No. _____

In The
Supreme Court of the United States

BRANDON LEE MOON,

Petitioner,

v.

COUNTY OF EL PASO; COUNTY OF EL PASO ASSISTANT DISTRICT ATTORNEY JOHN DAVIS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

JANE M.N. WEBRE
Counsel of Record
WILLIAM G. COCHRAN
SCOTT DOUGLASS & MCCONNICO LLP
303 Colorado Street, Suite 2400
Austin, Texas 78701
(512) 495-6300
jwebre@scottdoug.com

Attorneys for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Whether absolute immunity shields a prosecutor's unconstitutional handling of post-conviction DNA testing under *Imbler v. Pachtman*, 424 U.S. 409 (1976), where the prosecutor's personal involvement with legal proceedings has ended, there is no ongoing judicial proceeding in which the prosecutor could function as an advocate, and all existing direct and collateral post-conviction appeals have been exhausted.

As to this question, there is a circuit split between the United States Court of Appeals for the Third Circuit in *Yarris v. County of Delaware*, 465 F.3d 129 (3d Cir. 2006), and the United States Court of Appeals for the Fifth Circuit here, and the Fifth Circuit's holding also conflicts in principle with decisions of the First, Second, Fourth, Sixth, Seventh, Eighth, and Ninth Circuits.

PARTIES TO THE PROCEEDING BELOW

Petitioner in this Court, plaintiff-appellant below, is Brandon Lee Moon.

Respondents in this Court, defendants-appellees below, are County of El Paso and County of El Paso Assistant District Attorney John Davis.

Petitioner has notified the Clerk and all additional defendants-appellees below and listed here of his belief that each no longer has an interest in the outcome of the Petition for a Writ of Certiorari and for that reason has been omitted from the Petition: City of El Paso, Salvador Olivarez, Detective Jeffrey Dove, Edie Rubalcaba, Ron Urbanovsky, Glen Adams, Steve Simmons, Jaime Esparza, and Gilbert Sanchez.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Brandon Lee Moon respectfully petitions for a writ of certiorari to review the holding of the United States Court of Appeals for the Fifth Circuit affirming the dismissal of his complaint based on absolute prosecutorial immunity.

OPINIONS BELOW

On October 23, 2006, Petitioner filed his complaint against Respondents and other defendants in the United States District Court for the Western District of Texas, seeking damages under 42 U.S.C. § 1983 based on violations of his rights under the First and Fourteenth Amendments to the United States Constitution. The district court had jurisdiction over Petitioner's claims pursuant to 28 U.S.C. § 1331.

Respondent County of El Paso Assistant District Attorney John Davis moved to dismiss based on absolute prosecutorial immunity. On October 21, 2014, the district court dismissed the complaint based on absolute prosecutorial immunity. A copy of the order of dismissal is included in the Appendix. (App. 15).

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at *Moon v. City of El Paso*, 906 F.3d 352 (5th Cir. 2018). A copy of the Fifth Circuit's opinion is included in the Appendix. (App. 1). The Fifth Circuit had jurisdiction over Petitioner's appeal from a final judgment rendered by a district court pursuant to 28 U.S.C. § 1291.

Other parties below filed petitions for rehearing as to portions of the Fifth Circuit's holding not at issue here. The Fifth Circuit denied those petitions for rehearing on December 12, 2018. Copies of the Fifth Circuit's orders denying the other parties' petitions for rehearing are included in the Appendix. (App. 30 & 32).

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the holding of the United States Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. § 1254(1), which confers jurisdiction on this Court to review on writ of certiorari the opinion of the Court of Appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner seeks damages under 42 U.S.C. § 1983, which provides, in relevant part:

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

> except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. . . .

42 U.S.C. § 1983.

Petitioner alleges that Respondents violated his rights under the First and Fourteenth Amendments to the United States Constitution, the relevant parts of which read as follows:

First Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Fourteenth Amendment (Section 1): "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner Brandon Moon spent seventeen years in prison for a rape that he did not commit. He was exonerated in 2004 after DNA testing proved his innocence. In this suit, Petitioner sued various law enforcement personnel for actions that led to his wrongful conviction in 1988, and also for later actions that caused him to remain unjustly incarcerated for an additional eight years, while DNA evidence known to Respondent Assistant District Attorney John Davis in 1996 could have secured Petitioner's release.

