

11-2367-cv

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

KARLA GIRALDO,

Plaintiff-Cross-Defendant-Appellee ,

- against -

SCOTT EVAN KESSLER, Assistant District Attorney, Bureau Chief of Domestic Violence, individually and in his official capacity, KESHIA ESPINAL, Assistant District Attorney, in her own capacity,

Defendants-Cross-Defendants-Appellants ,

CITY OF NEW YORK, NEW YORK CITY POLICE DEPARTMENT, SEAN WARD, Detective, in his official and individual capacity, THOMAS FITZGERALD, P.O., in his official and individual capacity,

Defendants-Cross-Defendants,

SAFE HORIZON, INCORPORATED, ENIDIA SEOANE, RICHARD A. BROWN, Queens County District Attorney, individually and as the District Attorney of Queens County, NORTH SHORE LONG ISLAND JEWISH HEALTH SYSTEM, INCORPORATED, DAWNE KORT, M.D., SUSAN CABIBBO, R.N., DANIEL FROGEL, DR.,

Defendants-Cross-Defendants-Cross-Claimants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR DISTRICT ATTORNEYS ASSOCIATION OF THE STATE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF THE DEFENDANTS-CROSS-DEFENDANTS- APPELLANTS AND FOR REVERSAL OF THE DECISION BELOW

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STATEMENT OF AMICUS CURIAE

The District Attorney’s Association of the State of New York (“DAASNY”) is a state-wide organization composed of the elected District Attorneys from each of the 62 Counties throughout New York, the Special Narcotics Prosecutor of the City of New York, as well as Assistant District Attorneys, a membership body that is approximately 2,000.¹ Members of DAASNY engage daily in the criminal prosecution of domestic violence crimes. That responsibility encompasses the prosecutorial decision whether to prosecute, and if so, for what crimes, a determination that, especially in the context of domestic violence, necessitates post-arrest interviews of victims, or witnesses, by prosecutors as a pivotal part of their professional review and evaluation of the evidence preparatory to initiating, and conducting a criminal prosecution. The district court’s decision in *Giraldo v. City of New York*, 2011 WL 2150148 (EDNY) (A80), denying absolute immunity to the prosecutor defendants in this civil suit arising from their post-arrest interview of the plaintiff, a victim of domestic violence, clearly affects the work of many DAASNY members.

FACTUAL STATEMENT

¹ Pursuant to Local Rule 29.1 (b) (1)-(3), DAASNY discloses that no counsel for any party authored any part of this brief; that no party or party’s counsel contributed any money to the preparation or submission of this brief; and that no person other than those listed as counsel on this brief for *amicus curiae* contributed money intended to fund the preparation or submission of this brief.

Plaintiff, a victim and witness in the State criminal prosecution against former New York State Senator Hiram Monserrate, has sued among other defendants the two Assistant District Attorneys who interviewed her in the hours following Monserrate's arrest for assaulting her on December 19, 2008. *See Monserrate v. New York State Senate*, 599 F.3d 148, 152-153 (2d Cir. 2010) (denial of Monserrate's request to enjoin his post-conviction expulsion from the State Senate and to cancel an upcoming Special Election for his seat; decision notes that assault occurred on December 19, 2008; Monserrate's subsequent indictment; his conviction on October 15, 2009, after a bench trial, of misdemeanor reckless assault; and his sentence on December 4, 2009).²

The prosecutor defendants' interview of plaintiff that gives rise to her civil claim and which is the focus of this appeal, occurred on the same day the prosecutors initiated the criminal action against Monserrate for assaulting plaintiff by the filing of a felony complaint, and the criminal proceeding began at his arraignment on those charges in the Criminal Court of the City of New York. *See* N. Y. CRIMINAL PROCEDURE LAW §1.20 (16) (a) (defines "Criminal action" in relevant part as commencing with "the filing of an accusatory instrument against a defendant in a criminal court") and §1.20 (18) (a) (defines "Criminal proceeding" in relevant part as "any proceeding which . . . constitutes a part of a criminal

² Monserrate is currently appealing his criminal conviction.

action”); *see also* *People v Hiram Monserrate*, docket number 2008QN067420, felony complaint filed and dated December 19, 2008, charging two counts of felony assault in the second degree and one count of misdemeanor criminal possession of a weapon in the fourth degree; Monserrate arraigned and cash bail posted December 19, 2008; *see e.g.* *Warney v. Monroe County*, 587 F.3d 113, 118 (2d Cir. 2009) (taking judicial notice of federal habeas corpus petition on appeal); *Shmueli v. City of New York*, 424 F.3d 231, 233 (2d Cir. 2005) (“The New York state prosecution of Shmueli is a matter of public record, of which we take judicial notice.”).

