In the

Supreme Court of the United States

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JOSHAWAY DAVIS,

Petitioner,

vs

STATE OF ALASKA,

Respondent.

No. 72-5794

Washington, D. C.
December 12, 1973

Pages 1 thru 48

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STATE OF ALASKA,

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Washington, D. C.,

Wednesday, December 12, 1973.

The above-entitled matter came on for argument at 10:44 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

ROBERT H. WAGSTAFF, ESQ., 820 East Eighth Avenue, Anchorage, Alaska 99501; for the Petitioner.

CHARLES M. MERRINER, ESQ., Assistant District Attorney, Third Judicial District, 1001 W. Fourth Avenue, Anchorage, Alaska 99501; for the Respondent.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 72-5794, Davis against Alaska.

Mr. Wagstaff, you may proceed whenever you're ready.

ORAL ARGUMENT OF ROBERT H. WAGSTAFF, ESQ.,

ON BEHALF OF THE PETITIONER

MR. WAGSTAFF: Mr. Chief Justice, and may it please the Court:

The issue presented to the Court in this case is the virtual confrontation of the confrontation clause of the Sixth Amendment against a State statute and court rule, which provides that juvenile records shall remain secret, anonymous, in virtually all cases save when the juvenile is being sentenced as an adult and the court, in its discretion, feels that the juvenile record would be relevant or desirable.

In this particular case, this statute and court rule was applied when a juvenile was testifying for the prosecution as a chief identification witness against the accused, Petitioner Davis.

Now, we sought at trial to use this, his juvenile record, not simply to impeach his character with prior wrongful acts, but, rather, to show that he had bias, prejudice, and was testifying out of fear and favor when he

identified Petitioner Joshaway Davis at trial.

The court's protective order, or the court entered a protective order, the trial court did, during the voir dire examination for jurors, and at that time the issues were fully raised that are actually presented in our briefs today; the confrontation issue was argued to the trial court.

There has here been a significant diminution of cross-examination, and this calls into question the integrity of the whole fact-finding process, and requires that the competing interest be closely examined.

The facts of the Davis case really bespeak the legal issues raised.

A safe was found on some property next to a truck, approximately 25 miles north of Anchorage, Alaska. The stepson of the owner of this property owned this particular truck, and was on probation for burglary as a juvenile. He had committed acts which, if he'd been an adult, would be burglary. He had been adjudicated to be a juvenile delinquent and was under probation at that time to the Juvenile Court. He was sixteen years of age, and lived on this particular property.

QUESTION: Was that his only collision with the law?

MR. WAGSTAFF: To our knowledge. We never actually were provided with the record at that time. But

respondent has admitted, in essence, what I've just related to the Court, in their particular brief; and I don't believe that's at issue.

We desired to bring this fact out to the jury in order to show that this witness was initially afraid that he was going to be linked into a burglary charge himself, because this witness turned out to be the chief critical identification witness, and, indeed, the one essential witness at trial against Joshaway Davis.

The story that Mr. Green, the boy Green, gave to the police officers when they came up to investigate the situation was that earlier in the day he had been walking in the area where the safe was found and had observed two black men to be standing near a recent, a late-model Chevrolet automobile, metallic in color.

He said that he talked to them briefly and asked what they were doing there, and they -- he asked if they were having any trouble and they related that, they just said simply to him: Is your father here?

And he progressed, he said no, and he progressed on, and then came back later and stated that he observed these two men in the same position, one with a crowbar. He stated that he probably could identify them.

The next day Green was taken down to the police station in Anchorage, an inherently coercive environment to

begin with, but coupled with this he was taken into a small room, in the presence of four detectives, seated between the two chief investigators, the two actual investigating officers, one of whom was packaging pistols, apparently in connection with another case, and given either five or six photographs and asked to see if he could identify one or both of the persons that he claimed to have seen standing where this safe was found.

Now, at this particular point in time, our theory of the case, and the one that we were precluded from presenting to the jury, was that Green was under a lot of pressure then to identify someone else. He, in his own mind, if not actually, was a suspect of this burglary and was under strong impetus to, in fact, pick someone out of these photographs in order to take the heat off of himself.

Again, the jury was not aware of these circumstances.

He did, in fact, pick a picture out, one of which was the picture of Joshaway Davis.

There was a subsequent line-up and then an identification at trial.

Our point is that when this initial photographic identification was made, Green was then, and from that point forward, locked into this identification; and this was the critical point in time when the identification --

QUESTION: Before you leave that police station situation, I noticed on page 34, that you were referring to earlier, there was a general question in the course of the trial, "Had you" -- this is addressed to Green -- "Had you ever been questioned like that before by any law enforcement officers?"

I would assume, for the moment at least, that that was some kind of an effort to perhaps lay grounds for impeaching him; and he answered "No."

When, in fact, as we now know on the total record, if he had been involved as a juvenile and was on probation, he must have been at some time interrogated by police officers in the past.

MR. WAGSTAFF: That's correct, Mr. Chief Justice. And --

QUESTION: Did you pursue that by way of any impeachment at a later point?

MR. WAGSTAFF: In the trial?

QUESTION: Yes.

MR. WAGSTAFF: No, I did not. An objection was made at that time when I asked that question, there was a negative response, that -- the objection was incomplete; "he's attempting to raise in the jury's mind --" and the court said simply, "I'll sustain the objection."

And at that point, I believe that the court, and

the record reflects, was referring to its prior protective order that we couldn't get into that particular area.

Respondent attempts to limit the meaning of that question with the words"like that". I think when the question is read in conjunction with the prior question, which was, "And then you went into the investigators' room with Investigator Gray and Investigator Weaver?" "Yeah." "And they started asking you questions about -- about the indicent, is that correct?" "Yeah." "Had you ever been questioned like that before by any law enforcement officers?" The answer was "No."

