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August 3, 2017

Office of Disciplinary Counsel
4000 S. Sherwood Forest Blvd., Suite 607
Baton Rouge, Louisiana 70816

Re: Request for Investigation of the Orleans Parish District Attorney's Office

To the Office of Disciplinary Counsel:

The Southern Poverty Law Center ("SPLC") writes to request that the Office of Disciplinary Counsel investigate the Orleans Parish District Attorney's Office and District Attorney Leon Cannizzaro, Jr.

District Attorney Cannizzaro and the assistant district attorneys in his office have admitted to manipulating the judicial process since taking office in 2009 by fabricating documents to appear as subpoenas and serving them upon members of the public. The so-called "subpoenas" threatened fines and imprisonment if the targeted member of the public failed to come to the District Attorney's Office and answer questions posed by assistant district attorneys or their staff. Rather than following the law—which requires court authorization for the issuance of subpoenas—the District Attorney's Office routinely sent these fake subpoenas to witnesses without notifying any court. In so doing, District Attorney Cannizzaro and unknown members of his staff who acted under his supervision betrayed the public trust and violated their ethical obligations under the Louisiana Rules of Professional Conduct.

The Office of Disciplinary Counsel is charged with investigating "all information coming to the attention of the agency which, if true, would be grounds for discipline."¹ This broad mandate to investigate misconduct stems from the crucial role of attorney discipline as a means of protecting the public, preserving the integrity of the legal system, ensuring the administration of justice,

¹ La. S. Ct. R. XIX, sec. 4.

detering future unethical conduct, and rehabilitating the offending attorneys.² In the instant case, these considerations are particularly acute given the crucial role of prosecutors in seeking truth, administering justice, and protecting the public. Without a comprehensive investigation into the scope of this misconduct throughout the District Attorney's Office, the public will be deprived the opportunity to know whether prosecutors are upholding the law and following the ethical rules. Moreover, investigating and sanctioning the unethical conduct will deter prosecutors across the state from engaging in similar misconduct and protect the integrity of the legal profession.

I. Summary of Complaint

SPLC submits this ethics complaint against District Attorney Cannizzaro and unknown assistant district attorneys in his office for violations of Louisiana Rules of Professional Conduct ("Rule") 4.1(a) and 5.1, in addition to possible violations of other rules. The District Attorney admits that numerous fake subpoenas have issued from his office throughout his tenure but refuses to divulge which assistant district attorneys were involved in this unethical conduct.³ We respectfully request that this office utilize its broad regulatory powers in order to:

1. Investigate disciplinary action against the District Attorney for his apparent violation of Rule 5.1;
2. Investigate the scope of his office's practice of issuing fake subpoenas so as to identify those assistant district attorneys who authored and/or authorized the issuance of such documents in violation of Rule 4.1(a); and
3. Bring disciplinary action against them accordingly.

The Office of Disciplinary Counsel has unique authority to ensure that the experience of witnesses manipulated and intimidated by the District Attorney is never repeated, and that attorneys who act as an arm of the government are not doing so in violation of ethical rules. A comprehensive investigation is critical to protect the public, to protect the integrity of the legal system, and to deter these or other prosecutors from committing the same misconduct.

II. Southern Poverty Law Center's Interest

The Southern Poverty Law Center has worked to protect and advance civil rights in the Deep South for over four decades. SPLC advocates for the reform of the juvenile and criminal justice systems so they operate fairly and equitably; for the dignity and humanity of those interacting with these systems; and for a reduction in the prison population. Furthering this mission is of particular importance to SPLC in Louisiana—the prison capitol of the world.

² *The Purposes of Attorney Discipline*, La. Att'y Disciplinary Bd., <https://www.ladb.org/Discipline/Purpose.aspx>.

³ As Exhibit A indicates, Assistant District Attorney Laura Rodrigue has authorized such a fake subpoena in at least one instance. Mr. Cannizzaro's office has been ordered by Civil District Court Judge Nakisha Ervin-Knott to reveal the names of all prosecutors who authorized the issuance of these "fake subpoenas." Della Hasselle, *Judge Gives Orleans DA Leon Cannizzaro's Office Deadline to Hand Over "fake subpoena" Info*, *The New Orleans Advocate* (July 11, 2017, 9:10 AM), http://www.theadvocate.com/new_orleans/news/courts/article_bf6eda6a-6642-11e7-b463-3bcd6b9b2f8.html; see also Ex. D (judgment). Mr. Cannizzaro is appealing this ruling and the proceedings have been stayed in the meantime. See Ex. E (motion for suspensive appeal). All articles referred to in this letter are attached as Exhibit F.

Part of SPLC’s criminal justice work involves ensuring that prosecutors are held accountable for misconduct. Prosecutorial misconduct occurs when a prosecutor breaks a law or a code of professional ethics in the course of a prosecution. In *Berger v. United States*, Justice Sutherland explained that prosecutorial misconduct means “overstepp[ing] the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense.”⁴ SPLC brings this complaint to ensure that prosecutorial misconduct is addressed by the Office of Disciplinary Counsel when it arises.

III. Uncontroverted Facts

A. Subpoenas Are, By Definition, Orders Issued By A Court.

A subpoena is “a court’s written order”⁵ “commanding a person to appear before a court or other tribunal, subject to a penalty for failing to comply.”⁶ Subpoenas declare the time and place at which a person must appear, exerting control over that person with no regard for his schedule or access to transportation. Subpoenas are powerful instruments that must be regulated by a neutral magistrate so that they are not abused. Because the so-called “subpoenas” that the District Attorney’s Office sent to witnesses were not orders issued by any court, the label of “subpoena” placed on these documents⁷ is patently false and intentionally misleading.

B. By Law, District Attorneys May Only Seek to Have Subpoenas Issued With Court Authorization.

There is no mechanism under law that allows district attorneys to “subpoena” witnesses to speak with them outside of court without going through a judge. Under Louisiana Code of Criminal Procedure Article 66 (“Article 66”), a district attorney, after “setting forth reasonable grounds therefor,” can ask a judge to order the clerk of court to issue a subpoena to a witness ordering his appearance at a designated time and place to speak to the district attorney’s office. It is the court, not the district attorney’s office, which determines whether such documents may issue. It is also the clerk of court, not the district attorney’s office, who issues such subpoenas. Article 66 creates this limitation on the issuance of the subpoenas explicitly to prevent “possible abuse by the district attorney.”⁸

C. The Orleans Parish District Attorney’s Office Routinely Lied About Individuals’ Obligation To Speak To District Attorneys and the Penalties for Failing to Do So.

The Orleans Parish District Attorney’s Office has routinely and knowingly falsified “subpoenas” and served them upon witnesses without any court oversight. On April 26, 2017, a local media outlet reported that it had discovered numerous instances of the Orleans Parish District

⁴ 295 U.S. 78, 84 (1935).

⁵ *Writ*, Black’s Law Dictionary, (10th ed. 2014).

⁶ *Subpoena*, Black’s Law Dictionary, (10th ed. 2014);

⁷ *See* Ex. A.

⁸ La. Code Crim. Proc. Ann. art. 66, cmt. B.

Attorney's Office issuing fake subpoenas to compel witnesses to speak with prosecutors outside of court.⁹

A copy of one such "subpoena" is attached to this complaint.¹⁰ It is titled "SUBPOENA," and warns that "A FINE AND IMPRISONMENT MAY BE IMPOSED FOR FAILURE TO OBEY THIS NOTICE."¹¹ It also claims to be issued pursuant to Article 66,¹² which, in light of the failure to seek judicial permission for its issuance, is simply not true and is intentionally misleading. Witnesses in receipt of this document have been intimidated and misled into believing that they are under a legal obligation to appear as "commanded" or else face punishment.¹³

D. The District Attorney's Office Now Acknowledges Ethical Violations but Continues to Resist Transparency and the Voluntarily Regulation of This Practice.

The Office of Disciplinary Counsel should be particularly concerned with the practices of a district attorney's office that appears unwilling or unable to recognize when its attorneys are acting unethically or when they are obligated to operate with transparency. For example, even though Assistant District Attorney Laura Rodrigue withdrew a fake subpoena in November 2016 on the grounds that it was illegally issued,¹⁴ the Office sent a fake subpoena to at least one other witness several months later.¹⁵ In the Spring of 2017, when the practice of issuing "fake subpoenas" was made public through media reports, the District Attorney's Office defended it. According to the Office's spokesman Chris Bowman, the District Attorney did "not see any legal issues" with serving these fake subpoenas.¹⁶ Rather, in Bowman's words, the practice is "no different than if we just put a letter out [to a witness] on our letterhead." It was not until after Mr. Bowman was told that legal experts called the practice "illegal" that the Office announced it would stop the practice of issuing the fake subpoenas.¹⁷ Eventually District Attorney Cannizzaro publicly admitted his responsibility for allowing the practice to occur in his office. He told a television journalist:

I certainly take responsibility for the fact that these documents, these notices, were labeled a subpoena under our administration [. . .] It was improper, it was incorrect for us to label those notices as a subpoena, that was incorrect. That was improper, and I take responsibility for that.¹⁸

⁹ Charles Maldonado, *Orleans Parish prosecutors are using fake subpoenas to pressure witnesses to talk to them*, The Lens (Apr. 26, 2017, 2:34 PM), <http://thelensnola.org/2017/04/26/orleans-parish-prosecutors-are-using-fake-subpoenas-to-pressure-witnesses-to-talk-to-them>.

¹⁰ See Ex. A.

¹¹ See *id.*

¹² See *id.*

¹³ See Maldonado, *supra* note 9.

¹⁴ See *id.*

¹⁵ See *id.* This "fake subpoena" was authorized by Assistant District Attorney William Dieters. See Ex. B.

¹⁶ See Maldonado, *supra* note 9.

¹⁷ See *id.*

¹⁸ Paul Murphy, *Practice of "fake subpoena"s to be stopped by Orleans DA*, (WWL-TV broadcast Apr. 27, 2017), <http://www.wwltv.com/news/local/orleans/practice-of-fake-subpoenas-to-be-stopped-by-orleans-da/434702306>.

Even after that admission, however, District Attorney Cannizzaro attempted to down-play the violation by insisting that “there are no legal consequences” if a person failed to respond to the fake subpoena.¹⁹ It was later discovered that his office had sought the arrest of at least one person who had failed to respond to the misleading document.²⁰ Additionally, and paradoxically, District Attorney Cannizzaro tried to explain away the improper use of the word “subpoena” on the document by saying “the term says, listen, if you don’t respond, there may be a consequence for your failure to respond.”

District Attorney Cannizzaro was sued on May 15, 2017 by the American Civil Liberties Union for violating Louisiana’s Public Records Law by failing to disclose information about the “fake subpoenas.”²¹ A civil district court judge has ruled that District Attorney Cannizzaro’s office is obligated to identify the prosecutors who engaged in this practice.²² District Attorney Cannizzaro’s office is appealing this ruling.²³

The District Attorney’s Office *has* admitted—in an apparent attempt to deflect blame from the Cannizzaro administration—that the practice of issuing fake subpoenas has been going on for decades.²⁴ Rather than excusing the District Attorney’s conduct, this admission should elevate the Office of Disciplinary Counsel’s concerns given the apparent depth and breadth of this practice and the indications that many prosecutors have been involved in perpetuating it.

The Office of Disciplinary Counsel, whose purpose is to protect the integrity of the legal system and ensure the ethical practice of law, has the authority and responsibility to initiate an investigation into the District Attorney’s Office’s practices and to dispense appropriate discipline so as to deter further unethical conduct.²⁵ These uncontroverted facts merit an immediate investigation.

IV. Statement of Violations of the Louisiana Rules of Professional Conduct

Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct; knowingly assist or induce another to do so; or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer’s behalf.²⁶ It is hereby requested that the Office of Disciplinary Counsel investigate the Orleans Parish District Attorney and his office for violations of the following rules, and impose discipline as appropriate.

A. Rule 4.1

¹⁹ Charles Maldonado, *Prosecutor tried to jail victim of alleged domestic violence after she didn’t obey fake subpoena*, The Lens (Jun. 14, 2017, 3:37 PM), <http://thelensnola.org/2017/06/14/new-orleans-prosecutor-used-fake-subpoena-to-seek-arrest-warrant-for-victim-of-alleged-domestic-violence>.

²⁰ *See id.*

²¹ *See* Ex. C.

²² *See* Ex. D.

²³ *See* Ex. E.

²⁴ Charles Maldonado, *Will prosecutors who sent fake subpoenas face any consequences?*, The Lens (May 3, 2017, 8:21 PM), <http://thelensnola.org/2017/05/03/will-prosecutors-who-sent-fake-subpoenas-face-any-consequences>; *see also* Maldonado, *supra* note 9.

²⁵ *See* La. Att’y Disciplinary Bd., *supra* note 2.

²⁶ La. R. Prof’l Conduct R. (hereinafter “Rule”) 8.1; 8.4.

Rule 4.1(a) provides that in the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person. The Orleans Parish District Attorney's Office admits it routinely has fabricated documents intended to appear as subpoenas for witnesses, falsely informing them that they were obligated to appear and provide information to the District Attorney's Office or face a fine and imprisonment.²⁷ By routinely issuing its own fake subpoenas, the Orleans Parish District Attorney's Office knowingly made false statements of material fact or law to third persons in the course of its representation of Orleans Parish.

B. Rule 4.3

District Attorney Cannizzaro and the attorneys in his office have violated Rule 4.3, stating that when the lawyer "knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding." Of course, District Attorney Cannizzaro and the attorneys in his office did the opposite—they engaged in deliberate deception so that witnesses would misunderstand their obligations to talk to the District Attorney's Office.