The civil complaint alleges that on December 19, 2008 Assistant District Attorney Scott Kessler, Chief of the Domestic Violence Bureau in the Queens District Attorneys Office, and Queens Assistant District Attorney Keshia Espinal (“defendant prosecutors” or “prosecutors”) unlawfully detained plaintiff for about two hours in the District Attorney’s office to force plaintiff to “falsely accuse her boyfriend of assaulting her” (A27-8, 29, ¶¶72 and 66 [“continued to interrogate her for approximately 2 hours”]). The prosecutors’ conduct was part of a broader conspiracy between the prosecutors, named members of the New York City Police Department (“NYPD”) and medical personnel at the North Shore-Long Island Medical Center (“hospital”) who treated the plaintiff to force her (by threats and

unlawful restraint) to falsely accuse Monserrate of an assault (A21-9, ¶¶28,38, 40-41, 44-45, 51, 53, 55-56, 63-64, 66-67).

The prosecutors interviewed plaintiff after Monserrate had been arrested by NYPD for assaulting plaintiff (A23, ¶45).

The arrest occurred at the hospital where Monserrate had earlier brought plaintiff for medical treatment on December 19, 2008 (A20, 23, ¶¶23-26, 45). At the hospital, plaintiff insisted to medical personnel that her facial injury (she received 20 stitches to close the ½ inch laceration over her left eye) was accidentally caused (A20, 23, ¶26-27). According to plaintiff, although the treating nurse noted plaintiff's injury was from an "altercation," and plaintiff had remarked "He is crazy. He is crazy," those notations were false, and the nurse "falsely informed" police the plaintiff was the victim of domestic violence (A22, ¶¶34, 36-38). The medical doctors, who treated plaintiff, "contacted the NYPD regarding their 'suspicion' of domestic abuse," despite her denial of an assault (A21, ¶29).

Against her will, plaintiff was taken by police from the hospital to the NYPD's 105th precinct.

Members of the NYPD interrogated her for "over 5 hours" (A26, ¶56), forcing plaintiff to sign a "written statement accusing [Monserrate] of assaulting her" (A24, ¶51), though her written statement (in Spanish) did not accuse him of a

crime and “specifically stated that her injury was caused by accident” (A26, ¶57). Plaintiff told police she was in “tremendous pain” and wanted to go home, but the police refused to let her go unless she signed a written statement accusing Monserrate of an assault; and aggressively questioned her about the incident, frightening and intimidating her (A25-6, ¶¶54-59). Assured by police that she could go home after their interview, the police instead took plaintiff against her will to the Queens District Attorney’s office, where she first encountered the defendant prosecutors (A26, ¶60).

Plaintiff told the defendant prosecutors she “did not want to talk with them” (A27, ¶63), was in pain from the “anesthesia” (*id.*), “wanted to go home” (*id.*), and “was not a victim of Domestic Violence” (A27, ¶66), but the prosecutors refused to release her, and engaged in persistent questioning designed to “change her statement that what occurred was an accident” (A27, ¶64). The prosecutors “intentionally and over zealously exaggerated the accident that caused Plaintiff’s injuries . . .,” and questioned her as they did “solely because they knew Plaintiff’s boyfriend was a high profile New York State Politician” (A28, ¶68).

At about 6:30 P.M., on December 19, 2008, “almost 16 hours after the accident occurred” (A28, ¶69), plaintiff was allowed to leave the prosecutors’ office.

Following the filing of plaintiff's civil complaint, the defendant prosecutors moved for an order of dismissal under Federal Rule of Civil Procedure 12(b)(6) on several grounds including absolute immunity (A43-5).