Again we feel that this answer itself was, must have been, untruthful, and we were precluded from showing this to the jury.

Also, we not only were prohibited from cross-examining Green on this point, but the police investigators as well, with respect to particular pressures they may have put on Green at the time of the initial photographic identification.

Particularly, Investigator Gray was asked, "Did you at any time suspect Green to be involved in this burglary?" and he responded "No."

Cross-examination at that point was precluded on "How is your negative response consistent with your knowledge that he in fact was a juvenile on probation for burglary,

the safe was found on his land, next to his truck?" Again that question was precluded.

The prosecution at trial made the most of their protective order. The jury was, in essence, given a distorted view of exactly what Green was and who he was. The protective order, of course, came during the voir dire examination, so that any mention of the problem, the juvenile record, would not come before the jury.

In closing the argument, the prosecution stated that the petitioner's entire defense, which our entire defense was, that Green's identification was unreliable, that he was under pressure. We tried to show just by the fact that he was, the safe was found on his property, next to his truck, that he would be under pressure. That was our defense. This was developed in opening statement, throughout the trial, and in closing argument.

The prosecution, in closing argument, claimed that this was a total red herring issue, one that we had just made up, and that there was no basis for this belief. He also stated, and I'm referring to pages 422 and 424 of the transcript, that our defense of bias and prejudice and fear and favor on the part of Green came as a result of pure suspicion of society and suspicion of law enforcement officers. When, of course, the prosecutor must have known in his own mind, at least, the origins of our attack on

witness Green's credibility and any bias and fear and favor he had in testifying came from other independent sources than that.

As a result of Green's identification at the station house, a search warrant was obtained for a car belonging to Petitioner Joshaway Davis; a search was made of records of rental car agencies the police suspected, because of the description of the car maybe is a rental car, they found a car rented to petitioner; obtained a search warrant for the premises, his house, and also of the vehicle.

As a result of this search, they found evidence inferentially relating petitioner's car to be present perhaps at the scene, or actually with having had a safe, perhaps, in the trunk of the rented car at one time.

That's the extent of the other evidence presented against petitioner at trial. The actual evidence in the trunk of the car were insulation fibers that could have come from a safe, and paint chips that could have come from a safe. This was the extent of the identification of these particular substances.

There was no -- there were no fibers or paint chips found on petitioner's clothing or on his shoes or -- nor was the money found that was allegedly in the safe; none of the things that the search warrant basically was

seeking were ever found; just these small items of evidence.

This is important, of course, to the significance of Green's identification. The crucial nature, the essential nature of his testimony -- its essential nature I don't believe is actually in dispute; it was admitted at trial during the motion for a protective order, described as an essential witness, with that very word. Also the Alaska Supreme Court, in their opinion, described him as an essential witness; that the case could not have been made without him.

The trial judge ruled on the issue on the basis, strictly, of the State statute and the rule involved. He initially was inclined to rule in our favor, as the record reflects, and stated when he reversed himself that he really didn't agree with what he was doing, but he felt constrained to do so by a specific court rule in Alaska, which is cited, of course, in the brief.

QUESTION: Suppose Joshaway Davis had a juvenile record, would that -- would you have allowed that to go in?

MR. WAGSTAFF: His juvenile record?

QUESTION: I said supposing that he did have one, would you have allowed that to go in?

MR. WAGSTAFF: Absolutely not. His record would not be -- he didn't testify, for one thing; but assuming that he had testified, then the State statute would have prohibited,

and the rule prohibited it from being used against him in a subsequent criminal prosecution, as it should be.

QUESTION: And the difference is what?

MR. WAGSTAFF: The difference is what. Well, in this case, that Green was not being accused of anything, the record was not sought to be used against him, strictly. It was sought to be used to impeach his credibility, not even necessarily to attack his character, but that he was testifying under fear and favor.

And if there is any conflict between that particular State law and rule and the Sixth Amendment, then the statute and rule must accede to the Sixth Amendment, the confrontation clause.

QUESTION: You say you wanted to use the record to impeach his credibility?

MR. WAGSTAFF: His, Green's credibility, yes, and to show that he was testifying from fear and favor.

QUESTION: What did the Alaska Supreme Court mean when it said that Davis claims not to be interested in impeaching the juvenile, but rather desires to show bias, prejudice, or motive, in that the witness was under pressure to shift suspicion from himself onto another? Is that a correct reflection of what you want to do?

MR. WAGSTAFF: Yes, it is. When we're talking about impeachment and --

QUESTION: I mean you just weren't interested in introducing the record to show that he had had a criminal record and he might not be reliable or truthful?

MR. WAGSTAFF: No, we weren't using it under the State's rule of evidence which provides that impeachment of character may come about by showing any specific bad acts in the past. We weren't attempting to do that.

QUESTION: That kind of impeachment goes to sort of a general attack on credibility.

MR. WAGSTAFF: On character. The distinction that I would make is that would be an attack on the witness's character; in this case we wanted to make a specific attack on his credibility, to show bias and prejudice on his part.

QUESTION: Just for the limited purpose of showing bias, prejudice or motive, in the sense that he had some special reason for cooperating with the police?

MR. WAGSTAFF: Yes.

QUESTION: Because he was on probation?

MR. WAGSTAFF: Yes. That -- there would be two parts to what his special motive for the identification would be; the first part would be to take the pressure off himself, when he made that initial identification shortly after the safe was discovered on his property, next to his truck, that he was very anxious to do that: that the investigation be turned away from him. At least as he saw

it in his own mind.