C. Rule 5.1

District attorneys are required to make reasonable efforts to ensure that their offices have in effect measures giving reasonable assurance that all lawyers in the office conform to the Rules of Professional Conduct.²⁸ In fact, supervising prosecutors bear a heightened obligation to ensure that attorneys under their supervision do not violate ethical rules, because, "[u]nlike other litigating lawyers, prosecutors are not merely advocates and officers of the court, but also administrators of justice who have a duty to seek justice, and not merely to convict."²⁹

A lawyer holding a supervisory position over other lawyers undertakes certain responsibilities and liabilities. The Louisiana Bar Association's Office of Disciplinary Counsel has dispensed punishment upon those supervising attorneys who allow ethical transgressions to occur in their organizations. For instance, discipline resulted when a lawyer relinquished legal responsibilities to employees resulting in fraudulent real estate transactions³⁰ and when a lawyer failed to supervise a subordinate lawyer and failed to report that lawyer's egregious ethical violations.³¹

Throughout District Attorney Cannizzaro's tenure as district attorney, and apparently for decades before that, prosecutors in Orleans Parish have engaged in a pattern and practice of deceit that violates the Rules of Professional Conduct and continues to go undisciplined.

Upon information and belief, District Attorney Cannizzaro failed to implement any meaningful supervisory protocols, such as training or performance monitoring, to ensure that prosecutors under his supervision would not engage in the unethical conduct described herein. Given the

²⁷ See Murphy, *supra* note 18.

²⁸ See Rule 5.1.

²⁹ Annotations to Rule 3.8 (internal quotation marks and citation omitted).

³⁰ See *In re Trahant*, 2012-1435, p. 13 (La. 12/14/12); 108 So. 3d 67, 75 (discipline).

³¹ See *In re Tolchinsky*, 99-1742 (La. 9/3/99); 740 So. 2d 109 (disbarment).

admitted recurrence of this unethical conduct over a long period of time,³² it is clear that District Attorney Cannizzaro abdicated his ethical duty to ensure meaningful oversight of the prosecutors in his office.

D. Potential Violations of Rules 3.3, 3.4, and 8.4

Because the scope of the Office's practice is not known, it cannot definitively be said whether violations of additional Rules have occurred. The Office of Disciplinary Counsel should investigate the District Attorney's Office in order to determine the extent of the violations.

District Attorney Cannizzaro and assistant district attorneys in his office may have violated Rule 3.3, mandating a duty of candor to the tribunal. District Attorney Cannizzaro's office prepared and presented cases that relied on witnesses whom it tricked into talking to the state. Upon information and belief, District Attorney Cannizzaro and his officers did not clarify this with the court.

District Attorney Cannizzaro and his assistant district attorneys have apparently used this practice to issue fake subpoenas after charges have been instituted (as opposed to during a pre-charging investigation).³³ Issuing fake subpoenas post-charging arguably presents a violation of Rule 3.4 by unilaterally creating a system of *ex parte* subpoenas, in addition to violating Article 66 on its face.³⁴ Under Rule 3.4, attorneys are obligated not to, *inter alia*, unlawfully obstruct another party's access to evidence or knowingly disobey an obligation under the rules of a tribunal. After a defendant is charged, he has rights to know about the evidence and witnesses the prosecutor intends to present. Code of Criminal Procedure Article 963 requires a *judge* to determine whether or not orders should be issued *ex parte*. Through issuing fake subpoenas post-indictment the District Attorney may violate Rule 3.4 by knowingly violating the terms of Article 963 and unlawfully obstructing the defendant's access to evidence.

Rule 8.4 precludes an attorney from "engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation." Professional "misconduct" includes conduct "involving dishonesty, fraud, deceit or misrepresentation," even if the conduct is not criminal in nature. For example, a lawyer engages in misconduct by improperly backdating stock certificates in the course of representing a client.³⁵ A violation of Rule 8.4(c) often entails a violation of one or more additional Rules.³⁶ The totality of the District Attorney's Office's conduct may amount to a violation of Rule 8.4.

³² See Charlie May, *New Orleans district attorney has been sending fake subpoenas to witnesses to make them testify*, Salon, (Apr. 28, 2017, 4:11 PM), <http://www.salon.com/2017/04/27/new-orleans-district-attorney-has-been-sending-fake-subpoenas-to-witnesses-to-make-them-testify>.

³³ See, e.g., Maldonado, *supra* note 9 (claiming that witnesses received subpoenas in the immediate days before trial).

³⁴ See *State v. Rachal*, 362 So. 2d 737, 739-40 (La. 1978) (subpoena power granted district attorney under Article 66 was for purposes of pre-charge investigation of offense and was not intended to afford prosecutor examination of exculpatory evidence secured by defendant, after prosecution has been instituted).

³⁵ See *In re Sealed Appellant*, 194 F.3d 666, 672 (5th Cir. 1999).

³⁶ See, e.g., *In re Hackett*, 2010-1013, p. 9 (La. 9/3/10); 42 So. 3d 972, 978; *In re McKee*, 2007-1381 (La. 2/1/08); 976 So. 2d 152; see also *In re Calahan*, 2006-0005 (La. 5/17/06); 930 So. 2d 916 (disbarring lawyer for violations of rules 3.3, 4.1 and 8.4(c), among other rules violations).

V. Violation of American Bar Association Standards

In addition to violating the Louisiana Rules of Professional Conduct, District Attorney Cannizzaro and the attorneys in his office who engaged in the practice of issuing fake subpoenas have also violated national standards by attempting to force third parties to communicate with the District Attorney's Office. The American Bar Association (ABA) has stated that "[a] prosecutor should not secure the attendance of persons for interviews by use of any communication which has the appearance or color of a subpoena or similar judicial process unless the prosecutor is authorized by law to do so."³⁷

In commentary to that directive, the ABA wrote:

There is evidence that some prosecutor offices have occasionally scheduled persons for interviews by means of documents that in format and language resemble official judicial subpoenas or similar judicial process even though they lack subpoena power in these instances. Such practices are improper and amount to a subversion and usurpation of judicial power [A] prosecutor's communication requesting a person to appear for an interview should be couched in terms of request; it should not simulate a process or summons that the prosecutor does not have the power to issue.³⁸

Courts across the country, too, have long recognized the degree to which it is entirely unethical to send a judicial-looking "summons" to prospective witnesses. In *United States v. Thomas*, for example, the court held that it is improper for a prosecutor to send any document that could be construed by a layperson to compel attendance at a witness conference.³⁹ The court noted that the precise practice at issue had been labeled "unprofessional conduct" by the American Bar Association.

The *Thomas* court stated: "The 'summons' here in question is an offensive document under the A.B.A. Standards . . . and although these standards are not technically binding on the Court, we are convinced that this 'summons' is a usurpation of the judicial power."⁴⁰ The court ordered: "that the United States Attorney shall cease sending to prospective witnesses whom he wishes to interview before the trial date any form which includes the word 'Summons' or any derivative thereof or which in its format and language resembles an official judicial subpoena or similar judicial process or which conveys the impression that non-appearance is subject to sanction."⁴¹

³⁷ ABA Criminal Justice Standards for the Prosecution Function 3-3.1(e) (3d ed. 1993), available at https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/prosecution_defense_function_authcheckdam.pdf.

³⁸ *Supra* at 51.

³⁹ 320 F. Supp. 527 (D.C. 1970).

⁴⁰ *Id.* at 529. The D.C. Bar subsequently issued an ethics opinion coming to the same conclusion. D.C. Bar, Formal Op. 32 (March 29, 1977).

⁴¹ *Id.* Courts have likewise disavowed the use of trial subpoenas to compel interviews with prosecutors. *See, e.g., United States v. LaFuente*, 991 F.2d 1406, 1411 (8th Cir. 1993) ("The government may not use trial subpoenas to compel prospective trial witnesses to attend pretrial interviews with government attorneys."); *United States v. Keen*,

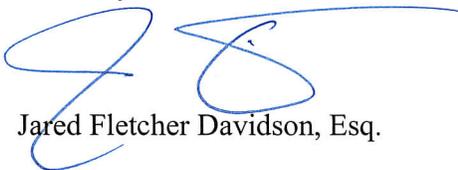
As noted by the *Thomas* court, violations of the ABA standards are not binding on the judiciary. They also do not bind the Louisiana Office of Disciplinary Counsel. Nonetheless, the condemnation by the nation's oldest and largest professional attorney association of the practices engaged in by District Attorney Cannizzaro and attorneys in his office indicates the harsh criticism these practices merit and provides strong support for this request for investigation.

VI. Conclusion

"[A] private person has the right to expect that the government, when acting in its own name, will behave honorably. When a government agent presents himself to a private individual, and seeks that individual's cooperation based on his status as a government agent, the individual should be able to rely on the agent's representations."⁴² Investigative subpoenas "provide a 'vast potential, if not temptation, for prosecutors . . . to crush personal liberties and rights of privacy.'"⁴³ The District Attorney's Office has violated the public's trust and failed to meet the standards required of Louisiana lawyers.

Accordingly, for the reasons set forth above, we respectfully request that the Office of Disciplinary Counsel investigate this matter, and impose discipline.

Sincerely,



Jared Fletcher Davidson, Esq.

Enclosures

509 F.2d 1273, 1274 (6th Cir. 1975) (concluding that there is "no question" that government's use of subpoenas to compel witnesses to attend interview was "highly improper" under the rules of criminal procedure); *United States v. Standard Oil Company*, 316 F.2d 884, 897 (7th Cir. 1963) (government may not subpoena witnesses to the United States Attorney's office for private interrogation by government counsel). Cannizzaro and his office likely also violated *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny in the cases where it issued these subpoenas. Under that doctrine, the district attorney is required to turn over any and all evidence which might be utilized "to undermine the ostensible integrity of the investigation" into the case. *Kyles v. Whitley*, 514 U.S. 419, 448 (1995). Certainly, evidence that the District Attorney's Office lied to witnesses, in writing, to obtain interviews and statements would call into question the state's investigation in to each case. It is highly unlikely that the District Attorney's Office disclosed its own malfeasance to the defense counsel, as it is constitutionally and ethically required to do.

⁴² *SEC v. ESM Gov't Secs., Inc.*, 645 F.2d 310, 316 (5th Cir. 1981).

⁴³ *Gutierrez v. Medley*, 972 P.2d 913, 917 (Utah 1998) (Stewart, J., concurring).



SUBPOENA

A FINE AND IMPRISONMENT MAY BE IMPOSED FOR FAILURE TO OBEY THIS NOTICE.

Office of the Orleans Parish District Attorney
CRIMINAL DISTRICT COURT FOR THE PARISH OF ORLEANS

To: Tiffany Lacroix

You Are Hereby Notified pursuant to LSA-CCRP art. 66 to appear before the District Attorney for the Parish of Orleans, to testify to the truth according to your knowledge in such matters as may be required of you.

on 11-29-16

at 10:00 AM 12 noon

to Assistant District Attorney:

Laura Rodrigue

phone #: 822-2414

at 619 South White Street

In the case of:

State of LA vs: Cardell Hayes

Item # D-10616-16

Case # 528-975

Charge(s): 14:30.1

Instructions:

Contact the above named Assistant District Attorney upon receipt of this subpoena.
Bring this subpoena with you to the District Attorney's Office when you appear to testify.

RETURN OF PERSONAL SERVICE

THIS IS TO CERTIFY that on

I received the process of Court of which this is a duplicate.

Recipient of Service

THIS IS TO CERTIFY that on

I made due Personal Service thereof by leaving same in the hands of the aforesigned Recipient

(please write Recipient's name),

the person to whom the process is directed.

Server of Process

RETURN OF DOMICILIARY SERVICE

THIS IS TO CERTIFY that on

I received the process of Court of which this is a duplicate.

Recipient of Service

THIS IS TO CERTIFY that on

I made due Personal Service thereof by leaving same in the hands of the aforesigned Recipient 

(please write Recipient's name),

a person of suitable age and discretion, residing at the domicile of the person to whom the said process of Court was issued, who was absent at the time, which fact I learned by interrogating the person in whose hands the said process was left.

Server of Process

Ex. 1



SUBPOENA

A FINE AND IMPRISONMENT MAY BE IMPOSED
FOR FAILURE TO OBEY THIS NOTICE.

Office of the Orleans Parish District Attorney
CRIMINAL DISTRICT COURT FOR THE PARISH OF ORLEANS

To:

You Are Hereby Notified pursuant to
LSA-CCRP art. 66 to appear before the
District Attorney for the Parish of Orleans, to
testify to the truth according to your knowledge
in such matters as may be required of you.

on FRIDAY, JANUARY 27, 17
at 9:00 AM

to Assistant District Attorney:

WILLIAM DIETERS

phone #: [REDACTED]

at 619 South White Street

In the case of:

State of LA vs. JAMES CUNNINGHAM

Item # A-14485-15

Case # 523-272 "A"

Charge(s): RS. 14:62.8

Instructions:

Contact the above named Assistant District
Attorney upon receipt of this subpoena.

Bring this subpoena with you to the District
Attorney's Office when you appear to testify.

RETURN OF PERSONAL SERVICE

THIS IS TO CERTIFY that on

I received the process of Court of which this is a duplicate.

Recipient of Service

THIS IS TO CERTIFY that on

I made due Personal Service thereof by leaving same in the hands of
the aforesigned Recipient

(please write Recipient's name),

the person to whom the process is directed.

Server of Process

RETURN OF DOMICILIARY SERVICE

THIS IS TO CERTIFY that on

I received the process of Court of which this is a duplicate.

Recipient of Service

THIS IS TO CERTIFY that on

I made due Personal Service thereof by leaving same in the hands of
the aforesigned Recipient

(please write Recipient's name),

a person of suitable age and discretion, residing at the domicile of the
person to whom the said process of Court was issued, who was absent
at the time, which fact I learned by interrogating the person in whose
hands the said process was left.

