 512 U.S. at 487, because he no longer has access to *habeas corpus* relief. *See Spencer v. Kemna*, 523 U.S. 1, 21 (1998) (Souter, J. concurring) ("[A] former prisoner, no longer in custody, may bring a Section 1983 action establishing the unconstitutionality of a conviction or confinement without being bound to satisfy a "favorable termination" requirement that it would be impossible as a matter of law for him to satisfy"); *see also Dewalt v. Carter,* 224 F.3d 607 (7th Cir. 2000) (same); *Burd v. Sessler*, 702 F.3d 429, 435 (7th Cir. 2012) (same); *Simpson v. Nickel*, 450 F.3d 303, 307 (7th Cir. 2006) (same). Here, Plaintiff has had access to 42 U.S.C § 1983 since December 6, 2011, the day Plaintiff's parole ended. (*See* Ex C, Court Order, ¶ 1.) On that date, Plaintiff was no longer in custody for purposes of *habeas* relief and *Heck* was no longer a bar to his due process claims under Section 1983.

To explore further, so that federal civil actions are not used to undermine the integrity of parallel criminal proceedings, Section 1983 claims implying the invalidity of a plaintiff's underlying conviction benefit from deferred accrual under *Heck* until the plaintiff can

demonstrate the conviction has been invalidated. *See Heck* at 487 ("[W]hen a state prisoner seeks damages in a [Section] 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated.")

Granted, the *Heck* Court, in dicta and a footnote, opined that the *Heck* bar should also apply to plaintiffs no longer in custody: "We think the principle barring collateral attacks … is not rendered inapplicable by the fortuity that a convicted criminal is no longer incarcerated." *Heck,* 512 U.S. at 490, n. 10. But Justice Souter, in a concurrence joined by three Justices, disagreed and expressed that plaintiffs who have completed "probation, or parole, or who discover (through no fault of their own) a constitutional violation after a full expiration of their sentences" should not be bound by *Heck's* "favorable termination" requirement because they no longer have access to *habeas corpus* remedies. *Heck,* 512 U.S. at 500 (Souter, J., concurring). Four years later, in *Spencer v. Kemna*, five Justices, including Justices Souter, O'Connor, Ginsberg, Breyer and Stevens, in concurring and dissenting opinions, reaffirmed their belief that "a former prisoner, no longer in custody, may bring a Section 1983 action establishing the unconstitutionality of a conviction or confinement without being bound to satisfy a "favorable termination" requirement that it would be impossible as a matter of law for him to satisfy." *Spencer,* 523 U.S. at 19-24.

The pronouncement of the five Justices in *Spencer* struck a chord with our own Seventh Circuit. In *Dewalt v. Carter,* 224 F.3d 607, 616-18 (7th Cir. 2000), the court explained it would not apply *Heck* in a way that would "contravene the pronouncement of five sitting Justices…[who] hold the view that a Section 1983 action must be available to challenge the constitutional wrongs where federal *habeas* is not available."[4] *See also*, *Burd v. Sessler*, 702 F.3d 429, 435 (7th Cir. 2012) ("We have held that, where a plaintiff cannot obtain collateral relief to satisfy *Heck's* favorable termination requirement, his action may proceed under Section 1983 without running afoul of *Heck*"); *Simpson v. Nickel*, 450 F.3d 303, 307 (7th Cir. 2006) (The *Heck* doctrine is "limited to prisoners who are 'in custody' as a result of the defendants' challenged acts, and who therefore are able to seek collateral review. Take away the *possibility* of collateral review and § 1983 becomes available.")

Here, it is indisputable that on December 6, 2011, the day Plaintiff's parole terminated, Plaintiff was no longer in custody for purposes of *habeas corpus* relief. *See Burd*, 702 F.3d at 435 (holding once the plaintiff's supervised release expired, any subsequent *habeas corpus* petition would be foreclosed due to failure to meet the 'in-custody' requirement at the time of filing.)

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[4] *Dewalt v. Carter,* 224 F.3d 607 (7th Cir. 2000), explicitly overruled *Anderson v. County of Montgomery,* 111 F.3d 494 (7th Cir. 1997) and *Stone-Bey v. Barnes*, 120 F.3d 718 (7th Cir. 1997), which both held a *Heck* bar applied to plaintiffs despite the fact that *habeas corpus* relief was unavailable to either plaintiff at the time of the filing.

Cf. *Cochran v. Buss,* 381 F.3d 637, 640 (7th Cir. 2004) ("It has long been established that 'custody' does not require physical confinement"); *Jones v. Cunningham*, 371 U.S. 236 (1963) (holding a person free on parole was "in custody" of the parole board for purposes of *habeas corpus*); *Hensley v. Mun. Court*, 411 U.S. 345, 351–52 (1973) (ruling that individuals released on bail or on their own recognizance pending trial or pending appeal are "in custody.") Consequently, once Plaintiff was no longer in custody as of Dec. 6, 2011, *Heck* no longer barred his Section 1983 due process claim and the statute of limitations began to run. *See Hobbs v. Cappulleti*, 899 F.Supp. 2d 738, 755 (N.D. Ill. 2012) (A Section 1983 claim accrues – and the clock on the statute of limitations begins to run – "when the plaintiff has a complete and present cause of action, that is, when the plaintiff can file suit and obtain relief). Plaintiff thus had until December 6, 2013, two years from the date he was released from parole, to file his due process claims against Defendants. *See Jenkins v. Village. of Maywood*, 506 F.3d 622, 623 (7th Cir. 2007) (Section 1983 actions litigated in federal courts in Illinois are subject to a two-year period of limitations) (citing 735 ILCS 5/13-202). Plaintiff missed that window by more than three years when he untimely filed this lawsuit on January 11, 2017. Subsequently, Plaintiff's Section 1983 due process claim is time-barred and should be dismissed with prejudice.

2. Plaintiff's *Brady* and evidence destruction allegations fail to state a cognizable claim.

Even if this Court finds Plaintiff's due process claim is timely, he still fails to state a claim for withholding and destruction of exculpatory evidence. Defendants acknowledge that Plaintiff's allegations as to fabricating evidence and falsifying police reports (Dkt. 1 at ¶ 107), are sufficiently plead aside from the timing deficiency.

a. Plaintiff's Due Process claim for destruction of evidence fails.

Plaintiff alleges Defendants destroyed a blood stain from a pair of Plaintiff's pants, hairs found in the victims' hands, and fingernail clippings from the victims. (Dkt. 1 at ¶¶ 64-66.) Yet the supposedly *destroyed* evidence was in existence and made available to Plaintiff during both of his criminal trials. *See Savory,*82 Ill.App. 3d at 771; *Savory* 105 Ill.App. 3d at 1032. Thus, Plaintiff's claim, as it relates to destroying evidence, is not fairly characterized as a *Brady* claim, but rather a failure to preserve evidence claim.

"[T]he Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." *Arizona v. Youngblood*, 488 U.S. 51, 57 (1988). To state a due process claim based on failure to preserve evidence, a plaintiff must show materiality of the evidence, prejudice to the accused, and bad faith by the

government. *Armstrong v. Daily*, 786 F.3d 529, 549 (7th Cir. 2015).

As explained in *Youngblood:*

> We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, *i.e.,* those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant. We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.

Youngblood, 488 U.S. at 58.

Put into context, a failure to preserve "potentially useful" evidence does not violate due process "*unless a criminal defendant can show bad faith on the part of the police.*" *Illinois v. Fisher*, 540 U.S. 544, 547-48 (2004) (emphasis original).

Here, Plaintiff offers only a single, conclusory statement that "[i]n the alternative, the Defendants destroyed this potentially exculpatory evidence in bad faith." (Dkt. 1 at ¶ 107.) This conclusory statement, without any facts to back it up, fails to make Plaintiff's claim plausible. Plaintiff is in essence asking this Court to draw an inference that after having used the evidence in trial to secure Plaintiff's conviction, one or

more of the thirteen Defendant Officers knowingly destroyed the evidence in bad faith. First, there is no permissible inference from any of the facts plead in Plaintiff's Complaint to suggest that it was one of the Defendant Officers as opposed to any other person who might have lost the evidence. Second, it was thirty-two years after Plaintiff's conviction that his petition for DNA testing on the following five items was granted: (1) blood stained knife; (2) fingernail scrapings from and hairs found in victims' hands; (3) light switch plate; (4) vaginal swabs from Connie Cooper; and (5) blood stained pants. (Ex. A, Court Order Granting Request for DNA Testing (Aug. 6, 2013) (Kouri, J.)). For fourteen years prior to this order, both the Illinois Appellate Court and the Supreme Court of Illinois informed Plaintiff that the blood stained pants and fingernail clippings were not materially relevant to his claim of innocence. *See People v. Savory,* 309 Ill.App. 3d 408, 415-416 (3d Dist. 1999); *People v. Savory,* 197 Ill. 2d 203, 214-215 (2001).

Following *Youngblood's* reasoning, requiring the Defendant Officers to maintain evidence for thirty-two years goes well beyond their obligation "to preserve evidence to reasonable bounds," especially when higher courts within this state had repeatedly deemed the evidence merely useful and not materially relevant to Plaintiff's claim of innocence. *Youngblood,* 488 U.S. at 58.

In sum, Plaintiff fails to show that the evidence had exculpatory value prior to it being "destroyed" and he fails to show any plausible connection that the missing

evidence is no longer available due to the bad faith or alleged action of any of the Defendant Officers.

b. Plaintiff's Due Process claim for withholding exculpatory evidence fails.

The Supreme Court, in *Brady v. Maryland,* 373 U.S. 83 (1963), held that the Due Process clause of the Fourteenth Amendment requires the government to disclose all exculpatory evidence to the defense. *Id.* at 87. To establish a due process claim under *Brady*, a plaintiff must show that "(1) the evidence at issue is favorable to the accused, either because it was exculpatory or impeaching; (2) the evidence must have been suppressed by the government, and (3) there is a reasonable probability that prejudice has ensued." *Parish v. City of Chicago,* 594 F.3d at 554.

Within the context of *Brady*, evidence is considered "suppressed" only in situations where the evidence could not have been obtained by the defendant with reasonable diligence. *Carvajal v. Dominguez,* 542 F.3d 561,567 (7th Cir. 2008). First, evidence regarding his own confession does not support a *Brady* violation, *see Saunders-El v. Rohde*, 778 F.3d 556, 562 (7th Cir. 2015) ("*Brady* cannot serve as the basis of a cause of action against police officers for failing to disclose the circumstances surrounding a coerced confession") (quoting *Sornberger v. City of Knoxville*, 434 F.3d 1006, 1026 (7th Cir. 2006). Rather, Plaintiff's only other allegations regarding this claim are that Defendants withheld witness statements and witness testimony that they knew to be false and perjured. (Dkt. 1 at ¶ 107.)

