REVISED

# OFFICIAL TRANSCRIPT
# PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 85-1347

TITLE PENNSYLVANIA, Petitioner V. GEORGE F. RITCHIE

PLACE Washington, D. C.

DATE December 3, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

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PENNSYLVANIA, :

Petitioner, :

V. : No. 85-1347

GEORGE F. RITCHIE :

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Washington, D.C.

Wednesday, December 3, 1986

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:59 o'clock p.m.

APPEARANCES:

EDWARD MARCUS CLARK, ESQ., Assistant District Attorney, Allegheny County, Pittsburgh, Pennsylvania; on behalf of the petitioner.

JOHN H. CORBETT, JR., ESQ., Pittsburgh, Pennsylvania; by invitation of the Court, as amicus curiae, in support of the judgment below.



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P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: We will hear argument now in No. 85-1347, Pennsylvania against George F. Ritchie.

Mr. Clark, you may begin whenever you are ready.

ORAL ARGUMENT OF EDWARD MARCUS CLARK, ESQ.,

ON BEHALF OF THE PETITIONER

MR. CLARK: Thank you, Mr. Chief Justice, and may it please the Court, this case is before you today on a writ of certiorari to the Supreme Court of Pennsylvania. The Commonwealth has contended in our brief that the intermediate appellate court and the Supreme Court of Pennsylvania erroneously construed and misapplied two very important segments of the Sixth Amendment jurisprudence of this Court, and in the process effectively have dismantled a very elaborate statutory procedure erected to encourage more complete reporting of what has become a very shameful and often secret crime, the sexual abuse of children.

Specifically, the court below erred, we contend, in concluding that the compulsory process and the confrontation clause invariably requires that a criminal defendant in a sexual offense case such as this must be given pretrial access to confidential records

compiled by a child protective service agency notwithstanding the fact that the records were never used or employed by the prosecution at any stage of the proceeding.

Before we address the merits of those contentions, Your Honors, I would request the Court's indulgence in view of the fact that the respondent here has interposed a challenge to this Court's jurisdiction under the so-called final judgment rule of Title 28, USC Section 1257. In view of that I would like to briefly summarize the factual and the history of this case in order to set the context for argument on that issue.

Respondent was charged in a four-count information with rape, incest, involuntary deviant sexual intercourse, and corrupting the morals of children. The charging document alleged a course of conduct that spans some four years. The specific criminal episode giving rise to the charges, however, occurred in June of 1979. Prior to trial, respondent initiated discovery proceedings seeking, among other things, results or reports involving a medical examination counsel believed had taken place regarding the victim in this case.

Subsequently he issued a subpoena to the Children and Youth Services Agency of Allegheny County

seeking review and total access to their confidential records pertaining to the victim. The agency chose not to surrender those records to the respondent based on that subpoena, and as a result respondent's counsel, trial counsel filed a pleading called a motion for sanctions and a hearing was convened at the trial court level.

At the hearing, respondent informed the trial court that he had to have access to these medical records in preparation for trial, and also that he was aware that there had been conversations between the complaining victim and a Children and Youth Services caseworker.

In addition to those alerts, red flags for the court below, respondent's counsel also said that there is possible witnesses, witnesses not known to the defendant. There could be witnesses in those records that could be useful in my defense, matters that could be favorable to the defendant.

Based on that presentation the trial court denied relief, denied access to these records, and characterized, I think correctly, the assertions or the offer of proof by respondent's trial counsel as too vague and nonspecific.

Of course, as the Court is aware, respondent

proceeded to trial, was convicted by a jury, and ultimately sentenced to a term of imprisonment.

The intermediate appellate court of Pennsylvania, the Superior Court, without having considered or having access to the notes of testimony from that pretrial hearing, concluded that the procedures employed by the trial court below failed to protect the respondent's confrontation rights, his privileges there.

A remand was ordered and the trial court was directed to review these records for purposes of determining whether or not there was a statement by the victim pertaining to abuse. So far so good as far as the commonwealth is concerned. But inexplicably the court determined that respondent's counsel must be given access to the entire file, unexpurgated, unexcised, to determine whether or not -- in order to be able to present argument concerning relevancy.

QUESTION: Incidentally, Mr. Clark, Act 1975 was amended, was it not?

MR. CLARK: I am sorry, I am not familiar with that Act. Are you speaking of the final judgment rule, Your Honor?

QUESTION: No, I am speaking of the statute under which access is or is not --

MR. CLARK: Oh, under the federal rules, Your Honor.

QUESTION: Yes.

QUESTION: The Pennsylvania statute.

QUESTION: The Pennsylvania statute.

MR. CLARK: Oh, the Pennsylvania statute, yes, it was amended in 1982, Your Honor. Yes.