Server of Process

EX. 1

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

2017 MAY 15 P 12: 58

NO. 17-4661

DIVISION **D**
MARJORIE ESMAN

CIVIL SECTION 12
DISTRICT COURT

VERSUS

LEON A. CANNIZZARO, JR.,

IN HIS OFFICIAL CAPACITY AS ORLEANS PARISH DISTRICT ATTORNEY

DALE N. ATKINS
CLERK, CIVIL DISTRICT COURT
402 CIVIL COURTS BUILDING
424 LLOYOLA AVENUE - ROOM 402
NEW ORLEANS, LA 70112
DEPUTY CLERK
504-407-0000

FILED: _____

Receipt Date 5/15/2017 1:05:00 PM

Receipt Number 028897

**PETITION FOR WRIT OF MANDAMUS
PURSUANT TO THE LOUISIANA PUBLIC RECORDS LAW**

Register CDCCASH1

Case Number 2017 - 04661

NOW INTO COURT, through undersigned counsel, comes petitioner Marjorie Esman, who requests, pursuant to Article XII, Section 3 of the Louisiana Constitution of 1974, La. R.S. 44:31 *et seq.*, and other applicable law cited herein, that this Court issue a Writ of Mandamus directing Leon Cannizzaro, in his official capacity as records custodian for the Office of the District Attorney for Orleans Parish, to provide Petitioner with public records in his possession.

Grand Total \$ 512.00

Amount Received \$ 512.00

Balance Due \$ 0.00

Change Due \$ 0.00

Payment / Transaction List

In addition, Petitioner seeks penalties for violation of the State public records law

Item	Amount	Paid	Bal
Petition for Mandamu	\$444.50	\$444.50	\$0.00

In support of this Petition, Petitioner states the following:

Judicial College \$0.50 \$0.50 \$0.00

Building Fund Fee \$25.00 \$25.00 \$0.00

Indigent Legal Fee \$10.00 \$10.00 \$0.00

Petitioner Marjorie Esman is the Executive Director of the American Civil Liberties

Exhibits (Paper) \$8.00 \$8.00 \$0.00

Union and American Civil Liberties Union Foundation of Louisiana in New Orleans.

2.

Defendant Cannizzaro is the District Attorney for the Parish of Orleans and the records custodian for the Office of the District Attorney for the Parish of Orleans.

3.

On April 26, 2017, Ms. Esman learned through media reports that prosecutors employed by Defendant have engaged in the practice of issuing to witnesses documents titled "subpoena" that were not authorized by a judge or issued by a clerk of court.¹

¹ Maldonado, Charles, "Orleans Parish prosecutors are using fake subpoenas to pressure witnesses to talk to them," THE LENS, April 26, 2017, at <http://thelensnola.org/2017/04/26/orleans-parish-prosecutors-are-using-fake-subpoenas-to-pressure-witnesses-to-talk-to-them/>, last viewed May 12, 2017.

VERIFIED
CEDERICK FAVAROTH

4.

The so-called “fake subpoenas” carried a notice warning that “A FINE AND IMPRISONMENT MAY BE IMPOSED FOR FAILURE TO OBEY THIS NOTICE.”²

5.

Ms. Esman seeks to discover the scope of this practice. Specifically, she wants to determine how widespread the practice has been within the office of Defendant. To that end, she drafted a public records request to the Office of the District Attorney.

6.

In a letter dated May 5, 2017, attached hereto as Exhibit A, Ms. Esman requested:

Records sufficient to show the names and Louisiana Bar Association numbers of any and all lawyers currently employed by your office who have ever authorized or sent documents titled, styled, or identified as subpoenas that were not authorized by a judge, meaning they were not issued by the Clerk of Court and/or signed by a judge.

7.

On May 8, Defendant responded by letter, attached hereto as Exhibit B, stating that the Orleans Parish District Attorney’s Office “does not maintain” the requested records. The response continues to allege that because it “does not maintain separate records of subpoenas, the District Attorney’s Office is not required to compile” the requested names.

8.

Defendant also asserted that he is relieved of the burden to make records available for inspection because doing so “would be unreasonably burdensome or expensive.” The request “involves the review of literally thousands of closed files, a substantial number of which are stored off-site,” Defendant stated, adding that compliance would require his office to “manually review thousands of files stored on premises and off-site, the retrieval fee for which is \$8.10 per file.”

9.

For the above-cited reasons, Defendant denied the request because it “would be unreasonably burdensome.”

10.

The Office of the District Attorney has stated publicly, through First Assistant District Attorney Graymond Martin, that the office has no records maintenance policy with respect to the so-called “fake subpoenas.” Martin told a reporter there “was no formal system of keeping

² *Id.*

record of them. They were issued by individual prosecutors who decided on their own whether to put them in case files.”³

11.

Petitioner submits that Defendant arbitrarily and capriciously denied her request. His response does not address the specific request, which did not seek the subpoenas themselves; instead, Defendant appears to have issued a formulaic denial that does not comply with Louisiana’s public records law.

12.

Louisiana’s public records law provides that “[a]ll persons and public bodies having custody and control of any public record” must preserve the public record “for a period of at least three years from the date on which the public record was made.” La. R.S. 44:36(A). A prosecuting agency’s public records “pertaining to a criminal prosecution that results in a conviction ... shall be retained for a period of three years[.]” La. R.S. 44:36(E)(1).

13.

When a request is made for a record to which the public is entitled, a responsible official such as Defendant “shall have the record segregated from other records under his custody so that the public can reasonably view the record.” La. R.S. 44:33(A)(1). If segregating the record would be “unreasonably burdensome or expensive,” the official shall “so state in writing and shall state the location of the requested record.” La. R.S. 44:33(A)(2).

14.

If a record is not in a public official’s custody or control, the law provides that the official shall “state in detail to the best of his knowledge and belief, the reason for the absence of the record from his custody or control, its location, what person then custody of the record and the manner and method in which, and the exact time at which it was taken from his custody or control. He shall include ... ample and detailed answers to the inquiries of the applicant which may facilitate the exercise” of the public’s right to access those records. La. R.S. 44:34.

15.

Defendant’s response to Petitioner’s request violates Louisiana’s public records law. He does not claim that the requested records do not exist, nor does he claim that they are out of his

³ Sledge, Matt, “New Orleans prosecutors end use of controversial ‘DA subpoenas’ on witnesses,” THE NEW ORLEANS ADVOCATE, April 26, 2017, at http://www.theadvocate.com/new_orleans/news/courts/article_c5b44baa-2ab3-11e7-911d-2b796cd09c6e.html, last visited May 12, 2017.

custody or control. He does not specify their location other than to say they are stored "on premises and off-site." He does not provide ample and detailed answers to Petitioner's request to facilitate the exercise of her right to access the records. He claims that his office does not maintain them, and that obtaining them would be unreasonably burdensome.

16.

A writ of mandamus "may be directed to a public officer to compel the performance of a ministerial duty required by law," La. C.C.P. Art. 3863. This writ is appropriate to compel Defendant to abide by his statutory duty to produce the records requested by Petitioner.

17.

Suits filed under Louisiana's public records law "shall be tried by preference and in a summary manner." La. R.S. 44:35(C).

18.

The burden of proving "that a public record is not subject to inspection, copying, or reproduction shall rest with the custodian." La. R.S. 44:31(B)(3).

19.

The public's right of access to public records is a fundamental right, guaranteed by the constitution. *Title Research Corp. v. Rausch*, 450 So.2d 933, 936 (La. 1984) (citing La. Const. art. 12, § 3, which must be "construed liberally in favor of free and unrestricted access to the records[.]") Access can be denied "only when a law, specifically and unequivocally, provides otherwise." *Id.* "Whenever there is doubt as to whether the public has the right of access to certain records, the doubt must be resolved in favor of the public's right to see." *Id.*

20.

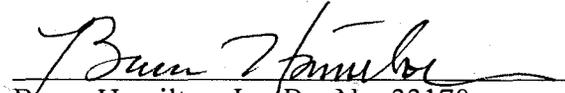
Petitioner submits that Defendant has an obligation to maintain the records sought and to produce them or make them available for inspection. Rather than comply with Petitioner's request or attempt to comply, Defendant has obfuscated the existence and/or location of the records sought.

WHEREFORE, Petitioner prays:

1. That a writ of mandamus be issued directing Defendant to disclose the records requested or show cause why he should not be ordered to do so, and

2. For an award of attorney's fees, damages, sanctions, and costs as provided by law, including specifically penalties for intentional, unreasonable, and arbitrary denial of a valid public records request pursuant to La. R.S. 44:35(E) and 44:37.

Respectfully submitted,



Bruce Hamilton, La. Bar No. 33170
ACLU Foundation of Louisiana
P.O. Box 56157
New Orleans, Louisiana 70156

[REDACTED]
[REDACTED]

Counsel for Marjorie Esman

Sheriff please serve:

Leon A Cannizzaro, Jr.
In His Capacity as District Attorney, Parish of Orleans
619 S. White Street
New Orleans, LA 70119

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

FILED
2017 MAY 15 P 12:58

NO. _____

DIVISION _____

SECTION:
DISTRICT COURT

MARJORIE ESMAN

VERSUS

LEON A. CANNIZZARO, JR.,

IN HIS OFFICIAL CAPACITY AS ORLEANS PARISH DISTRICT ATTORNEY

FILED: _____

DEPUTY CLERK

ORDER

Considering the foregoing Petition for Writ of Mandamus filed herein by the Petitioner, Marjorie Esman;

IT IS HEREBY ORDERED that the Defendant, Leon A. Cannizzaro, Jr., in his official capacity as Orleans Parish District Attorney, be served with the foregoing Petition and a copy of this Order, and that an alternative writ of mandamus shall issue herewith, directing and compelling Defendant to immediately produce the public records requested, or show cause to the contrary.

IT IS FURTHER ORDERED that a hearing shall be held on the _____ day of _____, 2017, at _____ o'clock ____ .m., and Defendant shall show cause as to:

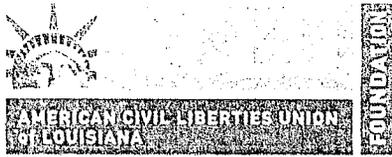
- Why said records should not be produced as requested, and why the alternative writ of mandamus issued by this Order shall not be made peremptory and permanent;
- Why Defendant should not be taxed with costs and attorneys' fees, as well as penalties for an arbitrary and capricious failure to comply with the law, and all other equitable and just relief as may be permitted by law.

New Orleans, Louisiana, this _____ day of _____, 2017.

JUDGE

PLEASE SERVE:

Leon A. Cannizzaro, Jr.
In His Capacity as District Attorney, Parish of Orleans
619 South White Street
New Orleans, Louisiana 70119



FILED

2017 MAY 15 P 12: 59

May 5, 2017
John Rohr, Custodian of Records
Orleans Parish District Attorney
619 S. White Street
New Orleans, LA 70119

CIVIL
DISTRICT COURT

Via postal mail and fax (504) 571-2928

Re: Public Records Request

Dear Mr. Rohr,

AMERICAN CIVIL
LIBERTIES UNION
FOUNDATION OF
LOUISIANA
PO BOX 58157
NEW ORLEANS, LA 70156
71304 522 0617
WWW.LAACLU.ORG

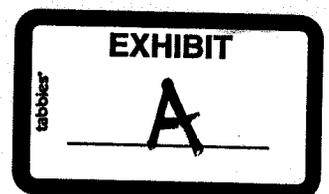
Pursuant to the Public Records Act of Louisiana, R.S. 44:1 et seq., we request copies of the public records described below. For purposes of this request, the term "documents" includes, but is not limited to, any memoranda, letters, electronic mail or "e-mail," handwritten, typed, or electronic notes, recordings of any kind and in any form (video, audio, digital, etc.)

1. Records sufficient to show the names and Louisiana Bar Association numbers of any and all lawyers currently employed by your office who have ever authorized or sent documents titled, styled, or identified as subpoenas that were not authorized by a judge, meaning they were not issued by the Clerk of Court and/or signed by a judge.

Under the provisions of R.S. 44:32, if you raise a question as to whether any of the records requested is a public record, you are required to notify in writing the person making the request of your determination and the reasons, including the legal basis therefor. Notice shall be made within three days of the receipt of the request, exclusive of Saturdays, Sundays and legal public holidays. If you claim exemption for a record or records under the Public Records Act, or any other statute, include for each record the section of law under which exemption is claimed and your reasons for believing the statute is applicable to the record.

Under the provisions of R.S. 44:33, if the public record is not immediately available, you are required to certify this in writing promptly, and in your certificate fix a day and hour within three days, exclusive of Saturdays, Sundays and legal public holidays, for the exercise of the right granted in the Public Records Act.

Under R.S. 44:34, "If any public record applied for by any authorized person is not in the custody or control of the person to whom the application is made, such person shall promptly certify this in writing to the applicant, and shall in the certificate state in detail to the best of his knowledge and belief, the reason for the absence of the record from his custody or control, its location, what person has custody of the record and the manner and method in which, and the exact time at which it was taken from his custody and control. He shall include in the certificate



VERIFIED
CEDERICK FAVAROTH

May 5, 2017

Page 2 of 2

ample and detailed answers to inquiries of the applicant which may facilitate the exercise of the right granted by this Chapter.”

If you are invoking R.S. 44:34 to deny this request, please answer the following questions in detail.

1. Is a copy of the requested public record usually located in your office?
2. Why is your copy of the requested public record absent from your office?
3. Where is your copy of the requested public record?
4. Who has received a copy of the requested public record?
5. How and from whom did the present custodian gain control of your copy of the requested public record?
6. What was the exact time your copy of the public record was taken from your custody and control?
7. When will your copy of the requested public record be returned to your office?
8. Is there any other public official who has a copy of the requested record?
9. What is/are the name(s) of anyone who has a copy of the requested public record?
10. What is/are the location(s) where the public record can be viewed?
11. What are the hours and dates when the requested public record can be viewed?

AMERICAN CIVIL
LIBERTIES UNION
FOUNDATION OF
LOUISIANA
67 BOY 61ST
NEW ORLEANS, LA 70156
TR 04 22 0617
WWW.AACLU.ORG

Please contact us at the number above when the requested materials are ready to be mailed. We request that any and all documents that are available be made available in electronic form. This request includes any documents that are in paper form but that can be scanned to electronic form, as well as digital copies of any recordings. For those documents that cannot be produced in electronic form, if the cost of copies does not exceed \$50.00, proceed without further approval and send us an invoice with the records; otherwise, call to advise and gain approval to proceed. As you are aware, failure to abide by the Public Records Law may result in certain penalties and the award of attorney's fees. We trust that you will comply without the necessity of any further action on our part.

