IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17-50572

BRANDON LEE MOON,

Plaintiff–Appellant,

v.

CITY OF EL PASO; COUNTY OF EL PASO; SALVADOR OLIVAREZ; DETECTIVE JEFFREY DOVE; ASSISTANT DISTRICT ATTORNEY JOHN DAVIS; EDIE RUBALCABA; GILBERT SANCHEZ,

Defendants–Appellees.

Appeal from the United States District Court for the Western District of Texas

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(Filed Oct. 15, 2018)

Before JOLLY, ELROD, and WILLETT, Circuit Judges.

DON R. WILLETT, Circuit Judge:

Brandon Lee Moon languished in prison nearly seventeen years for a crime he did not commit. Fortunately—albeit belatedly—post-conviction DNA testing exonerated him. Upon his release, Moon sued various government and law enforcement personnel over his wrongful conviction and imprisonment. In this appeal we need only decide: (1) whether false imprisonment is a "continuing tort" under Texas law (it is), (2) whether

Moon's § 1983 due process claim against the County Defendants is time-barred (it is), and (3) whether the assistant district attorney enjoys prosecutorial immunity (he does).

The perpetrator of this 1987 sexual assault has never been apprehended. Brandon Moon, however, is undeniably innocent, and he is entitled under Texas law to pursue his false-imprisonment claim.

We AFFIRM in part, REVERSE in part, and REMAND Moon's pendent state tort claim for false imprisonment to the district court.

I. BACKGROUND

Thirty years ago, Brandon Lee Moon was convicted of aggravated sexual assault. Knowing he was innocent, Moon requested DNA testing, which the trial court ordered. The district attorney's office sent semen and blood samples to Lifecodes, a DNA testing company. Moon's trial counsel also obtained DNA samples from the district clerk's office evidenced by an entry on a "checkout document." Lifecodes's analysis ruled out the possibility that Moon was the source of the DNA. But no airtight *legal* conclusions could be drawn because Lifecodes had no DNA samples from the victim's family for exclusion purposes.[1]

[1] *See generally Understanding DNA Evidence: A Guide for Victim Service Providers*, OFF. FOR VICTIMS OF CRIME, (Apr. 2001), https://www.ovc.gov/publications/bulletins/dna_4_2001/dna8_4_01.html ("Exclusion does not necessarily mean a suspect is innocent.").

Fast forward to Moon's fourth habeas petition (filed pro se) in 1996. Moon argued that Lifecodes's report entitled him to release. Assistant District Attorney John Davis represented the State of Texas. This round of habeas proceedings revealed that the checkout form, which documented that Moon's attorney checked out DNA evidence from the district clerk's office in 1989, was missing. The clerk's office conducted a three-week search—to no avail. Given the checkout document's absence, Davis successfully pressed a chain-of-custody argument. Moon's habeas petition failed.

The checkout document later turned up. It was in the district clerk's office *the whole time* and was overlooked during the search. According to Moon, the checkout document was critical. Had it been recovered, Davis would not have asserted a chain-of-custody argument. And as Moon sees it, his habeas petition would have surely succeeded.

While Moon's fourth habeas petition was pending, Davis requested additional DNA testing. (Unlike the original testing that followed Moon's conviction, this 1996 round was sought by Davis, not by the court.) The results arrived a few months later, after the habeas petition had been denied. Donna Stanley, a Department of Public Safety criminalist, reported that the DNA evidence excluded Moon as the source of the semen. But as with the earlier Lifecodes analysis, the 1996 results could not conclusively establish Moon's innocence absent reference samples from the victim and her family. So the results helped exculpate (cast doubt) but did not

exonerate (clear doubt). Stanley sent the analysis to Davis but not to Moon or to the court. Davis, in turn, did not disclose the results to Moon or seek to obtain follow-up DNA samples that would have confirmed Moon's innocence. Moon remained in prison for eight more years—for a rape he did not commit.

Cue the Innocence Project. In 2004, they acquired the final piece of the scientific puzzle: blood samples from the victim and her family. DNA testing irrefutably proved Moon's innocence and secured his release in December 2004.

Not quite two years later, in October 2006, Moon brought this suit raising § 1983 and state claims. According to Moon, the City of El Paso and two detectives (City Defendants) falsely imprisoned him; officials in the El Paso County District Clerk's office (County Defendants) violated his due process right of access to the courts by overseeing a shambolic office and failing to keep track of the checkout document; and Assistant District Attorney Davis deprived him of due process by making an unfounded chain-of-custody argument during Moon's 1996 habeas proceeding, and failing to inform Moon of the State's separate exculpatory (though not conclusively exonerating) DNA report.

