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Supreme Court of Texas.
In Re Bexar County Criminal District Attorney's Office, Relator.
No. 05-0613.

September 28, 2006

Appearances:

Clarkson F. Brown (argued), Assistant Criminal District Attorney, Attorney General's Office, Austin, TX, for relator.

Robert W. Wilson (argued) and Christopher John Gale (argued), Law Offices of Gale, Wilson & Sanchez, P.L.L.C., San Antonio, for real party in interest.

Before:

Don R. Willett, Wallace B. Jefferson, Nathan L. Hecht, Harriet O'Neill, Dale Wainwright, David M. Medina, Phil Johnson, Scott A. Brister

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JUSTICE: Please be seated.

JUSTICE: The Court is ready to hear argument in 05-0613, In Re Bexar County Criminal District Attorney's Office Justice Greene, the judge sitting in this Court.

ORAL ARGUMENT OF CLARKSON F. BROWN ON BEHALF OF THE PETITIONER

COURT MARSHALL: May it please the Court. Mr. Brown will present argument for the release. Please observe five minutes for rebuttal.

MR. BROWN: Good morning. The Fourth Court draws an opinion regarding District Attorney on their testimony that there was a prosecution cases which opens up the District Attorney's of Texas to testify every time most prosecution case is filed. The Fourth Court ignore the fact ...

JUSTICE: Well, but we did that then we-- I mean, we did say in King that we have one [inaudible] which the DA sentence -

MR. BROWN: Why?.

JUSTICE: - for example.

MR. BROWN: In the King case the DA sat on did testify. Nobody knows [inaudible] testified, whether he objected or not, whether he objected in order to testify. This Court did not find in King that DA sentence testimony was necessary. And in fact if you read the Fourth Court opinion regarding the King case and the "but for" element that

they looked at regarding procurement, they say that in order to prove the "but for" element you have to have the person to discretion to prosecute testify that for false information the testimony would not appear. If you take the King case in the Fourth Court case and extended to the language of the Fourth Court uses and then other Courts have used, the real problem here not only opening DA's to testify when they have a discretion to prosecute is they knew also after then tells Courts that they must now allow claimant attorneys in underlying cases and defense attorney, in malicious prosecution cases call grand jurors that decide whether to prosecute. If the case law says, when is the discretion of the District Attorneys or the Grand Jury, and in the King case you don't have the grand juries testify. You have sentence merely providing additional evidence which ...

JUSTICE: Okay. Can DA reject or refuse in recognition by the grand jury? And then, and then he ultimately the DA's authority laid the ...

MR. BROWN: All pledge DA can dismissed the case.

JUSTICE : Hold on.

MR. BROWN: I'm sorry.

JUSTICE: Their ultimate decision with go forth prosecution in the kind of which.

MR. BROWN: Correct. But the light standard set forth by this Court is that you have to call the person with the discretion to testi-- discretion to prosecute, and the language specifically said be it the prosecutor or the grand jury. It doesn't say only to get ...

JUSTICE: The ultimate and always is, the prosecutor.

MR. BROWN: Correct. But when it stays at the grand jury. And the King case says-- in the King case it says, says "The decision to prosecute was the grand juries." That's from the King case and the language of this Court and the ele-- and the person with the discretion is the King case states the discretion to prosecute was the grand juries. They then have to, if you take King and the Fourth Courts opinion to its extension you have to a-- grand juries to be called, to be asked the question. "But for" the false information would you indict in this case?

JUSTICE: How would you propose prep-- propose proving that element without intruding on top processes as a work product.

MR. BROWN: I believe the way you do it is the way you did it in the Thrift case which is the same kind of case. And I believe that the King case was going this way. What, what happened in the King case which is surprising with the Fourth Court opinion, the jury was presented with-- in that case it was filed in pieces of false information. And the Fourth Court said they never had the "but for" question. The other side will tell you what-- that's a great case, three DA's testified in that case, this is the Bexar County case. The three DA's had testified now. One of the merit testified to the "but for" question. All they testified about was their investigation how they got the case was have in false information. They never get to the key question, the Fourth Court says, "You must have this testimony for which is the 'but for' question."

JUSTICE: But again how do you -

MR. BROWN: What they ...

JUSTICE: - prove that?

MR. BROWN: In Thrift, what they did was they presented the five pieces of false evidence that was presented to the DA and I think to the law enforcement. And the jury was allowed to draw the conclusion that "but for" all that false information this tep-- this prosecution will not come forward. And I think that's how you have to do it in

order to not violate work product of District Attorneys and in order to not violate the grand jury secrecy. And have this Court test Civil Court were not going to start breaking grand jury shield or we're going to start calling grand juries [inaudible].

JUSTICE: So do you have an expert testify as to elements that a prosecutor considers in determining whether to prosecute ...

MR. BROWN: I think you can call-- in the Thrift case it was simply a matter of-- they just presented so much false information they said well the jury just made the decision that their no--they said no prosecutor but have this much false information.

