

# Supreme Court of the United States

OCTOBER TERM, 1969

Office-Supreme Court, U.S.  
FILED

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JOHN F. DAVIS, CLERK

In the Matter of:

Docket No. 15

CLARENCE DE BACKER,

Appellant

vs.

HOMER BRAINARD, SHERIFF OF  
DODGE COUNTY, NEBRASKA,

Appellee

*pt. 2*

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Place Washington, D. C.

Date October 14, 1969

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C O N T E N T S

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ORAL ARGUMENT OF:

PAGE

Richard L. Kuhlman, Esq.  
on behalf of Appellee

18

Alfred L. Scanlan, Esq.  
as amicus curae (for National Council  
of Juvenile Court Judges)

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 October Term, 1969

3 -----  
4 CLARENCE DE BACKER, )  
5 Appellant )  
6 vs ) No. 15  
7 HOMER BRAINARD, SHERIFF OF )  
8 DODGE COUNTY, NEBRASKA, )  
9 Appellee )  
-----

10 Washington, D. C.  
11 Tuesday, October 14, 1969

12 The above-entitled matter came on for further  
13 argument at 10:10 a.m.

14 BEFORE:

15 WARREN E. BURGER, Chief Justice  
16 HUGO L. BLACK, Associate Justice  
17 WILLIAM O. DOUGLAS, Associate Justice  
18 JOHN M. HARLAN, Associate Justice  
19 WILLIAM J. BRENNAN, JR., Associate Justice  
20 POTTER STEWART, Associate Justice  
21 BYRON R. WHITE, Associate Justice  
22 THURGOOD MARSHALL, Associate Justice

19 APPEARANCES:

20 WILLIAM G. LINE, Esq.  
21 Fremont, Nebraska (Appointed by this Court)  
22 RICHARD L. KUHLMAN, Esq.  
23 Dodge County Attorney  
24 Fremont, Nebraska  
25 ALFRED L. SCANLAN, Esq.  
Washington, D. C.  
(for National Council of Juvenile Court  
Judges, as amicus curiae)

P R O C E E D I N G S

1  
2 MR. CHIEF JUSTICE BURGER: You may proceed whenever  
3 you are ready.

4 ORAL ARGUMENT OF RICHARD L. KUHLMAN, ESQ.

5 ON BEHALF OF APPELLEE

6 MR. KUHLMAN: If the Court please, the Appellant  
7 yesterday mentioned that he would accept the measure of in-  
8 voluntary custody as a matter of determination as to whether  
9 or not the jury trial guaranteed in a criminal case applies to  
10 juvenile court proceedings.

11 Of course, we have on the one hand --

12 Q Could you tell me where the Appellant is at the  
13 present time? Is he in a regular prison of the state?

14 A Yes; he is in the men's reformatory, which is  
15 a part of the penal complex. He is no longer in the training  
16 school to which he was ordered.

17 Q I have been looking in the record to see when  
18 the transfer took place.

19 A It doesn't appear in the record, Your Honor.

20 Q Was it as a result of him acquiring a certain  
21 age?

22 A No; this occurs as a matter of transfer by the  
23 Department of Institutions, through a statute.

24 Q Purely administrative?

25 A Purely administrative. And, as I pointed out

1 yesterday, this matter of whether or not this statute which  
2 allows this transfer is unconstitutional should be attacked in  
3 that way, rather than attacking the juvenile court system  
4 through this vehicle. The fact that he is in the penal complex  
5 is by virtue of a separate statute which is not at issue here.

6 Q He is now in a penal institution where a man  
7 or woman, who is an adult, would be if convicted of forgery?

8 A Yes. The basis for the transfer is a matter,  
9 the statute sets out if they become incorrigible they can be  
10 transferred. And it was based on this that he was transferred.

11 Q As you terminated yesterday, I think you were  
12 making the point: nowhere in this case is there any attack on  
13 the validity of this administrative process by which he was  
14 transferred out of a juvenile detention establishment into an  
15 adult penal institution?

16 A That is correct, Your Honor.

17 Q And I think your point was, and you have just  
18 made it again, that, if anything, is the correct attack by  
19 collateral proceedings?

20 A Yes, by habeus corpus there at the penal comp-  
21 lex to test the sufficiency or constitutionality of this  
22 transfer, rather than through the juvenile jury system.

23 Q While we have you there -- although it probably  
24 is not relevant here -- was there any kind of hearing in the  
25 administrative process of making this transfer from one

1 institution to another?

2 A Yes, there is a hearing within the Board of  
3 Pardons.

4 Q A hearing of some kind?

5 A The Department of Public Institutions. It is  
6 a hearing that determines this.

7 Q This is an institutional hearing held in the  
8 penitentiary?

9 A I am not certain just where they hold it. I am  
10 not familiar with this part of it but I will assume they hold  
11 it at the training school at Kearney, where the boy is.

12 Q Did they have an outsiders there?

13 A I don't know.

14 Q If all the hearing amounts to is the warden  
15 calls him in and talks to him, you wouldn't call that a hear-  
16 ing, would you?

17 A No, I wouldn't call that a hearing.

18 Q You said, "hearing." Can you tell me how much  
19 of a hearing it is -- or do you know?

20 A I am not familiar with this part of it, Your  
21 Honor.

22 Q He was originally committed to the industrial  
23 school until he reached the age of 21; is that correct?

24 A Yes. Basically, yes. The commitment is for  
25 an indeterminate period of time. There was never a time stated

1 in the Order. They are committed to the institution and when-  
2 ever the institution feels that they are ready for release, then  
3 they release them.

