No. 18-1193

In The
Supreme Court of the United States

BRANDON MOON,

Petitioner,

v.

EL PASO COUNTY and
ASSISTANT DISTRICT ATTORNEY JOHN DAVIS,

Respondents.

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

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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REPLY TO PETITIONER'S QUESTION PRESENTED FOR REVIEW

Because ADA Davis' actions and decisions were at all times made as an advocate for the State during the course of ongoing judicial proceedings and thereafter in the determination of whether Moon might have been wrongfully convicted, the Fifth Circuit was correct in holding that he had absolute immunity from Moon's 42 U.S.C. §1983 lawsuit. All federal circuits apply the same substantive law that the Fifth Circuit did here. In order for ADA Davis to fulfill his prosecutorial duty to assure that an innocent man did not remain in jail, he had a duty to determine if the DNA test results were material and reliable in establishing his innocence. This means he had to review the 1997 DNA test results when they arrived, without regard to whether a judicial proceeding was already underway. In doing so, his activities and decisions were performed as the State's attorney and were an integral part of the judicial process and directly related to the judicial phase of the criminal process. The Fifth Circuit properly applied the standards asserted in *Imbler v. Pachtman*, 424 U.S. 409, 430-31 (1976) when they reached the conclusion that ADA Davis had absolute immunity.

PARTIES TO THE PROCEEDING

Petitioner is Brandon Moon (plaintiff-appellant below).

Respondent is Assistant District Attorney John Davis (defendant-appellee below).

Respondent El Paso County, Texas (defendant-appellee below) is named by Petitioner as a party of interest, but no assertion has been made against the County in Moon's pleadings or appeals. At all times, ADA Davis was acting in his capacity as a state employee. The County was a named party based upon the actions of the County District Clerk, and the Fifth Circuit's dismissal of El Paso County and the District Clerk was not appealed. There is, therefore, a dispute over the proper status of El Paso County as a party to this proceeding.

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Cygne Nemir, on behalf of Assistant District Attorney John Davis, et al., respectfully responds to the petition for a writ of certiorari from the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at *Moon v. City of El Paso*, 906 F.3d 352

(5th Cir. 2018). The opinion of the district court is not reported. (Pet. App. 15a-29a).

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-14a) was entered on October 15, 2018. Two petitions for rehearing were denied on December 12, 2018 (Pet. App. 30a, 32a). The petition for a writ of certiorari was docketed on March 14, 2018. The jurisdiction of this Court was invoked under 28 U.S.C.S. § 1254(1).

STATEMENT OF THE CASE

Petitioner Brandon Moon (Moon) was charged with a series of rapes. (ROA.685). He was convicted in 1988 of three counts of aggravated sexual assault and sentenced to 75 years in prison. (ROA.832, 862-65, 938). Two convictions of aggravated rape were upheld on appeal. (ROA.808). Post-conviction, Moon successfully petitioned the state appellate and district courts for orders releasing the trial evidence to a private lab, Lifecodes Corporation (Lifecodes) for DNA testing. (ROA.912). At the instruction of Moon's attorney, only the bathrobe and the comforter were tested. (ROA.207). Specifically, the rape kit was not tested, and the lab concluded the semen samples on the robe were too small to test. (App. 7; ROA.902). The test results did not exonerate Moon. The Conclusion of the report said,

> A comparison of the DNA-Print™ pattern obtained from sample [the peach colored bedspread] excludes Bandon (*sic*) Lee Moon [blood sample] as the source of the DNA recovered from the evidence sample. *No conclusions can be made without a victim exemplar for comparison.* (*Emphasis added*). (App. 8; ROA.903).

The report ended by saying that the evidence will be repackaged and returned to [Moon's attorney]. *Id.* The evidence was not returned to Moon's attorney, and the evidence was lost. (ROA.752).