JUSTICE: I guess what I'm asking is-- I mean, this is an area that, that, that would like person would know that what is amply to employ prosecutor in that decision or you need expert to say, "Here's what a reasonable prosecutor would look at until that is certified."

MR. BROWN: I think all you need is to present to the jury what the elements of the criminal case are. And the jury can say, "All right, here's what was presented." If you have to five elements to the criminal case, well, the five things that they base is on were all false, none of this were true. That case could never been indicted. And I think you have to do that. I know it's a high standard but I think for the public policy standpoint you have to protect the prosecutors and the criminal justice system and the grand juries.

JUSTICE: Would, would you having an expert?

MR. BROWN: You could have an expert. Certainly come in and say, I guess you hire a prosecution perhaps a defense attorney-- criminal defense attorney and say here's the criminal case that needed to be initially prima facie shown and you'd explain to a jury that here's it had to be shown that here's what just basically to get to prosecutor's door, here's what it had been brought forward." They may pile up all the false information and that's how the jury makes a decision as they didn't drift what the Fourth Court said. There was enough falsity here that this-- but actually that this case ...

JUSTICE: Just to say, just to say this, guess it work, I mean we're really asking why did the DA filed the case? Right? Why did the DA come forward? ...

MR. BROWN: Well, I think that's, that's ...

JUSTICE: You know, we can all-- car experts to speculate I'm not sure ...

MR. BROWN: I think when you're asking a jury to say look at is-- the malicious prosecution for this we're going to have to say there was so much false information, there's no way this case could have gone forward. And that's ...

JUSTICE: They go forward like in the Touyard case in the drug charge case up there in Wood Texas, where the DA as I understand resigned and perhaps maybe disbarred, I mean DA's are not above the law, certainly they're prone to make mistakes as in that situation. So why can't we-- why can't they plant a source, you say, get into the mindset of the DA when they're going forth with information that perhaps is false.

MR. BROWN: Right. I believe in this malicious, malicious prosecution case you're going to have in the co-work product of the DA's. And not-- that's never been broke, that's no Court as ever say you can break that, you just simply can't. If you're getting into-- if you're looking in the criminal activity in the District Attorney ...

JUSTICE: I mus-- well you produced a big file.

MR. BROWN: Yes.

JUSTICE: And the-- is it clear to you that the-- either party has

right to the file? No pro-- no work product problem later.

MR. BROWN: In this case, this are not a waivers ...

JUSTICE: In general.

23 MR. BROWN: In general I don't think, in general I don't think any party has the right to DA's file. I think the DA's office as we did in this case can elect to assist private litigants as we do all the time.

JUSTICE: To what percent of DA's offices have open files criminal cases?

MR. BROWN: Presented the DA's offices?

JUSTICE: Yeah. I would, I mean gen--

MR. BROWN: Generally relate to do so?

JUSTICE: Yeah.

MR. BROWN: I just know the Bare County, we generally-- if there's nothing in there that we have a reason if to close the case, nothing it's going to re-occur, nothing it's not a big case or I think it's going to come back. A minor case like this prior to litigants come forward and they say we'd like to, I mean, create copy the file we'll produce it. In this, we usually exclude work product in this one, I guess this is my pendants, I'm the one that produced the file and I went through it and saw nothing in there really that matter to the DA's office, I produced the whole thing. And now here, [inaudible]

JUSTICE: And therefore, you should wait.

JUSTICE: No good deed though unpunished.

MR. BROWN: Right. So I think, I think the Fourth Court opinion goes way too far in opening the DA's offices at-- because I don't think that the four test requires that you call DA's to the stand. And then not only goes too far in the-- you're not just asking for work product in the DA's, you're asking for co-work product under the "but for" test. You're asking pure legal theory and opinion, you're not acting fact question your saying, is it your opinion that you would not have prosecuted in this case or you're going to ask grand juries, you're going to have to call at least nine of them and saying ...

JUSTICE: Help me understand what the affect what we certainly concern about the DA's office, we're also concerned about what the common law claim is with malicious prosecution which is more our daily wit. What happens if the rule is no DA's cooperate in this case at all? No files, no testimony, no nothing. Does that make it easier or harder to a couple on malicious prosecution claim.

MR. BROWN: I guess it all depends what's in the file.

JUSTICE: Defendants, defendants will all say, well, you know, the plaintiff will have to have something bad, some loud that was tossed on misrepresentation and the defendants will all say, "Yeah, but we don't know why the DA may have been, you know, made certain analysis the DA my-- DA's Texas have discretion whether to file this case or not, so you might then hear from the DA or anything." Not the DA-- what we're just telling you it's their discretion, here we end up deciding this cases on whether the jury likes the plaintiff or the defendant. Because we're not going to get any evidence as to whether the DA in fact made an independent call or not.

MR. BROWN: Right. And one of the elements isn't-- why it was dismissed in the element it was dismissed. To where you going to get your evidence from, it's your malice argument and the probable cause admit and the malice element another issue that the Fourth Court didn't address. The malice comes out before it happens, before the law suit, before the prosecution occurred. So then your jury would hear that in these were two people that hated each other and this one filed the law

suit. And that's where he get the decision on whether in malicious not-- the reason that DA dismissed it is irrelevant. I mean, it can be a witness problem, it can be the DA decided later the case is no good. That the jury never ...