QUESTION: And under the ordered remand would access be governed by the old or the amended statute?

MR. CLARK: I presume it would be under the amended statute, Your Honor. The Commonwealth wouldn't have any problem with that.

The Supreme Court reviewed this appellate decision.

QUESTION: Well, you might if we thought that that was a basis for saying that the case is moot, that we now have a new statute in front of us.

MR. CLARK: Well, I don't believe the case would be moot, Your Honor, in this regard. We have --

QUESTION: Why don't you tell us why it wouldn't be.

MR. CLARK: We don't think that the amendments to the statute effectively have altered the basic ruling by the Pennsylvania Supreme Court, which is that invariably these confidential records must be given

carte blanche to a criminal defendant in this case.

QUESTION: The basic change in the statute as I understand it is that henceforth the prosecutor has access. Under the prior version even the prosecutor didn't have access to it. Now he has access, right?

MR. CLARK: The prosecutor has access to reports which have been given by the Children and Youth Agency to the prosecutor. The prosecutor does not customarily, in my understanding of this law, has not delivered those files. That is not part of his investigatory tools, Your Honor.

The regulations governing access by prosecutors in this case are very explicit in terms of the kinds of crimes which require their disclosure, the forms upon which the information that is given to the police department --

QUESTION: Well, if we reversed the judgment of the Supreme Court of Pennsylvania in this case the result would be that the conviction stands affirmed, wouldn't it?

MR. CLARK: Absolutely correct, Your Honor.

QUESTION: And certainly that I would think would prevent the case from being moot.

MR. CLARK: I'm sorry, I don't understand. Your Honor is saying that this would moot the case?

QUESTION: No, it seems to me that would prevent the case from being moot.

MR. CLARK: Oh, absolutely correct.

QUESTION: A decision here has some effect on the rights of the parties before us.

MR. CLARK: Absolutely, Your Honor. Absolutely. I thank you for your assistance in that regard.

QUESTION: Even though you didn't recognize it at first.

QUESTION: May I ask on a somewhat related question, is the respondent a fugitive?

MR. CLARK: Not to my understanding, Your Honor.

QUESTION: Because I notice the affidavit for in forma pauperis indicated he was unavailable and the lawyer didn't know where he was.

MR. CLARK: I believe there is a subsequent communication with the Court, Your Honor, involving, I believe they found the respondent and he subsequently signed an affidavit attesting to his pauper status.

QUESTION: I see.

QUESTION: He is not incarcerated now?

MR. CLARK: He is not incarcerated. The judgment of sentence was stayed pending direct appeal

rights.

We think that, not to belabor the obvious here in terms of the challenge to the final judgement rule, that the Sixth Amendment issues here have been finally litigated, certainly in the highest state court of Pennsylvania, and that there is no further review possible in our -- Justice Scalia, I am sorry you are indicating your disagreement.

QUESTION: Sure, you can get further review. The state can refuse on remand to turn over these records as the Supreme Court has said it must do, whereupon either the conviction will be set aside and we would have a final appealable matter, or some contempt sanction would be imposed upon the prosecutor or whoever is in custody of those records, and Pennsylvania would then be able to decide this question again, I presume.

I mean, what do you with United States versus Ryan, that whole line of cases?

MR. CLARK: I think in United States versus Ryan, Your Honor, those cases involve the absolute refusal to divulge and to deliver certain materials. The Commonwealth is not in a position of arguing that kind of situation.

QUESTION: That is an interesting difference, but does it bear upon whether the decision is final or

not? In Ryan you had an individual who refused to turn over records. The District Court said you must turn them over. The Court of Appeals said, yes, you must. And we said that the Court of Appeals should not have even entertained the matter because it was not final until he steadfastly refused to turn them over and was held in contempt.

MR. CLARK: That's correct, Your Honor. I understand that.

QUESTION: Now, why was that not final and yet this is final?

MR. CLARK: Well, the trial court here already had access to these records. The Children and Youth Services agency surrendered those records, as they have a practice of doing. In fact, one of the subparts of the confidentiality statute exempts courts of competent jurisdiction precisely to handle these kinds of controversies so that where --

QUESTION: Have they been given to the attorney for the other side?

MR. CLARK: They have not been given to the attorney for the other side.

QUESTION: Well, then, they haven't --

MR. CLARK: They have not been ordered --

QUESTION: -- they haven't done what they have

been ordered to do yet, nor have they categorically refused to do what they have been ordered to do. They want to litigate it first before they take their chances. And what we said in Ryan is, you have to take your chances. Go into contempt and then we will see whether you had to turn it over or not. Now, why should there be a different rule here?

