

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: LYNNE KALINA, Petitioner v. RODNEY FLETCHER

CASE NO 96-792

PLACE: Washington, D.C.

DATE: Tuesday, October 7, 1997

PAGES: 1-56

ALDERSON REPORTING COMPANY

1111 14TH STREET, N.W.

WASHINGTON, D.C. 20005-5650

202 289-2260

LIBRARY

OCT 15 1997

Supreme Court U.S.

RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE

'97 OCT 15 A11:55

IN THE SUPREME COURT OF THE UNITED STATES

- - - - -X

LYNNE KALINA, :

Petitioner :

V. : No. 96-792

RODNEY FLETCHER :

- - - - -X

Washington, D.C.

Tuesday, October 7, 1997

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:03 a.m.

APPEARANCES:

NORMAN MALENG, ESQ., King County Prosecutor, Seattle,
Washington; on behalf of the Petitioner.

PATRICIA A. MILLETT, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Respondent.

TIMOTHY K. FORD, ESQ., Seattle, Washington; on behalf of
the Respondent.

C O N T E N T S

	PAGE
ORAL ARGUMENT OF	
NORMAN MALENG, ESQ.	
On behalf of the Petitioner	3
ORAL ARGUMENT OF	
PATRICIA A. MILLETT, ESQ.	
On behalf of the United States, as amicus curiae,	
supporting the Petitioner	19
ORAL ARGUMENT OF	
TIMOTHY K. FORD, ESQ.	
On behalf of the Respondent	29

1 PROCEEDINGS

2 (11:03 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in Number 96-792, Kalina v. Fletcher.

5 Mr. Maleng, you may proceed whenever you're
6 ready.

7 ORAL ARGUMENT OF NORMAN MALENG

8 ON BEHALF OF THE PETITIONER

9 MR. MALENG: Mr. Chief Justice and may it please
10 the Court:

11 This case presents the important question of
12 whether a prosecutor is entitled to absolute immunity when
13 she causes an arrest warrant to issue in conjunction with
14 her filing of criminal charges against an individual.

15 In this case, Deputy Prosecutor Lynne Kalina
16 reviewed and professionally evaluated a completed police
17 report, determined that a burglary charge would be filed,
18 and then prepared and filed an Information, a motion
19 requesting the issuance of an arrest warrant, and a
20 certification which summarized the evidence for the court.

21 In Imbler, Buckley, and Burns, this Court set
22 forth a workable approach to determine which functions of
23 a prosecutor are entitled to absolute immunity. Absolute
24 immunity applies when the challenged activity is
25 undertaken in the prosecutor's role as advocate for the

1 State, is intimately associated with the judicial phase of
2 the criminal process, and is connected with the initiation
3 and conduct of a prosecution.

4 QUESTION: Mr. Maleng, is the crucial thing here
5 the Information or the application for the arrest warrant?
6 What was the basis for the action against the officials?

7 MR. MALENG: It was a burglary charge, Mr. Chief
8 Justice, and as a part of the charging package is, the
9 deputy prosecutor prepared an Information which was the
10 initial pleading in a prosecution, also requested the
11 issuance of an arrest warrant, and provided the
12 certification to the court to meet the Gernstein
13 requirement.

14 Each of the factors which --

15 QUESTION: Well, in Washington could a police
16 officer have obtained the arrest warrant?

17 MR. MALENG: Justice O'Connor, the police
18 officer could not have obtained the arrest warrant.

19 QUESTION: So Washington is different from most
20 other States in that regard?

21 MR. MALENG: It is different than many States
22 and, of course, there's a diversity of procedures
23 throughout the United States, but in the State of
24 Washington is that an arrest warrant cannot be issued
25 unless it's in connection with the filing of a --

1 QUESTION: In a State where a police officer
2 could obtain the arrest warrant, even though the
3 prosecutor filed the Information against a defendant,
4 would the police officer have absolute immunity under our
5 case law for a false statement in getting the arrest
6 warrant?

7 MR. MALENG: No, Justice O'Connor, the police
8 officer would not have absolute immunity.

9 QUESTION: No. We would look at the function,
10 this Court said.

11 MR. MALENG: We would look to the function,
12 but --

13 QUESTION: And what would be the function if the
14 police officer were getting it?

15 MR. MALENG: If a police officer was obtaining
16 the arrest warrant it would be the part of the completion
17 of his investigation in preparation for handing the case
18 over to the prosecutor. I might just --

19 QUESTION: Now, do you say that the function is
20 different in Washington, where the prosecutor gets the
21 arrest warrant?

22 MR. MALENG: The principles that we are
23 advocating --

24 QUESTION: Or is it the same function? I don't
25 know how you analyze what the function is when the -- in

1 this case, where it is the prosecuting attorney who gets
2 the arrest warrant. How is that different from where the
3 police officer does?

4 MR. MALENG: The analysis is really the same in
5 this sense. It is part of the initiation of a prosecution
6 by a prosecutor, and as a part of that initiation, a
7 prosecutor, as recognized in the Buckley case, can take a
8 whole series of preliminary acts leading up to that
9 initiation.

10 In our State, one of those preliminary acts that
11 goes together with the Information is the preparation of a
12 certification. In other States, and let's say a grand
13 jury State, is that a police office may obtain an arrest
14 warrant and that would be different than occurs in our
15 State, but the police officer is performing a different
16 function.

17 The principal in Imbler protects that sensitive
18 decision for prosecutors to initiate a prosecution and to
19 conduct a prosecution.

20 QUESTION: If you simply have an Information
21 filed and don't seek an arrest warrant, is this
22 certification necessary

23 MR. MALENG: No --

24 QUESTION: -- under Washington law?

25 MR. MALENG: Under our State procedures, at

1 least in King County's as a local rule, is that we are
2 required to provide a summary, a brief summary of the
3 facts for the court, and so our certification really meets
4 two purposes. One is the Gernstein requirement, but in
5 King County we have a local rule that requires us to
6 provide a brief summary to the court.

7 QUESTION: But is it possible that in some cases
8 in King County there would be an Information filed but not
9 an effort to immediately arrest the person?

10 MR. MALENG: In the State of Washington as a
11 matter of routine, any time that we file an Information in
12 a felony case is that we request the issuance of an arrest
13 warrant. The next step that is taken, if it's a less
14 serious type of a felony offense, is that a series of
15 letters is sent out to the defendant, which occurred in
16 the case before the Court, requesting their voluntary
17 appearance, and if that occurs, the case proceeds.

18 QUESTION: So here, letters were sent before the
19 arrest warrant was issued requesting the defendant to
20 surrender?

21 MR. MALENG: After the arrest warrant was
22 ordered by the Court but before it was actually served
23 there was several letters that were sent to the defendant,
24 but they went to the wrong address, and did not reach the
25 defendant, and when that occurred the arrest warrant was

1 served.

2 QUESTION: Is -- does the prosecutor's
3 description or summary that you just explained have to be
4 under oath?

5 MR. MALENG: The certification, yes, does need
6 to be under the oath to meet the Gernstein requirement, is
7 that we really adopted this procedure in the State of
8 Washington following the Gernstein decision, and it not
9 only meets the requirements of Gernstein, but we believe
10 that it is a better practice to follow to have the
11 prosecutor prepare this document, and the reason is, is
12 that I think it really acts as a citizen's buffer, is that
13 a prosecutor, by preparing the certification, I think
14 provides for a more thorough evaluation of the police
15 file. You're not just reading through it, but you're
16 required to prepare a summary.

17 And it's also a benefit to the court, because it
18 provides a more orderly flow of information to the court,
19 rather than getting it from, let's say in King County,
20 where there's 26 different police jurisdictions.