From mid-1995 until May 20, 1996, Respondent Davis represented the State of Texas in adversarial proceedings relating to Petitioner's fourth petition for a writ of habeas corpus in Texas state court. ROA.1907. In his fourth habeas petition, Petitioner asserted an actual innocence claim and sought DNA testing. ROA.2087–.2094; ROA.2096–.2105. Previous DNA testing conducted in 1990 using nascent DNA technology had excluded Petitioner as the source of some semen recovered at the crime scene, but the limited nature of the technology precluded conclusive proof of Petitioner's innocence. ROA.1964. By 1995, DNA technology had advanced considerably. Petitioner sought testing in the wake of those technological advances.

Petitioner filed his fourth habeas petition on March 26, 1995. ROA.2094. It was denied by a Texas state district court on May 20, 1996. ROA.2056–.2063. Respondent Davis testified that May 20, 1996, marked

the end of his "involvement with [Petitioner] Brandon Moon's legal proceedings." ROA.1916.

Beginning immediately before Petitioner's fourth habeas petition was denied and then continuing after that denial during a time when no legal proceedings involving Petitioner were pending, Respondent Davis engaged a serologist in the Texas Department of Public Safety ("DPS") laboratory to conduct additional DNA testing on physical evidence relating to Petitioner's rape conviction. ROA.1968; ROA.1972–.1973. The DPS serologist isolated two different semen donors from two pieces of evidence—a comforter and a bath robe. *See* ROA.1952. Petitioner had previously been excluded as the source of the semen recovered from the comforter in the 1990 DNA analysis. ROA.1964. But the DPS serologist could not reach a conclusive opinion of Petitioner's innocence in 1996 absent samples from the victim's family to compare to the semen recovered from the bathrobe. *See* ROA.2066.

Around December 1996, seven months after Respondent Davis's involvement with Petitioner's legal proceedings ended, Respondent Davis received a report from the DPS serologist in which the serologist concluded: "It is imperative to obtain a blood sample from [Petitioner] Brandon Moon and the victim's husband in order to resolve this case. An additional blood sample from the victim is also needed." ROA.2065–.2066; *see* ROA.1917. The serologist then sent a letter to Respondent Davis requesting that he secure the requested blood samples so DPS could complete the DNA testing: "Please submit one purple top tube of blood

from each individual for comparison." ROA.1952–.1954.

Respondent Davis did not obtain samples for follow-up testing that would have cleared Petitioner. ROA.1918. More significant, Respondent Davis failed to inform Petitioner or the court of the DNA testing conducted by DPS, or that the testing indicated Petitioner could be innocent and follow-up testing was necessary to confirm that conclusion. *Id.*; ROA.1932. Instead, Respondent Davis informed no one and left Petitioner to languish in prison for eight more years. Respondent Davis was not involved in any ongoing adversarial proceeding when he failed to disclose or act upon the results of post-conviction DNA testing.

In 2003, the follow-up samples requested by the DPS serologist in 1996 were sent to the DPS laboratory, and DNA testing (that was available in 1996) proved that Petitioner was innocent. ROA.2068; ROA.2074. Petitioner was released from prison and the state district court entered an order dismissing the state's case against him. ROA.1630–.1635; *see* ROA.176.[1]

Petitioner's § 1983 claims against Respondents stem from Respondent Davis's failure to inform Petitioner of the DNA testing conducted by DPS in 1996 and his failure to inform Petitioner of the DPS

[1] For an overview of the DNA-specific procedural history in Petitioner's case, see Craig M. Cooley & Gabriel S. Oberfield, *Increasing Forensic Evidence's Reliability and Minimizing Wrongful Convictions: Applying* Daubert *Isn't the Only Problem*, 43 TULSA L. REV. 285, 315 (2007).

serologist's request that Respondent secure additional blood samples to confirm results that ultimately proved Petitioner's innocence. Petitioner asserts that Respondents violated his constitutional right of access to the courts by interfering with and significantly delaying his filing of a meritorious petition to challenge his underlying wrongful conviction.[2] The Fifth Circuit held that absolute prosecutorial immunity shields Respondent Davis's failure to inform Petitioner, because "he was still acting as counsel for the State of Texas" when the testing was initially requested and "[i]t does not matter that the results didn't arrive"—and thus the challenged failure to inform did not occur—"until after the habeas proceeding had concluded." *Moon*, 906 F.3d at 360. (App. 12).