MR. CLARK: I think beforehand it would be a requirement of the respondent here to request the state Supreme Court to enforce its mandate before we -- the Children and Youth Services is not in sort of some kind of limbo contempt situation here because it hasn't delivered these files yet. We immediately appealed.

QUESTION: There is no final action that has been taken against anybody. Nobody has been held in contempt. No defendant has been acquitted. Nothing final has happened.

MR. CLARK: A defendant has been convicted, Your Honor --

MR. CLARK: The Court has said if --

MR. CLARK: -- and a Sixth Amendment issue has been authoritatively decided by a state court, arguably incorrectly, and as a result of that we have a situation where the state trial courts of Pennsylvania are routinely permitting criminal defendants to scavage.

QUESTION: This prosecution is still proceeding, isn't it? It is not over.

MR. CLARK: I don't think it's over any more than the fact that as this Court did in South Dakota versus Neville where the State Supreme Court there had authoritatively adjudicated a federal constitutional issue and remanded the case to the trial court for further proceedings on another matter, and this Court determined that it still had jurisdiction to decide the issue in view of the fact that no matter who prevailed at the trial court level, the issue would either be mooted or the state would be prevented from proceeding any further in the United States Supreme Court by virtue of the double jeopardy clause.

QUESTION: As I understand it, the only way we can distinguish the next case where a litigant is ordered to turn over information and he says that that order is incorrect, the only way we can turn down an appeal from that order without requiring him to take his chances and either lose the case or go into contempt, you say the distinction between that case and this one is what, that here -- here what?

MR. CLARK: Between Ryan and this case, Your Honor?

QUESTION: Yes, that is essentially Ryan I was

describing.

MR. CLARK: In Ryan the defendant absolutely refused to disclose these, to surrender his --

QUESTION: And here? And here the prosecution is absolutely refusing to do what is requested. Turn them over to the counsel for the other side.

MR. CLARK: The agency was directed to surrender those records initially to the trial court, Your Honor. Here, the order from the Supreme Court, yes.

QUESTION: Well, isn't the --

MR. CLARK: The Supreme Court has -- I'm sorry.

QUESTION: If there is a refusal to turn them over won't the conviction be set aside?

MR. CLARK: Presumably the prosecution would be dismissed at that point.

QUESTION: I would suppose it would because if they are turned over and there is something in them that the defendant should have had during the trial, there is going to be a new trial.

MR. CLARK: There will be a new trial.

QUESTION: Well, the Supreme Court of Pennsylvania has already ordered a new trial, hasn't it?

MR. CLARK: The Supreme Court -- no, it has ordered a remand, Your Honor, for purposes of an evidentiary hearing to determine whether or not harmless error occurred.

QUESTION: But the court already has the records that are to be opened. Is that correct?

MR. CLARK: The trial court at one time had custody of those records.

QUESTION: Well, does the trial court have them now?

MR. CLARK: No, Your Honor.

QUESTION: Who has them now?

MR. CLARK: Those records are with the Children and Youth Services Agency.

QUESTION: I see.

MR. CLARK: That agency has not been ordered by the Court pending this appeal to surrender those records.

QUESTION: That is the court that is going to look at them under this order.

MR. CLARK: In a largely ceremonial sense, Your Honor.

QUESTION: Well, I know, but who is going to determine whether or not there is something in the records that requires a new trial?

MR. CLARK: Well, as I understand it from the Supreme Court's opinion, Your Honor, apparently trial counsel was to make that determination, a rather unusual --

QUESTION: You mean the trial counsel will say, I found something in here that I think --

MR. CLARK: The trial counsel will second-guess the trial courts, the appellate courts.

QUESTION: He is going to have to argue with the trial court about it.

MR. CLARK: Yes, Your Honor.

QUESTION: And if the trial court agrees with them there is going to be a new trial.

MR. CLARK: That's correct, Your Honor.

QUESTION: (Inaudible) a new trial, will the prosecution under the amended statute want access to those records?

MR. CLARK: Certainly, Your Honor, they would.

QUESTION: They will?

MR. CLARK: I should think so.

QUESTION: If there is a new trial and he is acquitted, you will never be able to have this question raised in this case.

MR. CLARK: It will never be raised here in this Court with that case, Your Honor. There is another

aspect to this finality argument that we have, this finality theory that we have that the very harm that we seek to avoid here, the disclosure of those confidential records will happen as soon as that remand takes place. And in our view this is virtually an irretrievable loss if we are correct on our theory of the Sixth Amendment issue.

QUESTION: I am sure counsel could have said that in Ryan, too. He could have said, Your Honor, my client is not going to take the chance of going into contempt. If you don't hear this appeal now he is going to turn this information over, and we said, you know, we are sorry, we don't sit here to review issues. We sit here to review final actions, and there is no final action in this Court, by this Court, so go away.

