OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-1279

TITLE DELAWARE, Petitioner V. ROBERT E. VAN ARSDALL

PLACE Washington, D. C.

DATE January 22, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

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DELAWARE, :

Petitioner, :

V. : No. 84-1279

ROBERT E. VAN ARSDALL :

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Washington, D.C.

Wednesday, January 22, 1986

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:05 o'clock a.m.

APPEARANCES:

RICHARD E. FAIRBANKS, JR., ESQ., Chief of Appeals Division, Delaware Department of Justice, Wilmington, Delaware; on behalf of the petitioner.

PAUL J. LARKIN, JR., ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States as amicus curiae in support of the petitioner.

JOHN WILLIAMS, ESQ., Dover, Delaware; on behalf of the respondents.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in Delaware against Van Arsdall.

Mr. Fairbanks, you may proceed whenever you are ready.

ORAL ARGUMENT OF RICHARD E. FAIRBANKS, JR., ESQ.,
ON BEHALF OF THE PETITIONER

MR. FAIRBANKS: Mr. Chief Justice, and may it please the Court, the Delaware Supreme Court reversed Robert Van Arsdall's murder conviction because he was not permitted to cross examine Robert Fleetwood on the issue of bias.

The bias claim arose because the state had entered into a -- dropped a traffic violation for Mr. Fleetwood. Reversal was not mandated in the Delaware Supreme Court's opinion because Robert Fleetwood's testimony was important or critical -- he was a critical witness, or that its impact in any way affected the outcome.

The Delaware Supreme Court determined that the Sixth Amendment to the United States Constitution imposed a per se reversal rule requiring reversal in all cases in which a single witness was not subject to complete bias cross examination.

We do not argue with the holding of the

Delaware Supreme Court that bias cross examination in this case should have been permitted. Our position is simply that reversal is not mandated under the Sixth Amendment unless there is a determination by the court that the impact was affected by the witness's testimony, or that if the witness had been impeached the result would have been the same.

QUESTION: Mr. Fairbanks, does the state concede that there was a violation of the Constitution here, the confrontation clause? Is that the error? And then you want us to apply a harmless error rule to it?

MR. FAIRBANKS: Your Honor, we concede that the cross examination should have been permitted.

QUESTION: Was it a violation of the confrontation clause in the state's view --

MR. FAIRBANKS: Your Honor --

QUESTION: -- to restrict the cross examination?

MR. FAIRBANKS: Where you draw a line between cross examination and remedy is not clear. The State of Delaware is content with the harmless error rule in this case.

QUESTION: Well, I am just trying to determine what the state's position is, whether it is a concession that there was a constitutional error to which the

harmless error rule should then be applied, or whether there was no confrontation clause violation in the first place.

MR. FAIRBANKS: Justice O'Connor, we have not and the parties have not taken a position on that point. The parties have taken the position that the cross-examination should have been permitted, and that harmless error should be a determination at some point, or at least outcome determinative prejudice should be a determination at some point.

We do not concede that the violation occurs without consideration of prejudice. We do not assert that position in this case. We simply assert that at some point along the line considerations of outcome determinative prejudice is appropriate. The Delaware Supreme Court excluded such considerations from its opinion and from its determination. It reversed solely and exclusively because there was not the requisite quantity of cross examination.

QUESTION: But it just seems to me, Mr. Fairbanks, that we have to approach the analysis some way, and I am wondering if it is the state's position that you focus on the prejudice in determining whether there is a violation in the first place or whether you focus on it after you concede a violation to determine

whether it is harmless.

MR. FAIRBANKS: Your Honor, this Court has recognized that cross examination restriction cases raise confrontation clause problems because restrictions on cross examination emasculate the right.

QUESTION: Mr. Fairbanks, throughout your brief you have cited Chapman against California, and did not the Court hold in that case that it doesn't make any difference whether it is a constitutional violation or some other violation that the harmless error rule applies to both categories?

MR. FAIRBANKS: Your Honor, Chapman stands for the proposition that at least for federal constitutional violations there is not an automatic reversal rule mandated in all cases, and that therefore some consideration --

QUESTION: Undoubtedly courts would look more -- give a much closer scrutiny to a constitutional violation, wouldn't you think, than they would to some other statutory or regulation --

MR. FAIRBANKS: That is true, Your Honor, and we are content --

QUESTION: And therefore Justice O'Connor's question, is it a constitutional violation or not? It really makes a difference as to whether you concede there

is a constitutional violation here or that you don't.

MR. FAIRBANKS: Justice White, we believe that the error was harmless wherever you placed the burden.

QUESTION: That may be so, but you don't expect us to say to the Delaware Court, look, you were wrong in saying you never need to look at prejudice. Somewhere along the line -- and we won't tell you where -- you ought to start looking at it.

MR. FAIRBANKS: Justice White, I think our position is that in the analysis the reversal is not mandated by the Constitution until you look at outcome determinative prejudice. We recognize that this Court has not drawn that line. This case in our cert question --

QUESTION: Well, where would the federal jurisdiction be if it isn't constitutional error. What business do we have hearing it at all?

MR. FAIRBANKS: Because the Delaware Supreme Court reversed on the basis that it concluded that the Constitution Sixth Amendment right of confrontation compelled reversal without consideration of outcome determinative prejudice. We think that is the error, that at some point along the analysis outcome determinative prejudice must be considered.

Where along the analysis is not focused on in

the parties' briefs, and it is not --

QUESTION: You don't challenge the Supreme Court of Delaware's conclusion that the restriction of cross examination here did violate the Sixth Amendment right, do you?

MR. FAIRBANKS: We do not quarrel with the fact that the examination should have been permitted. We do quarrel with the concept of reversal as mandated unless you consider prejudice.

QUESTION: Mr. Fairbanks, I think what we are all probing at from these inquiries is that if this case was decided on a state ground, the case has no business here. If there isn't a constitutional basis, you shouldn't be here. We shouldn't have granted your petition.

