
United States Court of Appeals
for the
Fifth Circuit

Case No. 19-30197

RENATA SINGLETON; MARC MITCHELL; LAZONIA BAHAM; TIFFANY
LACROIX; FAYONA BAILEY; SILENCE IS VIOLENCE;
JANE DOE; JOHN ROE,

Plaintiffs-Appellees,

– v. –

LEON A. CANNIZZARO, JR., in his official capacity as District Attorney of
Orleans Parish and in his individual capacity; DAVID PIPES; IAIN DOVER;
JASON NAPOLI; ARTHUR MITCHELL; TIFFANY TUCKER; MICHAEL
TRUMMEL; INGA PETROVICH; LAURA RODRIGUE; MATTHEW
HAMILTON; GRAYMOND MARTIN; SARAH DAWKINS,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA, IN NO. 2:17-CV-10721,
HONORABLE JANE TRICHE MILAZZO, PRESIDING

**BRIEF FOR *AMICI CURIAE* LOUISIANA FOUNDATION AGAINST
SEXUAL ASSAULT, DV LEAP, AND THE NATIONAL ALLIANCE TO
END SEXUAL VIOLENCE IN SUPPORT OF PLAINTIFFS-
APPELLEES AND AFFIRMANCE**

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Violence in Support of Plaintiffs-
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CERTIFICATE OF INTERESTED PERSONS

Case No. 19-30197

The undersigned counsel of record certifies that all of the interested persons and entities described in the fourth sentence of Rule 28.2.1 who have an interest in the outcome of this case are listed in the Certificate of Interested Persons contained in the brief of Plaintiffs-Appellees.

TABLE OF CONTENTS

	Page
INTRODUCTION AND INTEREST OF THE AMICI.....	1
ARGUMENT	5
I. THE ALLEGED USE OF FAKE SUBPOENAS IS NOT ENTITLED TO ABSOLUTE IMMUNITY	5
II. THE ALLEGED USE OF FAKE SUBPOENAS IS LIKELY TO BE SELF-DEFEATING	7
CONCLUSION	14

TABLE OF AUTHORITIES

	Page(s)
 Cases	
<i>Buckley v. Fitzsimmons</i> , 509 U.S. 259 (1993).....	6
<i>Cousin v. Small</i> , 325 F.3d 627 (5th Cir. 2003)	5, 6
<i>Imbler v. Pachtman</i> , 424 U.S. 409 (1976).....	5, 6
<i>Kalina v. Fletcher</i> , 522 U.S. 118 (1997).....	5, 8
<i>Loupe v. O’Bannon</i> , 824 F.3d 534 (5th Cir. 2016)	6
<i>Schloss v. Bouse</i> , 876 F.2d 287 (2d Cir. 1989)	6-7
<i>Singleton v. Cannizaro</i> , 372 F. Supp. 3d 389 (E.D. La. 2019).....	2, 7, 8
<i>Spalding v. Vilas</i> , 161 U.S. 483 (1896).....	7
<i>Stump v. Sparkman</i> , 435 U.S. 349 (1978).....	7
 Other Authorities	
American Civil Liberties Union, <i>Responses from the Field: Sexual Assault, Domestic Violence, and Policing</i> (Oct. 2015)	13
Judith Lewis Herman, <i>Justice From the Victim’s Perspective</i> , 11 VIOLENCE AGAINST WOMEN 571 (2005).....	9
Linda G. Mills, <i>Killing Her Softly: Intimate Abuse and the Violence of State Intervention</i> , 113 HARV. L. REV. 550 (1999).....	10

Rhonda Martinson, J.D. *et al.*, *Ending Gender Bias in the Law
Enforcement Response to Sexual Assault and Domestic Violence*,
Report on the OVW Roundtable (Aug. 2016).....11

U.S. Dep’t of Justice, *Identifying and Preventing Gender Bias in Law
Enforcement Response to Sexual Assault and Domestic Violence
(2015)*.....12