The district court dismissed all of Petitioner's claims, but even that process took until 2017—eleven years after Petitioner filed suit in 2006. Petitioner appealed from the dismissals. The Fifth Circuit affirmed

---

[2] To be clear, Petitioner does not claim a constitutional right to obtain post-conviction access to DNA, but rather that Respondents violated his right to access the courts under the First and Fourteenth Amendments. *See Bounds v. Smith*, 430 U.S. 817, 821 (1977) ("It is . . . established beyond doubt that prisoners have a constitutional right of access to the courts."); *see also Schlup v. Delo*, 513 U.S. 298, 321 (1995) ("[A] prisoner retains an overriding 'interest in obtaining his release from custody if he is [actually] innocent of the charge for which he was incarcerated.' ") (quoting *Kuhlmann v. Wilson*, 477 U.S. 436, 452 (1986) (Powell, J., concurring)). Therefore, Petitioner's claims do not implicate this Court's decision in *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 73 (2009) (holding there is no "freestanding [constitutional] right to access DNA evidence for testing").

in part, reversed in part, and remanded for further proceedings. *Moon*, 906 F.3d at 361. (App. 14). Relevant here, the Fifth Circuit affirmed the district court's Rule 12(b)(6) dismissal of Petitioner's § 1983 claims against Respondents based on absolute prosecutorial immunity. *See id.* at 360. (App. 12–14).

REASONS FOR GRANTING THE WRIT

This case presents the Court with an ideal vehicle to clarify the law among the circuits regarding the scope of absolute prosecutorial immunity as applied to an issue that will increase in importance as post-conviction DNA testing becomes more prevalent. The federal courts are split and need guidance from this Court on how to apply *Imbler* and its progeny, including *Van de Kamp v. Goldstein*, 555 U.S. 335 (2009), at the intersection of absolute prosecutorial immunity and post-conviction DNA testing. The Fifth Circuit's holding misapplies the rule set out in *Imbler*, and this Court should reverse it.

I. The federal courts are split as to whether a prosecutor must be personally involved in ongoing judicial proceedings for absolute immunity to shield the prosecutor's handling of post-conviction DNA testing.

A. The Third Circuit holds the prosecutor must be personally involved in ongoing judicial proceedings.

In *Yarris*, the Third Circuit held that absolute immunity does not apply to "[t]he handling of requests to conduct scientific tests on evidence made after conviction" where such action is "not related to grounds claimed in an ongoing adversarial proceeding." *Yarris v. County of Delaware*, 465 F.3d 129, 138 (3d Cir. 2006). In other words, "[a]fter a conviction is obtained, the challenged action must be shown by the prosecutor to be part of the prosecutor's *continuing personal involvement* as the state's advocate in adversarial post-conviction proceedings to be encompassed within that prosecutor's absolute immunity from suit." *Id.* at 137 (emphasis added). Otherwise, the challenged action "can be best described as part of the 'prosecutor's administrative duties . . . that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings.'" *Id.* (quoting *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993)). The prosecutors in *Yarris* failed to show "how the handling of DNA evidence related to ongoing adversarial proceedings in

which they were personally involved," and the court held that absolute immunity did not apply. *Id.* at 138.[3]

B. The Second Circuit holds absolute immunity depends on whether the prosecutor is personally involved in ongoing judicial proceedings, but it has not had an opportunity to reach the question presented here.

In addressing § 1983 claims based on prosecutors' failure to promptly provide the results of post-conviction DNA testing, the Second Circuit held that "absolute immunity shields work performed during a post-conviction collateral attack, at least insofar as the challenged actions are part of the prosecutor's role as an advocate for the state." *Warney v. Monroe County*, 587 F.3d 113, 123 (2d Cir. 2009). Under *Warney*, immunity "depends chiefly on whether there is pending or in preparation a court proceeding in which the prosecutor acts as an advocate." *Id.* The challenged action in *Warney* occurred while the prosecutors were opposing the plaintiff's appeal from the denial of state post-conviction relief, and the plaintiff's federal habeas petition was still pending. *See id.* at 118–19. Accordingly, the challenged action occurred "in the 'judicial

[3] The Third Circuit reaffirmed its holding in *Yarris* in an unpublished opinion, noting that "[a]bsent [a] relation to post-conviction proceedings, [challenged prosecutorial] actions lack[ ] a sufficient nexus to the judicial process to entitle the prosecutor to absolute immunity." *Wrench Transp. Sys., Inc. v. Bradley*, 212 Fed. Appx. 92, 97 (3d Cir. 2006).

phase' of proceedings integral to the criminal justice process," and the court held that absolute immunity attached. *Id.* at 124.