JUSTICE: But the reason the DA filed the case is not irrelevant his cause has been procured. It was based solely on what--

MR. BROWN: One of the parties procures it. Right if the DA, if it procured on a lie. That goes to one, one small element at the other problem the Fourth Court ...

JUSTICE: I mean usually in the-- I mean in past cases used the cases the DA if called to testify says Courts opinion. Somebody comes in with the complaint, that's not my fault here, I do my own investigation that's why I found. And that's why-- -

MR. BROWN: That's why I chose the points ...

JUSTICE: - that, that means the defendants gets off.

MR. BROWN: No. They still-- the person that brought it in still procures it. If they brought in to the DA's, well, if the DA's says, "Yes." "But for" the false information I still would have prosecuted this case. Then the person does get off. Then there's no liability, the promise-- the DA can say that our position is the DA to volunteer to say that. Now the-- compelled the set other come in the court to talk about why they dismissed or deny dismissed the case. And open up the DA's offices for private litigants and defendants in future cases perhaps criminal case is to finding out how the DA's office works. Did you get not in this worn your banks again find out to working at the DA's office. Why cases are dismissed? May find ways the defense-- defendants in criminal cases open the DA's office often find out why cases are dismissed and work out to their advantage or attorney's do in the future. And so ...

JUSTICE: We did say in King, tell me not, -

MR. BROWN: Yes. I know.

JUSTICE: DA sentence did testify and we did sort of say he should have offered an opinion.

MR. BROWN: Yes that was-- I'll just say surprising part of King and I think what the Court is saying is DA sentence could have been asked his opinion and DA sentence is certainly free to offer his opinion. It says he can what-- he can not-- hold this person.

JUSTICE: We can say he was certainly free to, we dismissed it as we said they offered no evidence whatever asked by opinion from DA sentence for example. So it seems to indicate that we, we had be afraid of that going on that direction.

MR. BROWN: I think that was-- if you say going on that direction I think if it was looked at more closely other than simply between two hyphens perhaps it would be you regret me a little differently than to say, the DA sentence opinion could be offer. His co-work product which is like that would be did that he needs to answer that question because in you're now ordering an attorney based within Texas to go into Court. And for the first time I read the order in the co-work product divide. Simply because of the fact the two civil litigants seeking monetary damages need him to say whether or not he will dismiss the case.

JUSTICE: Normally if a file is produced that discloses work product like this one then testimony regarding that disclosure can be compelled. You're arguing for different result here.

MR. BROWN: Right. I don't think ...

JUSTICE: Your file contain notes about conversations and opinions in both processes. Normally, in any other civil litigation that can be gone into and the person whose involve in those communication or

persons can be compelled to testify about those notes. If they've been voluntarily produced because rationale is privileges had been waived. Why should we treat this differently other than in it's-- and it's not an insignificant issue that working at the DA's office but it's you're asking for something different in what happens most of the time.

MR. BROWN: I don't believe it's different. I believe what the cases have said as if you waive your work product to certain documents you may waive it to other documents. I don't believe the case to say if you waive it to documents you don't have to take the stand and testify. Perhaps, private person, what attorneys would.

JUSTICE: You said testify, if you had testify about the documents you waive the privileges too then I would certainly disagree with you. You produced a letter that says I'll with X about Y and do that voluntarily and then you get on the stand then lawyer says, "Well, tell me about this letter and your conversation about X and Y then you can be compelled to testify about that normally."

MR. BROWN: I agree, that a non-attorney could be compelled to testify.

JUSTICE: Maybe beyond that there's an issue into discussion of debate maybe you win but about this specific notes that were turned over normally can be compelled to testify.

MR. BROWN: And I think if it wasn't attorney's notes and wasn't attorney's file that would be true. There was-- say one of the, the plaintiff or the defendant the case something they had in their possession and turned over they could be asked about those but I don't believe their attorney will you put on stand and say their attorney has sent out and you will receive something in the file, the discussion between the attorney and his client I don't believe any Court would say, now the attorney has to take the stand and be ask about what happened in that conversation. Perhaps the plaintiff would, if they waive, they waived their attorney-client produce in that case, I believe. Currently the attorney can be compelled to discuss that.

JUSTICE: May it further questions? Thank you, Counsel.

MR. BROWN: Thank you.

JUSTICE: The Court is now ready to hear argument from the Real Party In Interest.

COURT MARSHALL: May it please the Court. Mr. Wilson and Mr. Gale, attorneys for Real Party in Interest. Mr. Wilson [inaudible]

ORAL ARGUMENT OF GALE, WILSON ON BEHALF OF THE RESPONDENT

MR. WILSON: Chief Justice, to all justice of the Supreme Court, opposing Counsel, may it please the Court. I think that the course has been stop from an issue of course with this particular case. And at this very important case where the Supreme Court to make another decision from malicious prosecution. Because the Court has decide in past we identify King and also by let-- that, that procurement initiation issue has been an issue in past to the Court.