21 QUESTION: Mr. Maleng, is it the case here that
22 the certification could have been executed by a police
23 officer?

24 MR. MALENG: There's no -- yes. There's no
25 requirement in the State of Washington that it be prepared

1 by a prosecutor. It could have been prepared by a police
2 officer, but is the standard practice in the 39 counties
3 in the State of Washington and really for the reasons that
4 I advanced.

5 QUESTION: Right. I understand that. If a
6 police officer did prepare a certification, I take it on
7 your view the police officer would also be subject to an
8 absolute immunity.

9 MR. MALENG: Under those circumstances the -- if
10 it was prepared by a police officer, he would not have
11 absolute immunity unless he was --

12 QUESTION: How is that possible under what I
13 understand to be the functional approach, and the
14 functional approach that your argument assumed, and that
15 was that it was the function, not the officer, with
16 respect to which the immunity decision is made?

17 MR. MALENG: First is that, unlike a prosecutor,
18 is the police wouldn't meet the threshold question of
19 immunity analysis, and that is that there's no common law
20 tradition of absolute immunity for a police officer.

21 QUESTION: Well, but he's performing the same
22 function and, I mean, the theory of the way the common law
23 practice is applied to immunity doctrine is, we look to
24 the function and see whether that function at common law
25 was subject to an immunity.

1 Now if, on that standard, the prosecutor gets
2 absolute immunity, then it's -- I think it necessarily
3 follows that the police officer would get absolute
4 immunity.

5 MR. MALENG: Justice Souter, they're performing
6 different functions. The --

7 QUESTION: Well, I don't -- I guess, explain
8 that to me. I don't see why, because I thought we
9 judged -- we judge the function without respect to the
10 officer, so why are they different?

11 MR. MALENG: This Court has set forth the
12 functional test and said that we look to the nature and
13 function of the act being performed, and not just to the
14 act itself.

15 QUESTION: And the nature and function of the
16 act here is the provision of information under oath, with
17 whatever probability of soundness that oath carries, on
18 the basis of which a magistrate is going to issue an
19 arrest warrant. That function, it seems to me, is exactly
20 the same whether it's performed by a police officer or
21 whether it's performed by a prosecutor.

22 MR. MALENG: It is a different function if it's
23 performed by a police officer, as a police officer can't
24 move from the "investigative function" over to the
25 prosecutorial advocacy function, namely --

1 QUESTION: Are you saying that a police officer
2 never has absolute immunity because he's always engaged in
3 investigating and never crosses the divide into
4 prosecuting, so that the same -- the very same act which
5 we all agree is involved here, the same act is
6 characterized one way if it's done by a police officer, a
7 different way if it's done by the prosecutor, because the
8 prosecutor does prosecute, and police officers don't
9 prosecute?

10 MR. MALENG: A police officer, Justice Ginsburg,
11 would have absolute immunity if they were functioning as a
12 witness. I believe a police officer also, if he was
13 attached to a prosecutor's office and was acting under the
14 direction of a prosecutor and acting as the agent, yes,
15 they would have absolute immunity in that circumstances,
16 but generally no, because they are performing a different
17 function.

18 QUESTION: But how does the same act, swearing
19 out this warrant application, become prosecutorial if done
20 by one person but merely investigatory if done by another?

21 MR. MALENG: this Court has indicated also, I
22 believe, is that you can have a situation in which
23 prosecutors do a whole series of preliminary acts in
24 conjunction with the filing of criminal charges.

25 Now, some of those acts can be performed by

1 someone other than a prosecutor, for example, a police
2 officer questioning witnesses, visiting a crime scene,
3 signing a certification. But when those functions are
4 performed by a prosecutor, the full force and reasons for
5 absolute immunity apply.

6 The difference between that and the police
7 officer is that the police officer can't be a part of the
8 function that this Court has protected, and the function
9 that is being protected is the sensitive decision to
10 initiate a prosecution which can involve, as the Buckley
11 case said and this Court reaffirmed, can have a whole
12 series of things associated with that, so it is really a
13 different function.

14 QUESTION: Mr. Maleng, I think you're doing --
15 making the following assumption in your argument, and I'd
16 like you to comment on it. The issue, I guess -- one way
17 to put the issue here is, how do we characterize this
18 function of providing the certification?

19 Do we characterize it in a very narrow and
20 specific sense of providing the certification, period --
21 we carve that out -- or do we characterize it as part of a
22 broader process, the process of initiating a prosecution?

23 If we characterize it in the narrow sense,
24 merely providing, in effect, evidence under oath, then
25 there doesn't seem to be anything peculiar about that

1 function to prosecutors. Police officers can do it.

2 If we characterize it in the broad sense and
3 say, oh, it's just a part of initiating a prosecution,
4 then we're talking about a function that prosecutors do
5 and that prosecutors, generally speaking, get absolute
6 immunity for, and it seems to me that when we ask you the
7 question, how do you characterize, you shift back and
8 forth, and I don't think we -- I mean, we really can't
9 shift back and forth.

10 I would have thought that the reason for
11 characterizing it narrowly was the Malley case. In the
12 Malley case, generally speaking it's prosecutors that get
13 search warrants, but witnesses who come forward to provide
14 evidence for those search warrants don't get absolute
15 immunity, and I would have thought that there was an
16 analogy there to this situation. Prosecutors get arrest
17 warrants, but prosecutors don't necessarily provide
18 evidence.

19 So it would have seemed to me that the Malley
20 case was a reason to characterize the function narrowly as
21 presenting evidence, as opposed to characterizing the
22 function broadly as just a little part of going after or
23 getting a search warrant and starting a prosecution. Is
24 my argument wrong about the application of Malley in
25 deciding whether you take the narrow view or the broad

1 view?

2 MR. MALENG: Justice Souter, I think you've
3 really raised the issue before the Court, and that is
4 whether you take the broad view or the narrow view. I
5 think that what the Court was indicating in the Malley
6 case is expressing also a concern in making incognizance
7 comparisons between the activities of police officers and
8 the activities of prosecutors, and shows that there's a
9 dramatic difference between those type of activities.

10 QUESTION: But Malley took the narrow view on
11 the way you and I are using the terms, didn't it?

12 MR. MALENG: Malley took the view that a police
13 officer cannot be held to be analogous to a prosecutor.

14 QUESTION: Right, but the Malley case said, when
15 you're getting a search warrant, which is essentially a
16 prosecutorial kind of function, the witness, the police
17 witness does not get an absolute immunity, and it seems to
18 me there's an analogy here. Prosecutors initiate
19 prosecutions. They get the official ball rolling, and one
20 incident of that is getting the arrest warrant, but it's
21 the provision of evidence on the basis of which the arrest
22 warrant issues that seems to be analogous to the provision
23 of evidence on the basis of which the search warrant
24 issues, so it seems to me that Malley took the narrow
25 view, and my question is, why shouldn't we, for

1 consistency reasons, take the narrow view here?

2 MR. MALENG: What the Court indicated, Justice
3 Souter, in the Malley case is that the police officer in
4 that situation was one step removed, really, from the
5 initiation of a prosecution, and was really not intimately
6 associated with the judicial phase of the criminal
7 process, and that's true throughout the whole activities,
8 because, as I indicated, what the Court was seeking to do
9 in the Imbler case is to protect the sensitive decision to
10 prosecute, to initiate a prosecution, and the Court in the
11 Buckley cases reaffirmed the fact that a prosecutor may
12 undertake a whole series of preliminary acts in
13 conjunction with the initiation of that prosecution.

14 QUESTION: But prosecutors are not
15 characteristically witnesses.

16 MR. MALENG: In the State of Washington, it is
17 the practice that we follow, but Ms. Kalina was not a
18 testifying or complaining witness in this case, is that
19 her certification specifically disclaimed the role of
20 being a testifying witness. She did not purport to offer
21 first-hand knowledge.