Warney is consistent with *Yarris* to the extent both hold that "[t]he proper and useful focus for ascertaining the function being served by a prosecutor's act is . . . on the pendency of court proceedings that engage a prosecutor as an advocate for the state." *Id.* at 124; *see id.* at 121–23 (noting that "the Third and Sixth Circuits have suggested that absolute immunity should extend to post-conviction conduct so long as the prosecutor can show that an advocacy function was being performed" and "[w]e join these courts").[4] That said, because there the prosecutors met their burden to demonstrate personal involvement in ongoing judicial proceedings, *Warney* did not reach the question presented here. *See id.* at 125 ("On the facts of this case, we need not, and do not, decide whether absolute immunity extends to prosecutorial conduct regarding DNA evidence, occurring after a prisoner's appeals and collateral attacks have been exhausted."). But the rule of the Second Circuit is clear: absolute immunity depends on whether the prosecutor is personally involved in ongoing judicial proceedings.[5]

---

[4] *Warney* cites *Yarris* and *Spurlock v. Thompson*, 330 F.3d 791, 799 (6th Cir. 2003). *Warney*, 587 F.3d at 121. The Petition addresses *Spurlock* below at Part I.D.

[5] In an unpublished opinion with facts similar to *Warney*, the Eleventh Circuit held that absolute immunity applied to a prosecutor's failure to turn over evidence for DNA testing, because the prosecutor took that action "when she opposed [the plaintiff's]

C. Breaking with the law of the Second and Third Circuits, the Fifth Circuit holds "[i]t does not matter" whether the prosecutor is personally involved in ongoing judicial proceedings.

In this case, the Fifth Circuit held that "[i]t does not matter" that the challenged action occurred after Respondent Davis's personal involvement in Petitioner's legal proceedings ended, during a time at which no judicial proceedings were ongoing after all existing post-conviction appeals had been exhausted. *See Moon*, 906 F.3d at 360. Respondent Davis represented the state in adversarial proceedings relating to Petitioner's fourth habeas petition. ROA.1907. Petitioner's fourth habeas petition was denied May 20, 1996. ROA.2056–.2063. Respondent Davis testified that May 20, 1996, marked the end of his "involvement with [Petitioner's] legal proceedings." ROA.1916. Seven months later, on December 13, 1996, Davis received the report in which the DPS serologist stated it was "imperative" to obtain blood samples for follow-up testing. ROA.2065–.2066; *see* ROA.1916. And about one month later, Davis received the letter from DPS requesting that Davis "submit one purple top tube of blood from each individual for comparison." ROA.1952–.1954. Davis failed to disclose or act upon the DPS reports.

---

request in post-conviction proceedings to perform DNA testing on [the] evidence." *Wright v. Pearson*, 747 Fed. Appx. 812, 814 (11th Cir. 2018). *Wright* is consistent with *Warney* and *Yarris* in focusing on whether the prosecutor was personally involved in ongoing judicial proceedings at the time the challenged action occurred.

Although Respondent Davis was not personally involved in any ongoing adversarial proceeding at that time, the Fifth Circuit nevertheless characterized Davis as "still acting as counsel for the State of Texas," because the initial request for DNA testing had occurred before Petitioner's fourth habeas petition was denied, and "[m]ore legal proceedings followed intermittently until [Petitioner's] exoneration nine years later." *Moon*, 906 F.3d at 360. The Fifth Circuit's holding cannot be harmonized with the holding of the Third Circuit in *Yarris*, and it conflicts at least in principle with the Second Circuit's holding in *Warney*. In *Yarris*—as in this case—more legal proceedings followed the challenged action until the plaintiff's exoneration about fourteen years later. *See Yarris*, 465 F.3d at 133 (discussing the prosecutors' failure to deliver the DNA evidence for testing in 1988 or 1989, and the plaintiff's subsequent habeas petition, which was granted in 2003). Indeed, it is hard to imagine a scenario where more legal proceedings would *not* follow the challenged action in a case like this, where the plaintiff's subsequent exoneration by DNA evidence forms the basis for the plaintiff's § 1983 claims in the first place.[6] The question is whether, at the time the challenged action

[6] To the extent the Fifth Circuit based its conclusion on the fact that the initial request for DNA testing occurred before Petitioner's fourth habeas petition had been denied, that logic also conflicts with decisions of other circuits. *See, e.g.*, *Lavicky v. Burnett*, 758 F.2d 468, 476 (10th Cir. 1985) (refusing to apply absolute immunity to a prosecutor's post-trial disposition of property illegally seized before trial, even though absolute immunity applied to the initial seizure).

occurred, the prosecutor was personally involved in then-ongoing judicial proceedings. And Respondent Davis was not.