Specifically, Plaintiff claims that Defendants withheld information surrounding the statements of the Ivy witnesses. However, at minimum, Plaintiff knew Frank, Tina and Ella Ivy's witness testimony was allegedly false when they testified at his second trial because they implicated him in the murders. There are no allegations in the Complaint that Plaintiff was prevented from learning the circumstances surrounding the statements and testimony of the three Ivy witnesses. If Plaintiff needed the information about the circumstances surrounding the witnesses' testimony and statements, all Plaintiff had to do was interview them. *See Harris v. Kuba,* 486 F.3d 1010, 1015 (7th Cir. 2007) (*Brady* does not "place any burden upon the government to conduct a defendant's investigation or assist in the presentation of the defense's case.") Accordingly, Plaintiff's *Brady* claim fails. *See Id.*, at 1016 (Plaintiff's Section 1983 claim failed because without demonstrating suppression, there was no *Brady* violation.)

Independent of untimeliness, Plaintiff cannot sustain his due process claims for destruction or withholding of exculpatory evidence.

II. BECAUSE PLAINTIFF FAILS TO PLEAD A CONSTITUTIONAL VIOLATION, HIS DERIVATIVE CONSTITUTIONAL CLAIMS FAIL AS WELL.

A. Plaintiff's Failure to Intervene Claim in Count V is Inadequate.

To start, to the extent this Court rules any of Plaintiff's underlying constitutional claims are

untimely, his claims based upon a failure to intervene in the alleged misconduct would also be untimely. Moreover, to the extent the court agrees that Plaintiff's due process claims based upon withholding and destruction of exculpatory evidence fail to set forth cognizable constitutional violations, so go his derivative failure to intervene claims. *See Harper v. Albert*, 400 F.3d 1052, 1064 (7th Cir. 2005) ("In order for there to be a failure to intervene, it logically follows that there must exist an underlying constitutional violation"); *Gordon v. Devine,* 2008 WL 4594354, at *6 (N.D. Ill. 2008) (failure to intervene is only timely to the extent it encompasses timely Constitutional actions.)

Moreover, should any of Plaintiff's underlying Constitutional claims remain, there is no plausible basis for Plaintiff's failure to intervene claim. An officer can be liable under Section 1983 if he had reason to know that another officer was committing a constitutional violation against the plaintiff and he had a realistic opportunity to intervene to prevent the harm from occurring. *Chavez v. Illinois State Police*, 251 F.3d 612, 652 (7th Cir. 2001); and *Yang v. Hardin,* 37 F.3d 282, 285 (7th Cir. 1994). Here, Plaintiff fails to identify the conduct that required intervention; whether Defendants had knowledge of the illegal conduct, or whether these Defendants had a realistic opportunity to prevent it. Instead, Plaintiff merely and vaguely alleges that "one or more Defendants stood by without intervening to prevent the violation of Plaintiff's constitutional rights, even though they had the duty and opportunity to do so." (Dkt. 1, ¶ 115.)

Plaintiff has failed to allege which Defendants knew that another Defendant was violating Plaintiff's constitutional rights and had "a realistic opportunity to intervene to prevent the harm from occurring." *Abdullahi v. City of Madison,* 423 F.3d 763, 774 (7th Cir.2005) (*quoting Yang v. Hardin,* 37 F.3d at 285). Plaintiff has utterly failed in his obligation to "adequately plead[ ] personal involvement" of each defendant. *Brooks v. Ross,* 578 F.3d 574, 580 (7th Cir. 2009). Plaintiff makes it "virtually impossible to know which allegations of fact are intended to support which claim(s) for relief," *Custom Guide v. CareerBuilder, LLC,* 813 F.Supp. 2d 990, 1001 (N.D. Ill. 2011), where his first statement in the first paragraph of each count reads "Plaintiff incorporates each paragraph of this Complaint as if fully restated here." (Dkt. 1, ¶¶ 88, 94, 99, 104, 114, 119, 131, 136, 139, 145, 148.) "Courts have discouraged this type of 'shotgun' pleading where each count incorporates by reference all preceding paragraphs and counts of the complaint notwithstanding that many of the facts alleged are not material to the claim, or cause of action, appearing in a count's heading. Such pleadings make it virtually impossible to know which allegations of fact are intended to support which claim(s) for relief." *Custom Guide v. CareerBuilder, LLC,* 813 F.Supp. 2d at 1001 (citation, brackets, and internal quotation marks omitted).

Consequently, Plaintiff's failure to intervene claim is unclear and does not provide a "short and plain statement" that puts specific Defendants on notice that they may be liable under this Count.

B. Plaintiff Has Not Stated a *Monell* claim in Count VI.

In order to survive a motion to dismiss, a *Monell* claim requires a plaintiff to plead an underlying Constitutional claim. *See City of Los Angeles v. Heller,* 475 U.S. 796, 799 (1986) (holding that if there is no violation of the Plaintiff's constitutional rights by a police officer, "it is inconceivable" that the municipality could be liable pursuant to a *Monell* claim.) Without allegations sufficiently setting forth actionable constitutional violations in the Section 1983 counts, Plaintiff's *Monell* claims based on those counts fail as a matter of law.

As previously discussed, Plaintiff fails to adequately plead an underlying Constitutional violation; his coerced confession claims are time-barred and his due process claim is either insufficiently plead or time-barred as well. Thus, if there is no underlying Constitutional violation, this derivative claim must be dismissed as a matter of law. *See Treece v. Hochstetler,* 213 F.3d 360, 364 (7th Cir. 2000) (municipality liability for a constitutional injury under *Monell* "requires a finding that the individual officer is liable on the underlying substantive claim.")

III. PLAINTIFF'S STATE CLAIMS ALSO FAIL DUE TO IMPROPER PLEADING AND UNTIMELINESS.

A. Plaintiff's Claim for Malicious Prosecution in Count VII Fails Because it is Unsupported as a Matter of Law, and Alternatively, is Untimely.

1. Plaintiff's criminal prosecution was not terminated in a manner indicative of innocence.

To prevail on a malicious prosecution claim under Illinois law, a plaintiff must allege facts showing the termination of the criminal proceeding in a manner indicative of plaintiff's innocence. *Walker v. White,* 2017 WL 2653078, at *5 (N.D. Ill. June 20, 2017), *citing Swick v. Liataud*, 169 Ill.2d 504, 512-513 (1996). Conversely, "a malicious prosecution action cannot be predicated on underlying criminal proceedings which were terminated in a manner *not* indicative of the innocence of the accused." *Swick v. Liataud*, 169 Ill.2d at 511 (1996) (emphasis added). Here, Plaintiff's general pardon from Governor Quinn in no way terminated the underlying criminal proceedings in a manner indicative of his innocence.

"Since at least 1977 Illinois has adhered to the view that two forms of pardon are presently used by the Governor of this state, one based upon the innocence of the defendant and the other merely pardoning the defendant without reference to his innocence." *Walden v. City of Chicago*, 391 F. Supp. 2d 660, 671 (N.D. Ill. 2005) (internal quotations and citation omitted); *see*

also Shakari v. Astrue, 825 F.Supp. 2d 948, 952 (N.D. Ill. 2011) ("'[A] general pardon merely releases an inmate from custody and supervision, and it does not act to erase or negate an offender's conviction'") (quoting *Walden* at 671); *People v. Chiappa,* 53 Ill.App.3d 639, 641 (1977) ([A] general pardon does not absolve the defendant from guilt but forgives him for having committed the offense).

A clear illustration of the two pardons can be found in *Walden,* 391 F. Supp. 2d at 671-73. There the plaintiff received two pardons for the same crime: a general pardon in 1978 from then-Illinois Governor James Thompson and a pardon of innocence in 2003 from then-Illinois Governor George Ryan. *Id.* At issue was whether the plaintiff timely filed his Section 1983 lawsuit in 2004 in light of the 1978 general pardon. Defendants argued the 1978 pardon favorably terminated plaintiff's underlying convictions which removed any *Heck* bar and started the two-year statute of limitations. *Id.* The court, "following a number of Illinois state court cases, including *People v. Thon,* 319 Ill.App.3d 855 (2001), [held] that the 1978 pardon did not result in a termination of the proceedings in [p]laintiff's favor, but that the 2003 pardon did. As a result, the [ ] causes of action accrued in 2003." *Walden* at 680. "Unless the pardon specifically and explicitly states that it is based on the innocence of the defendant, the pardon is to be considered general, and thus does not absolve the criminal defendant of guilt. *Id.* Consequently, the guilt of the plaintiff in the underlying conviction is "absolved by a pardon only where the same [pardon] states that it is based upon the innocence of the defendant. [A] general pardon ...

does not absolve the defendant from guilt but forgives him for having committed the offense." *Id.* at 672.

Here, Plaintiff cannot plausibly allege the criminal proceedings against him were terminated in a manner indicative of his innocence, when (1) clearly established law says a general pardon does not absolve the Plaintiff from guilt, and (2) the general pardon issued to him specifically declines to reinstate his Second Amendment right "to ship, transport, possess, or receive firearms, which may have been forfeited by the conviction." (*See* Ex. B, Certificate of Clemency.) An innocent man, even one who is plausibly innocent, does not have his Second Amendment rights stripped by the Governor of Illinois as the result of a crime he supposedly did not commit; particularly when the Governor had it within his power to grant a pardon based on innocence. Accordingly, the malicious prosecution claim should be dismissed because Plaintiff's criminal case was not terminated in a manner indicative of his innocence.

2. Alternatively, Plaintiff's malicious prosecution claim is time-barred.

Even if Plaintiff's malicious prosecution claim is properly plead, it is subject to the one-year limitations period found in the Illinois Tort Immunity Act and so it is untimely. *See* 745 ILCS 10/8-101(a) (requires civil actions against local entities and its employees to be "commenced within one year from the date the injury was received or the cause of action accrued"); *Grzanecki v. Cook County Sheriffs Police Dept.,* 2011 WL 3610087, at *2 (N.D. Ill. Aug. 16, 2011) ("[P]laintiff's [state] claim for malicious prosecution is subject to the one-year

statute of limitations in the Tort Immunity Act"). A malicious prosecution claim does not accrue until the criminal charges have been dropped or otherwise disposed of in plaintiff's favor. *Id; See also Jones v. Connors,* 2012 WL 4361500, at *4 (N.D. Ill. Sept. 20, 2012) (A cause of action for malicious prosecution does not accrue until the criminal proceedings upon which it is based have been terminated in the plaintiff's favor").

Accordingly, if this Court does find Plaintiff's general pardon terminated the underlying criminal conviction in Plaintiff's favor, his malicious prosecution claim accrued on January 12, 2015 and it expired one year later. Therefore, his Jan. 11, 2017 filing date is untimely.