22 QUESTION: How did she disclaim it?

23 MR. MALENG: In the joint appendix on page --
24 which is in the joint appendix on page --

25 QUESTION: 19, I think.

1 MR. MALENG: -- 19, it indicates at the
2 beginning that Lynne Kalina is a deputy prosecutor and is
3 familiar with the police report, and investigation
4 conducted in the Seattle Police Department case, that this
5 case contains the following upon which the motion for the
6 determination of probable cause is made.

7 QUESTION: She goes on to sign it under penalty
8 of perjury, which I understand she's not required to do,
9 or correct me if I'm wrong.

10 MR. MALENG: She is required to sign it under
11 oath for purposes of meeting the Gernstein principle, but
12 the fact that she does or doesn't sign shouldn't be the
13 factor that determines whether absolute immunity applies
14 or not.

15 QUESTION: Are there other situations --

16 QUESTION: But you know, there's a sentence in
17 her -- excuse me. There's a sentence in her certification
18 that purports to be a statement of fact. The defendant,
19 Rodney Fletcher, has never been associated with the school
20 in any manner and did not have permission to enter the
21 school. She states that as a fact, not as -- that's not a
22 fact that would necessarily --

23 MR. MALENG: There was an affidavit, Justice
24 Stevens, in the file from the principal that Mr. Fletcher
25 had no association with the school, and that was the --

1 QUESTION: But the person to who -- who issued
2 the warrant relied on that as a statement of fact by the
3 person who signed the certificate.

4 MR. MALENG: That is correct.

5 QUESTION: And that was an inaccurate statement
6 purporting to be given by her own -- you see, she -- would
7 let the reader think she's saying she knew that.

8 MR. MALENG: It would have been preferred if
9 she'd made a reference to the affidavit.

10 QUESTION: Well, that may be what this whole
11 case --

12 QUESTION: In other words, she can say,
13 consistently with your procedure, I have reviewed the
14 police report and, based on the police report, I believe
15 the facts to be as follow -- the following, and then sign
16 it under penalty of perjury?

17 MR. MALENG: Yes.

18 QUESTION: That suffices?

19 MR. MALENG: Yes.

20 QUESTION: And if that were done, would there be
21 probable cause, a basis for probable cause within the
22 meaning of the Fourth Amendment?

23 MR. MALENG: We believe that there is a probably
24 cause --

25 QUESTION: No, but I mean, on that theory the

1 prosecutor comes up and says, look, I really don't know
2 anything about this, but these people out here are telling
3 me that it is so, and I'm not warranting to you that
4 they're right. I'm just telling you what I've got in the
5 file. Would that be a sufficient predicate for probable
6 cause for Fourth Amendment purposes?

7 MR. MALENG: Under our procedures is that she's
8 stating that she's familiar with the report, and that
9 she --

10 QUESTION: Well, but the magistrate has got to
11 make -- whoever issues the warrant --

12 MR. MALENG: Yes.

13 QUESTION: -- has got to make a determination of
14 fact. Can a magistrate make a determination of fact
15 sufficient for constitutional purposes when the only thing
16 the magistrate has before him is a statement from somebody
17 saying, I really don't know anything about this, but there
18 are some people out there who happen to think the
19 following propositions are true. Would that be enough for
20 the Fourth Amendment?

21 MR. MALENG: Yes, Justice Souter, because
22 under -- you can meet the Gernstein requirement with
23 hearsay evidence, and that is the character of the --

24 QUESTION: Yes, but when you meet it with
25 hearsay evidence you in effect are warranting that you

1 believe the hearsay is correct, and that there is a
2 sufficient basis for doing it, and it seems to me the
3 prosecutor can't have it both ways. The prosecutor can't
4 say, look, I'm not a witness here, therefore I get
5 absolute immunity for whatever's done, and at the same
6 time satisfy Fourth Amendment standards for providing
7 evidence on the basis of which probable cause is found by
8 an independent magistrate. I don't see how you can have
9 it both ways.

10 MR. MALENG: Trial lawyers and prosecutors
11 routinely make factual representations to the court, and
12 they're under high duty to tell the truth whether they are
13 sworn or not sworn.

14 QUESTION: Thank you, Mr. Maleng.

15 Ms. Millett, we'll hear from you.

16 ORAL ARGUMENT OF PATRICIA A. MILLETT

17 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

18 SUPPORTING THE PETITIONER

19 MS. MILLETT: Mr. Chief Justice, and may it
20 please the Court:

21 Justice O'Connor and Justice Souter both asked
22 the critical question in this case, and that is, how we
23 define the function that is at issue. We believe it's
24 defined as it was in Malley, and that is the function of
25 seeking an arrest warrant, not simply the signing of a

1 certification.

2 What is critical in this case, and is a critical
3 distinction from Malley, is the function of seeking an
4 arrest warrant in conjunction with the filing of criminal
5 charges against an individual.

6 In Malley, the police officer sought the arrest
7 warrant without the involvement of a prosecutor long
8 before any indictment process had started by a prosecutor.
9 There was no prosecutorial decision. In that sense, the
10 criminal judicial process had not yet been invoked by the
11 Government, and that is the critical distinction in this
12 case in our opinion.

13 The reason --

14 QUESTION: Would it be the same case if she had
15 filed a certification just as a lawyer but not sworn to
16 anything, and then the magistrate had said to her when she
17 appeared in court, I'd like to know whether the defendant
18 had any access to the property before, do you have a
19 witness who can testify to that, and she had responded,
20 yes, and then he swore her as a witness and she said
21 exactly what she said here. Would she be immune?

22 MS. MILLETT: We believe that she would get
23 absolute immunity for statements in court, whether it
24 would be considered prosecutorial immunity or witness
25 immunity under Burns v. Reed and Briscoe v. LaHue.

1 It may not satisfy the Fourth Amendment, but, of
2 course, the Fourth Amendment violation does not strip one
3 of immunity, else it would be no immunity at all.

4 QUESTION: Do you think the witness immunity in
5 the context of testimony at trial applies to any sworn
6 statement in support of an affidavit for a search warrant?

7 MS. MILLETT: I think it depends -- arrest
8 warrant. I think --

9 QUESTION: Arrest warrant. Either one, right.

10 MS. MILLETT: -- a search warrant may be much
11 further away from the criminal judicial process, but once
12 the process has been initiated by the Government, as it
13 has here, or triggered as it is in the Federal system,
14 that as written or -- whether a statement is written or
15 said in court should not make a functional difference for
16 purposes of absolute immunity, so we actually believe that
17 had a police officer signed it or, for example, the
18 suspect information report that was also filed with the
19 Information and request for arrest warrant here would
20 merit absolute immunity.

21 QUESTION: Well, your view, then -- I want to be
22 sure I understand. Your view is, even if this had been
23 signed by a police officer, there would be immunity.

24 MS. MILLETT: It would. The police officer
25 probably wouldn't be called prosecutorial immunity, but it

1 would be the traditional common law immunity for
2 affidavits.

3 QUESTION: So you're relying not on
4 prosecutorial immunity but witness immunity as your basic
5 position.

6 MS. MILLETT: Well --

7 QUESTION: That that applies in this context.

8 MS. MILLETT: If it were a police officer, the
9 label might be witness -- I'm not sure if absolute
10 immunity attaches, or whether the exact label matters, but
11 what's--

12 QUESTION: Well, it matters a great deal, I
13 think.

14 MS. MILLETT: All right.

15 QUESTION: Because under your theory here it
16 really doesn't matter whether she's a prosecutor at all,
17 because you're suggesting, if I understand you correctly,
18 that any affidavit, any person who makes an affidavit in
19 support of an arrest warrant is entitled to absolute
20 immunity.