If the rule set out in *Yarris* were applied to the facts of this case, absolute immunity would not shield the challenged action. Respondent Davis failed to show that his handling of the DNA test results "related to ongoing adversarial proceedings in which [he was] personally involved." *See Yarris*, 465 F.3d at 138. At the time the challenged conduct occurred, Respondent Davis's personal involvement with legal proceedings involving Petitioner had ended, there was no ongoing judicial proceeding in which Davis could function as an advocate, and all of Petitioner's existing direct and collateral post-conviction appeals had been exhausted.

D. Holdings of the First, Fourth, Sixth, Seventh, Eighth, and Ninth Circuits addressing the scope of absolute immunity in the post-conviction context comport with the law of the Second and Third Circuits; the holding of the Fifth Circuit conflicts with them as well.

In post-conviction scenarios that do not involve post-conviction DNA testing, other circuits have analyzed absolute prosecutorial immunity consistent with the rule set out in *Yarris* and *Warney*. The other circuits hold that absolute immunity turns on whether the prosecutor was personally involved in ongoing judicial proceedings. The Fifth Circuit's holding conflicts

in principle with the holdings of at least the First, Fourth, Sixth, Seventh, Eighth, and Ninth Circuits.[7]

The Sixth Circuit held that absolute immunity does not shield a prosecutor from claims that he coerced false testimony from a witness "after the trial was completed" where, "at the time of the [challenged action], . . . [t]here were no ongoing adversarial proceedings." *Spurlock v. Thompson*, 330 F.3d 791, 799 (6th Cir. 2003). The court provided a succinct summary of the scope of absolute immunity:

> Absolute immunity applies to the adversarial acts of prosecutors during post-conviction proceedings, including direct appeals, habeas corpus proceedings, and parole proceedings, *where the prosecutor is personally involved in the subsequent proceedings and continues his role as an advocate* . . . [but] where the role

[7] In addition to the published cases discussed herein, the Fifth Circuit's holding also conflicts with unpublished decisions of the Tenth and Eleventh Circuits. The Tenth Circuit held that absolute immunity applies where "the actions complained of . . . were actions taken in connection with the judicial process, namely, [the prosecutor's] representation of the state in the habeas proceeding." *Ellibee v. Fox*, 244 Fed. Appx. 839, 844 (10th Cir. 2007). The Tenth Circuit also held—in an opinion subsequently vacated by this Court on mootness grounds—that absolute immunity turns on whether the challenged action was taken as "part of the presentation of the government's case [ ]or of the judicial process." *Martinez v. Winner*, 771 F.2d 424, 436–39 (10th Cir. 1985), *opinion modified on denial of reh'g*, 778 F.2d 553 (10th Cir. 1985), *cert. granted, judgment vacated sub nom. Tyus v. Martinez*, 475 U.S. 1138 (1986). And, as discussed above, the Eleventh Circuit issued a decision consistent with the rule set out in *Warney*. *See Wright*, 747 Fed. Appx. at 814.

> as advocate has not yet begun, namely prior to indictment, or where it has concluded, absolute immunity does not apply.

Spurlock at 799 (citation omitted) (emphasis added). *Spurlock* is thus consistent with the rule of *Yarris* and *Warney*.

The First Circuit similarly held that absolute immunity does not extend to actions undertaken by prosecutors in connection with a post-conviction civil rights investigation where "no post-conviction proceeding was pending at the time of the civil rights investigation." *Guzman-Rivera v. Rivera-Cruz*, 55 F.3d 26, 30 (1st Cir. 1995). The court reasoned that, because the post-conviction investigation could have had "several possible outcomes"—including some outcomes that would not "require the [prosecutors] to perform a quasi-judicial function"—the challenged action "had only an attenuated and contingent, as opposed to 'intimate,' association with the judicial phase of the criminal process." *Id.* (quoting *Imbler*, 424 U.S. at 430) (internal alteration omitted).

The Seventh Circuit addressed a closer situation where, although "the plaintiffs' [post-conviction] appeals were pending" at the time of the challenged action, the defendant prosecutors "were not *personally* prosecuting the appeal." *Houston v. Partee*, 978 F.2d 362, 365–66 (7th Cir. 1992) (emphasis added). The court held that the prosecutors' lack of *personal* involvement in ongoing judicial proceedings was enough to preclude absolute immunity: "[W]e decline to extend

absolute prosecutorial immunity from claims by people whom the prosecutors are no longer prosecuting." *Id.* at 368; *see also Reid v. State of N.H.*, 56 F.3d 332, 338 (1st Cir. 1995) (distinguishing *Partee* because the plaintiff "has not alleged that these prosecutors did not represent the [s]tate after his conviction," and noting that "the record suggests otherwise"). In a later case post-dating this Court's decision in *Van de Kamp*, the Seventh Circuit reaffirmed that—by its reading of *Van de Kamp*—"[t]he Supreme Court . . . has not overruled our view that 'absolute immunity [does not] indefinitely attach[ ] to every [prosecutor in an office] once a prosecution begins.'" *Fields v. Wharrie*, 672 F.3d 505, 513 (7th Cir. 2012) (quoting *Partee*, 978 F.2d at 366).