4 Q Is there a statutory maximum?

5 A Yes. The longest period of time they can be  
6 kept is until they are 21.

7 Q And this subsequent transfer to the adult  
8 penal institution, did that, or could that increase the length  
9 of the term of his custody?

10 A The amount of time is limited to two years by  
11 the statute. They can only commit them for a term of two years  
12 to the penal complex, under this administrative --

13 Q If they committed him two day's before this  
14 man's 21st birthday, could it be for an additional two years?

15 A I am not certain, Your Honor. I would believe  
16 that they could, but I wouldn't be certain.

17 Q In any event, it is your submission that now is  
18 not before us in this case?

19 A This is my contention, that this is another  
20 matter which should be taken up. But on the other side of this  
21 is the matter of the benefits which a child receives from a  
22 judicially-oriented juvenile court system. This against the  
23 involuntary custody idea in the training school, not in a penal  
24 complex.

25 There was some mention yesterday of the delinquency

1 being a violation of the statute. This is the definition that  
2 the Nebraska statutes have of being a delinquent. Anyone who  
3 violates any of the state statutes or municipal ordinances.  
4 But it is more than just a violation that is involved that can  
5 involve custody. A child who needed special supervision can  
6 be disposed of in exactly the same way as a child who has been  
7 charged with being a delinquent child, which involves the  
8 commitment to the training school or to a foster home or pro-  
9 bation, or any of the other avenues open so far as a delinquent  
10 child is concerned.

11 I might note in passing that even after a criminal  
12 trial a district judge has the option, if he wishes, to send a  
13 boy to the training school instead of sending him to the penal  
14 complex. The fact that he has been convicted in District  
15 Court by the jury doesn't necessarily mean he is going to the  
16 penal complex. He could be sent to the training school, if the  
17 Court felt this was a proper disposition of the case.

18 Q Could he be sent in the first instance by the  
19 juvenile court to the penal institution, or must he first be  
20 sent to the juvenile institution?

21 A No, he cannot be sent directly from the juvenile  
22 court to a penal institution. The only place they can commit  
23 him is to a training school or to some foster home or some  
24 other disposition. They cannot sentence to the penal complex.

25 Q Then the Nebraska statute, in effect, vests a



1 broader power in the administrative managers of the juvenile  
2 institutions than they do in the juvenile judge himself; is  
3 that correct?

4 A This would be correct.

5 Q Are any standards at all prescribed by statute  
6 for the transfer -- guidelines?

7 A Incurrigibility is the one that I can recall  
8 right off as a basis for the transfer. But actually, with even  
9 neglected or dependent children, if you are talking about in-  
10 voluntary custody, a neglected or a dependent child can be taken  
11 from his home and placed in some other home, be it a state  
12 home for children or what it may be. So, even with a dependent  
13 or a neglected child there can still be a matter of involun-  
14 tary custody, so to speak, involved. If this, indeed, is the  
15 measure of whether or not it is a criminal matter guaranteeing  
16 a jury trial under the Sixth Amendment, which guarantees a jury  
17 trial in criminal matters.

18 Q So-called custody, however, would be in a  
19 foster home, would it not?

20 A Yes, in a foster home or it could be in a  
21 state institution, state home for children, or this type of  
22 thing.

23 Q The fourth category provided by the statute of  
24 your state seems to be a child in need of special supervision.  
25 You have a neglected child, a dependent child and a delinquent

1 child, and fourthly, a child in need of special supervision.

2 A How is such a child handled under your  
3 procedure?

4 A The child who is in need of special super-  
5 vision can be handled the same as a delinquent child. Dispo-  
6 sition can be the same. However, there is one restriction.  
7 In order for a child in need of special supervision to be com-  
8 mitted to an institution in the first instance there must be  
9 a showing that it is for -- that it is necessary for the pro-  
10 tection of the welfare of the child or of society in general.  
11 This must be specifically shown, alleged in the petition, which  
12 is served and shown at the hearing, before they can be com-  
13 mitted in the first instance, otherwise there must be proba-  
14 tion and/or some other type of disposition. And if, after a  
15 period of time it is shown that there has not been the re-  
16 habilitation that there should be, they can then be brought  
17 back into court and sent to the training school.

18 Q To the very same place?

19 A Yes. So far as the benefits of not having a  
20 jury trial in juvenile court are concerned, the two main  
21 things are the promptness of the disposition and avoiding the  
22 trauma of a public hearing.

23 So far as the prompt hearing is concerned, a jury  
24 trial in and of itself is a delay. Just simply setting up a  
25 jury trial where, in addition to the people involved in the

1 thing, you must get either six or twelve other people at a  
2 certain place at a certain time.

3 The District of Columbia does have provision for a  
4 jury trial in their proceedings. I might point out that  
5 according to Judge Miller's testimony before the Senate, they  
6 were approximately 10 percent of the juveniles that asked for  
7 a jury trial, and this ten percent asking for a jury trial has  
8 caused approximately a six-year backlog in these trials.

