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CONSTITUTIONAL LAW

Sixth Amendment • Right of Confrontation

Unavailable Witness

State v. Roberts, 55 Ohio St. 2d 191, 378 N.E.2d 492 (1978).

THE SIXTH AMENDMENT to the Constitution states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." This seems simple and absolute, but case law has proven it to be neither; almost every phrase has been dissected and interpreted by courts and commentators. In fact, there may be more law review articles on this subject than there are cases.[1] Some of the questions that could be asked are: What is meant by "all criminal prosecutions?" Does this require confrontation in preliminary hearings? Does "shall enjoy the right" give only a privilege that may be waived? Is "to be confronted" synonymous with cross-examination? Are "[t]he witnesses against" any persons whose testimony is utilized by the prosecution at trial or any persons whose testimony might be so used?

These issues were faced by the Ohio Supreme Court in *State v. Roberts*[2] when, for the first time since 1902, the court considered the validity of the admission in a criminal trial of the preliminary hearing testimony of a prosecution witness who had since become unavailable. With three justices dissenting, the court concluded that such admission violated the defendant's sixth amendment right to confront the witnesses against him.[3]

On January 7, 1975, the defendant, Herschel Roberts, was arrested by the Mentor police and charged with forging a check in the name of Bernard Isaacs and receiving stolen credit cards belonging to Isaacs and his wife.

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[1] In addition to those cited in this note *see* Baker, *The Right to Confrontation, the Hearsay Rules and Due Process—A Proposal for Determining When Hearsay May Be Used in Criminal Trials*, 6 CONN. L. REV. 529 (1974); Davenport, *The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 HARV. L. REV. 1378 (1971-72); Graham, *The Right of Confrontation and Rules of Evidence: Sir Walter Raleigh Rides Again*, 9 ALAS. L.J. 3 (1971); Griswold, *The Due Process Revolution and Confrontation*, 119 U. PA. L. REV. 711 (1970-71); Larkin, *The Right of Confrontation: What Next?* 1 TEX. TECH. L. REV. 67 (1969-70); Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. PUB. L. 381 (1959); Semerjian, *The Right of Confrontation*, 55 A.B.A.J. 152 (1969); Comment, *Federal Confrontation: A Not Very Clear Say on Hearsay*, 13 U.C.L.A. L. REV. 366 (1965-66); Comment, *Criminal Procedure—Sixth Amendment Right of Confrontation Made Obligatory in State Prosecutions*, 44 N.C.L. REV. 173 (1965-66); Annot., *Interplay of the Confrontation Clause and the Hearsay Rule*, 29 ARK. L. REV. 375 (1975-76).

[2] 55 Ohio St. 2d 191, 378 N.E.2d 492 (1978).

[3] *Id.* at 197, 378 N.E.2d at 496.

The preliminary hearing was held before the Mentor Municipal Court on January 10. There, the defense called the daughter, Anita Isaacs. She testified that she was acquainted with Roberts and that she had let Roberts and his girlfriend stay in her apartment over the Christmas holidays in December, 1974, while she was away. However, she denied ever giving him or talking about giving him her parents' credit cards. Roberts' attorney did not ask to have her declared hostile or to examine her as on cross-examination.

The municipal court bound Roberts over to the grand jury which indicted him for receiving stolen property and for forgery. The grand jury also returned a secret indictment against him for receiving stolen property (silverware and appliances belonging to Mr. and Mrs. Isaacs), and for possession of heroin. The Lake County Court of Common Pleas set the trial on both indictments for July 17, 1975.

After six continuances, the trial was finally held on March 4, 1976. The delays were caused by efforts to locate Anita Isaacs who had disappeared. Amy Isaacs testified that her daughter had left home at the end of January, 1975, for Tucson, and had next been heard from when she applied for welfare assistance in California in April or May. The last word her parents received was a phone call from Anita in the summer of 1975 during which she said only that she was traveling somewhere outside of Ohio. Mrs. Isaacs testified that she neither knew where Anita was nor how to contact her.