The Fourth Circuit considered a straightforward case where the defendant prosecutor "was handling the postconviction motions and the initial direct appeal to the [state court of appeals]" at the time of the challenged action. *Carter v. Burch*, 34 F.3d 257, 263 (4th Cir. 1994). The court held that absolute immunity shielded the prosecutor from the claims at issue, because his personal "functions in representing the [s]tate in [post-conviction judicial proceedings] very much implicated the judicial process." *Id.*; *accord Allen v. Lowder*, 875 F.2d 82, 86 (4th Cir. 1989) (reversing application of absolute immunity where prosecutor was "acting in a purely administrative capacity when he assisted the [s]heriff's office in obtaining the safekeeping order from the [court]").

The Eighth Circuit also considered a straightforward case where the challenged action—the "prosecutors'

failure to bring [their underlying failure to object to the jury charge at trial] to light in the post-conviction proceedings"—was merely an attempt by the plaintiff to "recast [the claimed] injury [as flowing from post-conviction conduct] to avoid [absolute] immunity." *Patterson v. Von Riesen*, 999 F.2d 1235, 1237 (8th Cir. 1993), *abrogated on other grounds as recognized by Webb v. City of Maplewood*, 889 F.3d 483, 487 (8th Cir. 2018). The court rejected that attempt and held that absolute immunity applied, because "[a] prosecutor deciding whether to object to a proffered jury charge during trial clearly performs a function 'intimately associated with the judicial phase of the criminal process.'" *Id.*

Finally, the Ninth Circuit addressed claims that a prosecutor failed to file a post-conviction petition with the sentencing court for an order directing the plaintiff's release after the statute under which he was imprisoned was declared unconstitutional. *Cousins v. Lockyer*, 568 F.3d 1063, 1068–69 (9th Cir. 2009). The court held that absolute immunity applied because the challenged action—failure to petition the court—was "entirely dependent upon his role as an advocate for the [s]tate." *Id.* at 1068; *see Cannon v. Polk County Dist. Atty.*, 501 Fed. Appx. 611, 613 (9th Cir. 2012) (holding absolute immunity shields actions taken in connection with a prosecutor's "representation of the government in the post-conviction proceedings").[8]

---

[8] In an earlier case, *Demery v. Kupperman*, 735 F.2d 1139 (9th Cir. 1984), the Ninth Circuit applied absolute immunity to

II. The holding of the Fifth Circuit warrants reversal because the challenged action falls outside the scope of shielded conduct under this Court's absolute immunity jurisprudence.

In *Imbler*, this Court extended common law absolute immunity to protect prosecutors sued under § 1983 for alleged deprivations of a criminal defendant's constitutional rights committed while the prosecutors were acting within the scope of their duties in initiating and pursuing criminal prosecutions where the challenged "activities were intimately associated with the judicial phase of the criminal process." 424 U.S. at 427–30. Underscoring the touchstone of intimate association with judicial proceedings, this Court explained that the "public policy" considerations underlying its decision stemmed from a desire to shield a prosecutor's "performance of his duties . . . in deciding which suits to bring and in *conducting them in court*," *id.* at 424 (emphasis added), and to afford a prosecutor "wide discretion in the *conduct of the trial and the presentation of evidence*," *id.* at 426 (emphasis added). *See Rehberg v. Paulk*, 566 U.S. 356, 363 (2012) (describing the scope of immunity recognized in *Imbler* as

---

actions taken during "a prosecutor's post-trial handling of a case . . . in the context of administrative proceedings" without analysis of whether such actions were "intimately associated with the judicial phase of the criminal process." *Id.* at 1145. The rule of *Demery* can be harmonized with the rule of *Cousins*. *See Lampton v. Diaz*, 639 F.3d 223, 227 (5th Cir. 2011) ("The prosecutor [in *Demery*] was completing his duty under state law to monitor the outcome of the proceeding. His actions were thus related to the litigation over which he had jurisdiction.").

encompassing "actions taken by prosecutors in their role as advocates"). This Court left open the "difficult questions" of how to "delineate the boundaries" of absolute immunity where a prosecutor acts "in the role of an administrator or investigative officer rather than that of advocate." *See id.* at 430–31 & n.33.