9 Q That was because they only handled 40 a year,  
10 wasn't it?

11 A Yes, sir.

12 Q Less than one a week?

13 A Yes, sir.

14 Q I didn't see any explanation for the reason  
15 they can only hold one a week.

16 A I would assume it is because of the other  
17 business of the court that they can only schedule one per week.

18 Q You are speaking now of one jury trial?

19 A Yes, sir; one jury trial per week.

20 Q While they are doing one jury trial a week  
21 they are doing a multitude of other nonjury trials?

22 Q Could that be remedied by more courtrooms,  
23 more judges?

24 A This is what the judge was asking for.

25 Q That can be remedied by money?

1           A       Yes, by increasing it. There were approxi-  
2 mately 2500 cases that were handled during this year.

3           Q       If it was a thousand it could be handled by  
4 money?

5           A       Yes, this is true.

6           Q       The other point, what about the fact -- is it  
7 not true that all of these benefits that accrue from the stan-  
8 dard juvenile court proceedings -- isn't it possible that the  
9 juvenile or his lawyer or his parents could waive the jury  
10 trial and accept all those nice benefits?

11          A       This presents a problem. It was pointed out  
12 here yesterday that in Colorado where they allow jury trials  
13 that there were only two over a period of time. However, I  
14 believe this was prior to Gault, and the attorney was injected  
15 into the juvenile court proceedings. Since that time there  
16 have been more and more juveniles with an attorney.

17          Q       But they could waive it?

18          A       Yes. Well, this presents a problem, Your  
19 Honor.

20          Q       As I understand it all of this is for the  
21 benefit of the juvenile.

22          A       Yes, sir.

23          Q       And if the juvenile wants all of that benefit,  
24 he can get it by not asking for a jury trial; am I correct?

25          A       He can get it by waiving the jury trial, by --

1 Q What's wrong with allowing him to have a jury  
2 trial if he wants to waive all those benefits?

3 A This brings up the problem of how does he  
4 waive it? How does a youngster waive it? Attorneys are  
5 becoming more and more hesitant about waiving for a youngster,  
6 because of the fact that he will discuss it with the youngster,  
7 and the youngster will say later, "I didn't understand."

8 Q Well, is it possible that they would also  
9 discuss it with the parents?

10 A I would say --

11 Q Isn't that the usual thing? The juvenile, the  
12 parents and the lawyer, right?

13 A Yes, Your Honor.

14 Q And if they decide they want a jury and they  
15 want to give up these benefits, what's wrong with that?

16 A I don't know that they would be giving up the  
17 benefits of the court by asking for a jury trial. I don't  
18 think that this would necessarily be so.

19 Q Because after the trial the judge could still  
20 give him all of these benefits.

21 A Oh, yes.

22 Q I'm not talking about the constitutionality of  
23 the claim for the jury trial, I'm just talking practically.  
24 There is very little problem there, is there?

25 A The problem is that the attorney becomes

1 hesitant about waiving because can a parent waive for a child?  
2 Or does the child have to understand; it's the child that has  
3 to --

4 Q Well, in the regular proceeding, isn't it  
5 normal for the judge to ask the parents about what they think?  
6 Not that he's bound by it --

7 A In our proceedings, at least they are. The  
8 matter is discussed with the parents and with the child.

9 Q So, they find the juvenile delinquent and the  
10 judge talks it over with the parents and says, "I really don't  
11 think anything will be aided by putting this boy away," and I  
12 would do what I would normally do. Nothing is lost but money.

13 A I'm not sure I follow you, Your Honor.

14 Q I said I don't think anything is lost but the  
15 cost of the state of summoning the jury. What else is lost?

16 A If -- on a number of these there can be a long  
17 delay during the period when they are readjusting for this,  
18 these things can't happen immediately. During this period of  
19 time something has to be done with these youngsters. At this  
20 time they are in their formative years; they are in the period  
21 of time when they are forming themselves for later life and by  
22 not correcting the thing immediately or as close to the time  
23 of the incident, you are really doing damage to the child,  
24 rather than helping him. You are hindering the child; you are  
25 burdening the child with something he should't be. You are

1       burdening him with a delay that is really bad for him.

2               Q       But which he, his family and his lawyer agrees  
3       that they want.

4               A       Yes. And my question is: Is this right? Is  
5       it fair trust this thing, either. I'm not sure -- I don't  
6       have any figures statewide in the particular county in which  
7       I am, a population of approximately 35,000. I would say it  
8       would run 30 to 35 juvenile cases a year in the juvenile court.

9               Q       And the juvenile court in your county is  
10       just the same judge with a different hat on; is that correct?

11              A       Yes. There we use the county judge who serves  
12       as probate judge and has a -- doesn't have general jurisdiction  
13       but he has charge of probate matters and we use him as the  
14       juvenile judge.

15              Q       I suppose a city like Omaha they have a special  
16       juvenile court?

17              A       In Omaha and in Lincoln they do have a special  
18       juvenile court, and I am not familiar with the figures there.

19              Q       While I have interrupted you, I suppose that  
20       often there is -- at least not infrequently, there may be an  
21       adversity of interest between the juvenile parents and the  
22       juvenile. Too often the parents might even be the complaining  
23       witnesses.

24              A       This is very true. There can be a number of  
25       things.

1           The child's real problem of where he is may be his  
2 parents. This may well be. Maybe his parents haven't pro-  
3 vided him with the background he needs. This is the reason  
4 that he is in difficulty; this is the reason that he is going  
5 out and stealing and this type of thing and the parents may be  
6 the real problem in the thing and having the parents waive or  
7 speak for him, this isn't doing justice for the child.

8           So far as the insistence of the Appellant that he  
9 could have won the case in a criminal court with a jury, there  
10 is other evidence that I have which is still in the file which  
11 I did not use in this court and the juvenile court. I'm just  
12 as convinced that I could have convicted him in a criminal case.  
13 My decision was that the possibility for using the juvenile  
14 court could possibly save this young man and this is the reason  
15 that he was taken into juvenile court, rather than taken into  
16 the criminal court.