Sincerely,


Marjorie Esman
Executive Director



Leon A. Cannizzaro, Jr.
DISTRICT ATTORNEY

FILED
2017 MAY 15 P 12:59
CIVIL
DISTRICT COURT

May 8, 2017

Marjorie Esman
Executive Director
American Civil Liberties Union
Foundation of Louisiana
P.O. Box 56157
New Orleans, LA 70156

Re: Public Records Request

Dear Ms. Esman:

This correspondence comes in response to your letter directed to John Rohr¹ dated May 8, 2017. In your letter, you request a copy of "records sufficient to show the names and Louisiana Bar Association numbers of any and all lawyers currently employed by your office who have ever authorized or sent documents titled, styled, or identified as subpoenas that were not authorized by a judge, meaning they were not issued by the Clerk of Court and/or signed by a judge."

Pursuant to LSA-R.S. 44:32, you are advised that the Orleans Parish District Attorney's Office does not maintain a copy of documents titled, styled, or identified as subpoenas in a particular file or location, nor does the District Attorney's Office maintain a list of documents titled, styled, or identified as subpoenas. Under the Public Records Law, a records custodian is not required to compile a list in order to respond to a public records request. Rather, the custodian need only make the record available in the particular format in which it is maintained. *See Nungesser v. Brown*, 667 So.2d 1036 (La. 1996), *rehearing denied*, 671 So.2d 929 (La. 1996); *Lewis v. Morrell*, 2017 WL 1247926 (La. App. 4th Cir. April 5, 2017); *Beckett v. Serpas*, 112 So.3d 348, 353 (La. App. 4th Cir. 2013); *Williams Law Firm v. Bd. of Sup'rs of Louisiana State Univ.*, 878 So.2d 557, 563 (La. App. 1st Cir. 2004). *See also* Jack M. Weiss and Mary Ellen Roy, *OPEN GOVERNMENT GUIDE: OPEN RECORDS AND MEETINGS LAWS IN LOUISIANA*, 16 (6th ed. 2011). With respect to your request, since the District Attorney's Office does not maintain separate records of subpoenas, the District Attorney's Office is not required to compile

¹ Your letter is mistakenly directed to John Rohr as custodian of records for the Orleans Parish District Attorney's Office. You are advised that John Rohr is not the legal custodian of records of the Orleans Parish District Attorney's Office. The legal custodian of records of the District Attorney's Office is the Honorable Leon A. Cannizzaro, Jr.



Marjorie Esman
May 8, 2017
Page 2

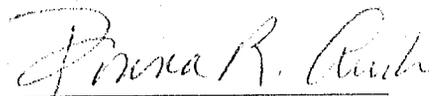
a list of lawyers currently employed by the District Attorney's Office who may have ever authorized or sent subpoenas that were not authorized by a judge.

Under the Public Records Law, a public official is relieved of the obligation to make a public record available for inspection when doing so would be unreasonably burdensome or expensive. See LSA-R.S. 44:33(A)(2). It is well established that the examination of public records or requests for reproduction cannot be so burdensome as to interfere with the operation of the custodian's constitutional and legal duties. *Beckett v. Serpas*, 112 So.3d 348, 353 (La. App. 4th Cir. 2013); *Vandemweghe v. Parish of Jefferson*, 70 So.3d 51, 58 (La. App. 5th Cir. 2011), *writ denied*, 71 So.3d 289 (La. 2011); *Elliott v. Dist. Attorney of Baton Rouge*, 664 So.2d 122 (La. App. 1st Cir. 1995), *writ denied*, 664 So.2d 440 (La. 1995).

In the present case, the request for records of documents titled, styled, or identified as subpoenas, particularly in light of the fact that the request involves a review of literally thousands of closed files, a substantial number of which are stored off-site. Therefore, compliance with your request would require that this Office manually review thousands of files stored on premises and off-site, the retrieval fee for which is \$8.10 per file. Given the potential volume of the records that would have to be reviewed in order to respond to your request, the fact that the records are not readily identifiable and locatable, and the retrieval costs involved, the District Attorney's Office submits that obtaining the records requested by you and preparing them for public review, including redacting and removing privileged information and documentation therefrom and determining whether there is a potential for further criminal litigation, would be unreasonably burdensome.

For the reasons discussed above, your request is denied at this time.

Respectfully submitted,



Donna R. Andrieu
Assistant District Attorney

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

No. 2017-04661

DIVISION "D"

Section 12

MARJORIE ESMAN

VERSUS

**LEON A. CANNIZZARO, JR.
IN HIS OFFICIAL CAPACITY AS ORLEANS PARISH DISTRICT ATTORNEY**

FILED: _____

DEPUTY CLERK

JUDGMENT

This matter came before the Court on the 11th day of July 2017, pursuant to Marjorie Esman's *Petition for Writ of Mandamus Pursuant to the Louisiana Public Records Law*.

PRESENT: Bruce Hamilton (LA BAR #33170), attorney for Marjorie Esman

PRESENT: David Fink (LA BAR #33550) and J. Edward McAuliffe, III (LA BAR #33969), attorneys for Leon A. Cannizzaro, Jr. and the Orleans Parish District Attorney's Office

The Court, after hearing the argument of counsel, considering the law, the entire record, and for the reasons orally assigned, renders the following Judgment:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Marjorie Esman's *Petition for Writ of Mandamus Pursuant to the Louisiana Public Records Law* is **GRANTED IN PART**. The District Attorney's Office for the Parish of Orleans shall provide Ms. Esman with the records requested in her public records request, dated May 5, 2017, for the years 2013, 2014, 2015, 2016, and 2017.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the District Attorney's Office for the Parish of Orleans has twenty (20) days from July 11, 2017 to provide records sufficient to show the names and Louisiana Bar Association numbers of any and all lawyers currently employed by the Orleans Parish District Attorney's Office who authorized or sent documents titled, styled, or identified as subpoenas that were not authorized by a judge in

cases that were accepted by the District Attorney's Office in 2017 that do not fall within the exemptions as set forth in La. R.S. 44:3(A)(1).

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the District Attorney's Office for the Parish of Orleans has thirty-five (35) days from July 11, 2017 to provide records sufficient to show the names and Louisiana Bar Association numbers of any and all lawyers currently employed by the Orleans Parish District Attorney's Office who authorized or sent documents titled, styled, or identified as subpoenas that were not authorized by a judge in cases that were accepted by the District Attorney's Office in 2016 that do not fall within the exemptions as set forth in La. R.S. 44:3(A)(1).

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the District Attorney's Office for the Parish of Orleans has fifty (50) days from July 11, 2017 to provide records sufficient to show the names and Louisiana Bar Association numbers of any and all lawyers currently employed by the Orleans Parish District Attorney's Office who authorized or sent documents titled, styled, or identified as subpoenas that were not authorized by a judge in cases that were accepted by the District Attorney's Office in 2015 that do not fall within the exemptions as set forth in La. R.S. 44:3(A)(1).

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the District Attorney's Office for the Parish of Orleans has sixty-five (65) days from July 11, 2017 to provide records sufficient to show the names and Louisiana Bar Association numbers of any and all lawyers currently employed by the Orleans Parish District Attorney's Office who authorized or sent documents titled, styled, or identified as subpoenas that were not authorized by a judge in cases that were accepted by the District Attorney's Office in 2014 that do not fall within the exemptions as set forth in La. R.S. 44:3(A)(1).

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the District Attorney's Office for the Parish of Orleans has eighty (80) days from July 11, 2017 to provide records sufficient to show the names and Louisiana Bar Association numbers of any and all lawyers currently employed by the Orleans Parish District Attorney's Office who authorized or sent documents titled, styled, or identified as subpoenas that were not authorized by a judge in

65

cases that were accepted by the District Attorney's Office in 2013 that do not fall within the exemptions as set forth in La. R.S. 44:3(A)(1).

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Ms. Esman's request for an award of attorney's fees, damages, sanctions, and costs in accordance with La. R.S. 44:35(D), including penalties pursuant to La. R.S. 44:35(E) and 44:37 are **DENIED**.

JUDGMENT READ and RENDERED on the 11th day of July, 2017, in **NEW ORLEANS, LOUISIANA**.

JUDGMENT SIGNED on the 12th day of July, 2017, in **NEW ORLEANS, LOUISIANA**.



JUDGE NAKISHA ERVIN-KNOTT

ENTERED ON MINUTES

JUL 13 2017

Marjorie Esman vs. Leon A. Cannizzaro, Jr.
In His Official Capacity As Orleans Parish District Attorney
CDC#2017-04661, Division D, Section 12
Writ of Mandamus Judgment

CHARLENE WILLIAMS

Page 3 of 3

66

FILED

311 JUL 18 A 10:20

FILED ON BEHALF OF THE ORLEANS PARISH DISTRICT ATTORNEY'S OFFICE - PAYS NO COURT COSTS - LA. R.S. 13:4521

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NO. 2017-4661

DIVISION "D"

MARJORIE ESMAN

VERSUS

LEON A. CANNIZZARO, JR., IN HIS OFFICIAL CAPACITY AS ORLEANS PARISH DISTRICT ATTORNEY

FILED: _____

DEPUTY CLERK

MOTION FOR SUSPENSIVE APPEAL

NOW INTO COURT, through undersigned counsel comes Defendant Leon A. Cannizzaro, Jr. In His Official Capacity as the District Attorney for Orleans Parish, respectfully represents as follows:

1.

On July 11, 2017, the Honorable Nakisha Erin-Knott of Division "D" for the Civil District Court for Orleans Parish heard oral arguments in connection to the Plaintiff's Writ of Mandamus.

2.

An oral judgment was rendered by this Honorable Court on July 11, 2017 regarding the aforementioned Writ of Mandamus.

3.

This Honorable Court signed the Judgment and Reasons for Judgment on July 12, 2017 ruling as follows:

- 1) Defendant has twenty (20) days from July 11, 2017 to provide records sufficient to show the names and Louisiana Bar Association numbers of any and all lawyers currently employed by the Orleans Parish District Attorney's Office who authorized or sent documents titled, styled, or identified as subpoenas that were not authorized by a judge in case that were accepted by the District Attorney's Office in 2017 that do not fall within the exemptions as set forth in La. R.S. 44:3(A)(1)
2) Defendant has thirty-five (35) days from July 11, 2017 to provide records sufficient to show the names and Louisiana Bar Association numbers of any and all

1 | Marjorie Esmann v. Leon A. Cannizzaro, In his Official Capacity as the District Attorney for Orleans Parish, et al. Motion for Suspensive Appeal

VERIFIED

Handwritten signature and stamp

lawyers currently employed by the Orleans Parish District Attorney's Office who authorized or sent documents titled, styled, or identified as subpoenas that were not authorized by a judge in case that were accepted by the District Attorney's Office in 2017 that do not fall within the exemptions as set forth in La. R.S. 44:3(A)(1);

3) Defendant has fifty (50) days from July 11, 2017 to provide records sufficient to show the names and Louisiana Bar Association numbers of any and all lawyers currently employed by the Orleans Parish District Attorney's Office who authorized or sent documents titled, styled, or identified as subpoenas that were not authorized by a judge in case that were accepted by the District Attorney's Office in 2017 that do not fall within the exemptions as set forth in La. R.S. 44:3(A)(1);

4) Defendant has sixty-five (65) days from July 11, 2017 to provide records sufficient to show the names and Louisiana Bar Association numbers of any and all lawyers currently employed by the Orleans Parish District Attorney's Office who authorized or sent documents titled, styled, or identified as subpoenas that were not authorized by a judge in case that were accepted by the District Attorney's Office in 2017 that do not fall within the exemptions as set forth in La. R.S. 44:3(A)(1);

5) Defendant has eighty (80) says from July 11, 2017 to provide records sufficient to show the names and Louisiana Bar Association numbers of any and all lawyers currently employed by the Orleans Parish District Attorney's Office who authorized or sent documents titled, styled, or identified as subpoenas that were not authorized by a judge in case that were accepted by the District Attorney's Office in 2017 that do not fall within the exemptions as set forth in La. R.S. 44:3(A)(1);

6) Plaintiff's request for attorney fees, damages, sanctions and costs are denied.

4.

The Deputy Clerk of Court has certified that notice of the aforementioned judgment was mailed on July 12, 2017. A copy is attached hereto as Exhibit "A."

5.

In accordance with the provisions of La. Code of Civ. Proc. Art. 2121, *et seq*, the Defendant desires to appeal suspensively from the aforementioned final judgment signed on July 12, 2017 in partial favor of the Plaintiff, Marjorie Esman.

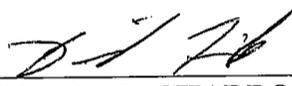
6.

In accordance with the provisions of La. Rev. Stat. 13:4581, the Defendant does not have the requirement of posting a bond in relation to the suspensive appeal as the Defendant is a political subdivision of the State as per La. Rev. Stat. 42:62(9).

WHEREFORE, Leon A. Cannizzaro, Jr. In His Official Capacity as District Attorney for Orleans Parish prays that it be granted a suspensive appeal from the final judgment on July 12, 2017 returnable unto the Court of Appeal, Fourth Circuit, Louisiana, within the applicable delays fixed by law, without the requirement of bond as mandated by La. R.S. 13:4581.

Respectfully Submitted:

LAW OFFICE OF BERNARD L. CHARBONNET, JR.