INTRODUCTION AND INTEREST OF THE AMICI

This case involves alleged use of deception by prosecutors in the form of fake subpoenas to induce crime victims and other witnesses to submit to interviews with prosecutors against their will, and to testify—in some cases allegedly falsely—about traumatic experiences. As alleged in the Second Amended Complaint (the “Complaint”), the individual Plaintiffs have, in effect, been re-victimized by Appellants’ misuse of their investigatory authority and punished for the exercise of their constitutional right not to submit to off-the-record interviews in the absence of a valid subpoena or properly obtained material witness warrant. Amici, organizations dedicated to advocating for victims of sexual assault and domestic violence, write to explain the adverse impact of this conduct on victims/witnesses of such crimes and, by extension, on the effective functioning of the criminal justice system. In doing so, the Amici seek to underscore the consequences of allowing the alleged conduct on the part of the individual defendants to evade legal accountability under the cloak of absolute immunity.¹

The District Court found in relation to Appellants’ alleged systematic use of fake subpoenas that “granting the Individual Defendants absolute immunity for

¹ The parties have consented to the filing of this brief. No party’s counsel authored this brief in whole or in part, and no party or other person contributed money to its preparation.

allegations of systematic fraud that bypassed a court meant to check powerful prosecutors would not protect the proper functioning of a district attorney’s office.” Instead, the court found, it would “grant prosecutors a license to bypass the most basic legal checks on their authority.” *Singleton v. Cannizaro*, 372 F. Supp. 3d 389, 408 (E.D. La. 2019). The court concluded that it “is not the type of conduct absolute immunity is meant to protect,” *id.*, and that the Individual Defendants “are not entitled to absolute immunity for their alleged role in creating or delivering ‘subpoenas’ to victims and witnesses of crimes.” *Id.*

The District Court recognized the troubling implications of defining prosecutorial immunity so broadly as to cover Appellants’ deliberate circumvention of judicial oversight over the issuance of witness subpoenas. The court clearly grasped the danger—and incongruity—of protecting conduct designed to sidestep judicial supervision with an immunity that exists to protect the integrity of the criminal justice system.

Amici strongly support thorough investigation and prosecution of sexual violence and domestic violence. We write, however, to highlight what we believe would be the counterproductive consequences of handing prosecutors a blank check to engage in the abuses alleged in this case. Cloaking an alleged fraudulent practice in absolute immunity would effectively sanction constitutional violations that inflict additional trauma on those directly affected by domestic violence or

sexual assault. Discouraging the cooperation of such critical witnesses by eroding trust in prosecutors will erode the ability of the judicial system to address these crimes.

Amici have first-hand knowledge of the devastating impact on crime victims and witnesses of being punished for resisting (or purportedly resisting) prosecutors' efforts to extract testimony to support their theories. We also share an understanding of the reasons for such resistance—reasons rooted in the vulnerable circumstances of such victim/witnesses and the severe risks they may reasonably believe they will incur if they accede to out-of-court interviews. Giving prosecutors free reign to trample the rights of crime victims and witnesses—enabled by an assumption of absolute immunity—will harden such resistance. Victims who might otherwise be willing, albeit with trepidation, to cooperate with law enforcement authorities will be dissuaded from coming forward, thereby hindering the successful prosecution of sex crimes and domestic abuse. The purpose of absolute immunity—to promote the efficient administration of justice—will thereby be subverted.

The Louisiana Foundation Against Sexual Assault (LaFASA) is a coalition agency that serves statewide sexual assault crisis centers through education, professional training, technical assistance, and community engagement resulting in safer, healthier, stronger, and better-informed communities throughout

Louisiana. LaFASA believes that meaning and impactful service to survivors can only be accomplished by educating advocates and communities in all aspects of the survivor's often complicated and nuanced journey. LaFASA's initiatives are specifically tailored to deliver this type of information and guidance to ensure that survival is a reality, and eventually, to eradicate the public-health epidemic of sexual assault entirely.

DV LEAP, a national leader in domestic violence litigation at all levels, including the Supreme Court, assists with appeals of unjust rulings in domestic violence and child abuse cases. DV LEAP also provides training and in-depth consultation to lawyers, judges, mental health professionals, litigants, and shares resources with key stakeholders. In the policy arena, DV LEAP partners with advocacy organizations at the local and national level to improve policy and laws to protect the victims of domestic violence.

The National Alliance to End Sexual Violence (NAESV) is the voice in Washington for the 56 state and territorial sexual assault coalitions and 1300 rape crisis centers working to end sexual violence and support survivors. NAESV advocates for the rights of survivors engaged with the criminal justice system and encourages the use of responsible practices and policies for those working with victims.