The district court (Gleeson, D.J.) granted the prosecutors' motion to dismiss all of plaintiff's claims against them for failure to state a claim for relief except for the claim under 42 U.S.C. §1983 (2002) ("1983 claim") that the prosecutors "forcefully detained and interrogated" (A87) her and conspired to do so (A90).

And as to that remaining claim, the district court denied the defendant prosecutors' motion to dismiss because of absolute immunity (A92-3). The "timing of Monserrate's arrest . . .," the court reasoned, was not determinative in the prosecutors' favor, but instead, when viewed "objectively," the prosecutors' interview of plaintiff was similar to that performed earlier by the police; thus, the prosecutors' challenged conduct fell on the investigative, not advocacy, side of a prosecutor's function. *Id.* Instead, the prosecutors may be entitled to qualified immunity, a determination, the court found, could not be made at the pleading stage (A94-5).

SUMMARY OF ARGUMENT

A prosecutor's conduct intimately related to the judicial process is shielded from personal civil liability by absolute immunity. This immunity protects the advocacy *function* by ensuring a prosecutor's legal knowledge and training

applied to the review, evaluation and presentation of evidence both in the initiation and the conduct of a criminal case is uninhibited by the prospect of future monetary liability. Given its purpose, absolute immunity bars suit against a prosecutor by a witness in a criminal case when, as here, the civil claim challenges the prosecutor's advocacy function. The prosecutors' post-arrest interview of the plaintiff was quintessentially advocacy: to learn, review, and evaluate evidence from a material witness, the victim, preparatory to furthering the criminal prosecution against Monserrate for assault. Further demonstrating that the prosecutors' interview was an integral part of their advocacy, not investigative, function was that they interviewed plaintiff *after* Monserrate's arrest, and on the same day the criminal action commenced. Absolute immunity, therefore, bars plaintiff's 1983 claim challenging her detention by the prosecutors as unlawful when such detention was a component part of their advocacy function.

ARGUMENT

UNDER THE FUNCTIONAL APPROACH THE DEFENDANT PROSECUTORS' POST-ARREST INTERVIEW OF THE PLAINTIFF WAS A NECESSARY PART OF THEIR DETERMINATION WHETHER TO INITIATE AND CONDUCT A PROSECUTION, AND AS SUCH WAS ADVOCATORY PROSECUTION CONDUCT INTIMATELY RELATED TO THE JUDICIAL PROCESS PROTECTED BY ABSOLUTE IMMUNITY.

(i) The Standard of Review

Because this is an interlocutory appeal from a denial of a motion to dismiss a complaint, the standard of appellate review is *de novo* with “all well-pled factual allegations” accepted as true and “all reasonable inferences” drawn in favor of the plaintiff. *Warney*, 587 F.3d at 116, 120.

(ii) A Prosecutor’s Post-Arrest Interview Of A Witness Preparatory To Determining Whether to Initiate And Conduct A Prosecution Is A Core Prosecution Advocatory Function.

Absolute immunity bars a civil suit against a prosecutor for advocacy conduct that is “intimately associated with the judicial phase of the criminal process.” *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976). This immunity attaches to conduct both inside the courtroom, and “preliminary to the initiation of a prosecution and actions apart from the courtroom.” *Id.* at 431 n. 33; *see also e.g. Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993) (noting that the Court has not “retreated . . . from the principle.”). Barring civil suit is consistent with the historical common law immunity afforded prosecutors; prevents civil litigation that distracts prosecutors from their core advocacy responsibilities and that inhibits the unfettered exercise of their professional judgment; and is necessary to promote the truth seeking function of the criminal justice process itself. *See e.g. Imbler*, 424 U.S. at 421-426. Since absolute immunity “protects an official not only from liability but also from suit, the validity of the defense should be determined at an early stage.” *Shmueli*, 424 F.3d at 236.