MR. CLARK: It is not final in the sense, Your Honor, that there are further proceedings to come. That is absolutely correct. But this Court's line of cases beginning from Cox Broadcasting --

QUESTION: But if you refuse, the conviction is going to be set aside.

MR. CLARK: That's correct, Your Honor. I am not sure that I can represent that a refusal to surrender these records is what is going to happen. Those records --

QUESTION: If and when it is set aside we could review it then, right? You could then appeal the setting aside of it for these erroneous grounds, for these grounds that you assert are erroneous.

MR. CLARK: If -- in the event there is a refusal?

QUESTION: Right.

MR. CLARK: Is that what you are saying, Your Honor?

QUESTION: Right.

MR. CLARK: I believe that the mandate of the Supreme Court of Pennsylvania is that Children and Youth Services will surrender their records to the trial court. Presumably if the trial court wants those records it will order them, as it may under the statute. When that occurs the trial court, as the opinion indicates, is expected to review these files to determine whether or not there would be anything in there that might have been helpful to the respondent in preparing his defense.

Then the court is to surrender those records to the respondent so that he may do his second guessing evaluation of the trial court's exercise of discretion.

QUESTION: Mr. Clark, you might be well

advised to move to the merits since you only have half an hour.

MR. CLARK: Thank you very much, Your Honor.

In returning to the merits, the Commonwealth would observe that the Supreme Court of Pennsylvania erred in three specific respects. It misconstrued or misapplied the application of the confrontation clause in the circumstances of this case. It erroneously concluded that counsel's offer at the pretrial proceeding was a sufficient preliminary demonstration of materiality so as to trigger, if there is a compulsory process issue here, that clause, and it incorrectly concluded, we believe, that the two clauses in effect have -- cannot countenance the ex parte judicial review of these confidential records which the Commonwealth insists must occur.

The privilege of confrontation is exclusively a trial right. The situation complained of here involves a pretrial decision involving pretrial matters. Facially the confrontation clause is not applicable here.

The Supreme Court of Pennsylvania relied on Davis v. Alaska as dispositive of the issue, failing to understand, I believe, that the constitutional error that this Court found in Davis v. Alaska was the

restriction on the trial lawyer's attempt to cross examine a witness concerning his juvenile status, attempting to coax from him the fact that he might have suspect motives in testifying.

This is an inapt analogy, we believe, to this case. It may very well be that the compulsory process clause provides perhaps more expansive privilege, and if it does it might be applicable here. Certainly the compulsory process clause is available to a criminal defendant in a pretrial context.

Privileges guaranteed under that clause, we think, however, require a respondent, a defendant to identify with some particularity the witnesses or the evidence that he would seek to have the court compel for his use at trial.

The respondent's litany of could be's does not meet that minimal test of materiality which this Court has discussed most recently in United States versus Valenzuela Bernal. There the Court determined that it is imperative upon the person seeking access to what apparently is information he can't possibly know the contents of to make some plausible theory about how a witness might be used, what that witness might be capable or competent to describe, and so forth.

Under this Court's discussion there, I

believe, which is dispositive of the compulsory process clause issue before this Court, it cannot be doubted that the offer by the respondent was so vague, so generalized, so undirected that the trial court simply had no information upon which to exercise its discretion.

I would hasten to assure the Court that the respondent was very well aware of the names of the caseworker who was involved in interviewing the child, the name of the doctor who treated or examined the victim, and that he very well could have sought the trial court's assistance in isolating statements made by either one of those parties that might be in that file because those people would be competent to testify about some aspect presumably of the criminal defendant's preparation for trial.

QUESTION: Mr. Clark, what about Brady versus Maryland? That is not really a compulsory process case.

MR. CLARK: No, Your Honor, that is a due process case.

QUESTION: That doesn't require a specific description of what -- in fact you often don't know what the prosecution or the government has, right?

MR. CLARK: That's absolutely correct, Your

Honor.

QUESTION: And due process requires that if you ask the government for whatever exculpatory information it may have the government turn that over if that would be material. Why isn't that applicable?

MR. CLARK: It could very well be, Your Honor, in this regard. Those files never having been in the possession of the Commonwealth, but having been in the possession of the trial court, it may very well be that the trial court could make that preliminary determination regarding whether or not there is exculpatory evidence in there, and I am not here today to attempt to say that where exculpatory evidence exists and where the Commonwealth as a law enforcement representative would have some access to that confidential material, that there wouldn't be any obligation of someone to determine whether or not there was exculpatory material.

QUESTION: Your point is that the order here goes beyond Brady and it requires it all to be turned over whether in fact it is exculpatory material or not.