And, secondly, that he would have impetus to testify just by virtue of the fact that he was on probation and would somehow hope thereby --

QUESTION: But, in any event, you had a more limited reason for wanting to use the record than you might have had?

MR. WAGSTAFF: No, I don't think I understand your question, Justice White.

QUESTION: Well, the appellant -- he claims not to be interested in impeaching the juvenile. Now, if we put that aside, whatever it is, you are left with something that is less than --.

MR. WAGSTAFF: I've tried to cover that somewhat in my reply brief, that when the term "impeachment" and the term "attack on credibility" had been used somewhat interchangeably, and I tried to distinguish them, at least for purposes of my argument. And the cases that I have cited in support of our position also make that distinction.

QUESTION: The reason I was interested in it is that the Alaska -- the State Supreme Court seemed to say that with respect to this limited reason for wanting to use the juvenile record, that that reason was amply satisfied by the scope of the cross-examination which was allowed.

MR. WAGSTAFF: I don't think the Alaska Supreme Court was limiting themselves to strictly impeachment in terms of the particular civil rule. I think they were talking about a general impeachment attack. And I think that you could define under two sub headings under the word "impeachment": attack against character; and attack against credibility.

The case --

QUESTION: How do you separate those two? I confess that I could not understand what the Supreme Court's opinion meant when they said that you were not attacking impeachment. By whatever name you call it, if you try to undermine the jury's acceptance of the testimony given,it is impeachment, is it not?

MR. WAGSTAFF: I agree with that completely, Mr. Chief Justice.

I think what the court must have made was using -- the reason the term "impeachment" is a word of art. Particularly, and I've cited it in the first part of my brief under Alaska Civil Rule 43, it talks about impeachment by an adverse party, and then it goes on: that a party may not be impeached by evidence of particular wrongful acts, except that it may be shown by the examination of the witness or the record of a judgment that he had been convicted of a crime.

I think that's what the court was talking about. We weren't attempting to do that, although, as I've argued in my brief, I think that that even should be allowed and let the jury determine the particular significance of that.

QUESTION: But you weren't pushing for that in the State court.

MR. WAGSTAFF: Wasn't pushing for that, and we aren't pushing for that now.

QUESTION: Yes.

MR. WAGSTAFF: Because it's not necessary in this case. But I think it should be allowed.

QUESTION: Because it could be that you could use a prior criminal record for impeachment for a purpose that's wholly aside from showing bias or prejudice.

MR. WAGSTAFF: Yes. That simply this person is a bad person, and he should not be believed.

QUESTION: Yes, and he may not be truthful.

MR. WAGSTAFF: Yes.

QUESTION: But yet --

QUESTION: And it might be that a jurisdiction such as Alaska might wholly abolish the rule that permits impeachment, simply by showing a prior conviction. And I take it your argument doesn't go to any such general abolition.

MR. WAGSTAFF: No, it does not, and of course

there is a perceptible trend in that direction. But we were not limiting, we were not offering it solely for that purpose. And actually that was a secondary purpose. The primary purpose was to show that this witness, in his own mind, by virtue of the fact that he was on probation for burglary, would feel that he was a suspect.

QUESTION: You might have had the situation for showing that if he were simply charged as a juvenile, and not even finally adjudicated.

MR. WAGSTAFF: That's correct. It could be -- his mind is what is critical, and the jury should be allowed to determine what factors were present in his mind, what pressures he would feel. We relied very heavily on, of course, two cases where this is discussed greatly: the Alford case and Smith vs. Illinois. And I think those cases are directly applicable here.

QUESTION: In reading the opinion of Chief Justice Boney, that part of it appearing on 59a of the Appendix, he was simply describing your argument. He says that you recognize that the majority of the case law is against you so far as cross-examining a juvenile prosecution witness, those in order generally to impeach him, and that therefore you were trying to take your case out of this general rule and show that you had very special reasons, special circumstances to do it here, Particularly in light of his

footnote 40 on that page.

You know what you argued to the Alaska Supreme Court, I don't. But this seems to be a reflection of the argument you made, that you're not under the general rule, you're under the exception to the rule.

MR. WAGSTAFF: That's correct.

QUESTION: Because of the special circumstances in your case.

MR. WAGSTAFF: That's correct.

QUESTION: Now, this particular witness having been found a delinquent by reason of larceny, and of the stolen safe having been found next to his truck, and therefore that he was under some particular reason to testify against your client; that it wasn't just a case of general impeachment. That's the way I understand it. Is that my --

MR. WAGSTAFF: That's correct.

QUESTION: Have I misread it?

MR. WAGSTAFF: No. I think that's absolutely correct, Justice Stewart.

QUESTION: And the court went on to think that if that was your purpose, at least their view of the evidence was, and of the cross-examination, that you hadn't had ample opportunity to satisfy that purpose. Within the cross-examination that you were allowed. That's what they

said, isn't it?

MR. WAGSTAFF: That's what they found, yes.

QUESTION: Yes.

MR. WAGSTAFF: But of course the questions that were permitted were only self-serving general questions, such as: Did you feel you were under pressure, Mr. Green? Did you feel you might be a suspect?

Questions like this, which he answered negatively, which would offer --

QUESTION: And the trial court's ruling prevented you from going into the fact that the safe was found on his property and that he had some relationship with the owner of the truck. I mean, you were perfectly free to follow up that, if you chose.

MR. WAGSTAFF: Yes. But that's the extent of it. We could not bring it home to the jury, as Justice Rabinowitz points out in his dissent, the pressures that Green must have felt in his own mind. And when he denied that he felt these pressures, and when he denied he had ever been questioned by a police officer before, these were questions that were ripe for exposure on cross-examination: that the witness either had a very bad memory or was lying, or whatever other reasons can be expressed.