Moon filed multiple petitions for writ of habeas corpus seeking release from prison in reliance upon the 1990 DNA test results. (ROA 824-27, 843-47, 857, 701-08, 2595)[1]. In 1992, Moon filed his third application asserting that he had newly discovered evidence – the 1990 DNA test results from Lifecodes – that "conclusively show that he is not the source of the semen discovered at the crime scene." (ROA.858). Moon admitted that the Lifecode's DNA comparisons failed to exclude members of the victim's family as possible sources of the semen discovered at the crime scene. *Id.* While his third application for habeas relief was pending, he also filed a *Motion for Production of Blood Samples* requesting the state court to compel the victim and her male family members to provide blood samples.

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[1] *See also Moon v. Collins*, No. 93-8761, 1994 U.S. App. LEXIS 43152 (5th Cir. May 2, 1994) (Moon filed a federal petition for writ of habeas corpus in 1992) and *Moon v. Collins*, 22 F.3d 1093 (5th Cir. 1994) (Moon's appeal from denial of the writ).

(ROA.2454). No order granting or denying this motion was found,[2] but the order of the court denying Moon's third application for writ of habeas corpus stated "The State was not required under *Brady v. Maryland*, 373 U.S. 83 (1963) to have conducted DNA comparisons. . . ." (ROA.893). Significantly, Moon's *Motion for Production of Blood Samples* demonstrated that Moon and his counsel were aware in 1992 that Moon needed to get more blood specimens and submit them for DNA testing before DNA results could be used to exonerate him. (ROA.2454).

Moon filed his fourth state *Application for Writ of Habeas Corpus* (Fourth Application) in 1995 stating that his 1990 DNA test result was new evidence that proved his actual innocence. (ROA.701-02). Within a few weeks, the Texas Legislature amended its habeas statute to require the release of a defendant upon post-conviction proof of actual innocence. Acts 1995, 74th Leg., ch. 319 § 5, eff. Sept. 1, 1995; Tex. Code Crim. P. art. 11.07 sec. 4(a)(2). In relevant part, the statute says:

> Article 11.07. Sec. 4. (a) If a subsequent application for writ of habeas corpus is filed after final disposition of an initial application challenging the same conviction, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that: . . . (2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could

[2] No ruling is believed to exist.

> have found the applicant guilty beyond a reasonable doubt.

Assistant District Attorney John Davis (ADA Davis) knew of the new statute. Davis also knew that a Defendant on death row had successfully relied upon the statute to obtain release based upon DNA evidence. Moon cited this case in his Fourth Application. (ROA.718). Davis recognized Moon's Fourth Application was potentially an important case, and he spent several months preparing his 324-page writ answer (Answer). (ROA.710-1034). Texas did not have a DNA statute at the time, and Moon did *not* request new DNA testing in his Fourth Application. (ROA.701-08).

ADA Davis: (1) reviewed and summarized each of the previous petitions for habeas relief; (2) conducted an exhaustive search for the missing evidence; (3) recreated as much of the chain of evidence as possible; (4) contacted the State Lab for expert assistance in understanding and explaining the 1990 DNA test results; (5) asked the state criminalist, Donna Stanley, in the Serology/DNA section of the Texas Department of Public Safety to contact Lifecodes in order to receive a full explanation of the previous tests conducted and the results obtained, and determine whether further DNA testing could be done; (6) learned that the trial court evidence was still in the possession of Lifecodes; and (7) asked Donna Stanley to have the evidence returned to the State Lab and retested. (ROA.710-1034).

While Ms. Stanley was unable to conduct the DNA testing prior to the denial of the Fourth Application,

she prepared an affidavit, that was attached to ADA Davis' Answer. Stanley explained the shortcomings of the 1990 DNA test results, advised that Lifecodes was sending the evidence to her at the State Lab, and stated her intent to retest the blood samples. (App. 1; ROA.943-44). Her affidavit said:

> I will determine if any of the evidence is still in a condition in which a new DNA test can be done. If so, to properly test the evidence, I will require a new blood sample from the victim, and from applicant, Bandon [sic] Lee Moon. Additionally, . . . I will need a blood sample from the victim's husband. . . . Further, . . . I need a blood sample from the son. . . ." (App. 2; ROA.944).