MR. CLARK: That is absolutely right, Your Honor. What distinguishes this from Brady material, of course, is that it was never in the possession of the attorney for the Commonwealth, the prosecutor, and I

think that is the essence of the Brady decision, because --

QUESTION: Certainly under the amended statute the Brady case would become pertinent.

MR. CLARK: It certainly would, Your Honor, and I am quite -- the Commonwealth is quite content to represent that we believe the trial court is in a very excellent position to make these discriminating choices between extraneous material and matter which is certainly dangerous.

QUESTION: Mr. Clark, in this case to what extent did the trial judge actually examine the file?

MR. CLARK: It is difficult to tell from reading the record, Your Honor, but it appears that I could imagine the trial judge, knowing him as I do, leafing through things. There is no way to demonstrate that from the record, however.

QUESTION: Didn't the trial judge say he hadn't read those 50 pages?

MR. CLARK: He said he hadn't read all 50 pages. I think the dialogue goes --

QUESTION: Of the nonmedical record?

MR. CLARK: I believe the dialogue goes something like this, Your Honor. Respondent's counsel sought medical records. He says, there's medical

records in there, I know there are, and the trial court apparently leafed through some material --

QUESTION: He said there wasn't any.

MR. CLARK: -- and said, I don't see any medical records in there, and he apparently turned to the representative of the Child Protective Service Agency and said, are there any medical records in here that were representative? He said there were not. And that apparently concluded that inquiry.

QUESTION: May I ask you if you think what the trial judge did was constitutionally sufficient?

MR. CLARK: Absolutely, Your Honor, based on the proffer made by respondent's counsel.

QUESTION: But he had no duty to look at the file?

MR. CLARK: He had a duty to look in a file if he got a specific request for a specific kind of --

QUESTION: Absent a specific request identifying particular material --

MR. CLARK: At that point no, Your Honor.

QUESTION: I see.

MR. CLARK: At that point no.

QUESTION: He wanted medical records.

MR. CLARK: He wanted medical records. He looked for some evidence --

QUESTION: And the judge said, there aren't any.

MR. CLARK: There aren't any. Apparently he was able to make that kind of a discriminating choice by leafing through how many ever pages there were in that record. And in that -- I would -- if there are no further questions by the Court I would like to reserve the balance of my time for rebuttal.

CHIEF JUSTICE REHNQUIST: Very well, Mr. Clark.

We will hear from you now, Mr. Corbett.

ORAL ARGUMENT BY JOHN H. CORBETT, JR., ESQ.,

ON BEHALF OF THE RESPONDENT

MR. CORBETT: Mr. Chief Justice, and may it please the Court, this case provides an opportunity for this Court to reaffirm its concern for the integrity of the truthseeking function of state criminal trials. The Supreme Court of Pennsylvania has held in this case that the integrity of its criminal trials, the truthseeking function embodied in those trials is paramount to this privilege statute, a statute created under Pennsylvania law, and in doing so it did not render that statute unconstitutional. It did not declare that statute unconstitutional, but interpreted that statute and sent the case back to the trial court for determination of

whether there is material in the CWS files, the Child Welfare Service files to determine further if that material, if relevant the suppression of that material was harmless beyond a reasonable doubt, and if a new trial was warranted.

In doing so, the decision of the Supreme Court of Pennsylvania, we would state to this Court, is not a final decision under Section 1257. Certainly it does not fit the classic definition of finality because there are a number of things for the trial court to do other than simply to record a judgment.

The trial court must hold an evidentiary hearing in camera to determine the relevancy of the material in the CWS files. It must determine if the suppression of such evidence was harmless beyond a reasonable doubt, and if necessary determine whether a new trial was warranted.

Furthermore, this case does not present itself as a classic example of those kind of cases which this Court identified in Cox Broadcasting Company as being a final judgment for purposes of appeal to this Court. There are a number of things to be done in the lower court, and the issue that the district attorney of Allegheny County is presenting to this Court will not evade review.

If the material goes back -- if this case goes back to the trial court and a new trial is granted then the district attorney can then once more go through the various stages of appeal and bring this case to this Court.

QUESTION: It seems to me the harm that the state statute or the state rule was designed to prevent, namely, the disclosure of these records, will -- the harm will have been done. And what the state wants to do is to prevent access to these records insofar as the Constitution will permit, and if this case goes back the records will be turned over to counsel and harm will be done, and that is precisely what the state wants to prevent. It is sort of like a double jeopardy issue.

MR. CORBETT: Well, Your Honor, if I may, I have two responses to that. The first is that the district attorney is bringing a Sixth Amendment issue to this Court but it is not claiming a Sixth Amendment injury. It is in fact presenting sub silencio a Tenth Amendment issue for this Court to consider.

