No. 20-12281

In the

United States Court of Appeals

for the Eleventh Circuit

Kidanemariam Kassa,
Plaintiff-Appellant,

v.

Antionette Stephenson,
Defendant-Appellee.

On Appeal from the United States District Court for the Northern District of Georgia, Atlanta Division.
No. 1:17-cv-2068 — Steven D. Grimberg, *Judge*

BRIEF OF AMICUS CURIAE STATE OF GEORGIA IN SUPPORT OF REHEARING EN BANC

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TABLE OF CONTENTS

Table of Contents iv

Table of Authorities v

Interests of Amicus Curiae 6

Argument 8

I. Motions made in court, including motions to cancel a material witness warrant, are "intimately connected to the judicial phase of the criminal process." 8

II. The panel decision is in conflict with authority from other circuits. 12

Conclusion 16

TABLE OF AUTHORITIES

Cases **Page(s)**

Buckley v. Fitzsimmons,
509 U.S. 259 (1993).....8

Burns v. Reed,
500 U.S. 478 (1991).....8, 10, 11, 12

Dababnah v. Keller-Burnside,
208 F.3d 467 (4th Cir. 2000).....7, 10

Forrester v. White,
484 U.S. 219 (1988).....8

Hart v. Hodges,
587 F.3d 1288 (11th Cir. 2009).....9, 15

Imbler v. Pachtman,
424 U.S. 409 (1976).....6, 8, 12

Ireland v. Tunis,
113 F.3d 1435 (6th Cir. 1997).....12

Odd v. Malone,
538 F.3d 202 (3d Cir. 2008).....13, 14, 15, 16

Safar v. Tingle,
859 F.3d 241 (4th Cir. 2017).....7, 10, 13, 16, 17

Stockdale v. Helper,
979 F.3d 498 (6th Cir. 2020).....10

Van de Kamp v. Goldstein,
555 U.S. 335 (2009).....8, 10, 17

INTERESTS OF AMICUS CURIAE

Each day, prosecutors must juggle heavy caseloads under "serious constraints of time and even information." *Imbler v. Pachtman*, 424 U.S. 409, 425 (1976). Some are "responsible annually for hundreds of indictments and trials." *Id.* at 426. Prosecutors serve this demanding role with distinction. But even the best prosecutors make mistakes, especially during demanding, fast-flowing trials. If a prosecutor could be hauled into court and stripped of absolute immunity for each mistake or oversight, "his energy and attention would be diverted from the pressing duty of enforcing the criminal law." *Id.* at 425. Prosecutor offices would not be able to function. That is doubly true if prosecutors could be held liable for damages for every error.

But the panel opinion held that prosecutors can be liable for failing to make a motion in court because moving to cancel a material witness warrant has "nothing to do with conducting a prosecution for the state." Slip Op. 11. That cannot be right. In Fulton County, those warrants are withdrawn based on oral motions made in court. Making motions in court during trial is a core prosecutorial function that is "intimately associated with the judicial phase of the criminal process." *Imbler*, 424 U.S. 409 at 430. Even if the decision to move to withdraw the warrant is

routine or administrative, it "falls comfortably within a prosecutor's core advocacy duties." *Safar v. Tingle*, 859 F.3d 241, 249 (4th Cir. 2017). Indeed, the panel's holding to the contrary creates a circuit split. The Fourth Circuit has held that a failure to withdraw an arrest warrant, even when the basis for the warrant has been "wholly discredited," is protected by prosecutorial immunity. *Id.* at 250. The panel opinion does not cite *Safar*, much less explain why *Safar* is wrong.

"Failure to grant a prosecutor immunity for actions taken in open court in pursuit of a court order would be a portentous step." *Dababnah v. Keller-Burnside*, 208 F.3d 467, 471 (4th Cir. 2000). The panel took that step based on a misunderstanding of law and fact. The decision thus leaves the state of prosecutorial immunity in this circuit in flux. That uncertainty harms all prosecutors—including the many prosecutors in Georgia—who rely on immunity so they can do their jobs without the constant threat of personal liability for mistakes. Absent prosecutorial immunity, some lawyers may hesitate to become prosecutors. Those that do may find their decision-making chilled by the specter of personal liability. Clearly defined and easily applied rules for prosecutorial immunity are, in other words, important for everyone. The State

of Georgia urges this Court to grant en banc review of this case to restore clarity for prosecutors.

ARGUMENT

I. Motions made in court, including motions to cancel a material witness warrant, are "intimately connected to the judicial phase of the criminal process."

The touchstone for prosecutorial immunity has always been whether the prosecutor's conduct is "intimately associated with the judicial phase of the criminal process." *Imbler*, 424 U.S. 409 at 430. And, importantly, this is a "functional" analysis. *Forrester v. White*, 484 U.S. 219, 229 (1988). It turns on "the nature of the function performed." *Id.* Accordingly, if the prosecutor's actions are "closely associated with the judicial process," "involve [his] role as advocate for the State," or are "connected with the prosecutor's basic trial advocacy duties," they are protected. *Burns v. Reed*, 500 U.S. 478, 495 (1991); *Buckley v. Fitzsimmons*, 509 U.S. 259, 271 (1993); *Van de Kamp v. Goldstein*, 555 U.S. 335, 346 (2009).