MR. FAIRBANKS: Chief Justice, I think the Delaware Supreme Court opinion on this point is clear. It reversed because it believed the Sixth Amendment compelled reversal. The Delaware Supreme Court found federal constitutional error confrontation, and reversed without looking at prejudice.

QUESTION: And Chapman tells all of us that even if there is a constitutional error, it might be, it might be subject to the harmless error rule, so what do you lose, if anything, by conceding that there is a

constitutional error here?

MR. FAIRBANKS: Your Honor, for purposes of this case, we don't quarrel with that fact.

QUESTION: Well, let's get on with your argument then.

MR. FAIRBANKS: Our point is that this case doesn't require a determination of where you place the line between violation and prejudice. It wasn't focused on, and that is why the state isn't dealing with that.

QUESTION: Mr. Fairbanks, this is not new, but it still worries me. You say we and our. Who are you talking about, the State of Delaware?

MR. FAIRBANKS: The State of Delaware, Your Honor. I represent the State of Delaware.

QUESTION: What does the Supreme Court of Delaware -- who do they represent?

MR. FAIRBANKS: Your Honor, the Supreme Court of Delaware is the highest judicial body in the state. It determines the law of the State of Delaware, and reviews convictions and reverses when it determines that either federal constitutional or state constitutional law is violated.

QUESTION: Then it speaks for the State of Delaware.

MR. FAIRBANKS: Yes, Your Honor.

QUESTION: And you speak for the State of Delaware. And we make a decision as to who is the State of Delaware, don't we?

MR. FAIRBANKS: I don't believe that that's the crux of this case, Justice Marshall. The crux of this case is whether or not harmless error is an appropriate consideration at some point in the analysis. We submit that it is, that a per se rule imposes an excessive penalty, places form over substance, and draws the line, the Delaware rule draws the line in the wrong place.

It places the line on the basis of quality of -- excuse me, of quantity of cross examination permitted, and does not look at the importance of the witness. The Delaware rule essentially says that if there is no cross examination on the issue of bias permitted, that reversal is required whether the witness is important, whether the outcome would have changed had cross examination gone forward. We think that draws a line in the wrong place. We ask this Court simply to push the line differently, to draw the line in a different place, and to balance these concerns so that the determination of the importance of the witness takes precedence over mere quantity of cross examination.

This case was -- took about nine days to try, but the state's case against Van Arsdall is fairly

straightforward. There was a New Year's Eve party in 1981. It was an impromptu party and it flowed between the Pregent and the Fleetwood apartments. Robert Van Arsdall was a guest. He came to the party. He ate dinner. He left. At about 10:30 --

QUESTION: Mr. Fairbanks, could I interrupt, because I am still a little puzzled. I don't mean to repeat what Justice O'Connor asked you, but do you concede -- or what is your position on whether there can be a violation of the confrontation clause that has no prejudice to the accused at all?

In other words, do you think prejudice to the accused is an element of the violation of the confrontation clause, or only an element of the harmless error inquiry?

MR. FAIRBANKS: Your Honor, the guts of the Delaware Supreme Court decision is that effective cross examination was not permitted. We suggest that although this case doesn't mandate the determination, that at some point, this right should be looked at in concert with all the other Sixth Amendment rights, effective assistance of counsel, speedy trial, compulsory process.

In no other of those Sixth Amendment rights --

QUESTION: But take effective assistance of counsel for a minute. If you say that prejudice is an

element of a showing of the violation, then you couldn't possibly have a harmless -- by hypothesis, if you have got the violation.

MR. FAIRBANKS: That is true.

QUESTION: So I am asking you, is there a prejudiced component in the confrontation violation in your view?

MR. FAIRBANKS: We concede that if there is a prejudiced component -- we simply haven't taken a position on that point. I think if pressed our position is that it does become a component, but this case need not rise or fall on that premise.

QUESTION: Because the Delaware Supreme Court's analysis really is kind of in two steps. They first talk about the confrontation clause, and they talk both about state and federal. Then they say we have got enough prejudice here so we have a per se rule once we've got a violation. If you need prejudice to get the confrontation clause, I don't know how you could ever call it harmless.

MR. FAIRBANKS: They looked at prejudice, we submit, at the wrong place. They didn't look to prejudice at the outcome. They looked to whether or not cross examination of Fleetwood could have been successful. If cross examination of Fleetwood would have

been successful, they determined that constitutes prejudice.

We think that is not the prejudice analysis, that at the very minimum the prejudice analysis comes in as to whether or not the outcome changes. If the outcome doesn't change --

QUESTION: I understand that, but I am just trying to figure out what you are saying, what issue that is directed to. Is it directed to the constitutional violation, or even after a constitutional violation is conceded, it is directed to the harmless error inquiry. I just don't know what your position is.

MR. FAIRBANKS: This Court in Davis versus Alaska reversed, and this is the basis upon which the Delaware Supreme Court based its ruling, its interpretation of Davis versus Alaska. We think that its interpretation of Davis versus Alaska is excessively literal, and it doesn't look to what this Court actually did in Davis versus Alaska.

Davis versus Alaska in our view does not compel a per se rule because Davis versus Alaska considered two things, one, whether the cross examination of Green could have been successful, and two, it determined that Green was a crucial, in effect, the key witness for the prosecution in that case.

It only reversed after it determined both of those two things. It did not consider a harmless error analysis not because the Constitution forbad it, but simply it reflects the common sense approach that if a witness is key, if the state's case wouldn't be the same, they couldn't even prove the case without Green's testimony, a harmless error analysis is impossible.

So that, yes, if Davis versus -- Davis versus Alaska, we think, can be read to pushing the analysis into outcome determinative prejudice into the violation for an effective assistance -- excuse me, an effective cross examination.

However, for this case, we don't care where the line is drawn. We simply want at some point in the analysis consideration of outcome determinative prejudice to be considered, that the Delaware Supreme Court in refusing to consider that, we think, erred.