And that is that by interpreting the Sixth Amendment claim in this fashion it is saying that the Supreme Court of Pennsylvania has applied excessive federal regulation to a state statute, and in that manner is attempting to bring this case to this Court

under the rubric of a Sixth Amendment case when in fact the district attorney has not suffered a Sixth Amendment injury, and it is not the type --

QUESTION: Well, you agree, don't you, Mr. Corbett, that one of the bases of the Supreme Court of Pennsylvania's decision was its perception of how the Sixth Amendment should be applied.

MR. CORBETT: Absolutely. Absolutely, but --

QUESTION: (Inaudible) require turning over these materials to the defense attorney?

MR. CORBETT: Yes, it did. That goes to the second -- my second response to Justice White's question before, and that is, this disclosure of material in the CWS files is not such a great harm that this Court should be concerned with it. Under this state statute, the state statute that was in effect at the time this case went to trial, there were five classes of individuals who were entitled to gain access to this material --

QUESTION: Well, do you think that is --

MR. CORBETT: -- one of which --

QUESTION: Do you think that has much to do with finality, how great the harm is?

MR. CORBETT: Yes, I think it does, whether or not the type of harm that the district attorney is

propounding is irreparable I think is a concern that this Court must face here. What I am saying here is that this state statute gives access to five groups of individuals, which was later expanded to eleven groups of individuals, and under both statutes a court of competent jurisdiction pursuant to court order had access to this material, and I suggest that that is a classic subpoena order.

Secondly, the Supreme Court of Pennsylvania remanded this case to the trial court with instructions that this material be reviewed in camera and that appropriate protective orders be imposed upon counsel for the dissemination of that material, so that this material is not going to be disseminated widely to the public.

QUESTION: Mr. Corbett, isn't it true that the kind of damage you are responding to that Justice White suggested will always occur in any of our cases such as Ryan, where we have insisted that the individual who asserts a right, even a constitutional right not to disclose information which the court requires him to disclose nonetheless go into contempt before he can bring it up here?

He either goes into contempt or else he turns it over. If he turns it over he produces exactly the

result which the Constitution assertedly guarantees won't happen. So in that respect I would think your response would be the state is in no different situation from anyone who refuses to turn material over or says he will refuse. The refusal has to be evident before we intervene.

MR. CORBETT: Yes. Thank you, Justice Scalia.

QUESTION: Is there an exception in Ryan, though, when privileged information is in the hands of a third person?

MR. CORBETT: Well, that brings us to a difficulty with this case, and that is that the district attorney is really wearing two hats in bringing this case to this Court. The district attorney is wearing the hat of the privilege holder in withholding the information and also as the litigator in a case and that they are interested in maintaining the judgment they have in their favor.

I think the Court understands my argument on the finality issue. I would like to then move on to the substantive issue itself dealing with the --

QUESTION: Mr. Corbett, before you do --

MR. CORBETT: Yes, Your Honor.

QUESTION: -- is your client available now?

MR. CORBETT: Yes, Your Honor, he is. As Mr. Clark pointed out, we had some difficulty in locating this individual. He was not in any way a fugitive. We have supplied his affidavit to the Court. It is a matter of record.

Moving on, then, to the confrontation and compulsory process issue itself, the facts in this case are extremely important in order for the Court to understand exactly what transpired, both during the pretrial hearing in chambers where the CWS records were discussed and also during the trial.

The facts as adduced during these proceedings indicate that the complainant was the 13-year-old daughter of my client. The criminal charges arose out of an event that occurred on June 11th, 1979. This young girl was the only witness at trial to establish that any type of a crime had ever occurred. There was no other type of direct testimony, no other type of circumstantial evidence entered of any kind whatsoever that any crime had ever occurred.

This girl indicated that these events had occurred three or four times a week for a period of four years. During her testimony at trial and also in the pretrial hearing defense counsel was able to point out that in September, the previous September of 1978 a

representative of CWS had investigated the Ritchie home and that no criminal charges had been filed at that time, no further action taken.

It is significant for our purposes to point to that September of 1978 to indicate that we had in the home a representative of the state who apparently interviewed the members of the family, and no criminal charges arose from that incident. The complainant gave statements to that representative of CWS, and yet we were denied the opportunity to look at that material, to cross examine the complainant during the trial.

QUESTION: Well, are you contending, Mr. Corbett, that the Sixth Amendment right to confrontation confers something more than the right to examine a witness who is present in court and testifies?

MR. CORBETT: The Sixth Amendment right to confrontation, I think, gives the defendant the opportunity to develop the facts, to see where the truth lies, and does so by giving the -- by giving the defense an effective opportunity to cross examine the witness.