17           Q       And you have discretion on this, as I under-  
18 stand it --

19           A       Yes, sir.

20           Q       -- 48 hours or something, and you have dis-  
21 cretion with respect to the juvenile, what, between 16 and 18,  
22 or what is it?

23           A       No. I have discretion at any age.

24           Q       What is a ten-year-old boy?

25           A       I would have discretion there, too.



1 Q You would?

2 A Yes.

3 Q But the discretion must stop at some age. What  
4 if it's a fifty year old man, you don't have discretion to bring  
5 him before the juvenile court?

6 A No, no. The top age is 18. When they reach  
7 their 18th birthday they are no longer subject to the juvenile  
8 court. They then must go directly into criminal court.

9 Q But 18 or below you have discretion to initiate  
10 juvenile proceedings or to initiate criminal proceedings in  
11 an ordinary criminal court no matter how tender the age?

12 A Yes.

13 Q So far as the statute goes?

14 A So far as the statute is concerned. By way of  
15 background, we do have the presumption that a seven-year-old  
16 cannot form intent and that someone between seven and fourteen  
17 can -- that is the presumption, but whether or not they can --

18 Q That is a presumption whether by 10, 12, 14, 16, 18, 20, 22, 24, 26, 28, 30, 32, 34, 36, 38, 40, 42, 44, 46, 48, 50, 52, 54, 56, 58, 60, 62, 64, 66, 68, 70, 72, 74, 76, 78, 80, 82, 84, 86, 88, 90, 92, 94, 96, 98, 100?

19 A It was touched upon, Your Honor. I don't  
20 believe the Court's opinion mentioned it, but it was simply  
21 touched upon in the argument.

22 Q

23

24 A The closest thing to it is the Fugate vs Ronin  
25 case where they say that the prosecutor has absolute discretion

1 in it, which is --

2 Q Standard list discussion.

3 A Yes, which is the basic concept of the United  
4 States, that the prosecutor has discretion as to what he will  
5 file, whether it be a misdemeanor, felony, or what it may be.

6 So far as other jurisdictions which -- or other  
7 people may feel that a jury trial should not be had, there are,  
8 of course, 34 states which do not provide a jury trial. And  
9 of course, the District of Columbia, as I mentioned before, does  
10 have a jury trial provision and at the present time there is a  
11 bill in the House and in the Senate which is supported by the  
12 United States Attorney General's Office, which among other  
13 things, eliminates the provision for a jury trial for juveniles.  
14 The President's Crime Commission Report -- in their report they  
15 state that they do not feel that a jury trial serves any pur-  
16 pose in a juvenile proceeding.

17 The Uniform Juvenile Court Act does not provide for  
18 a jury trial and the Model Rules for Juvenile Court, which was  
19 prepared by the National Council of Juvenile Judges, does not  
20 provide for a jury trial in a juvenile court.

21 Really, one other problem that you have in connection  
22 with a jury trial for -- in a juvenile court, is the matter of  
23 finding a jury of peers. Really, the juvenile judge who, by  
24 dealing with these children all the time, is less apt to be  
25 shocked by the long hair; by the mannerisms; the things that

1 the children do, than the average person from off the street.

2 Your juvenile judge is actually closer to dealing  
3 to being a peer of the juvenile, than are the juries as they  
4 are selected now.

5 Q In your state a person has to be 21 years of  
6 age or older to be a juror, doesn't he?

7 A Yes. They just had recent legislation on it.  
8 It used to be 25, and they reduced it to either 20 or 21.

9 Q In any event, you could not have teenage  
10 jurors?

11 A No. No provision for teenage jurors.

12 So far as the Duncan Rule, the reason for this rule  
13 was the compliant or the biased or the eccentric judge, for  
14 protection against this type of thing. Where, in the juvenile  
15 court, any judicially-oriented juvenile court has another  
16 provision which protects against the same thing. The trial  
17 -- either in the District Court or in the Supreme Court.

18 Q Thank you, Mr. Kuhlman.

19 MR. CHIEF JUSTICE BURGER: Mr. Scanlon.

20 ORAL ARGUMENT OF ALFRED L. SCANLAN, ESQ.,

21 ON BEHALF OF THE APPELLEE

22 MR. SCANLAN: Mr. Chief Justice, may it please the  
23 Court, the National Council of Juvenile Court Judges appears  
24 today as amicus to support the contention of the Appellee, that  
25 the Sixth Amendment, as incorporated through the 14th, does not

1 require jury trial in juvenile adjudications of delinquency;  
2 and secondly, to support its claim that the exercise of the  
3 prosecutor's discretion to try a child as a juvenile, rather  
4 than to accuse him as a criminal, violated no requirement of  
5 due process.

6 Q Did you make any decision on the standard of  
7 proof?

8 A No, sir; we do not, for several reasons.  
9 Frankly, in this area, at least, it seems to me the standard of  
10 proof formula becomes more semantic than ever. Most juvenile  
11 court judges, I would say, as Dean Paulsen points out, are not  
12 going to find the child guilty of the act of which he is  
13 accused unless he is really convinced the boy did the act. And  
14 I think it's a matter of great moment that if this Court de-  
15 cides that the Sixth Amendment, through the Fourteenth, requires  
16 a jury trial, it would seem to me quite obvious that you would  
17 file with the reasonable doubt standards.