Fleetwood's testimony in this case added very little. He established but one point. He established that Van Arsdall was present in the Pregent apartment some time before midnight. He puts it between 11:00 and 11:30. Van Arsdall in his two statements puts the time that he was present at 11:30. Pregent puts the time before midnight.

The defense counsel said in opening to the jury

and remove the question of presence of Van Arsdall in the Pregent apartment, he said he was there prior to midnight. Van Arsdall when he took the stand said that he was there at about 11:30.

Fleetwood's testimony adds nothing to this case. It is cumulative and unimportant. The key time is what happened when the murder occurred. The medical examiner put the time of death between midnight and 1:00 o'clock. That, we think, is the focus. The focus is not 11:30 in the jury's mind but what happened when Fleetwood -- excuse me, when Van Arsdall and Pregent and Epps were in the apartment.

That determination is made by the medical examiner's reconstruction of the crime scene and his testimony that there were arterial spurt marks on Van Arsdall's shirt, blood droppings, and that looking at it from that point of view --

QUESTION: Mr. Fairbanks, are you taking the position that the state puts on a witness and the defendant says, I want to impeach this witness, and the judge says, oh, that witness isn't important, I won't let you, that he can do that and never -- not commit reversible error? Just say, I don't think that is a very important witness?

MR. FAIRBANKS: No, Your Honor, because the

determination is not the trial court's determination. The determination is the appellate court's determination --

QUESTION: Well, but --

MR. FAIRBANKS: -- based upon a reading of the entire transcript. The trial court may not know whether the witness turns out to be an important witness.

QUESTION: Well, he says, this is the last witness, this is our last witness, and the judge says, well, he is not important at all, you cannot impeach him.

MR. FAIRBANKS: I think it depends -- that that --

QUESTION: Why is it different for a trial judge than for the appellate court?

MR. FAIRBANKS: It is the same analysis that is undertaken in any harmless error analysis. The trial judge makes a ruling. Harmless error permits the appellate court to review that ruling and to apply harmless error analysis. It does not compel the determination by the trial court to say it is harmless, don't permit cross examination.

We don't think that is where harmless error plays a part.

QUESTION: You concede there was error, and

then my next question is, what is the source of the error? Why is it error? What rule of law did he violate, the judge?

MR. FAIRBANKS: The judge improperly restricted cross examination on --

QUESTION: What is the source of the rule of law that told him he shouldn't do that? Is it Delaware law or some other law?

MR. FAIRBANKS: The Delaware Supreme Court determined that it was federal constitutional law, and we think that is the error, that the Federal Constitution does not mandate reversal without consideration of harmless error at some point, whether it is in the -- wherever you play it.

QUESTION: But do you agree that the Federal Constitution obligated the judge to allow the impeachment in this case?

MR. FAIRBANKS: We agree --

QUESTION: At the trial level. I am just asking about the trial level.

MR. FAIRBANKS: We agree that the Federal Constitution is violated if no cross examination of any witness is permitted.

QUESTION: In this particular case do you agree that the trial judge violated the Federal Constitution?

MR. FAIRBANKS: No, we do not, because we don't believe that the cross examination would have been successful in the first place. There is no basis to believe the jury would have disbelieved Fleetwood.

No matter what cross examination is undertaken, Fleetwood said what Van Arsdall conceded. There is no reason for a jury to disbelief it. We just don't think that it --

QUESTION: Well, would the judge have violated the Federal Constitution if he had said at the trial, I don't think this is a very important witness, I will not allow any impeachment of this witness? Would that have violated the Federal Constitution?

MR. FAIRBANKS: We think that that is clearly a violation of state law. The Delaware Supreme Court determined that it was a violation of the federal constitutional law --

QUESTION: But you don't think it is

MR. FAIRBANKS: We do not. We think that the Delaware Supreme Court's ultimate rule was incorrect, that it placed the burden at too high a price for a mere trial error, that it placed the focus on the quantity of cross examination and not on the importance of the witness, and unless you permit states to do that, you permit the appellate courts to do that, we think that it

is improper and is not required by the Constitution.

QUESTION: If the Delaware Supreme Court had said solely on the basis of Delaware law this is error and reversal, you wouldn't be here.

MR. FAIRBANKS: That's correct. But the Delaware Supreme Court's opinion clearly relies solely and exclusively on the Federal Constitution. It does cite the state constitution, but it has previously ruled that the state constitution is read in concert with the Federal Constitution. That this Court said in Delaware versus -- was likely the determination of the trial court -- of the state supreme court that it really only focused on the Federal Constitution.

And under this Court's ruling in Michigan versus Long, unless the Delaware Supreme Court expressly articulated a basis for discrete state law, this Court has jurisdiction. The Delaware Supreme Court did not do that. The Delaware Supreme Court --

QUESTION: Doesn't your case, Mr. Fairbanks, depend on your convincing us that the Court misapplied Chapman and Harrington and the cases that have followed on harmless error, even assuming the presence of the constitutional error?

MR. FAIRBANKS: Yes, Your Honor. We believe that the Delaware Supreme Court inappropriately

determined that Chapman didn't apply, even assuming a federal constitutional violation, that Fleetwood's cross examination was restricted in violation of the confrontation clause. That is our case.

I would like to reserve whatever remaining time for rebuttal.

CHIEF JUSTICE BURGER: Very well.

Mr. Larkin.

ORAL ARGUMENT OF PAUL J. LARKIN, JR., ESQ.,

ON BEHALF OF THE UNITED STATES

AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

MR. LARKIN: Mr. Chief Justice, and may it please the Court, the question before the Court in this case is essentially one of classification. As the Court's questions have made clear, the question here turns on prejudice, and whether prejudice is an element of the claim that a defendant must make in order to establish a confrontation clause violation or whether it is part of the harmless error analysis.

Now, in our brief we haven't focused on that precise question, because the question presented in the petition didn't seem to do that and because the allocation of the burden of proof in this case should not be outcome determinative.