These principles can give rise to difficult questions in edge cases, but moving *in court* for cancellation of a material witness warrant is not one of them. Making and arguing motions is a core part of a prosecutor's "basic trial advocacy duties," regardless of how easy, rote, or routine the motion might be. *Van de Kamp*, 555

U.S. at 346. Kassa's counsel conceded in open court that absolute prosecutorial immunity protects the act of *obtaining* a material witness warrant. Argument at 4:50. That is plainly true. Making this type of motion is "intimately associated with the judicial phase of a criminal trial" because it is made in court; it is made either during or at the end of a criminal trial; it is made by the prosecutor to a judge; and it relieves the prosecutor's own key witness—upon whom the entire success of the criminal trial largely rests—from the duty of remaining at the court and providing further testimony. *See Hart v. Hodges*, 587 F.3d 1288, 1295 (11th Cir. 2009) ("Prosecutors are immune from appearances before a court and [their] conduct in the courtroom.").

And if *seeking* a warrant is protected by prosecutorial immunity, then the decision whether to move for it to be withdrawn should be too. The typical practice in Fulton County is for prosecutors to make an oral motion to release the warrant after the witness has testified.[1] Argument at 17:00. If an oral

[1] The panel seemed to base its decision, in part, on the idea that the prosecutor's failure to withdraw the warrant was post-trial conduct. Slip. Op. 13. But as the panel itself recognizes, the practice in Fulton County is to move to withdraw the warrant during trial, immediately after the witness testifies. *Id.* at 4. ADA Stephenson's failure to do that is what she is being sued for.

motion, made in court, asking for a court order is not part of the "judicial process," then those words have lost their meaning. *Burns*, 500 U.S. at 495. "Failure to grant a prosecutor immunity for actions taken [or not taken] in open court in pursuit of a court order would be a portentous step." *Dababnah*, 208 F.3d 467, 471 (4th Cir. 2000).

Yet the panel took that step. It held that the failure to move for the cancellation of a material witness warrant has "nothing to do with conducting a prosecution for the state." Slip. Op. 11. The panel reasoned that seeking the revocation does not require "any advocacy" or any "exercise of professional judgment or legal skill." *Id.* No Supreme Court case, however, makes professional judgment or legal skill a condition precedent to receiving the immunity. To be sure, these things all but guarantee that the immunity will apply, but they are not requirements. But it is well settled that some routine tasks are nevertheless protected by prosecutorial immunity. *See Van de Kamp*, 555 U.S. at 346 (even administrative tasks are protected when they are "directly connected with the prosecutor's basic trial advocacy duties"); *Stockdale v. Helper*, 979 F.3d 498, 502 (6th Cir. 2020); *Safar v. Tingle*, 859 F.3d 241, 249 (4th Cir. 2017). Ultimately, the question is simply whether the act was "intimately associated with the

judicial phase of the criminal process." *Imbler*, 424 U.S. 409 at 430. And a motion, made in court, seeking a court order, is absolutely part of the process. *Burns*, 500 U.S. at 495.

The panel got it wrong for another, related reason. Motions to withdraw warrants *do* require professional judgment and legal skill. Prosecutors must first determine if they need (or might need) additional testimony from the material witness and whether it makes strategic sense to release him from the obligation to appear in court. Prosecutors must then assess when, how, and where to make the motion. And after that decision is made, prosecutors must advocate their position to the judge. This necessarily requires advocacy and professional judgment, at whatever stage it occurs. Indeed, court orders granting or withdrawing warrants are undisputedly *judicial* acts for which judges receive absolute judicial immunity. *See Ireland v. Tunis*, 113 F.3d 1435, 1441 (6th Cir. 1997). It would be incongruous, to put it mildly, for the prosecutor's failure to seek a motion asking for that order to be unprotected on the basis that it is not part of the judicial phase of litigation.

Ultimately, the panel's holding seems premised on the belief that the prosecutorial duty here is easy. *See* Slip Op. at 11. But prosecutorial immunity does not turn on whether the action at

issue is simple or complex, easily failed or difficult to accomplish. What matters is whether the action is *prosecutorial*, and motions made in court involving a witness to a crime plainly are.

In short, the panel applied the incorrect test for prosecutorial immunity and overlooked the judgment, skill, and advocacy involved in the process for cancelling a material witness warrant. This Court should grant en banc review to clarify the proper understanding of prosecutorial immunity.

II. The panel decision is in conflict with authority from other circuits.

For the reasons just given, the panel decision is wrong. But it also misunderstands and contradicts authority from other circuits. Until the panel decision, no court had held that prosecutors do not receive immunity for failing to make a motion, in court, seeking a court order. The panel misunderstood the Third Circuit case it relied on (almost exclusively). And it overlooked *Safar v. Tingle*, which holds that the "decision to revoke an arrest warrant"—even if that warrant is "stale"—is protected by absolute prosecutorial immunity. 859 F.3d 241, 249 (4th Cir. 2017).