For the next decade, the district court oversaw limited discovery. Eventually, it dismissed (or granted summary judgment against) all of Moon's claims. Moon appealed, challenging only the dismissal of (1) his state false-imprisonment claim against the City Defendants; (2) his § 1983 due process claim against

the County Defendants; and (3) his § 1983 due process claim against Assistant District Attorney Davis.

II. STANDARD OF REVIEW

We review de novo a dismissal under Rule 12(b)(6).[2] In the proceedings below, the parties introduced and used evidence extrinsic to the pleadings, so the district court construed Defendants' motions to dismiss as motions for summary judgment.[3] Our review of a summary-judgment grant is de novo too, applying the same standard as the district court.[4] Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[5]

III. DISCUSSION

A. False imprisonment is a "continuing tort" in Texas, and Moon's claim was timely filed.

Texas's residual two-year statute of limitations governs Moon's false-imprisonment claim.[6] But when did the clock start running: When Moon was imprisoned in

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[2] *Torch Liquidating Trust ex rel. Bridge Assocs. L.L.C. v. Stockstill*, 561 F.3d 377, 384 (5th Cir. 2009).

[3] *See Burns v. Harris Cty. Bail Bond Bd.*, 139 F.3d 513, 517 (5th Cir. 1998) (converting motion to dismiss into a motion for summary judgment after parties submitted many exhibits outside the pleadings).

[4] *Id.*

[5] FED. R. CIV. P. 56(a).

[6] *See* TEX. CIV. PRAC. & REM. CODE § 16.003.

1988 or when he was released in 2004? The district court chose the former, meaning his 2006 claim was time-barred. We disagree.

Because limitations is the sole basis for the district court's dismissal of Moon's false-imprisonment claim, we make an *Erie* prediction whether the Supreme Court of Texas would hold that false imprisonment is a continuing tort.[7] The default accrual rule, as that Court recently reaffirmed, is that "a cause of action generally accrues at the time when facts come into existence which authorize a claimant to seek a judicial remedy," and the "fact that damage may continue to occur for an extended period . . . does not prevent limitations from starting to run."[8] On the other hand, added the Court, "We recognize that the continuing-tort doctrine might provide needed protections to plaintiffs in certain situations."[9]

As a formal precedential matter, the Supreme Court of Texas is agnostic: "We have neither endorsed nor addressed the continuing-tort doctrine."[10] And our circuit has no binding precedent on whether the doctrine applies in the false-imprisonment context,

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[7] *Am. Int'l Specialty Lines Ins. Co. v. Rentech Steel LLC*, 620 F.3d 558, 564 (5th Cir. 2010) ("Because the Texas Supreme Court has never ruled on [this issue] . . . we must make an '*Erie* guess' as to how the Texas Supreme Court would rule. . . .").

[8] *Exxon Mobil Corp. v. Rincones*, 520 S.W.3d 572, 591 (Tex. 2017) (quoting *Murray v. San Jacinto Agency, Inc.*, 800 S.W.2d 826, 828 (Tex. 1990)).

[9] *Id.* at 593.

[10] *Id.* at 592 (cleaned up).

although one unpublished opinion concluded that a Texas false-imprisonment claim accrued at the time of imprisonment.[11] Yet multiple Texas intermediate courts *have* weighed in. And they uniformly hold that false imprisonment is a continuing tort that accrues upon the plaintiff's release.[12] The City Defendants cite various cases opposing this proposition.[13] But these cases are distinguishable as they address tolling, a separate issue from accrual. Virtually all treatises support the accrual-upon-release view, consistently stating that false imprisonment is a continuing tort.[14]

Every day behind bars is irreplaceable, with the final day as wrongful as the first. Making our best *Erie*

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[11] *Villegas v. Galloway*, 458 F. App'x 334, 338 (5th Cir. 2012) (citing *Wallace v. Kato*, 549 U.S. 384, 389–90 (2007)).

[12] *E.g.*, *Jim Arnold Corp. v. Bishop*, 928 S.W.2d 761, 766 (Tex. App.-Beaumont 1996, no writ) ("Traditionally, continuing tort theories apply to such causes of action as nuisance, trespass, and false imprisonment."); *Upjohn Co. v. Freeman*, 885 S.W.2d 538, 542 (Tex. App.-Dallas 1994, writ denied) ("The concept of *continuous injury* . . . has been expanded to include false-imprisonment cases."); *Adler v. Beverly Hills Hosp.*, 594 S.W.2d 153, 154 (Tex. App.-Dallas 1980, no writ) ("We hold that false imprisonment is a continuing tort and that the cause of action for the entire period of imprisonment accrues when the detention ends.").

[13] *See Patrick v. Howard*, 904 S.W.2d 941, 944 (Tex. App.-Austin 1995, no writ); *White v. Cole*, 880 S.W.2d 292, 295 (Tex. App.-Beaumont 1994, writ denied).