In Hastings the Court made clear that most

constitutional errors can be harmless, but Hastings like Chapman, said that there are certain categories of errors that are not susceptible to that type of analysis. The first and most elementary category are those errors that for one reason or another effectively deprive the defendant of what has come to be known as a trial.

That follows directly from the due process principle that a defendant cannot be punished at all by the state or by the government until he has received a trial that accords with basic fundamental fairness.

In a case where the defendant may have denied all opportunity to cross examine any of the government's witnesses, which was essentially what you had in Brookhart versus Janus, you may have a situation like that. In that type of circumstance, the defendant has essentially been relegated to the position of being a member of the audience rather than an actual participant at the trial.

But this case doesn't even closely approximate that type of situation. However harmful the error may have been in the defense view, however essential it may have been to bring this evidence before the trier of fact, what you essentially have here is one item of evidence that was not allowed to be introduced.

QUESTION: Well, Mr. Larkin, what is the

standard for determining whether there is a confrontation clause violation in a setting such as we have in this case of an isolated error of limiting cross examination of a single witness? What is the standard? Is prejudice a component of the standard?

MR. LARKIN: We think a strong argument can be made to support the principle that prejudice should be a component, the reason being is that is consistent with the purpose the confrontation clause serves in the trial process, which is to enhance the accuracy of the outcome. Unless the error on which the defendant bases his claim calls into question the accuracy of the outcome of the trial, the concerns the confrontation clause has are not necessarily implicated.

QUESTION: Well, is that your submission, that it is a component of the constitutional violation or not?

MR. LARKIN: We didn't make --

QUESTION: Because there might be a stronger argument on the other side.

MR. LARKIN: Well, there would be --

QUESTION: What is your position?

MR. LARKIN: I would, I think, be forced just to say that -- I would take the same position we took in the brief. In the brief we said that it wasn't necessary

to decide that question in this case because it wasn't outcome determinative.

Now, once the category of error is put to one side, that is, the category where the defendant has been deprived of a trial altogether, the question becomes whether or not the type of error is one in which the court will virtually presume in every case that the defendant was prejudiced.

QUESTION: Mr. Larkin, may I just take the other side of the coin? Here the Delaware rule is that there must be an opportunity to show bias, one form of cross examination. What if instead of asking to show bias he just said, I want to cross examine this witness, and the judge said, no, he is not important, and he denied the right of cross examination entirely.

Would there be any difference in the prejudice analysis than you have in the Delaware rule, that basically this is a trivial witness, he is not worth the court's time to hear you cross examine?

MR. LARKIN: Well, we think it is not a good practice, and would certainly be error --

QUESTION: Of course not. Nobody is going to argue it is a good practice. What about the constitutional violation?

MR. LARKIN: It would turn on whether prejudice

is an element of the claim. For example, in a case in which the defendant is charged with robbing a federally insured bank --

QUESTION: Well, take this particular case. If one concluded that this witness is unimportant, which is basically the state's argument, his cumulative testimony, then I take it your position was, the trial judge could hae denied cross examination entirely without committing error, reversible error.

MR. LARKIN: Yes, that would be our position, because, although no one would ever condone it, and I think it is unlikely ever to happen --

QUESTION: Well, you might think it is unlikely to deny a right to show any bias on a witness, too, but it happened in this case.

MR. LARKIN: Well, I think the reason it happened was not because of any feeling on the part of the trial judge that he wanted to damage the defense. After all, Van Arsiall -- excuse me, Fleetwood testified just to two real matters. He testified first to the events that occurred at the party, and those weren't in dispute. He testified that he saw the defendant in the room.

QUESTION: No, but the prosecutor thought he was important enough to put him on the witness stand. He

at least made that decision. So the prosecutor thought there was some value to the testimony.

MR. LARKIN: Yes, and it may be not simply just to show that Van Arsiall was in the room, but also to show that Pregent was in the room.

QUESTION: Whatever the reason.

MR. LARKIN: So even though we agree that the trial judge should not have cut off the inquiry in this manner, since in this type of case there was no prejudice to the defendant, there is no reason to foreclose that type of inquiry based on the characterization that the Delaware Supreme Court made.

What the Delaware Supreme Court essentially did was say that since there was a strong case for showing bias, and since there was a complete denial of any opportunity to do that, there is no reason to go further and decide whether the case should be decided differently, whether the outcome was affected.

QUESTION: So it is similar to a complete denial of cross examination. It would be exactly the same analysis.

MR. LARKIN: The Delaware Supreme Court would, I am sure, probably follow the same type of analysis.

QUESTION: And so would you.

MR. LARKIN: Right, in this case, because we

don't think the outcome was affected.

QUESTION: Right.

MR. LARKIN: But here the Delaware Supreme Court believed that -- it had to presume that the defendant was prejudiced in essence, and it relied on Davis, and we don't think Davis can be read that way. Davis painstakingly pointed out the fact that the defendant there had been prejudiced in a variety of different ways, in fact, pointed out that the witness may have even lied on the stand.

There is also no reason to adopt the rule that the Delaware Supreme Court did. The question of whether or not there is a complete denial of cross examination and the question of whether or not the witness is crucial are all elements in deciding whether or not the outcome of the case was affected.

QUESTION: I assume you say that if the cross examination had shown that this may was lying, that wouldn't be any good?

MR. LARKIN: If Fleetwood had completely recanted his testimony on the stand, it still would have had no effect on the outcome of this case. The defense has argued that they were prejudiced.

QUESTION: So perjury is not important.

MR. LARKIN: No, perjury is important, but even

under the Court's decisions dealing with the introduction of perjured testimony, that fact alone is insufficient to call for reversal.

QUESTION: My final question is, do you see any unfairness in letting one side question the witness and denying the other side the exact same privilege?

MR. LARKIN: Oh, it is unfair, but the question is not simply whether it is fair to allow the procedure to go in this fashion.

QUESTION: It is not too unfair.