B. Plaintiff's Intentional Infliction of Emotional Distress ("IIED") in Count VII is Insufficiently Plead and Time-Barred.

1. Plaintiff's IIED claim is insufficiently plead.

To the extent IIED claim is based upon any of the same conduct that forms the basis of his malicious prosecution claim, he cannot bring the IIED claim until the underlying criminal proceeding has been terminated in his favor. *See Parish v. City of Elkhart,* 613 F.3d 677, 684 (7th Cir. 2010) (allowing an IIED claim under these circumstances allows an impermissible collateral attack on a presumptively valid criminal conviction.) As discussed *supra*, if the Court finds Plaintiff's underlying conviction has not

been terminated in his favor, his IIED claim fails under these circumstances as well.

2. Plaintiff's IIED Claim is Time-Barred.

Plaintiff's IIED claim is subject to the one-year statute of limitations placed on tort claims by the Illinois Tort Immunity Act. 745 ILCS 10/8-101. Under *Bridewell v. Eberle*, the Seventh Circuit made clear that an IIED claim based upon an arrest and prosecution accrues at the time of the arrest. 730 F.3d 672, 678 (7th Cir. 2013) Further, the Seventh Circuit foreclosed the argument that an IIED constitutes an ongoing or continuing claim for injury. *Id.* ("[T]he idea that failing to reverse the ongoing effects of a tort restarts the period of limitations has no support in Illinois law – or federal law either"). As such, Plaintiff had one year from the date of his arrest in 1977 to file his IIED claim. Plaintiff is well beyond the statute of limitations and his IIED claim must be dismissed with prejudice.

C. Generalized Allegations of Conspiracy in Count IX Are Untimely And Do Not State a Claim Upon Which Relief Can Be Granted.

To start, to the extent this Court rules any of Plaintiff's underlying constitutional claims are untimely, his claim of conspiracy would also be untimely. Moreover, Plaintiff's state civil conspiracy claim should be dismissed because Plaintiff has failed to plausibly allege the existence of any conspiracy. A civil conspiracy claim is derivative of the underlying tort and cannot stand alone. *See Farwell v. Senior Services Associates, Inc.,* 2012 IL App (2d) 110669 at

¶ 22 (May 22, 2012) ("[A] plaintiff's civil conspiracy cannot stand where there are no underlying intentional torts that defendants could have conspired to perform.") Because the claims upon which Plaintiff's conspiracy claim is based (malicious prosecution and IIED) warrant dismissal, the civil conspiracy claim must be dismissed. (Dkt.1 at ¶ 142; discussed *supra*).

Furthermore, Plaintiff has not adequately pled that Defendants had reached some agreement with each other to violate Plaintiff's rights. According to Plaintiff, "[a]s described more fully in the preceding paragraphs, the Defendants, acting in concert with other co-conspirators, known and unknown, reached an agreement among themselves to frame Plaintiff for a crime he did not commit and conspired by concerted action to accomplish an unlawful purpose and/or to achieve a lawful purpose by unlawful means. In addition, these co-conspirators agreed among themselves to protect one another from liability for depriving Plaintiff of these rights." (Dkt. 1at ¶ 140.)

A complaint cannot simply provide labels, conclusions, and a formulaic recitation of the elements of a claim; the complaint must allow the court to draw the reasonable inference that the defendant is liable. *Iqbal,* 556 U.S. at 678. Plaintiff "must allege sufficient facts to bring his claim, and conclusory allegations that the defendants agreed to achieve some illicit purpose are insufficient to sustain his claim." *Farwell,* 2012 IL App (2d) 110669 at ¶ 22. To be clear, throughout his entire Complaint, Plaintiff never identifies a single Defendant having performed any specific wrongdoing. All allegations of wrongdoing are alleged against each

and every Defendant – as if "Defendants" was a single person who did all the misconduct at all times.

In particular, Plaintiff's conspiracy claim, alleged against all conspirators – known and unknown – is essentially a "catch-all" where each and every Defendant and unsued co-conspirator is alleged to have conspired regardless of whether they had any role in the investigation or prosecution of Plaintiff's case or even knew of Plaintiff's existence. In *Andrews v. Burge*, 660 F.Supp. 2d 868, 879-80 (N.D. Ill. 2009), a comparable Section 1983 lawsuit, the court dismissed a similar conspiracy claim:

> "Indiscriminately incorporating every paragraph of every count in other counts…can result, as it does here, in a complaint that does not tell some of the defendants why they are liable. The structure of this complaint is typical of the problems created by the amorphous pleading. There are very specific allegations about what certain named police officers and a prosecutor did with [the plaintiff.] The further up the chain of command the complaint goes, the more vague are the grounds for individual liability. It does not help to make equally general allegations that all defendants conspired with all other defendants and everything alleged against one is alleged against all. In a simpler case, a general conspiracy claim is adequate but not here."

In this case Plaintiff does not even go so far as *Andrews* to allege specific allegations against specific Defendants. Instead, Plaintiff does nothing more than recite conclusory statements that all Defendant Officers and all other unknown co-conspirators conspired with one another. In doing so, Plaintiff fails to inform each Defendant what it is they allegedly did that would justify a finding of liability against them.

Thus, because Plaintiff's conspiracy allegations are conclusory, speculative, and implausible, and because his underlying constitutional claims are not actionable, Plaintiff's conspiracy claim must be dismissed.

D. Plaintiff's *Respondeat Superior* and Indemnification Claims in Count X and XI Should be Dismissed.

Plaintiff's *respondeat superior* claim in Count X seeks liability against the City, alleging it is "liable as principal for all torts committed by its agents," the Defendant Officers. (Dkt. 1 at ¶ 147.) *Respondeat superior* liability, however, is "entirely derivative." *Moy v. Cook County,* 159 Ill.2d 519, 524 (1994). Thus, to the extent the claims against the Defendant Officers are dismissed, this claim must also be dismissed against the City. *See Kirk v. Michael Reese Hospital and Medical Center,* 117 Ill.2d 507, 532 (1987) (granting dismissal of claim against principal where Plaintiff failed to state a claim against the agent.)

Likewise, Plaintiff's Count XI seeks statutory indemnification against the City based upon the actions of the Defendant Officers. (Dkt. 1 at ¶ 151.) The City's liability, however, is dependent upon its

employees being liable. If the employees are not liable, then there is no basis for the City's liability. Thus, to the extent the claims against the Defendant Officers are dismissed, Count XI fails.

CONCLUSION

WHEREFORE, based upon the foregoing, it is respectfully submitted that Plaintiff's claims are time-barred and fail to state a claim for relief. Accordingly, the Defendants request this Honorable Court dismiss Plaintiff's Complaint in its entirety, with prejudice.

Dated: August 25, 2017

Respectfully submitted,

/s/ Sara J. Schroeder
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[*Certificate of Service Omitted in the Printing of this Appendix*]

APPENDIX C

OCTOBER 2016

BEFORE THE ILLINOIS PRISONER REVIEW BOARD ADVISING THE HONORABLE BRUCE RAUNER, GOVERNOR

PARDON DOCKET NO. ___

[Dated July 25, 2016]

IN THE MATTER OF	)
JOHNNIE L. SAVORY	)
	)

SUPPLEMENTAL PETITION FOR EXECUTIVE CLEMENCY

Christopher Tompkins
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312/840-8686

Counsel for Johnnie L. Savory

Dated: July 25, 2016

* * *

[*Table of Contents Omitted in the Printing of this Appendix*]

INTRODUCTION

The purpose of this supplemental petition is narrow, but important. Mr. Savory was already pardoned by Governor Quinn on January 12, 2015. However, that pardon was issued without the benefit of recent DNA testing of physical evidence in Mr. Savory's case that indicates that someone else – and not Mr. Savory – committed the crime, and therefore did not specifically recognize Mr. Savory's innocence as contemplated by 735 ILCS 5/2-702(h). Those new DNA testing results were unsealed by the Circuit Court in Peoria County on January 21, 2015, just days after the issuance of the pardon. Accordingly, in light of the new DNA testing results, and an additional witness recantation that has occurred since Mr. Savory's 2003 clemency petition, this supplemental petition respectfully requests formal recognition of Mr. Savory's innocence as contemplated by 735 ILCS 5/2-702(h).

This petition concerns a crime for which Mr. Savory was wrongfully imprisoned for thirty years. In 1977, at the age of 14, Mr. Savory was arrested for two murders for which he has steadfastly denied involvement. He was subsequently tried twice for those murders. The Illinois Appellate Court reversed the first conviction after it determined that police interrogation tactics resulted in an involuntary confession and violated Mr. Savory's constitutional rights. Despite the State's public acknowledgements following the reversal that there was no evidence of guilt other than the coerced and inadmissible confession, in 1981 Mr. Savory was again tried and convicted. That conviction rested largely on the testimony of three of Mr. Savory's

acquaintances (Frank, Tina, and Ella Ivy) who testified at trial that Mr. Savory made admissions to them on the day of the crime – testimony that was not presented at the first trial because, according to a former member of the prosecution team, it was not viewed as credible – along with very rudimentary testing of several items of physical evidence that would not pass muster in an Illinois courtroom today.

The minimal evidence presented at the 1981 trial should not have been sufficient then, and has not withstood the test of time. Each of Mr. Savory's acquaintances have recanted their testimony that Mr. Savory admitted committing the crime – two on multiple occasions – stating that they were pressured by the State to testify at Mr. Savory's 1981 trial based on confused and incomplete recollections of events that had occurred more than four years earlier. Moreover, the rudimentary testing of physical evidence used in Mr. Savory's 1981 trial – such as visual microscopic comparison of hair samples to see if they look "similar" – has been thoroughly discredited.

After seeking DNA testing of physical evidence for more than a decade, Mr. Savory's request was finally granted by the Circuit Court in Peoria County in August 2013, over the continued vigorous objection of the State. Unfortunately, after testing was ordered it was discovered that some evidence of potentially great probative value had been lost by the State and could not be tested – despite being listed in inventories of material supposedly preserved following the murders. Specifically, the State could not locate hairs – potentially from the murderer – that had been clutched

in the hands of both victims, or a piece of fabric cut from a pair of pants that the State has long alleged belonged to Mr. Savory and contained a small bloodstain of the same blood-type as victim Connie Cooper.

Crucially, testing on two other items that were located indicates that some other still-unidentified individual – and not Mr. Savory – committed these murders. In particular, testing of vaginal swabs from Connie Cooper reflects the presence of seminal fluid from an unidentified male and definitively ***excludes*** Mr. Savory as the source. Moreover, a bloodstain on a bathroom lightswitch wall plate – that the State has long claimed was deposited by the murderer while cleaning up after the crime – has been determined to have come from victim James Robinson and another unidentified person, but ***not*** Mr. Savory or any other member of the Cooper-Robinson household.