[14] *See*, *e.g.*, 20 WILLIAM V. DORSANEO III, TEXAS LITIGATION GUIDE § 331.07; 2 ROY W. MCDONALD & ELAINE A. CARLSON, TEXAS CIVIL PRACTICE § 9:73 (2d ed.); 4 JAMES B. SALES & J. HADLEY EDGAR, TEXAS TORTS & REMEDIES § 51.04; 50 TEX. JUR. 3D *Limitation of Actions* § 70; 7 TEXAS JURISPRUDENCE PLEADING & PRACTICE FORMS § 116:9 (2d ed.); *see also* 32 AM. JUR. 2D *False Imprisonment* § 108.

guess, we believe the Supreme Court of Texas would side with the intermediate appellate courts and trusted treatises. False imprisonment is a continuing tort in Texas—the injury persists until the imprisonment ends—meaning Moon's claim accrued upon his release in December 2004. His false-imprisonment claim was thus timely.

B. Moon's due process claim against the County Defendants was properly dismissed as time-barred.

Moon contends the County Defendants violated his right of "access to the courts" under the Due Process Clause of the Fourteenth Amendment. He argues that the County Defendants maintained a "system of utter disorganization" that "interfered with and significantly delayed Moon's filing of a meritorious petition for post-conviction relief." Alternatively, Moon argues that the failure to train or supervise subordinate officials in "proper record-keeping methods" violated Moon's right of access to the courts.

We agree with the district court that Moon's access-to-courts claim is time-barred. Because this claim is brought under § 1983, the federal accrual law governs,[15] and the critical inquiry for accrual is "when the plaintiff knows or has reason to know of the injury which is the basis of the action."[16] The conduct Moon complains of—the district clerk's state of "utter

[15] *See Hitt v. Connell*, 301 F.3d 240, 246 (5th Cir. 2002).

[16] *Gartrell v. Gaylor*, 981 F.2d 254, 257 (5th Cir. 1993).

disorganization," resulting in the checkout document being lost—occurred in 1996 at the very latest. Moon filed his claim in 2006. Moon was aware of the 1996 events while in prison because testimony during Moon's habeas proceedings revealed that the evidence and checkout document could not be found. The two-year limitations period has long lapsed.

Moon alleges no facts sufficient to toll the pertinent limitations period. Nor does any equitable doctrine toll limitations here. State law generally governs tolling.[17] In Texas, two doctrines, neither applicable in this case, may toll limitations (or delay accrual): fraudulent concealment, or injuries that are both inherently undiscoverable and objectively verifiable.[18] Our review of the record and the governing law leaves us unpersuaded that Moon has satisfied any applicable Texas tolling doctrine or articulated specific facts that warrant extending limitations. We thus hold that Moon's due process claim against the County Defendants is time-barred.

C. Absolute immunity bars Moon's due process claim against the prosecutor.

Assistant District Attorney Davis represented the State of Texas in Moon's fourth habeas proceeding

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[17] *Wallace*, 549 U.S. at 395; *Bd. of Regents v. Tomanio*, 446 U.S. 478, 484–86 (1980).

[18] *See Valdez v. Hollenbeck*, 465 S.W.3d 217, 229 (Tex. 2015); *Madis v. Edwards*, 347 F. App'x 106, 108–09 (5th Cir. 2009) (listing cases).

in 1996. Moon claims Davis violated his due process rights under the Fourteenth Amendment by (1) asserting an unfounded chain-of-custody argument in Texas's response to Moon's pro se habeas proceeding, and (2) failing to inform Moon or his counsel of the State's 1996 DNA testing. The district court dismissed the claims against Davis based on absolute immunity. We agree.

Prosecutors enjoy absolute immunity for the initiation and prosecution of a criminal case, including the presentation of a case at trial.[19] If the prosecutor continues his role as an advocate, absolute immunity extends to conduct during post-conviction proceedings.[20] Absolute immunity is not a rigid, formal doctrine, but attaches to the functions a prosecutor performs.[21] Generally, a prosecutor does not enjoy absolute immunity when performing administrative or investigative functions, or when his role as an advocate has concluded.[22] But the broad scope of absolute prosecutorial immunity may even reach an *apparently* administrative or investigative function if that function "require[s] legal knowledge and the exercise of related discretion."[23]

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[19] *Imbler v. Pachtman*, 424 U.S. 409, 426 (1976).

[20] *Spurlock v. Thompson*, 330 F.3d 791, 799 (6th Cir. 2003); *Carter v. Burch*, 34 F.3d 257, 263 (4th Cir. 1994); *Houston v. Partee*, 978 F.2d 362, 366 (7th Cir. 1992).

[21] *Thompson*, 330 F.3d at 797; *Burch*, 34 F.3d at 261; *Partee*, 978 F.2d at 366.

[22] *Burns v. Reed*, 500 U.S. 478, 486 (1991).