This document was sent to Moon as part of ADA Davis' writ answer.

ADA Davis' extensive research disclosed many problems including the incomplete testing of the DNA evidence and that the only DNA sample tested belonged to a woman. (ROA.770-77, 781-83). His response to Moon's Fourth Application thoroughly documented the problems with the 1990 DNA test results. *Id.* Davis demonstrated that the 1990 test results could not be relied upon to establish Moon's innocence, and the trial court quickly denied the Fourth Application without a hearing. (ROA.2056-63).

About eight months after denial of the Fourth Application, the 1997 DNA test results from the State

Lab were sent to ADA Davis but not to Moon. (App. 13; ROA.1952-53). The State Lab results ended:

> Conclusion: Without reference blood standards from the victim, her husband, son and the suspect, an interpretation of the results cannot be attempted. However, from these results it can be concluded that the semen donor on the comforter is different from the semen donor on the robe and the vaginal specimens. (App. 13; ROA.1954).
>
> Investigative Leads: It is possible to perform additional DNA analysis on the evidentiary samples. Please submit one purple top tube of blood from each individual for comparison. *Id.*

Again, Moon could not be exonerated without new blood samples and additional testing. ADA Davis reviewed the 1997 test results, knowing that he must release Moon if the DNA test results conclusively established Moon's innocence. (ROA.80-81). If so, ADA Davis would be required to file pleadings with the trial court and the Texas Court of Criminal Appeals in order to secure vacation of Moon's conviction and to secure release or acquiesce to a motion filed by Moon. If not, ADA Davis' duty was to leave Moon incarcerated. Moon, however, acknowledged in his original Complaint that he did not qualify for release from prison based upon the 1997 DNA test results. (ROA.40).

ADA Davis was aware from his legal knowledge and experience that the law did not require him to turn over non-exculpatory evidence to an inmate post-petition or to take action to seek out evidence to prove

Moon's innocence. *Id.* He exercised his discretion in deciding not to take the matter further. *Id.*

These 1997 decisions form the basis for Moon's Section 1983 action against ADA Davis. Moon asserts that ADA Davis' failure to turn over the test results and to obtain the missing blood exemplars caused Moon to remain in prison for an additional eight years in violation of his constitutional right to access the courts. (Pet. 4-6). No one, however, disputes that the 1997 DNA test results were inadequate to establish a meritorious petition to set aside his conviction.

By 2001, Texas had established a procedure for requesting post-conviction DNA testing, and Moon utilized it in 2003 and again in 2004. (ROA 2068, 2074). *See* Tex. Code Crim. P. art. 64.01. Notably, had ADA Davis failed to locate the missing evidence and secure it at the State Lab in 1996, Moon would have never been able to secure the final testing that proved his innocence.

As to Moon, ADA Davis always acted as an employee of the 34th Judicial District of the State of Texas. *See* Tex. Gov't Code § 43.120. The District Attorney of the 34th Judicial District is elected to serve a multi-county district and is a State elected official. As an assistant district attorney, ADA Davis is a state actor. (Pet. App. 8). Moon's crimes occurred in El Paso County, but the State directed Davis' activities as an advocate. Moon has asserted no viable claim against El Paso County in conjunction with its claims against ADA Davis. Moon has not mentioned the County in his

Petition other than incorrectly naming the parties on the cover of his Petition.

ARGUMENT

In his certiorari petition, Moon claims that the Fifth Circuit's opinion was wrong and conflicts with other circuits in holding that ADA Davis had absolute immunity because his complained-of actions or inactions, relative to Moon, were not made during ongoing active judicial proceedings and were made at a time when ADA Davis was engaged only in administrative duties. *See* (Pet. 5-6, 9-13). These contentions are without merit.

