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Long Shielded From Lawsuits, Prosecutors Face Scrutiny After Fake Subpoenas

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For years prosecutors in Louisiana's Orleans Parish served crime victims and witnesses with documents labeled "SUBPOENA," stamped with an official seal. The documents warned of fines and imprisonment for those who didn't comply.

The problem, prosecutors acknowledged in 2017, was that the documents weren't court-ordered subpoenas, as they appeared, but were devised merely to compel witnesses to come in for questioning.

Now, some people who received the fake subpoenas are suing for damages, putting to the test a 40-year-old doctrine that gives prosecutors a nearly absolute shield against lawsuits for on-the-job misconduct. The case has shined a spotlight on the wide latitude given to prosecutors to pursue convictions without the official scrutiny for potential civil-rights violations that police officers and federal law-enforcement routinely face.

Attorneys for the American Civil Liberties Union, one of the groups representing the plaintiffs, say the prosecutors' alleged actions were so egregious that they present a perfect opening for courts to decide whether more checks and balances are needed. They will present arguments to the Fifth U.S. Circuit Court of Appeals in New Orleans on Wednesday.

The case could "establish that there is something a prosecutor can do that is so far out of the zone and so far out of their role" that courts would recognize a limit on prosecutors' immunity, said Clark Neily, vice president for criminal justice at the Cato Institute, a libertarian Washington-based think tank.

That, he said, "would be an extraordinary achievement."

Prosecutors say immunity makes it possible to do a job that naturally requires confrontation and often taking away people's freedom. Without it, everyone accused of a crime could seek legal retribution, prosecutors say.

"Any ruling that alters or diminishes the scope of absolute immunity compromises the ability of district attorneys and assistant district attorneys to fulfill their responsibilities," the Louisiana District Attorneys Association said in an amicus brief in the case.

The plaintiffs say the New Orleans prosecutors' actions aren't shielded by absolute immunity because in creating fake subpoenas they were acting outside of the legal bounds of their role. The DA's office jailed some who ignored the documents, according to the plaintiffs' lawsuit.

The lead plaintiff in the case, Renata Singleton, met with a prosecutor about a domestic dispute after receiving fake subpoenas but said she didn't want to answer questions. She was arrested and held in jail for five nights, the plaintiffs allege in court documents.

"I felt like a failure," Ms. Singleton said in a video produced by the ACLU.

The subpoenas drew outrage when the Lens, a local investigative news site, reported on them a couple of years ago. District Attorney Leon Cannizzaro Jr. told a local television station in April 2017 that he would drop the subpoena heading on its notice and instead label it a "notice to appear."

He said the office was simply trying to protect the public.

"It was improper. It was incorrect for us to label those notices as a subpoena," he said in the television interview. "I take responsibility for that."

A spokesman declined to comment, citing the continuing litigation.

The plaintiffs sued in the U.S. District Court for the Eastern District of Louisiana in 2017 for damages they say they incurred when they lost their jobs or spent money on bail or attorneys fees because of the subpoenas. The defendants asked a judge to dismiss the case on the grounds of prosecutorial immunity.

U.S. District Judge Jane Triche Milazzo in New Orleans granted that motion in part, ruling last year that damages stemming from the use of verbal and written threats were covered by absolute immunity, but that claims based on the false subpoenas weren't. The district attorney's office appealed the latter part of the ruling to the Fifth Circuit.

In court documents the DA's office said the actions were protected by absolute immunity and disputed the plaintiffs' rendering of the facts. Only two of the plaintiffs were actually arrested and the evidence doesn't suggest that it was on the basis of the false subpoenas, the brief said.

Prosecutors' absolute immunity dates to a 1976 Supreme Court case. Justice Lewis F. Powell Jr. wrote that prosecutors need protection given that "a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the state's advocate."

Over the years, judges have given prosecutors stronger protection than police officers, doctors and government officials, attorneys say. Arguably, only judges have similar or stronger protections, Molly Kovel, a senior attorney at the ACLU, said.

Other efforts to hold prosecutors accountable have proved challenging. Prosecutors can be reported to state bar associations by opposing counsel, law clerks or judges, but that rarely happens in practice given the insular nature of the system, critics say. New York's governor signed a bill creating a commission to investigate potentially unethical behavior by state prosecutors, but a State Supreme Court judge said it violated the separation of powers between the state's three branches of government.