JUSTICE: What do you want to ask the DA?

MR. WILSON: What do I want to ask the DA? Well, as I briefed as I cited to you within my brief that he was very involve in this case. There are several telephone messages from the ...

JUSTICE: There's no question about that. You got all that. What do you want to ask?

MR. WILSON: My questions I want to ask the DA regarding to-- the procurement issue, affirmative issue on would be respond King. "Did you rely on the information?" For the complaint filed by the defendant complaint in this case to ...

JUSTICE: What you going to substantial lead for that? You got the affidavit from Travis and filed the case as the-- have lots of investigation but that was the only affidavit. Why do you need to ask that?

MR. WILSON: Based on the King case, King case said we need the evidence from DA in that case show that he relied on that information Supreme Court prosecution, that's the King case said.

JUSTICE: What evidences say that they didn't?

MR. WILSON: What evidences is there? We've got a lot ...

JUSTICE: You've got, you've got to this Court. You 've offered the affidavit which is the basis for the indictment you say that's my prope-- prima facie case that's nothing in here that's affidavits from somebody else. So when you need the post through it you've ask you mean that first.

MR. WILSON: The lower court evidence put Court with threat. This case is on the trial and if there's evidence comes forth during the trial or from the DA himself in his testify. I think it maybe necessary of course to ask the question regarding the defendant because they also have the issue regarding them not to testify and I would think that curiously their false information that they disclosed information. That DA we've known of the time involves this complaint, you know, are you going to testify? No. I'm not going to testify with the DA's that bring forth this complaint when the complaint is not going to be our testify, rejecting also those that in the malice, I may think.

JUSTICE: I can't, I can't speak for that. You've got a bunch of phone records from DA's saying, "This ladies their son they shown it up," and I am saying, "I'm dismissed in the case because she failed to appear and chewing me out for 20 minutes that--they stays end up," there you dismissed the case and say that again, "I did it because you said she want and no one search the terms she want gone up here." So there's put possible may do you have for more than this?

MR. WILSON: Well, other than the DA can testify then that conversation and we deemed the doctrine evidences itself. This can be an issue. In that telephone conversation the DA had the complaint is a very important issue in my case because I'm in the-- and he said-- she said tough argument. Yeah, I have the complaint in the case calling some ...

JUSTICE: So you-- some asked from my question is, you made this because you think it-- not because you're afraid to get a directed verdict because it has a falsity in your case.

MR. WILSON: No, I don't think that falsity I'm telling being appellants have my case. When there's elements which it-- the DA talk those malice which start that when you initially procure initiate you can malice the time.

JUSTICE: No, but I mean, you want to call this person life deposition trial turns you death for one reason or one of two reasons either of a supposing witness that they want to arrest them until they admit all your right outline when I wrote there. Or if it's a helpful witness they won't throw a stand to say, when you say you dismissed it because I said there weren't shown a-- did you really mean it? Yes, I really mean that. That's when you said, "yes" could you, you know which is just falsity.

MR. WILSON: That ...

JUSTICE: That is not, I need to know what's not in the file that makes this so important that we need to mandamus the District Attorneys portion to show up.

MR. WILSON: You're missing falsity. That is not a falsity issue, I mean, that goes in maliciousness of the complainant and also goes through credibility from ignoring falsity because the-- that complainant not what is you're talking about in the conversation call back and said, "No, I'm ignoring the case dismissed." "I want to continue with the case." In fact honestly we found this case you know this is my client admit it which is going to a maliciousness of the complaint and the witness himself. And then the DA to come in and testify regarding that conversation.

JUSTICE: Because the juries won't believe the DA's notes saying that evidence.

MR. WILSON: Well, how will the DA's notes in the evidence is going to be an issue because as Henrich conversation with the complainant that conversation ...

JUSTICE: Well, you've got it back that on written questions that prove it up don't share it to office records what's, what's the problem here?

MR. WILSON: Well, if, if, if you are my trial judge will you tell me and check it on it can be great. But I'm relying ...

JUSTICE: Why worry about that after the trial whether it's admissibility calls may great but it's done by depot on written questions. It's in office, you know, records may ignore the course to DA's office.

MR. WILSON: Correct. But still it's-- if you're saying with an hearsay. I mean, I'm going to-- I can get to the first level with the business rec-- section.

JUSTICE: Not a, not a problem with the plaintiffs sitting there. This information by a party opponent takes care of the inside that within to yourself.

MR. WILSON: If I may be given that like the DA. The DA's there testify regardless conversation, it's not going to be an issue. I got a ...

JUSTICE: So you, you just need it to make it alive witnesses that on effect.

MR. WILSON: No. I mean, I mean it there to plea the maliciousness of the complaint and also the credibility to complain. If the doctrine does not give the evidence that's the problem we have in this case. Is it on that the DA their line because the judges quashed my subpoena, if she doesn't allow the evidence into to the-- this be seen by the jury that's going to exchanged Crudup case. And also it's very important, I believe, not only regarding this telephone conversation that this having with the complaint. This also the involvement of the complaint with the DA's office as well with that-- the work product that they waive in this in the file shows that the DA mooch the judge in this case is asking for an increase in the bond also asking for a temporary restraining order against my client when she's not into account to testify for. She's wanting to put more of this point to my client and burden of the TRO caravan and she's discussing this with the DA's office.