MR. LARKIN: If the effect of the trial has not been changed in any substantial manner, there is no reason to set the judgment aside. Whether or not a defendant has been prejudiced by a restriction on cross examination turns on a host of factors, the importance of this witness to the case, the claim of bias and its strength, the nature of the defense that the defendant has raised, and a variety of matters that will vary from case to case.

No one, I think, either we or the state, has said that the trial judge was correct in cutting off the inquiry in this manner, but we and the state have taken --

QUESTION: But the question of whether he was correct or not, if he was in error, how under the sun can that help the defendant other than to let him cross

examine? You say that he was injured, but that is just not important.

MR. LARKIN: No, we say he was injured in the sense that he wasn't given the opportunity to cross examine him.

QUESTION: Injured is all I need.

MR. LARKIN: But he wasn't injured --

QUESTION: You need more. That is all I need.

MR. LARKIN: We don't think he was injured in the sense that the outcome of the trial was any different. And as long as the outcome of the trial wasn't affected, we --

QUESTION: How do you tell that from a cold record?

MR. LARKIN: Well, examination of the record here shows that the state never presented the theory that the respondent has now argued as to why he was prejudiced. The state didn't argue in its closing argument, and Pages 169 and 201 to 202 of the joint appendix show this --

QUESTION: But the judge didn't know that when this witness -- did the judge know when the witness was on the stand what the state was going to argue in its closing argument? Certainly it didn't know that.

MR. LARKIN: Well, the judge had some idea,

because the opening argument --

QUESTION: How could he?

MR. LARKIN: Well, the opening address of the state pointed out that they couldn't explain why the murder occurred, and in the closing argument of the state's trial counsel, the state not only argued that it couldn't explain why the murder occurred, it also said they couldn't explain why the defendant went across the hall to Fleetwood's apartment.

The state never made the argument to the jury that the respondents say that the state did. They didn't present that theory to the jury. They argued the exact opposite, that they couldn't explain that. The record as a whole also shows that the real controversy in this case is not between Fleetwood and the defendant. It was between Dr. Lee, the state's expert witness, and the defendant. Dr. Lee, the forensic expert, tied together all the pieces of circumstantial evidence in a form that showed that the defendant was the one who had committed the crime.

Fleetwood's testimony at the time it came and in the manner in which it was used by the state was relatively trivial. The result in this case was not therefore any different and would not have been any different if Fleetwood had been fully impeached on this

type of matter.

The particulars that he had testified to were, of course, not in dispute either as to the events of the party or as to the defendant's presence, so we think in this case since the error -- my time is up. Unless there are any further questions, I have nothing further to add.

CHIEF JUSTICE BURGER: Very well.

Mr. Williams.

ORAL ARGUMENT OF JOHN WILLIAMS, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. WILLIAMS: Mr. Chief Justice, and may it please the Court, as a result of the constitutional error here, Robert Van Arsdall lost his right to be acquitted or convicted on the basis of all of the evidence which exposes the truth. Bias is always relevant, and the jury in this case should have been exposed to all the evidence. The defense is entitled to present its theory to the jury.

The defendant should not be convicted merely on the state's evidence. Davis versus Alaska, a 1974 decision of this Court, pointed out that the confrontation clause of the Sixth Amendment to the United States constitution requires a defendant to have some opportunity to show bias on the part of a prosecution

witness.

Davis versus Alaska did not require any specific showing of prejudice because the defendant was denied the right to effective cross examination, which would be constitutional error of the first magnitude, and no amount of showing of want of prejudice would cure it.

QUESTION: Isn't the issue here whether cross examination would have produced any benefit? Isn't that one of the subordinate issues here?

MR. WILLIAMS: Well, I think that is certainly the issue that the state would have presented to this particular Court, and we think that that is an important consideration. We think that the Delaware Supreme Court did determine that in deciding whether or not there was even a violation in this case.

QUESTION: Did they pass on that, or did they by a per se rule?

MR. WILLIAMS: Well, I think they passed on it because at Page 7 of the opinion they point out that the argument that the state is making here today was also asserted to the Delaware Supreme Court. They point out on the first side of the reported opinion that the error --

QUESTION: Where are you reading from, counsel, by reference to the petition?

MR. WILLIAMS: I am not sure if it is in the --

QUESTION: Well, don't let me interrupt. I just --

MR. WILLIAMS: It is Page 7 of the reported opinion. The quotation, very minor quotation in the argument made by the state to the Delaware Supreme Court was that the error was harmless because Fleetwood's basic testimony was cumulative and unimportant, and in this case, in deciding whether or not there was even a violation, it is our position that the Delaware Supreme Court as a matter of course had to determine that.

The right to confrontation of witnesses against a criminal accused is a fundamental right. It is essential to a fair trial. Confrontation means more than being able to confront the witness physically. There are several public policy reasons which support the per se error which is formulated by the Delaware Supreme Court in the Van Arsdall opinion.

First, I would point out to the Court that it is a rule of limited application. It applies to a total in limine prohibition against biased cross examination of a prosecution witness. The harmless error standard is still the general rule in Delaware. The per se reversal is the exception.

QUESTION: But, counsel, what if the state

called the most pro forma sort of witness just to identify documents or something like that, that really there was no contest about, and the Delaware trial court refused to allow cross examination as to bias for that witness.

Now, would the Supreme Court of Delaware reverse under that situation?

MR. WILLIAMS: No, Justice Rehnquist, I do not think they would do that. They have indicated, if not in the Van Arsdall opinion, in the prior 1983 decision in Webber that one of the things that you do look at, and there are a number of exceptions to this Delaware per se rule, one of the things you look at is cruciality of a witness.

If the witness is truly not crucial, then the Sixth Amendment confrontation right may not even be implicated.

QUESTION: Well, but now did the Supreme Court of Delaware hold that this witness was crucial?

MR. WILLIAMS: I think they did. They didn't state that specifically, but I think it is inherent in the opinion.