The panel relied heavily on *Odd v. Malone*, 538 F.3d 202 (3d Cir. 2008), but it misunderstood that case at every turn. That case involved a plaintiff who was arrested and detained under a

material witness warrant after the indictment had issued and prior to trial. *Id.* at 205. The trial court judge instructed the prosecutor to notify him if the trial was continued so that he could release the plaintiff, but the prosecutor failed to do so. *Id.* at 205–06. The Third Circuit concluded that the prosecutor was not entitled to prosecutorial immunity for the plaintiff's § 1983 claims for alleged violations of the Fourth and Fourteenth Amendments. *Id.* at 206. But the court relied on several factors that do not exist here.

First, the Third Circuit placed much significance on the fact that the prosecutor's failure to notify the judge that the trial had been continued occurred during a "prolonged and clearly delimited period of judicial inactivity" (i.e., after the indictment had issued but months before the start of trial). *Odd*, 538 F.3d at 212. The timing of the prosecutor's challenged conduct thus "cast serious doubt," for the Third Circuit at least, on the prosecutor's "claims that her actions … remained 'intimately associated' with the judicial phase of the litigation." *Id.* at 214. But these timing concerns are not present here. ADA Stephenson's failure to make an oral motion to cancel the material witness warrant against Kassa did not occur prior to the criminal trial. Rather, her oversight occurred during, or at the end of, the prosecution.

Second, the Third Circuit held that, because prosecutors in Philadelphia County are merely required to notify the court of the status of a detained material witness, the act of releasing those witnesses is a judicial function rather than a prosecutorial one. *Id.* at 214. Although prosecutors could *facilitate* the release through their notifications, the judge was unilaterally responsible for obtaining the witness's release. Not so here. Judges in Fulton County cannot release material witnesses on their own. Instead, prosecutors must first make a motion for the witness's release. This makes the initiation of a material witness warrant a prosecutorial function rather than a judicial one.

Third, the Third Circuit decided that, as a matter of policy, it did not want to give prosecutors immunity for disobeying an explicit court order. *Odd*, 538 F.3d at 214 ("We can imagine few circumstances under which we would consider the act of disobeying a court order or directive to be advocative, and we are loath to grant a prosecutor absolute immunity for such disobedience."). But no such order existed in this case. And even if it had, this Court has already rejected—in binding precedent—the idea that a prosecutor "should be categorically denied absolute immunity if he disobeys a judge's order." *Hart*, 587 F.3d at 1298. This is because "the determination of absolute prosecutorial

immunity depends on the nature of the function performed, not whether the prosecutor performed that function incorrectly or even with dishonesty." *Id.*

Finally, the Third Circuit characterized the prosecutor's failure to notify the judge that the trial had been continued as "plainly administrative." Perhaps that is a fair characterization of the prosecutor's failure to act there, for the reasons given above. But making (and, by extension, failing to make) an oral motion in court is without doubt part of the "basic trial advocacy duties" of every prosecutor. *Odd* simply did not involve that question.

The Fourth Circuit, by contrast, *has* considered that question, and it held that prosecutorial immunity applied. In *Safar v. Tingle*, 859 F.3d 241, 243 (4th Cir. 2017), the prosecution stemmed from "an allegation of fraud that was mistakenly reported and almost immediately retracted." An arrest warrant was issued, and the prosecutor failed to ask the court to withdraw that warrant despite knowing the underlying basis for it had been retracted. *Id.* The court held that, even though the "charges [had] been wholly discredited," "deciding whether or not to withdraw an arrest warrant" is protected by prosecutorial immunity. *Id.* at 249–50. Even if the decision about whether to move for the warrant's withdrawal is so simple as to be "administrative," it is

still "directly connected with the prosecutor's basic trial advocacy duties." *Id.* at 249 (quoting *Van de Kamp*, 555 U.S. at 346). That is because "[f]iling and arguing motions in court is garden-variety trial work that falls comfortably within a prosecutor's core advocacy duties." *Id.*

The panel did not consider *Safar*, which is in direct conflict with the panel opinion. ADA Stephenson has been sued for failure to make a motion in court. Per *Safar*, that kind of failure (even if the motion is administrative), is protected by prosecutorial immunity. The panel held otherwise based on a misunderstanding of the Third Circuit's decision in *Odd*. This Court should grant rehearing en banc to correct that misapplication and restore clarity about how prosecutorial immunity works in this circuit.

CONCLUSION

For the reasons set out above, this Court should grant the petition for en banc review.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

I hereby certify that that this document complies with the type-volume limits of Fed. R. App. P. 29(b)(4) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 2,578 words.

/s/ *Ellen Cusimano*
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CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2022, I served this brief by electronically filing it with this Court's ECF system, which constitutes service on all attorneys who have appeared in this case and are registered to use the ECF system.

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