The results of this new DNA testing, when combined with the recantations of each of the witnesses who testified Mr. Savory made admissions concerning the murders should remove any lingering question that Mr. Savory committed these horrible crimes for which he spent 30 years – and most of his adult life – in prison. Accordingly, Mr. Savory respectfully asks the Governor to use his power of executive clemency to correct errors made by police, prosecutors, the courts, and unwittingly, the jury, and recognize Mr. Savory's innocence as contemplated by 735 ILCS 5/2-702(h).

REQUIRED INFORMATION & BACKGROUND

I. Biographical Information.

A. Johnnie Savory's Childhood.

Johnnie Savory was born on July 25, 1962 in Peoria Illinois. Mr. Savory's mother, Claudeen Savory, died in 1963 when Mr. Savory was just 8 months old. Following his mother's death, Mr. Savory lived in Peoria with his father, Y.T. Savory, sister Louise, and grandmother Martha Alexander.

Mr. Savory did not grow up in a model household. Mr. Savory's principal caregiver, his father, had a history of alcohol abuse and spent time in the Illinois Department of Corrections.[1] Mr. Savory's family barely scraped by and often lacked food and other necessities. While attending elementary school, Mr. Savory worked odd jobs to raise money to help support his family. With nobody to rely on, Mr. Savory became creative in caring for his family. For example, in an effort to prevent his father from spending the family's money before paying for necessities, Mr. Savory sometimes took the family's rent money and gave it to a teacher at school to safeguard and distribute as needed. Mr. Savory also assisted his father in the care of his disabled sister, Louise Savory. At the time of his arrest, Mr. Savory was 14 years old and was attending late afternoon junior high school in Peoria.

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[1] Mr. Savory's father's conviction was eventually reversed. *People v. Savory,* 379 N.E.2d 372 (3rd Dist. 1978).

B. Johnnie Savory's Life In Prison.

Mr. Savory was arrested at the age of 14, and spent the next 30 years imprisoned by the Illinois Department of Corrections. Like many other inmates, Mr. Savory initially had a period of adjustment after he was sent to prison, but matured to become a model prisoner. During his 30 years in prison, Mr. Savory earned his GED and four vocational certificates for auto body repair, electronics repair, paralegal studies, and music dynamics. He completed computer science courses offered through Danville Community College and earned six college credits through Lincoln College. He also participated in many personal development programs and seminars offered in prison.

While in prison, Mr. Savory worked with prison officials to make the institutions safer for both staff and inmates. From 1991-1995, Mr. Savory was an informal member of the Hill Correctional Center's crisis team, which sought to stabilize prisoners suffering from severe depression. In one instance, correctional officers asked Mr. Savory to counsel a fellow prisoner who had attempted suicide. Furthermore, not only did Mr. Savory never join a gang, he counseled many young prisoners new to the correctional system to avoid prison gangs. While at Hill Correctional Center, Mr. Savory intervened to help a young prisoner who had been beaten by prison gang members. He took the young man under his wing and convinced him that, despite the threat from the gang, the young man would never benefit from joining the prison gang.

Other examples of Mr. Savory's willingness to be a positive influence within the correctional system include his participation in the Peoria Jaycees and the Lifers Club, a charitable organization whose membership includes prison inmates serving at least 20 years. For three years, he served as vice president of the Peoria Jaycees. He was vice president of the Lifers Club for two years. In both positions, he worked to mobilize fellow prisoners and persons in the outside community to gather money and food for the homeless and to help fund a park in Peoria. In addition, Mr. Savory volunteered to help paint the Hill Correctional Center, and served as a personal fitness trainer for many correctional officers.

C. Johnnie Savory's Life After His December 2006 Parole.

Mr. Savory was paroled in December 2006, and the remainder of his sentence was commuted by Governor Quinn on December 6, 2011. Since his release from prison, Mr. Savory has lived in Chicago and has been a law-abiding and productive member of the community. He works full-time at the Rainbow PUSH coalition. Mr. Savory volunteers with the Northwestern University School of Law Center on Wrongful Convictions, where he serves as a mentor for recently released exonerees transiting to a life of freedom. Mr. Savory also continues to work tirelessly on his own case to gain recognition of his innocence and wrongful conviction. Several months ago, Mr. Savory welcomed the birth of his daughter.

II. Conviction For Which Executive Clemency Is Sought.

This clemency petition concerns Mr. Savory's conviction for the January 18, 1977 murder of James Robinson and Connie Cooper. Robinson, age 14, and Cooper, age 18, were found murdered in their Peoria home, by their mother, Noyalee Robinson, and her ex-husband, William "Peter" Douglas.

Police believe that Robinson and Cooper were murdered sometime between 8:30 and 9:30 on the morning of January 18, 1977. (Ex 3, R.1582.) The bodies were discovered in Cooper's bedroom, the victims of multiple stab wounds. Cooper was found dressed with her nightgown pulled up to her waist, and white panties with a tear in the crotch area. (Ex 16; Ex 2, R.1398.) Cooper was found on the floor of her room, not far from her bed, and had sustained multiple stab wounds and other injuries. (*Id.*) Cooper's bed and bedding were soaked with her blood, suggesting that is where she was killed. (Ex. 2, R.1417; Ex. 16; Ex. 38 (Items 9-13).)

Cooper was stabbed repeatedly in her abdomen, genital area, upper thigh, back, and buttocks. (Ex. 3, R.1583-86; Ex. 15; Ex. 34.) A wound on Cooper's left back pierced a major vein and is thought to have been the cause of death. (Ex. 3, R.1585-86; Ex. 34.) Cooper sustained a bruise on the left side of her face consistent with being punched. (Ex. 3, R.1583-84; Ex. 34.) Cooper also suffered defensive wounds to both sides of her hands, and the tip of a finger on her right hand had been sliced off, suggesting she had fought back against her attacker. (Ex. 3, R.1584-85; Ex. 34.) Finally, Cooper

also suffered a slicing wound across her forehead and right cheek that resulted in only a small amount of blood, and thus was likely inflicted post-mortem. (Ex. 3, R.1583; Ex.14 ¶ 22.) Vaginal swabs taken during Cooper's autopsy contained seminal material, but in 1977 the source was never identified. (Ex. 38 (Item 1A); Ex. 34; Ex. 36.)

James Robinson was discovered fully clothed in a T-shirt and blue jeans nearer to the door to the bedroom. (Ex. 2, R.1397; Ex. 16.) Robinson also died from multiple stab wounds, including two stab wounds to his chest and two stab wounds to his abdomen. (Ex. 3, R.1581; Ex. 35.) Robinson also had relatively blood-less wounds to his face, indicating they were likely inflicted post-mortem. (Ex. 4, R.1581; Ex. 14 ¶ 22; Ex. 35.) Unlike Cooper, Robinson did not have any defensive wounds. Robinson's clothing was stained both with his own blood, and blood determined to be the same type as Cooper. (Ex. 38, 3/17/1977 (Items 5-7).)

The initial police investigation focused on a romantic or sexual motive. Police interviewed family members and other witnesses to identify Cooper's boyfriends and sexual partners. (Ex. 17.) In the days after the crime, the police questioned a number of Cooper's love interests, such as Charles Watts, an ex-boyfriend who had previously been physically violent toward Cooper. (Ex. 17; Ex. 25.) In addition, the Police focused on Kenneth Parker, another man with whom Cooper had been having a relationship. (Ex. 20; Ex. 23; Ex. 24; Ex. 26.) The police inquired about Curtis Spence, the father of Connie's son. (Ex. 19.) The police also explored whether the murder could have been

committed by Cooper's stepfather, William "Peter" Douglas. (Ex. 18; Ex. 21; Ex. 22.) Police considered each of these individuals suspects, and none were ever definitively ruled out as the perpetrator.

On January 25, 1977, a week after the murders, the police investigation abruptly turned its focus to Johnnie Savory – a friend of James Robinson who had coincidentally been at the Robinson house the day before the murders. Police located Mr. Savory at the late afternoon junior high school he was attending. *People v. Savory,* 82 Ill.App.3d 767, 769 (3rd Dist. 1980) ("*Savory I*"). The police then proceeded to interrogate him almost continuously for the next day and a half – not stopping until Mr. Savory allegedly confessed to the crime, but soon after he refused to affirm the alleged confession. *Id.*

The nearly continuous questioning of 14-year-old Mr. Savory began at 3:30 p.m. at his school, at which time Mr. Savory gave police an account of his activities on January 18. *Id.* at 769. Mr. Savory was then transferred to the police station and interrogated for another eight hours, during which he steadfastly denied any involvement in the deaths of James Robinson or Connie Cooper. *Id.* at 769-70. During this period, Mr. Savory was interrogated first by the police and then later, at approximately 10:00 p.m., by a polygraph examiner. *Id.* at 770. It was not until the end of this session that Mr. Savory's father was informed that Mr. Savory was being questioned by the police. *Id.* After the polygraph examination, Mr. Savory was placed under arrest and read his *Miranda* warnings for the first time. *Id.* At that point, Mr. Savory indicated

that he did not wish to continue speaking with the police. *Id.*

The police resumed their interrogation at 10:30 a.m. the following morning and continued that session until 8:00 p.m. that night. *Id.* at 770-71. It was at the end of this marathon session that 14-year-old Mr. Savory – after being continuously badgered by the police and given a second polygraph examination – allegedly confessed. *Id.* at 771. Soon after, Mr. Savory refused to reaffirm his alleged confession, again explaining to police that he was not involved in the murders – a position he has maintained to this day. *Id.*

Mr. Savory was tried for the murders in June of 1977 before a Peoria County jury. The prosecution's case was based almost exclusively on his alleged confession, which the court had refused to suppress despite the circumstances of the interrogation, and a limited amount of physical evidence. After a two-day trial, Mr. Savory was convicted and sentenced to two concurrent terms of 50 to 100 years.

In 1980 the Third District Illinois Appellate Court reversed the conviction, finding that the alleged confession was involuntary and that the Peoria police improperly failed to "scrupulously honor" Mr. Savory's statement that he did not want to talk to police in violation of the *Miranda* rule. *Savory I,* 82 Ill.App.3d at 774-75. The court determined that the police's failure to observe *Miranda,* and the circumstances of Mr. Savory's marathon interrogation, made Mr. Savory's alleged confession was involuntary. *Id.* Noting that special care is required in cases involving suspects as young as Mr. Savory, the Court stated:

> [W]e do have a period of approximately eight hours, interrupted by a meal, of questioning on January 25 and then an additional period of questioning, interrupted by meals, commencing at about 10:30 in the morning of January 26 and continuing until about 8 p.m. when the inculpatory statements were made. We also observe that thereafter the defendant did not reaffirm his inculpatory statements but in fact recanted them shortly after they were made. Without deciding that the length of the questioning would of itself justify suppression of the statements as not voluntary, we do believe that the cumulative effect of all of the circumstances does compel the conclusion the prosecution did not sustain its burden of establishing the voluntariness of the statements. We believe the error in admitting the statements requires a new trial because we can not say beyond a reasonable doubt that it did not contributed to the verdict of the jury under the authority of *Chapman v. California* (1967), 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d. 705.