ARGUMENT

I. THE ALLEGED USE OF FAKE SUBPOENAS IS NOT ENTITLED TO ABSOLUTE IMMUNITY

Absolute prosecutorial immunity is a judicially created rule that protects the efficient functioning of the criminal judicial system by blocking civil suits that would divert resources and impair the independent, unbiased judgment of prosecutors. “Attaining the system’s goal of accurately determining guilt or innocence requires that both the prosecution and the defense have wide discretion in the conduct of the trial and the presentation of evidence.” *Imbler v. Pachtman*, 424 U.S. 409, 426 (1976). Public trust in the prosecutor’s office “would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages.” *Id.* at 424-25. Absolute immunity is not grounded in “a desire to shield abuses of office” but rather in the belief that “any lesser degree of immunity could impair the judicial process itself.” *Kalina v. Fletcher*, 522 U.S. 118, 127 (1997). The primary interest is in “protecting the proper functioning of the [prosecutor’s] office.” *Id.* at 125. The high cost of such protection, however, is that “[w]ilful or malicious prosecutorial misconduct” is absolutely immune from a damages claim “if it occurs in the exercise of [the prosecutor’s] advocacy function.” *Cousin v. Small*, 325 F.3d 627, 635 (5th Cir. 2003).

The latitude that absolute immunity affords to prosecutors calls for careful policing of its limits. For one thing, the actions of a prosecutor “are not absolutely immune merely because they are performed by a prosecutor,” *Loupe v. O’Bannon*, 824 F.3d 534, 538 (5th Cir. 2016) (quoting *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993)); they must be performed “in the exercise of [the prosecutor’s] advocacy function.” *Cousin*, 325 F.3d at 635. The conduct in question must be “intimately associated with the judicial phase of the criminal process.” *Loupe*, 824 F.3d at 538 (quoting *Imbler*, 424 U.S. at 430). Conduct that avoids legally required court approval, such as ordering a warrantless arrest, falls “outside the judicial process” and thus is not protected by absolute immunity. *Id.* at 540.

Absolute immunity also does not apply when a prosecutor “performs the investigative functions normally performed by a detective or police officer.” *Id.* at 539. A prosecutor’s “administrative duties and those investigatory functions that do not relate to an advocate’s preparation for the initiation of a prosecution or for judicial proceedings are not entitled to absolute immunity.” *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993). Even after probable cause to arrest has been found, a prosecutor “may engage in ‘police investigative work’ that is entitled to only qualified immunity.” *Id.* at 274 n.5.

And finally, absolute immunity does not cover acts that are “manifestly or palpably beyond [the prosecutor’s] authority,” *Schloss v. Bouse*, 876 F.2d 287, 291

(2d Cir. 1989) (quoting *Spalding v. Vilas*, 161 U.S. 483, 498 (1896)), or are performed in the “clear absence of all jurisdiction.” *Id.* (quoting *Stump v. Sparkman*, 435 U.S. 349, 357 (1978)). Where a prosecutor “acts without any colorable claim of authority, he loses the absolute immunity he would otherwise enjoy.” *Id.*

The case for denying absolute immunity in this case is strong. The alleged issuance of false subpoenas plainly implicates the recognized exceptions to absolute immunity noted above: As Appellees explain, it is investigatory in nature (the fake subpoenas were allegedly used to gather information by interrogating crime victims and witnesses), and, like ordering a warrantless arrest, it exceeds the prosecutor’s legal authority. Circumventing the court by fabricating subpoenas falls outside of the judicial process and thus contravenes a principal purpose of absolute immunity: to protect the integrity of the judicial process. As the District Court explained, the practice “bypasse[s] a court meant to check powerful prosecutors.” *Singleton*, 372 F. Supp. 3d at 408. Extending absolute immunity to such “outside the law” conduct would amount—incongruously—to judicial sanctioning of a blatant subversion of the court’s power.