JUSTICE: Well, I mean the late entry to file looks like both of your clients were abused in the police. Now, we're calling the police on each other don't paper cross. Paper cross depends on grass clippings their sprinklers come on over my side now that's, that's on both sides. My question is haven't you all who asked to the DA's office on that,

why should we have to do it some more?

MR. WILSON: Well, for that reason my client was one of those arrested in jail and it correspond that he call the Court three or four times and the ...

JUSTICE: And your client call the police dozen times. Complainant-- and drag the police out there and say go to the same thing to then deadly.

MR. WILSON: My client call the police because that's what he was told the jury by the police. So the other problem call the police was that she was doing as well. But the complainants case she was never arrested to come to jail, she never can-- to come to Court three or four times that she never had to come to Court at all. The day of trial, the day this case is going to trial he says, "I may come to testify." At my clients have to goes upon be in jail, go to Court three or four times to obtain in attorney based upon this complaint issue file on DA's office which a supposing write down to a form with and that was in deal rely on that, that he was coping her with her case. Now you're talking about with your asking DA's office, how about the DA addressed in my client where he going to judge asking for a TRO. That's important increase in the bond. Just based upon his one piece of information despite there was filed by the complainant. We thought about my clients with this.

JUSTICE: Let me ask you, let me ask you of this. Is there a-- is the "but for" evidence from the District Attorney is that co-work product, do you think or not?

MR. WILSON: Your Honor, no, I mean, when we say ...

JUSTICE: Why, why did you say not?

MR. WILSON: Sufficiently there are two hardship including the case that was based from King decision you were decided ...

JUSTICE: No, but, but the question is it a co-work product which is the thought processing is-- let's say is to find another rules that middle impressions, opinions, conclusions, legal theories, is not co-work product.

MR. WILSON: Yes. I mean, giving the opinion of the attorney could be positive for work product.

JUSTICE: Yes. And this is our-- do you know anybody says for disclose of co-work product?

MR. WILSON: Well, based on King decision where the Supreme Court said that the criminal issue in-- in reverse that case based upon no evidence from the DA's office showing that they are relying on this false information which immediate to come in and testify. Yes, her relying on false on that information which is false. If further known this false going to come forward to the case.

JUSTICE: And, and part of the King, just in general, are you aware of any basis for every discovering of co-work product?

MR. WILSON: That it his way.

JUSTICE: Okay. But-- and I'm saying that you are here. But otherwise-- depart for me why or what you think King Court case said. Generally, co-work product is all the type of a letter bond.

JUSTICE: That means. Why would the, why would the file containing this is what as I have says, this is what that says is-- waive as to core wack-- work product question whether why I'm going to prosecute or dismiss this claim?

MR. WILSON: Well, if you're going to make argument under hardship and necessity there is one, one road he could travel to give ...

JUSTICE: That's to give work product but that's not to give work-- co-work product.

MR. WILSON: Correct. Yes.

JUSTICE: So you're waiving this to that and of course there's kind of a sliding scale here then we will-- can you get the substantial of equivalent file their means which is one of my questions are use of this substantial prevalent of everything except the co-work product.

MR. WILSON: In this particular case based on my agreement the King case, they need for it for that "but for" analysis they need the DA to come in and testify. To show that ...

JUSTICE: Was this going to a testimony for example, this not the exclusive and one and only means to gather the invoice there, there are interview notes and, and report which you already have ...

MR. WILSON: Yes, I know. If they will come evidence, yes. May-- I have invested here in that case which has memo in the files as well which says the 14 year old-- his statement is suspicious. Mean that you know false and not credible let memorize to get the evidence? I don't know, I may have-- it's up to the trial judge to make that decision.

JUSTICE: I understand your, your problems with trying to get back to which submitted in, in those type of cases. I understand that perhaps could be parts of the State where you may have a prominent family and cahoots with the DA goes after another family for whatever reason. But what more is just sufficient, what more do you need and, and dit-- in your case to go forward, and, and if we decide in your favor in this case, what is that do to the DA's across the state, as what is said the like your, your opponent there that, that subject them to cross examination and therefore one of this files so then after then become open her files to everybody, I'm not certainly can't be a good rule.

MR. WILSON: We'll know. I don't-- But I think in this particular case it was say he did produce his file the illegitimate, I'll still be for Appellate Court in this Court argument that one has entitled to it because the involvement with the complainant with the DA's office it-- in malicious prosecution case that's where the information is falling in this the DA's office and most definite case is from appellant like at they're talking to refuge in this principle.

JUSTICE: Is the only-- is the question that you're asking whether the DA went forth with the prosecution based on false information given to it by the most prosecution defendant, is that the, is that the issue?

MR. WILSON: That's one of the issues, your Honor.

JUSTICE: What else can you ask about?