The prosecutor then offered to introduce the transcript of Anita's testimony at the preliminary hearing on the grounds that she was unavailable to testify in person, as specified in Ohio Revised Code Section 2945.49.[4] The court admitted the transcript over objection. The defendant was found guilty on all counts and the court entered judgment.

The Lake County Court of Appeals reversed. In an unreported opinion it held that the admission of the recorded testimony was a violation of the defendant's right to confront adverse witnesses, guaranteed by the sixth amendment to the Constitution of the United States.[5] The state appealed and the Ohio Supreme Court, in a four to three decision, affirmed.

[4] OHIO REV. CODE ANN. § 2945.49 (Page 1975). The statute states:

> Testimony taken at an examination or a preliminary hearing at which the defendant is present, or at a former trial of the cause, or taken by deposition at the instance of the defendant or the state, may be used whenever the witness giving such testimony dies, or cannot for any reason be produced at the trial, or whenever the witness has, since giving such testimony, become incapacitated to testify. If such former testimony is contained within a bill of exceptions, or authenticated transcript of such testimony, it shall be proven by the bill of exceptions, or transcript, otherwise by other testimony.

[5] U.S. CONST. amend. VI, provides in part, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."

The problem of prior testimony of unavailable witnesses has not arisen very often in Ohio. Although the Ohio Supreme Court had occasion to consider admission of dying declarations in 1842[6] and prior testimony of deceased witnesses in 1856,[7] the question of previous testimony of a living but unavailable witness in a criminal case did not come before the court until 1902 in *State v. Wing*.[8] Like *Roberts*, this case involved testimony from a preliminary hearing. At that time Ohio had no statute permitting the admission of prior testimony in criminal cases. Although there was such a statute for civil actions,[9] the court declined to extend it to the criminal area. The court stated that common law principles governed and, since the only time that the common law would admit the previous testimony of a living but unavailable witness was when his absence was caused by the connivance or procurement of the accused, the preliminary hearing testimony was held inadmissible. It was also suggested that the witness might have been located if the trial court had granted a continuance.

Ten years later in *State v. Huffman*,[10] the court applied the same rule to testimony from an earlier trial. This was the last time that the Ohio Supreme Court considered the problem of prior testimony in criminal cases until the *Roberts* decision. What case law there is after 1912 was developed at the appeals court level.[11]

In 1929 the first statute on the subject was passed.[12] It allowed testimony from a preliminary hearing at which the defendant had been present, or from a former trial of the case, to be admitted whenever the witness "could not for any reason be produced at the trial." It thus made the extension to criminal cases which *Wing* had refused to make. The wording of this statute was carried over almost verbatim into Ohio Revised Code Section 2945.49 in 1953 when the Revised Code was adopted.

The *Roberts* court framed the issue in the case as follows: "[w]hen a witness testifies against the accused at a preliminary hearing and is not

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[6] Montgomery v. State, 11 Ohio 424 (1842).

[7] Summons v. State, 5 Ohio St. 325 (1856).

[8] 66 Ohio St. 407, 64 N.E. 514 (1902).

[9] 1892 Ohio Laws.

[10] 86 Ohio St. 229, 99 N.E. 295 (1912).

[11] State v. Johnson, 52 Ohio App. 2d 406, 370 N.E.2d 785 (1977); State v. Earley, 49 Ohio App. 2d 377, 361 N.E.2d 254 (1975); State v. Gaines, 40 Ohio App. 2d 224, 318 N.E.2d 857 (1974); City of Columbus v. Edmister, 106 Ohio App. 443, 155 N.E.2d 72 (1958) (regarding OHIO REV. CODE. ANN. § 2945.49); Keith v. State, 53 Ohio App. 58, 4 N.E.2d 220 (1936); Mitchell v. State, 40 Ohio App. 367, 178 N.E. 325 (1931); Briseno v. State, 36 Ohio App. 459, 173 N.E. 617 (1930) (regarding GEN. CODE 13444-10).

[12] 1929 Ohio Laws.

cross-examined, and the witness is later shown to be unavailable to testify at the trial, may the prosecution introduce the witness' recorded testimony pursuant to R.C. 2945.49?"[13] In order to answer this question, the court broke down the problem into three components: what constitutes unavailability; what is the nature of the sixth amendment right of confrontation; and can confrontation at a preliminary hearing satisfy the requirements of the sixth amendment.