QUESTION: And what Sixth Amendment case construing the confrontation clause of ours do you rely on for that proposition?

MR. CORBETT: I think quite frankly our strongest case here is Davis versus Alaska, where in its

broadest sense the case may be read to state that a state may not deny its confrontation claim or confrontation obligations simply by alleging that the evidence that it wishes to withhold is privileged by -- under state law.

QUESTION: But in Davis the effort was to interrogate the witness on the stand. They weren't seeking access to information which would enable them to interrogate the witness.

MR. CORBETT: They were -- in Davis they were also looking to -- they were looking to obtain facts from which they could cross examine the witness during the trial. Those facts existed in juvenile records. In this case we have --

QUESTION: But the effort was to examine the witness herself, wasn't it?

MR. CORBETT: In this case, yes. In Davis.

QUESTION: Well, in Davis.

MR. CORBETT: Yes.

QUESTION: I mean, they weren't -- were they seeking in Davis discovery of a lot of allegedly confidential records in order to enable them to prepare to examine the witness?

MR. CORBETT: No, they weren't. In Davis, Davis dealt with the possible basis of bias or prejudice

of the witness in testifying in the manner in which he did.

QUESTION: Certainly our case of Delaware against Fensterer indicates that it is not the very broad view that you subscribe to for Davis that is controlling with us.

MR. CORBETT: That may be true. However, in Fensterer you had a situation where the defense was able to bring in a witness to present facts on their own side of the case to show that the expert witness in that case called for the prosecution had no basis for such an opinion, that such an opinion was not recognized in the body of scientific knowledge.

In this case the only source that the defense could point to to obtain those facts were contained in the CWS files.

QUESTION: The statements in that file did you say included statements by the complaining witness? Or you don't know?

MR. CORBETT: We think they should. We don't know. There was --

QUESTION: Was this anything like Jencks versus United States? They wanted statements of the government witnesses, in order to cross examine to show inconsistencies with the testimony?

MR. CORBETT: I think it is very similar to Jencks, yes.

QUESTION: Well, of course, Jencks was not a constitutional decision, though.

MR. CORBETT: Well, in this case I think that -- I think that in order to cross examine this witness we have to be given access to that material. There is no other source for that kind of material. Certainly if it were not for this state statute those statements would be available to us. It is only but for this state statute --

QUESTION: (Inaudible) Jencks rule?

MR. CORBETT: No. No, Your Honor, it does not.

This Court last term in Delaware versus Van Arsdall indicated that defendant shows a violation of his right of confrontation by showing that he has been prohibited from engaging in otherwise appropriate cross examination designed to show a prototypical form of bias on the part of a witness and thereby to expose to the jury facts from which the jury could appropriately draw inferences relating to the reliability of the witness.

We are asking the Court that we have been denied the opportunity to look at those facts, to bring those facts before the trier of fact, here the jury, and

have the jury --

QUESTION: But your claim is quite different than the one in Van Arsdall. In Van Arsdall questions were asked to a witness on the stand and the trial judge said, no, the witness is not required to answer those questions. Here, no one prevented you from asking this witness any question you wanted to on the stand. Your complaint is, you want to do a lot of discovery work before you start asking questions.

MR. CORBETT: Well, what I am complaining about is the fact that as in Davis the jury may very well have thought that defense counsel's cross examination of the victim concerning this investigation in September of 1978 may have been a baseless ground of attack.

Here we have a situation where the principal issue at trial was the credibility of two parties, the complainant and the defendant, and it may very well have tipped the scale for the jury to have heard a different version of the facts that the complainant gave on prior occasions.

And in that respect I am saying that there lies the violation of the right to confrontation.

QUESTION: Well, Mr. Corbett, doesn't your claim fit a lot more easily under the compulsory process

clause than the confrontation clause for right of access to information?

MR. CORBETT: I think this case presents -- I think both the confrontation and the compulsory process issues go hand in glove.

QUESTION: Well, I just don't see that you were denied confrontation. Conceivably there is some compulsory process problem, but I don't see that it fits very comfortably under the confrontation clause.

MR. CORBETT: Okay. If I may just point out one matter concerning that, on the -- whether or not the defense has shown whether they have made out -- whether the claim is material, whether or not the suppression of such evidence undermines confidence in the outcome of the case is the standard of materiality that this Court must wrestle with.

Here we have more than a "plausible showing," as the Court indicated under --

QUESTION: How have you made a plausible showing to reveal the entire record as opposed to just verbatim inconsistent statements of the witness?

MR. CORBETT: Well, we have the CWS files. The record indicates, the entire record indicates that the CWS files contain facts that the Commonwealth of Pennsylvania has gathered --

. QUESTION: Is the judge, is the trial judge incompetent to make the determination of what is material?

