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**SWEET RESULT IN SAVORY: HOW THE SEVENTH  
CIRCUIT TOOK THE CORRECT APPROACH TO  
POST-CONVICTION ACCESS TO DNA EVIDENCE  
IN SAVORY V. LYONS**

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INTRODUCTION

The use of DNA evidence within the criminal justice system has become a part of popular culture. The growth of the “CSI” franchise on major network television,<sup>1</sup> coupled with its success in attaining viewers,<sup>2</sup> may suggest a public fascination with the use of scientific

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<sup>1</sup> As of February 2007, CBS aired three separate television shows based on the CSI franchise: CSI: Crime Scene Investigation, CSI: Miami, and CSI: NY. See CSI Homepage, <http://www.cbs.com/primetime/csi/> (last visited April 22, 2008); CSI: Miami Homepage, [http://www.cbs.com/primetime/csi\\_miami/](http://www.cbs.com/primetime/csi_miami/) (last visited April 22, 2008); CSI: NY Homepage, [http://www.cbs.com/primetime/csi\\_ny/](http://www.cbs.com/primetime/csi_ny/) (last visited April 22, 2008).

<sup>2</sup> According to Nielsen Media Research, CSI: Crime Scene Investigation was the most watched show on U.S. television for the 2002-03 television season. Joal Ryan, *TV Season Wraps: “CSI” Rules*, EONLINE, May 22, 2003, <http://www.eonline.com/news/article/index.jsp?uuid=2c7a48e7-bd06-4a73-9311-0bab5caf4ef1&page=2> (last visited April 22, 2008). CSI maintained its dominance throughout the decade, ranking 2nd in viewership for 2003-04, 3rd in 2005-06, and 4th in 2006-07, while its sister show, CSI: Miami, placed 9th in 2003-04, 7th in 2004-05, and 9th in 2005-06. See Joal Ryan, *“Idol” Rules TV Season*, EONLINE,

techniques to solve crimes.<sup>3</sup> The popularity of the show (and its imitators) is a small example of the way in which DNA testing has revolutionized the criminal justice system. Yet for all its advantages, access to DNA evidence—and the increasingly accurate results derived from improved testing<sup>4</sup>—is subject to a procedural roadblock in some jurisdictions that limits access to those who may benefit from its use. Specifically, the procedural roadblock erected in some jurisdictions prevents prisoners from gaining post-conviction access to physical evidence for the purpose of DNA testing through a § 1983 claim. Instead, those jurisdictions limit prisoners to the more complicated—and potentially more restrictive and time-consuming—habeas corpus relief.

There are two judicial methods by which a prisoner may gain access to physical evidence in order to conduct DNA testing. First, the universally accepted method is through a writ of habeas corpus, by

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May 27, 2004, <http://www.eonline.com/news/article/index.jsp?uuid=f11a7579-284c-4d9b-bc69-3bfd2b9bec42&page=2> (2003-04 Nielsen ratings) (last visited April 22, 2008); Joal Ryan, *No Toppling “Idol”*, EONLINE, June 1, 2005, <http://www.eonline.com/news/article/index.jsp?uuid=9c3320c5-f831-4443-9776-a2061f3b9ddd&page=2> (2004-05 Nielsen ratings) (last visited April 22, 2008); Joal Ryan, *“Idol” Extends Reign*, EONLINE, May 25, 2006, <http://www.eonline.com/news/article/index.jsp?uuid=8ccaf68b-821c-4eec-91cb-1f269b21391c> (2005-06 ratings) (last visited April 22, 2008); Joal Ryan, *Idol Biggest of Smallest*, EONLINE, May 25, 2007, <http://www.eonline.com/news/article/index.jsp?uuid=17b8f65c-3700-49b5-8432-b0ac725ccf21&page=2> (2006-07 Nielsen ratings) (last visited April 22, 2008).

<sup>3</sup> The phenomenon does not appear limited to the U.S. As of December 2006, the CSI franchise was “syndicated in 200 countries to a global audience of 2 billion.” Gerard Gilbert, *CSI: The cop show that conquered the world*, THE INDEPENDENT, Dec. 19, 2006, <http://www.independent.co.uk/news/media/csi-the-cop-show-that-conquered-the-world-429262.html> (last visited April 22, 2008). It has been anecdotally suggested that American juries now expect a higher standard of forensic evidence due in part to the show’s popularity. *Id.*

<sup>4</sup> DNA testing in the early 1990s, which used the PCR method, could isolate a genetic marker that would be shared by only 2 percent of the population, or one in fifty. The chance of two people matching genetic markers in current STR testing are less than one in a trillion. Fay Flam, *Initial DNA Scientist Vindicated, but still has concerns*, PHILADELPHIA INQUIRER, A-14, Jan. 13, 2006.

which a prisoner may challenge the validity of his confinement.<sup>5</sup> The second, more controversial method is through 42 U.S.C. § 1983. Created by the Civil Rights Act, this cause of action allows any person to file a civil claim in federal court if their constitutional rights have been violated by a state actor under color of state law.<sup>6</sup> While both methods can yield the access to post-conviction DNA testing that the prisoner seeks, habeas corpus relief is subject to several rules—such as the “state exhaustion” requirement—which can make it a less desirable route to relief than § 1983. Federal appellate courts are split on the validity of these methods. While the Ninth and Eleventh Circuits have held that a claim requesting post-conviction access to DNA evidence is cognizable under both habeas corpus proceedings and 42 U.S.C. § 1983,<sup>7</sup> the Fourth, Fifth, and Sixth Circuits have limited the relief to such requests strictly to a writ of habeas corpus.<sup>8</sup>

In *Savory v. Lyons*, the Seventh Circuit faced the question of whether a prisoner could validly make a claim under 42 U.S.C. § 1983 for post-conviction access to physical evidence for the purpose of DNA testing.<sup>9</sup> In its opinion, the Seventh Circuit declined to join the Fourth Circuit’s approach, instead following the Ninth and Eleventh Circuits in holding that such a claim under § 1983 was viable.<sup>10</sup> In reaching its decision, the *Savory* court drew support from the 2005 Supreme Court case *Wilkinson v. Dotson*, a case which updated the Court’s treatment of the tension between § 1983 and habeas claims for post-conviction relief without expressly speaking to the issue of DNA testing. By recognizing that *Dotson*’s reasoning all but expressly resolved the dispute over the viability of state prisoner’s § 1983 claims

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<sup>5</sup> *Preiser v. Rodriguez*, 411 U.S. 475, 484 (1973).

<sup>6</sup> *Id.* at 483-84.

<sup>7</sup> *See Osborne v. District Attorney’s Office for the Third Judicial District*, 423 F.3d 1050, 1054 (9th Cir. 2005); *Bradley v. Pryor*, 305 F.3d 1287, 1290-92 (11th Cir. 2002).

<sup>8</sup> *See Harvey v. Horan*, 278 F.3d 370 (4th Cir. 2002); *Kutzner v. Montgomery County*, 303 F.3d 339, 340 (5th Cir. 2002); *Boyle v. Mayer*, 46 Fed.Appx. 340, 340 (6th Cir. 2002).

<sup>9</sup> *Savory v. Lyons*, 469 F.3d 667, 670 (7th Cir. 2006).

<sup>10</sup> *Id.* at 672.

for post-conviction access to DNA testing, the *Savory* court reached the proper result and ensured that future decisions in the Seventh Circuit will be decided on their merits, rather than be derailed by procedural roadblocks.<sup>11</sup>

This comment examines the ramifications of the Seventh Circuit's opinion in *Savory* concerning whether § 1983 may act as a vehicle to obtain post-conviction access to physical evidence for the purpose of DNA testing. Part I provides a brief introduction to the writ of habeas corpus and 42 U.S.C. § 1983, including the relative merits of each in terms of post-conviction access. Part II examines the judicial stage set for *Savory*, including Supreme Court precedents and the conflicting interpretations developed by the Circuits. Part III discusses the facts, holding, and reasoning of *Savory*. Finally, Part IV examines *Savory* within the context of the circuit split and the *Dotson* decision, and argues that the Seventh Circuit reached the proper result by holding that state prisoners' § 1983 claims seeking post-conviction access to DNA testing are cognizable.<sup>12</sup>

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<sup>11</sup> It has been argued that this "overproceduralism" makes it difficult for inmates to have their constitutional claims heard. Jordan Steiker, *Restructuring Post-Conviction Review of Federal Constitutional Claims Raised by State Prisoners: Confronting the New Face of Excessive Proceduralism*, 1998 U. CHI. LEGAL F. 315, 315-16 (1998).