21 MS. MILLETT: Two things. One, if that had been
22 filed at the initiation or onset of the formal procedures
23 by the Government --

24 QUESTION: At the time you file an Information
25 and so on --

1 MS. MILLETT: Right, and the reason I'm
2 equivocating somewhat about a prosecutor here is just
3 because I think that she was performing a hybrid function
4 here.

5 If, instead, Ms. Kalina had simply been a
6 witness at a barroom fight --

7 QUESTION: I understand, but I'm asking to the
8 extent that she's performing the half of the hybrid that
9 was --

10 MS. MILLETT: Mm-hmm.

11 QUESTION: -- testimonial rather than a lawyer
12 presenting a case to a judge. That half you say is
13 equally entitled to immunity under the witness immunity
14 doctrine.

15 MS. MILLETT: Under witness or, one wants to
16 call it affidavit immunity.

17 QUESTION: So it doesn't matter whether she's a
18 prosecutor or a member of the mafia or a police officer,
19 she's still entitled to --

20 MS. MILLETT: It would matter for some things,
21 but right, certainly for purposes of whether absolute
22 immunity attaches, but I think the reasoning here is a
23 little more complicated, because -- and one of our
24 concerns in this case --

25 QUESTION: Absolute immunity but not perjury,

1 would there be, or just absolute immunity from a 1983
2 suit, or --

3 MS. MILLETT: From civil liability damages.
4 Certainly, no one is pretending that absolute immunity
5 gives -- even judges don't get it from criminal
6 prosecutions or perjury charges, or --

7 QUESTION: Do I understand that you are drawing
8 a straight time line? You are saying yes, under Malley it
9 doesn't matter who the actor is, it's the function, so you
10 are saying -- which I didn't understand from the brief --
11 that whether it's a police officer or prosecutor, once
12 it's the prosecution is being put before the court,
13 anybody who signs this application gets absolute immunity.

14 MS. MILLETT: I believe --

15 QUESTION: But if it's removed, it's before the
16 prosecutor has decided whether there's going to be a
17 criminal case, then it's only qualified whoever that --

18 MS. MILLETT: I -- taking the first part of your
19 question, I believe the time line is absolutely critical
20 for purposes of deciding whether -- is a critical factor
21 in functional analysis, and yes, it's very relevant here,
22 because the time line -- it's not so much a date time
23 line, but it's an initiation of the judicial process,
24 which is exactly what the purposes of immunity doctrine
25 are supposed to cover.

1 I think before actual initiation of a criminal
2 prosecution or a criminal proceedings, say if there was a
3 search warrant back at the investigatory stage, it's a
4 harder question, because in one sense any time a prosec --
5 and this is what the Court noted in Burns v. Reed.

6 Any time a prosecutor is coming to a court and
7 presenting information to the court to provide the basis
8 for a judicial action, that that should merit absolute
9 prosecutorial immunity. You're acting in an advocacy
10 role, and the reason we give immunity is to protect the
11 process itself, the ability of the court to collect
12 information and make the decisions necessary in that case.

13 So it may be a little bit harder when we're --
14 the further we get away from the initiation of the
15 criminal process, the harder the question is. We concede
16 that.

17 But you would still need to consider the
18 important goal of absolute immunity to allow the judicial
19 system to receive information, however delivered, whether
20 one thinks it's a proper way or improper, ethical or
21 unethical, whatever mistaken -- but the important thing is
22 that the process be protected, and that's what we think
23 absolute immunity would protect in this situation.

24 QUESTION: Well, as you rightly say, or rightly
25 indicate, I mean, the issuance of a search warrant is the

1 beginning of a judicial proceeding, too, and I assume that
2 your argument assumes that there is a historic -- given
3 the way we go about the immunity question that there is a
4 basis in historical practice for distinguishing between
5 the immunity that seems to be implied by the initiation of
6 the one judicial process, search warrants, and the other
7 judicial process, arrest warrant and filing of charges.

8 Is there, and where would I find the historical
9 basis for drawing the line where you would have us draw
10 it?

11 MS. MILLETT: The closest, strongest case for
12 the common law precedent for immunity in this context
13 which we think is on fours with this situation is a case,
14 Kitler v. Kelsh, which is cited I believe on page 19 of
15 our brief, and was cited by this Court in Imbler.

16 And there what you had was a prosecutor who
17 swore out an arrest warrant, swore out a complaint, and in
18 that context, from the description in the case, the
19 complaint was not only legal claims but factual claims
20 and, in fact, when you look at the dissent in that case,
21 the dissent advocated drawing the exact line that
22 respondents propose here, and that is that you get
23 absolute immunity for filing the complaint and seeking the
24 arrest warrant but not for the factual assertions.

25 QUESTION: What about the other side of the --

1 QUESTION: That had nothing to do with
2 functional distinctions. The common law distinction was
3 between giving evidence and initiating a prosecution.
4 There was civil liability for wrongful initiation of a
5 prosecution. There was no civil liability for testimony.

6 MS. MILLETT: Well, I think --

7 QUESTION: And that's the explanation of that
8 case, not the functional distinction that our cases have,
9 I think, mistakenly applied, mistakenly if we think we're
10 tracking what the common law was.

11 MS. MILLETT: Well, I think it -- there's more
12 than sort of two factors coming together. There's also
13 the question of whether it was private or a public
14 prosecutorial decision that was being made. For example,
15 the complaining witness cases that are cited by this Court
16 in the Malley case all involved private persons, and so
17 there's an entirely separate argument for why absolute
18 immunity did not attach to that, and the --

19 QUESTION: It's the implication of what you're
20 saying that Malley was wrongly decided.

21 MS. MILLETT: No. The implication is that
22 Malley was different, because the police officer was there
23 was not involved with the prosecutor in a prosecutorial
24 decision to initiate criminal proceedings.

25 The police officer was more analogous to a

1 private complaining witness than we have here, where Ms.
2 Kalina, or the police officer, or whomever is signing the
3 affidavit, is affiliated with the actual onset of judicial
4 proceedings, and it is the onset of judicial proceedings
5 and the provision of information to the court for that
6 ongoing process that is critical.

7 And one of the reasons it's critical is, again,
8 unlike the police officer in *Malley v. Briggs*, a
9 prosecutor in this context is going to have ongoing
10 responsibilities in the case and ongoing duties that will
11 be supervised and protected by the court, and the
12 defendant will also have those protections.

13 QUESTION: Would your argument be different if
14 we were dealing with a State in which the historical
15 practice had been traditionally that the -- what is called
16 the certification here, the statement under oath about
17 fact, was given by police officers and investigators as
18 opposed to prosecutors? Would your argument be different
19 then, or would your conclusion be different?

20 MS. MILLETT: What is critical is whether it is
21 the initiation -- whether that would be combined with a
22 prosecutorial to, as here, initiate a criminal
23 prosecution. Who signs it? As I said, we think the --

24 QUESTION: If so, the witness would get the
25 immunity?

1 MS. MILLETT: Yes, whether it would be called
2 prosecutorial immunity or not.

3 Thank you --

4 QUESTION: Thank you, Ms. Millett.

5 MS. MILLETT: -- Mr. Chief Justice.

6 QUESTION: Mr. Ford.

7 ORAL ARGUMENT OF TIMOTHY K. FORD

8 ON BEHALF OF THE RESPONDENT

9 MR. FORD: Thank you, Mr. Chief Justice, and may
10 it please the Court:

11 Let me begin by answering a couple of questions
12 that I don't think got answered. One is, our claim is
13 based exclusively on the fact that Rodney Fletcher was
14 arrested, that his person was seized without probable
15 cause, and that has been our position from the beginning.