MR. CORBETT: No, I don't think it is a matter of declaring whether or not a trial judge is or is not incompetent. As we indicated in our brief in the case of Alderman v. United States, this Court indicated that it is enough for judges to judge, and in that case it is useful to have the defense, defense counsel participate in deciding whether or not material is useful to the defense.

We have set forth in our brief several steps that one can go through in analyzing whether or not defense counsel should participate, one of which is whether or not the case is factually complex in itself. I suggest that when this type of criminal case arises where you have claims of abuse arising in a family relationship that is a quite complex factual determination, and a trial judge sitting -- the best trial judge sitting as objectively as he possibly can, in looking at this material would or may very well overlook something that would have great significance to the defense.

In looking at the privilege statute that is the bone of contention in this case, one of the classes

of categories of individuals who have access to this information is a court of competent jurisdiction pursuant to court order. We argued in the state courts, and the Supreme Court of Pennsylvania agreed with us, that it would be absurd to suggest that a court is granted access to this file, and yet it is not free to use that material to assist in the truthseeking function of the criminal trials.

In determining which remedy should be applied in looking at this material contained in the file, whether or not defense counsel should participate, we have set forth in our brief two alternate lines of cases looking at this particular situation. One was under the dicta of this Court in the case of United States versus Nixon, where the Court suggested that the case would be remanded back to the trial court in order to have the trial judge review this material in chambers with counsel present and counsel would then -- or the trial judge would then have the benefit of counsel's advice on determining what information is relevant and material to the action.

The second line of cases that we have outlined for the Court in our brief concerns those cases arising under the Freedom of Information Act. These cases arise under the various courts, federal courts of appeals, and

in those situations the courts have required the party withholding the information to prepare affidavits indicating why the information should not be turned over to the opposing party, and also an affidavit to assist the judge, the trial judge in reviewing the material.

Both the affidavit and the material would then be sealed and -- placed under seal for review by appellate courts. Since that procedure was not used in the present case and -- we would submit to the Court that in the absence of such a procedure defense counsel must assist the trial judge in determining the materiality of this material in order to ensure the integrity of this truthseeking process.

With no further questions, I would request the Court to affirm the judgment of the Supreme Court of Pennsylvania.

QUESTION: Do you think Davis is the closest case to supporting you?

MR. CORBETT: I think Davis would be the closest case concerning the confrontation issue and possibly Washington versus Texas being the closest case on the compulsory process issue.

Thank you, Your Honors.

QUESTION: Thank you, Mr. Corbett.

Mr. Clark, do you have anything else you wish

to say? You have four minutes remaining.

ORAL ARGUMENT OF EDWARD MARCUS CLARK, ESQ.,

ON BEHALF OF THE PETITIONER - REBUTTAL

MR. CLARK: Thank you, Your Honor.

Very briefly, I would like to address the figurehead role that the respondent's counsel seems to envision for the trial court. It is kind of an enfeebled referee or arbiter, which this Court has specifically declined to assign to the trial court judge in situations like that, and in the case of United States versus Nobles this Court clearly indicated its disfavor with the contention that the trial court should not be in the position of evaluating preliminarily these kinds of determinations.

QUESTION: Mr. Clark, may I just make one inquiry? Does the district attorney have the power to direct the Child Welfare Service not to turn over those records?

MR. CLARK: Absolutely no, we do not have that power. I can't imagine the circumstances under which we would. We have the power to perhaps seek courts' assistance in getting material for ourselves which is due us under the statute, and with the Court's indulgence I would like to backtrack. I believe on a question that Justice Brennan asked regarding whether or

not, if we went back on a remand, whether or not the proceeding would be decided under the immunity statute or under the old statute.

I think in view of the fact that the amendments to the statute involve the new access to prosecutors and the issue before this Court is the access of defendant to those statutes, that more appropriately the proceedings should occur under the 1975 Act rather than the 1982 amendment.

And in view of the fact that the scant proffer concerning materiality by the respondent, our lack of access initially to those records, and respondent's failure to follow up his request at the cross examination stage at trial, we believe that the integrity of the judgment and conviction here is best served by analyzing the case under the 1975 Act, Your Honor.

If there are no further questions from the Court the Commonwealth of Pennsylvania would ask this Court to reverse the judgment of sentence below, rather, the judgment and order by the Supreme Court, and in effect affirm the trial court's decision.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Clark. The case is submitted.

(Whereupon, at 1:55 o'clock p.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:

#85-1347 - PENNSYLVANIA, Petitioner V. GEORGE F. RITCHIE

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

BY Paul A. Richardson

(REPORTER)