Id. at 775.

Given that the alleged confession was inadmissible because of the impropriety of the interrogation, it appeared that Mr. Savory would not stand trial a second time. Prosecutors publicly stated that Mr. Savory would not be retried because of the lack of any evidence connecting Mr. Savory to the crime other than the alleged confession. (Ex. 45, 46.) The prosecution, however, turned to three witnesses – not called to

testify in the first trial because of questions of reliability – who testified that Mr. Savory allegedly made incriminating statements to them regarding the crime. In addition, the State relied on several pieces of physical evidence they claimed linked Mr. Savory to the crime: (1) evidence that hair found in a bathroom sink was "similar" to Mr. Savory's hair; (2) evidence that Mr. Savory or his father may have owned a pocket knife that may have had trace amounts of blood; and (3) evidence that a pair of blue pants way to large for Mr. Savory had a small bloodstain near the pocket that was the same blood type as Connie Cooper, Type A.[2] Based on this evidence, Mr. Savory was convicted a second time and sentenced to two concurrent sentences of 40 to 80 years.

III. Other Required Information.

A. Identification Information.

Name: Johnnie L. Savory

Social Security No.: [REDACTED]-2728

Former IDOC No.: L-12206

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[2] At the second trial, the State also improperly introduced several statements Mr. Savory allegedly made to police about "collateral facts" and improperly commented on Mr. Savory's exercise of his right to remain silent, both of which have been found to violate Mr. Savory's constitutional rights although were also determined to be harmless in light of the other evidence introduced at trial – the new discredited physical evidence and recanted testimony of the Ivys. *Illinois v. Savory,* 105 Ill.App.3d 1023, 1030 (1982); *Savory v. Lane,* 832 F.2d 1011, 1016 (7th Cir. 1987).

B. Petitioner's Current Address.

Petitioner's current mailing address is:

Johnnie L. Savory
PO Box 53311
Chicago, Illinois 60653

Correspondence regarding this petition should be sent to Mr. Savory's attorney:

Christopher Tompkins
Jenner & Block LLP
353 N. Clark St
Chicago, Illinois 60654
ctompkins@jenner.com

C. Criminal History.

Largely due to inadequate parental supervision and guidance, Mr. Savory entered Peoria County's juvenile system at the age of 12 or 13 and was on temporary probation for truancy and running away from home at the time of this conviction.

D. Conviction Information.

1. Mr. Savory was sentenced to 40 – 80 years following his conviction for two counts of murder, Peoria County Case No. 77 CF 565. This sentence was imposed on June 12, 1981.

2. Mr. Savory was also sentenced to 2 years for a conviction for possession of contraband in a Penal Institution in 1993 Knox County Case No. 93 CF 122.

3. Mr. Savory was paroled on December 19, 2006.

E. Military Service.

Mr. Savory has not served in the military.

F. Pending Appeals or Post-Conviction Proceedings.

On December 22, 2014, Mr. Savory filed a Petition for Relief from Judgment and Motion for a New Trial pursuant to 735 ILCS 5/2-1401 in the Circuit Court of the Tenth Judicial Circuit for Peoria County. That petition was denied by an order issued on May 4, 2016. On June 2, 2016 Mr. Savory filed a motion for reconsideration of the May 4, 2016 order. That motion remains pending as of the time of this petition.

G. Prior Clemency Petitions.

Mr. Savory previously filed petitions for executive clemency for his murder conviction in February 1995, and on November 21, 2003 (Pardon Docket No. 24750). On December 6, 2011, Governor Quinn commuted Mr. Savory's sentence. On January 12, 2016, Governor Quinn granted Mr. Savory a pardon, with expungement of his conviction.

H. Public Hearing.

In an effort to expedite this matter and consideration by the Governor, Mr. Savory is willing to forgo a public hearing in connection with this petition. However, if the Board

believes a hearing would be useful, Mr. Savory's representatives are happy to make a presentation at the hearings scheduled for October 2016.

REASONS FOR EXECUTIVE CLEMENCY

As discussed, Mr. Savory has already been pardoned. The sole focus of this petition is recognition that Mr. Savory is innocent, as contemplated by 735 ILCS 5/2-702(h). Mr. Savory is entitled to official recognition of his wrongful conviction for two reasons. *First,* new DNA testing unsealed just days after Governor Quinn's January 2015 pardon definitively excludes Mr. Savory and points to some other unidentified individual as the perpertrator. *Second,* as detailed in Mr. Savory's prior clemency petition, the other evidence of Mr. Savory's guilt presented at his second trial has been discredited, including most notably the testimony of Mr. Savory's three acquaintances, each of whom have recanted their trial testimony.

I. New Evidence From DNA Testing Excludes Mr. Savory And Points To Another Assailant.

Mr. Savory has long sought DNA testing of the physical evidence introduced at his 1981 trial and other evidence collected from the murder scene. In 1998 Mr. Savory was one of the first defendants to attempt to take advantage of a new provision of the Code of Criminal Procedure permitting post-conviction DNA testing not available at the time of trial (725 ILCS 5/116-3). That request was vigorously opposed by the State, and denied by the Illinois courts. *People v.*

Savory, 197 Ill.2d 203 (2001). In 2005, Mr. Savory also sought DNA testing through a federal civil rights action under 28 U.S.C. § 1983, but relief in that case was determined to be barred by the statute of limitations. *Savory v. Lyons,* 469 F.3d 667 (7th Cir. 2006).

Undeterred by repeated refusals to test key evidence in his case, in November 2012 Mr. Savory returned to court, again seeking DNA testing, based on technological advances in testing since his initial motion in 1998, and the additional recantation of Ella Ivy. On August 6, 2013 the Circuit Court of Peoria County granted the request for testing, finding that there was "limited direct evidence of the identification of the perpetrator and the prosecution used forensic evidence at trial to connect the Defendant to the crime." (Ex. 48 at 11.) With respect to the physical evidence introduced at trial, the Circuit Court stated "Can it be imagined that such rudimentary 'scientific' evidence would be presented and argued to a jury in a courtroom today, particularly in a double homicide trial?" (*Id.* at 9, n. 14.)

Unfortunately, some of the testing sought by Mr. Savory proved to be impossible. At some point the State lost key physical evidence, including most notably hairs collected from both victims' hands as well as the alleged blood stain on the blue pants on which the State relied heavily at the 1981 trial. (Ex. 41 (Items 31, 59, 69); Ex. 7 at 28-29, 40-42.)[3] Moreover, some of the

[3] Indeed, the Peoria Police department represented that they had possession of that evidence as recently as 2005 in disclosures

evidence appears to have degraded over time due to age and the conditions under which it was stored. No interpretable results were obtained from DNA testing on the knife alleged by the state to be the murder weapon, other stains identified on the blue pants, or fingernail scrapings from Connie Cooper. (Ex. 42 (Items 21A to 22A1, 44A to 44B1, 59B to 59E1); Ex. 43 (Items 21A1, 22A1, 59A1 to 59E1); Ex. 7 at 38-42, 153-54, 162-66.)

Significantly, however, DNA testing of other items did result in significant new evidence that someone else other than Mr. Savory committed these murders. Testing of a vaginal swab from Connie Cooper – which had previously tested positive for seminal fluid – excluded Mr. Savory as the source of the seminal fluid. (Ex. 43 (Item 1A1); Ex. 7 at 30-31, 153-56.) Moreover, testing of blood stains on a bathroom light switch that the State has long asserted was deposited by the killer when cleaning up after the murders, was determined to contain blood from two contributors, a major contributor who was determined to be James Robinson, and another still unidentified minor contributor. (Ex. 43 (Item 15A1); Ex 44 (Item 15A1); Ex. 7 at 32-38, 153-54, 156-62.) Mr. Savory and other members of the Robinson-Cooper household were excluded as the minor contributor. (Ex. 43 (Item 15A1); Ex. 7 at 159-60.)

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provided in Mr. Savory's 42 U.S.C. § 1983 action seeking DNA testing. (Ex. 49.)

A. Seminal Fluid Collected From Connie Cooper Did Not Come From Mr. Savory.

The first piece of new evidence are DNA test results on seminal fluid taken from Connie Cooper that excludes Mr. Savory. At the time of the autopsy the Peoria County Comer collected vaginal swabs from Connie Cooper. (Ex. 34.) Analysis in 1977 by the State of Illinois Bureau of Identification revealed the presence of seminal material, but given then-existing technology further analysis could not be undertaken to determine its source. (Ex. 38 (Item 1A).) In recent testing, the Illinois State Police laboratory was able to extract a male DNA profile from the vaginal swabs using Y-STR testing, which is capable of isolating the Y chromosome in a mixed sample. Through those tests, the Illinois State Police laboratory was able to definitively exclude Mr. Savory and Cooper's step-father, Peter Douglas, as the source of the seminal fluid. (Ex. 43 (Item 1A1); Ex. 7 at 30-31, 153-56.) Unfortunately, given limitations of the Y-STR testing method, the State Police were not able to compare the profile to the CODIS database to identify the potential source. (Ex. 7 at 148-51.)

The significance of this new evidence cannot be understated. From the start of the investigation of these murders the police focused on a sexual motive. Cooper was found partially clad, with her nightgown pulled up and her panties ripped. Cooper's bed and bedding were covered in her own blood, indicating that she was likely initially stabbed on her bed. Moreover, Cooper sustained multiple stab sounds to her lower body, including multiple wounds targeted at her pubic

area. Given the condition of the scene, at the start of the investigation the police rightly focused on a boyfriend or love interest of Ms. Cooper. They interviewed several individuals purported to be Cooper's boyfriends, and explored whether there may have been a sexual relationship of some kind between Cooper and her stepfather, Peter Douglas.

Moreover, other evidence indicates that the seminal material was likely from sexual activity the morning of the crime. Connie Cooper spent the evening before at home with her family, and indeed shared a bedroom with her mother the night before the crime, and was alone but awake in her bedroom when her mother left for work the next morning. (Ex. 2, R.1245, R.1251-52, 1256-59.) Cooper's purported boyfriend, Kenneth Parker, stated that he had not had intercourse with Cooper since the prior Thursday, January 13th. (Ex. 23.) Accordingly, evidence that this was a sexually motivated crime, combined with the presence of seminal material from some other individual, strongly indicates that someone else other than Savory committed these murders.