Moon's petition should be denied for the following reasons:

1. ADA Davis acted as an advocate for the State at all times.

ADA Davis at all times was acting as an advocate during the time that he answered Moon's fourth post-conviction habeas writ application, at which time he provided Moon with the roadmap of necessary blood samples Moon needed in order to obtain reliable, conclusive DNA testing, and a few months afterwards when ADA Davis evaluated the final report of the serologist and determined that essentially the same information had previously been given to Moon concerning what he needed for a definitive DNA test (certain

blood samples). He further determined that it need not be forwarded to Moon. The advocacy function of a prosecutor includes seeking exoneration and confessing error to correct an erroneous conviction. *Warney v. Monroe County*, 587 F.3d 113, 125 (2d Cir. 2009). If the final serological report had dispensed with the needed blood samples and had exonerated Moon, ADA Davis would have been under a duty to disclose that to Moon and aid him in court proceedings for exoneration. Texas law would have required ADA Davis to so act, Tex. Code Crim. P. art. 2.01 ("It shall be the primary duty of all prosecuting attorneys, including any special prosecutors, not to convict, but to see that justice is done. They shall not suppress facts or secrete witnesses capable of establishing the innocence of the accused."); as would federal law. *See, e.g.*, *Warney*, 587 F.3d at 125. Thus, when the final report added nothing material to what had already been disclosed, ADA Davis, acting in his advocacy function, determined that nothing further need be done at that time, including forwarding that report to Moon. For this reason alone, certiorari should be denied.

2. There is no conflict or split between the federal circuit courts of appeals.

This illustrates why there is no conflict in the circuit courts of appeals. All apply the same law, it is just the facts here show that all of ADA Davis' complained-of actions and inactions occurred – while he was acting as the State's attorney – but in a quiet period in between Moon's various post-conviction judicial

proceedings. The continuity of the advocacy function is what matters, not the day the test results came in the mail. The Fifth Circuit merely applied the same case law and function test to the facts of this case to reach its conclusion that ADA Davis had absolute immunity. *Moon v. City of El Paso*, 906 F.3d 352, 360 (5th Cir. 2018). The Fifth Circuit correctly ruled:

> [A]bsolute immunity insulates ADA Davis. Moon's fourth habeas petition was still pending when ADA 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 ADA 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, ADA Davis is nonetheless immune.
>
> . . . [T]he 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*.

(Pet.App. 12-13). As long as an advocacy function, as here, is being performed, all of the circuit courts hold that absolute immunity applies. *Warney*, 587 F.3d at 123, 125 (noting that a disclosure decision is advocacy as well as preventing unjust imprisonment, and prosecutor's function included preparation for a court proceeding);

Cousins v. Lockyer, 568 F.3d 1063, 1068-69 (9th Cir. 2009) (where AG would have had to petition the court for an order directing a release of petitioner due to statute invalidated by AG, such would require an action entirely dependent upon the AG's role as an advocate for the State, and thus AG was entitled to absolute immunity); *Yarris v. County of Delaware*, 465 F.3d 129, 137-38 (3d Cir. 2006) (absolute immunity hinges on showing of advocacy); *Spurlock v. Thompson*, 330 F.3d 791, 799 (6th Cir. 2003) (advocacy showing key to immunity); *Guzman-Rivera v. Rivera-Cruz*, 55 F.3d 26, 29 (1st Cir. 1995) (absolute immunity hinges on advocacy); *Carter v. Burch*, 34 F.3d 257, 263 (4th Cir. 1994) (personal involvement in advocacy of case entitled prosecutor to absolute immunity); *Patterson v. Von Riesen*, 999 F.2d 1235, 1237 (8th Cir. 1993)*, abrogated on other grounds*, 889 F.3d 483, 487 (8th Cir. 2018) (prosecutors were entitled to absolute immunity for their advocacy conduct in initiating prosecution and in presenting the State's case); *Houston v. Partee*, 978 F.2d 362, 366 (7th Cir. 1992) (failure to show personal involvement in the case as advocate did not satisfy claim of absolute immunity).