[23] *Van de Kamp v. Goldstein*, 555 U.S. 335, 344 (2009).

1. The Chain-of-Custody Argument

There is no freestanding, substantive due process right to access DNA evidence at the post-conviction stage.[24] State procedures for post-conviction DNA testing protect the "limited liberty interest" to which a convicted person may be entitled.[25] So we must ask whether consideration of Moon's claim within Texas's procedures for post-conviction relief "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental" or "transgresses any recognized principle of fundamental fairness in operation."[26]

Moon's first claim stems from a legal argument the State made in opposition to Moon's fourth habeas petition. A checkout form showing that evidence was checked out of the district clerk's office in January 1989 was missing in 1996. No actual evidence was missing; only the checkout sheet that provided the custodial link between the district clerk's office and the sheriff's department. Since the checkout document was missing when Davis wrote the State's response to Moon's fourth habeas petition, Davis raised a chain-of-custody argument in the State's brief. Ultimately, the presiding judge denied Moon's petition for a slew of

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[24] *Dist. Attorney's Office for the Third Judicial Dist. v. Osborne*, 557 U.S. 52, 69 (2009).

[25] *Id.* ("When a State chooses to offer help to those seeking relief from convictions, due process does not dictate the exact form such assistance must assume." (cleaned up)).

[26] *Id.* (quoting *Medina v. California*, 505 U.S. 437, 446, 448 (1992)).

reasons, including *but not limited to* the failure to maintain the integrity of the chain of custody. Davis never saw the missing checkout sheet until August 2007.

When Davis opposed Moon's fourth habeas petition, he did so as a legal advocate for the State of Texas. Because Davis continued that role during post-conviction proceedings, absolute immunity shields him.

2. Failure to Inform of DNA Results

The second part of Moon's claim against Davis is based on the failure to inform Moon of the State's DNA testing in 1996 after his fourth habeas petition was denied. Moon argues that Davis violated his constitutional rights by failing to obtain additional samples or to inform Moon that additional DNA testing had been performed. Even though the results of this 1996 DNA test were inconclusive, they were—according to Moon—"exculpatory evidence that cast doubt on Moon's guilt."

Here too, absolute immunity insulates Davis. Moon's fourth habeas petition was still pending when Davis requested the 1996 DNA testing. Thus, he was still acting as counsel for the State of Texas. It does not matter that the results didn't arrive until after the habeas proceeding had concluded. When Davis received the indicative-yet-inconclusive test results, he determined, based on his legal knowledge and experience, that the results were "non-exculpatory." He exercised his discretion by deciding not to pursue the matter any

further. Whatever the merits of this decision, Davis is nonetheless immune.

Moon argues that absolute immunity does not apply since the habeas proceeding had ended. But absolute immunity is about more than mere chronology.[27] More legal proceedings followed intermittently until Moon's exoneration nine years later. Moreover, the decision-making process—whether to turn over non-exonerative post-conviction evidence—was precisely the type of prosecutorial function the Supreme Court envisioned in *Van de Kamp*.

* * *

There remains one housekeeping matter: What should happen with Moon's lone remaining claim, his Texas tort claim for false imprisonment? Under 28 U.S.C. § 1367(c), a district court may decline to exercise supplemental jurisdiction if it "has dismissed all claims over which it has original jurisdiction." Whether to refuse, or to retain, supplemental jurisdiction over a pendent state-law claim is committed to a district court's "wide discretion"[28]—and we review only for *abuse* of that discretion. For now, we REMAND Moon's false-imprisonment claim to the district court, which will weigh traditional "common law factors of judicial economy, convenience, fairness, and comity."[29]

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[27] *Cousin v. Small*, 325 F.3d 627, 636 (5th Cir. 2003) (holding that absolute immunity is "functional rather than temporal").

[28] *Noble v. White*, 996 F.2d 797, 799 (5th Cir. 1993).

[29] *Enochs v. Lampasas Cty.*, 641 F.3d 155, 159 (5th Cir. 2011).

IV. Conclusion

As for Moon's federal claims, we AFFIRM the district court's dismissal in favor of Davis and the County Defendants. As for Moon's pendent false-imprisonment claim, we REVERSE the district court's dismissal. False imprisonment is a continuing tort under Texas law, meaning Moon's claim was timely filed. We thus REMAND it to the district court for further proceedings.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

BRANDON LEE MOON	§	
Plaintiff	§	
	§	CIVIL ACTION NO.
v.	§	SA-06-CA-925-OG
CITY OF EL PASO, et al	§	
	§	
Defendants	§	

ORDER

(Filed Oct. 21, 2014)

This case arises out of the conviction and 17-year imprisonment of Plaintiff, Brandon Lee Moon, whose conviction for aggravated sexual assault was vacated by the Texas Court of Criminal Appeals based on actual innocence. Plaintiff was convicted in January 1988 of two counts of aggravated sexual assault and sentenced to 75 years in prison. In December 2004, DNA test results showed he was not the rapist. Plaintiff's fifth post conviction motion for release was filed December 21, 2004. On April 21, 2005, the 346th Judicial District Court entered an order of dismissal. The Texas Court of Criminal Appeals granted Plaintiff's habeas application on May 2, 2005, and vacated the conviction.