QUESTION: Do they say -- do they paraphrase that, or do you just say they must have thought that?

MR. WILLIAMS: Well, they cite to their own

decision the year before in Webber, the 1983 decision, and one of the things that is pointed out in the Webber versus state decision is one of the exceptions and one of the elements that you look to is cruciality of a witness.

We think that the Delaware rule certainly encompasses that. It would be nonsensical to have a rule, for example, that if we were denied confrontation of -- the first witness who testified in this particular case is probably a good example. All Alvin Epps testified to -- Alvin Epps was the estranged husband of the victim. All he testified to was that he dropped his wife off at this apartment building in the early morning, and he didn't see her again that entire day.

We think had we had bias evidence against Alvin Epps, for example, we knew that he and Mr. Van Arsdall had been engaged in altercations, if we had that kind of strong bias evidence to present, but we were again prohibited, even a total in limine prohibition as in this case, we would not be arguing that that is a violation of the Sixth Amendment confrontation clause.

QUESTION: Now, is there anywhere in the Supreme Court of Delaware's opinion where they say why the witness cross examined here Fleetwood was crucial or was different from Epps?

MR. WILLIAMS: Well, I don't think they say that. No, I think what they do is refer to their prior opinion in Webber, and you have go to back and read Webber to see the other exceptions. There are a number of exceptions to the Delaware rule. If the evidence that is being offered in the bias cross examination is marginally relevant, then the Delaware Supreme Court is not going to apply its per se error rule.

They have also said that if the cross examination in harassing in nature, then they will not apply their per se error rule. In fact, in this opinion, the Van Arsdall opinion, I was attempting to cross examine another prosecution witness at trial, Jay Meinier, in fact, all I wished to ask Jay Meinier initially was what her address was. The objection was made by the prosecution that I was attempting to harass that witness, and that objection was sustained.

I think it points out to the Court that the Delaware Supreme Court does not have a broad across-the-board rule in this case. They said that, well, while you didn't get to cross examine Ms. Meinier concerning her address, we are not going to apply any per se reversal rule to that particular --

QUESTION: Did they not apply that same approach to the testimony of Detective Bowers? The trial

court had limited the cross examination of Bowers, and the Supreme Court of Delaware said that limitation was within discretion.

MR. WILLIAMS: That is certainly true, Mr. Chief Justice.

QUESTION: So they don't have an across-the-board per se approach.

MR. WILLIAMS: Oh, definitely not, and I think all you have to do is look at the Van Arsdall opinion. On appeal we raised three confrontation cross examination problems, and only on one or as to one witness, at least, Fleetwood, did the Delaware Supreme Court feel that its rule was in any way offended.

The Delaware Supreme Court, of course, did not reach the second area of bias cross examination against Robert Fleetwood that we also wanted to pursue, that is, the Blake homicide. The Delaware Supreme Court simply hasn't ruled on that issue.

We think in this case that the Delaware Attorney General has advanced no reason that the accused should not have been permitted to show the bias of a prosecution witness appearing at trial to testify against Mr. Van Arsdall, nor has it been demonstrated that a defense showing of Fleetwood's bias or interest would not have affected the jury's assessment of the witness's

credibility.

Although the state caused this problem, and then claimed it was harmless, it now asks for a license to do the same thing in the future. This is not a mere technicality. This is not a case where a new trial was granted because the word "larceny," for example, was misspelled in an indictment.

The public would be shocked to learn it is only a technicality that an individual on trial for murder can be denied the opportunity to show his jury that a prosecution witness may be lying. The Delaware rule gives meaningful guidance to trial judges in the exercise of their judicial discretion, and that is what was found in this case.

It was found that the trial judge had abused his discretion. Certainly judicial discretion is broad. But it is not absolute. Judicial discretion can be interposed to limit even bias cross examination, but a certain threshold of cross examination is constitutionally required.

A harmless error rule of this factual circumstance places an impossible burden upon a trial judge. How is a trial judge to determine during a trial whether an adverse witness is crucial or important? In fact, in this case Fleetwood's true importance to the

prosecution really did not become apparent until after the prosecution had rested its case and was pursuing the cross examination of the defendant, Robert Van Arsdall.

QUESTION: Mr Williams, I would like to understand exactly what your position is with respect to whether or not in this case, at least, the Delaware Supreme Court applied a per se rule.

I read from Page A7 of the opinion of the Delaware Supreme Court, the first full paragraph: "We hold that under the circumstances of this case, where the defendant was subjected to a blanket prohibition against exploring potential bias through cross examination, the trial court committed a per se error."

Is it your position that the error in this case was a per se error, not subject at all to examination with respect to whether prejudice was caused?

MR. WILLIAMS: That is certainly our position in this case. Yes.

QUESTION: Are you saying that just to the law of Delaware, or is that the federal constitutional rule?

MR. WILLIAMS: Well, we have argued that in the alternative. We have initially asserted that this was decided, this case was decided on the basis of state law, that Delaware had a particular parochial problem. That is, this problem keeps occurring, occurring, and

reoccurring, and --

QUESTION: But the Delaware case that you rely on primarily relied in turn on Davis against Alaska, which was a United States constitutional rule.

MR. WILLIAMS: That is certainly true. In fact, Van Arsdall also cites to Davis versus Alaska, but the important thing, I think, about that, and the way it should be interpreted as to the federal question issue here is that Delaware says in the Van Arsdall opinion that its decision, its rule is consistent, not identical, but consistent with Davis.

In fact, the Delaware rule seems to have evolved from some District of Columbia Court of Appeals decisions, Article III --

QUESTION: But coming back to this case, is it your position that wholly without regard to all of the evidence viewed in its totality, that a per se rule must be applied even though it is perfectly clear to the average person or the average lawyer that there was no prejudice?

MR. WILLIAMS: No, I don't think the Delaware rule is that simplistic. In fact, if it was that simplistic, I don't think --

QUESTION: Do you think if prejudice -- if no prejudice can be shown, that there is no per se rule?