16 The focus of this is on the certification that
17 made it possible, both under the Federal Constitution and
18 Washington Criminal Rule 2.2, for an arrest warrant rather
19 than a summons to issue.

20 Another question I'd like to point out is
21 Washington law does provide for summons procedures in
22 felony cases, nonseizure-type documents.

23 QUESTION: So you would not have made this claim
24 if there had been no actual arrest. Even though the
25 arrest warrant or the certification might have been --

1 it's not in the nature of a defamation claim.

2 MR. FORD: It is not in the nature of a
3 defamation claim, Mr. Chief Justice. It is in the nature
4 of a false arrest claim, just as the Malley case was, and,
5 of course, under the Albright case there's considerably
6 controversy at least over whether you even have a 1983
7 claim if you are only hailed into court by summons, and
8 certainly Mr. Fletcher's damages would be very different
9 if they existed at all.

10 The next question, I'd like to answer Justice
11 O'Connor's question about whether police officers can
12 issue these -- can swear in support of arrest warrants,
13 and they certainly can, and I think it is -- actually I
14 would differ with Mr. Maleng with regard to whether, under
15 Washington law, a police officer could obtain an arrest
16 warrant without the interposition of a prosecutor.

17 Under our justice court rules, or lower court
18 rules, Washington has a procedure where the prosecutors
19 have begun to file direct in superior court Informations,
20 felonies without going through preliminary hearings in the
21 lower courts.

22 In our lower courts, the district courts and
23 municipal courts, we have a criminal rule for the courts
24 of limited jurisdiction, 2.1(c), which provides even
25 citizens can issue complaints, and those complaints can be

1 followed by arrest warrants, again if a complainant swears
2 under oath to facts that make out probable cause.

3 QUESTION: What is the jurisdiction over -- what
4 kind of criminal actions do those lower courts have
5 jurisdiction over?

6 MR. FORD: That rule itself, Your Honor, would
7 only deal with misdemeanors, but in felonies you can also
8 have those same courts have jurisdiction issue arrest
9 warrants, although I admit it would not be on the
10 complaint only of a citizen or police officer for
11 felonies.

12 QUESTION: And this was a felony involved here.

13 MR. FORD: This was a felony, although I'm
14 not -- I would contend there's no constitutional
15 difference --

16 QUESTION: How can that be? I don't -- I'm just
17 trying to understand the procedure. You mean, if, in
18 conjunction with the issuance of a case, the prosecution
19 decides I'd like to arrest Mr. Smith under Washington
20 law -- it's a felony. You need probable cause and a
21 warrant -- couldn't the policeman attest to the facts?

22 MR. FORD: The policeman could attest to the
23 fact, Justice Breyer. As I understood the question it was
24 whether a policeman could do this completely by him or
25 herself.

1 QUESTION: Why not?

2 MR. FORD: Because you do -- under Washington
3 law you do have to have either a complaint or an
4 Information filed in order to issue an arrest warrant from
5 our court.

6 QUESTION: Ever?

7 MR. FORD: Ever.

8 QUESTION: I mean, if a policeman's walking down
9 the street and he sees a crime --

10 MR. FORD: He can make a warrantless arrest.

11 QUESTION: Well, he knows there is a crime going
12 on, and he wants to produce a warrant, and he goes to the
13 magistrate and says, please give me a warrant.

14 MR. FORD: Under our criminal rules --

15 QUESTION: He can't do that?

16 MR. FORD: He cannot do that, and our rules I do
17 believe --

18 QUESTION: Even if there's no case going on a
19 policeman couldn't just get a warrant for an arrest
20 ordinarily, when he knows there's a crime going on in a
21 building and --

22 MR. FORD: Under Washington procedure, only if
23 there has been an initiation at least by complaint.

24 QUESTION: Of a case?

25 MR. FORD: In a court. However, that is -- and

1 one thing I would also point out, the certification that
2 Justice Kennedy asked about is a King County local rule.
3 It's not a certification as a summary, and it is not
4 sworn.

5 It is a different document, but they have the
6 certification of probable cause. It is kind of an omnibus
7 document that kind of takes care of all of these problems
8 at once. The actual rule --

9 QUESTION: Well, in that instance is there an
10 underlying sworn affidavit from the police officer? Does
11 somebody swear to something?

12 MR. FORD: There has to be a sworn statement by
13 somebody under our criminal rules, Justice, there does
14 have to be under the Fourth Amendment of the Constitution,
15 so somebody has to swear. It does not have to be a
16 prosecutor, and indeed there's no rule. The certification
17 process is something that I think as Mr. Maleng
18 acknowledged in many of his statements is going a bit
19 informally. It's not provided for by rule or statute
20 anywhere. The prosecutors have just decided they're going
21 to do this.

22 QUESTION: And this is the practice in most
23 felony cases that the prosecutor makes this summary and
24 the certification under oath?

25 MR. FORD: That is my experience, Your Honor,

1 yes. The --

2 QUESTION: Mr. Ford, you could not have made a
3 complaint for essentially malicious prosecution against a
4 prosecutor, could you?

5 MR. FORD: That is the difference, Justice
6 Ginsburg. That is a claim for false arrest, and
7 traditionally --

8 QUESTION: So you're really saying that less is
9 more in this case. In other words, by slicing it thinner
10 and saying we're just going to go after this arrest
11 warrant, you are able to bring a 1983 case, where your
12 fundamental grievance of malicious prosecution, you can't
13 bring under 1983 because that would surely trigger
14 absolute prosecutorial immunity.

15 MR. FORD: I would submit, Your Honor, our
16 fundamental claim is false arrest, and we would be -- we
17 would have a different defendant if we had a police
18 officer who had issued this false affidavit that resulted
19 in the arrest, but we would still have a cause of action,
20 which is being arrested without probable cause. A public
21 official under color of State law made up the probable
22 cause that resulted in Rodney Fletcher's arrest.

23 QUESTION: But the largest -- if we were talking
24 not in lawyer's terms, the largest offense to your client
25 is that this client was not only arrested, but that there

1 was a prosecution initiated, criminal charges filed
2 against that person.

3 MR. FORD: Well, I don't know. Our complaint
4 has to do with his arrest and, indeed, under Albright I'm
5 not --

6 QUESTION: Yes, because you're slicing it
7 thinner because under the law malicious prosecution is not
8 an avenue that's open to you. You could -- do you
9 disagree with that, that that's why you're bringing this
10 case as a false arrest case rather than the larger false
11 prosecution?

12 MR. FORD: Because that's what brought it to
13 law, because that's what happened to Rodney Fletcher.
14 That's his complaint. He was hauled into jail. After
15 that, they -- the prosecution went nowhere. They gave up
16 very quickly. But his problem was, he got hauled into
17 King County Jail, had to spend the night in jail, have his
18 wife come get him and his children, those sorts of things.
19 That's his complaint.

20 And I think that again there's a question even
21 under the Albright case as to whether he could complain at
22 all against anybody for the broader question, but this is
23 what happened to him, and that's why the complaint has
24 been brought as it has, because also what happened to him
25 is exactly the same as what happened to Mr. Briggs in the

1 Malley v. Briggs case.

2 And I beg to differ with my colleagues with
3 regard to the differences there. In the Malley v. Briggs
4 case Officer Malley was not a percipient witness, did not
5 claim to be if you -- as the opinion states, but he went
6 in and reviewed a log of --

7 QUESTION: Not what kind of a witness?

8 MR. FORD: This is a word the Government's come
9 up with. Percipient, Your Honor.

10 QUESTION: One -- I hear someone --

11 MR. FORD: That's correct, and the Government's
12 suggested that there's a difference, and I would submit
13 that there is not. I think that the Government has an
14 interest in protecting DEA or FBI agents who often perform
15 this function in the U.S. Attorney's Offices, because the
16 U.S. Attorneys never do this themselves, but they are
17 trying to bring the immunity to cover their police
18 officers.

