

September 27, 2013

The Supreme Court of Texas  
Attn: Clerk of Court  
201 West 14<sup>th</sup> Street, Room 104  
Austin, Texas 78701

In The Supreme Court of Texas  
Shell Oil Company and Shell International, E&P, Inc.  
vs. Robert Witt  
No. 13-0552

Dear Sir/Madam:

Shell Oil Company has petitioned for review of the above decision, which reversed the summary dismissal of a libel claim by a former Shell employee identified in a report submitted to the U.S. Department of Justice (“DOJ”) as having authorized payment of bribes to Nigerian government officials. The signers of this letter are six former Attorneys General of the United States who believe for reasons summarized below that the petition raises serious public policy issues that warrant this Court’s attention, and that review therefore should be granted. .

In summary, we understand the facts underlying the petition to be as follows. After a Shell contractor pleaded guilty in 2007 to having paid bribes through its subsidiary to Nigerian customs officials in connection with a Shell oil and gas project in that country, the DOJ told Shell it was conducting a criminal investigation into whether Shell had violated the Foreign Corrupt Practices Act (“FCPA”) in connection with hiring its contractor’s subsidiary, and asked to meet with Shell. It asked also for information about several potential witnesses, including respondent Robert Witt, who supervised the oil and gas project in question.

At the meeting, Shell offered to conduct its own investigation, pursuant to a plan to be submitted to DOJ, into the circumstances surrounding the hiring of the contractor’s subsidiary and the payments in question. It made that report and underlying documents available to DOJ two years later, in February 2009. The report identified Robert Witt as among those who had authorized payment of the bribes, stated that he had falsely denied

involvement, and disclosed that he had been fired. In November 2010, DOJ filed a criminal information charging Shell with FCPA violations, based in part on information provided by Shell in its report, and concluded a deferred prosecution agreement with the company, which agreed to pay a monetary penalty.

Writt eventually sued for wrongful termination and for libel, claiming that Shell had defamed him in the report it submitted to DOJ. The trial court summarily dismissed the libel claim as barred by the Texas rule granting absolute privilege to statements to prosecutors in connection with a reasonably contemplated future judicial proceeding. After the jury found for Shell on the wrongful dismissal claim, Writt appealed the summary dismissal of his libel claim. In a 2-1 decision, the Texas Court of Appeals, Houston (1<sup>st</sup> Dist.) reversed, finding the report only conditionally privileged. The amended majority opinion reasoned as follows with respect to absolute privilege::

. . . [A]lthough the record establishes that the DOJ contacted Shell to discuss Shell's engagement of [its contractor's subsidiary] . . . there is nothing in the record that conclusively establishes that, at that time, the DOJ had filed a criminal proceeding against either Shell or Writt . . . [or] was acting in a manner preliminary to filing a criminal proceeding . . . [or that] Shell . . . actually contemplated in good faith and took under serious consideration the possibility of a judicial proceeding. 2013 WL 3198426 at 13.

The policy justification for that conclusion appeared to be as follows:

To extend the absolute privilege to the circumstances of the instant case, where neither Shell nor Writt was party to an ongoing or proposed judicial or quasi-judicial proceeding at the time Shell made the complained-of statements, would have the very dangerous effect of actually discouraging parties from being truthful with law-enforcement agencies and instead encourage them to deflect blame to others without fear of consequences. 2013 WL 3198426 at 4.

To the extent the majority opinion would deny absolute privilege for statements made to law enforcement authorities at the request of those authorities during an actual ongoing investigation, based on the absence of a formal judicial proceeding or an actual intent to commence such a proceeding, and would reach that conclusion based on the fear that to do otherwise would encourage parties to incriminate others without concern for consequences, we believe its reasoning is seriously flawed. If absolute privilege is to be denied for statements to law-enforcement authorities unless a judicial proceeding has been commenced or "proposed," valuable evidence likely will be denied to law-enforcement authorities, or its production seriously impeded, at the investigative stage of cases, when it is most valuable. Indeed, the majority appears to misapprehend the very concept of a criminal investigation, demanding that the conclusion be reached or at hand before evidence can be gathered freely. The danger foreseen by the majority – that a

contrary rule will encourage false incrimination – is illusory. It suggests that corporations, which cannot act except through their employees and agents, will incriminate themselves by falsely accusing such employees or agents, and that the prospect of a civil libel claim is a more potent deterrent to false accusations than the prospect of a prosecution for perjury, false statements or obstruction; neither proposition withstands scrutiny.

For the reasons set forth above, we believe that the captioned decision should be reviewed by this Court.

Respectfully submitted,

/s/ Michael B. Mukasey

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