None of the circuit cases cited by Moon in his petition, *see* (Pet. 9-18), conflict with the Fifth Circuit in this case. They all hinge on advocacy by the prosecutor on behalf of the State, which is what ADA Davis was engaged in at all times in this case. There is no evidence that ADA Davis was acting as an investigator, was looking out for himself, talking to the media, or destroying evidence. His actions and inactions were

purely prosecutorial and intimately linked to the actions he took in responding to Moon's Fourth Application.

Much like the Attorney General in *Cousins*, if the serologist's final report had exonerated Moon without the need of further blood samples, ADA Davis would have been duty bound to seek Moon's release through the courts at that very time and would remain in his role as an advocate. *See Cousins*, 568 F.3d at 1068-69. But since the results were inconclusive, as noted by the Fifth Circuit, ADA Davis made the decision as an advocate that no further action need be taken at that time. Consequently, there is no conflict in the circuit courts of appeals, such that certiorari should be denied.

3. *Van de Kamp* provides for absolute immunity here.

This Court's case of *Van de Kamp v. Goldstein*, 555 U.S. 335 (2009), demonstrates another reason why certiorari should be denied. In *Van de Kamp*, supervising prosecutors were sued for failure to disclose that an informant had given favorable testimony at Goldstein's trial in exchange for a reduced sentence, and for failing to train and supervise their lower-level prosecutors. *Van de Kamp*, 555 U.S. at 338-40. Because the administrative duties of these supervising prosecutors involved legal knowledge and the exercise of related discretion, absolute immunity still applied. *See Van de Kamp*, 555 U.S. at 342-44. Thus, even if ADA Davis' failure to disclose the final serological report to Moon

involved an administrative function (which ADA Davis contests), because it involved ADA Davis' legal knowledge and the exercise of his related discretion, absolute immunity should still apply. *See Van de Kamp*, 555 U.S. at 342-44.

Moon's proposed result – that absolute immunity requires the presence of ongoing judicial proceedings post-petition before the prosecutor could be determined to be functioning as an advocate – is inconsistent with this Court's ruling in *Van de Kamp*. In *Van de Kamp*, this Court explained that when *Imbler* said that prosecutors were not entitled to absolute immunity for administrative work, the Court was referencing administrative obligations like "workplace hiring, payroll administration, the maintenance of physical facilities, and the like". *See Van de Kamp*, 555 U.S. at 344. These tasks are exceedingly different from reviewing DNA evidence with a mind to whether or not one must initiate a post-trial proceeding to vacate a wrongful conviction.

The decisions ADA Davis made required knowledge of the law, experience with the duties of a prosecutor and case law, experience related to the adequacy of evidence to overturn a conviction, and a sense for whether the evidence was properly characterized as exculpatory. These are not administrative or investigatory functions. They are critical to his job as a prosecutor and fall within the functional test required under *Imbler* and *Van de Kamp*.

ADA Davis had to make a legal decision if the final report contained evidence that exonerated Moon or was even exculpatory beyond what ADA Davis had already disclosed. In his discretion, ADA Davis determined that the report was neither exonerative nor exculpatory. In making that determination, absolute immunity should apply. *See Van de Kamp*, 555 U.S. at 342-44. For this additional reason, certiorari should be denied.

4. Unlike the cases relied upon by Moon, the new 1997 DNA results were non-exculpatory and could not be relied upon by Moon to obtain release from prison.

Petitioner Brandon Moon is only free today because of the acts taken by Assistant District Attorney John Davis of the District Attorney's Office for the 34th Judicial District of Texas. Attached to this response is the affidavit of forensic serologist Donna Stanley of the Texas Department of Public Safety Laboratory in Austin, that details the steps she took at Davis' direction to secure the crime-scene evidence that would lead to Moon's release and, again, the steps she took at Davis' direction to ensure that Moon knew exactly what he had to do to obtain definitive DNA testing that might (and did) lead to his release. (App. 1-4; ADA.943-44).