19 QUESTION: Are they saying -- and here I may be
20 speaking -- you have to correct me if I'm not -- that in
21 many States I would guess it's possible for a policeman to
22 get a warrant and arrest somebody a few hours or days
23 before a prosecutor does anything in court.

24 MR. FORD: I believe that was the case in Rhode
25 Island with Mr. --

1 QUESTION: All right, and then they're saying,
2 but Washington, oddly enough, that isn't so. In
3 Washington, the only time you arrest a felon with a
4 warrant, the only time, is in conjunction with a
5 prosecutor filing an Information, and there is no other
6 time, and therefore, unlike all other States, because of
7 this odd quirk of Washington procedure, the arrest of a
8 felon is part of the court function, the court filing
9 function.

10 It's not in Rhode Island, it's not anywhere
11 else, because it exists in other places that you could
12 arrest a person without filing an Information, but not so
13 in Washington, so in those other places it's a police
14 duty, in Washington it's different. In Washington, it's
15 part of the case-initiating.

16 I'm not buying that argument, but I want to
17 focus it specifically.

18 MR. FORD: Let me focus it specifically on that,
19 then, Justice Breyer. It's not correct in Washington,
20 because you can arrest somebody in conjunction with filing
21 a complaint. Now, that's just another word, but it's a
22 word that's very important, because officer Briggs, or
23 Officer Malley, I'm sorry, got a complaint.

24 He swore out a complaint to a judge, and the
25 complaint ordered any police officer to bring the

1 defendant to the court to be held to answer on the
2 complaint. It was exactly the same function.

3 He was having him arrested to answer a criminal
4 complaint that was based on his summary of a police report
5 that he had read and he swore under oath that that made
6 out probable cause, and went to a judge, and the judge --
7 and they had a file, it has a case number, and they issued
8 court documents, a complaint and an arrest warrant. Here
9 we had an Information and an arrest warrant.

10 QUESTION: But in --

11 MR. FORD: The only difference is a word.

12 QUESTION: But in Malley the person was arrested
13 on the basis of this complaint, but a grand jury, which in
14 Rhode Island is apparently committed to the job of
15 finding -- refused to indict. Here the Information is a
16 substitute for the indictment, not the complaint, isn't
17 it?

18 MR. FORD: And -- I agree, Mr. Chief Justice,
19 that's true for the Sixth Amendment purpose of initiating
20 a criminal prosecution, but for purposes of the Fourth
21 Amendment and for purposes of the traditional common law
22 background that we were looking at in 1871 there was no
23 difference.

24 Every variety of this kind of behavior, of
25 somebody coming before a judge swearing to facts, having

1 the judge have a complaint or a writ ne exit, or whatever
2 you'd call it, and arresting somebody based on the sworn
3 statement of that person, who is called a complaining
4 witness at common law, very ancient law in this regard --

5 QUESTION: The point I was trying to make was
6 that if you compare the facts in Malley with the facts in
7 this case, the facts in Malley seem to have been further
8 removed from the determination of probable cause, because
9 there it ultimately went to a grand jury after all the
10 Malley facts had happened, and the grand jury refuses to
11 indict.

12 Here, the Information is filed, and that in
13 itself is a determination of probable cause.

14 MR. FORD: Well, it's an initial determination
15 of probable cause, Your Honor, but it doesn't justify an
16 arrest, and in Washington, of course, it's not final. We
17 also do have a safeguard under a case called State v.
18 Knapstad, where a judge can determine whether the
19 prosecutor did, in fact, have probable cause to bring this
20 Information.

21 So there are many systems in our country, but
22 the common denominator we have now in our States and in
23 the Territories and States and even back into England in
24 the law that this is abased on is that when people come
25 into, before a judge or a magistrate or a justice of the

1 peace, or whatever they happen to be called locally, and
2 swear to facts, and get some kind of an order that allows
3 somebody else's body to be seized, they were never held to
4 be immune from liability before 1871, before 1791 when the
5 Oath or Affirmation Clause was put into the Fourth
6 Amendment establishing the function that we believe is
7 relevant here, a very ancient and important function of
8 providing that oath or affirmation.

9 It's never been subject to immunity, and the
10 fact that the prosecutors in Washington have really
11 voluntarily, just as a matter of their own practice and
12 convenience, or perhaps for this reason, usurped that
13 function, without even the Washington legislature or court
14 rules telling them to, and said well, we'll be the
15 witnesses here, they have taken on a function that
16 prosecutors as far as I can tell, reading -- we cited some
17 historical materials that go back into the 13th and 14th
18 Century.

19 The prosecutors and their predecessors have
20 never acted as witnesses. It's a fundamentally different
21 function of swearing to facts and bringing the facts in
22 and saying, I vouch for these facts.

23 And in most contexts, of course, there is, as I
24 think Justice Stevens pointed out, a defamation immunity
25 for witnesses, but there has always been an exception in

1 this particular context, where a person comes in, a person
2 who might say exactly the same things at a trial and be
3 absolutely immune, but when the context is the initiation
4 of a matter before some kind of judicial officer, the
5 purpose of which is to take somebody's body into custody,
6 that that person has never been held immune from liability
7 no matter what their rank in society.

8 QUESTION: But it wasn't defamation liability,
9 as the perjured testimony would be. It was liability for
10 malicious prosecution, essentially, right?

11 MR. FORD: I think the differences between
12 malicious prosecution and false arrest and trespass, and
13 trespass on the case, and the different things in the
14 common law have -- I have not grasped yet, Justice Scalia,
15 but what I understand is that whatever you called it at
16 that time, nobody recognized it as a circumstance in which
17 a person should be immune from liability, even though they
18 were doing something, swearing, very much like what they
19 could do in court under absolute immunity.

20 When they did it in this context, when ex parte,
21 I would assume that the policy reasons are because there
22 is no protection of the courtroom, it's an ex parte
23 proceeding, it involves an initiation of a very drastic
24 governmental action against a person, whatever those
25 policy reasons were, the common law in 1871 was clear that

1 in that context a swearer, a person who took an oath or
2 affirmation, was not subject to the immunities that they
3 would be later in the proceeding, and I think that is the
4 difference, and there's no historical basis -- this one
5 1927 --

6 QUESTION: So Mr. Ford, if the prosecutor did
7 the same thing, but once the trial is going on says, I
8 need to arrest this material witness, and the police
9 report tells me this, this, and this, and so I swear out
10 an arrest warrant, but it's in court while the trial is
11 going on to hold the material witness, that would be
12 absolutely immune?

13 MR. FORD: That is a fascinating question,
14 Justice Ginsburg. It had not occurred to me because of
15 course the material witness is not a party to the lawsuit,
16 and how the common law would have treated that I do not
17 know. It does seem to me to be a part of advocacy, but it
18 also seems to be kind of like initiating a new proceeding
19 against a material witness.

20 QUESTION: But if you're talking about witness,
21 it's the same swear -- I swear, this is what the police
22 report, I gather from the police report -- and it's the
23 same exact form as the one that leads to the prosecution,
24 but it happens during the trial. If -- just your
25 puzzlement shows it isn't that easy to draw the line

1 between what is advocacy and what is testimony.