18 But if the Court -- I can see the Court being  
19 troubled by the actual adjudication of delinquency in this case.  
20 A subsequent Nebraska case to which we refer in our brief,  
21 Guy versus Doeschot, Page 8: In our view, at least, and in view  
22 of the dissenting judge there, seemed to depart somewhat from  
23 the stricter preponderance of proof. Now, it's possible if the  
24 Nebraska Court got another look at that particular issue in this  
25 case it might reach a different result.

1 elected to come the habeus corpus route. He eschewed bringing  
2 a direct appeal where he would have had a trial re novo in the  
3 Distrit Court and then again I was amazed to find that  
4 Nebraska's Supreme Court has rather broad powers in civil  
5 cases on the equity side in reviewing the sufficiency of the  
6 evidence. But the sufficiency of the evidence question, as I  
7 read this record, was never squarely presented to the Nebraska  
8 Supreme Court. I would think that since four judges went for  
9 him on the constitutional grounds, he probably would have won  
10 the case if he went that way. But, I don't know what the  
11 Nebraska Supreme Court would do if it went back, in that  
12 posture. Maybe Nebraska, like most states, you can't use  
13 habeus corpus as substitute for appeal. I dont know what they  
14 do. I suppose it would depend if it was a mandate from this  
15 Court on the particular issue. But, for those reasons, we have  
16 not taken up the standard of proof point.

17 Q What was the Appellant route?

18 A The Appellant route was one of carefully pro-  
19 tection, Mr. Justice. There would have been an appeal from  
20 the adjudication of the juvenile court judge here to the  
21 District Court and there there would be a trial de novo.

22 Q With a jury?

23 A Not with a jury.

24 Q They couldn't get a jury in the District Court,  
25 either?

1           A       That's right; we couldn't get a jury. I  
2 didn't mean to imply that.

3           Q       Even the juvenile court proceeding in the  
4 District Court?

5           A       I gather it is; I gather it is. It's a statute  
6 that goes a long way in protecting the juvenile.

7           Q       The same judge?

8           A       No, because in this county, particularly, you  
9 only have a county judge. It would not be the same judge.

10          Q       And you have it out on the District Court?

11          A       Correct.

12          Q       And it did not happen in this case, you say?

13          A       Oh, no. This is a habeus corpus.

14          Q       State habeus?

15          A       That is correct. Right in the District Court.

16          Q       There was no --

17          A       Just the constitutional issues presented to him.  
18 Not the sufficiency of the evidence question.

19                 We turn then to -- I guess we injected into the case  
20 the retroactivity issue. If I understand Mr. Line's position,  
21 he stated very candidly yesterday, it's sort of a simplistic  
22 syllogism. Duncan vs Louisiana; and Bloom vs the United States  
23 require a jury trial in a serious criminal matter. Deprivation  
24 of a child of his liberty is a serious criminal matter, q.e.d.  
25 a jury trial is required in adjudications of delinquency of this

1 type.

2 Q What did he define as a serious criminal?

3 A Well, I think he didn't say, and we would  
4 admit, Mr. Justice, that a proceeding that deprives a child of  
5 his liberty up to his 21st birthday, is a serious matter. Now,  
6 I don't think it important in this case that we bog down in  
7 labels. Those that support juvenile court jurisdiction have  
8 been accused of using labels to justify their conclusion that  
9 jury trials are not required in such proceedings, but I think  
10 the other side is guilty of the same thing. Juvenile court  
11 jurisprudence is something different, whether it finds its  
12 origins in the English Equity Courts or whether it has a  
13 relationship to American criminal justice, I don't think it is  
14 too important. It's a creation of idealistic reformers. The  
15 reforms might have bogged down here and there, but it is some-  
16 thing different. It is like American Administrative Law is  
17 something different. It's a civil proceeding, but it's  
18 different. Similarly,

19 Similarly, I think juvenile court jurisprudence,  
20 juvenile court justice is something different, either from the  
21 *parens patriae* business or from Criminal Justice. And I think  
22 the decision has to be made plus the insertion of the jury  
23 system, with all its delays, its horrendous delays. Is the  
24 insertion of that system into the juvenile court system, is that  
25 going to contribute materially to the integrity or the efficacy

1 of the fact-finding process? Is it going to confer any sub-  
2 stantial benefit on the child or rather, might it not do some  
3 harm?

4 Now, Mr. Justice talks about it only takes money.  
5 It takes money and time. The District of Columbia is -- how  
6 many judges can you pour into this situation; and for what  
7 benefit? The adverse publicity of its trial. The Sixth  
8 Amendment says, "public trial." We're not going to have quiet  
9 little jury trials. Public trials. I don't see how that can be  
10 advantageous to children in most instances.

11 Q Couldn't he waive a public trial?

12 A Yes, Mr. Justice, a juvenile could waive a  
13 public trial. He could waive a jury trial.

14 Q Would that be over the objection of the prose-  
15 cutor?

16 A Oh, I was contemplating the situation Mr.  
17 Justice envisioned. In other words, we had a jury trial pro-  
18 vided by statute -- I didn't gather he said by requirement of  
19 the Constitution.