<sup>12</sup> It is critical to note that while the plaintiff in *Savory* brought a § 1983 claim asserting a constitutional right of due process to post-conviction access to physical evidence for the purpose of DNA testing, *Savory* does not answer the question of whether such a right exists. 469 F.3d at 675. Indeed, because the statute of limitations for a § 1983 claim had elapsed in *Savory*, the court was not forced to answer such a question. *Id.* Instead, *Savory* deals with the procedural question of whether § 1983 is an appropriate vehicle to make such a challenge. Judge King's dissent in *Harvey* takes special effort to note that though he believes § 1983 is a proper vehicle for such a claim, the US Constitution does not support a due process right to post-conviction access to physical evidence for the purpose of DNA testing under the facts of that case. 278 F.3d at 388 (King, J., dissenting).

## I. THE WRIT OF HABEAS CORPUS AND 42 U.S.C. § 1983

In examining whether prisoners should be able to use a § 1983 action to gain post-conviction access to physical evidence, or instead be limited to habeas corpus relief, it is necessary to address a threshold question: why does it matter which approach the prisoner uses? If a prisoner is guaranteed to have his habeas claim heard, why bother filing a § 1983 claim of questionable validity? The answer lies in the procedural elements specific to each approach, which yield concrete differences in how the prisoner's desired result is reached. It is these procedural differences that make § 1983 claims more desirable to a prisoner than a habeas claim, thereby making the cognizability of the § 1983 claim for post-conviction access to DNA testing of importance.

### A. *Habeas Corpus*

The writ of habeas corpus provides a vehicle by which a prisoner can challenge the validity of his imprisonment.<sup>13</sup> Thus, if a state prisoner is held in violation of his federal constitutional rights, he may apply for a writ of habeas corpus for relief.<sup>14</sup> Inspired by the Magna Carta and imported from English law,<sup>15</sup> the writ of habeas corpus is often referred to as the “Great Writ” due to its central role in preserving basic notions of due process and “personal liberty.”<sup>16</sup> The Supreme Court once wrote:

[a]lthough in form the Great Writ is simply a mode of procedure, its history is inextricably intertwined with

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<sup>13</sup> Preiser v. Rodriguez, 411 U.S. 475, 484 (1973).

<sup>14</sup> See Steiker, *supra* n.11, at 325 (writing that “federal habeas remains available for the redress of virtually all federal constitutional violations”).

<sup>15</sup> See Fay v. Noia, 372 U.S. 391, 402 (1963) (discussing the introduction of a bill before the English House of Commons in 1593 to implement the use of the writ of habeas corpus to combat perceived violations of due process guaranteed by the Magna Carta). While Fay is no longer good law, its historical discussion of the writ of habeas corpus remains relevant.

<sup>16</sup> *Id.* at 401.

the growth of fundamental rights of personal liberty. For its function has been to provide a prompt and efficacious remedy for whatever society deems to be intolerable restraints. Its root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release.<sup>17</sup>

Indeed, the writ is so vital to American ideals that the Founding Fathers felt compelled to guarantee its maintenance in the Constitution's Suspension Clause.<sup>18</sup>

The federal habeas corpus statute states that a federal court may only consider a state prisoner's writ of habeas corpus application if the grounds for that application are that his imprisonment violates federal law.<sup>19</sup> Furthermore, a federal court will not grant a writ of habeas corpus if the state prisoner has failed to exercise all available state remedies.<sup>20</sup> Known as the "state exhaustion" requirement, this means

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<sup>17</sup> *Id.* at 401-402.

<sup>18</sup> "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion or the public Safety may require it." U.S. CONST., art. I, § 9, cl. 2.

<sup>19</sup> The statute reads:

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2254(a) (2000).

<sup>20</sup> The statute states:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State; or there is an

that if the state prisoner has any unused “right” or “procedure” available under state law to address the issue presented in his application for a writ of habeas corpus, the federal court will not grant the writ.<sup>21</sup>

Federalism concerns underlie the imposition of this “state exhaustion” requirement. Specifically, courts have expressed concern that allowing a federal court to correct errors of federal law made by state courts, without first giving the state court system opportunity to correct the error itself, would generate friction between the two systems.<sup>22</sup> The “state exhaustion” requirement is an expression of the doctrine of “comity”<sup>23</sup>—it does not eliminate the federal habeas corpus remedy, but rather defers its exercise until all available state remedies have been exercised.<sup>24</sup>

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absence of available State corrective process; or circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. 2254(b)(1) (2000).

<sup>21</sup> “An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.” 28 U.S.C. 2254(c) (2000).

<sup>22</sup> See *Presier v. Rodriguez*, 411 U.S. 475, 490 (1973); see also *Darr v. Burford*, 339 U.S. 200, 204 (1950) (explaining that “it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation”).

<sup>23</sup> “[T]he doctrine of comity between courts . . . teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter.” *Darr*, 339 U.S. at 204.

<sup>24</sup> The Supreme Court wrote in *Cook v. Hart*:

[C]omity demands that the state courts, under whose process [the prisoner] is held, and which are, equally with federal courts, charged with the duty of protecting the accused in the enjoyment of his constitutional rights, should be appealed to in the first instance. Should such rights be denied, his remedy in the federal court will remain unimpaired.

*B. 42 U.S.C. § 1983*

42 U.S.C. § 1983 was enacted as part of the Civil Rights Act of 1871 as a method to enforce the Fourteenth Amendment.<sup>25</sup> It creates a civil cause of action by which any person may challenge state action that violates their federal constitutional or statutory rights in federal court.<sup>26</sup> The Supreme Court has compared § 1983 to a common law tort action,<sup>27</sup> established on “the principle that a person should be compensated fairly for injuries caused by the violation of his legal rights.”<sup>28</sup> An action brought under § 1983 may seek declaratory, injunctive, and monetary relief.<sup>29</sup>

Like an application for writ of habeas corpus, a successful § 1983 claim requires a violation of federal law.<sup>30</sup> In the context of obtaining post-conviction access to DNA testing, state prisoners often allege that denial of access to DNA testing constitutes a violation of due process

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146 U.S. 183, 194-95 (1892).

<sup>25</sup> *Lugar v. Edmonson Oil Company, Inc.*, 457 U.S. 922, 934 (1982).

<sup>26</sup> The statute states in relevant part:

Every person who, under color of any statute . . . of any State . . . subjects . . . any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (2000).

<sup>27</sup> *Heck v. Humphrey*, 512 U.S. 477, 483 (1994); *see also* Student Note, Benjamin Vetter, *Habeas, Section 1983, and Post-Conviction Access to DNA Evidence*, 71 U. CHI. L. REV. 587, 593-94 (2004).

<sup>28</sup> *Heck*, 512 U.S. at 483 (quoting *Carey v. Phipus*, 435 U.S. 247, 257-58 (1978)); *see also* Vetter, *supra* n.27, at 595.

<sup>29</sup> 42 U.S.C. § 1983 (2000). *See also* Martin A. Schwartz, *The Preiser Puzzle: Continued Frustrating Conflict Between the Civil Rights and Habeas Corpus Remedies for State Prisoners*, 37 DEPAUL L. REV. 85, 89 (1988).