MR. WILLIAMS: Well, I think you have to decide whether there is a violation or not before you even implicate the Sixth Amendment.

QUESTION: Well, let's assume you have a violation to begin with. I think all of us make that assumption.

MR. WILLIAMS: Certainly.

QUESTION: Obviously, the judge should have permitted the cross examination. But you have that violation, which is a constitutional violation. Then is it your position that wholly without regard to the facts and circumstances of the case, there must be a reversal of the conviction?

MR. WILLIAMS: No, I don't think we would say wholly without regard to facts and circumstances.

QUESTION: So we may look at the facts and circumstances of this case?

MR. WILLIAMS: I think you have to, just as the Delaware Supreme Court did, because the Delaware rule -- it says it is a per se rule. It is very clear. But it is not a blanket rule of automatic reversal. There are exceptions. And I think the most important --

QUESTION: How do you reconcile those two concepts? The per se rule is a blanket rule, is it not?

MR. WILLIAMS: It is certainly a blanket rule,

but it is a thin line, I guess is the best way I can characterize it. What the Delaware Supreme Court was concerned with was total in limine prohibitions. That is the first limitation, and that is why this is really a narrow case. We are talking about a very narrow category of violations here. And in both the Webber decision, which preceded this particular case, and this case there are a number of exceptions. I have already mentioned a few. They have indicated as well, the Delaware Supreme Court has, that if the testimony is truly cumulative, that that would not trigger the confrontation protection.

It has been argued in this particular case that the testimony of Robert Fleetwood was cumulative. It may be cumulative in content, and in that sense there is some superficial resemblance to the Harrington type of situation, but it is the position of Mr. Van Arsdall the testimony of Robert Fleetwood was certainly not cumulative in its probative effect.

What was the importance of Robert Fleetwood's testimony? All he really said was that he saw Robert Van Arsdall at Pregent's apartment prior to the Epps homicide. Van Arsdall also stated that he was at Pregent's apartment prior to the Epps homicide.

The difference is, Van Arsdall never admitted being seen at the Pregent apartment prior to the Epps

homicide by anyone with the exception of Daniel Pregent and the victim, Doris Epps.

QUESTION: Was this line of argument made to the jury by defense counsel?

MR. WILLIAMS: That was our line of argument. Yes, it was made in both opening and closing. That was our defense in this case. Our defense was that the post-homicide conduct of Robert Van Arsdall was simply inconsistent with the actions of a murderer or murder accomplice. He went across the hall. He had blood on his clothing. He was carrying the bloody murder weapon. He knocked on the door of Fleetwood's apartment, revealed his presence at the homicide scene to three other people. We submit that is highly incriminating and certainly not the kind of conduct that someone who had just committed a homicide would engage in.

QUESTION: Well, Mr. Williams --

MR. WILLIAMS: Yes, Justice O'Connor.

QUESTION: -- I suppose that Mr. Van Arsdall testified that Mr. Fleetwood did not see him?

MR. WILLIAMS: He testified that he did not recall being seen by anyone at the apartment with the exception of Pregent.

QUESTION: And didn't Mr. Fleetwood himself indicate that Mr. Van Arsdall had not seen Mr. Fleetwood,

that Fleetwood had seen Van Arsdall, but not vice versa?

MR. WILLIAMS: Well, I don't think Fleetwood could have testified as to what was in Van Arsdall's mind. I think --

QUESTION: Well, but at least his testimony is consistent with that, that he didn't think Van Arsdall had seen Fleetwood. Isn't that right?

MR. WILLIAMS: Well, I don't know if that's true or not.

QUESTION: So I don't see how that would be inconsistent at all with your defense.

MR. WILLIAMS: Well, I think the inconsistency, Justice O'Connor, is the inference that the prosecutor made when it was cross examining Van Arsdall. The very point in question that was asked of Van Arsdall by the prosecutor is, isn't it true the reason you went across the hall to Fleetwood's apartment was to kill Fleetwood, suggesting that Van Arsdall went across the hall carrying the murder weapon not to alert other people to a problem with which he had no culpability, but to do away with a potential witness at the scene. He didn't admit that he had been seen by them, but the inference was there.

We think under those kind of circumstances when the testimony of Fleetwood -- the probative effect is utilized to undercut the entire defense, that we

certainly had a right to attempt to discredit Robert Fleetwood, and we had strong evidence of bias in this case. We had evidence that the prosecutor was dealing with this witness. He had dropped criminal charges on the eve of this homicide trial. He asked Robert Fleetwood to come over --

QUESTION: What sort of criminal charges?

MR. WILLIAMS: The charges, Justice Rehnquist, were that he was charged with being drunk on the highway. It is an offense in Delaware where you can receive up to 30 days' incarceration for a first offense, and we think that was certainly the first area of bias cross examination we wanted to pursue.

We think that the other evidence which the Delaware Supreme Court really hasn't ruled on, and certainly is of greater consequence, was the fact that Robert Fleetwood was a suspect to the same police department in another homicide, the Blake case, and we think that is certainly important evidence that the jury should have had.

The jury had the right to decide whether this witness was or was not lying, and that is what we were prevented from showing. This is not a case where you have the erroneous admission of harmless testimony. What you have here is the improper exclusion of evidence that

the defense wanted to present. We had evidence --

QUESTION: Did you try the case, Mr. Williams?

MR. WILLIAMS: Yes, sir.

QUESTION: It was a nine-day trial?

MR. WILLIAMS: No, it was nine days for the prosecution to present its case.

QUESTION: And how long did Fleetwood's testimony take?

MR. WILLIAMS: I can't remember if Fleetwood was on for more than on day or not. It took, I would think, at least two to three hours.

QUESTION: Including direct and cross?

MR. WILLIAMS: Yes. There was a long colloquy where we made our offer of proof on the two areas of bias cross examination. I think it was interrupted at one point even to sequester Robert Fleetwood so that he wouldn't hear discussions.