20 Q By statute.

21 A And his question was: could it be waived? I  
22 would have to say yes, certainly. He could waive the jury trial  
23 he could waive the public aspects of the system and its effects  
24 of the jury trial. But certainly I -- for the few children for  
25 whom that might be of some benefit, why do we have to undermine



1 the --

2 Giving a jury trial would cure none of the evils  
3 of which this Court's decision involved with directly.

4 Q How about retroactivity which you said was  
5 injected into --

6 A Yes; I never did answer that. I'm sorry. I  
7 would say that in DeStefano vs the United States, this Court  
8 decided that it would not apply Duncan vs Louisiana retro-  
9 actively. In DeStefano there was an attempt to expand the  
10 right of jury trial. The precise question in that case was  
11 whether having less than a unanimous jury in a noncapital case  
12 violated the Sixth Amendment. This was a moot questic ; this  
13 was going beyond Duncan. This Court did not go beyond Duncan  
14 and DeStephano, rather it said no.

15 Q The Sixth Amendment didn't apply to the states  
16 until May 20, 1968.

17 A That is correct. Now, it seems to me anomalous  
18 to say to her that it doesn't apply to adult criminals till  
19 May the 20th, 1968. It would apply to the juvenile criminals  
20 earlier than that date. The fact that the Nebraska Supreme  
21 Court didn't consider it, Your Honor, I think is easily ex-  
22 plained by the fact it was never presented to it. Actually, I  
23 think the case was argued in the Supreme Court of Nebraska  
24 after -- before DeStephano was even decided. I think the  
25 calendar is right on that.

1           So, I just think if his whole case was: "I stand on  
2 Duncan vs Louisiana; they gave us the right; I'm entitled to  
3 that right," it seems to me that if you take Duncan vs  
4 Louisiana as a basis of your crime, that you have a jury trial  
5 right, you have to take the restrictions of Duncan vs  
6 Louisiana as enunciated by this Court in DeStephano versus the  
7 United States.

8           Q       He doesn't, either in his jurisdictional  
9 statement or his brief, argue, argue the Equal Protection  
10 Clause, but he does arrive at a certain result through the  
11 discretion that adults have jury trials and he wants to have a  
12 jury trial, why, if the prosecutor is going to turn him down,  
13 he should have some reason for it.

14           A       Well, with respect to Equal Protection, the  
15 amicus -- the question wasn't raised in that context, but that's  
16 -- put that aside. It seems to me the answer to the Equal  
17 Protection objection is that the decisions in this court show  
18 that children can be treated differently from adults with  
19 respect to the application of constitutional rights if it is  
20 for their benefit.

21           The case here this morning is not as Mr. Line said,  
22 "Is the Constitution for adults only?" We only need to go back  
23 to the Ginsberg case and the Prince (?) case, where this Court  
24 certainly did not give a child the protection which free speech  
25 was given adults or the protection which the free exercise of

1 religion clause would give an adult. So, clearly, the  
2 question is: is this a reasonable classification. Children  
3 are treated differently because the condition of their  
4 maturity distinguishes them from the adults. As a result of  
5 that condition and other factors working on it, they get in  
6 situations where, for their own benefit, the society must do  
7 something. The system that has grown up with all its imper-  
8 fections to deal with children on a different basis than adults,  
9 is the criminal court system. Is that an unreasonable classi-  
10 fication?

11 It seems to me when you have the Congress pushing to  
12 appeal the jury trial right in the District of Columbia -- I  
13 don't know what reception I could get -- but while the Congress  
14 is taking up this matter, in the name of Heaven, can those  
15 legislatures that elected never to get in that pickle in the  
16 first place, have violated due process of law? I don't think  
17 they have.

18 Thank you, Your Honor.

19 CHIEF JUSTICE BURGER: Mr. Line.

20 MR. LINE: Mr. Chief Justice, may it please the  
21 Court, a few comments would be in order on the point about not  
22 making a direct appeal from the juvenile court. And it has  
23 been pointed out that I did not attack the sufficiency of the  
24 evidence.

25 Of course, the reason for that is obvious. The

1 evidence is more than sufficient to sustain a conviction of  
2 what he did. An appeal on the sufficiency of the evidence  
3 would have been close to frivolous.

4 The jury question was another matter. When this  
5 boy's mother told him to sign his father's name to the check  
6 and that would have been established in front of a jury of  
7 citizens in a community, I believe that they would have ex-  
8 ercised the pardoning power that juries don't want to exer-  
9 cise.

10 Q Mr. Line, while we're on that point, suppose  
11 there were a jury trial permitted under the Nebraska statutes,  
12 and you were confronted with the situation of having the  
13 mother being trusted with waiving or not waiving the jury  
14 trial. Would you think that situation would be a desirable  
15 one?

16 A Mr. Justice, it's obvious that there will be  
17 situations where the child is adversary to the parent and it  
18 existed in this case. The child's adversary to the father.

19 Q I think it was suggested by either Mr. Kuhlman  
20 or Mr. Scanlan that this might be a very, very large propor-  
21 tion of all the juvenile cases coming before the courts, who  
22 are not responsible people, hence do not have the relationship  
23 of trust and confidence of the child for whom they would be  
24 called upon to waive the jury.

25 A I think certainly -- I don't know what

1 the percentage would be, but if it's as high as 25 or 30 per-  
2 cent of the cases it's a substantial percentage and would  
3 present a problem. In that case, it would seem to me that the  
4 responsibility would have to fall on the juvenile's lawyer,  
5 who, after all, is the lawyer for the juvenile, not for the  
6 parents.

7 I mean, if the lawyer sees a conflict of interest  
8 between the juvenile and the parent he has to go with the  
9 juvenile. Now, if he's retained and being paid by the parents  
10 to defend the child, there can be problems. On the other  
11 hand, in that case if they are paying the lawyer to defend the  
12 child they probably would want the child to be defended and  
13 therefore there wouldn't be the conflict. The conflict could  
14 arise in a case of appointed counsel. I could see where the  
15 parents would come in and say, "We don't want this child; he  
16 has given us a hard time." There I think it's the responsi-  
17 bility of an American lawyer and he's had a lot of responsibility  
18 for a long, long time and I think he can successfully fill that  
19 one.