Plaintiff brought this lawsuit against Defendant John Davis under 42 U.S.C. § 1983 for alleged violations of his Fourteenth Amendment right to due

process. Plaintiff seeks compensatory and punitive damages. Dkt. # 1, ¶ 39-44, 49, 78-79. Defendant Davis has moved to dismiss the claims asserted against him. Dkt. # 27, 146, 154, 163, 167. Because this case involves qualified and absolute immunity issues, the Court allowed only limited discovery. After such discovery, Plaintiff was allowed sufficient time to file responses. Dkt. # 55, 134, 165. The Court has reviewed the record and the applicable law, and finds that the motion to dismiss filed by Defendant John Davis (Dkt. # 27) should be GRANTED.

I.

Standard of review

To survive a rule 12(b)(6) motion to dismiss, a complaint must set forth "a claim for relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 556. In considering a rule 12(b)(6) motion, the court construes the complaint in the light most favorable to the plaintiff, reading the complaint as a whole and taking the facts asserted therein as true.

When matters outside the pleadings are presented to and not excluded by the court, the 12(b)(6) motion must be treated as one for summary judgment and disposed of as provided in rule 56. Fed.R.Civ.P. 12(d).

Under rule 56, the court must grant summary judgment if the moving party demonstrates there is no genuine issue as to any material fact, and he is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(a).

In reviewing a motion for summary judgment, the court views the facts in a light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Once a motion for summary judgment is properly made and supported, the opposing party has the burden of showing that a genuine dispute exists. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson*, 477 U.S. at 247-48 (emphasis in original). A "material fact" is one that might affect the outcome of a party's case. *Id.* at 248. Whether a fact is considered to be "material" is determined by the substantive law, and "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.*

Here, because evidence outside the pleadings has been presented by both parties without objection, the motion to dismiss will be construed as a motion for summary judgment.

II.

Official capacity claims against Davis

The State of Texas is immune and has not been sued. However, as Assistant District Attorney, John Davis is a state official. To the extent that a state official is sued in his official capacity, he is entitled to Eleventh Amendment immunity because the State cannot be sued for money damages under section 1983. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71, 109 S.Ct. 2304, 2312 (1989). Thus, any claims asserted against John Davis in his official capacity should be dismissed. *Ganther v. Ingle*, 75 F.3d 207, 210 (5th Cir. 1996) (The Eleventh Amendment bars claims against defendants in their official capacities); *Florance v. Buchmeyer*, 500 F.Supp.2d 618, 639 (N.D. Tex. 2007) (claims against DA's and ADA's, sued in their officials capacities, were dismissed).

III.

Individual capacity claims against Davis

Defendant John Davis was Assistant District Attorney for El Paso County beginning in October 1993 – five years after Mr. Moon's conviction. Dkt. # 27, Exh. C. He had no involvement with the Moon case until 1996, when he was attorney of record for the State of Texas in the habeas proceedings. Dkt. # 27, Exh. C. In fact, Davis was not involved in the Moon case until the *fourth* application for writ of habeas corpus. Dkt. # 134, Exh. A, p. 51,1. 4-5. Plaintiff claims that Davis thwarted his attempts to secure additional DNA

testing, and thus violated his due process rights under the Fourteenth Amendment, in two ways: first, by including a chain of custody argument in the State's response to his 1996 application for writ of habeas corpus; and second, by failing to inform Defendant of DNA testing that the State performed in 1996. Dkt. # 134, pp. 5-9. Defendant Davis moves for dismissal based on absolute immunity, qualified immunity, and because Plaintiff has failed to state a claim for relief under Section 1983, which requires a constitutional violation.

A. Applicable law:

1. Absolute immunity:

In stating a claim against Davis in his individual capacity, the allegations must fall outside of the scope of conduct that is protected by absolute prosecutorial immunity. It is well settled that a prosecutor enjoys absolute immunity for the initiation and prosecution of a criminal case, including the presentation of a case at trial. *Imbler v. Pachtman*, 424 U.S. 409, 96 S.Ct. 984 (1976). The doctrine also applies to the prosecutor's conduct during post conviction proceedings as long as he is continuing his role as an advocate. *Spurlock v. Thompson*, 330 F.3d 791, 799 (6th Cir. 2003); *Houston v. Partee*, 978 F.2d 362, 366 (7th Cir. 1992); *Carter v. Burch*, 34 F.3d 257, 263 (4th Cir. 1994). The immunity afforded to a prosecutor attaches to the functions he performs, and not merely to his office. *Thompson*, 330 F.3d at 797; *Burch*, 34 F.3d at 261; *Partee*, 978 F.2d at