QUESTION: Couldn't you, under Alaska, have moved to have his "no" answer to your question of whether he had

ever been questioned by a police officer stricken, since the trial judge sustained an objection to the question?

MR. WAGSTAFF: I -- it was not my objection, it was -- I think the motion would have been made, that motion to strike would have been made by the person making the objection, the prosecutor. I think that the normal trial practice in Alaska is to let the answer stand, it's been made.

I would like to reserve the rest for rebuttal.

QUESTION: Well, by asking the question, you knew you were going to be bound by the answer.

MR. WAGSTAFF: Well, I didn't know what the answer was, of course.

QUESTION: You knew you were going to be bound by it.

MR. WAGSTAFF: I knew I'd be bound by it.

QUESTION: And you knew that the order was outstanding.

MR. WAGSTAFF: Yes. The order, the protective order.

QUESTION: Was outstanding, and yet you asked that question and you got the answer of "no" and you were stuck with it. Because of you asking the question.

MR. WAGSTAFF: That's correct.

MR. CHIEF JUSTICE BURGER: All right. Mr. Merriner.

ORAL ARGUMENT OF CHARLES M. MERRINER, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. MERRINER: Mr. Chief Justice, and may it please the Court:

As I read this Court's confrontation cases, in determining the damage that has been done to the integrity of the fact-finding process, I see that the focus is on two things: one is the cruciality of the unconfronted testimony; and the other is that this Court looks to see just how misled the fact-finder has been by not hearing the confrontation that has been denied.

And I must concede that Richard Green's testimony was crucial to the State's case against Joshaway Davis. My argument is that the jury was not significantly misled by the denial of cross-examination, by not having heard about the juvenile record, and by not hearing cross-examination in this area.

QUESTION: Was that the premise of your argument?

MR. MERRINER: No, Your Honor. My argument is that the testimony was reliable enough that the jurors were authorized to hear it, even though they did not hear these facts that impeached the testimony, and they did not hear cross-examination in that area.

In determining just how misled the jurors were, I would like to emphasize here at the outset that Richard

Green was on the stand. He was immediately cross-examined in all areas except this one. He was under oath. The jury was able to observe this man's demeanor as he testified.

And although Mr. Wagstaff could not cross-examine in this one area, he was able to bring out questions concerning whether or not this person thought himself to be under suspicion and therefore whether or not he had a motive to quickly identify somebody else, or to fabricate his story in order to help himself in some way.

QUESTION: Well, apparently we now know, do we not, that on page 34 he did answer one question falsely, whether that was --

MR. MERRINER: Well, I would dispute that, Your Honor, --

QUESTION: You mean that it was a false answer?

MR. MERRINER: Yes, Your Honor, Mr. Chief Justice.

QUESTION: What do you suggest it was?

MR. MERRINER: I pointed out in footnote 3 on my brief -- that's on page 13 -- that this response was not untruthful, because this inquiry referred to being questioned as a prospective witness and not as a prospective accused.

QUESTION: Okay.

MR. MERRINER: The words were, "Had you ever been questioned like that before" -- this man was a witness and

he was not a prospective accused.

We don't know whether or not the police officers questioned him at all when he was picked up for his juvenile violation.

QUESTION: Well, isn't that then -- if that extraordinary, very extraordinary suggestion that you make were possibly true, that they didn't question him, isn't that something that might appropriately have been the scope of further examination?

MR. MERRINER: Yes, Mr. Chief Justice.

Now, I submit to this Court that when this question was answered in this way, if Mr. Wagstaff had thought here that there was perjury involved, he could have asked for the jury to be excused, could have gone into this further; but there was an objection. Mr. Ripley, the prosecuting attorney, said, "I'm going to object to this, Your Honor, it's a carry-on with rehash of the same thing. He's attempting to raise in the jury's mind --" and the Court simply said, "I'll sustain the objection."

Mr. Wagstaff, at that time, could have made an offer of proof, an offer of proof that perjury had been committed. And if he could have shown that, then I would think that the court would have had to have allowed him the juvenile record, because if you've got perjury on the stand, certainly the defense counsel should be able to

impeach with whatever means is necessary to bring out the fact that there has been perjury on the stand.

As the record now stands -- and he's never raised this; in his brief he simply says, this one statement: "Counsel asked if he had ever been questioned before by law enforcement officers; his answer was no." And he doesn't say in there this showed that the man perjured himself. The implication is raised, of course, and that's the reason I put in my footnote 3. But at the time of trial --

QUESTION: Well, in the face of your Rule 23, you suggest in the circumstances, you postulate that he might have got the juvenile record in?

MR. MERRINER: Yes.

QUESTION: Well, that would certainly be contrary to the prohibition of Rule 23, wouldn't it?

MR. MERRINER: Well, yes, but of course a rule cannot stand if it's unconstitutional for its application, to be -- for it to be applied. And there is another rule in Alaska, Criminal Rules, Rule 57, which says that in the interest of justice you can dispense with any of the foregoing rules.

The rule would, I submit, have had to have been abandoned at that point if, during the offer of proof, it had come out that Richard Green had perjured himself by

this statement, then I would think that defense counsel would have been able to bring out the juvenile record at that point. Or his right to confront the witnesses against him would be denied.

But Mr. Wagstaff -- and getting off this point -- was able to question closely about whether or not Richard Green considered himself under suspicion, and, as the Alaska Supreme Court stressed, the jury was able to observe his demeanor while he was being questioned this way.