MR. WILSON: Neither are issue there was to maliciousness and credibility issue of the complainant.

JUSTICE: Well, but that's not the, I mean the DA has little to saying about that, really. So I guess my question more practical one. Well, if you're-- most District Attorney's offices who believe that they prosecute based on lies given by the defendant the most prosecution case. Most of them are not can be reluctant to say that because it, it in this on their credibility and the DA's elected their, you know, what sort of information are we using to prosecute, can't that sort of information be gotten about receive the of less form of DA system requiring of the DA to testify, I mean, the more cooperative effort instead of compelling a testimony from DA's, we're trying that enforcer can allow.

MR. WILSON: Yes, I mean that there be taking of that decision for that. Taking of that decision for our TRAP.

JUSTICE: Or inquire-- our phone call, you know, in, in-- and you just have made this the basis from our-- maybe you take this-- they're

always work to the pass room and no matter presumption is they are-- they would, they would be less possible the answering next for the question that they in fact themselves believe that the prosecution was based on a lie by some of the King for.

MR. WILSON: You're Honor I'd like to say, Yes, they would be cooperative with me so I can tell you that I represented to take my client in a criminal case and the DA was less cooperative on that case and based upon also in the information are received after the fact when I got in civil litigation so possibly if the DA's is cooperative you could use that round that the round-- that I would base on incident.

JUSTICE: Well, we're-- well, we're confronting here and we understand in decision but a decision that says you're entitled to bring him in the Court to testify not men-- I just in this case doing this two individuals involved but this can be state why. And so Harris County is trying to prosecute capital murder cases and felonies, etcetera and some portion of their time that they've spent in a civil court room explaining why there is it. And whether that's good policy or not, there's something that was not to be the issue in King and maybe not with the suppress to look at that.

MR. WILSON: Well, in that type of case like in-- a case is based on the complaint that FBI were, were the complaint is based upon who's the police officer. No, they are not running that issue and with the capital murder case and this would-- in our view complaint can actually view this, and what it happens [inaudible].

JUSTICE: I'm just talking about the resources does the DA office has to find in other case were not related to most prosecution case. The co-attorneys out calling prosecutors out and having them separate deposition who of whole day deposition or three-day trial for what happened there, their invocations.

MR. WILSON: Yes.

JUSTICE: We really have to consider.

MR. WILSON: Yes, there are invocations but your Honor, I also want to-- based upon this Court that my only issue that our brief would quick forth is not only the procurement that we have the malice under which have on this brief put it in my case no suit credibility issues as well and then the waiver which he ...

JUSTICE: Your co-counsel is going to address to Court.

MR. GALE: I think that the key issue here with us, what the DA's office is requesting what they're requesting is the merely contesting one. I want to address ...

JUSTICE: But quickly-- but they don't-- is it co-work product?

MR. GALE: It is not.

JUSTICE: Okay.

MR. GALE: And then the question directly ...

JUSTICE: Okay. Okay. What both Counsel will also say it was.

MR. GALE: Let is said in decisions some impressions of attorneys in our co-work product. The question is when did you develop those impressions whether develop their anticipations that litigation whether it is civil disputed or the criminal context or that ...

JUSTICE: Does it says it was in the, in the course of that the criminal ...

MR. GALE: Whether-- the question is much like in attorney that handles our real contest for somebody. Would he testifies in the later suit regarding his impressions of that time he was looking backward then. He is not talking about something he was considering or developing during the case it settle that he's now looking back to answer question for the corps, you know, it is not working upon any

attorney or any government entity to come forward and give testimonies triple. Although it maybe a burden sometimes and attorneys have to do that. The District Attorney's office does not have some sort of excellent immunity perhaps from the 1983 suit for some civil rights file issue that not coming in from testimony and that is what both have in ...

JUSTICE: Lawyers have-- every other lawyer has an absolute immunity from saying, "Why did you file that case or dismissed that case?" "Why did you tell your client, why did you dismissed that claims?"

MR. GALE: Any-- I understand that the Fourth Court opinion in this case really hints on procurement initiation issue, that seems to be the import of the King decision which owns back then come but upon immediate attorney who wishes the very most prosecution case they actually come forward then now would say the depend this socially context will now practice case.

JUSTICE: Well, in this case the file that was produced under the by work product says, "I clearly inform her that it-- this is actually the DA or someone if the DA's office said that they can assist the DA's speaking right in here." I clearly informed her that if he did not testify the case would be dismissed and later on it seems to say that, I would dismiss it because her son would not testify.

MR. GALE: And ...

JUSTICE: In notes here, tell why the case was going to be dismissed and the opinion of the author here and I don't know exactly who it was but some facts one of the assistant DA's right in the middle of the case that could extent that's co-work product, it was disclosed to other terrorist.

MR. GALE: Well, I certainly don't think that's co-work product but then it came to do the case it's often, the deals with the dismissal case. And I think the Fourth Court ...

JUSTICE: That's-- I believe that's a court product would not core work product.

MR. GALE: I, I believe. I agree with that.