Securing the evidence from the previous non-definitive testing done by Lifecodes, Stanley states in her affidavit (which affidavit was part of Davis' Answer

to Moon's fourth state habeas application a copy of which was received by Moon):

> I also asked Dr. Baird [of Lifecodes] if he still had the evidence that he had received as shown on the first page of the [Lifecodes] DNA report. He stated that he did. *As I have been instructed by the District Attorney's Office for the 34th Judicial District*, I have requested Dr. Baird to ship to me all of the evidence . . . Upon receipt of this shipment from Lifecodes, I will determine if any of the evidence is still in a condition in which a new DNA test can be done.

(App. 3; ROA.944) (emphasis added). Stanley received that evidence and detailed what was needed for a definitive, conclusive, reliable DNA test:

> . . . [T]o properly test the evidence, I will require a new blood sample from the victim, and from applicant, Brandon Lee Moon. Additionally, since the victim stated that she had sexual intercourse with her husband the night before the sexual assault occurred, I will need a blood sample from the victim's husband to insure that any male DNA that I may be able to recover and test from the evidence does not come from the victim's husband as it is possible that the closeness in time between the sexual intercourse between the victim and her husband and the sexual intercourse between the victim and the perpetrator of the assault would yield the victim's husband's DNA on the victim's rape kit or even on the peach bedspread. Further, since the victim left the

> house wearing her son's bath robe, I need a blood sample from the victim's son.

(App. 3; ROA.944). The Stanley affidavit was signed and sworn to on May 17, 1996. *Id*. Later that same month, May, 1996, Davis sent Moon his Answer to Moon's fourth state writ application, attaching as part of the Answer the Stanley affidavit. The above was also quoted verbatim at page 57 of Davis' writ answer to Moon. Thus, by the end of May, 1996, Moon had the roadmap, provided to him by Davis, with which to free himself. Davis secured the evidence through Stanley and then had her detail how to do a definitive DNA test. Consequently, when Moon states in his petition that, "DNA evidence known to Respondent Assistant District Attorney John Davis in 1997 could have secured Petitioner's release," *see* (Pet. 4), Moon misinforms this Court because in 1996, through Stanley's affidavit, Moon knew as much as Davis knew. As stated, Davis secured the evidence and gave Moon the keys to his release, he simply did not act on it until years later. But he had the knowledge of what he needed to do to free himself in May, 1996, through Davis' efforts.

Stanley's further testing, completed in January, 1997, *see* (App. 9-13; ROA.1952), really adds nothing to her affidavit. She states in her conclusion: "Without reference blood standards from the victim, her husband, son and the suspect, an interpretation of the results cannot be attempted." (App. 13; ROA.1953). She

added in a section entitled Investigative Leads: "Please submit one purple top tube of blood from each individual for comparison." *Id.*

None of the January, 1997 report added anything of substance that was exculpatory or changed what she still needed to do a definitive DNA analysis, because she still needed the blood from the victim, Moon, the victim's husband, and the victim's son. The roadmap to freedom did not change in this report. It was essentially the same as the affidavit. Thus, again when Moon states in his petition, claiming that Davis failed to inform him that, "testing indicated Petitioner *could be* innocent and follow-up testing was necessary to confirm that conclusion," *see* (Pet. 6) (emphasis added), he again misinforms this Court as this was nothing new from Stanley's May, 1996, affidavit that told Moon that he needed to get blood from the individuals named again in her January, 1997, report. He knew the key to his freedom then – from Davis – in May, 1996. For this additional reason, certiorari should be denied.

5. Because the complained-of, non-disclosed report contained no exonerative or exculpatory evidence, and added nothing material to what had already been disclosed to Moon by ADA Davis, there was no duty for ADA Davis to disclose that report or attempt to create exonerative or exculpatory evidence for Moon.