20 Q As a lawyer, or as Advocate, or would he have  
21 to become a guardian ad litem?

22 A Well, he might have to take on some guardian  
23 ad litem functions, but again, I think that the average lawyer  
24 views his responsibility differently in dealing with a juvenile.  
25 I think there is a built-in less adversarial feature about it.

1 I think that the average lawyer wants to do something for the  
2 child and doesn't view it in a hard-core, adversary fashion  
3 like you have to with some adults.

4 As a matter of fact, I don't even know, at least in  
5 our area, if the adult criminal process is so intensely  
6 adversary. As I said, we dispose of them by pleas and if  
7 guilty and so forth.

8 On this business of court convenience and court ad-  
9 ministration, if the laws of Nebraska stopped pleading people  
10 guilty, the system would cease to function, without many  
11 more judges, many more courthouses and many more juries. The  
12 criminal justice system in this country today, of course,  
13 functions on negotiations. I can't see any real marked dif-  
14 ference between the adult criminal system and the juvenile  
15 system, because the end result can be very much the same.

16 To clear up any misunderstanding on a transfer  
17 statute, I mention the transfer statute as to me an example --  
18 the ultimate example of the end result of the process. I  
19 would feel that DeBacker was just as much deprived of his free-  
20 dom and would be just as much in a penal institution, if he  
21 were in the training school at Kearney. I think that this  
22 Court said that in Gault, that no matter how euphemistic the  
23 title, the training school is a penal institution.

24 So, I don't think it makes any substantial difference.  
25 It's just that on the basis of a hearing with no statutory

1 standard, at the pleasure of the Board of Pardons, the end  
2 result of the juvenile court process can be after an adjudica-  
3 tion of delinquency, can be confinement in a penal institution,  
4 whether it be called the boy's training school or men's  
5 reformatory. I think it's basically a distinction without a  
6 difference.

7 As I say, here is a boy in an adult penal institu-  
8 tion with people who got there with constitutional rights,

9 Q Would you make a comment on Mr. Justice's  
10 questioning, I think, of Mr. Scanlan a while ago, whether there  
11 is a problem of a 16 or 17-year-old getting a jury of his  
12 peers if the jury is 25 or over?

13 A I don't -- adults will do fine. I mean, from  
14 my standpoint, if I want -- I had anticipated if I got a jury  
15 in this case, of adults. I don't believe that a juvenile is  
16 entitled to a teenage jury. Again, I think that's a decision  
17 that the lawyer makes. One of the first things that you do  
18 when you are defending an adult, if you think, in view of the  
19 facts after investigating the case, will a jury give him a run  
20 for his money? You may not feel quite that way about a juvenile  
21 because you might feel his need for treatment and as his  
22 guardian ad litem you might be a little more inclined to in-  
23 volve yourself in the process. I mean, if an adult criminal  
24 defendant says, "I want a jury," why, he has one. You don't  
25 attempt to talk him out of it, because every time you plead a

1 man guilty you are running a risk of an accusation of in-  
2 competence when he gets incarcerated and things don't go well.  
3 But that's the routine part of the perils of the profession  
4 and it's compensated by its advantages.

5 So, a jury of peers, I submit, would be satisfied  
6 by a jury of adults.

7 Q I am looking at the record here and don't see  
8 that you raised in the juvenile court this question of burden  
9 of proof, or degree of proof.

10 A No, I did not raise that in the juvenile  
11 court, Mr. Justice.

12 Q And does it appear that the county with the  
13 juvenile judge applied any standards of proof other than proof  
14 beyond a reasonable doubt? You were just relying on the  
15 statute, I suppose.

16 A Oh, the statute; right. He didn't articulate  
17 it -- a standard.

18 Q And you did not object on that ground?

19 A On that ground I objected to the statute, and  
20 as a matter of fact, the deprivation of a jury and the standard  
21 of proof are together.

22 Q As far as the evidence in this case, as far as  
23 the judge passing on it is concerned, it didn't worry you too  
24 much?

25 A No, I --



1 Q No matter what the standard was?

2 A No matter what the standard was that would fit  
3 the reasonable doubt standard. Our evidence just isn't in-  
4 sufficient.

5 Q Well, your statement was, at the beginning of  
6 your argument today, I think, was that led me to look at this  
7 record and to wonder if you had objected to that.

8 A That was, of course, discussed and decided by  
9 the Supreme Court.

10 Q It was decided by the Supreme Court, but I  
11 wonder if it really is in this case?

12 A Well, in the second case that they talk about,  
13 the Doeschot case, in the amicus curae brief, with obvious  
14 shades of division still burning deeply, they said, "We won't  
15 think of it again under this record, we will just apply it."  
16 Under this record the evidence was sufficient. And then they

17 Q The evidence was sufficient even under a  
18 reasonable doubt standard?

19 A Even under a reasonable doubt standard and I  
20 believe the dissenting justices in that case dissented only  
21 basically, without even talking about it again.

22 And in the second case, Geiger(?) case, it was a  
23 rerun of the DeBacker case and the alliance formed up again with  
24 the three to four division.

25 Q Do you think the juvenile could have waived the

1 right to be represented by a lawyer?