The facts that were kept from the jurors did somewhat impeach Richard Green's testimony; the fact that he had been convicted of a crime did somewhat impugn his credibility, this being a larcenous type crime, a burglary of two cabins; the fact that he was on probation showed that he had somewhat of a motive to quickly identify somebody else, to foist the blame onto someone else, to take the suspicion that he felt was on himself, or perhaps even to fabricate his story in order to aid himself in the eyes of the law enforcement people he had to deal with.

But these facts are not that impeaching, in themselves.

As for the argument that the conviction itself impeaches his credibility, in the sense that this was a larcenous type crime, Mr. Wagstaff does not rely much on this argument. As Mr. Justice White was bringing out, the

Alaska Supreme Court indicated in the opinion that this was not Mr. Wagstaff's main argument, that it should have been brought in as a conviction itself to impeach credibility.

He has a further argument, that is, that there was a motive here because of the probation.

Mr. Justice Rehnquist mentioned the possibility of totally abolishing, for any witness, the use of prior records. Now, in February of this year, Alaska, the Alaska Supreme Court did promulgate a rule that says you cannot use for any witness any criminal conviction if it's over five years old.

I can see problems there. If there's a perjury conviction that's six years old, and the State's witness has the perjury conviction behind him, he is a crucial witness, I can definitely see there are problems, that the defense counsel would be denied his right to confront if he could not ask that question.

QUESTION: Well, you then treat the right to confront, not merely the right to cross-examine generally, but the right to cross-examine about any subject that the defense counsel chooses.

MR. MERRINER: If by not being allowed to go into this area the jury is rather greatly misled about the reliability of his testimony, that testimony is crucial, yes.

QUESTION: Well, what if the State recognizes the husband-wife marital communication privilege, and that privilege is claimed by a witness on the stand who is being cross-examined by defense counsel, do you think that the State court has to abolish that in the interest of confrontation?

MR. MERRINER: Well, I know in Washington v. Texas, this Court stressed the fact that they were in no way indicating that these privileges were being questioned. But I could see the possibility of the defense knowing about some communication made to a husband, and the wife is on the stand, a crucial State's witness, some communication that, you know, she tells him, "I'm going to get up on the stand and lie." And I can see there that if the State just went ahead and applied the rule, without much consideration of the problem, I can see there that the denial of confrontation would exist.

QUESTION: Well, have any of our cases ever gone that far?

MR. MERRINER: No, Mr. Justice Rehnquist.

QUESTION: Well, you're arguing for the State, aren't you?

MR. MERRINER: Yes. But I'm arguing here that the focus should be, the test should be on the cruciality of the testimony to just how misled were the jurors.

Now, this test will apply to any fact situation, it will apply to any privilege, executive privilege, whatever, and it may be that all rules, in some situations, would have to fall.

QUESTION: Of course, the prosecution always has the privilege of not raising the rule.

MR. MERRINER: Yes. Assuming the court does not, on its own, do so.

Now, as to the impeaching quality of the fact that Richard Green was on probation, the record contains no indication that he stood to gain anything significant at all by his actions. The record contains no indication that he in any way was involved in that burglary, that he stood to suffer probation revocation.

QUESTION: Well, of course, had there been the usual scope of cross-examination, we might have a record that would disclose some reasons that we can now only speculate about.

MR. MERRINER: Yes, but in light of how impeaching these facts were generally, which, I submit, are not that impeaching, and in light of the extensive corroboration of this man's testimony, it seems apparent that any further cross-examination into this area would not have raised any hidden doubts in the jurors' minds, doubts that are not present in this record. This extensive corroboration shows

that his testimony would not have cracked under further examination. It's basic, considering --

QUESTION: Well, how in the world can you say that? Suppose he asked the question: Did the police officers say, Now, look, you're under probation, you're under this and you're under that, you committed a crime exactly like this, that's the one you were convicted for, and it's either you or who else?

You mean that wouldn't help?

MR. MERRINER: Let me go into just how corroborative this testimony was, and I think that when you realize just how corroborative it was, then you will see that by asking these further questions, that testimony would not have been changed.

QUESTION: Well, I have great difficulty in being able to take a very careful pair of calipers and find out what goes through a juror's mind, I've always had great problem with that. If I wanted to get all of the facts.

MR. MERRINER: Well, in these confrontation cases, that's the question that has to be asked, is what would the jurors have thought, the test is what the average juror would have thought, as I believe Schneble brings out. But that is the question that has to be asked.

Now, the confrontation --

QUESTION: Well, do I know what the average juror

in Anchorage, Alaska, would think? You may assume I've never been there, except going through on a plane.

MR. MERRINER: It's even colder than this up there now.

[Laughter.]

But if we look at just how corroborative his testimony was, we'll see that these hidden doubts would have not been raised by further examination, any significant hidden doubts.

Perhaps most importantly there was a story given to the trooper on the very day that the burglary occurred, on the very day that the safe was found out at his stepfather's property, and he said: I saw these two men beside a late-model, metallic blue Chevrolet sedan.

The very next day he went down to the police station, he picked out, out of six pictures, -- and I believe the record will show that, I know it will show that the Alaska Supreme Court opinion is wrong in that respect; there were six pictures, they are identified in the record, Exhibits 25 through 30, I believe -- he picked out -- and also the Alaska Supreme Court opinion is wrong when it says he picked out two pictures; he picked out one picture, the record will show. So he picked out of six pictures the picture of the petitioner. He was able to do this, even though it was ten years old. It did not show the

petitioner with a mustache in the picture, although at the scene of the burglary he had a mustache; at the line-up, two days after the photo line-up, he had a mustache.