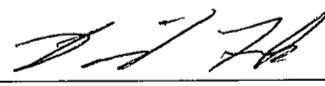

BERNARD L. CHARBONNET, JR, BAR NO. 4050
DAVID M. FINK BAR NO. 33550
Attorney for the Orleans Parish District Attorney's Office
One Canal Place
365 Canal Street, Suite 1155
New Orleans, Louisiana 70130
Tel: 504-561-0996
Fax: 504-561-7850

and

J. EDWARD MCAULIFFE, III.
ORLEANS PARISH DISTRICT ATTORNEY'S OFFICE
619 S. White Street
New Orleans, Louisiana 70119
Phone: (504) 822-2414

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 18th day of July 2017, served a copy of the foregoing *Motion for Suspensive Appeal* has been served on counsel for all parties to this proceeding, by facsimile transmission and by mailing same by United States mail, properly addressed and first class postage prepaid.


DAVID M. FINK

FILED

017 JUL 18 A 10:20

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

CIVIL DISTRICT COURT

NO. 2017-4661

DIVISION "D"

MARJORIE ESMAN

VERSUS

LEON A. CANNIZZARO, JR.,
IN HIS OFFICIAL CAPACITY AS ORLEANS PARISH DISTRICT ATTORNEY

FILED: _____
DEPUTY CLERK

ORDER

Considering the foregoing *Motion for Suspensive Appeal* filed by the Defendant, Leon A. Cannizzaro, Jr. In His Official Capacity as the District Attorney for Orleans Parish;

IT IS ORDERED that a suspensive appeal is hereby **GRANTED** to the Defendant, Leon A. Cannizzaro, Jr. In His Official Capacity as the District Attorney for Orleans Parish, returnable to the Court of Appeal, Fourth Circuit on the 31st day of July, 2017, without the requirement of bond as mandated by La. R.S. 13:4581.

New Orleans, Louisiana this 18th day of July, 2017



HONORABLE NAKISHA ERVIN-KNOTT CIVIL DISTRICT COURT

SHERIFF PLEASE SERVICE NOTICE TO ALL COUNSEL OF RECORD

David M. Fink
365 Canal Street, Suite 1155
New Orleans, Louisiana 70130
Tel: (504) 561-0996
Fax: (504) 561-7850
*Attorney for Leon A. Cannizzaro, Jr.
In His Official Capacity as the District
Attorney for Orleans Parish*

Bruce Hamilton
909 Poydras Street, Suite 2400
New Orleans, Louisiana 70112
Tel: (504) 522-0628
Fax: (888) 534-2996
Attorney for Marjorie Esman

ENTERED ON MINUTES

JUL 19 2017

Yodonnalisa Harris

4 | *Marjorie Esman v. Leon A. Cannizzaro, In his Official Capacity as the District Attorney for Orleans Parish, et al. Motion for Suspensive Appeal*

VERIFIED
Cal Kelley

J. Edward McAuliffe, III.
Orleans Parish District Attorney Office
619 S. White Street
New Orleans, Louisiana 70119
Tel: (504) 822-2414
Attorney for Leon A. Cannizzaro, Jr.
In His Official Capacity as the District
Attorney for Orleans Parish

http://www.theadvocate.com/new_orleans/news/courts/article_bf6eda6a-6642-11e7-b463-3bcd6b9b2f8.htm

Judge gives Orleans DA Leon Cannizzaro's office deadline to hand over 'fake subpoena' info

BY DELLA HASSELLE | DHASSELLE@THEADVOCATE.COM JUL 11, 2017 - 9:10 AM



Leon Cannizzaro leads the press conference about the conviction in the Cardell Hayes trial held by Orleans

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Parish District Attorneys in New Orleans, Monday December 12, 2016.

Advocate staff photo by SOPHIA GERMER

Della Hasselle

An Orleans Parish judge has given District Attorney Leon Cannizzaro's office 20 days to turn over the names of prosecutors involved in cases where so-called "fake subpoenas" were used this year to try to compel witnesses to talk with the office.

At a hearing Tuesday, Civil District Court Judge Nakisha Ervin-Knott said the office could have 20 additional days to turn over the same information for each of the five years prior to 2017.

The Lens first reported that Cannizzaro's office used the subpoena lookalikes, which were not authorized by a judge but appeared to be official court documents, to pressure witnesses to sit for interviews with prosecutors.

The documents had the word "subpoena" printed in capital letters at the top, next to a logo of the Orleans Parish District Attorney's Office. They also warned that a fine or imprisonment could be imposed for failure to obey the notice.

The DA's Office said it did not track how often it used the misleading documents or who sent them.



Dozens rally against Orleans DA Leon Cannizzaro over 'fake subpoenas,' other issues

On May 15, the American Civil Liberties Union of Louisiana sued Cannizzaro after asking him to provide records identifying lawyers in his office who issued or authorized such bogus subpoenas. The organization also wanted the lawyers' Bar Association numbers.

When Cannizzaro denied the request, an action the ACLU said violated the state's public records law, the group accused the DA of employing "deceptive tactics" and "violating the public trust."

"What is he trying to hide?" asked Executive Director Marjorie Esman.

Esman said Tuesday she felt "vindicated" by the judge's ruling. "This is a matter of extreme public import," she said.

David Fink, a lawyer for Cannizzaro, didn't respond to requests for comment but said during the hearing that the group's initial public records request was overly burdensome.

"The DA's Office has at least 15,000 files a year," Fink said, adding that Cannizzaro had limited staff members available to work on such a task and would have to pull prosecutors from their normal cases to complete it. He said the office had no index of the "documents contained in each and every file."

New Orleans shooting victim, jailed for fear he wouldn't testify, decries DA's aggressive pursuit of witnesses

Ervin-Knott said that while she "understood the dilemma" of combing through a large number of records, the public had a right to know the information. She called her job "a balancing act" between giving the public what they deserve and not creating an undue burden on Cannizzaro's office.

"Only you and your office know how to pull that information," the judge told Fink, suggesting the lawyers in the office might have exchanged emails that would help pin down answers to the request.

At the hearing, Ervin-Knott said she was helping Cannizzaro's office fulfill the records request by narrowing the focus, which originally hadn't been limited to any particular time frame. The organization had initially sought records showing "fake subpoenas" issued by any prosecutor who is now employed by Cannizzaro.

It wasn't immediately clear how many lawyers might have issued the subpoenas, or for how many years the practice went on.

The lawsuit is one of three the office faced over the issue of the fake subpoenas.

Earlier in May, the MacArthur Justice Center filed a suit to obtain documents the DA's Office sent to witnesses from 2013 to the present.

The Lens also sued Cannizzaro in May, seeking copies of the subpoenas.

Other critics, including the Orleans Public Defenders office, also have assailed Cannizzaro over the subpoenas, criticizing them as misleading.

The New Orleans City Council issued a resolution in May that blasted Cannizzaro for the separate but also controversial tactic of using material witness warrants to force witnesses to testify at trials. In one instance, a woman who said she was the victim of a sexual assault was jailed to ensure she testified.

Cannizzaro has consistently defended the use of material witness warrants, which allow prosecutors to arrest witnesses afraid or unwilling to come forward on their own.

The DA has said the tactic is necessary in fighting crime.

Since it came to light that the bogus subpoenas did not have court approval, however, his office has halted that practice. Prosecutors in April announced they were dropping the ominous heading used on earlier notices and would send a request called a “notice to appear” instead.

Staff writer Matt Sledge contributed to this report.

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The Lens (<http://thelensnola.org/2017/04/26/orleans-parish-prosecutors-are-using-fake-subpoenas-to-pressure-witnesses-to-talk-to-them/>)

Criminal Justice

Orleans Parish prosecutors are using fake subpoenas to pressure witnesses to talk to them

By Charles Maldonado, Staff writer April 26, 2017 2:34pm

Editor's note: This story has been updated with a report that the District Attorney's Office has said the practice will end.

The notice Tiffany Lacroix received in November had "SUBPOENA" printed at the top, next to a logo of the Orleans Parish District Attorney's Office. It ordered her to meet with a prosecutor to discuss the upcoming trial of Cardell Hayes, charged with murdering former Saints player Will Smith.

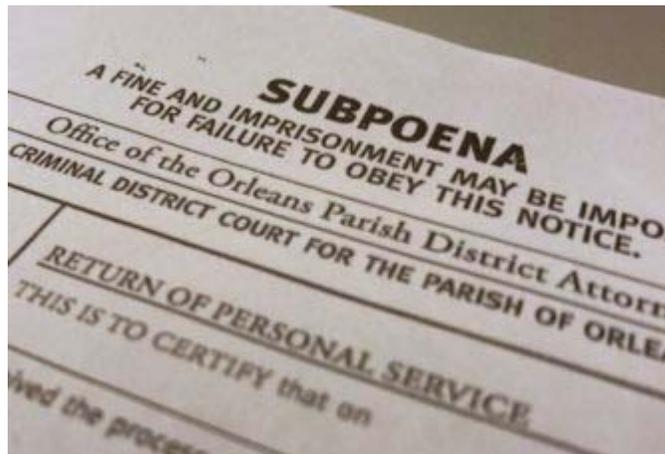
"A FINE AND IMPRISONMENT MAY BE IMPOSED FOR FAILURE TO OBEY THIS NOTICE," it declared (<https://www.documentcloud.org/documents/3677078-Tiffany-LaCroix.html#document/p5/a3>).

But it wasn't authorized by a judge. It wasn't issued by the Clerk of Court, which sends out subpoenas. And Lacroix wouldn't have gone to jail if she had ignored it. In other words, it was fake.

The notice came from District Attorney Leon Cannizzaro's office. His prosecutors are using these fake subpoenas to pressure witnesses to talk to them — a tactic that defense lawyers and legal experts said is unethical, if not illegal.

"There's no question this is improper," said Pace University law professor Bennett Gershman, a former prosecutor in New York City and an expert in prosecutorial misconduct.

"Clearly, it's unethical because the prosecutor is engaging in fraudulent conduct," he said.



Steve Myers / The Lens

The Orleans Parish District Attorney's Office is sending out notices like this that threaten jail time if people don't come in for questioning. But they're not legal documents because they haven't been authorized by a judge.

Colin Reingold, an attorney with Orleans Public Defenders, said the practice “borders on fraud or forgery, and certainly I see ethical problems with compelling someone to come in under false pretenses.”

Assistant District Attorney Chris Bowman, who serves as Cannizzaro’s spokesman, defended the use of the documents, which he called “notifications” or “notices.”

“It is inappropriate for the District Attorney’s Office to falsely suggest that this document is a ‘subpoena.’ ”
—Dane Ciolino, Loyola University law professor

“The district attorney does not see any legal issues with respect to this policy,” he said.

Cannizzaro’s office deals with “an extraordinary number of cases,” he said, including many in which potentially crucial witnesses are reluctant to talk.

“Maybe in some places if you send a letter on the DA’s letterhead that says, ‘You need to come in and talk to us,’ ... that is sufficient. It isn’t here,” he said. “That is why that looks as formal as it does.”

Have you received one of these fake subpoenas? We want to talk to you. Email editor@thelensnola.org (mailto:editor@thelensnola.org) , or call or text 504-229-2346.

But Wednesday, after The Lens told Bowman that our story would report that legal experts say the practice could be illegal, The New Orleans Advocate reported that the DA’s office had announced it would end the practice (http://www.theadvocate.com/new_orleans/news/courts/article_c5b44baa-2ab3-11e7-911d-2b796cd09c6e.html) . The Lens received no such announcement.

Bowman didn’t know how often these notices are used, but he said the practice predates Cannizzaro’s tenure by decades.

“The district attorney does not see any legal issues with respect to this policy.”
—Assistant District Attorney Chris Bowman

The Lens has found three recent cases in which witnesses received the so-called subpoenas. In two cases, people with ties to the defendant received them days before the trial. A lawyer told us about another instance, but we

couldn’t confirm it.

“It’s no different than if we just put a letter out on our letterhead,” Bowman said.

There is one important difference. To the untrained eye, these appear to be legal documents, complete with the threat of arrest.

“It is inappropriate for the District Attorney’s Office to falsely suggest that this document is a ‘subpoena,’” said Dane Ciolino, a Loyola law professor and legal ethics expert, “and to suggest that disregard of the document can be punishable by fine or imprisonment.”

Fine and imprisonment may be imposed (p. 5) (<http://www.documentcloud.org/documents/3677078-Tiffany-LaCroix.html#document/p5/a350214>)



SUBPOENA

A FINE AND IMPRISONMENT MAY BE IMPOSED FOR FAILURE TO OBEY THIS NOTICE.

Office of the Orleans Parish District Attorney
CRIMINAL DISTRICT COURT FOR THE PARISH OF ORLEANS

To: Tiffany Lacroix

RETURN OF PERSONAL SERVICE

THIS IS TO CERTIFY that on

View the entire document with DocumentCloud (<http://www.documentcloud.org/documents/3677078-Tiffany-LaCroix.html#document/p5/a350214>)

You are hereby notified pursuant to LSA-CCRP art. 66 to appear before the court to testify to the truth according to your knowledge in such matters as may be required of you.
on 11-29-16
at Dawn 12 noon

THIS IS TO CERTIFY that on

I made due Personal Service thereof by leaving same in the hands of the aforesigned Recipient

Subpoenas are used to compel someone to testify or produce evidence. They're typically used for trials and hearings, and they're issued by the clerk of court (<https://www.legis.la.gov/legis/Law.aspx?d=112743>).

To Assistant District Attorney
Laura Rodrigue

(please write Recipient's name),
the person to whom the process is directed.

Louisiana law also allows district attorneys — with a judge's authorization — to use subpoenas to force witnesses to be questioned outside court (<https://www.legis.la.gov/legis/Law.aspx?d=112685>). A judge isn't present at those meetings, and prosecutors can exclude anyone, except a witness' attorney.

phone # 822-2424

RETURN OF DOMICILIARY SERVICE

THIS IS TO CERTIFY that on

I received the process of Court of which this is a duplicate.

People who ignore a subpoena can be charged with contempt of court and arrested.

State of LA vs Cardell Hayes

Item # 17-10616-16

Case # 528-975

To subpoena someone for one of these private interviews, prosecutors have to submit a written application to a judge in which they present "reasonable grounds to question the person." The judge decides whether to order the court clerk to issue the subpoena.