366. If the prosecutor's alleged misconduct occurs when he is serving as an advocate in legal proceedings and his conduct is intimately associated with the judicial phase of the criminal process, absolute immunity attaches. *Imbler*, 424 U.S. at 430-31; *Buckley v. Fitzsimmons*, 509 U.S. 259, 273-74, 113 S.Ct. 2606 (1993); *Kalina v. Fletcher*, 522 U.S. 118, 125, 118 S.Ct. 502 (1997). As a general rule, a prosecutor does not enjoy absolute immunity when performing functions that are clearly administrative or investigative, or when his role as an advocate has concluded. *Burns v. Reed*, 500 U.S. 478, 111 S.Ct. 1934, 1943-44 (1991); *Thompson,* 330 F.3d at 798-99; *Partee*, 978 F.2d at 366. However, the broad scope of absolute prosecutorial immunity may even reach some functions that appear to be administrative or investigative in nature if performing that function "requires legal knowledge and the exercise of related discretion." *Van de Kamp v. Goldstein*, 555 U.S. 335, 344, 129 S.Ct. 855, 862 (2009).

2. Qualified immunity:

In situations where a prosecutor is not entitled to absolute immunity, he may still be entitled to qualified immunity. *See Mitchell v. Forsyth*, 472 U.S. 511, 524, 105 S.Ct. 2806, 2814 (1985); *see also Cousin v. Small*, 325 F.3d 627, 637 (5th Cir. 2003). The presumption is that qualified immunity applies, and the burden is on the prosecutor to show that he is entitled to absolute immunity. *Burns*, 500 U.S. at 486-87, 111 S.Ct. at 1939.

Under the doctrine of qualified immunity, "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727 (1982). This is not a mere defense to liability, but immunity from suit. *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806 (1985). Once raised by a defendant, the plaintiff has the burden to demonstrate that the doctrine is not applicable before the Court can adjudicate the merits of the claim. *See McClendon v. City of Columbia*, 305 F.3d 314, 323 (5th Cir. 2002) (en banc). As part of his burden, the plaintiff must comply with the "heightened pleading" standard. *See Schultea v. Wood*, 47 F.3d 1427, 1433-34 (5th Cir. 1995) (en banc). This standard requires more than conclusory allegations; instead, the plaintiff must support his claim with enough factual specificity to raise a genuine issue as to the illegality of the defendant's conduct at the time of the alleged acts. *Id.* at 1434.

3. Constitutional violation:

Plaintiff must show a constitutional violation to prevail under Section 1983. Although Plaintiff refers generally to the Fourth, Sixth, and Fourteenth Amendments in his complaint, there are no allegations against John Davis that would implicate the Fourth and Sixth Amendments. Plaintiff's claim against John Davis rests on the "duty to provide exculpatory

evidence" and the "failure to disclose exculpatory evidence" . . . "in violation of [Moon's] 14th Amendment due process rights." Dkt. # 1, pp. 24-25. The exculpatory evidence that Moon refers to is post conviction DNA evidence.

After the initial briefing on this [sic] issues in this case, the Supreme Court handed down its decision in *DA's Office for the Third Judicial Dist. v. Osborne*, 557 U.S. 52, 129 S.Ct. 2308 (2009). In the *Osborne* decision, the Supreme Court made clear that there is no freestanding constitutional right to DNA evidence at the post conviction stage and *Brady*[1] is the wrong legal framework. 129 S.Ct. at 2320. State procedures for post conviction DNA testing provide the limited liberty interest, if any, to which a convicted person may be entitled. *Id.* at 2319. " '[W]hen a State chooses to offer help to those seeking relief from convictions,' due process does not 'dictat[e] the exact form such assistance must assume.' " *Id.* at 2320 (quoting *Pennsylvania v. Finley*, 481 U.S. 551, 559 (1987)). Thus, the question is "whether consideration of [Moon's] claims within the framework of the State's procedures for post conviction relief 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental,' or 'transgresses any recognized principle of fundamental fairness in operation.' " *Id*.

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[1] *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963) (due process requires a prosecutor to disclose material exculpatory evidence to the defendant prior to trial).

(quoting, in part, *Medina v. California*, 505 U.S. 437, 446, 448, 112 S.Ct. 2572 (1992)).