And two days after the photo identification there was a corporeal line-up, he again picked the man out, out of a group of seven men he picked two men that time, one as representing the other man. So he picked Joshaway Davis.

And, as it turned out, the evidence was that Joshaway Davis had rented a late-model, a 1969, the burglary having occurred in February 1970, metallic blue Chevrolet Impala.

At this point maybe I should mention that Mr. Wagstaff contends that there was a coercive atmosphere there, yet there really is nothing in the record that shows there was anything suggestive about the photo identification, nothing at all. He was in a room down at the police station, true; but there is evidence in the record that no indication was made to him to pick out such-and-such a picture. There is testimony to that effect. There is none to the contrary.

Nothing at all in the record showing that the photo identification was suggestive. There is lots of evidence about how this line-up was conducted, the corporeal line-up. Nothing to indicate that that was in any way suggestive.

Now, not only did he rent the car that was described, but the police developed evidence, or discovered evidence that on the day of the burglary, shortly after noon, Joshaway Davis extended the rental contract by paying, from a large roll of bills, fifty dollars and two rolls of quarters.

And the story that Richard Green had given was that he had seen these men out there shortly before noon.

Also, in the truck of the car there were paint chips and fibers found that, I submit, virtually conclusively show that that safe was in that trunk.

Now, --

QUESTION: Well, then, are you really not getting pretty close, if not on, a harmless error argument here?

MR. MERRINER: No, Mr. Chief Justice. When you look at the harmless error argument, you look at whether or not the jury would have been swayed to vote differently if it had heard this evidence.

Now, I've just given you some evidence that the jury hasn't even heard, that is, the contract extension; the jury never heard about that.

I submit that the test is whether or not this evidence was reliable, viewing all that we know about this testimony, viewing all we know, was it reliable enough so that this jury was given reliable testimony, it was not misled

as to this testimony, so that an innocent man was not convicted. It is not a harmless error argument, as such, in that you do look at other evidence aside from what the record contains, or that the jury heard.

Mr. Wagstaff says that all that the paint chips and fibers showed was that a safe could have been in the trunk. The FBI agent told about performing a microchemical analysis on the fibers, and he said that he had never found this particular composition materials in the fibers anywhere but in safes. He compared the fibers from the safe with the fibers in the trunk, he said they matched. He said that just by looking at the fibers in the trunk he could almost conclude for sure that it came from a Mosler safe. This was a Mosler safe.

Then you have the paint. There were three layers of paint. Again a microchemical analysis, and each layer was the same.

The evidence virtually shows beyond any doubt that that trunk did contain that safe at one time.

Also, Richard Green, when he first told the story to the trooper, said that the man he talked with, whom he later identified as Joshaway Davis, was wearing a brown or black mackinaw jacket. When the safe was later examined, there was found to be a little reddish-brown material on one of the rough edges, where it had been broken into.

Joshaway Davis's description, as given by Richard Green, did not vary from his actual description.

And as to the tires. In the reply brief, Mr. Wagstaff said that I unduly relied upon the evidence concerning the tires. There were two sets of tire tracks out there. And one set of tire tracks went up to where the safe was found. There had been a snow two or three days earlier. These were the only tire tracks there.

The officer, Investigator Gray, testified that he examined the two sets of tire tracks, both of which had been made by snow tires. The two tracks had been made by different vehicles. And then when he was asked by Mr. Wagstaff a question, he said the snow tires on the rear of the vehicle appeared to be the same. And he meant there, and it was clear from the questioning, appeared to be the same on these tracks that led up to the place where the safe was dumped off, as the tires on the back of the vehicle.

So you have all of this corroboration. You have the fact that he was on the stand and the jury was able to observe his demeanor, he was under oath, to the extent that he was cross-examined, and his testimony contains sufficient indicia of reliability to have justified the jury having heard this testimony, even without the denied cross-examination.

The jurors still possessed a satisfactory basis for examining the truthfulness of his testimony, and Joshaway Davis was not denied a fair trial.

In the confrontation cases of this Court, the opinions look not only to the damage done to the integrity of the fact-finding process, but the cases look to the underlying reasons behind the denial of the confrontation.

And if there has been a significant misleading of the jury concerning crucial testimony, that reason has to be closely examined.

In this case the jury was not significantly misled concerning the crucial testimony, but even if we closely examine the reason behind denying the cross-examination in the area of the juvenile record here, it will bear up to the scrutiny.

If juvenile records had to be revealed in cases that would not benefit -- in which it would not benefit the defense, any more than it would have in this case, then many juvenile records will have to be revealed. And of course that will open somewhat of a breach in the juvenile system structure, and there will be an attendant damage to the system as such, and it will adversely affect many juvenile witnesses who have juvenile -- many witnesses who have juvenile records. And it will especially affect those who are still being rehabilitated at the time they

have to take the stand, such as was the case here with Richard Green.

QUESTION: Mr. Merriner, you began your statement by saying if juvenile records have to be revealed in a case that would not be of greater benefit to the defense then in this particular case. Are you suggesting, then, that there be -- that the rule should not be that a juvenile record is always inadmissible on cross-examination of a prosecuting witness for purposes of impeachment, but that there be a case-by-case rule in the balancing of how much harm is done to the defendant by non-disclosure of the record, how much damage would be done to the particular juvenile by disclosure of the record, and so on?

Or are you telling -- is that the rule which you think the Court --

MR. MERRINER: I would like to --

QUESTION: -- tha ought to exist in this constitutional area, or are you, on the other hand, saying that there ought to be a per se rule that if a State has expressed a public policy, as your State of Alaska has, that juvenile records not be revealed, that that be the end of it, that they never be revealed on cross-examination. Is that what you're telling us the rule ought to be?