II. THE ALLEGED USE OF FAKE SUBPOENAS IS LIKELY TO BE SELF-DEFEATING

The case against giving relieving prosecutors from liability for using fake subpoenas to coerce off-the-record testimony by witnesses of domestic violence or

sexual assault is bolstered by the reality that such fraudulent investigatory tactics are likely to be self-defeating, “impair[ing] the judicial process” that absolute immunity is designed to protect. *Kalina*, 522 U.S. at 127; *see also Singleton*, 372 F. Supp. 3d at 408 (granting absolute immunity for the issuance of fake subpoenas “would not protect the proper functioning of a district attorney’s office”). Many sexual assault and domestic violence victims are reluctant to voluntarily assist prosecutors as a result of their well-founded fear of retribution (physical, emotional, financial) by the perpetrator as well as, in some cases, fear of the consequences of such cooperation for the perpetrator, which also may negatively affect a victim/witness and her children. The impact of systematically deceiving vulnerable victims of domestic violence or sexual assault—important potential sources of testimonial evidence—is to erode trust in and respect for law enforcement, especially after the practice has been publicly exposed, as it has been here. *See* Sec. Am. Compl. ¶ 67. This will, in turn, predictably reduce voluntary participation by such individuals in what they rightly believe to be a tainted process.

The use of chicanery to obtain evidence may in some circumstances advance the government’s interest in obtaining a criminal conviction—a detective making a false statement in an interrogation to prompt a confession, for example, or an undercover agent bating a suspect into incriminating behavior. Such techniques

also may sometimes be an effective way for prosecutors to develop evidence for trial. But from their close work with victims of sexual assault and domestic violence, Amici are familiar with the trepidation experienced by individuals (usually women) who are assaulted by romantic partners or other acquaintances yet remain vulnerable (financially, physically, professionally, and otherwise) to them. They are victims, not suspects. They differ from other crime victims and, consequently, approach interaction with the criminal justice system differently. In particular, they often have reasons relating to their personal security to resist the entreaties of aggressive prosecutors. See Judith Lewis Herman, *Justice From the Victim's Perspective*, 11 VIOLENCE AGAINST WOMEN 571, 574 (2005), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.853.4843&rep=rep1&type=pdf> (“Victims who participate in the justice system may . . . fear for their safety because of the threat of retaliation by the perpetrator. . . . [T]his fear is often well founded. Perpetrators of sexual and domestic violence have intimate knowledge that makes it very easy for them to threaten or discredit their victims.”). This reluctance to participate in the prosecution of an intimate partner—even (or especially) an abusive one—has undoubtedly been exacerbated by the publicly reported practices alleged in this lawsuit, including the use of fraudulent subpoenas to extort witness cooperation.

Victims of sexual assault or domestic violence, who may have suffered trauma at the hands of close acquaintances or intimate partners, are understandably reluctant to tell their stories in an out-of-court setting in which they are unprotected against high-pressure manipulation and threats. *See, e.g.*, Sec. Am. Compl. 3-4. One reason for this is that the wishes and needs of the victims of sexual assault and domestic violence, with their “unique safety, cultural, and emotional needs,”² are often “diametrically opposed to the requirements of legal proceedings.” Herman, *op. cit.*, at 574. They constitute a class of crime victims whose circumstances demand special sensitivity and trustworthy support from police and prosecutors.

The conduct alleged in the complaint reflects the opposite: a propensity to distrust and blame victims and to bully and force them to assist the prosecution with bogus judicial orders. In the absence of a properly obtained subpoena, this conduct drives a wedge between prosecutors and the public. It sows seeds of doubt in the minds of those contemplating reporting domestic crime and threatens to chill the flow of information on which successful prosecutions depend.³

² Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550, 603 (1999).

³ Linda G. Mills, a professor at NYU’s Silver School of Social Work, has argued that “such policies as mandatory arrest, prosecution, and reporting, which . . . categorically ignore the battered woman’s perspective, can themselves be forms of abuse” that “discourage many survivors from forming partnerships with state officials to help control the violence they endure.” Mills, *op. cit.*, at 554, 556. Mills opines that prosecutors “degrade the battered woman” when they “force her

Studies of the interaction of domestic or sexual assault crime victims with law enforcement, the results of which are consistent with Amici's experience, suggest the self-defeating nature of Appellants' alleged conduct. According to an August 2016 report by the Battered Women's Justice Project, for example, surveys showed that female victims of domestic violence "shared a strong reluctance to turning to law enforcement for help." Rhonda Martinson, J.D. *et al.*, *Ending Gender Bias in the Law Enforcement Response to Sexual Assault and Domestic Violence*, Report on the OVW Roundtable at 7 (Aug. 2016), <http://www.bwjp.org/assets/documents/pdfs/ovw-gender-bias-roundtable-report.pdf>. Seventy percent of respondents feared that calling the police would make things worse, among other reasons because calling the police would have negative consequences for them, and the offender would only get a slap on the wrist. *Id.* Twenty-four percent of respondents who had contacted the police reported that they had been arrested or threatened with arrest during a partner-abuse incident or while reporting a sexual assault incident to the police. *Id.* Of those who had not contacted the police, seventeen percent feared the police would be violent or would threaten to arrest or arrest them. *Id.* Respondents reported fear

to testify against her will," *id.* at 589, and she posits that subpoenaing domestic abuse victims only at their request, i.e., once they have decided to cooperate with the criminal justice system, is more likely to elicit truthful testimony and to avoid unwittingly aligning the victim with her abuser. *See id.* at 601, 602.