<sup>30</sup> 42 U.S.C. § 1983 (2000) (protecting “immunities secured by the Constitution and laws”).

under *Brady v. Maryland*.<sup>31</sup> In *Brady*, a man convicted of murder in a Maryland state court argued that the prosecution had suppressed exculpatory statements of a witness in violation of due process.<sup>32</sup> The Court agreed with the prisoner, holding that “suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment.”<sup>33</sup> The Court reasoned that such disclosure by the prosecution is necessary for a fair trial, which is a fundamental concept of our judicial system.<sup>34</sup> Subsequent to *Brady*, courts have argued that if this fairness principle requires disclosure of exculpatory evidence before trial, there is no reason it should not likewise extend to disclosure of potentially exculpatory evidence (such as DNA evidence) after the trial.<sup>35</sup> Therefore, when a state officer refuses a prisoner post-conviction access to DNA testing, a prisoner raising a § 1983 claim would argue that the state officer denying access to the evidence had deprived him of his constitutional right to due process under color of state law.

Section 1983 actions are not subject to the “state exhaustion” requirement because the statute was enacted to circumvent the legal systems of states that were unwilling to enforce their own laws.<sup>36</sup> Specifically, the enacting Congress felt that states’ refusal to address

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<sup>31</sup> See *Savory v. Lyons*, 469 F.3d 667, 674-75 (7th Cir. 2006); see also *Bradley v. Pryor*, 305 F.3d 1287, 1291 (11th Cir. 2002); *Harvey v. Horan*, 278 F.3d 370, 378 (4th Cir. 2002). State prisoners seeking post-conviction access to DNA testing are not limited to *Brady* as the basis for a due process violation. For a more complete discussion of possible constitutional violations to use as the basis for a § 1983 claim seeking post-conviction access to DNA testing, see *Vetter, supra n.27*, at 590-93.

<sup>32</sup> *Brady v. Maryland*, 373 U.S. 83, 84 (1963).

<sup>33</sup> *Id.* at 87.

<sup>34</sup> *Id.* Writing for the majority, Justice Douglas wrote, “[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.” *Id.*

<sup>35</sup> *Harvey v. Horan*, 285 F.3d at 317 (Luttig, J. concurring); see also *Vetter, supra n.27*, at 591-92. *Vetter* notes that while this extends the meaning of *Brady* beyond its plain language, “the extension is not entirely unreasonable and has been accepted by at least one district court.” *Vetter, supra n.27*, at 591-92.

<sup>36</sup> *Schwartz, supra n.29*, at 89.

Klu Klux Klan violence by applying their own laws required a federal work-around.<sup>37</sup> Where both Congress and subsequent Supreme Court opinions expressed such a clear distrust of state action in the matter, implementing a “state exhaustion” requirement would have voided the purpose of the statute.<sup>38</sup>

*C. Why the decision between habeas corpus and § 1983 matters*

The growth of constitutional rights extended to state prisoners in the middle of the 20th century, paired with a dearth of post-conviction rights actually offered by the states, generated a system in which federal courts seemed to supervise state procedures.<sup>39</sup> In order to protect their decisions, states responded by expanding their own post-conviction procedures.<sup>40</sup> This growth of state procedure, when paired with the federal habeas statute’s exhaustion requirement, created added delay to the adjudication of prisoners’ constitutional rights.<sup>41</sup> In addition, prisoners subject to these state post-conviction procedures may not receive the full protections ordinarily accorded under due process,<sup>42</sup> raising the question of whether these added procedures serve the interests of justice.

Section 1983 claims present plaintiffs with a number of advantages over federal habeas applications. First, because § 1983 claims are not subject to the added delay of the state exhaustion requirement, state prisoners may seek immediate relief in federal court.<sup>43</sup> Additionally, because § 1983 is a civil action, prisoners may seek monetary damages in addition to any injunctive or declaratory

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<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 90.

<sup>39</sup> Steiker, *supra* n.11, at 342 (1998).

<sup>40</sup> *Id.* at 342-43.

<sup>41</sup> *Id.* at 343.

<sup>42</sup> *Id.* For instance, Professor Striker notes that prisoners are not entitled to the Sixth Amendment right to counsel in state post-conviction hearings. *Id.* at 343-44, n.114; *see also* Murray v. Giarratano, 492 U.S. 1, 10 (1989).

<sup>43</sup> Vetter, *supra* n.27, at 595.

relief.<sup>44</sup> On the other hand, the lack of a state exhaustion requirement means that state courts may find their decisions overturned in federal court as the result of § 1983 actions, increasing friction between the state and federal judicial systems.<sup>45</sup> Nevertheless, the significant advantages in bringing a § 1983 action rather than seeking federal habeas relief led state prisoners to begin using § 1983 as an alternative to habeas corpus when attempting to have their constitutional claims heard.<sup>46</sup> The significant overlap of the two approaches eventually required judicial intervention.

## II. JUDICIAL PRECEDENT

The United States Supreme Court first addressed the conflict between prisoners using § 1983 and writs of habeas corpus in the 1973 case *Preiser v. Rodriguez*.<sup>47</sup> The Court later clarified its position in 1994 with *Heck v. Humphrey*.<sup>48</sup> Though neither case specifically addressed how § 1983 and habeas claims pertained to requests for post-conviction access to DNA testing, they created the larger framework by which later analysis would be conducted. Subsequent to *Heck*, a split developed between several Federal Circuit courts over whether such post-conviction DNA testing requests could be made using § 1983, or instead limited to habeas relief. As the Circuits debated, the Supreme Court issued *Wilkinson v. Dotson*, which further clarified *Heck* without speaking definitively on the issue of post-conviction access to DNA testing. This section will examine the development of these precedents, from the stage set by the Supreme Court in *Preiser* and *Heck*—and later *Dotson*—to the decisions creating the split amongst the Federal appellate courts.

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<sup>44</sup> *Id.* at 595.

<sup>45</sup> *See* *Darr v. Burford*, 339 U.S. 200, 204 (1950) (writing that federal courts' power to review state court decisions through habeas actions created "an area of potential conflict between state and federal courts").

<sup>46</sup> Vetter, *supra* n.27, at 595.

<sup>47</sup> 411 U.S. 475, 477 (1973).

<sup>48</sup> 512 U.S. 477, 478 (1994).

## A. Supreme Court Precedent

### 1. *Preiser v. Rodriguez*

In *Preiser v. Rodriguez*, the United States Supreme Court heard arguments from three New York state prisoners challenging the validity of their imprisonment.<sup>49</sup> Decided in 1974, *Preiser* was issued almost thirty years before *Harvey v. Horan*, the first case where federal appellate courts grappled with the viability of post-conviction DNA testing requests through § 1983.<sup>50</sup> In examining the more general question of whether a prisoner could challenge his confinement through a § 1983 claim,<sup>51</sup> however, *Preiser* laid the groundwork for the later DNA cases.

*Preiser* consolidated a number of lawsuits that shared a common thread: each prisoner had earned a number of “good-time” credits which should have had the effect of shortening their sentence had the credits not been revoked by the state prison.<sup>52</sup> The prisoners filed lawsuits under § 1983 claiming that their credits had been unconstitutionally revoked under color of state law.<sup>53</sup> Because each prisoner had secured enough “good-time” credits to be released immediately but for the revocation, a successful challenge of the procedures by which they were deprived of those credits would have resulted in an immediate release from prison.<sup>54</sup>

New York contended that the prisoners’ claims should be limited to habeas corpus relief and were not properly brought via § 1983.<sup>55</sup> Because the prisoners were poised to be released from prison if their claims succeeded, New York argued that the prisoners were actually

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<sup>49</sup> 411 U.S. at 476-77.

<sup>50</sup> *Harvey v. Horan*, 278 F.3d 370 (4th Cir. 2002).

<sup>51</sup> *Preiser*, 411 U.S. at 477.

<sup>52</sup> *Id.* at 476-82.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 487.