There were legal arguments being made to the trial judge. In fact, we have cited a 1979 decision of the Delaware Supreme Court in Winchon.

QUESTION: I am curious as to just how many pages of transcript does his actual testimony take? Can you remember that?

MR. WILLIAMS: I don't know. I'd have to refer to the volume. But we think that that misses the point.

I think what the State of Delaware is trying to argue here is that you can quantify all these things, but at some point quality is important, and if you have one question, one good question on cross examination, why did you go across the hall to Robert Fleetwood's apartment, to kill Robert Fleetwood, that that may be all it takes for the prosecution to completely undermine the defense that was presented in this case. We think that is certainly what happened here.

Robert Van Arsdall was convicted. His co-defendant, where virtually the same evidence was offered at his trial, the same forensic expert, Dr. Lee, testified against Daniel Pregent at Pregent's trial, and Pregent was acquitted at a subsequent hearing. We think that there is certainly a problem here that the Delaware Supreme Court has attempted to deal with this difficulty in its trial courts by drawing a broad line that any trial judge will be cognizant of in the future.

That is, they have to allow some bias cross examination. As long as they do that, and then they can properly exercise their sound judicial discretion, then the Delaware Supreme Court will analyze for harmlesses. However, if they do not do that, have a total in limine prohibition, and it does not meet any of the other recognized exceptions to the Delaware rule, then Delaware

will certainly apply a per se error rule.

The Delaware rule, as I said, does give meaningful guidance to a trial judge. The difficulty here is that the trial judge really is not going to know during the course of the trial if a witness is then crucial or then important or may subsequently, as the facts in this particular case indicate, become important later on because of subsequent developments in the trial.

A determination of witness credibility has to be left to the jury. An appellate court cannot speculate what a jury would do. A jury is the sole judge of witness credibility. There is no significant competing state interest her. At least in the Davis situation it was an Alaska state policy of confidentiality of juvenile delinquency adjudications, but there is no such state policy here.

It has been argued that you will preserve scarce trial resources if you don't have a per se rule but a harmless error rule. It is the position of Mr. Van Arsdall that you preserve scarce trial resources by making it plain that this type of error will not be tolerated.

Fleetwood's credibility was an important issue in this case. Fleetwood's testimony hurt the

defendants. Without Fleetwood, there was no prosecution explanation for why Van Arsdall went across the hall, apart from Van Arsdall's innocent explanation for his post-homicide conduct. This is not the erroneous admission of harmless testimony. This is the exclusion of defense evidence. The evidence offered by Fleetwood undercut the defense in this case. What Fleetwood testified to may have been cumulative in content, but it certainly was not cumulative in probative effect.

The offer of proof made in this case clearly establishes what evidence of bias or interest the defense intended to present to the jury had it been permitted to do so. The factual distinction between the erroneous admission of harmless testimony and the wrongful exclusion of defense evidence makes a logical excision in this case impossible.

That is, you can't just take it out, and the reason you can't take it out and speculate what the jury would have done was because the jury never heard it, and that is the distinction between this case and the Harrington line of decisions. This was a circumstantial evidence case, unlike Harrington. There was not overwhelming untainted evidence here.

In fact, by the time of closing argument, the prosecution was still not sure who had committed this

homicide. It offered the jury two alternative theories. That is, that Van Arsdall alone may have committed the murder or that somehow Van Arsdall may have been an accomplice to Daniel Pregent.

As I pointed out, by the subsequent trial, Daniel Pregent was acquitted. We agree that a confessing defendant, as in Schnebel versus Florida, has little reason to complain. And that is simply because the Sixth Amendment really isn't implicated in that type of situation, but here Fleetwood's testimony was used to the detriment of Van Arsdall.

Among the essentials of a fair trial is that each side has an opportunity to present its evidence to the jury. When a conviction is based only on the prosecution's evidence, justice has been denied.

If there are no additional questions, we submit the case to the Court.

CHIEF JUSTICE BURGER: Very well.

Do you have anything further? You have two minutes remaining.

ORAL ARGUMENT OF RICHARD E. FAIRBANKS, JR., ESQ.,
ON BEHALF OF THE PETITIONER

MR. FAIRBANKS: Thank you, Chief Justice.

I would like to make three quick points. One, in response to Justice Rehnquist's question about how

much transcript is involved for Robert Fleetwood's testimony, the entire direct, cross, and voir dire in which legal arguments were made and the inquiry was made of Fleetwood took 51 pages of the transcript. It begins on Page 73 of the joint appendix, and it reflects that it went from 40 to 91 of the trial transcript.

Fleetwood -- the defense theory of Fleetwood's importance has three problems with it. One, the inferences that the defense seeks to draw are fairly attenuated. Fleetwood said he simply poked his head in the door. He didn't talk to anybody. There is no indication that he was seen.

The prosecutor in closing didn't argue the point. That wasn't the basis of the state's theory as to why Van Arsdall went across the hall, and three of the defendants didn't even notice that this was a problem until after he had read the transcript at least twice, because he only raises this theory for the first time in his reply brief.

The second point is, the Delaware rule is clearly a per se rule. In its holding at Page A7 of the petition the court said in establishing a per se error rule, it said consequently the actual prejudicial impact of such an error is not examined, and reversal is not mandated.

The third point simply is that this Court has recently recognized that confrontation clause cases fall into two broad categories. The first category is the hearsay, the out of court declarations in which there is no cross examination of anybody, of any witness. In that instance, clearly harmless error is available.

This case falls in the second category, the Davis versus Alaska category, in which there is a restriction of cross examination. We think it makes no sense to impose a per se rule only in that line of cases.

We would ask the Court to reverse the conviction.

CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 11:04 o'clock a.m., the case in the above-entitled matter was submitted.)

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:

#84-1279 - DELAWARE, Petitioner V. ROBERT E. VAN ARSDALL

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

BY Paul A. Richardson

(REPORTER)