Indeed, experienced FBI investigator and crime scene expert Gregg McCrary[4] has examined evidence in this case and concluded that the crime likely had a sexual component and that the seminal fluid was left

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[4] Mr. McCrary has over 40 years investigating violent crimes for the FBI. (Ex. 14 ¶ 2.) Mr. McCrary was an FBI field agent for 17 years and then served as a Supervisory Special Agent at the FBI's National Center for the Analysis of Violent Crime where he provided expertise on investigative techniques and crime scene analysis. (*Id.* ¶ 3.)

by the killer. (Ex. 14 ¶ 24; Ex. 7 at 71-104.) Mr. McCrary believes that a sexual component is indicated because of the state of Cooper's clothing, and because she was likely initially stabbed in her bed. (Ex. 14 ¶ 15.) Moreover, Mr. McCrary believes a sexual motive is indicated by the multiple, targeted stab wounds to Cooper's genital area, which often indicates personal animus or rage. (*Id*.) Moreover, the fact that there was no sign of forced entry, Cooper was awake at the time her mother left the house, and Cooper's son was placed in another bedroom suggests that the murder was someone known to Cooper, someone she voluntarily let in the house. (*Id*. ¶¶ 17-18.) Accordingly, Mr. McCrary believes that there is a significant possibility that the unknown male DNA found in Cooper's vaginal swab belongs to her killer. (Ex. 14, ¶¶ 23-24; Ex. 7 at 71-104.)

B. Bloodstains On Bathroom Light Switch Plate Was Left By An Unidentified Perpetrator Other Than Mr. Savory.

New DNA testing results on a bloodstain on a light switch plate in the bathroom of the Robinson residence also indicates that someone else other than Mr. Savory was the perpetrator. At the time of the crime, the police found blood stains on a light switch plate and in other locations in the bathroom of the residence. In 1977 these stains were tested for blood-type and determined to be Type O blood, the same blood type as James Robinson. (Ex. 2, R.1467; Ex. 38 (Item 15).) However, further testing could not be conducted. At trial, the State claimed that this bloodstain was left by the killer when they cleaned-up after the murder in the

bathroom. (Ex. 5, R.1802 (State's closing argument: "And then he went in the bathroom and cleaned up. Turned on the light. There was blood, as you will recall on the light switch plate.").)

Recent DNA testing of the stain identified two separate contributors of DNA material. The major contributor was determined to have a DNA profile consistent with James Robinson. (Ex. 43 (Item 15A1); Ex 44 (Item 15A1); Ex. 7 at 32-38, 153-54, 156-62.) However, testing also identified the profile of another minor contributor. This profile also did not belong to Connie Cooper or the other two individuals in the home, Noyalee Robinson and Peter Douglas. (*Id*.) More significant is that the profile also did not belong to Mr. Savory. (*Id*.) Again given the nature of the sample, it could not be uploaded to the CODIS database and compared to other profiles and given that a different method of testing was used to develop the profile of the DNA left on the light switch plate, it could not be compared to the profile extracted from Cooper's vaginal swab. (Ex. 7 at 148-51, 158.)

Again these results are substantial evidence of Mr. Savory's innocence. There is no reason to doubt the State's theory that the stain was placed there when the killer cleaned up following the murders. And the fact that other family members were excluded makes it very unlikely that the minor contributor's profile was left at some other time. Indeed, Mr. McCrary believes it is highly likely that – given the number of stab wounds and Connie Cooper's defensive wounds – the killer would have been injured in the attack, and left his own DNA on the bathroom light switch plate along

with Robinson's. (Ex. 14 ¶¶ 26-27.) Accordingly, as with testing of the vaginal swab, this new DNA testing excludes Mr. Savory as the perpetrator and points to another still unidentified person as the murder.

II. The Evidence Presented At Mr. Savory's Second Trial Was And Is Insufficient To Establish Mr. Savory's Guilt.

Beyond this strong new evidence excluding Mr. Savory as the murderer, however, the other evidence relied on by the State at his 1981 trial – which was weak even then – simply has not stood the test of time. The State's evidence that Johnnie Savory was involved was extremely thin. There were no known witnesses to the crime who could provide evidence and the prosecution's entire case linking Mr. Savory to Robinson home on January 18, 1977 consisted of: (1) the testimony of three of Mr. Savory's friends – Frank, Tina, and Ella Ivy – that Mr. Savory allegedly made inculpatory statements to them; (2) evidence that during his interrogation Mr. Savory exercised his right to remain silent and other statements to police; (3) evidence that hair found at the scene was "similar" to Mr. Savory's hair; (4) evidence that Mr. Savory or his father may have owned a pocket knife that may have had trace amounts of blood; and (5) evidence that a pair of blue pants allegedly worn by Mr. Savory had a small bloodstain determined to be the same blood type as Connie Cooper.

Yet, as discussed below, at the time of his conviction and today none of this evidence connects Johnnie Savory to this crime. The Ivys were not credible when they testified at Mr. Savory's 1981 trial, and their

testimony has been repeatedly recanted and contradicted by other evidence. The physical evidence has limited value and has been undermined by the new DNA testing discussed above. For all of these reasons, the evidence presented against Mr. Savory does not establish his involvement in this crime.

A. The Testimony Of The Ivy Siblings Is Not Credible Evidence Of Mr. Savory's Guilt And Has Been Repeatedly Recanted.

The centerpiece of the State's case has long been the testimony of three witnesses – Frank, Tina, and Ella Ivy – that Mr. Savory allegedly made incriminating admissions to them on the day of the crime. The Ivys, who were only interviewed by police for the first time three weeks after the murders and who did not testify at Mr. Savory's first trial, surfaced less than a month prior to the second trial as the State desperately searched for new evidence to present to convict Mr Savory. But the testimony of the Ivy siblings has never provided credible evidence of Mr. Savory's guilt, and in fact has been disavowed by the Ivys themselves.

Police did not interview the Ivy family until February 7, 1977 – some three weeks after the January 18, 1977 murders and nearly two weeks after Mr. Savory's arrest on January 26, 1977. (Ex. 30.) The police report of that interview does not reflect the specific alleged damaging admissions by Mr. Savory about which the Ivys later testified as the State desperately sought evidence for a retrial, and in fact reflects only that Mr. Savory may have had some knowledge about the murders that was widely reported by media outlets. (*Id.*) Indeed, the Ivys were not called

to testify at the first trial because – according to the testimony of former Assistant State's Attorney Joseph Gibson at a post-trial hearing on a motion for a new trial – the prosecution deemed their testimony "too shaky" and potentially influenced by media coverage of the murders. (Ex. 6, R.1867-70.)

After the first conviction was overturned it appeared that Mr. Savory would not stand trial a second time. John Barra, then the Peoria County State's Attorney, was quoted in a *Peoria Journal Star* news article in January 1981 stating that it was likely that Mr. Savory would not be retried because the alleged confession was the only "substantial evidence to tie Savory to the crime or the scene of the crime." (Ex. 46.) Barra continued, "I don't know how it would be possible to try him without it." (*Id*.) Michael Mihm – the State's Attorney at the time of the first trial – agreed, stating that that it would be nearly impossible to prosecute Mr. Savory without his alleged confession. (*Id*.)

Yet, just a few weeks before the second trial, the police re-interviewed the Ivys, who became the State's star witnesses. The Ivys' eventual trial testimony, even if true, provided no evidence of guilt. Taking issue with an Illinois Appellate Court decision upholding Mr. Savory's conviction based on the Ivys' testimony, the United States Court of Appeals for the Seventh Circuit has stated:

> In sum, the record does not support the assertion that defendant admitted to three witnesses that he had stabbed the victims and they were dead before the bodies had been

> discovered, or that he gave detailed descriptions of the wounds before that discovery. Neither do they support the statement that he admitted his presence and complicity in the killings. The testimony of the Ivys thus had significantly less probative force than the Appellate Court's summary suggests. Accordingly, we cannot accord a presumption of correctness to that court's findings.

United States ex. rel. Savory v. Lane, 832 F.2d 1011, 1019 (7th Cir. 1987). Beyond these general concerns, however, the testimony of Prank, Tina and Ella Ivy at the second trial: (1) has largely been recanted by the each of Ivys; (2) is not consistent with statements made to police close to the time of the crime; (3) is contradicted by later statements; (4) is contradicted by other evidence in the possession of the police and prosecution at the time of the second trial; and (5) lacks sufficient detail to be credible.

1. Frank Ivy.

The testimony of Frank Ivy was, on its face, pure conjecture. The testimony is further contradicted by both Frank Ivy's own statements to police in 1977 and statements he has made following the trial recanting his testimony. Finally, Frank Ivy's testimony is contradicted by other evidence in the case – Johnnie Savory simply could not have been at the Ivy household on January 18th at all of the times that Frank Ivy testified he was there.

In his testimony, Frank Ivy testified that Mr. Savory first came to his house at 5:30 p.m. on January

18, 2003. (Ex. 3, R.1494.) Frank Ivy further testified that Mr. Savory left the house but returned later that evening after 8:00 p.m. (Ex. 3, R.1495.) Frank Ivy testified that it was at that time Mr. Savory allegedly made incriminating statements:

Q: Did you have occasion to have a conversation with him concerning the incident concerning Scopie later that evening?

A. Yes.

Q. Where did that take place?

A. In my room.

Q: Your bedroom?

A. Yes.

Q: Who was present?

A. Nobody but me and him.

Q. What did he say?

A. "We was practicing Karate."

A. Who was practicing Karate?

A. Scopie and him. And he accidentally stabbed him.

Q. Did he say anything concerning Scopie's sister at all?

A. She came in the room and he stabbed her, *I guess.*

> MR. VIELEY: I am going to object to that and move to strike that. That is guess and conjecture.
>
> THE COURT: Overruled. It goes to the weight, not the admissibility. Did the Jury hear that answer? Go ahead. I think you are hearing the answers a little bit better than I am over here. Go ahead, Mr. Gaubas.
>
> MR. GAUBAS: Thank you, your Honor.
>
> Q. Frank, do you recall any other particulars of the conversation at that time?
>
> A. No.

(Ex. 3, R.1495-96 (emphasis added).) On its face, this testimony of Frank Ivy was nothing more than a "guess." At trial, Frank Ivy posited only that he "guessed" that Mr. Savory accidentally stabbed Scopie and his sister. Frank Ivy's testimony does not recount the exact words allegedly used by Mr. Savory and fails to credibly establish that Mr. Savory admitted his culpability.

There is more, however. A string of evidence contradicts Frank Ivy's trial testimony. The most important of which is that Frank Ivy himself says his testimony at trial was incorrect, and has done so on at least three separate occasions:

- Less than one week *before* the second trial, Frank Ivy told investigator Charles Peters that he was not sure who had made the statements he attributed to Mr. Savory and that it may have been someone else.