Charge(s): 14-20

THIS IS TO CERTIFY that on

I made due Personal Service thereof by leaving same in the hands of the aforesigned Recipient

The point of court approval, Bowman told the jurors, is to prevent possible abuse by the DA's office.

Instructions:
Contact the above named Assistant District Attorney upon receipt of this subpoena.
Bring this subpoena with you to the District Attorney's Office when you appear to testify.

(please write Recipient's name),

a person of suitable age and discretion, residing at the domicile of the person to whom the process is directed, at the time, which fact I learned by interrogating the person in whose hands the said process was left.

In these cases, the District Attorney's Office didn't go to a judge. Instead, the office sent the notices itself.

Ex. 1

WITNESSES SUMMONED TO TALK TO PROSECUTORS

After Lacroix got her fake subpoena, her lawyer Anthony Ibert asked a judge to quash it. As he noted in a court filing, the "subpoena" didn't appear to have been issued by the clerk of court (<https://www.documentcloud.org/documents/3677078-Tiffany-LaCroix.html#document/p3/a4>), as the law requires.

After Ibert objected, Bowman said, the DA's office withdrew it and asked the judge to issue a subpoena for Lacroix to show up in court. Ibert initially refused to provide Lacroix's address, Bowman said, but the judge insisted.

(<https://www.documentcloud.org/documents/3677078-Tiffany-LaCroix.html#document/p5/a350214>)
who were accused of criminal wrongdoing," he said. "And they're getting defense attorneys to come in and try to get them from going on the stand."

He acknowledged it's their right to do that.

Another client of Ibert's, Fayona Bailey, received a fake subpoena (<https://www.documentcloud.org/documents/3678328-Fayona-Bailey-subpoena.html>)

in a different murder case earlier this year. Ibert objected then (<https://www.documentcloud.org/documents/3678071-Fayona-Bailey-motion-to-quash.html>), too, and the District Attorney's Office asked a judge for a real

More from our investigation: Prosecutors in Jefferson Parish have used fake subpoenas similar to those in New Orleans (<http://thelensnola.org/2017/04/27/prosecutors-in-jefferson-parish-have-used-fake-subpoenas-similar-to-those-in-new-orleans/>)

Bowman confirmed that the District Attorney's Office used an invalid subpoena in that case.

“Maybe in some places if you send a letter on the DA's letterhead that says, ‘You need to come in and talk to us,’ ... that is sufficient. It isn't here.”

**—Assistant District Attorney
Chris Bowman**

Thomas Frampton, a public defender, said it happened in one of his cases. Just days before his client was to be tried on a theft charge in early 2016, a character witness for the defendant got one of these notices.

The witness was Larry Bagneris, a longtime civil rights activist and director of the city's Human Relations Commission

(<http://www.nola.gov/human-relations-commission/>) .

Bagneris said he got a call from someone with the District Attorney's Office. “I said, ‘I don't think I should be talking to you,’” Bagneris said. “Two days later, I got a subpoena. Two gentlemen came to my office.”

Bagneris said the investigators who delivered the notice insisted he come to the DA's office. Though he complained to the office about how he was treated, he complied. He said he was questioned about the details of the case.

No witness subpoena for Bagneris appears in the official online case summary. Frampton said he didn't learn until after the defendant was acquitted that Bagneris had been called in to talk to prosecutors.

Until he was contacted by The Lens, Bagneris believed the subpoena was real and approved by the court.

Bowman said he didn't have any information about this instance.

Bagneris was not called to testify at the trial. Even so, Gershman said contact between prosecutors and defense witnesses, without a judge's authorization or the defense attorney's knowledge, is potentially “fraught with coercion.”

“It's very possible that this witness, after this meeting, might be scared to testify,” he said. “All of this is fraught with very, very dangerous consequences. For the system. For the defense. And maybe for the prosecutor if he's caught violating” the Code of Criminal Procedure.

DO FAKE SUBPOENAS CROSS AN ETHICAL LINE? A LEGAL ONE?

Cannizzaro's office has been accused of overly aggressive tactics. Prosecutors frequently use the state's habitual offender law (http://www.theadvocate.com/new_orleans/news/courts/article_cb112404-8803-11e6-a553-ef6f3cbe5dd.html) to secure long sentences, even for nonviolent crimes. They have charged witnesses with perjury (https://www.buzzfeed.com/albertsamaha/he-says-police-pressured-him-to-lie-now-perjury-charges?utm_term=.vDbQDEr#.dkJwAn6N) if they recant their testimony.

And earlier this month, the watchdog group Court Watch NOLA found several cases in which the DA's office obtained arrest warrants (<http://www.courtwatchnola.org/wp-content/uploads/2014/04/2016-CDC-Report.pdf>) for victims of crimes because they did not cooperate with prosecutors.

New Orleans City Councilman and defense attorney Jason Williams said the use of fake witness subpoenas

fits into a pattern of overzealous prosecution.

“I can only imagine how dangerous this could potentially be,” he said. “If older assistant district attorneys are encouraging younger, less experienced [assistant district attorneys] to do this, it creates a culture.”

Ibert said he thinks the fake subpoenas may be a type of forgery. The documents don't include a judge's name or signature. But Louisiana's law on forgery (<http://legis.la.gov/Legis/Law.aspx?d=78648>) includes “to alter, make, complete, execute, or authenticate any writing so that it purports ... to be the act of another who did not authorize that act.”

At the very least, Ibert said, the practice violates the rules of conduct for attorneys. One of those rules requires lawyers to be truthful when dealing with third parties (<https://lalegaethics.org/louisiana-rules-of-professional-conduct/article-4-transactions-with-persons-other-than-clients/rule-4-1-truthfulness-in-statements-to-others/>) such as witnesses and victims.

The fake subpoenas could violate that rule, he said, because “you've misrepresented yourself to a third party.”

Bowman responded, “You're talking to criminal lawyers that do not want the district attorney to get witnesses to come into court. ... Criminal lawyers who don't want witnesses cooperating at all.”

Generally, he said, “I guess the question is, has anyone been fined and imprisoned? Which according to the stuff you've showed me so far, they absolutely have not been.”

“You're talking to criminal lawyers that do not want the district attorney to get witnesses to come into court.”
—Assistant District Attorney Chris Bowman

Pete Adams, the director of the Louisiana District Attorneys Association, declined to comment on the practice.

Ibert, who served as an assistant district attorney under Harry Connick and Eddie Jordan, admitted they used a similar tactic. The office had “preprinted forms that said ‘subpoena,’” he said. “They were normally

sent with a letter that said, please meet with me.”

Ibert said those documents did not, however, threaten jail or fines. He stopped using them after he was warned by a magistrate commissioner that they were likely illegal.

Williams said he believes the bar association will look into the matter. “At the end of the day, it's a ruse.”

If a defense attorney did something similar, Williams said, “I guarantee you this DA would try to prosecute that defense attorney.”

This story was updated after publication to reflect the New Orleans Advocate's report that the practice will end. (April 26, 2017)

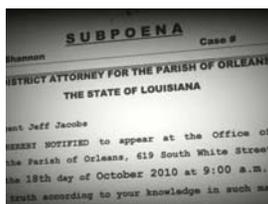
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Practice of fake subpoenas to be stopped by Orleans DA

Paul Murphy , WWLTV 8:37 PM. CDT April 27, 2017



NEW ORLEANS - For years, The Orleans District Attorneys office under several DA administrations, sent some witnesses written notices with the word "Subpoena" on the top, notifying them if they didn't speak with prosecutors, they could be forced to pay fines or even serve jail time.

[The prosecutorial practice was first reported by the investigative website The Lens \(http://thelensnola.org/2017/04/26/orleans-parish-prosecutors-are-using-fake-subpoenas-to-pressure-witnesses-to-talk-to-them/\).](http://thelensnola.org/2017/04/26/orleans-parish-prosecutors-are-using-fake-subpoenas-to-pressure-witnesses-to-talk-to-them/)

Thursday, District Attorney Leon Cannizzaro told WWL-TV, his office is dropping the subpoena heading from its notices and admitted the DA's office does not have the power to simply issue a subpoena without a judge's okay.

"It was improper for us, it was incorrect for us to label those notices as a subpoena," Cannizzaro said. "That was incorrect. It was improper and I take responsibility for that."

The amended document now reads as "Notice to Appear."

The DA's use of the so called subpoenas was a topic of discussion at the New Orleans City Council Criminal Justice Committee hearing at City Hall.

Committee Chair Susan Guidry said that issuing fake subpoenas is a form of prosecutorial abuse.

"I understand the public safety aspect of wanting with all your being to get the witness to come forward.," Guidry said. "But, if it can't happen legally, then it shouldn't happen."

Council Vice President Jason Williams, a high profile criminal defense attorney, said sending out the misleading witness notices is fraud.

"It might even be prosecutable," Williams said. "There is nothing in the Code of Evidence or Code of Criminal Procedure that allows a district attorney or a prosecutor to do this."

Williams added that the revelation of "fake subpoenas" has the potential to overturn some criminal convictions.

"You don't know how often they've been doing it, in what cases they've been doing it," Williams said. "A lot of defense attorneys are going to be looking into cases they've tried to find out if this tactic was used."

"There are no consequences, there are no legal consequences for the person who is the subject of that notice if they do not show up," Cannizzaro said. "No case has been presented to me where someone was arrested because they failed to honor a District Attorney's notice."

Loyola Law School Professor Dane Ciolino said sending out a document, stamped as a subpoena is unethical and potentially a violation that could be investigated by the state judiciary committee.

"The DA is supposed to file a motion, go before a judge ask for the issuance of a subpoena from the court," Ciolino said. "That isn't the way the District Attorney's Office is currently doing it."

Cannizzaro maintains his office only used the so called subpoenas to to bring reluctant witnesses into their office and to help make good cases against bad people.

"I don't want to be the one that says we're just going to dismiss the case, we're not going to try and get evidence against this violent offender," Cannizzaro said. "I don't want to put that type of person back out on the street."

As of this week, the District Attorney Subpoenas will no longer be used.

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The Lens (<http://thelensnola.org/2017/06/14/new-orleans-prosecutor-used-fake-subpoena-to-see-arrest-warrant-for-victim-of-alleged-domestic-violence/>)

Criminal Justice

Prosecutor tried to jail victim of alleged domestic violence after she didn't obey fake subpoena

By Charles Maldonado, Staff writer June 14, 2017 3:37pm

In defending the use of fake subpoenas that threatened fines and jail (<http://thelensnola.org/2017/04/26/orleans-parish-prosecutors-are-using-fake-subpoenas-to-pressure-witnesses-to-talk-to-them/>), Orleans Parish District Attorney Leon Cannizzaro said he doesn't know of anyone who's been locked up for ignoring one.

That's not for lack of trying. In January, a prosecutor sought to arrest a victim of alleged domestic violence in part because she had failed to obey a fake subpoena.

A judge issued the arrest warrant, but she soon recalled it after the DA's office decided to drop charges against the victim's ex-boyfriend.

In an interview, Cannizzaro acknowledged his office issued the fake subpoena and the prosecutor cited it when seeking the arrest warrant.

He defended those actions, noting that the victim had gone to police twice but had stopped cooperating with prosecutors.

"The law is designed so that, if you make a complaint, there should be some responsibility on your part to follow up with that complaint," Cannizzaro said. "This criminal justice process is not like an invitation to a party, where you have the right to decline to show up."

Live chat Thursday: Discuss our ongoing investigation into fake subpoenas with reporter Charles Maldonado (<http://thelensnola.org/2017/06/14/live-chat-thursday-discuss-the-lens-reporting-on-fake-subpoenas-in-and-around-new-orleans/>)

"This criminal justice process is not like an invitation to a party, where you have the right to decline to show up."

—District Attorney Leon

An expert in prosecutorial misconduct has said it's improper for prosecutors to mislead people by sending them fake subpoenas.

Obtaining an arrest warrant based partly on a fake subpoena "raises the level of

Cannizzaro

misconduct," said Bennett Gershman, a Pace University law professor.

"Now there are real consequences," he said. "That's a huge difference. You're no longer in this sort of hypothetical realm of no harm, no foul."

The day The Lens reported on the use of fake subpoenas, Cannizzaro's office announced it would stop (http://www.theadvocate.com/new_orleans/news/courts/article_c5b44baa-2ab3-11e7-911d-2b796cd09c6e.html) .

The Jefferson Parish DA's office also sent notices falsely labeled subpoenas (<http://thelensnola.org/2017/04/27/prosecutors-in-jefferson-parish-have-used-fake-subpoenas-similar-to-those-in-new-orleans/>) . On the North

Shore, prosecutors sent notices that weren't called subpoenas, but looked like official court notices (<http://thelensnola.org/2017/05/19/notices-sent-to-witnesses-on-north-shore-werent-called-subpoenas-but-they-looked-real-enough/>) .

Those agencies also said they'd stop immediately.

The notices sent by Cannizzaro's office threatened fines and imprisonment if people didn't show up for questioning. But they were not authorized by a judge or issued by the Clerk of Court, as the law requires.

Those were empty threats — or so it appeared until we saw an arrest warrant in a file at the courthouse.

NEW ORLEANS COP CHARGED WITH DOMESTIC VIOLENCE

James Cunningham, an officer with the New Orleans Police Department, was arrested twice in 2015 on allegations of domestic violence.

In January 2015, Cunningham's girlfriend said he kicked in her door (http://www.nola.com/crime/index.ssf/2015/01/girlfriend_tells_investigators.html) and injured her as she fought him off, according to a police report. In August 2015, he allegedly grabbed her and stopped her from leaving her house (http://www.nola.com/crime/index.ssf/2015/08/nopd_officer_arrested_suspende.html) , according to NOLA.com/The Times-Picayune.

Cunningham was charged with home invasion, domestic abuse battery and false imprisonment. The NOPD fired him in 2016 (http://www.nola.com/crime/index.ssf/2016/04/nopd_officer_fired_before_dome.html) .

In January of this year, a prosecutor was preparing to take the cases to trial after several delays. But the victim wasn't cooperating.