A related reason that certiorari should not be granted is that a prosecutor is not required to seek out

exculpatory evidence independently on a defendant's behalf. *United States v. Bagley*, 473 U.S. 667, 675 (1985); *Harm v. State*, 183 S.W.3d 403, 407 (Tex.Crim.App. 2006). Failure to create exculpatory evidence does not constitute a *Brady*[3] violation. *United States v. Gray*, 648 F.3d 562, 567 (7th Cir. 2011), *cert. denied*, 565 U.S. 1133 (2012). Evidence is exculpatory when, if disclosed and used effectively, it may make the difference between conviction and acquittal. *United States v. Bagley*, 473 U.S. at 676.

The evidence here did not make the difference between conviction and acquittal until Moon finally obtained the blood samples he knew he needed for a definitive DNA analysis. ADA Davis is the one who told him in his writ answer provided to Moon, along with the serologist's affidavit attached, how to do that. ADA Davis had no duty to seek out or create that evidence and did all – and more – that was required of him under *Brady*.

In fact, neither the serologist's May, 1996 affidavit nor her January, 1997 final report provided exculpatory evidence; they both only provided the same roadmap that further blood samples were needed that might lead to exculpatory evidence. Thus, Moon's statement in his petition that ADA Davis failed to disclose or act on the serologist's report, *see* (Pet. 12), is misleading on the facts and the law. ADA Davis disclosed to Moon what he needed to do in May of 1996 in

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[3] *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

his writ answer, attaching the affidavit from the serologist noting that several blood samples were needed for a definitive analysis, and that roadmap was not changed by the serologist's January, 1997 report. Contrary to what Moon asserts, under the law, ADA Davis had no duty to "act" on that information. If ADA Davis had undertaken to seek out and create exculpatory evidence for Moon, by doing so he would have abandoned his role as a prosecutor and would have become Moon's advocate and lawyer instead. Thus, it was up to Moon to seek out and create his own exculpatory evidence as provided by ADA Davis' roadmap. *United States v. Bagley*, 473 U.S. at 675; *United States v. Gray*, 648 F.3d at 567. Consequently, ADA Davis did more than what he was required to do, factually and legally.

ADA Davis' writ answer was overwhelming and detailed. He could have stopped there – knowing that Moon would remain incarcerated. Instead, he thought about how many attempts Moon had made to get released based upon DNA testing and thought it best to make sure there was nothing else in the evidence box at Lifecodes that could exonerate Moon. This is not the action of a prosecutor who has an evil purpose or is trying to hide material evidence.

Applying absolute immunity in this post-petition context, as was done by the Fifth Circuit, frees prosecutors from the fear of retaliatory suits for their decisions and encourages them to seek exculpatory information post-trial, which will, in turn help preserve the trust of the public in the proper functioning of the District Attorney's Office. *See Imbler*, 424 U.S. at

424-25. ("[I]t is in the interest in protecting the proper function of the office, rather than the interest in protecting its occupant, that is of primary importance."). For this additional reason, certiorari should be denied.

6. El Paso County is mischaracterized by Moon as a party of interest. At all times relevant to this case, ADA Davis has served as a State Actor.

At all times relevant to this case, ADA Davis served in a prosecutorial capacity. When acting in a prosecutorial capacity enforcing state penal law, a Texas prosecutor is an agent of the State of Texas, rather than of the county in which the criminal proceeding happens to be prosecuted. *Esteves v. Brock*, 106 F.3d 674 (5th Cir. 1997).

The prosecutorial actions of the district attorney, as well as his assistants, on behalf of the State of Texas cannot be attributed to El Paso County. *Id.* The District Attorney is a state elected official who serves the 34th Judicial District which serves three counties.

The United States District Court for the Western District of Texas previously ruled in this case that as Assistant District Attorney, ADA Davis is a state official. (Pet.App. 18). 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 § 1983. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989). Thus, any claims asserted against John Davis in his official capacity are attributable to the State.

Other than naming the County as a party in interest, Moon has made no statement that associates El Paso County with the Petition for Writ of Certiorari. Accordingly, El Paso County makes no additional response to Moon's petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APRIL 2019