

Cases of Interest from the U.S. Fifth Circuit

By Joseph S. Trytten

***Lefebure v. D'Aquila*, 15 F.4th 650, (5th Cir. Oct. 5, 2021) petition for certiorari pending**

The Fifth Circuit recently stood by a nearly-50-year-old Supreme Court Equal Protection decision—despite expressing serious concerns about allowing prosecutors to implement discriminatory policies of not investigating certain crimes when committed by or against certain groups of people.

The plaintiff in this case alleges that her cousin's husband, a Louisiana state prison warden, brutally and serially raped her while she was living at her cousin's home. The plaintiff sought to bring criminal charges, and the warden was initially arrested for rape. However, the plaintiff alleges that the warden and his defense attorney conspired with the local district attorney and sheriff to protect the warden from investigation or prosecution.

The plaintiff sued the warden, district attorney, and others, alleging a violation of her rights to equal protection and due process under the Fourteenth Amendment. The defendants sought to dismiss the case for lack of standing. The district court partially granted the motion and certified the order for interlocutory appeal.

The Fifth Circuit affirmed the partial dismissal for lack of standing, relying almost exclusively on the 1973 Supreme Court decision *Linda R.S. v. Richard D.* (410 U.S. 614). In *Linda*, a case involving similar facts, the Court held that individuals have no legal interest in how other people are treated by law enforcement. While anyone accused of a crime has an interest in being treated fairly by prosecutors, and victims have an interest in ensuring their own protection from harm, victims do not have a legal right (and therefore have no standing) to see their perpetrators investigated or prosecuted.

The Court emphasized that prosecutorial decisions are generally given wide discretion under the separation of powers doctrine. The Court distinguished between a situation in which a law enforcement entity or prosecutor wrongfully refuses to protect someone from a crime, versus a situation in which the police or prosecutor simply fail to investigate or prosecute a crime that already occurred. In the first situation, the plaintiff has standing because the crime could have been prevented. In the second, the prosecutor's investigation could not change the fact that the crime occurred. Even in a case such as this—where the plaintiff alleges an unlawful conspiracy to avoid prosecution—the law does not grant a cause of action based on discriminatory non-enforcement of the law.

Nonetheless, the Court expressed grave reservations over the effects of its ruling. It even went so far as to agree with the plaintiff's general premise: that a prosecutor with a policy of non-

prosecution for certain types of crimes against certain types of people “may very well be tantamount to a denial of equal protection.” The Court quoted excerpts of the dissent in *Linda* with approval, agreeing with many of its arguments—particularly the notion that a policy of non-prosecution can cause future crimes (and thus give standing to future victims) by removing the deterrent of criminal penalties.

Despite these apparent qualms, the Court made it clear that it was bound by *Linda*—50-year-old precedent that it is—and had no choice but to dismiss the plaintiff’s claims for lack of standing.

In a spirited dissent, Judge James Graves contended that the majority misconstrued the plaintiff’s claims as a “failure to prosecute” when they are more accurately viewed as a “failure to protect”—a type of claim for which the plaintiff would have standing. Adopting many of his arguments from the *Linda* dissent, Judge Graves maintained that a well-known policy of failing to prosecute domestic violence allegations against law enforcement officers can only serve to make those officers more likely to commit sexual crimes in the community. Because the plaintiff had alleged a longstanding policy of not prosecuting law enforcement for sexual crimes, Judge Graves would have found that the plaintiff had pled causation and therefore had standing.



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