<sup>55</sup> *See id.* at 482.

challenging the very validity of their imprisonment.<sup>56</sup> Such an action traditionally could only be accomplished through a writ of habeas corpus, which required exhaustion of state remedies.<sup>57</sup> In an *en banc* hearing, the Second Circuit Court of Appeals disagreed with the State, holding that the § 1983 claims were valid, and “not subject to any requirement of exhaustion of state remedies.”<sup>58</sup>

The Supreme Court reversed the Second Circuit in a 6-3 decision, holding that the state prisoners were limited to habeas relief.<sup>59</sup> In justifying its holding, the Court noted that issues of federal-state comity were of primary concern.<sup>60</sup> While the dissent argued that previous Court decisions had allowed § 1983 actions on questions of state prison administration without disturbing notions of federal-state comity, the majority replied that the issues in those cases did not implicate any other statute, while the case before them directly addressed the purpose of the federal habeas corpus statute: challenging the validity of the prisoners’ confinement.<sup>61</sup> Thus, the court held that “when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from imprisonment, his sole federal remedy is a writ of habeas corpus.”<sup>62</sup>

The *Preiser* Court noted in dictum that its holding did not prevent a prisoner from bringing a suit under § 1983 seeking monetary damages.<sup>63</sup> While the plaintiffs’ requests in *Preiser* for equitable relief would have resulted in restoration of their good-time credits, and therefore resulted in their immediate release, the Court wrote that an award of damages would yield no direct effect on the “fact or length”

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<sup>56</sup> *See id.*

<sup>57</sup> *See id.*

<sup>58</sup> *Id.* The Second Circuit’s decision was highly contested within the *en banc* panel, generating opinions by eight judges, including three dissents. *Id.*

<sup>59</sup> *Id.* at 500.

<sup>60</sup> *Id.* at 591.

<sup>61</sup> *Id.* at 592 n.10.

<sup>62</sup> *See id.* at 500.

<sup>63</sup> *Id.* at 494.

of a prisoner's imprisonment.<sup>64</sup> Despite the Court's plain language authorizing prisoners to use § 1983 to seek monetary damages in *Preiser*,<sup>65</sup> the Court would be forced to readdress the issue 21 years later in *Heck v. Humphrey*.

## 2. *Heck v. Humphrey*

In *Heck v. Humphrey*, an Indiana state prisoner convicted of voluntary manslaughter filed a § 1983 claim against several state officials, alleging, amongst other things, that his prosecution had been unlawful and the defendants had destroyed exculpatory evidence.<sup>66</sup> However, rather than seeking his release through injunctive relief, the plaintiff sought money damages.<sup>67</sup> *Heck* sheds light on the split over post-conviction DNA testing because rather than seeking actual release from prison—which would have been the ultimate result had the *Preiser* plaintiffs succeeded in their § 1983 claims—both the *Heck* and DNA plaintiffs sought some other form of relief. Both the District Court and the Seventh Circuit agreed that although the *Heck* plaintiff's claim did not seek his release from prison, a victory on the merits would call into question the very validity of his confinement.<sup>68</sup> Because *Preiser*'s dictum concerning monetary damages appeared to

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<sup>64</sup> *Id.*

<sup>65</sup> The *Preiser* Court wrote:

If a state prisoner is seeking damages, he is attacking something other than the fact or length of his confinement, and he is seeking something other than immediate or more speedy release—the more traditional purpose of habeas corpus. In the case of a damages claim, habeas corpus is not an appropriate or available federal remedy. Accordingly, . . . a damages action by a state prisoner could be brought under the Civil Rights Act in federal court without any requirement of prior exhaustion of state remedies.

*Id.*

<sup>66</sup> 512 U.S. 477, 478-79 (1994).

<sup>67</sup> *Id.* at 479.

<sup>68</sup> *Id.* at 479-80.

carve out an opening for a valid § 1983 claim, the Supreme Court granted certiorari to determine whether the prisoner's claim could rightly be heard.<sup>69</sup>

In a 5-4 opinion, the Supreme Court affirmed the lower court's holding that a § 1983 claim for money damages cannot stand if the plaintiff's victory on the merits would call into question the validity or duration of his imprisonment.<sup>70</sup> Justice Scalia, writing for the majority, began by highlighting *Preiser's* dictum, which stated that a prisoner's § 1983 claim for money damages would not trigger the state exhaustion requirement because it wouldn't attack the validity or duration of a prisoner's confinement.<sup>71</sup> However, he noted "[t]hat statement might not be true . . . when establishing the basis for the damages claim necessarily demonstrates the invalidity of the conviction."<sup>72</sup> For instance, Justice Scalia explained that a case in which a prisoner brought a § 1983 claim for money damages alleging that a prison had used the wrong administrative procedures did not violate *Preiser* because the prisoner was not challenging the essence of his confinement, but rather a set of procedures that were used.<sup>73</sup> On the other hand, if the *Heck* plaintiff were to win his § 1983 claim on the merits, a court would have to find that the defendants actually did conduct an unlawful investigation and destroyed exculpatory evidence. Such a finding would clearly call into question the validity of the plaintiff's confinement, an outcome prohibited by *Preiser* if it results from a § 1983 claim.

The Court rationalized its holding by drawing an analogy between the *Heck* plaintiff's suit and the common law tort of malicious

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<sup>69</sup> *Id.* at 480.

<sup>70</sup> *Id.* at 487.

<sup>71</sup> *Id.* at 481.

<sup>72</sup> *Id.* at 481-82.

<sup>73</sup> *Id.* at 482-83. Here the Court was referring to the facts of *Wolff v. McDonnell*, a case in which the Court held that the prisoner's § 1983 claim for damages was valid. *See* 418 U.S. 539 (1974).

prosecution.<sup>74</sup> One key element a plaintiff must establish in a malicious prosecution action is that the underlying criminal proceeding was resolved in his favor.<sup>75</sup> The rationale behind this requirement is that it helps provide finality in criminal judgments, and prevents prisoners from making collateral attacks on their convictions.<sup>76</sup> The Court therefore reasoned that if such collateral attacks were prevented in the common law, then the same requirement should be applied to the tort liability created by § 1983.<sup>77</sup>

Seeking to clarify any misconceptions caused by *Preiser's* dictum, the Court held that in order for a prisoner's § 1983 claim for money damages to survive, "a district court must consider whether a judgment in favor of the plaintiff would *necessarily* imply the invalidity of his conviction or sentence."<sup>78</sup> Justice Scalia went on to note that "if the district court determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed."<sup>79</sup>

### *B. The Circuit Split: Post-Conviction Access to DNA Testing*

After *Preiser* and *Heck*, lower courts began to struggle with the issue of whether a prisoner's post-conviction request for access to physical evidence for DNA testing could properly be brought under § 1983, or was instead restricted to habeas relief. The Fourth, Fifth and Sixth Circuits held that such requests should be limited to habeas relief. While the leading cases in those jurisdictions were heard prior to *Dotson*, subsequent decisions in those circuits have persisted in

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<sup>74</sup> *Heck*, 512 U.S. at 484. The Court also reasoned that because § 1983 created a kind of tort liability, and tort liability was derived from the common law, then the common law should be consulted for guidance. *Id.* at 483.

<sup>75</sup> *Id.* at 484.

<sup>76</sup> *Id.* at 484-85.

<sup>77</sup> *Id.* at 486.

<sup>78</sup> *Id.* at 487 (emphasis added).

<sup>79</sup> *Id.* (emphasis in original).

holding that such requests are limited to habeas relief. On the other hand, the Eleventh and Ninth Circuits held that requests for post-conviction DNA testing could rightly be made through a § 1983 claim. This section will examine the critical cases for each approach.

### 1. Habeas Corpus Relief Only—the Fourth, Fifth, and Sixth Circuits

In the January 2002 decision *Harvey v. Horan*, the Fourth Circuit was the first federal appellate court to hold that a prisoner seeking post-conviction access to physical evidence for DNA testing was limited to habeas relief.<sup>80</sup> The plaintiff in *Harvey*, a Virginia state prisoner who had been convicted of rape and forcible sodomy, filed a § 1983 claim seeking access to the rape kit in order to conduct DNA testing that had been unavailable at the time of his conviction.<sup>81</sup> The district court found that the plaintiff's § 1983 claim was cognizable because it did not challenge the length or duration of his conviction.<sup>82</sup> The State appealed.<sup>83</sup>

In a 2–1 decision, the Fourth Circuit reversed the lower court and held that a plaintiff seeking post-conviction access to DNA evidence was limited to habeas corpus relief. Writing for the majority, Chief Judge Wilkinson first looked to *Heck*'s holding that a plaintiff may not use § 1983 if a successful claim would “necessarily imply the invalidity of his conviction or sentence.”<sup>84</sup> Despite the plaintiff's argument that DNA evidence may just as well prove his guilt, the court responded that the plaintiff's action was only the first step in a broader attempt at challenging his conviction.<sup>85</sup> As such, the court found that the request was merely an attempt at an end run around *Heck*, and held that the § 1983 claim was not viable.<sup>86</sup>

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<sup>80</sup> 278 F.3d 370, 375 (4th Cir. 2002).