During this conversation with Peters, which was recorded on tape and transcribed for the record during the second trial,[5] Frank Ivy stated:

> Q. O. K. Did Johnnie make any remarks that you can recall concerning that, the two kids that got killed?
>
> A. No, he didn't say anything. He said 'huh', something like that.
>
> Q. Who else was present, do you recall, watching that TV program?
>
> A: The whole family.
>
> Q: Do you recall him making any reference to having been over to Scopie's house?
>
> A. No.
>
> Q: You don't recall that?
>
> A. No.
>
> Q. Do you recall his mentioning anything about doing Karate?
>
> A. Yes.
>
> Q. Or anything like that?

---

[5] For some inexplicable reason, Mr. Savory's attorney failed to lay the necessary foundation to play this tape for the jury or call investigator Charles Peters to testify even after being given an opportunity to do so by the court. Because of this inexcusable error, the jury *never learned* that Frank Ivy has contradicted his sworn trial testimony in a statement made less than a week prior to his testimony at trial.

A. Yes, uh huh.

Q. What was that about?

A. They was playing, doing Karate. And he had–after they picked up the knife.

Q. Pardon?

A. After they had picked up the knife. That's about all he had told me.

Q. What was that again?

A. They picked up the knife while they were doing Karate.

Q. Prior to this recorded interview I had a little chat with you for a while?

A. Uh huh.

Q: And you indicated that you thought that somebody else said that they may have been playing around with the knife.

A. Something like that, yeah.

Q. And you indicated to me that you didn't remember actually hearing Johnnie say that?

A. No.

A. Is that correct?

A. That's correct.

Q. O.K. So what is the story on it, then?

A. As I said, somebody said that. He could have said it. I really don't remember.

. . .

Q. You say that you don't remember any other conversations with Johnnie concerning this?

A. Huh uh[.]

(Ex 3, R.1603-1605.)

- Two years later, Frank Ivy signed a statement stating that his statements to police and trial testimony were "wrong." (Ex. 10 ¶ 7 & Ex. B.) In the statement, Frank Ivy stated that his testimony was based on information he had heard on the street and that he felt pressured into testifying by Detective Cannon of the Peoria Police Department. (*Id*.)

- In May 2003, Frank Ivy again affirmed that Mr. Savory never told him that he had stabbed James Robinson and Connie Cooper and was pressured to testify at the second trial and told the police what they wanted to hear based on rumors. (Ex. 10 ¶ 6.)

What's more, Frank Ivy's statements to police close to the time of the crime in 1977 contained no mention of the alleged admission about which Frank Ivy later testified about in 1981. In particular, the sole police report recounting police interviews of the Ivy family in 1977 does not contain any statement by any of the Ivys that Mr. Savory admitted stabbing James Robinson or Connie Cooper. (Ex. 30.) Rather, the police report

recounts only that the Ivys claimed Mr. Savory had made statements that reflected that Connie Cooper and James Robinson had been murdered. It was not until prosecutors were seeking to retry Mr. Savory a second time in 1981 (without the coerced confession), that police reports reflect Mr. Savory's alleged admission to Frank Ivy. (Ex. 31.) If Frank Ivy had in fact stated that Mr. Savory admitted involvement, surely this would have been recorded in police reports filed in 1977. This report indicated that the police did not re-interview Frank Ivy until early April 1981, less than a month before trial the 1981 trial and almost two months after the case was remanded by the Illinois Appellate Court. (*Id*.)

Finally, Frank Ivy's trial testimony regarding when Mr. Savory was present at the Ivys' home is further contradicted by Peoria police themselves, and Frank Ivy's father Willie Ivy. Indeed, Peoria police officer Glenn Perkins testified that he saw Mr. Savory in a crowd of people outside of the Robinson residence between 5 and 6 p.m. on January 18th. (Ex. 2, R.1390.) Perkins recorded this recollection in a police report he filed on January 27, 1977. (Ex. 28.) Police reports filed by police officer Marcella Brown indicates that a film crew for the local news filmed Mr. Savory at the scene at 6:20 p.m., and that a cameraman had observed Mr. Savory board a bus and leave the scene at 7:00 p.m. (Ex. 29.) Mr. Savory simply could not have been at the Ivy home at 5:30 p.m., as Frank Ivy testified, and at the crime scene at the same time. Frank Ivy's assertion that Mr. Savory was at the Ivys' home at 8:00 p.m. was also contradicted by his father, Willie Ivy, who stated

that Mr. Savory did not return to the house until 10:30 p.m. (Exhibit 30.)

In light of this evidence it cannot be said that there is any credible evidence that Mr. Savory confessed to Frank Ivy. Joe Gibson and the Seventh Circuit are correct – Frank Ivy's testimony was simply not credible.

2. Tina Ivy.

Tina Ivy's testimony also does not establish Mr. Savory's guilt. At trial, Tina Ivy testified that she had seen Johnnie Savory at quarter or ten till 7:00 p.m. on January 18th at the Ivys' house. (Ex. 3, R.1515.) Tina testified that it was at that time that Johnnie Savory allegedly made incriminating statements:

> Q. What, if anything, was said at that time?
>
> A. That two kids had got killed
>
> Q. What, if anything, else did he tell you?
>
> A. That him and Scopie had been together earlier that day doing Karate. And that he had accidentally cut Scopie.

(Ex. 3, R.1515.)

Yet, Tina's testimony is no more reliable than that of Frank Ivy. Like her brother, Tina Ivy has recanted her testimony on several occasions:

- In 1983, Tina Ivy signed two statements stating that Mr. Savory did not tell her that he had stabbed James Robinson and Connie Cooper as she has testified and that she had not seen Johnnie Savory

at 7:00 p.m. on January 18, 2003. Tina Ivy stated that her testimony was based on rumors she had heard in the street. (Ex. 9 ¶ 6 & Exs. B and C.)

- At a post-conviction hearing two years after the trial, Tina Ivy testified that Mr. Savory had never admitted he killed James Robinson and his sister. (Ex. 9 ¶ 6 & Ex. D. at R.1970.) Tina Ivy testified that she had pending criminal charges on her mind at the time she testified in 1981. (Ex. 9 ¶ 6 & Ex. D. at R.1972.) At the time she testified at the second trial, Tina Ivy was on probation for a forgery charge and had been enrolled in a drug rehabilitation program. (Ex. 9 ¶ 6 & Ex. D. at R.1967-68.)
- In May 2003, Tina Ivy again signed an affidavit confirming that her testimony at Mr. Savory's second trial was not accurate. (Ex. 9 ¶ 4.)
- In July 2012, Tina Ivy reiterated her post-trial recantation to representatives of Mr. Savory. (Ex. 12.)

Like the testimony of her brother, Tina Ivy's testimony is also not consistent with what she told the police in her initial interview in February of 1977. The police report of that interview contains no mention of any admission by Mr. Savory that he had committed the crimes. Indeed, the police report does not even reflect that Tina spoke with Mr. Savory around 7:00 p.m. on January 18th. (Ex. 30.)

Tina Ivy's testimony is also contrary to the testimony and statements of other witnesses. As noted above, the police and other witnesses have claimed that they saw Johnnie Savory outside of the crime scene

between 5:00 p.m. and 7:00 p.m. (Ex. 2, R.1390; Ex. 28; Ex 29.) Mr. Savory could not possibly have been at the Ivys' house making incriminating statements to Tina Ivy at the same time he was also at the crime scene. This is further confirmed by the 1977 statement of Willie Ivy, Tina Ivy's father, who stated that Savory did not return to the Ivys' house until 10:30 p.m. (Ex. 30.) As Tina Ivy's later statements confirm, the only time she saw Mr. Savory on January 18th was earlier in the day, when they rode the bus to school together around 3:00 p.m. (Ex. 9 ¶ 6 & Exs. B and C.)

In light of her later statements, and the other evidence contradicting her statement, Tina Ivy's testimony fails to establish Mr. Savory's guilt.

3. Ella Ivy.

Finally, the testimony of Ella Ivy has also been recanted and does not establish Mr. Savory's guilt. Ella testified that she saw Johnnie Savory sometime before 3:00 p.m. and again around 4:00 p.m. at the Ivy's house. (Ex 3, R.1483-84.) Ella testified that Mr. Savory allegedly stated (1) he had accidentally cut James Robinson, (2) that James Robinson and Connie Cooper were dead, and (3) that Cooper's baby was in the oven, a statement he later retracted and told Ella that the baby was in the bedroom. (Ex. 3, R.1480-87.) Ella Ivy also testified she had attempted to watch the news and purchase a newspaper to confirm Mr. Savory's alleged story but was unable to do so, and that a black knife fell out of Savory's pockets during one of their conversations. (*Id.*)

Yet Ella Ivy has recanted much of her testimony at trial. In particular, Ella Ivy has signed an affidavit stating that (1) she never heard Savory make any comments about how the victims were killed, (2) she never heard Savory say anything about the baby being in the oven, (3) she never saw Savory with a knife and one did not drop out of his pocket, and (4) she doesn't recall going to purchase a newspaper on the day of the murders. (Ex. 11.) Ella Ivy explains that she "was confused about different facts of this case" because of hearing rumors, being interviewed by police numerous times, and feeling pressured to testify that Mr. Savory was responsible. (*Id*.)

Moreover, Ella Ivy's testimony is at odds with the evidence of Johnnie Savory's movements on January 18th. In particular, Ella testified that her conversations with Mr. Savory occurred around 3:00 p.m. and again around 4:00 p.m. (Ex 3, R.1483-84.) Yet, as Tina Ivy testified at trial, she and Mr. Savory left the Ivy home around 2:30 p.m. to catch a bus to go to their late afternoon school. (Ex 3, R.1513-14.) Mr. Savory's movements after he boarded the bus with Tina are accounted for. Mr. Savory's probation officer Percy Baker testified at the first trial that he saw Mr. Savory in his office from 3:00 p.m. until 3:30 p.m. on the afternoon of the 18th. (Ex. 1, R. 952-53.) The principal at the late afternoon school Mr. Savory was attending told police in 1981 that Mr. Savory arrived at the school around 4:00 p.m. and stayed until almost 5:00 p.m. (Ex. 32; Ex. 3, R. 1569-71.). As discussed above, Mr. Savory was next seen at the crime scene by police and reporters. Further, Ella's brother, Frank Ivy testified that that he arrived at home from school

around 3:45 p.m. and Mr. Savory was not at the residence when he got home. (Ex. 3, R.1493-94.) Mr. Savory could not have been at the Ivy home making incriminating statements to Ella Ivy at the same time he was at school.