Or are you, as your statement just suggested, suggesting that there be a case-by-case evaluation, and a

balancing in each case, depending upon the specific circumstances of each case?

MR. MERRINER: I would argue for a personal rule if I felt that I analytically could. But, take the situation where a juvenile is told by his judge: Now, you finger somebody else who was with you there, and testify about that, or else I'm going to send you away for as long as I can.

If you had a situation like that, and you forbid any questioning about his juvenile appearance, you know, before that court, I can see that confrontation would be denied. Here he had a definite motive, and assuming the testimony is crucial, and assuming it's not greatly corroborated, to show that there would not have been any doubts raised by further cross-examination.

QUESTION: But your Supreme Court didn't limit it.

MR. MERRINER: Excuse me?

QUESTION: Your Supreme Court did not limit the per se rule.

MR. MERRINER: Well, I read the opinion as hedging on the matter, yes. I think they did, in the sense --

QUESTION: Well, the rule that's before us doesn't permit what you say, does it?

MR. MERRINER: No, but --

QUESTION: Well, that's the only thing we have

before us.

MR. MERRINER: Well, we do have the other rule that I mentioned, about how the interest of justice can cause a rule not to be applied. But the Alaska Supreme Court, when it discussed this issue, a rather brief discussion, but --

QUESTION: On page 60a, at the bottom of the page, they seem to be hedging a little bit in saying that in this particular case no great damage was done.

MR. MERRINER: Yes. Let me -- in footnote 40 on 59a, they start out with a case where they say it stands for this "juvenile record not admissible to impeach absent special circumstances".

QUESTION: Well, in that they're citing what the California case held.

MR. MERRINER: Yes, but in citing a case --

QUESTION: Well, you in -- to come back to my question of what your argument is to us in this case: As I understand it, then, from your answer, and you tell me if I'm wrong, that you concede that there may be cases where a denial of the right of the defense counsel to ask a prosecution witness about his juvenile record would be a deprivation of the defendant's constitutional right.

MR. MERRINER: Yes, but I wouldn't think they would be --

QUESTION: Am I right about that or not?

MR. MERRINER: Yes. But I think these cases would be very rare, and there will not be a great breach in the juvenile secrecy structure, as such --

QUESTION: These cases would be rare, and this is not one of them?

MR. MERRINER: Yes.

QUESTION: Is that it?

MR. MERRINER: In the case, for example, where the judge tells him: You get on the stand or you'll be sentenced more than you would be ordinarily.

Or a case like where there has been perjury that has come out on the stand and you've got to bring out the juvenile record to show it. Cases like that.

QUESTION: Yes.

MR. MERRINER: Thank you, that's all I have, if there's no other --

QUESTION: When the trial judge heard his answer, that he had never been questioned, did that not -- should that not have suggested to the trial judge that here was an area in which the witness was not being completely candid with the jury?

MR. MERRINER: Well, it should have suggested that to Mr. Wagstaff, that it would come out like that.

QUESTION: Do you think Mr. Wagstaff, then, should

have asked for an opportunity, out of the presence of the jury, to pursue the cross-examination in some way that would lay a foundation for an exception to the Alaska rule on confrontation?

MR. MERRINER: Yes, he should have at least done that. I don't think the judge had any duty to do it on his own. And, as I argue in that footnote, this was really not an untruthful reply. He had never been questioned like that, as far as we know. He had never been questioned --

QUESTION: Well, at the very least it was a very ambiguous answer, wasn't it?

MR. MERRINER: Yes. It was ambiguous --

QUESTION: And you say it was the duty of defense counsel to pursue that --

MR. MERRINER: Yes. I don't see why this Court should focus upon that one question and say, Look, here was obvious perjury -- when it has not even been raised in the brief, it has not been raised until argument now. And the lower court has had no chance at all to rule upon that particular error, if that was error, that one point.

QUESTION: Mr. Merriner, does Alaska practice provide an opportunity to counsel who finds himself in the position that Mr. Wagstaff did following the combined answer of Mr. Green and the objection by the prosecutor and

the sustaining of the objection to the question, to at least allow the party that asked the question and got what is basically an answer to a question that has been ruled to be impermissible, and get that answer stricken?

MR. MERRINER: Yes.

QUESTION: So that he isn't both bound by the answer and still precluded by the court's ruling from following it up.

MR. MERRINER: As far as I know, yes, he could have argued that this was an unresponsive answer and I'm not bound -- he could have made that argument, and the judge certainly, within his discretion, could have stricken that.

QUESTION: How could you say that was unresponsive? He said: Have you ever been questioned? and he said no.

MR. MERRINER: Well, okay, it certainly was responsive.

QUESTION: I'd have great problem with that.

MR. MERRINER: Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Merriner.

Do you have anything further, Mr. Wagstaff?

REBUTTAL ARGUMENT OF ROBERT H. WAGSTAFF, ESQ.,

ON BEHALF OF THE PETITIONER

MR. WAGSTAFF: Yes, Your Honor. Thank you.

Now, with respect to a follow-up on that particular answer, whether that should have been done at trial, I think we should look back to the court's initial ruling when the protective order was asked for. It was unequivocal, it's cited, the court said it didn't want to go in this area at all. We were getting into that area a little bit, and that's why, perhaps, it was not pursued at that time.

I don't think that that particular question is essential. It's another reason why cross-examination should have been allowed on that particular issue.

Of course, we never know, again, what the cross-examination, what this record would have revealed; and that's the whole reason of permitting cross-examination.