JUSTICE: The panel of the Fourth Court opinion is I believe it's going to malice issue. What you have here is a situation where each persons bring a criminal charge they by their own actions have no intention of pursuing it to the end which shows the malice intent. The Fourth Court opinion may we goes in the procurement and initiation issue. I think the panel overlooked the importance of the testimony which goes first analysis. Yes, analysis shown the time in procure or in initiate that it is in the shown by direct evidence as well as indirect evidence or circumstantial evidence. So they never did have that permen-- for amazing moment or someone had missed that I did this because someone are real or not in maliciousness for which you have in this case is a showing by circumstantial evidence that although they brought the charge, they have no intent on assuming it to the end. I see that my time is expired, if I can ask for few moment.

JUSTICE: Are there any further question?

JUSTICE: Yes, I have another question. To your knowledge, were all the facts upon which this prosecution was initially brought false?

MR. GALE: We believe so, your Honor.

JUSTICE: And why does it that-- square that [inaudible] King statement that on inference might be drawn in the case which the only information that officially relied on deciding to prosecute was false. The inference being that the prosecution was procured and causation existed. Why doesn't your, the fact that all the information being

false? That's clearly within King, and make it unnecessary to have any other information.

MR. GALE: Well, I think first of all you have to make sure that the information is going to be part of the evidence in the case. And I think you really have a hearsay problem with regards to this. I will expect any judge not to this lower court launch the report that was disseminate by the DA's office. I would expect that and we do have an hearsay from-- if it doesn't comment, it certainly examined from me and say, "I would like to give this affidavit, I will not testify deposition, I'm not then testify Travis but you can use that affidavit for the purposes you want." We all know the affidavit is not permanently evidence and therefore it's a-- basically no use.

JUSTICE: And you're kind of mingling information prosecution was based on with admissibility of trial, let's make it to your ...

MR. GALE: Why? I think the problem is, is that they worried, I mean, really admit it that they securing it, choose to decide in they're going to assist in cases and they provide all the documents in that regard. When they provide this documents and really admit the main points then occurs regarding waiver issue but they have waived the, the privilege is they might otherwise have and that's what the Fourth Court have in this case.

JUSTICE: As soon as they don't provide any documents to you, remain. Where do you go from there? If you give them, will you go from there if you don't ...

MR. GALE: I don't think they will offer it ...

JUSTICE: - perhaps you present your case but you want us, you want us to require his office to testify.

MR. GALE: I think-- Although I think it waive whatever privilege is applied to and it waive any of those it is-- argue about the waiver issue because it dealt to brief that entirely in this case and the only reason where it respond to was this because it was part of the Fourth Courts brief name. I mean, a part from that is it's still is a court work product, it was still be here arguing if they didn't supply the document. You know, their, their-- they have not taken the position that they were going to give us the documents. But if they have taken that position we will be here arguing that there is not immunity from the production of those documents regards to this case, and you will be the same as the Court argue with regard to testimony as well.

JUSTICE: Is it your position that none of the information for this in the file was co-work product?

MR. GALE: No, I, I have not start with the record the attorney something else considered co-work product and I would think that I don't see anything in their sort of the daily law of a journal regarding the DA's intent from its witnesses or rebuttal the witnesses anything to that nature. Most of their concerns were collateral and not really in, in, in anticipation of litigation. There are things concerning more for procedural nature regarding the dismissal things to that nature. So I think-- and to the extent with the investigators and also discussed with different witnesses and which spoken to them and have this answer for testimony, I really don't think that things are considered co-work product, I think it's sort of the, the other crop work product which there is a need in this case and they're certainly not the agony for them to sort of to ask this Court for, for an absolute protection as far as documents are testified. Yes, it's doctrine sometimes that the claimant did come forth and he get testimony regarding some incident that they have an involvement with or people that they are presented past but there is no protection for the

DA's office with regards that mutually present protection from assault or anyone else could only presidents in the United States. So ...

JUSTICE: Are there any further questions? Thank you, Counsel.

MR. GALE: Thank you.

JUSTICE: Mr. Brown, I'm not sure I understand your position on the waiver argument. Are these your notes and follows produced at the top of looks like it says notes regarding a file number prepared by Robert McCabe of ADA.

REBUTTAL ARGUMENT OF CLARKSON F. BROWN ON BEHALF OF PETITIONER

MR. BROWN: He was one of the District Attorneys looking out.

JUSTICE: In his handwritten notes, that's what it looks like. He says, I clearly informed her if he did not testify the case will be dismissed, appellants later says then to dismiss it because her son would not testify. That's the opinion or determination of at least one assistant DA of what would happened to the case if the son did not testify, correct?

MR. BROWN: Correct.

JUSTICE: That ultimately was a decision of the DA's office, correct?

MR. BROWN: To dismiss the case. Correct.

JUSTICE: And this says because the son would not testify at least in the McCabe's opinion have-- has the DA's office disclosed anything that tell why the case was dismissed. But they only have this one Assistant DA's opinion.

MR. BROWN: Just the docket sheet which would the-- I think it was dismissed lack of witnesses.