Notably, as well, the reasons underlying absolute immunity equally apply to bar civil suit when, as in this case, the plaintiff is a witness, not a defendant. *Betts v. Richard*, 726 F.2d 79, 80-81 (2d Cir. 1984) (noting “first case in this circuit raising the question . . . whether a witness in a criminal prosecution has a viable 1983 claim against the prosecutor,” and reasoning that absolute immunity applies if the prosecutor was acting as an advocate, observing “[t]he fundamental question remains the same. Did the activity occur while acting as an advocate in a judicial proceeding . . .?”) (internal quotation marks and citation omitted).

Betts represents the majority view in the factual setting of a prosecutor’s decision to detain a witness under a material witness order to secure testimony at an upcoming judicial proceeding. *See e.g. al-Kidd v. Ashcroft*, 580 F.3d 949, 957-60 (9th Cir. 2009) (citing cases including *Betts* but holding absolute immunity inapplicable in *al-Kidd* since prosecutor’s purpose was to investigate witness; qualified immunity also ruled inapplicable), *reversed and remanded*, ___ U.S. ___, 131 S.Ct. 1074 (2011) (qualified immunity applies; question of absolute immunity not reached).

True, plaintiff was not detained by a judicial order, but that is not determinative; rather, what is decisive is whether based on the complaint the prosecutors were exercising an advocatory function when they detained and interviewed her. *See e.g. Betts*, 726 F.2d at 81; *Pinaud v. County of Suffolk*, 52

F.3d 1139, 1150 (2d Cir. 1995) (prosecutor’s ordering transfer of accused prisoner from federal to state custody to initiate prosecution is within the advocacy function “similar to those [actions] involved in arguing for bail or in obtaining an arrest warrant”); *Kulwicki v. Dawson*, 969 F.2d 1454 (3d Cir. 1992) (suit by accused; prosecutor not allowed absolute immunity for witness interviews about two weeks before criminal complaint filed, noting, although not determinative, that “[e]vidence obtained at or after the filing is likely to be connected with an existing prosecution and is absolutely protected”) (citation omitted); *but see e.g. Odd v. Malone*, 538 F.3d 202, 216 (3d Cir. 2008) (civil suit by witness; prosecutor’s failure to inform court as directed when court issued material witness order that trial was continued resulting in witnesses continued detention, was conduct within the administrative function; court observed that a “flood of litigation” not likely “from permitting detained *witnesses* to sue prosecutors”) (italics in original).

A prosecutor’s investigative or administrative action, furthermore, is nonetheless encompassed by absolute immunity when the conduct is an integral part of the advocacy function, as made recently clear in *Warney*, 587 F.3d at 124 (in context of post-conviction discovery of DNA testing results, the court noted: “Just as the administrative act in [*Van de Kamp*] was integral to an advocacy function, we conclude that the prosecutors' actions here-which could be seen as administrative or investigative, were also integral to the overarching advocacy

function of dealing with post-trial initiatives challenging an underlying criminal conviction: they require[d] legal knowledge and the exercise of related discretion”) (internal quotation marks and citation omitted); and in *Van de Kamp v. Goldstein*, 555 U.S. 335, ___, 129 S.Ct. 855, 861-63 (2009) (Administrative actions by supervisory prosecutors concerning office-wide policy and management of information sharing for disclosure of exculpatory evidence during trial within advocacy function). And this Court has emphasized that function, not the alleged purpose or motive of the prosecutor, determines whether absolute immunity applies. See e.g. *Bernard v. County of Suffolk*, 356 F.3d 495, 502 (2d Cir. 2004). Hence, although the plaintiff was not detained by a court order, if the prosecutors’ interview and detention of her was conducted as part of their advocacy function, absolute immunity bars the civil suit.

The immunity recognized by *Imbler*, therefore, protects a single core area of the prosecutor’s work, his or her advocacy (as opposed to an administrative or investigative) *function*. To determine the function challenged by a civil claim, the prosecutor’s acts underlying the claim must be “considered with reference to context.” *Warney*, 587 F.3d at 123. As the term “context” was further explained: “[W]e conclude that it is unhelpful to ascertain the prosecutor’s functional role by isolating each specific act done or not done; rather, a prosecutor’s function depends

chiefly on whether there is pending or in preparation a court proceeding in which the prosecutor acts as advocate” *Id.*