QUESTION: Was there anything to prevent you from asking the court to give you a hearing out of the presence of the jury, to pursue your question on page 34, which, at least, was very ambiguous, you'd agree, and then also to develop what were the detailed conversations between the police and this witness Green, between the time they first contacted him and the day of the trial? To see if, for example, there was any suggestion that if he didn't cooperate, they would refer this to his probation officer or

other comparable -- anything to prevent you from doing that?

MR. WAGSTAFF: I would say that what prevented me from doing that was the court's indication, when it ruled on the protective order, that he essentially felt that his juvenile record was inviolate. That's how I would answer that question, and do answer it.

QUESTION: Well, he could preserve the confidentiality of that by taking this kind of thing in chambers, but on the record.

MR. WAGSTAFF: That perhaps could have been done, and, again, the reason why it was not is because of how the protective order was interpreted, and the force of it, and the rapid objection and the sustaining of it.

Again, the critical issue are not these particular questions, because we don't know what the answer would have been to further cross-examination. The critical point, the essential point that we're making is: the jury was never permitted to consider what pressure Green was under when he made the initial identification at the station house.

Mr. Merriner has urged what he characterizes as a corroboration argument, in which he cites much evidence that didn't even go to the jury.

The proper test, as the Chief Justice suggested, is harmless error. A constitutional error was committed.

Was it harmless?

Can we say, beyond a reasonable doubt, that one juror would not have been affected by this information. And I submit that we cannot.

The jury was out seven hours, as it was.

The evidence that was cited -- well, when we're dealing with harmless error, I think it should be kept in mind that usually harmless error is referring to tainted evidence, evidence that should have been kept out. Is there sufficient evidence to convict anyway, without this?

In this case, it's exculpatory evidence that the jury should have been made aware of. In a little different situation, I think this situation that was discussed in the case of Giqiville?, a 1971 case: would the jury have been affected by this information? Can we say beyond a reasonable doubt that the jury would not have come in with another verdict, that this would not have raised a reasonable doubt in their mind?

And that in the corroboration argument, Mr. Merriner cites facts again that were not even to the jury: fibers on a safe that matched a coat. This information was contained in an affidavit for a search warrant; never submitted to the jury. Rolls of bills in the search warrant; never submitted to the jury. Extension of the contract in the affidavit for a search warrant; never submitted to the

jury.

QUESTION: Extension was for the rental --

MR. WAGSTAFF: Of the rental agreement, yes.

QUESTION: Right.

MR. WAGSTAFF: These are not proper considerations when we're discussing harmless error; not, well, was this person probably guilty? Or looking at the evidence that could have been presented, can we determine whether it's sufficient to prove beyond a reasonable doubt a guilt?

Because we don't know these rulings, how the trial judge would have ruled, whether this information is admissible in the first place; whether, in fact, the fibers did match. Perhaps there was an identification by an FBI expert that said they did not match. We don't know this.

So that information cannot be considered, and I think it's pretty clearly improper.

Harmless error is important, also, because the crime -- it was burglary and larceny that he was convicted of, not possession of stolen property. All the information that was, the incriminating evidence, if it can be characterized as that, which really incriminated Mr. Davis's car, only indicated that there was stolen property in the car, not that a burglary and larceny had been committed. Because there were other fingerprints found at the scene, not his.

And that's why Green's testimony was particularly essential, that he established a link in the prosecution's chain of evidence of recent possession, and his testimony -- absent his testimony there could not have been a conviction.

QUESTION: Mr. Wagstaff, are you contending for a rule that would permit defense counsel to cross-examine a juvenile prosecuting witness as to his previous record in all cases, even though the State had a policy, such as your State of Alaska has, of keeping such records confidential; or are you simply telling us that in this particular case it was important, to protect the constitutional rights of your client?

MR. WAGSTAFF: I'm saying both, Mr. Justice Stewart. I think that any time someone is testifying against the accused in a criminal proceeding, that if they have a juvenile record, the defense has a right to bring this out, for whatever weight it might have to the jury. That fact alone. In some cases it could be very relevant. For instance, in the Alford fact situation, that could be very relevant. But that's for the jury to decide.

But we're even one step more persuasive than that. Here we can show specific reason for why the juvenile record should be brought out.

I think, in conclusion, that it's --

QUESTION: And yet to the Supreme Court of Alaska you argued that your case was different. You said, as I understand it, that, yes, the general rule is you can't bring it out, but this case is special circumstances.

MR. WAGSTAFF: Yes, I argued --

QUESTION: Now, are you using that argument to us, or are you arguing that the general rule that seems to be conceded in the States is simply constitutionally wrong?

MR. WAGSTAFF: I argued both, Mr. Justice Stewart, to the Supreme Court, as I'm arguing now, that it should be allowed to be brought out in all circumstances when someone is testifying against the accused in a criminal proceeding, unless it can be shown that there's some really wild-fact situation, where it would be terribly abusive.

But, absent that, it should be brought out and let the jury determine whether this person in his own mind would have some hope of benefit of his position with the prosecution, the government that's offering him as a witness. That's for the jury to decide.

And again, in this case, it's much, much stronger, because we can make a very persuasive argument to the jury that he was under specific reason --

QUESTION: The only State that has considered this particular question, I gather from the briefs -- I

haven't gone beyond them -- that only Michigan has adopted your proposed --

MR. WAGSTAFF: The per se rule, yes, Michigan has adopted it.

QUESTION: Is that right?

MR. WAGSTAFF: Although the Mississippi case, the Hamburg case, the court, the trial court there permitted testimony, cross-examination showing that there had been some supervision by juvenile authorities, but they felt that the record itself should have been offered.

But, clearly, the Michigan court, the three cases that I cited, have adopted a per se rule.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:46 o'clock, a.m., the case in the above-entitled matter was submitted.]