JUSTICE: Okay. Now in your opinion given this disclosure production of this document, could Mr. McCabe be compelled to answer, "Why was the case dismissed?" Is that question in trial, in your opinion?

MR. BROWN: No, that's co-work product. That cannot be waived [inaudible].

JUSTICE: Okay. What-- could he be in your opinion asked, did you believe the case should be dismissed because the son would not testify?

MR. BROWN: I don't believe he could be asked that question. I believe he could be asked, did you write that down? And he could say, "That's my document." I don't believe he could be compelled to discuss his legal theories or opinions.

JUSTICE: And, and if you wrote-- I believe under the law, the case should be dismissed because the primary witness the son cannot be there to testify. It can be ask the trial did he write that but he can't be asked to trial if that was his opinion at the time.

MR. BROWN: If he's allowed to be called in the Court, for I understand, I believe he could be asked if that's his document he wrote I don't be making go on to questioning about his legal serve.

JUSTICE: Even if he'd written it right there.

MR. BROWN: Even if she written it right there. The Supreme Court said its scenario that, "No attorneys on the article," you ask-- your two, four, and five and there in it that he can't going to attorney's legal theories opinions. It's undoubtedly it's not going to stop there where-- and those you organize open the DA's office to coming in and getting that opinion. No one can stop with that question.

JUSTICE: Even if there's no dispute, it's in-- about the importance of the information to the proceeding and there's no dispute that the information can be obtained. No other place they still believe, they still have the same opinion.

MR. BROWN: Right. Regarding waiver because something the hardship to get that never a plus forward for that. In a case like this when they said what attorney get the information somewhere else. They didn't try to look anywhere else. If you want to prove the false information they didn't. The police report didn't present the police report and say that's where get it. They haven't said-- they know about the investigate, that's the Sheriff Deputy, they didn't say what we're going to publish to hear something. What they want to do is condense in all that and say, "Here's an easy way to get this whole file when every know we'll just going to call the prosecutors." It's their file-- much of which in their comes with someone else.

JUSTICE: I'm just trying make a compel on policy argument. How this case is go forward without any assistance from the DA's office?

MR. BROWN: I think they will go forward without the evidence you have about the false information you take Travis Blank's affidavit list say, "Travis Blank get on the stand" and you say, "Is it sure?" And he say, "Yes." She hasn't then you present the notes I've-- and everything Travis Blank affidavits that was a lie. And said then you'd say, "Well, is that your malice?" Will that probably measure malice because that really happens your malice? This malice argument that in need the DA's that their testify that malice. Malice is clearly in the commencement. There's actually no reason to call the District Attorney to understand to talk about malice.

JUSTICE: It is your ne-- your position is understand the DA shouldn't be call on any instance even in the waiver situation. Would you concede that he can be call to testify to answer short questions like subject to answer suggested here by Justice Wainwright's deci-- his statement he asked.

MR. BROWN: No, I don't believe you should be able to call District Attorneys involved to prosecution case.

JUSTICE: What is that? What is that some holder said, "I told the District Attorney text that's not in this file?" Are you going to impeach that person?

MR. BROWN: Yeah, I'm going to-- immediately going to have the jury believe that person or not, we're not going to do by calling District Attorney's out of their Courts. And not ...

JUSTICE: They say their clients on the other side, they says, I told the DA that can't you-- you can't call the DA to say that they didn't tell me that that's not my file and tell me that, I mean that you can't call the DA for that purpose so the, the defendant in malicious prosecution file is there a-- without any witnesses when the DA-- all we have these are the defendants. It's your going ...

MR. BROWN: I think any ...

JUSTICE: I'm sorry.

MR. BROWN: I think any plaintiff could make up and there's a reason why all we just need the DA for this one question. And I'm trying ...

JUSTICE: For this case should be the defendant. In this case, you know ...

MR. BROWN: Or the defendant each party says that ...

JUSTICE: It is said that is false the truth. That is false-- but they denied mail. You're going to squaring matches and you're saying that you, you got the evidence but the DA is not meant, did not

testifying that co-work product but anything. So ...

MR. BROWN: Correct. I think you don't open up to DA's office to become a witnesses in every malicious prosecution case because on that actually every defendant or plaintiff become a-- to some reason and say, I just need the DA for this one question, I swear it only need to take a few minutes. Call the Court, can you shut down your courts and the DA over will just one question.

JUSTICE: Well, we do that the doctors or we don't fall in our surgical sweep. They give that position.

MR. BROWN: All right.

JUSTICE: They do that?

MR. BROWN: Right now, I don't think we want to open the DA's office to putting the District Attorneys under rules and let the people going and asking probable process of the criminal district attorney's offices. Because I don't think you're going to have a limited question of-- all right I'm going to call or I'm ask you one question and one question only to could that ended the other side get to cross on it and it always going to lead to more and more questions.

JUSTICE: And any further questions? I'd like to conclude the argument the case is submitted and the Marshall will now adjourn the Court.

COURT MARSHALL: All rise. Oyez. Oyez. Oyez. The Honorable Supreme Court of Texas will now stand adjourn.