2 MR. FORD: Well, it is easy to draw the line.
3 To me -- and that's the fundamental issue in this case.
4 Testimony is not advocacy. Swearing is not making a
5 decision. You don't decide whether to tell the truth or
6 not. When you go under oath, you tell the truth. Now,
7 you may be --

8 QUESTION: Well then, why are you having such a
9 problem with this case? You say maybe there would be
10 prosecutorial immunity if the very same thing happened
11 while the trial was going on.

12 MR. FORD: I was having trouble, Justice
13 Ginsburg, because I don't think anybody ever thought of
14 that question before, and as I'm thinking about it, I
15 think that that is the initiation of a new action against
16 the material witness, and would not be subject to
17 immunity.

18 Now, the different analogy that I had thought of
19 is what if the prosecutor swears in support of some motion
20 during the trial itself? It seems to me that is a
21 different thing where different sorts of protections
22 exist. That is within the area that the common law would
23 have found advocacy.

24 QUESTION: Well, what if a prosecutor avows or
25 swears to the court, I subpoena this witness, he's not

1 here, I ask you to issue a bench warrant? Protected or
2 not?

3 MR. FORD: If it's necessary under the Fourth
4 Amendment for that witness to have probable cause for that
5 bench warrant it seems to me that he may again be
6 initiating a new proceeding against that witness if he's
7 lying, or she is.

8 QUESTION: But the subpoena had already been
9 served. The bench warrant just really says, you know, you
10 come right now.

11 MR. FORD: And I don't know what the
12 constitutional requirements would be with regard to the
13 bench warrant under those circumstances, Mr. Chief
14 Justice.

15 I would say that with regard -- my thoughts have
16 been with regard to the defendant himself or herself.
17 With regard to that person, once you're in court in the
18 heat of battle swearing or avowing or proffering is the
19 more usual situation, that that is within the witness
20 immunity if it's a witness, the prosecutorial immunity if
21 it's a prosecutor.

22 But the initiation of a new proceeding to
23 arrest, that's where the common law has looked, and I have
24 not seen cases that have focused on, what if you initiate
25 a new proceeding in the middle of another proceeding. I

1 would assume the law would be the same, but I don't know
2 what the common law was and of course that, I think, is
3 what the Court has to look at.

4 What would have been the understanding in 17 --
5 or in 1871 about liability here, and it wouldn't
6 necessarily have been the opinion of the North Dakota
7 supreme court in 1927, which was characterized in the
8 Solicitor General's brief as having been a suit based on a
9 false complaint. That is, a false document.

10 I understand the argument here would be very
11 different if our only argument were Ms. Kalina lied when
12 she signed the Information and said Rodney Fletcher
13 committed a burglary in the Information. That is an
14 immune act. That is the initiation of a prosecution.
15 That is a decision. That is advocacy.

16 But when she takes the Fourth Amendment separate
17 rule of making an oath or affirmation, she is doing
18 something that has much more ancient roots and should not
19 turn on the -- the difficult lines, I think, Justice
20 Ginsburg, would be if there was a line that was based on
21 the name of the charging document, or the particular local
22 procedure.

23 I have looked at a number of States in regard to
24 this, and the States are very various and the counties,
25 I'm sure, within States vary as to how they handle

1 criminal prosecutions, and when -- where the police hand
2 off to the prosecutors, and to draw a line straight
3 through based on Washington's particular procedure I think
4 would be extraordinarily difficult and create different
5 rules in different States.

6 And, of course, in section 1983 the Civil Rights
7 Act was supposed to, I think, establish Federal minimums
8 for the protection of residents of the various States
9 regardless of what their State officials decided to do,
10 and when the -- the fact that our State officials and our
11 prosecutors have over the years said, well, wouldn't it be
12 easier if we just swear the witnesses, and we just
13 provided the oath or affirmation rather than have police
14 officers or FBI agents or the various people who do it in
15 every other jurisdiction of the country perhaps save one,
16 that can't change the constitutional rights and remedies
17 of the people of Washington that were enshrined in 1871
18 and existed a long time before that, of saying if you lie
19 about me and cause me to be arrested, I have a cause of
20 action to recover for my damages from you.

21 QUESTION: Well, now in the Burns case I think
22 we gave absolute immunity to a prosecutor who gave false
23 evidence at a hearing to get a search warrant, didn't we?

24 MR. FORD: I think not, Justice O'Connor. In
25 Burns the police officer testified, and I believe the

1 police officer was separately sued and was not a party
2 before this Court. The --

3 QUESTION: But the prosecutor --

4 MR. FORD: The prosecutor --

5 QUESTION: -- certainly, who presented the false
6 evidence, was given absolute immunity.

7 MR. FORD: I -- presenting and acting, asking
8 questions and even drafting documents, those are
9 prosecutorial-type functions.

10 QUESTION: Mm-hmm.

11 MR. FORD: But swearing on the bottom line,
12 that's when it changes. That's where the Fourth Amendment
13 says it changes to -- from an illegal arrest to a legal
14 arrest. That's where the common law said it changed, and
15 even magistrates could be sued at common law if there was
16 no oath or affirmation.

17 The person who puts their name on that oath or
18 affirmation, that's what causes an arrest, and 1983 says,
19 a person who causes another to be deprived of their rights
20 guaranteed by the Constitution.

21 What causes that arrest is swearing on the line
22 that says, I swear that this is true, and the person who
23 has done that has always been subject to liability, I
24 think was in the Burns case -- in some ways it's very much
25 like in the Buckley case.

1 Counsel referred to Buckley as if the court
2 granted prosecutorial immunity there, and I think it did
3 not, and I think that's the answer to Justice Souter's
4 questions about how broadly do you define under the -- I
5 think the petitioners here are really refighting Buckley
6 and saying, well, everything we do is designed to, you
7 know, convict or to prosecute or decide whether to
8 prosecute or not, so everything we do should be
9 prosecutorial, and Buckley certainly said that's not the
10 case with regard to particularly one function that was, I
11 think, very analogous to what happened here, which is the
12 manufacturing of false evidence.

13 In a very real sense, our claim is that Lynne
14 Kalina manufactured false evidence against Rodney
15 Fletcher, and she did so not only with regard to the
16 trial, but with regard to a critical moment when nobody
17 else was there in court to correct it, that the common law
18 and the cases of the majority of circuits, certainly, have
19 always said is subject to liability.

20 QUESTION: Well, it all boils down to how you
21 analyze the function, and in one sense you can say that in
22 Malley the function being performed by the police officer
23 in signing the affidavit was to further the investigation
24 for a crime, and here the function being served was to
25 further the prosecution of a criminal, an alleged crime.

1 MR. FORD: Except that, Justice O'Connor, in
2 Malley what the police officer was --

3 QUESTION: There was an initiation of a
4 prosecution here, and there was not at this stage in
5 Malley.

6 MR. FORD: It depends only on what you call a
7 prosecution. There was a criminal complaint filed against
8 Mr. Briggs, and the request of Officer Malley was that Mr.
9 Briggs be apprehended and brought -- held -- and held to
10 answer this complaint.

11 It wasn't, let him bring him in here for finger
12 prints, or bring him in here so we can take his picture
13 and show it to witnesses. It was bring him in here and
14 hold him to answer for the charge that I'm getting a judge
15 to issue right now, exactly the same, except in name, to
16 what Ms. Kalina did here, and I think the function test
17 can't turn on the name that a specific State gives a
18 particular document.

19 QUESTION: Can you help me with something else I
20 don't know, and perhaps -- are there grand jury
21 indictments as well in Washington?

22 MR. FORD: There can be, Your Honor.

23 QUESTION: Yes. All right. When the grand jury
24 indicts someone, then that's automatically probable cause
25 to try the person, isn't it?