Thus, an act may be investigative or administrative when considered alone, but when viewed in light of or in preparation of a pending judicial proceeding, the act forms a part of the prosecutor’s advocatory function and, consequently, protected from civil suit by absolute immunity. *See e.g. Warney*, 587 F.3d at 124-126 (prosecutor’s decision to conduct post-conviction DNA testing and when to disclose the results while partaking of administrative and investigative acts, when viewed in the context of the pending state and federal collateral proceedings, are acts that reflect “exercises of legal judgment in the ‘judicial phase’ of proceedings integral to the criminal justice process” protected by absolute immunity) (internal quotation marks omitted) (citing and discussing *Van de Kamp*, 555 U.S. at ____, 129 S.Ct. at 861-62 (supervisory prosecutors in training trial prosecutors on compliance with *Brady-Giglio* obligation, or creating information-system management office-wide to comply with discovery, “enjoy absolute immunity” since administrative supervision “is directly connected with the conduct of a trial.”)).

The advocatory function includes a prosecutor’s decision of what evidence to present to a grand jury, *see e.g. Bernard*, 356 F.3d at 503 (presentation of false evidence at grand jury) (citing *Pinaud*, 52 F.3d at 1149); or at trial, *see e.g. Dory v*

Ryan, 25 F.3d 81, 83 (2d Cir. 1994) (conspiracy to present false evidence at trial); and the collection and evaluation of evidence preparatory to those decisions, *see e.g. Imbler*, 424 U.S. at 431 n.33, as it does the prosecutor’s decision whether or not to commence a prosecution. *See e.g. Schloss v. Bouse*, 876 F.2d 287, 290 (2d Cir. 1989) (“[a]mong the acts for which a prosecutor is absolutely immune is the initiation of a prosecution”) (quoting *Imbler*, 424 U.S. at 410 and 424-25); *Barr v. Abrams*, 810 F.2d 358, 362 (2d Cir. 1987) (prosecutor’s filing a criminal information and obtaining an arrest warrant). The decision whether to commence a criminal prosecution includes “the question of precisely what charges will or will not be made.” *Ying Jing Gan v. City of New York*, 996 F.2d 522, 530 (2d Cir. 1993). And, “as a matter of logic,” absolute immunity “must also protect the prosecutor from damage suits based on his decision not to prosecute.” *Id.* (quoting *Schloss*, 876 F.2d at 290) (internal quotation marks omitted).

To effectively facilitate a prosecutor’s decision whether to initiate a prosecution and to conduct one unhindered by the threat of civil litigation, the advocacy function includes the prosecutor’s collection, review and evaluation of evidence preparatory to making those advocacy decisions. *See e.g. Forsyth v Kleindienst*, 599 F.2d 1203, 1215 (3rd Cir. 1979) (remanding case on question whether Attorney General conducted warrantless wiretapping as part of advocacy function, and observing: “To grant a prosecuting attorney absolute immunity over

his decision to initiate a prosecution while subjecting him to liability for securing the information necessary to make that decision would only foster uninformed decisionmaking and the potential for needless actions. We believe that the right to make the decision without being subject to suit must include some limited right to gather necessary information”), *on remand*, 551 F. Supp 1247 (D.C. Pa. 1982) (absolute immunity denied), *aff’d*, 729 F.2d 1267 (3d Cir. 1984), *aff’d in part and rev’d in part sub nom Mitchell v. Forsyth*, 472 U.S. 511 (1985) (qualified immunity applied since Attorney General performed wiretapping for national security, not to facilitate a prosecutorial decision).

Applied to this case these principles manifestly compel one conclusion (accepting the allegations in the complaint as true, which this Court must), absolute immunity bars assertion of plaintiff’s claim.