<sup>81</sup> *Id.* at 373-74.

<sup>82</sup> *Id.* at 374.

<sup>83</sup> *Id.*

<sup>84</sup> *Heck*, 512 U.S. at 487.

<sup>85</sup> *Harvey*, 278 F.3d at 375.

<sup>86</sup> *Id.*

The court proceeded to list a number of policy justifications for limiting a plaintiff to habeas relief, the foremost of which was the necessity of finality in criminal judgments.<sup>87</sup> The court worried that if prisoners were able to request new testing of physical evidence every time a new form of technology were developed, then the finality of criminal judgments would persistently be brought into question.<sup>88</sup> The court went on to say that “[t]he possibility of post-conviction developments, whether in law or science, is simply too great to justify judicially sanctioned constitutional attacks upon final criminal judgments.”<sup>89</sup>

The court also expressed concern that allowing post-conviction access to DNA testing of physical evidence through § 1983 claims would constitute judicial encroachment on an issue more properly settled by the democratic process.<sup>90</sup> Noting that several state legislatures had taken action in increasing post-conviction access to DNA evidence, the court feared that allowing access via § 1983 would stunt those initiatives.<sup>91</sup> The court therefore held that the plaintiff’s § 1983 claim could not stand, and limited him to habeas relief.<sup>92</sup>

Shortly after the *Harvey* decision, several other circuits followed the Fourth Circuit’s reasoning. In August of 2002, the Fifth Circuit held that a prisoner seeking post-conviction access to DNA testing was limited to habeas relief, and specifically cited *Harvey* as persuasive in its reasoning.<sup>93</sup> One month later, the Sixth Circuit followed similar reasoning in an unpublished opinion.<sup>94</sup> As recently as June of 2007, a court in the Northern District of Texas cited *Harvey* and its progeny as

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<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 376.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 377.

<sup>92</sup> *Id.*

<sup>93</sup> *Kutzner v. Montgomery County*, 303 F.3d 339, 340-41 (5th Cir. 2002).

<sup>94</sup> *See Boyle v. Mayer*, 46 Fed.Appx. 340 (6th Cir. 2002).

support for denying a plaintiff's § 1983 claim requesting post-conviction access to DNA testing.<sup>95</sup>

## 2. § 1983 Claims Cognizable—the Ninth and Eleventh Circuits

Though decisions issued by the Fourth and Fifth Circuits during the first 8 months of 2002 suggested a trending building toward denying prisoners post-conviction access to DNA testing via a § 1983 claim, the Eleventh Circuit arrived at a contrary position in *Bradley v. Pryor*, decided in September of 2002.<sup>96</sup> The plaintiff in *Bradley* had been convicted in Alabama for the murder of his stepdaughter in 1983.<sup>97</sup> In 2001, the plaintiff filed a § 1983 action seeking access to the rape kit and the victim's clothing in order to conduct DNA testing.<sup>98</sup> A magistrate judge suggested dismissing the plaintiff's claim, stating that it was no different than a habeas application and was subject to the habeas requirements.<sup>99</sup> The district court adopted the magistrate judge's findings and dismissed the plaintiff's claim.<sup>100</sup> The plaintiff appealed and the Eleventh Circuit granted review on the issue of "[w]hether a 42 U.S.C. § 1983 action initiated by a state prisoner . . . which seeks to compel the state to produce physical evidence for DNA testing . . . for the purpose of later asserting a claim of actual

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<sup>95</sup> *Gilkey v. Livingston*, 2007 WL 1953456 at 5 (N.D. Tex. June 27, 2007), *appeal dismissed on procedural grounds* 2008 WL 1766876 (5th Cir. Apr 15, 2008) (looking to *Harvey* and *Kutzner* in holding that a prisoner seeking post-conviction access to biological evidence for DNA testing was restricted to habeas relief). The District Court's opinion adopted the findings and conclusions of Magistrate Judge Paul D. Stickney. *Id.* at \*1. In his opinion, Judge Stickney noted the circuit split, but stated that *stare decisis* bound the court to follow the Fifth Circuit's holding in *Kutzner*. *Id.* at \*6, n.3.

<sup>96</sup> 305 F.3d 1287, 1292 (11th Cir. 2002).

<sup>97</sup> *Id.* at 1288.

<sup>98</sup> *Id.* at 1289. The State contended that it no longer had the evidence the plaintiff sought, but the plaintiff pushed for discovery in order to test the State's assertion. *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

innocence . . . is the ‘functional equivalent’ of a petition for federal habeas corpus.”<sup>101</sup>

Just as the Fourth Circuit did in *Harvey*, the *Bradley* court began its analysis by looking to *Preiser* and *Heck*. The court focused on *Heck*’s language regarding “‘whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence.’”<sup>102</sup> However, unlike the *Harvey* court, the Eleventh Circuit was persuaded by the plaintiff’s argument that success in his claim would not challenge the validity of his imprisonment, but instead would merely provide him access to DNA evidence.<sup>103</sup> Writing for the court, Judge Barkett explained:

[the plaintiff] prevails in this lawsuit once he has access to [the DNA] evidence . . . . Nothing in that result necessarily demonstrates or even implies that his conviction is invalid. As [the plaintiff] points out, it is possible that the evidence will not exculpate him . . . . But even if the evidence, after testing, permits [the plaintiff] to challenge his sentence, that challenge is no part of his § 1983 suit. He would have to initiate an entirely different lawsuit, alleging an entirely different constitutional violation, in order to demonstrate that his conviction and sentence are invalid.<sup>104</sup>

The court went on to dismiss the *Harvey* court’s reasoning that a § 1983 claim for post-conviction access to DNA testing was the “functional equivalent of a habeas corpus proceeding” merely because it was setting the stage for a subsequent challenge.<sup>105</sup> Judge Barkett

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<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 1290 (quoting *Heck v. Humphrey*, 512 U.S. 477, 487 (1994)) (emphasis added).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

contended that “[a]lthough [the plaintiff] might use the evidence, at some future date, to initiate a separate action challenging his conviction, future exculpation is not a necessary implication of [the plaintiff’s] claim in this case.”<sup>106</sup> As such, the Eleventh Circuit reversed the district court, and held that the plaintiff’s § 1983 claim seeking post-conviction access to physical evidence for the purpose of DNA testing did not violate the language set forth in *Heck*, and remanded for further proceedings.<sup>107</sup>

### C. *Wilkinson v. Dotson and After*

As the Circuits developed differing approaches for applying *Heck* to the issue of § 1983 claims for post-conviction access to DNA testing, the Supreme Court’s decision in *Wilkinson v. Dotson* took a step toward clarifying the issue.<sup>108</sup> While *Heck* eliminated the confusion revolving around prisoners’ § 1983 claims for money damages created by *Preiser*, the Court in *Dotson* sought to make a broader statement on the validity of prisoner’s § 1983 claims.<sup>109</sup> In *Dotson*, two Ohio inmates brought § 1983 claims challenging the constitutionality of state parole procedures.<sup>110</sup> In each case, the prison parole board applied procedures enacted after each inmate had begun to serve his sentence.<sup>111</sup> The inmates sued under § 1983 in federal district court, alleging that the prison officials had violated Due Process and the Constitution’s *Ex Post Facto* Clause, and sought declaratory and injunctive relief.<sup>112</sup> While the district court found that the prisoners were restricted to habeas relief and dismissed the complaints, the Sixth Circuit found that the § 1983 claims were valid

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<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 1291, 92.