2 A Could he have waived the right to be represen-  
3 ted by a lawyer?

4 Q Yes; and if so, would it be him, or his father  
5 or his mother and at what age could he do it?

6 A I think there you are getting into extremely  
7 touchy grounds. I suppose that an extremely intelligent  
8 juvenile could waive a lawyer.

9 Q Would he have to go to trial to find out  
10 whether he was sufficiently intelligent?

11 A That opens up a Pandora's box.

12 Q Most of it does.

13 A I think, Mr. Justice, that from the practical  
14 standard, even the prosecutors today are not trying to get  
15 juveniles to waive the rights of a lawyer.

16 Q I understand that, but it could come up,  
17 couldn't it?

18 A It could come up. I am not prepared to tell  
19 this court that a 16-year-old can't, under any circumstances,  
20 make an intelligent waiver of counsel. It could cause some  
21 thorny problems, a waiver.

22 Q Suppose he is being tried for murder?

23 A I doubt he would be permitted. By our Court  
24 of General Jurisdiction, I -- knowing him personally, he just  
25 wouldn't permit it, I don't believe.

1           That would be his own ad hoc determination in that  
2 case, but I don't believe he would permit a juvenile to waive  
3 counsel in such a serious matter.

4           Q       Mr. Line, I think this problem of a jury of  
5 peers still presents a problem, even though you, as counsel in  
6 a particular juvenile case, do not regard it as a problem.  
7 What do you think the Constitution means by a jury of peers?  
8 This is a term which has come back into currency and we are  
9 in recent years, very peer conscious in our society at the  
10 moment. What do you think it means in this context?

11          A       As representative of the adult as the typical  
12 Nebraskan really is.

13          Q       Granted, but the Constitution doesn't say  
14 Nebraskans; it says a jury of peers, if I can remember the  
15 language.

16          A       It still, however, seems to me that a peer --  
17 I am sorry to confess I have never attempted to define a peer  
18 before.

19          Q       You know what is meant in the society from which  
20 it was drawn. It meant that women were entitled to be tried by  
21 other women; gentlemen by other gentlemen; and peasants by  
22 other peasants. I'm not sure that's the precise classifica-  
23 tion.

24                 Don't you think a lot of teenagers would, at the  
25 present moment, being very peer conscious, might -- one of them

1 might demand of you, as his counsel, that he wanted a jury of  
2 his peers, that is to say, a jury composed of people less than  
3 18 years of age.

4 A Well, Jr. Justice, I kind of forget, would  
5 be my initial reaction to that.

6 Q Of course, you can see a post conviction  
7 attack on your effectiveness as counsel right there.

8 A Again, I guess I would brace myself for the  
9 consequences.

10 A couple of other points that I think Mr. Justice  
11 questioned whether a boy could be committed for two years  
12 right before his 21st birthday and I think the answer to that  
13 would be "no." I believe our statute would be construed that  
14 there is a total loss of jurisdiction over a juvenile when he  
15 becomes 21. One thing that should be made clear: under the  
16 Nebraska Juvenile Court Act there is no statutory requirement  
17 that the proceedings be closed now to the public. And there  
18 is no protection against publicity of the juvenile court pro-  
19 ceedings, other than the newspapers, it is the psychiatric  
20 reports, medical reports, probation officer reports are closed.  
21 But if it could happen that a juvenile proceedings could get as  
22 much publicity, for all practical purposes, as an adult  
23 criminal proceedings.

24 Q I was hoping we could get into the question of  
25 retroactivity. If we were to say that we ought not reach the

1 because in any event the DeStephano would deny this Appellant  
2 a jury trial. But, we would agree with you that there had to  
3 be a reversal on one of the other grounds, burden of proof as  
4 the case may be, what do you conceive would be the situation  
5 on retrial in the matter of the jury trial?

6 A Are you asking me, Mr. Justice, whether the  
7 Nebraska Court might change its mind, or --

8 Q No, we say that we can't reach your issue of  
9 jury trial here, since in any event, it couldn't apply, and we  
10 don't decide the issue of jury trial in juvenile court pro-  
11 ceedings, because Bloom and Company and Duncan, were not  
12 retroactive.

13 A Well, possibly a reversal, for example.

14 Q But we do reverse the -- that's the premise I  
15 wanted --

16 A See, there has to be a retrial. Depending on  
17 how you set it, perhaps the 5th Judge of the Nebraska Supreme  
18 Court might change his mind.

19 Q I see.

20 A But, Mr. Justice, I don't think yesterday that  
21 retroactivity was going into it. I don't think retroactivity  
22 is --

23 Q I know what your argument is. I'm just going  
24 on the premise that we don't agree with you.

25 A Well, as I say, it would depend on how you said

1 it and what hints the Nebraska Supreme Court might get from  
2 the opinion, but since you are familiar with the argument, it  
3 just seems to me that I am not going to say until this case,  
4 whether a juvenile court case is, in fact, a criminal prosecu-  
5 tion. That is --

6 Q I know you know, Mr. Line, that in Miranda  
7 warning area we had said that on retrial the Miranda Rule did  
8 not apply.

9 A Well, that's correct. For me the distinction  
10 is that there you are talking about criminal cases that have  
11 always been criminal cases. The unique feature in this case,  
12 and I --

13 Q So that's your basic argument?

14 A That's my basic argument.

15 MR. CHIEF JUSTICE: Thank you, Mr. Line.

16 Gentlemen, we thank each of you for your submissions.

17 (Whereupon, at 11:05 o'clock a.m. the argument in  
18 the above-entitled matter was concluded)