Like her two siblings, the sole police report recounting an interview with Ella Ivy close to the time of the crime in 1977 contains no mention of the admissions that Ella Ivy later testified to in her 1981 trial testimony. (Ex. 30.) Indeed, on cross examination at the second trial, Ella Ivy had initially told police that she "wasn't for sure" she remembered anything about the case and that she discussed her testimony with Officer Cannon and prosecutors no fewer than four of five times before her testimony at trial. (Ex 3, R.1487-88.)

B. The Physical Evidence Does Not Establish Mr. Savory's Guilt.

In addition to the Ivys' testimony, the State presented a limited amount of physical evidence alleged to connect Mr. Savory to the crime. In particular, the prosecution claimed that (1) a bloodstain on a pair of blue pants linked Mr. Savory to the crime scene; (2) hair found at the scene was "similar" to Mr. Savory's hair; and (3) Mr. Savory or his father owned a knife that "might" have had trace amounts of blood. None of this evidence demonstrates that Mr. Savory is connected to these murders, and in fact – as discussed above – other physical evidence demonstrates that someone else is responsible for the murders.

1. The Blue Pants.

At both trials, the prosecution claimed that Connie Cooper's blood was found on a pair of pants Mr. Savory allegedly wore while committing the crime. However, substantial evidence exists that, not only did the pants not belong to Mr. Savory, the blood allegedly found on the pants was not from Connie Cooper but Mr. Savory's father.

In the first instance, the pants did not even belong to Johnnie Savory. Rather, as Mr. Savory's father, Y.T. Savory, testified at both trials, the pants belonged to him and not Mr. Savory. (Ex. 1, R.867-70, Ex. 4, R.1710, R.1715-17.) Indeed, contrary to the later claims at trial, the police officers initially investigating the case thought it improbable that Mr. Savory wore the pair of blue pants while committing the crime. As a January 26, 1977 police report filed by Officer John Fiers states, "In the opinion of these officers, it is not probable that Mr. Savory would be wearing his father's pants due to the considerable size difference." (Ex. 27.) Officers Fiers and Jatowski both testified at trial that the size of the pants were for a full-grown man, and not a 14 year old boy. (Ex. 2, R.1407-08; Ex. 2, R.1442-43.)

Regardless of who the pants belong to, there is also substantial doubt about the source of the bloodstain. As Mr. Savory's father told police at the time they collected the pants at his house, the source of the blood on the pants was a cut on his leg that Mr. Savory's father had sustained two weeks earlier. (Ex 27.) At both trials, Y.T. Savory testified that that injury had been the source of the bloodstain on the blue pants. (Ex. 1, R.868-70; Ex. 4, R.1715-16.)

Testing conducted at the time of trial to determine whose blood was on the pants was inconclusive. Both Y.T. Savory and Connie Cooper had Type A blood. (Ex. 1, R.682-683, R.975; Ex. 38 (Item 23); Ex. 40.) Likewise, the blood on the pants was identified as Type A blood. (Ex. 38 (Item 59); Ex. 1, R.689; Ex. 2, R.1469-70.) At a 2002 deposition, the criminalist who performed the original analysis in this case, Robert Gonsowski, testified that the testing he conducted on the bloodstain would include *both* Y.T. Savory and Connie Cooper as potential sources of the blood but could not exclude either as the source. (Ex. 8 at 44-45.)[6] At the first trial, Gonsowski testified that he did not conduct further testing in an attempt to identify the subgroup of the blood on the pants. (Ex. 1, R.719.) At his deposition, Gonsowski expanded on this testimony stating that in 1977 there was no reliable test he was trained to perform to eliminate either Mr. Savory's father or Connie Cooper as the source of the stain. (Ex. 8 at 22-24; 27-28; 43-45.)

As discussed above, the blue pants were among the pieces of evidence subject to DNA testing by the August 2013 order of the Circuit Court in Peoria. However, when the pants were examined for testing, the alleged bloodstain that was the basis for testimony at the 1981

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[6] Gonsowski's deposition was taken in the context of litigation brought by Johnnie Savory against the Illinois State Police under the Freedom of Information Act to obtain the original laboratory worksheets that recorded the tests conducted on the blue pants. After conceding that there was no valid basis to withhold the worksheets, the Illinois State Police were unable to locate the original worksheet of the testing performed by Mr. Gonsowski on the blue pants.

trial had apparently been cut out of the pants and could not be located for testing. More significantly, however, was that this recent testing did not identify the presence of blood in the area of the pants were the stain had alleged to have been located, and testing on other stains did not find the presence of blood. (Ex. 42 (Items 59A to 59E1); Ex. 43 (Item 59A1 to 59E1); Ex. 7 at 38-42, 153-54, 162-66.) This is also significant given the amount of blood at the crime-scene. If Mr. Savory had been wearing those pants as the state has theorized, they would have had significantly more blood than just the small stain that can no longer be analyzed.

2. Hairs Found In Bathroom Sink.

The second item of physical evidence that the prosecution claimed linked Mr. Savory to the crime scene was hairs found in the sink and bathtub at the Robinson home. As Robert Gonsowski testified, the extent of his examination of those hairs in 1977 would have been a side-by-side microscopic comparison of the samples found at the scene and samples taken from Johnnie Savory. (Ex. 8. at 35; Ex. 1, R.691-92.) These tests purportedly allowed Gonsowski to make a visual comparison and determine only that the hair samples were "similar," but he could not definitively testify that they could have only come from Mr. Savory or that the hairs were "identical" to Mr. Savory. (Ex. 2, R.1474-75; Ex. 1, R.705-06.) The validity of this type of microscopic examination has long been questioned and, in 2009, the National Academy of Sciences determined it was unreliable. (Ex. 47 at 171 ("The committee found no

scientific support for the use of hair comparisons for individualization in the absence of nuclear DNA).)

3. The Pocket Knife.

The prosecution also paraded a pocket knife obtained from Y.T. Savory around the courtroom claiming that it was the murder weapon. Yet, the tests performed on the knife indicated only the possibility that that it had trace amounts of blood, and could not definitively determine that blood was actually on the knife. (Ex. 2, R.1476; Ex. 1, R.706.) No testing could be performed to determine with certainty that that it actually was blood, that it was human blood, or to determine the blood type. (Ex. 8; Ex. 38 (Item 44).) Furthermore, Mr. Savory's father, Y.T. Savory, testified that he had used that very knife to cut the stitches he received for his leg wound. (Ex. 1, R.872-73.) Most recently, testing on the knife did not find the presence or blood or yield any interpretable DNA profiles. (Ex. 42 (Items 44A, 44A1, 44B, 44B1); Ex. 43 (Items 44A1, 44B1); Ex. 7 at 38-42, 153-54, 162-66.)

4. Other Physical Evidence Establishes Innocence.

Other physical evidence collected in 1977 also excludes Mr. Savory. As noted, Mr. Savory sought to test hairs found in the hands of both victims that may have come from the murderer. While the State has lost that crucial evidence, analysis in 1977 determined that those hairs did not come from Mr. Savory. (Ex. 38 (Items 31, 69); Ex. 39 (Items 75-83).) Moreover, at least one hair found on Connie Cooper's bed sheets was determined in 1977 not to have come from either victim

or Mr. Savory. (Ex. 38 (Item 9); Ex. 39 (Items 75-83).) This is yet further evidence that someone else other than Mr. Savory committed this crime.

C. The Prosecution Improperly Introduced Other Alleged Inconsistent Statements And Claimed Mr. Savory's Exercise of His Right To Silence Was Evidence Of Guilt.

The final evidence of Mr. Savory's guilt offered by prosecutors were statements Mr. Savory allegedly made to the police that the State claimed showed knowledge of the crime as well as claims that Mr. Savory's refusal to talk to police at various points during his interrogation were in and of themselves evidence of guilt.

Regardless of the content of the allegedly inconsistent statements made by Mr. Savory, the Second District Appellate Court ruled that such statements were unreliable and introduced in violation of *Miranda v. Arizona. People v. Savory,* 105 Ill.App.3d 1023, 1029 (2nd Dist. 1982). The Illinois Appellate court also ruled that use of Mr. Savory's exercise of his right to remain silent as evidence of his guilt was also improper. *Id.* at 1031-32. However, both the Illinois Appellate Court, and later the Seventh Circuit, determined these errors were harmless in light of the testimony of the Ivys and other physical evidence described above, both of which have been discredited. *People v. Savory,* 105 Ill.App.3d 1029; *United States ex rel. Savory v. Lane,* 832 F.2d 1011 (7th Cir. 1987).

Irrespective of the constitutional issues, however, there are also serious questions about whether any of

the alleged statements – even if actually made by Mr. Savory – actually reflect any incriminating knowledge of the crime scene. The State has long claimed guilt because Mr. Savory supposedly told police that he and James Robinson had eaten corn the night prior to the murders, while at the second trial Peoria Coroner's physician, Dr. Phillip Immesoete testified that the victims had eaten corn that morning because the stomach contents of both victims included kernels of corn. (Ex. 3, R.1590.) However, the stomach contents – testified to for the first time by Dr. Immesoete at the second trial in 1981 – are not reflected anywhere in the autopsy reports for either victim (Exs. 33-35), the accompanying toxicology reports (Exs. 35-36), and were not noted in Dr. Immesoete's testimony at a 1977 Coroner's inquest (Ex. 15). This raises serious questions about this testimony. Indeed, the Chief Medical Examiner of Macomb and St. Clair Counties in Michigan, Dr. Daniel J. Sptiz, has reviewed records and testimony in this case and opined that it would be standard to document such findings in any autopsy report, and it raises serious questions about whether Dr. Immesoete's opinions were "influenced by others or based on factors other than the autopsies that he conducted in this matter." (Ex. 13 ¶¶ 22, 25.) Accordingly, not only was evidence of Mr. Savory's alleged statements improperly admitted, but they simply does not constitute evidence of guilt.

CONCLUSION

Mr. Savory served 30 years in prison, innocent of the crime charged for which he was convicted. For all of these reasons described in this petition, Johnnie

Savory respectfully requests that the Governor exercise his power of executive clemency and grant Johnnie Savory a pardon that recognizes his innocence as contemplated by 735 ILCS 5/2-702(h).

Respectfully Submitted,

Johnnie L. Savory

By Christopher Tompkins
One of His Attorneys

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Dated: July 25, 2016.

PETITIONER'S DECLARATION

I declare under penalty of perjury that all of these assertions made in this petition are complete, truthful and accurate.

/s/Johnnie L. Savory
Johnnie L. Savory

Subscribed and sworn to before me
this 25th day of July, 2016

/s/Kristy M. Wilson
Notary Public

OFFICIAL SEAL
KRISTY M. WILSON
Notary Public - State of Illinois
My Commission Expires 12/21/2019

* * *

[*Affidavit of Service Omitted in the Printing of this Appendix*]