When “considered with reference to context,” *Warney*, 587 F.3d at 123, plaintiff’s 1983 claim challenges conduct of the prosecutors that lies within their core advocacy function; that is, the post-arrest interview of a material victim-witness preparatory either to the prosecutors’ determination whether to file an assault charge against Monserrate, or (if a complaint had already been filed)

incident to conducting the prosecution, which includes the prosecutors' advocacy decision whether to continue the case.³

Pivotal to that conclusion is that the police had already arrested Monserrate when the prosecutors commenced the interview (A23, ¶45). Once the arrest took place, New York law required the police "without unnecessary delay" to bring Monserrate to a local criminal court and cause to be filed (unless overruled by the prosecutor) a criminal charge. *See* N.Y. CRIMINAL PROCEDURE LAW §140.20 (1). It is true that the prosecutors interviewed plaintiff to learn what happened between her and Monserrate (A27, ¶63 ["was interrogated by Defendants . . ."]), questioning fairly characterized as investigative. But when that questioning is viewed from the standpoint of having occurred after Monserrate's arrest, not before, makes the prosecutors' interview an integral part of their advocacy function, namely, deciding whether to initiate a prosecution against Monserrate and to conduct the prosecution in local criminal court (that is the arraignment and future court proceedings), actions that are protected by absolute immunity. *See e.g. Barr*, 810 F.2d at 362; *Imbler*, 424 U.S. at 430. Simply put, the prosecutors' interview of plaintiff was in a "pending or in preparation [of] a court proceeding in which the prosecutor acts as advocate," *Warney*, 587 F.3d at 123; That is, the filing

³ The determination whether or not to continue the criminal prosecution based on the known available evidence is also ethically required by NEW YORK RULE OF PROFESSIONAL CONDUCT 3.8 (a) (2011), which provides in relevant part that a "prosecutor . . . shall not . . . maintain a criminal charge when the prosecutor . . . knows or it is obvious that the charge is not supported by probable cause."

and prosecution of a felony complaint in New York City Criminal Court and, thereafter, continued prosecution of the case at the grand jury stage and, ultimately, trial.

That plaintiff's interview by the prosecutors occurred not only after the arrest (A23, ¶45), but on the same day (December 19, 2008) prosecutors initiated a criminal prosecution against Monserrate for felony assault against the plaintiff (of which this Court can take judicial notice), supplies another criminal procedural context for the prosecutors' conduct. The occurrence of the two events on the very same day links the challenged interview with the initiation and prosecution of Monserrate. This linkage further shows that the prosecutors' post-arrest interview of plaintiff was conducted as part of their advocatory function. *See e.g. Imbler*, 424 U.S. at 431 and n. 33.

Indeed, the substance of the prosecutors' interview of plaintiff as alleged in the complaint, considered in light of the procedural context surrounding the challenged conduct, supports this conclusion.

The plaintiff's theory is that the defendant prosecutors' unlawfully detained her for one purpose, to charge Monserrate because he was a "high profile New York State Politician" (A28, at ¶68). Specifically, the prosecutors questioned plaintiff "to get [her] to change her statement that what occurred was an accident" (A27, ¶64); and that the "D.A. defendants intentionally and over zealously

exaggerated the accident that caused the plaintiff's injuries . . ." (A28, ¶68). Although plaintiff insisted that she was "not the victim of domestic violence, and that she wanted to go home . . ." (A27-8, ¶66), the prosecutors continued to "interrogate her for approximately 2 hours" (*Id.*). Plaintiff's interview was in furtherance of a conspiracy to "create statements that would falsely implicate Plaintiff's boyfriend of a crime and falsely state comments that were allegedly made by Plaintiff" (A23, ¶ 41).

Thus, under the complaint, the prosecutors' unlawfully detained plaintiff to fabricate evidence (the false statements from her) for use in charging and prosecuting Monserrate. And, pivotally, the complaint alleges that the prosecutors detained her so as to continuously question her about how she had received her injuries and Monserrate's involvement, questions posed by a prosecutor engaged in the review and evaluation of the evidence preparatory to commencing and conducting a prosecution. Plaintiff's detention was part of the prosecutors' advocatory determination to initiate and to conduct, that same day, a criminal proceeding against Monserrate in which were used the fabricated evidence, acts that are plainly within the prosecutors' advocatory function. Thus, absolute immunity protects the prosecutors' detention and interview of plaintiff for the same reason it protects a prosecutor's detention of a witness (by court order) to allegedly present perjured testimony at trial, *see e.g. Betts*, 726 F.2d at 81, or shields a

prosecutor from civil suit for presenting false evidence to a grand jury, *see e.g. Pinaud*, 52 F.3d at 1149, as all such acts are intimately connected to a pending judicial proceeding or preparatory to one.