B. Application of the facts:

1. The chain of custody argument:

The first part of Moon's claim against Davis arises from a legal argument that the State made in response to Moon's fourth petition for writ of habeas corpus. As the record reflects, a "checkout document" showing that evidence was checked out of the district clerk's office in January 1989 was missing in 1996 – and the document remained missing until it was found in 2007 during discovery in this case. None of the actual evidence was missing – only the "checkout sheet" that showed the custodial link between the district clerk's office and the sheriff's department was missing. *See* Dkt. # 134, Exh. B-52. Because this document was missing when Davis wrote the State's response to Moon's fourth application for writ of habeas corpus, Davis included a chain of custody argument in the State's brief. Dkt. # 134, Exh. B-64, pp. 26-30. The presiding judge denied Moon's fourth application for writ of habeas corpus for many reasons, including *but not limited to* the failure to maintain the integrity of the chain of custody. Dkt. # 134, Exh. B-65. When Davis gave his deposition in this case, he testified that he never saw the missing "checkout sheet" until August 2007. Dkt. # 134, Exh. A, part 1, pp. 119-120. Davis testified that the document "would have completed the chain" of custody and he "wouldn't have raise the chain

of custody argument" in the State's habeas response if he had known of the document's existence in 1996.

Dkt. # 134, Exh. A, part 1, p. 120. Nevertheless, Plaintiff still claims:

> If [Davis] had not obfuscated the chain of custody evidence, the trial court would likely have ordered DNA testing for Moon in 1996. If that testing had been performed, it would have exonerated Moon and spared him eight additional years in prison. Instead, because of Defendant's conduct, the court denied Moon's request for court-ordered DNA testing. The denial of habeas corpus is significant, because any DNA testing done under court order would have had an official imprimatur, the results would have been reported to the court and Moon, and any necessary follow-up would have been performed.

Dkt. # 134, p. 7.

When Davis was asserting arguments in the State's brief in response to Moon's fourth application for writ of habeas corpus, he was clearly doing so in his role as advocate for the State of Texas. The doctrine of absolute prosecutorial immunity applies to the prosecutor's conduct during post conviction proceedings as long as he is continuing his role as an advocate. *Spurlock*, 330 F.3d at 799; *Partee*, 978 F.2d at 366; *Burch*, 34 F.3d at 263. Plaintiff's claim that Davis thwarted Moon's attempt to secure additional DNA testing in 1996 simply because Davis advocated a certain legal position based on documentation in existence at that

time is barred by the doctrine of absolute prosecutorial immunity.

2. Failure to inform of DNA results:

The second part of Moon's claim against Davis is based on the failure to inform Moon of the State's DNA testing in 1996 after the fourth habeas application had been denied. While the application was still pending, Davis wrote to Donna Stanley, a criminalist in the Serology/DNA section of the Texas Department of Public Safety. Davis asked Stanley to contact Lifecodes Corporation, which had conducted post conviction DNA testing in 1990 at Moon's request. Dkt. # 134, Exh. B-54. Davis requested that Stanley get a full explanation of the previous tests conducted and the results obtained, and determine whether further DNA testing could be done. *Id.* If further testing could be conducted, Stanley was asked to seek release of the DNA evidence in Lifecode's possession and have it transported to Texas DPS for further testing. *Id.* Stanley did as requested, and signed an affidavit explaining her role in the process prior to the denial of the fourth habeas application. Dkt. # 134, Exh. 59. In her affidavit, Ms. Stanley explained that the 1990 DNA test results were inconclusive and Moon could not be excluded as a suspect in the sexual assault of the victim. *Id.* Lifecodes still had the DNA evidence in its possession, and the evidence would be shipped to Ms. Stanley for further testing. *Id.* While Ms. Stanley was not able to conduct the DNA testing prior to the denial of the fourth habeas application, she expressed an intent to do the

testing. *Id.* Plaintiff was aware of this, and sent a letter to Ms. Stanley approximately one month later requesting that the tests be conducted. Dkt. # 134, Exh. B-71, p. 2.

Ms. Stanley concluded the testing approximately seven months later. Dkt. # 134, Exh. B-66. Like the 1990 results, the 1996 results were inconclusive. *Id.* Ms. Stanley recommended follow-up testing to include additional blood samples from Moon, the victim, the victim's husband, and the victim's son. *Id.*[2] Plaintiff now claims that Davis violated his constitutional rights by failing to obtain follow-up samples and/or inform him that DNA testing had been done. Dkt. # 134, p. 8. Plaintiff claims that the results, though inconclusive, were "exculpatory evidence that cast doubt on Moon's guilt." *Id.*

The actions of John Davis do not fall outside the broad scope of immunity or give rise to a constitutional violation. When Davis requested the 1996 DNA testing, the fourth habeas application was still pending. *Compare* Dkt. # 134, Exh. B-54 *and* Exh. B-65. Thus, he was still acting in his role as an advocate for the State of Texas and enjoyed absolute immunity. The fact that the results did not come until after the fourth habeas proceeding concluded should not change the immunity that attached to his actions. When Davis received the inconclusive test results, he determined,

