REPORTING CRIME – A CRIME VICTIM'S FIRST AMENDMENT RIGHT

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Imagine: Jane Doe has just been the victim of a sexual assault. She is angry, ashamed, in denial, nervous about entering an unknown criminal justice system, and is terrified that her attacker will come after her again if she reports the crime.

Now imagine: Jane musters the courage to report the crime and cooperate with law enforcement throughout the investigation. After the case ends, defendant files a civil suit, alleging defamation, malicious prosecution, abuse of process, negligent supervision, intentional infliction of emotional distress, negligent infliction of emotional distress, and false arrest, all based on Jane's reporting of the crime and her cooperation with law enforcement.

Unfortunately, this hypothetical is not a hypothetical. These retaliatory lawsuits are frighteningly common and have the aim and effect of chilling victim's First Amendment rights.

WHAT ARE THESE SUITS?

Lawsuits which target victims for reporting crime are known as strategic lawsuits against public participation (SLAPP), a term originally coined by Penelope Canan and George W. Pring, professors of sociology and law, respectively. *See* Penelope Canan and George W. Pring, SLAPPs: GETTING SUED FOR SPEAKING OUT (1996). While SLAPPs come in many forms, in the context of crime victims' rights SLAPPs are most often civil lawsuits brought by a criminal defendant against a crime victim or witness who reported the crime or cooperated with law enforcement during investigation. Camouflaged as ordinary civil tort suits, SLAPPs, present six common claims: 1) defamation, 2) business torts, 3) process violations, including malicious prosecution and abuse of process, 4) conspiracy, 5) constitutional and civil rights violations, and 6) violations of law. *Id.* at 150-151.

SLAPP suits are not ordinary tort cases because they target a victim's First Amendment rights of free speech and public participation through petitioning of government.

WHAT CAN YOU DO IF YOUR CLIENT IS SLAPPED?

Immediately identify the case as a SLAPP and move the case out of the context of simple torts, and into the First Amendment arena.

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and *to petition the Government for a redress of grievances*.

U.S. Const. amend. I (emphasis added). The final clause of the First Amendment, the right to petition the government for a redress of grievances, is fundamental to "the very idea of a government republican in form." *United States v. Cruikshank*, 92 U.S. 542, 552 (1875). *See also United Mine Workers of Am. v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967).

The United States Supreme Court has held that lawsuits brought as an assault on the First Amendment right to petition should be dismissed unless the petitioning activity at issue was a sham. *See Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657 (1965); *California Motor Transp. v. Trucking Unlimited*, 404 U.S. 508 (1972); *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365 (1991). This doctrine, known as the *Noerr-Pennington* Doctrine, originated in the antitrust arena but has long-since been expanded beyond that arena. *See, e.g., Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 59 (1993) (stating "[w]hether applying Noerr as an antitrust doctrine or invoking it in other contexts, we have repeatedly reaffirmed that evidence of anticompetitive intent or purpose alone cannot transform otherwise legitimate activity into a sham"); *Sierra Club v. Butz*, 349 F.Supp. 934 (N.D. Cal 1972) (naming *Noerr* and its progeny as basis for dismissing an "interference with advantageous relationship" suit); *Protect Our Mountain Env't, Inc. v. District Court*, 677 P.2d 1361 (Colo. 1984) (relying on federal case law and establishing a three-prong test for reviewing suits that target petitioning activity in environmental case).

A victim's attorney faced with a retaliatory civil lawsuit must be prepared to argue: 1) the victim's activity was petitioning activity; and 2) the activity was not sham petitioning.

WHAT IS "PETITIONING"?

The right to petition includes petitioning "all departments of the Government." *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). Courts nationwide have found that reporting criminal conduct, executing a criminal complaint with law enforcement, and assisting with a law enforcement investigation each constitute an exercise of the First Amendment right to petition. *See, e.g., Gable v. Lewis*, 201 F.3d 769, 771 (6th Cir. 2000) (noting that "[s]ubmission of complaints and criticisms to nonlegislative and nonjudicial public agencies like a police department constitutes petitioning activity protected by the petition clause"); *Estate of Morris ex. rel. Morris v. Dapolito*, 297 F. Supp. 2d 680, 692 (S.D.N.Y. 2004) (concluding that swearing out a criminal complaint against a high school teacher for assault and seeking his arrest were protected First Amendment petitioning activities); *Lott v. Andrews Ctr.*, 259 F. Supp. 2d 564, 568 (E.D. Tex. 2003) (noting that "[t]here is no doubt that filing a legitimate criminal complaint with law enforcement officials constitutes an exercise of the First Amendment right"); *Arim v. General Motors Corporation*, 520 N.W. 2d 695 (Mich. Ct. App. 1994) (granting summary judgment to individuals who were sued for their participation in a criminal sting operation run based on the First Amendment); *United States v. Hylton*, 558 F. Supp. 872, 874 (S.D. Tex. 1982) (noting that filing a legitimate criminal complaint with law enforcement officials constitutes an exercise of the First Amendment right); *Curry v. State*, 811 So.2d 736, 743 (Fla. Dist. Ct. App. 2002) (finding that complaints, even though numerous, made to law enforcement agencies are protected First Amendment activity regardless of "unsavory motivation" of petitioner).

WHAT IS SHAM PETITIONING?

Only legitimate petitioning activity is protected. "Sham" petitioning is not protected by the First Amendment. Therefore, for a crime victim's reporting and cooperation to be protected that activity must be legitimate, not sham, petitioning.

Sham petitioning was first characterized in *Noerr* as activity that is "nothing more than an attempt to interfere directly with the business relationships of a competitor." *Noerr*, 365 U.S. at 533, n.23. Generally, sham petitioning can be described as objectively baseless petition, or as one court stated, sham petitioning "encompasses situations in which persons use the governmental *process* – as opposed to the *outcome* of that process – as [a] . . . weapon." *Omni Outdoor Advertising*, 499 U.S. at 380 (emphasis in original). *See also See, e.g., California Motor Transport Co v. Trucking Unlimited*, 404 U.S. 508 (1972), *Bill Johnson's Restaurants, Inc. v. National Labor Relations Board*, 461 U.S. 731 (1983), *City of Columbia v. Omni Outdoor Products*, 499 U.S. 365 (1991), and *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, (1993).

WHAT CAN BE ARGUED IN ADDITION TO FEDERAL CONSTITUTIONAL ARGUMENTS?

Many states have Anti-SLAPP statutes that protect First Amendment petitioning activity. While state statutes vary in scope, many contain a procedural safeguard to ensure that sham petitioning is not protected. *See, e.g.,* ME. REV. STAT. ANN. 14 § 556 (2003) (providing that a court will grant a motion to dismiss unless the non-movant can show that the petitioning activity "was devoid of any reasonable factual support or any arguable basis in law and that the moving party's acts caused actual injury to the responding party"); MINN. STAT. ANN. § 554.03 (2000) (protecting activity unless "the conduct or speech constitutes a tort or a violation of a person's constitutional rights."); TENN. CODE ANN. § 4-21-1003 (2004) (creating immunity for "[a]ny person who in furtherance of such person's right of free speech or petition under the Tennessee or United States Constitution in connection with a public or governmental issue communicates information regarding another person or entity to any agency of the federal, state or local government regarding a matter of concern).

WHAT SHOULD WE DO?

Be vigilant – crime victims are targets of reprisal in many forms. Civil lawsuits are one method of reprisal. We must identify these cases as SLAPPs early, reframe the issue as a First Amendment victim's rights issue, and move to dismiss. This is the only way to ensure these suits do not become judicially condoned reprisal.

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