of the collateral consequences of police involvement, including the involvement of child protective services; criminal charges that could trigger immigration or deportation proceedings; and loss of housing, employment, or welfare benefits of the victim or the abuser. *Id.* at 8.

The U.S. Department of Justice has identified the following commonsense principle relating to the interaction of police with victims: “A victim who is treated with respect is more likely to continue participating in an investigation and prosecution than one who feels judged or blamed for a sexual assault or domestic violence incident.” U.S. Dep’t of Justice, *Identifying and Preventing Gender Bias in Law Enforcement Response to Sexual Assault and Domestic Violence*, at 12 (2015), <https://www.justice.gov/opa/file/799366/download>. “By taking affirmative steps to respect the dignity of all complainants, law enforcement officers may be able to increase the quality and quantity of the information they receive.” *Id.* The DOJ report states that law enforcement agencies “should review and revise their policies and procedures, as necessary, and provide training to assist officers in being cognizant of the emotional impact that participating in interviews and evidence-gathering may have on a victim who has undergone a traumatic event, such as a rape or sexual assault.” *Id.* at 13. “Arresting the wrong party or both parties . . . discourages the victim from reporting future incidents.” *Id.* at 20.

According to a 2015 ACLU report, *Responses from the Field: Sexual Assault, Domestic Violence, and Policing* (Oct. 2015), <https://www.aclu.org/report/sexual-assault-domestic-violence-and-policing>, Congress heard testimony, in connection with consideration of the Violence Against Women Act, that “the main reason survivors of sexual assault refused to report their attackers to the police was because of their lack of confidence in the criminal justice system.” *Id.* at 5. According to National Crime Victimization Survey data, thirty-eight percent of those who chose not to report victimization to the police “feared reprisal or did not want to get the offender in trouble.” *Id.* at 8. Reporting “may have negative collateral consequences for survivors in addition to concerns about retaliation from the abusers or their friends and family,” including fear of deportation or loss of child custody. *Id.* at 9, 25-26.

When the criminal justice process is infected with falsified subpoenas, pressure to lie, and/or threats of imprisonment—i.e., when it treats victims as perpetrators—as alleged here, it stands to reason, as the studies cited above suggest, that already hesitant victims will be further dissuaded from providing evidence voluntarily. Fear of mistreatment and lack of trust in the criminal justice system will reinforce the reluctance of domestic crime victims to step forward. Public revelation of prosecutorial misconduct reinforces the hesitancy of crime victims to report to authorities information that, when used by prosecutors, is likely

to further destabilize their lives. The coercion and retaliatory punishments Appellees allege were inflicted on resistant witnesses compounds the problem by converting the role of the criminal justice system from supportive to re-victimizing.

Studies such as those cited above document the adverse impact that abusive or insensitive behavior by law enforcement officials toward crime victims has on the willingness of such victims to work with the authorities to identify and bring perpetrators to justice. The conduct alleged in this case, if proven, is likely to reinforce hostility toward and suspicion of law enforcement and, as a result, lead more victims of sexual assault and domestic violence to conclude that the personal cost of seeking justice is too high. Rejecting Appellants' overly broad view of absolute immunity would help avert that unfortunate outcome.

CONCLUSION

For the foregoing reasons, the Court should affirm the District Court's ruling that the use of fake subpoenas to obtain out-of-court testimony from victims and

witnesses of sexual assault and domestic violence is not protected by absolute immunity.

Respectfully submitted,

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Dated: July 5, 2019

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CERTIFICATE OF FILING AND SERVICE

I, Jonathan Bloom, hereby certify that on July 5, 2019 the foregoing Brief was filed with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit through the CM/ECF system and served electronically on all parties.

The required copies will be sent to the court upon courts request.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,132 words. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft word in Times New Roman 14 Point Font.

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