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[2] Lifecodes had also requested a blood exemplar from the victim in 1990 when Moon's attorney had the evidence tested. Dkt. # 134, Exh. B-53.

based on his legal knowledge and experience as a prosecutor, that the results were "non-exculpatory" and exercised his discretion in deciding not to take the matter any further. Dkt. # 134, Exh. A, p. 94, 1. 10-14. While Plaintiff asserts that absolute immunity should not apply because the fourth habeas proceeding had ended, the mere timing of events is not determinative in deciding whether absolute immunity applies. *Cousin*, 325 F.3d at 636 (absolute immunity is "functional rather than temporal"). There were subsequent, intermittent legal proceedings in Moon's case until he was exonerated nine years later.[3] Moreover, the decision-making process – whether to turn over non-exculpatory post conviction evidence – was precisely the type of prosecutorial function that the Supreme Court meant to protect in *Van de Kamp v. Goldstein.*

Even if absolute immunity does not apply, Davis is entitled to qualified immunity because the conduct occurred while he was acting in his official capacity and within the scope of his discretionary authority. *Cronen v. Texas Dept. of Human Services*, 977 F.2d 934, 939

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[3] Post conviction legal proceedings began in 1988. Plaintiff exhausted his direct appeals and pursued five applications for writ of habeas corpus. Plaintiff filed various other motions and requests that were also intended to advance his legal interests, such as a motion appointing expert witness, motion for production of blood samples, motion to compel, motion for bail and motion for release. The legal proceedings culminated in Plaintiff's fifth post conviction motion for release, filed December 21, 2004. On April 21, 2005, the 346th Judicial District Court entered an order of dismissal. The Texas Court of Criminal Appeals granted Plaintiff's habeas application on May 2, 2005, and vacated the conviction.

(5th Cir. 1992). To overcome qualified immunity, Plaintiff must show that the allegations, if true, establish a constitutional violation, *Hope v. Pelzer*, 536 U.S. 730, 736 (2002); the constitutional right was clearly established at the time of the violation, *Saucier v. Katz*, 533 U.S. 194, 201 (2001); and the official's conduct was not objectively reasonable in light of clearly established law, *Wallace v. Comal County*, 400 F.3d 284, 289 (5th Cir. 2005).[4]

Here, Plaintiff cannot show a violation of a clearly established constitutional right. *Brady* was inapplicable at the post conviction stage, and Plaintiff did not have a substantive due process right to post conviction DNA evidence. *Osborne*, 129 S.Ct. at 2320, 2322 (*Brady* is the "wrong legal framework" and "we reject the invitation" to "recognize a freestanding right to DNA evidence untethered from the liberty interests [a defendant] hopes to vindicate with it"). Nor has Plaintiff shown that his procedural due process rights were violated. The State of Texas provides a process for post conviction DNA testing and federal courts will not presume that the process is inadequate. *Id.* at 2323. Plaintiff utilized the state procedure for post conviction DNA testing, and that procedure ultimately led to his exoneration.[5] Plaintiff has neither alleged nor shown

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[4] As the Supreme Court explained in *Pearson v. Callahan*, 555 U.S. 223, 236 (2009), there is no mandatory sequence in deciding these issues, but it may be helpful to determine firsthand whether the relevant facts make out a constitutional violation at all.

[5] S*ee* Texas Code of Criminal Procedure, Article 64.01.

that the State procedure, on its face or as applied, offends fundamental principles of fairness and justice. *See Osborne*, 120 S.Ct. at 2320.

For these reasons, the claims against Defendant John Davis must be DISMISSED with prejudice.

IT IS SO ORDERED this 21 day of October, 2014.

/s/ [Orlando Garcia]
ORLANDO L. GARCIA
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-50572

BRANDON LEE MOON,

Plaintiff–Appellant,

v.

CITY OF EL PASO; COUNTY OF EL PASO; SALVADOR OLIVAREZ; DETECTIVE JEFFREY DOVE; ASSISTANT DISTRICT ATTORNEY JOHN DAVIS; EDIE RUBALCABA; GILBERT SANCHEZ,

Defendants–Appellees.

Appeal from the United States District Court
for the Western District of Texas

ON PETITION FOR REHEARING

(Filed Dec. 12, 2018)

Before JOLLY, ELROD, and WILLETT, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing of appellees Jeffrey Dove and Salvador Olivarez is DENIED.

ENTERED FOR THE COURT:

/s/ Don R. Willett
DON R. WILLETT
UNITED STATES
CIRCUIT JUDGE

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Before JOLLY, ELROD, and WILLETT, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the motion of appellee City of El Paso for leave to file petition for rehearing out of time is GRANTED. IT IS FURTHER ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

/s/ Don R. Willett
DON R. WILLETT
UNITED STATES
CIRCUIT JUDGE