(iii) The District Court's Misapplication Of The Functional Approach In Denying Absolute Immunity To The Prosecutor Defendants.

However, the district court denied absolute immunity to the prosecutors' interview and detention of plaintiff finding the timing of the interview, post-arrest, was not determinative (A93). Instead, the court viewed the prosecutors' conduct as similar to that of the police, that is, they were still "building" a case, and hence, were acting as investigators, not advocates. *Id.* (citing *Hill v. City of New York*, 45 F.3d 653, at 662-63 (2d Cir. 1995); *Barbera v. Smith*, 836 F.2d 96, 100-01 (2d Cir. 1987) (prosecutor's alleged failure to protect witness that occurred before arrest warrant issued and indictment of killer falls within investigative function, as "government was still seeking evidence.")).

The district court misapplied the functional approach in denying absolute immunity to the prosecutors in several respects.

First, the district court focused on the prosecutors' conduct without "reference to [its] context," *Warney*, 587 F.3d at 123, resulting in the court's improper classification of the prosecutors' function as investigative. True, the prosecutors' were learning about what had occurred between Monserrate and the plaintiff earlier that day, and to that extent the interview can be characterized as

investigative. But that characterization ultimately is unhelpful, and incorrect, when classifying the interview functionally. *Id.* Contrary to the lower court, that the arrest of Monserrate occurred first, followed by the prosecutors' interview of the victim, is contextually significant because it began the critical advocacy process of deciding whether or not to charge Monserrate and, ultimately, to initiate and continue to prosecute him for assault. See N.Y. CRIMINAL PROCEDURE LAW §140.20 (1); see also *Criminal Court of the City of New York Annual Report 2009* at 28 (July 2010) ("Arrest to Arraignment- The Path of the Case" (featuring a flowchart of the process that depicts each step from arrest to the court arraignment) at <http://www.nycourts.gov/courts/nyc/criminal/AnnualReport2009.pdf>. (visited August 2, 2011); *New York City Criminal Court: Frequently Asked Questions*, at <http://www.courts.state.ny.us/courts/nyc/criminal/faqs.shtml> (visited August 2, 2011) (noting "length of time between arrest and arraignment is usually 24 hours"). Again, that Monserrate was charged by felony complaint and the criminal prosecution initiated in court for assaulting the plaintiff on the same day as the prosecutors' post-arrest interview reinforces the conclusion as a matter of law that the prosecutors' interview was a part of their advocacy, not investigative, function, that is, to initiate and to conduct a prosecution of Monserrate on December 19, 2008.

The context surrounding the prosecutors' interview in this case thus distinguishes the prosecutors' interview of the expert witness in *Buckley* during the "preliminary investigation of an unsolved crime," 509 U.S. at 275, months before probable cause, arrest and an indictment; and the prosecutor's interview of the child witness in *Hill* before the defendant was arrested, 45 F.3d at 662-63. In this case, however, the prosecutors' interview of plaintiff is more intimately connected to their function as advocates, not investigators.

Second, because the district court failed to properly consider the context of the prosecutors' conduct, the court thereby failed to recognize the unique advocatory role of the prosecutor at the critical juncture in the criminal process when plaintiff's interview occurred.

Plaintiff's interview, when temporally framed by the preceding arrest of Monserrate, the filing of a criminal charge subsequent to the arrest, and on the same day as the interview, demonstrates the prosecutors were not only "building" a case (A93), but, more importantly for determining function, doing so as part of a review and evaluation of plaintiff's statements to initiate and continue a criminal prosecution. That conduct is an important component of the prosecutor's advocatory function, unique to the prosecutor and, therefore, unlike that performed by a police officer. *See e.g. Connick v. Thompson*, ___ U.S. ___, 131 S.Ct. 1350, 1361 (2011) (a prosecutor is "trained in the law and . . . exercise[s] legal