<sup>108</sup> 544 U.S. 74, 76 (2005).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 77.

<sup>112</sup> *Id.*

and reversed the lower court.<sup>113</sup> The Ohio state officials filed a petition for certiorari, and the Supreme Court granted review.<sup>114</sup>

In an 8-1 decision, the Supreme Court held that the Ohio state prisoners' § 1983 claims were valid and remanded the case for further proceedings. In his majority opinion, Justice Breyer first addressed Ohio's contention that because the prisoners believed that the success of their § 1983 claims would ultimately lead to a speedier release from prison, they were actually challenging the duration of their confinement—essentially an assertion that the prisoners' § 1983 claim violated the holding in *Preiser*.<sup>115</sup> Considering the Court's jurisprudence on the issue, the Court held “that the connection between the constitutionality of the prisoners' parole proceedings and release from confinement is too tenuous here to achieve Ohio's legal door-closing objective.”<sup>116</sup>

The Court next examined the progression of the issue, including *Preiser* and *Heck*.<sup>117</sup> In order to provide a final and clear statement of the law on the issue, Justice Breyer wrote:

These cases, taken together, indicate that a state prisoner's § 1983 action is barred (absent prior invalidation)—no matter the relief sought (damages or equitable relief), no matter the target of the prisoner's suit (state conduct leading to conviction or internal prison proceedings)—*if* success in that action would necessarily demonstrate the invalidity of confinement or its duration.<sup>118</sup>

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 78.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 78-81.

<sup>118</sup> *Id.* at 81-82 (emphasis in original).

Crucially, the Court found that the prisoners were neither requesting speedier release nor challenging the validity of their confinement.<sup>119</sup> In explaining the potential result of one of the prisoner's claims, the Court wrote that "[s]uccess . . . does not mean immediate release from confinement or a shorter stay in prison; it means at most new eligibility review, which at most will speed consideration of a new parole application."<sup>120</sup> Thus, the *Dotson* court's analysis hinged on the word "necessarily." Only if the prisoner's § 1983 claim "necessarily" implied the invalidity of his confinement would he be forced to seek habeas relief.<sup>121</sup>

Justice Scalia wrote a concurring opinion in *Dotson* stating that Ohio's suggestion that the plaintiff be limited to habeas relief would require the Court "to broaden the scope of habeas relief beyond recognition."<sup>122</sup> Pointing to the writ's common law purpose of securing immediate release from unlawful confinement, Scalia argued that the writ should not be expanded to involve forms of relief too far removed from that common law foundation.<sup>123</sup> Because the *Dotson* plaintiff's request for relief—a new parole proceeding—did not fall within the realm of the writ's common law purpose, Justice Scalia contended that limiting him to habeas relief would be inappropriate.<sup>124</sup> Thus, where the plaintiff's requested relief did not bear on the status of his confinement, Justice Scalia agreed that a § 1983 claim was viable.<sup>125</sup>

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<sup>119</sup> *Id.* at 82.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 81-82. *Heck* actually used the word "necessarily" in its holding, but did nothing to draw attention to its importance. *Heck v. Humphrey*, 512 U.S. 477, 487 (1994) (holding that habeas must be used if "judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence"). The *Dotson* court, however, highlighted the word's importance by using it eight times in two pages. *See Dotson*, 544 U.S. at 81-82.

<sup>122</sup> *Dotson*, 544 U.S. at 85 (Scalia, J., concurring).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 86.

<sup>125</sup> *Id.* at 85-86.

Shortly after *Dotson*, the Ninth Circuit's opinion in *Osborne v. District Attorney's Office for the Third Judicial District* readdressed the issue of prisoner's § 1983 claims for post-conviction access to DNA testing.<sup>126</sup> The *Osborne* opinion suggested that *Dotson* provided the final word on the viability of § 1983 claims seeking post-conviction access to physical evidence for the purpose of DNA testing.<sup>127</sup> Noting how the *Dotson* court "emphasized that to be barred under *Heck*, a § 1983 claim must, if successful, necessarily demonstrate the invalidity of confinement or its duration," the *Osborne* court reasoned that the *Harvey* argument that claims setting the stage for subsequent attack on confinement were prohibited was "undercut considerably."<sup>128</sup>

Despite *Osborne*'s close reading of *Dotson*, the language of *Dotson* does not expressly overrule the holdings of *Harvey* and *Kutzner*. Moreover, as noted earlier, at least one post-*Dotson* federal court has persisted in holding that prisoner's claims for post-conviction access to DNA testing must be confined to habeas corpus proceedings.<sup>129</sup> Thus, the Seventh Circuit was forced to come to its own decision on the issue in the 2006 case *Savory v. Lyons*.

### III. SAVORY V. LYONS

#### A. *The Facts of Savory*

In June of 1977, Johnnie Lee Savory II was convicted for the murder of James Robinson and Connie Cooper, who were found dead

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<sup>126</sup> 423 F.3d 1050 (9th Cir. 2005). *Dotson* was filed on March 7, 2005, while *Osborne* was filed on September 8, 2005.

<sup>127</sup> The *Osborne* court wrote that "[a]ny remaining doubt as to the propriety of [seeking post-conviction access to DNA testing through a § 1983 claim] is removed, we believe, by the Court's recent opinion in *Dotson*." *Id.* at 1055.

<sup>128</sup> *Id.* (emphasis in original).

<sup>129</sup> See *Gilkey v. Livingston*, 2007 WL 1953456 at 5 (N.D. Tex. June 27, 2007), appeal dismissed on procedural grounds 2008 WL 1766876 (5th Cir. Apr 15, 2008).

in their Peoria, Illinois home in January of the same year.<sup>130</sup> Although his first conviction was reversed by the Illinois Appellate Court due to an involuntary confession, he “was retried and convicted” in 1981.<sup>131</sup> At his retrial, three of Savory’s friends stated that he had made incriminating statements to them.<sup>132</sup> The state presented several pieces of physical evidence at the trial, including 1) strands of hair resembling Savory’s collected at the scene of the crime; 2) a knife spotted with trace amounts of blood found at Savory’s home; and 3) a pair of bloodstained pants Savory may have worn which matched the blood type of the victim.<sup>133</sup>

Subsequent to his conviction, Savory made several attempts to challenge his conviction and confinement, including direct appeals,<sup>134</sup> habeas corpus proceedings in federal court,<sup>135</sup> post-conviction proceedings in state court,<sup>136</sup> and a petition for a writ of mandamus.<sup>137</sup> In 1998, Savory filed a motion in Illinois state court<sup>138</sup> pursuant to an Illinois state statute which, under certain circumstances, allows a defendant to conduct DNA testing on physical evidence presented at his trial if the method of testing was not available at the time of his trial.<sup>139</sup> When Savory’s motion was denied, he appealed to the

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<sup>130</sup> Savory v. Lyons, 469 F.3d 667, 669 (7th Cir. 2006).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> People v. Savory, 435 N.E.2d 226 (Ill. App. Ct. 1982); People v. Savory, 403 N.E.2d 118 (Ill App. Ct. 1980);.

<sup>135</sup> United States ex rel. Savory v. Peters, 1995 WL 9242 (N.D.Ill. January 9, 1995); United States ex rel. Savory v. Lane, 1985 WL 2108 (N.D.Ill. July 25, 1985), *aff’d*, 832 F.2d 1011 (7th Cir. 1987).

<sup>136</sup> People v. Savory, 638 N.E.2d 1225 (Ill. App. Ct. 1991).

<sup>137</sup> See Savory v. Lyons, 469 F.3d 667, 669 (7th Cir. 2006).

<sup>138</sup> *Id.* at 669.