She didn't respond to a subpoena (<https://www.documentcloud.org/documents/3862996-State-v-Cunningham-Motion-for-Bond.html#document/p1/a357480>) to appear at a trial on Jan. 25, according to a court filing by Assistant District Attorney William Dieters.

The victim declined to comment for this story. The Lens has decided not to identify her because of the nature of the charges.

The clerk's office had issued a subpoena — a real one — to the victim for that trial. It was delivered by a

**"If they've described it as a subpoena and it's not, that's not proper."
—Dane Ciolino, Loyola University**

However, the deputy left the trial subpoena at her door (<https://www.documentcloud.org/documents/3862998-State-v-Cunningham-Subpoena-Returns.html#document/p2/a357486>). That's not considered proper service (<https://www.legis.la.gov/legis/Law.aspx?d=112747>) under state law (https://casetext.com/case/state-v-dillon-12?passage=8X_qiBOzZnNCLynBjS-zoA).

Cannizzaro acknowledged that. He said deputies typically try several times to serve subpoenas properly before they leave them at someone's door, though he's not sure if that happened in this case.

Phil Stelly, spokesman for the Orleans Parish Sheriff's Office, said in a written statement that deputies "make every effort" to serve court papers to the people named or someone who lives with them.

DA'S OFFICE DELIVERS FAKE SUBPOENA

The trial was rescheduled for Jan. 27. In the meantime, according to Dieters, a victim counselor with the DA's office called the woman several times. She didn't answer.

So the DA's office tried another subpoena.

"The Assistant District Attorney attempted to serve the victim with a subpoena through an investigator," Dieters wrote in the court filing (<https://www.documentcloud.org/documents/3862996-State-v-Cunningham-Motion-for-Bond.html#document/p1/a357480>) requesting the victim's arrest. "No one answered at the address provided to the District Attorney's Office."

That document (<https://www.documentcloud.org/documents/3862997-State-v-Cunningham-Motion-to-Quash.html#document/p6/a357484>) summoning her on Jan. 27 is identical to the fake subpoenas The Lens has found in other cases.

The victim received it Jan. 26, according to a court filing by the victim's attorney, Anthony Ibert.

Like other fake subpoenas sent by the Orleans DA's office, the notice threatened punishment if it was ignored and purported to have been authorized by a specific part of state law (<https://www.legis.la.gov/legis/Law.aspx?d=112685>).

Cannizzaro's office would have been authorized to deliver a real subpoena ordering the victim to appear at the rescheduled trial.

Cannizzaro said Dieters decided to use the fake one — the office calls them "DA subpoenas" — because he needed the victim to come to the DA's office to prepare her first.

Jan. 25 trial Real subpoena, served improperly, ordered victim to court

Jan. 27 trial Fake subpoena ordered her to come to DA's office

Dieters asked Criminal District Court Judge Laurie White to issue an arrest warrant for the victim with a

That's called a material witness bond. The DA's office can use them to jail reluctant witnesses until they testify.

To get one, a prosecutor has to demonstrate (<http://legis.la.gov/Legis/Law.aspx?d=79016>) that the witness is essential to a case and that it may be too difficult to get the person to show up in court with a subpoena.

"Her testimony about what occurred is essential for the State to meet its burden," Dieters wrote. "The State has reason to fear [the victim] will not appear in Court pursuant to a subpoena."

Cannizzaro's office has been criticized for jailing witnesses and victims. In April, the watchdog group Court Watch NOLA identified 30 arrest warrants (<http://www.courtwatchnola.org/wp-content/uploads/2014/04/2016-CDC-Report.pdf>) sought by his office for victims and witnesses in 2016.

Cannizzaro said his office does that as a last resort.

In this case, he said, Cunningham had allegedly attacked the victim twice. Cunningham was a police officer, and Cannizzaro said the prosecutor didn't want Cunningham to intimidate the woman into abandoning her case.

If another incident had occurred, "I want to say that we did everything that we could to prevent this person from going out and hurting her a third or subsequent time," Cannizzaro said. "We are attempting to make sure that we can keep the violent offender from hurting the victim again or hurting some other innocent person."

Dieters' request to arrest the victim did not offer the subpoena itself as evidence. Instead, he provided a printout from the court's electronic witness roster, which should only include records of genuine subpoenas.

According to a court filing by Ibert, the victim's lawyer, the victim only received a fake subpoena for Jan. 27.

The computer system has an entry for a Jan. 27 subpoena (<https://www.documentcloud.org/documents/3862996-State-v-Cunningham-Motion-for-Bond.html#document/p8/a357487>). But the court clerk's office has no corresponding record of a genuine subpoena or a return, which is what a deputy or an investigator brings back to the clerk's office to demonstrate a subpoena was served.

Clerk of Criminal Court Arthur Morrell said the DA's office should have records of the subpoena and the return. The Lens has submitted a public records request for them.

Fake subpoena sent to victim in domestic violence case (p. 6)

(<http://www.documentcloud.org/documents/3862997-State-v-Cunningham-Motion-to-Quash.html#document/p6/a357484>)

**"The State has reason to fear [the victim] will not appear in Court pursuant to a subpoena."
—Prosecutor William Dieters, seeking an arrest warrant**



SUBPOENA

A FINE AND IMPRISONMENT MAY BE IMPOSED FOR FAILURE TO OBEY THIS NOTICE.

Office of the Orleans Parish District Attorney
CRIMINAL DISTRICT COURT FOR THE PARISH OF ORLEANS

To:

You Are Hereby Notified pursuant to LSA-CCRP art. 66 to appear before the District Attorney for the Parish of Orleans, to testify to the truth according to your knowledge in such matters as may be required of you.

on FRIDAY, JANUARY 27, 17
at 9:00 AM

to Assistant District Attorney:

WILLIAM DIETERS

phone #:

at 619 South White Street

In the case of:

State of LA vs. JAMES CUNNINGHAM

Item # A-14485-15

Case # 523-272 "A"

Charge(s): RS. 14:62.8

Instructions:

Contact the above named Assistant District Attorney upon receipt of this subpoena.

Bring this subpoena with you to the District Attorney's Office when you appear to testify.

RETURN OF PERSONAL SERVICE

THIS IS TO CERTIFY that on

I received the process of Court of which this is a duplicate.

Recipient of Service

THIS IS TO CERTIFY that on

I made due Personal Service thereof by leaving same in the hands of the aforesigned Recipient

(please write Recipient's name),

the person to whom the process is directed.

Server of Process

RETURN OF DOMICILIARY SERVICE

THIS IS TO CERTIFY that on

I received the process of Court of which this is a duplicate.

Recipient of Service

THIS IS TO CERTIFY that on

I made due Personal Service thereof by leaving same in the hands of the aforesigned Recipient

(please write Recipient's name),

a person of suitable age and discretion, residing at the domicile of the person to whom the said process of Court was issued, who was absent at the time, which fact I learned by interrogating the person in whose hands the said process was left.

Server of Process

EX. 1

(<http://www.documentcloud.org/documents/3862997-State-v-Cunningham-Motion-to-Quash.html#document/p6/a357484>)

View the entire document with DocumentCloud (<http://www.documentcloud.org/documents/3862997-State-v-Cunningham-Motion-to-Quash.html#document/p6/a357484>)

JUDGE ISSUES ARREST WARRANT, THEN RECALLS IT

White initially granted Dieters' request, signing an order (<https://www.documentcloud.org/documents/3862996-State-v-Cunningham-Motion-for-Bond.html#document/p3/a357482>) to arrest the victim.

Cannizzaro said that according to Dieters, White knew the "subpoena" cited in his motion was invalid. But she granted the order, Cannizzaro said, because Dieters described the repeated efforts to reach the victim.

“The judge made a statement on the record that the DA subpoena, it's not a valid subpoena. It's not an Article 66 subpoena,” Cannizzaro said, referring to the part of state law that spells out how prosecutors can force people to come talk to them (<https://www.legis.la.gov/legis/Law.aspx?d=112685>).

White denied that.

“Of course I would never issue a warrant for any victim based on a fake subpoena,” she said in an interview.

The Lens was not immediately able to obtain a transcript of the hearing.

**“Of course I would never issue a warrant for any victim based on a fake subpoena.”
—Criminal District Court Judge Laurie White**

After that, Dieters asked to reschedule the case. White refused, saying it had been delayed too many times, according to a clerk's notes in the court file.

So the DA's office decided to drop the charges against Cunningham, and White recalled the order granting the arrest warrant, according to the clerk's notes.

The judge then considered Ibert's motion to throw out the fake subpoena and the arrest warrant (<https://www.documentcloud.org/documents/3862997-State-v-Cunningham-Motion-to-Quash.html>) for his client. But the issue was moot because she had already recalled the warrant.

LAWYER SAYS VICTIM HAD HEADED PRIOR SUBPOENAS

Ibert's motion included a copy of the fake subpoena and described why it was invalid.

He wrote that his client had received “what appears to be an Art. 66 subpoena” from a neighbor who lives in the same apartment building.

Under Article 66 of the Code of Criminal Procedure, a prosecutor must ask a judge in writing and explain why he needs to speak with the person. If the judge approves the request, the Clerk of Court issues the subpoena.

None of that happened, Ibert wrote.

Moreover, he wrote, his client never received anything telling her to appear for a trial on Jan. 27.

The victim had appeared in court for previously scheduled trials, Ibert wrote. “Clearly, her repeated presence at court in response to a properly issued and served subpoena demonstrates her willingness to comply with the law.”

**The alleged victim “has been told that she will be jailed if she does not cooperate without being told what entails cooperation.”
—Anthony Ibert, lawyer for the victim**

He declined comment for this story because he didn't have permission from his client to discuss the case.

The woman had told the DA's office that she didn't want to pursue charges against Cunningham, Ibert wrote.

“She has been told that she will be jailed if she does not cooperate without being told what entails cooperation,” he wrote.

'NO LEGAL CONSEQUENCES' FOR FAKE SUBPOENAS?

The DA's office has discontinued the practice (http://www.theadvocate.com/new_orleans/news/courts/article_c5b44baa-2ab3-11e7-911d-2b796cd09c6e.html) of sending fake subpoenas. In an interview on WWL-TV (<http://www.wwltv.com/news/local/orleans/practice-of-fake-subpoenas-to-be-stopped-by-orleans-da/434702306>), Cannizzaro said they were improper but characterized them as relatively harmless.

"There are no legal consequences for the person who is the subject of that notice if they do not show up," he said.

Gershman, the expert in prosecutorial misconduct, took issue with that.

**Dieters threatened "real consequences that can have a huge impact on a person's liberty, their reputation."
—Bennett Gershman, Pace University**

Until he saw this court file, Gershman said, it appeared prosecutors were just trying to bully witnesses.

"Now they're asking a judge to issue an arrest warrant based in part on a fake subpoena," he said.

Gershman said Dieters threatened "real consequences that can have a huge impact

on a person's liberty, their reputation."

Loyola University Law Professor Dane Ciolino, a legal ethics expert, said prosecutors seeking a material witness bond can give any reason for believing the person won't show up in court. If a witness ignores a subpoena, doesn't answer phone calls from the DA's office or simply says he won't show up, that's all relevant.

"It's really up to the judge to evaluate whether that's sufficient evidence," he said.

But everything in the motion has to be true. Referring to a fake subpoena as a "subpoena" in a motion is not OK, he said.

"First of all, it's not a subpoena," he said. "If they've described it as a subpoena and it's not, that's not proper."

Asked about the wording his prosecutor used, Cannizzaro cited the Latin definition of the word *subpoena*. Literally, it means "under penalty."

"Essentially," he said, "the term says, listen, if you don't respond, there may be a consequence for your failure to respond."

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The Lens (<http://thelensnola.org/2017/05/03/will-prosecutors-who-sent-fake-subpoenas-face-any-consequences/>)

Criminal Justice

Will prosecutors who sent fake subpoenas face any consequences?

By Charles Maldonado, Staff writer May 3, 2017 8:21pm

Last week, the district attorneys in Orleans and Jefferson parishes admitted their prosecutors had sent fake subpoenas to witnesses in criminal cases (<http://thelensnola.org/2017/04/26/orleans-parish-prosecutors-are-using-fake-subpoenas-to-pressure-witnesses-to-talk-to-them/>) to pressure them to talk.

Legal experts say the practice was unethical, if not illegal. In an interview with WWL-TV, Orleans Parish District Attorney Leon Cannizzaro acknowledged the practice was “improper (<http://www.wwltv.com/news/local/cannizzaro-subpoenas-improper-incorrect/434680017>).”

What, if any, consequences will be faced by the prosecutors who sent the bogus subpoenas?

We spoke with a former U.S. Department of Justice attorney, a former U.S. Attorney and a former prosecutor turned public-corruption watchdog. The possible consequences range from federal prosecution to discipline by the state board that oversees attorney conduct.

But it's not at all certain that anything will happen — even though many people, including the Louisiana District Attorneys Association, now acknowledge prosecutors shouldn't have sent the false notices.

“Obviously it was inappropriate and I think those practices have been discontinued,” said Pete Adams, the group's executive director. He had declined to comment for The Lens' initial story detailing what was going on.

The U.S. Attorney's Office, the Louisiana Attorney General's Office and the Office of Disciplinary Counsel all declined to confirm or deny any investigations.

In both parishes, prosecutors delivered notices labeled “SUBPOENA” to witnesses, telling them they had to show up at the DA's office for questioning. Those so-called subpoenas were sent without a judge's approval, which is required by state law. So they had no legal authority.

The notices sent from the Orleans Parish DA's office threatened fines or jail time if the recipient ignored them. The ones from the Jefferson Parish DA's office didn't.

Late Wednesday afternoon, North Shore District Attorney Warren Montgomery said in a written statement that “documents that look like subpoenas” had been issued without his knowledge under his watch and his

Have you received one of these fake subpoenas? We want to talk to you. Email editor@thelensnola.org (<mailto:editor@thelensnola.org>) , or call or text 504-229-2346.

predecessor's.