judgment”); *Van de Kamp*, 555 U.S. at ___, 129 S.Ct. at 862 (“the types of activities on which Goldstein's claims focus necessarily require legal knowledge and the exercise of related discretion, *e.g.*, in determining what information should be included in the training or the supervision or the information-system management.”). And, absolute immunity ensures the exercise of the prosecutor’s “legal judgment” unhindered by the fear of potential future civil liability to a dissatisfied or vengeful accused or witness in a criminal case. *See e.g. Warney*, 587 F.3d at 122 (in applying absolute immunity to a prosecutor’s post-conviction conduct, this Court observed: “A post-conviction petition often present the same kinds of legal issues as the underlying criminal case, requires the same kinds of legal judgments, and calls upon the same kinds of advocacy skills and measures”).

Especially in domestic violence cases, such as the instant one, application of absolute immunity to a prosecutor’s post-arrest interview of a victim of such violence is critically important. As this Court has recognized: “The statistics demonstrate that domestic violence remains dangerous, serious and prevalent.” *Okin v. Village of Cornwall-On-Hudson Police Department*, 577 F.3d 415, 431 n.10 (2d Cir. 2009) (noting the statistics). In many instances, victims refuse to cooperate with law enforcement; or, despite the abuse, actively cooperate with the defense, as they refuse to acknowledge their violent victimization by the abuser, thereby continuing to endanger themselves. *Id*; *see also e.g. Stone and Fialk*,

Criminalizing the Exposure of Children to Family Violence: Breaking the Cycle of Abuse, 20 Harvard Women's Law Journal 205, 225 (Spring 1997) ("Prosecution of domestic violence is often frustrated by the unwillingness of complainants to appear in court or by their cooperation with the defense.") Thus, application of absolute immunity to the prosecutors' post-arrest interview underlying plaintiff's claim will facilitate, not deter, a prosecutor's intervention at the earliest stage of the criminal justice process to review and evaluate not only the legal viability of a criminal prosecution, but, pivotally, to act early, and quickly, to protect the victim's safety (while he or she is cooperative) through such judicial measures as bail conditions and orders of protection. See *Domestic Violence Interview: A Prosecutor's Guide*, available at <http://www.pace.edu/school-of-law/domestic-violence-interview-prosecution-guide> (visited July 21, 2011), at 2-3 (listing the ten questions a prosecutor should ask in his or her first interview with a domestic violence victim with virtually all the subjects of those questions inextricably related to a pending or anticipated criminal proceeding against the abuser).⁴ A prosecutor's post-arrest interview of a domestic violence victim, therefore, serves

⁴ The ten subjects are: 1) what happened; 2) is there a prior history of abuse (to determine the safety needs of the victim and evidence for prosecution); 3) is there a prior history in court with the abuser; 4) who medically treated the victim for his or her injuries; 5) is there prior abuse against the victim's children, if any; 6) whether the victim has plans to protect herself or himself in the future if violence should occur again; 7) whether there are any guns or other weapons owned by the defendant or in the house; 8) what "type of outcome in court" would make the victim feel safest; 9) explanation of the court's procedures; and 10) whether the victim and the defendant are citizens of the U.S.

an essential component of the prosecutor's advocacy function by determining whether or not to commence a criminal prosecution or to continue one, and by so doing breaking (hopefully) a cycle of domestic violence and ensuring the safety of the victim from further harm.

Finally, an affirmance in this case will be wholly at odds with the values identified by this Court in *Warney*. In concluding that a prosecutor enjoyed absolute immunity for his advocacy actions in connection with the post-judgment discovery of exculpatory evidence, this Court pointed out that doing so will encourage prosecutors to be true to their ethical obligation to investigate credible post-judgment allegations of actual innocence. *See Warney*, 587 F.3d at 125. It would be entirely illogical, then, to deny absolute immunity in the post-arrest context of this case when the prosecutor is attempting to clarify the propriety of commencing and continuing a criminal prosecution; the ethical obligation to go forward or to continue only if there is probable cause demands no less.

CONCLUSION

The order of the district court denying the defendant prosecutors' motion to dismiss the plaintiff's complaint on absolute immunity should be reversed, and the claims for relief asserted in it as against the defendant prosecutors should be dismissed.

Respectfully submitted,

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