<sup>139</sup> 725 ILCS 5/116-3 (2008). “[T]he result of the testing [must have] the scientific potential to produce new, noncumulative evidence materially relevant to the defendant’s assertion of actual innocence.” 725 ILCS 5/116-3(c)(1) (2008).

appellate court and the Supreme Court, both of which upheld the lower court's order.<sup>140</sup>

Nearly seven years after the Illinois circuit court denied Savory's motion for access to the physical evidence, Savory filed a suit under 42 U.S.C. § 1983 against a number of state and local officials (the "State"), arguing that their denial violated his constitutional rights.<sup>141</sup> He asked the district court to compel the State to give him access to 1) the bloodstained pants; 2) the hair samples; 3) the blood-spotted knife; and 4) DNA samples provided by Savory, his father, and others.<sup>142</sup> The district court dismissed the claim on the State's 12(b)(6) motion to dismiss, finding that the two year statute of limitations had run, and Savory no longer had a viable claim before the court.<sup>143</sup> Savory then appealed to the Seventh Circuit.

### *B. The Seventh Circuit's Analysis*

Before addressing the merits of Savory's claim, the Seventh Circuit first examined whether Savory could rightly bring an action to compel post-conviction access to physical evidence under § 1983.<sup>144</sup> The State argued along the lines of *Harvey*, asserting that Savory was a state prisoner attempting to challenge the "fact or duration" of his confinement, and his options were therefore limited to habeas corpus.<sup>145</sup> Judge Kanne, who authored the opinion, noted that Supreme Court precedents established by *Preiser* and *Heck* prevented a claim

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<sup>140</sup> The Illinois Supreme Court held that because the success of the State's case relied on other evidence, the bloodstained pants were not "materially relevant" to Savory's innocence, and upheld the circuit court's denial of his motion to compel DNA testing. *People v. Savory*, 756 N.E.2d 804, 811-12 (Ill. 2001).

<sup>141</sup> *Savory*, 469 F.3d at 669. The officials included the State's Attorney of Peoria County, Illinois, the Clerk of the Tenth Judicial Circuit Court of Illinois, the Chief of Police of the City of Peoria, and Peoria County, Illinois. *Id.*

<sup>142</sup> *Id.* at 670.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

from being brought under § 1983 if it “would necessarily imply the validity of [the plaintiff’s] conviction or sentence.”<sup>146</sup>

The court first analyzed the Supreme Court’s approaches to similar issues, noting that the high court’s opinion in *Wilkinson v. Dotson* had focused on *Heck*’s use of the use of the word “necessarily.”<sup>147</sup> The court then turned its attention to how the specific question of post-conviction access to physical evidence had created a split amongst its sister circuits.<sup>148</sup> Judge Kanne highlighted the Eleventh Circuit’s reasoning in *Bradley* that not only could updated DNA testing further incriminate the plaintiff, but even if it did suggest the plaintiff’s innocence, he would need to bring an entirely separate action to actually challenge his confinement.<sup>149</sup> The court also discussed the Fourth Circuit’s reasoning that because § 1983 would set up a challenge to the prisoner’s confinement, it was merely an attempt to circumvent the habeas corpus requirement.<sup>150</sup>

Ultimately the court found the Eleventh Circuit’s approach in *Bradley* to be more in line with the Supreme Court’s precedents set in *Preiser* and *Heck*.<sup>151</sup> Judge Kanne emphasized that the exception requiring the use of habeas corpus over § 1983 is narrow, and that courts must consider the immediate results of the success of the plaintiff’s motion. The court wrote:

Savory will not be released from prison, nor will his sentence be shortened, if he successfully gains access to physical evidence for DNA testing. Such access would not imply the invalidity of his conviction. At most, he would have the opportunity to use the results of the DNA testing in a future proceeding. Thus, success in Savory’s action “will *not* demonstrate the invalidity of

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<sup>146</sup> *Id.* at 669 (quoting *Heck v. Humphrey*, 512 U.S. 477, 487 (1994)).

<sup>147</sup> *Id.* at 671.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 672.

any outstanding criminal judgment against [him],” and will not unduly intrude upon the core habeas corpus relief.<sup>152</sup>

The court therefore held that Savory had brought a cognizable claim under § 1983.<sup>153</sup>

#### IV. ANALYSIS: EVALUATION OF *SAVORY* IN LIGHT OF THE CIRCUIT SPLIT AND *DOTSON*

In *Savory*, the Seventh Circuit was forced to choose between two conflicting approaches: the Fourth, Fifth, and Sixth Circuit’s position that prisoners seeking post-conviction access to DNA testing are limited to habeas relief, and the Ninth and Eleventh Circuit’s position that prisoners may also seek such relief through a § 1983 claim. In disapproving of the *Harvey* approach, the Seventh Circuit not only drew support from the Ninth and Eleventh Circuit’s decisions on the matter, but also from the recent Supreme Court *Wilkinson v. Dotson* opinion. In order understand why the Seventh Circuit reached the proper result in *Savory*, it is necessary to explain a) how the *Harvey* court applied *Heck*; b) how *Dotson*’s clarification of *Heck* drew *Harvey* into question; and c) why the *Dotson* framework applied to the facts of *Savory* resolves the argument in favor of the viability of § 1983 claims seeking post-conviction access to DNA testing.

##### A. Harvey’s “Packaging” in Applying Heck

The source of the circuit split over post-conviction access to DNA testing lay in the *Harvey* court’s application of *Heck* and its failure to draw a critical distinction between two separate legal actions. The

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<sup>152</sup> *Id.* (quoting *Heck v. Humphrey*, 512 U.S. 477, 487 (1994)) (emphasis in original).

<sup>153</sup> *Id.* Despite the holding regarding the general viability of § 1983 claims seeking post-conviction access to DNA testing, the court ultimately affirmed the district court’s finding that Savory’s individual § 1983 claim was barred by the statute of limitations. *Id.* at 675.

*Harvey* court reasoned that the plaintiff's § 1983 action could not proceed because it was merely a predicate to a subsequent motion seeking his release from prison.<sup>154</sup> By this logic, the prisoner's claim violated *Heck*'s mandate that prisoners seeking post-conviction relief be limited to habeas if "a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence."<sup>155</sup>

In applying *Heck*, the *Harvey* court created a single "package" out of two separate and distinct legal actions. The first action—which was the subject of the decision—was the plaintiff's § 1983 claim seeking post-conviction access to DNA testing ("Action One"). The second action, which could only commence if the first action proved successful, was a motion seeking release from prison ("Action Two"). In order to reach its decision that Action One violated *Heck*, the *Harvey* court merged Action One and Action Two into one indistinguishable package. While *Heck* never suggested that this sort of packaging was necessary, neither was it forbidden. Thus, *Harvey*'s "packaging" approach was not drawn into serious question until *Dotson* revisited *Heck*.

### B. How *Dotson* Unpackaged *Harvey*

In *Dotson*, the Supreme Court examined the conflict of § 1983 and habeas as it pertained to prisoners seeking review of parole procedures.<sup>156</sup> The fundamental issue before the *Dotson* court was no different from *Heck*: the cognizability of a § 1983 claim for a prisoner seeking post-conviction relief.<sup>157</sup> However, the factual situation presented in *Dotson* was slightly different than *Heck* because success in *Dotson* would not have necessarily invalidated the prisoner's conviction. Success did "not mean immediate release from confinement or a shorter stay in prison; it [meant] at most new eligibility review, which at most [would] speed *consideration* of a new

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<sup>154</sup> *Harvey v. Horan*, 278 F.3d 370, 375 (4th Cir. 2002).

<sup>155</sup> *Heck*, 512 U.S. at 487.

<sup>156</sup> *Wilkinson v. Dotson*, 544 U.S. 74, 76 (2005).

<sup>157</sup> *See id.*; *Heck*, 512 U.S. at 478.

parole application.”<sup>158</sup> In comparison, the *Heck* plaintiff could not win his § 1983 suit for damages without *necessarily* implying his conviction’s invalidity due to destruction of evidence and unlawful prosecution.<sup>159</sup>

This distinction, highlighted by the Court’s repeated use of the word “necessarily,”<sup>160</sup> was the fundamental clarification that *Dotson* provided. *Dotson* implicitly drew *Harvey*’s “packaging” approach into serious question by barring only those § 1983 claims which would *necessarily* imply the invalidity of a prisoner’s confinement. Though *Dotson* did not specifically address the viability of § 1983 claims for post-conviction access to DNA evidence, its relevance to the issue was quickly noticed by the Ninth Circuit.<sup>161</sup> This set the stage for the Seventh Circuit’s treatment of the issue in *Savory*.