His district includes St. Tammany and Washington parishes.

“While the documents did not mention the word ‘subpoena,’ I consider this misleading and unacceptable, and it has been discontinued,” Montgomery said.

Last week, after we informed the Orleans Parish DA's office that experts had told us its notices could be illegal, the office abruptly announced it would stop using them (http://www.theadvocate.com/new_orleans/news/courts/article_c5b44baa-2ab3-11e7-911d-2b796cd09c6e.html). The Jefferson Parish DA's office said its prosecutors used similar notices (<http://thelensnola.org/2017/04/27/prosecutors-in-jefferson-parish-have-used-fake-subpoenas-similar-to-those-in-new-orleans/>) and would also stop.

Locally (http://www.nola.com/opinions/index.ssf/2017/04/da_fake_subpoenas.html) and nationally (<https://www.washingtonpost.com/news/the-watch/wp/2017/04/26/report-new-orleans-prosecutors-threatening-witnesses-with-fake-subpoenas/>), public reaction was swift and sharp. Defense attorney and New Orleans City Councilman Jason Williams said if a defense attorney had done something similar, “I guarantee you this DA would try to prosecute that defense attorney.”

Could that sort of thing happen? Here's what we've learned.

DID FAKE SUBPOENAS VIOLATE FEDERAL CIVIL RIGHTS LAW?

Chiraag Bains, a former Department of Justice civil rights attorney and a senior fellow at Harvard Law School, told The Lens prosecutors' use of fake subpoenas may be a criminal civil rights violation (<https://www.law.cornell.edu/uscode/text/18/242>).

Bains served as a senior counsel to the Assistant Attorney General for the Justice Department's Civil Rights Division under President Barack Obama.

He said the practice “raises potential constitutional issues.”

The U.S. Supreme Court has held that compelling a witness to appear through a lawful subpoena isn't a type of seizure (<http://caselaw.findlaw.com/us-supreme-court/410/1.html>) under the Fourth Amendment. But an unlawful subpoena may be a different story, he said.

“A person might well be able to argue that being unlawfully compelled to appear and testify at a prosecutor's office, on threat of a fine and imprisonment, is an unreasonable seizure under the Fourth Amendment,” Bains said in an email.

And forcing defense witnesses to appear before prosecutors in advance of a trial “could raise due process issues,” he said. He cited a 1976 federal appeals court decision (<http://openjurist.org/535/f2d/223/united-states-v-morrison-boscia>) overturning a guilty verdict in a drug case. In that case, a prosecutor used an

“A person might well be able to argue that being unlawfully compelled to appear and testify at a prosecutor's office, on threat of a fine and imprisonment, is an unreasonable seizure under the Fourth Amendment.”

invalid subpoena to bring a defense witness in for questioning, then tried to intimidate her not to testify.

—**Chiraag Bains, Harvard Law School**

“The appeals court held that the prosecutor’s conduct deprived the defendant of his right to call witnesses on his behalf,” Bains said.

The misuse of the subpoena was clearly a factor in the decision, he said.

“If it could be proven that a prosecutor knew that a certain course of action would be unlawful and took that action anyway, the prosecutor would have criminal exposure,” Bains said.

State law spells out how these types of subpoenas can be issued (<https://www.legis.la.gov/legis/Law.aspx?d=112685>). Prosecutors must file a written motion with a judge presenting “reasonable grounds” for why they need to meet with the witness. The judge can order the court clerk to issue the subpoena.

A former U.S. attorney in New Orleans, however, said federal charges are unlikely.

“It does not appear that they were seeking to harm anyone, as opposed to gathering the facts,” Harry Rosenberg said.

“What I could see reading your articles, prosecutors in both parishes were well-intentioned in terms of trying to develop their cases against their defendants, and obviously stepped outside the boundaries,” he said.

Bains said the criminal statute on civil rights violations is typically used to prosecute police officers for excessive force. The law was used to prosecute New Orleans police officers in the Danziger Bridge shootings and the killing of Henry Glover after Hurricane Katrina.

“Prosecutors in both parishes were well-intentioned in terms of trying to develop their cases against their defendants, and obviously stepped outside the boundaries.”

—former U.S. Attorney Harry Rosenberg

But the Department of Justice “has charged prosecutors and judges under this provision for unlawful conduct,” he said.

In one case last year, a federal immigration prosecutor in Seattle was sentenced to a month in prison and banned from practicing law for 10 years (<https://www.justice.gov/usao-wdwa/pr/former-immigration-court-prosecutor-sentenced-prison-falsifying-document>) after he pleaded guilty to falsifying records in a case.

But to pursue such a case, Rosenberg said, federal prosecutors would have to prove not only that assistant district attorneys knew the fake subpoenas were illegal, but that they intentionally used them to harm witnesses — and that the witnesses were harmed.

He said he doesn’t believe prosecutors did that.

The Lens has found three cases in Orleans Parish in which fake subpoenas were delivered to witnesses. All

three were connected to the defendants. The subpoenas were sent out within weeks or days of trial.

In one case, a woman told The Lens that people with the Orleans Parish DA's office verbally threatened her with jail twice (<http://thelensnola.org/2017/04/28/woman-who-got-fake-subpoena-from-orleans-parish-da-said-she-was-told-she-could-be-jailed-if-she-ignored-it/>), including once after her lawyer had gone to court to quash the so-called subpoena.

Rosenberg said the DA's decision to stop sending the fake subpoenas helps them.

“Given that both district attorneys offices immediately ceased what they were doing, I think it mitigates to their favor that this is not going to rise to a violation of the Civil Rights Act,” he said. “Once it was brought to their attention, it ceased immediately.”

“We do not believe that any ‘DA subpoenas’ that may have been delivered by this office to a reluctant witness without going through the court process resulted in any undue advantage to the state.”

—Jefferson Parish DA's office

Chris Bowman, an assistant district attorney and spokesman for Cannizzaro, has told The Lens he didn't know how often the notices were sent out, but they had been used for decades.

He declined an interview request for this article. The assistant district attorneys whose names we've seen on fake subpoenas declined to comment or didn't respond to phone calls.

In a written statement Wednesday night, the Jefferson Parish DA's office said that the law requires only a request, not a hearing with prosecutors and defense attorneys. The motion is “generally considered to be a perfunctory step,” the statement said.

“We strongly believe that any subpoena that may have been issued without such a motion would have been signed and ordered issued by a court, had such a motion been presented,” the statement continued.

“As such, we do not believe that any ‘DA subpoenas’ that may have been delivered by this office to a reluctant witness without going through the court process resulted in any undue advantage to the state.”

WHAT ABOUT STATE CHARGES?

Defense lawyers and a nationally known expert in legal ethics have said the fake subpoenas may be a state crime.

Colin Reingold, a lawyer with Orleans Public Defenders, told The Lens last week the practice “borders on fraud or forgery.”

The so-called subpoenas don't include a judge's name or signature. But Louisiana's law on forgery (<http://legis.la.gov/Legis/Law.aspx?d=78648>) includes “to alter, make, complete, execute, or authenticate any writing so that it purports ... to be the act of another who did not authorize that act.”

Rafael Goyeneche, a former Orleans Parish prosecutor and now president of the Metropolitan Crime Commission, said he doesn't think the fake subpoenas were criminal.

He said prosecutors used them when he was with the office in the 1980s. “No one knows when it started and who started it,” he said.

Unlike the cases The Lens has found, Goyeneche said he remembers they were mainly used in white-collar cases, not street crime.

“Do I believe that’s a prosecutable offense? I’m not sure what statute you could prosecute it under.”

—Rafael

Goyeneche, Metropolitan Crime Commission

“Upon reflection, it was inappropriate,” he said. “Do I believe that’s a prosecutable offense? I’m not sure what statute you could prosecute it under.”

ATTORNEY DISCIPLINE

Attorneys must uphold certain rules of conduct. If they break the rules, they can be disciplined by the Louisiana Attorney Disciplinary Board or the Louisiana Supreme Court.

Punishment could range from reprimand to disbarment.

Loyola University law professor and legal ethics expert Dane Ciolino said the use of fake subpoenas may violate a rule requiring lawyers to be truthful to third parties (<https://lalegaethics.org/louisiana-rules-of-professional-conduct/article-4-transactions-with-persons-other-than-clients/rule-4-1-truthfulness-in-statements-to-others/>) such as witnesses and victims.

The disciplinary process begins with an investigation by the Office of Disciplinary Counsel. It decides whether to refer a case to the board. Anyone can file a complaint (<https://www.ladb.org/Complaint/HowTo.aspx>)

Even if the office hasn’t received a complaint, Rosenberg said, the Office of Disciplinary Counsel probably is monitoring news coverage of the fake subpoenas.

In a phone interview, Chief Disciplinary Counsel Charles Plattsmier said he has seen the news coverage. But under state Supreme Court rules, he is not allowed to reveal the existence of an investigation or comment on an ongoing one.

The Lens found two cases in other states in which similar practices resulted in discipline for the attorneys involved.

In 2013, the Oklahoma Supreme Court suspended former prosecutor Brad Miller for six months for prosecutorial misconduct (<http://newsok.com/article/3856251>). The discipline was related to a 20-year-old murder case he had prosecuted; the convictions were overturned in 2009.

Miller used fake subpoenas to pressure three girls — potential witnesses aged 9, 12 and 14 — to meet with prosecutors about the case. He used the fake subpoenas to obtain arrest warrants for the girls.

The use of fake subpoenas was just one of a number of charges against Miller.

In its opinion, the Oklahoma Supreme Court called the conduct “reprehensible.”

Earlier this year, the New Mexico Supreme Court reprimanded district attorney Donald Gallegos and his

deputy Emilio Chavez (<http://taosnews.com/stories/supreme-court-revisits-disciplinary-matter-involving-gallegos-chavez,38809>) after finding that Chavez had sent 94 fake subpoenas to obtain phone records from mobile phone companies.

Unlike Orleans Parish, where the fake subpoenas don't appear in court records, Chavez filed the documents in court and had them assigned to "miscellaneous case files," according to the Supreme Court opinion.

Gallegos authorized some of the subpoenas but said he was not aware of most of them.

Supreme Court justices noted the wording on the fake subpoenas, which was similar to the wording that Orleans prosecutors used (<https://www.documentcloud.org/documents/3677078-Tiffany-LaCroix.html#document/p5/a350214>). The template for the documents, they wrote, "contains a stern warning to its addressees: 'IF YOU DO NOT COMPLY WITH THIS SUBPOENA you may be held in contempt of court and punished by fine or imprisonment.'"

"In this case," the justices continued, "sending subpoenas that implied court authority, but lacked it, affected the rights of the subpoena recipients and third parties."

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Thursday, Apr 27, 2017 04:11 PM CST

New Orleans district attorney has been sending fake subpoenas to witnesses to make them testify

“There’s no question this is improper”

[Charlie May Skip to Comments](#)

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(Credit: Shutterstock/sirtravelalot)

The Orleans Parish district attorney’s office has been caught issuing fake subpoenas that threatened if the recipient ignored the notice he or she would be fined or imprisoned, [according](#) to The Lens.

Last November Tiffany Lacroix, received one of these “subpoenas” in the mail from District Attorney Leon Cannizzaro’s office. “A FINE AND IMPRISONMENT MAY BE IMPOSED FOR FAILURE TO OBEY THIS NOTICE,” it read. She was ordered to talk with a prosecutor prior to an upcoming trial for Cardell Hayes, a man charged with the murder of former New Orleans Saints football player Will Smith.

By law, when subpoenas are issued they must come from the clerk of court after being authorized by a judge in order to prevent “possible abuse” from a district attorney’s office. Lacroix’s notice was not approved by the court — which is potentially illegal or at least unethical — and she would not have been jailed or fined for failing to adhere to its demands.

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“There’s no question this is improper,” Pace University law professor Bennett Gershman, a former prosecutor in New York City and an expert in prosecutorial misconduct, told The Lens. He added, “Clearly, it’s unethical because the prosecutor is engaging in fraudulent conduct.”

Assistant District Attorney Chris Bowman, who serves as Cannizzaro’s spokesman, defended the use of the potentially illegal fake subpoenas and referred to them as “notifications” or “notices.”

“The district attorney does not see any legal issues with respect to this policy,” he told The Lens.

The Lens reported:

But Wednesday, after The Lens told Bowman that our story would report that legal experts say the practice could be illegal, The New Orleans Advocate reported [that the DA’s office had announced it would end the practice](#). The Lens received no such announcement.

Bowman didn’t know how often these notices are used, but he said the practice predates Cannizzaro’s tenure by decades.

The Lens has found three recent cases in which witnesses received the so-called subpoenas. In two cases, people with ties to the defendant received them days before the trial. A lawyer told us about another instance, but we couldn’t confirm it.

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Dane Ciolino, a Loyola law professor and legal ethics expert, told The Lens, “It is inappropriate for the District Attorney’s Office to falsely suggest that this document is a ‘subpoena.’”

Under Louisiana law, district attorneys are allowed to privately meet with witnesses outside of a courtroom, but subpoenas must be authorized by a judge. Failing to respond to such subpoenas can result in the recipient being charged with contempt of court or even arrested.

“To subpoena someone for one of these private interviews, prosecutors have to submit a written application to a judge in which they present ‘reasonable grounds’ to question the person,” according to The Lens. “The judge decides whether to order the court clerk to issue the subpoena.”

In these cases, however, a court did not authorize the so-called subpoenas.

Cannizarro’s office has a history of being accused of “overly aggressive tactics” including ensuring criminals face lengthy sentences — even if the crime is nonviolent — under the state’s repeat offender law,” according to The Lens, which also noted the office has charged witnesses with perjury for walking back on their testimony.

“I can only imagine how dangerous this could potentially be,” New Orleans City Councilman and defense attorney Jason Williams said. “If older assistant district attorneys are encouraging younger, less experienced [assistant district attorneys] to do this, it creates a culture.”

Charlie May is a news writer at Salon. You can find him on Twitter at [@charliejmay](https://twitter.com/charliejmay)