Since *Imbler*, this Court has addressed the bounds of absolute immunity on several occasions. This Court held that absolute immunity shields a prosecutor's "appearance in court in support of an application for a search warrant and the presentation of evidence at that hearing," but it does not shield "out-of-court activities by a prosecutor that occur prior to the initiation of a prosecution, such as providing legal advice to the police." *Burns v. Reed*, 500 U.S. 478, 492, 496 (1991). This Court held that "prosecutors are not entitled to absolute immunity for [conspiring] to manufacture false evidence" prior to a probable cause determination, and that "statements to the media are not entitled to absolute immunity." *Buckley*, 509 U.S. at 272, 277.[9] Most recently, this Court held that absolute immunity precluded claims based on a district attorney's failures to adequately train and supervise deputy district attorneys on their obligations under *Giglio*, as well as a district attorney's office's failure to create an adequate information management system relating to *Giglio*

[9] This Court also clarified that, "[o]f course, a determination of probable cause does not guarantee a prosecutor absolute immunity from liability for all actions taken afterwards. Even after that determination, . . . a prosecutor may engage in 'police investigative work' that is entitled to only qualified immunity." *Buckley*, 509 U.S. at 274.

obligations, because such actions—although "management tasks" by appearance—would be "directly connected with the prosecutor's basic trial advocacy duties." *See Van de Kamp*, 555 U.S. at 344, 346, 349.

The unifying thrust of this Court's absolute immunity jurisprudence is a focus on whether the challenged conduct was "intimately associated with the judicial phase of the criminal process." *Van de Kamp*, 555 U.S. at 343 (quoting *Imbler*, 424 U.S. at 430). Applying that rule here, and viewing all evidence in Petitioner's favor, Respondent Davis's failure to inform Petitioner of the 1996 DNA testing and his failure to order follow-up testing occurred outside the scope of his role as an advocate such that these omissions cannot constitute prosecutorial acts. Davis did not demonstrate that he was personally involved in ongoing judicial proceedings at the time of the challenged conduct—nor could he. It cannot be that Respondent Davis's actions "were intimately associated with the judicial phase of the criminal process" where there was no pending judicial phase of the criminal process with which those actions could be associated.

Sound policy reasons justify applying immunity in cases like *Imbler* and *Van de Kamp*, because "the threat of damages liability for . . . an error could lead a trial prosecutor to take account of that risk when making trial-related decisions." *Van de Kamp*, 555 U.S. at 346. Here, by contrast, there is no intimate connection between Respondent Davis's failures to inform Petitioner of the DNA testing, on one hand, and Davis's legal decision making and discretion during trial or

post-conviction judicial proceedings, on the other. No such connection could possibly exist. As Davis testified, his involvement with judicial proceedings related to Petitioner's case ended long before the challenged actions occurred. By the time of the relevant conduct, all of Petitioner's direct and collateral post-conviction appeals had been exhausted and no judicial proceedings involving Petitioner were pending. In this case, application of immunity would have no effect on Davis's trial-related decision making. Because Davis was functioning in the absence of ongoing judicial proceedings, the sound policy justifications undergirding application of absolute immunity elsewhere here ring hollow.[10]

At bottom, this Court's absolute immunity cases hold that—taking into account the "functional" considerations set out in *Imbler*—absolute immunity shields a prosecutor where the challenged action is "intimately associated with the judicial phase of the criminal process." *Van de Kamp*, 555 U.S. at 341. The Fifth Circuit's holding below steps past that rule in favor of concluding that Respondent's failure to act in response to the 1996 DPS reports "was precisely the type of

[10] Moreover, this case realizes the potential for incongruity in application of immunity among state actors that this Court feared in *Burns* and *Buckley*. Had Petitioner sued the DPS serologist for the same failure to inform him of the DNA test results, the DPS serologist would be—at most—entitled to qualified immunity. "When the functions of prosecutors and detectives are the same, as they were here, the immunity that protects them is also the same." *Buckley*, 509 U.S. at 276; *see Burns*, 500 U.S. at 495 ("[I]t is incongruous to allow prosecutors to be absolutely immune from liability for giving advice to the police, but to allow police officers only qualified immunity for following the advice.").

prosecutorial function the Supreme Court envisioned in *Van de Kamp*." *Moon*, 906 F.3d at 360. It may be that immunity should shield a prosecutor's unconstitutional handling of DNA testing where the prosecutor is personally involved in ongoing judicial proceedings, but those are not the facts of this case. The Fifth Circuit's granular focus on function caused it to misapply the core of this Court's holdings in *Imbler* and *Van de Kamp*. In the process, the Fifth Circuit split with the Third Circuit, stepped into tension with the Second Circuit, and created confusion among virtually every one of its other sister circuits.