### C. How Savory Got It Right by Applying Dotson

When the Seventh Circuit analyzed the relevant precedent in *Savory*, it highlighted *Dotson*’s holding that § 1983 claims for post conviction relief should be barred only if they “‘necessarily’ implicated the fact or duration of confinement.”<sup>162</sup> By using *Dotson* to create the judicial framework for resolving the circuit split, the *Savory* court implicitly drew the Fourth Circuit’s approach into question. Once the court recognized *Dotson*’s relevance to the issue of post-

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<sup>158</sup> *Dotson*, 544 U.S. at 76.

<sup>159</sup> *See Heck*, 512 U.S. at 490.

<sup>160</sup> *See Dotson*, 544 U.S. at 81 (writing that “§ 1983 remains available for procedural challenges where success in the action *would not necessarily* spell immediate or speedier release for the prisoner.” (emphasis in original)); *see also id.* at 81-82 (holding “that a state prisoner’s § 1983 action is barred... *if* success in that action would necessarily demonstrate the invalidity of confinement or its duration. (emphasis in original)); *and id.* at 82 (writing that “because neither prisoner’s claim would necessarily spell speedier release, neither lies at ‘the core of habeas corpus.’ (quoting *Presier v. Rodriguez*, 411 U.S. 475, 489 (1973))).

<sup>161</sup> *Osborne v. District Attorney’s Office for Third Judicial District*, 423 F.3d 1050, 1055-56 (9th Cir. 2005).

<sup>162</sup> *Id.* at 671.

conviction requests for DNA testing, a decision validating the use of § 1983 claims became inevitable.

The *Savory* court first noted that § 1983 claims for post-conviction access to DNA testing may prove either exculpatory or inculpatory.<sup>163</sup> If the DNA test showed that the prisoner indeed committed the crime, then the result of the § 1983 action would not have called the prisoner's confinement into question. As such, so long as a chance exists that DNA testing could prove inculpatory, then a § 1983 claim merely seeking *access* to the testing cannot *necessarily* call into question the validity of a prisoner's confinement.

The Seventh Circuit then incorporated the *Dotson* argument, stating that even if the DNA testing proved exculpatory, the plaintiff would still have to bring another legal action to pursue actual release from prison.<sup>164</sup> Judge Kanne wrote that “to overturn his conviction [the plaintiff would have to bring] ‘an entirely separate action at some future date, in which he would have to argue for his release upon the basis of a separate constitutional violation altogether.’”<sup>165</sup> Procedurally, this is synonymous with the Supreme Court's rationale in *Dotson* that the plaintiff's success in the § 1983 action would only mean a new review by the prison parole board, where an entirely separate action—the actual review itself—would be necessary to secure release from prison.<sup>166</sup> By applying *Dotson* in this way, *Savory* “unpacked” Action One (the § 1983 action seeking access to DNA testing) from Action Two (the subsequent action seeking release from prison). It is this second action—in which a plaintiff would argue that he was being imprisoned despite the existence of exculpatory DNA evidence proving his innocence—that should be limited to habeas relief, as it is the only action which truly challenges the validity of the plaintiff's confinement. As the *Savory* court correctly pointed out,

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<sup>163</sup> *See id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* (quoting *Harvey v. Horan*, 285 F.3d 298, 308 (4th Cir. 2002) (Luttig, J., concurring)).

<sup>166</sup> *Wilkinson v. Dotson*, 544 U.S. 74, 82 (2005).

access alone cannot imply the invalidity of a prisoner's confinement.<sup>167</sup>

Judge Kanne also made sure to address the comity issue that played a central role in the Fourth Circuit's reasoning in *Harvey*.<sup>168</sup> Because a plaintiff's success "[would] *not* demonstrate the invalidity of any outstanding criminal judgment against [him]," his § 1983 claim would not unduly intrude upon territory traditionally reserved for habeas actions.<sup>169</sup>

Finally, while not mentioned in *Savory*, it bears noting that Justice Scalia's concurring opinion in *Dotson* provides further support for the Seventh Circuit's result. Justice Scalia asserted that the common law roots of the writ of habeas corpus should act as a limit on the relief the writ can actually provide.<sup>170</sup> If the sought-after relief bears no resemblance to actual release from prison (or at least the shortening of a sentence), then use of the writ would "broaden the scope of habeas relief beyond recognition."<sup>171</sup> In the case of *Savory*, gaining access to physical evidence in order to perform DNA testing would not fall within the limited scope of habeas relief. As such, it would be inappropriate for *Savory* to seek access to testing through a writ of habeas corpus.

The Seventh Circuit's recognition of *Dotson*'s relevance provided the key to reaching the correct result in *Savory*. *Dotson* provided a method to undo the "packaging" approach created in *Harvey*, which erroneously limited prisoners seeking post-conviction access to DNA testing to habeas relief. In allowing prisoners to seek such relief through § 1983 claims, the *Savory* court reached the proper result and preserved habeas relief to its traditional purpose.

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<sup>167</sup> *Savory*, 469 F.3d at 672.

<sup>168</sup> *See Harvey*, 285 F.3d at 303.

<sup>169</sup> *Savory*, 469 F.3d at 672.

<sup>170</sup> *Dotson*, 544 U.S. at 85 (Scalia, J., concurring).

<sup>171</sup> *Id.* at 85.

## CONCLUSION

Not all courts agree with *Savory's* application of *Dotson* to the issue of § 1983 claims for post-conviction access to DNA testing. In June 2007, over two years after *Dotson* and nearly one year after *Savory*, a district court in the Northern District of Texas held that a plaintiff seeking post-conviction access to DNA testing was limited to habeas relief in *Gilkey v. Livingston*.<sup>172</sup> While mentioning the differing results reached in *Osborne* and *Bradley*, the court stated that it was “bound by Fifth Circuit case law.”<sup>173</sup> Such a result is at odds with the Supreme Court’s holding in *Dotson*. By holding that § 1983 claims for post-conviction access to DNA testing are viable, the *Savory* court reached the proper result and ensured that future cases in the Seventh Circuit on the issue would be in line with Supreme Court precedent.

By arriving at the correct result, the *Savory* court did more than simply secure another procedural route for prisoners seeking post-conviction access to physical evidence for the purpose of DNA testing. Section 1983 claims, which proceed directly to federal court, circumvent the state-exhaustion requirement imposed by the federal habeas statute that can create significant time delays.<sup>174</sup> Additionally, while prisoners seeking post-conviction access to DNA testing through a writ of habeas corpus may not seek monetary damages, a prisoner seeking the same relief through a § 1983 claim *can* seek monetary damages.<sup>175</sup> Thus, the advantages gained by allowing prisoners to pursue their claims through § 1983 are not merely procedural in nature. The Seventh Circuit’s decision in *Savory* therefore provides both timely resolution and a full range of remedies to prisoners

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<sup>172</sup> *Gilkey v. Livingston*, 2007 WL 1953456, at \*5 (N.D.Tex. June 27, 2007), *appeal dismissed on procedural grounds* 2008 WL 1766876 (5th Cir. Apr 15, 2008).

<sup>173</sup> *Id.* at \*6 n.3.

<sup>174</sup> For a description of the complicated process involved in seeking habeas relief, *see Steiker, supra* n.11, at 315-16 (writing that “[f]our, five or even six federal and state courts might address the merits of a federal claim before the defendant’s legal remedies are exhausted”).

<sup>175</sup> 42 U.S.C. § 1983 (2000); *see also Schwartz, supra* n.29, at 89.

attempting to address wrongs suffered at the hands of government actors.

As demonstrated by the success of *CSI* and its imitators, the promise of justice provided by DNA testing has captured the public imagination. While the benefits of this technology are obvious, there should be concern when those that may possibly benefit most from its use—prisoners who may be exonerated by an exculpatory DNA test—are excluded from timely access due to procedural roadblocks. The decision in *Savory* ensures that these promises of justice do not remain a fiction confined to a prisoner's common room TV screen.