1 MR. FORD: That's my understanding. It's very
2 rare in Washington.

3 QUESTION: All right -- oh. Well, what I really
4 wanted to know is, is it also probable cause to arrest the
5 person without going through any other procedure?

6 MR. FORD: My understanding of the case law
7 elsewhere is that the issuance of a grand jury indictment
8 is sufficient itself to warrant an arrest warrant. It
9 would not be under Washington law.

10 QUESTION: And do you -- are you familiar
11 enough -- in instances where a case begins through an
12 Information, in which case the prosecutor, I take it,
13 signs a statement and says, these are the facts, and this
14 is sufficient, and if it's accepted I take it that makes
15 probable cause for beginning the trial -- is that what an
16 Information does?

17 You write out on a piece of paper what the facts
18 are, and you say that this is the -- these constitute the
19 crime, and you give it to the judge, and now the judge
20 says yes, we can begin the trial now. Is that basically
21 how it works?

22 MR. FORD: It's an allegation, Your Honor, and
23 in Washington it's usually summary. It only says, I --

24 QUESTION: Now, do you need some backup for that
25 to begin the trial?

1 MR. FORD: Only if you arrest. In Washington,
2 you can initiate a prosecution. Ms. Kalina could have
3 charged Mr. Fletcher simply by filing an Information, not
4 sworn. He would not have been arrested. That would have
5 been just fine. Washington procedure provides for that.
6 They could have sent --

7 QUESTION: Do you need probable cause to begin
8 the procedure?

9 MR. FORD: You need probable cause only to
10 arrest him.

11 QUESTION: So you could bring -- you could
12 bring, if you don't arrest somebody, a proceeding against
13 him in a criminal court without probable cause?

14 MR. FORD: I think you'd be violating your oath,
15 and I think you'd be subject to dismissal. You would not
16 be subject, if you are a prosecutor, to a Federal civil
17 rights suit, or a malicious prosecution action in
18 Washington.

19 The -- but that would -- you can file the
20 document and, indeed, that is the only required document,
21 and many of the -- the question here is, what is the
22 prosecutorial function?

23 If we look historically, why have Washington
24 prosecutors always -- all of a sudden taken on the role of
25 witnesses when they -- no prosecutors have historically

1 that we can find, and the answer is not because Washington
2 law requires them to, because Washington law says clearly
3 you can initiate a prosecution --

4 QUESTION: Yes.

5 MR. FORD: -- and, in fact, the only thing that
6 is required is the filing of an Information.

7 QUESTION: You see, I'm bothered by this
8 slightly odd phrasing of the -- of what she swore to. It
9 was that I am familiar with the police report, and the
10 case contains the following, and it's as if she's vouching
11 for it but not stating it. I don't know how to deal with
12 this -- it's a rather unusual animal, and I don't know how
13 to think of it.

14 MR. FORD: Well, we haven't got into the facts
15 yet, of course, Your Honor. Because of absolute immunity
16 it doesn't matter if she made the whole --

17 QUESTION: No, I know --

18 MR. FORD: -- or whatever.

19 QUESTION: -- and then follow a bunch of factual
20 statements. What I'm thinking of is this odd way --

21 MR. FORD: Right.

22 QUESTION: I mean, she's not vouching for it.
23 She's not even vouching -- I mean, she's not saying she
24 knows it. She's saying it's in the police report. That's
25 what she knows.

1 MR. FORD: Number 1, I --

2 QUESTION: I'm trying to work out if that is --

3 QUESTION: Is that boilerplate? Is this typical
4 of what goes into a prosecutor's certificate for
5 determination of probable cause, those words, is familiar
6 with the police report, the case contains?

7 MR. FORD: I don't know the last phrase, Justice
8 Ginsburg. My experience is that it is fairly typical of
9 both our prosecutors and, of course, of Federal police or
10 law enforcement agents in Federal courts who do the same
11 thing, summarize reports in affidavits, and the Jones v.
12 United States said that hearsay can be the basis of an
13 arrest and arrest warrant, so that is what they're
14 capitalizing upon.

15 But of course here, our submission, and what we
16 plan to prove is that not only was she testifying falsely
17 about what Mr. Fletcher did, but also she's testifying
18 falsely about what's in those police reports, and that
19 will be the question, really, if we get to the question of
20 qualified immunity.

21 If she can say, hey, here's the police reports,
22 how do I know, we've got a different case, but our
23 contention is that she was false on both levels, and --

24 QUESTION: If you prevail can prosecutors
25 maintain their absolute immunity in further cases by

1 adopting that sort of formulation, of being just a little
2 bit more careful?

3 MR. FORD: I don't think it should go on the
4 formulation, Justice Kennedy. I think it goes on swearing
5 or not swearing. If they decide to swear, they're
6 stepping outside their prosecutorial role.

7 QUESTION: Well, suppose they swear that I have
8 read the police report and based on the police report
9 there's probably cause for the following, and then there's
10 a police affidavit as well?

11 MR. FORD: Well, if they supplied probable cause
12 that did not otherwise exist and did so falsely, they
13 would be the person who is the appropriate defendant, and
14 I would think that that would render them liable.

15 I know of nothing in the common law or any other
16 cases that say that claiming to be a second-hand witness
17 enables you to be absolutely immune, where claiming to be
18 a first-hand witness does not, and oftentimes as long as
19 you're going to allow hearsay there's going to be hearsay.

20 Actually, it's a third-hand witness versus a
21 second-hand witness, but again, Officer Malley was a
22 second-hand witness testifying to what was in the logs
23 that he had read from other officers. It's exactly the
24 same thing. That can't be the difference.

25 The difference is, if you choose to swear, if

1 you take on that police function, you take on their
2 qualified immunity. You're not -- you still have that,
3 but you take on their qualified immunity.

4 QUESTION: But I thought you said in answer to
5 my question if a prosecutor swears to something while the
6 trial is ongoing, that would be ranked as prosecutorial
7 even though it involves swearing, so I thought you were
8 conceding that you could have sworn plus prosecutorial.

9 MR. FORD: It is difficult for me to conceive an
10 instance where the prosecutor could step out of the role
11 and issue an affidavit that was not at least subject to --
12 I -- if the prosecutor became a trial witness he would
13 have the immunity of trial witnesses, or she would.

14 The -- if -- but if -- so that's the difference.
15 The difference is the common law difference between
16 complaining witnesses and trial witnesses, and prosecutors
17 never become trial witnesses in my experience, so that's
18 why I'm having trouble conceiving of that.

19 QUESTION: No, but there is the Chief Justice's
20 case. Let's assume the prosecutor says, now, I issued a
21 subpoena, and the subpoena doesn't, I take it, require
22 probable cause to believe that anything had been done
23 wrong by the witness. He simply says, you are a witness
24 who can give evidence.

25 The witness hasn't showed up. Therefore, issue

1 an arrest warrant. The cause for the arrest warrant
2 consists of the failure to respond to a lawfully issued
3 subpoena. If the prosecutor is lying in that case, then I
4 would suppose on your theory the prosecutor could be
5 liable, or at least -- strike that -- would not have any
6 absolute immunity even though in fact the process was
7 issued in the middle of a prosecution.

8 MR. FORD: Again, my conception of that would
9 be, it's a new proceeding against the witness, but that
10 would be the one hard question that would be left under
11 our --

12 QUESTION: Yes.

13 MR. FORD: -- conception that Malley should be
14 maintained.

15 Thank you.

16 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Ford.
17 the case is submitted.

18 (Whereupon, at 12:04, the case in the above-
19 entitled matter was submitted.)
20
21
22
23
24
25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

LYNNE KALINA, Petitioner v. RODNEY FLETCHER
CASE NO: 96-792

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Don Mari Fedirko-----

(REPORTER)