III. Post-conviction DNA testing will increase in prevalence and importance over time, and this case is an ideal vehicle to clarify the scope of prosecutorial obligations and immunities in this area.

"DNA testing has an unparalleled ability . . . to exonerate the wrongly convicted." *Osborne*, 557 U.S. at 55. In the United States alone, at least 361 innocent people have been exonerated by post-conviction DNA testing following a term of wrongful imprisonment. *See* Innocence Project, *Cases: Exonerated by DNA*, https://www.innocenceproject.org/all-cases/#exonerated-by-dna (last visited March 7, 2019).[11] Even a decade ago

[11] *Compare* National Registry of Exonerations, *Summary View: DNA Exoneration Cases*, https://www.law.umich.edu/special/exoneration/Pages/browse.aspx (last visited March 7, 2019) (setting the count at 364 exonerations by post-conviction DNA testing).

commentators recognized that "it is almost trite to observe that DNA has provided uncontestable proof that individuals can be convicted for crimes they did not commit." Myrna S. Raeder, *Postconviction Claims of Innocence*, CRIM. JUST. 14 (2009).

In short, "[m]odern DNA testing can provide powerful new evidence unlike anything known before," *Osborne*, 557 U.S. at 62, and DNA technology continues to undergo "rapid technical advances," *Maryland v. King*, 569 U.S. 435, 460 (2013). *See id.* at 442 ("The advent of DNA technology is one of the most significant scientific advancements of our era.") & 460 ("New technology will only further improve [the] speed and . . . effectiveness [of DNA identification]."). DNA testing also has the "salutary effect of freeing a person wrongfully imprisoned" and the means to "prevent the grotesque detention of innocent people." *Id.* at 455–56 (citation and internal punctuation omitted). And DNA testing is of increasing relevance in the post-conviction context in every regional judicial circuit of the United States. *See* National Registry of Exonerations, *Exonerations by State*, https://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx (last visited March 7, 2019).

This case is not about whether Petitioner has a right to post-conviction DNA testing in general. This Court held in *Osborne* that in the post-conviction context there is no "freestanding [constitutional] right to access DNA evidence for testing," *Osborne*, 557 U.S. at 73, and the right to such testing depends on a state's "postconviction relief procedures" bounded by due

process considerations. *See id.* at 69–70 (quoting *Medina v. California*, 505 U.S. 437, 446, 448 (1992)). This Court later clarified that a convicted state prisoner seeking DNA testing of crime-scene evidence may assert that claim in a civil rights action under § 1983. *Skinner v. Switzer*, 562 U.S. 521, 537 (2011).

Rather, this case is about whether absolute prosecutorial immunity shields a prosecutor's handling of post-conviction DNA testing once that testing is—for whatever reason—already underway. As *Yarris*, *Warney*, and this case demonstrate, the handling of post-conviction DNA testing by prosecutors will continue to implicate the constitutional rights of persons wrongfully imprisoned.[12] There is a clean circuit split between the Third and Fifth Circuits: As the law stands, absolute immunity does not shield the handling of post-conviction DNA testing by a prosecutor in Philadelphia from a § 1983 claim based on conduct occurring after the prosecutor's personal involvement in judicial proceedings has ended; but absolute immunity does shield the same conduct by a prosecutor in El Paso from the same § 1983 claim. This Court has the opportunity to grant certiorari and provide clarity and

---

[12] *See Yarris*, 465 F.3d at 137–38 (addressing § 1983 claims premised on withholding of exculpatory evidence in violation of Fourteenth Amendment); *Warney*, 587 F.3d at 120 (addressing § 1983 claims premised on failure "to promptly disclose exculpatory information" in violation of the Due Process Clause); *Moon*, 906 F.3d at 356 (addressing § 1983 claims premised on violation of Petitioner's right of access under First and Fourteenth Amendments).

uniformity in an area of increasing importance to the criminal justice system.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JANE M.N. WEBRE
Counsel of Record
WILLIAM G. COCHRAN
SCOTT DOUGLASS & MCCONNICO LLP
303 Colorado Street, Suite 2400
Austin, Texas 78701
(512) 495-6300
jwebre@scottdoug.com

Attorneys for Petitioner