The defendant contended that the state had failed to make a good faith effort to produce Anita Isaacs in person, as required by the United States Supreme Court's ruling in *Barber v. Page*.[14] While agreeing that *Barber* does require such an effort when the prosecution knows the whereabouts of a witness who is outside the court's jurisdiction, the *Roberts* court stated that *Barber* was not applicable; in that case the prosecution knew the location of the witness but made no attempt to secure him, while in the case at bar no one knew where the witness was.[15]

The opinion then considered just what constituted unavailability, and what sort of effort had to be made before the witness might be deemed unavailable. Citing Wigmore for the proposition that a witness who had disappeared was unavailable,[16] the court stated that "[a]s a matter of state law, R.C. 2945.49, authorizing the use of prior recorded testimony 'whenever the witness . . . cannot for any reason be produced,' [was] broad enough to cover instances where the witness has disappeared."[17]

Naturally, there must be proof that the witness was unavailable before his prior testimony might properly be admitted. The burden of proving unavailability was on the party seeking to introduce the former testimony;[18] thus in a criminal case, the *Roberts* court concluded, it rested on the state.[19] How was unavailability to be proven? Although noting that Wigmore stated that the witness' "disappearance [was] shown by the party's *inability to find* him after diligent search,"[20] the court imposed a somewhat lesser standard. Since the question of proof of unavailability had never before been considered in a criminal context, the court looked to the leading civil case, *New York Central Railroad v. Stevens*,[21] for guidance. In *Stevens*, prior

[13] 55 Ohio St. 2d at 193, 378 N.E.2d at 495.

[14] 390 U.S. 719 (1968).

[15] 55 Ohio St. 2d at 194, 378 N.E.2d at 495.

[16] 5 J. WIGMORE, EVIDENCE § 1405 (Chadbourn rev. 1974).

[17] 55 Ohio St. 2d at 195, 378 N.E.2d at 495.

[18] 5 J. WIGMORE, *supra* note 16, § 1414.

[19] 55 Ohio St. 2d at 195, 378 N.E.2d at 495.

[20] 5 J. WIGMORE, *supra* note 16, § 1405. See FED. R. EVID. 804(a)(5) for the comparable federal standard.

[21] 126 Ohio St. 395, 185 N.E. 542 (1933).

testimony had been admitted at trial under a statute similar to Section 2945.49, applicable only to civil actions. On appeal, the Ohio Supreme Court held that a sufficient foundation for admission of the testimony would be laid if the proponent showed that "by diligence . . . [the witness'] attendance could not have been procured."[22] The *Roberts* court stated that it saw no reason why a similar rule should not be used in criminal cases. Since no one knew the whereabouts of Anita Isaacs, the trial judge could reasonably have concluded that "due diligence" would not have been able to secure her attendance and that she was therefore unavailable to testify in person.[23]

Thus, the *Roberts* case appears to have established the rule that a witness who has disappeared is unavailable, and that an actual search for the person need not be made if it is obvious that it would be useless. Stated another way, if the state has done the most that it could do under the circumstances, that would be sufficient, even if an actual search for the witness was not made. In *Roberts,* the prosecution clearly satisfied this test. Several subpoenas were mailed to Anita in care of her parents; her parents were questioned for any information that they had; and the trial was postponed a number of times in the hope that Anita might return. In the absence of any other leads, it would seem that the state did all that it reasonably could. The rule established, therefore, seems sound since it would tend to avoid waste of time and effort in trying to locate missing witnesses when no information as to their whereabouts was available.

Nevertheless, despite its conclusion that the trial court properly found the witness to be unavailable, the Ohio Supreme Court held that the prior testimony should not have been admitted because it violated the defendant's sixth amendment right to confront the witnesses against him.[24]

Until recently, the sixth amendment was relatively unimportant in state criminal prosecutions because the Supreme Court had held in *West v. Louisiana*[25] that it did not apply to the states. However, in 1965 *West* was overruled[26] and since then, confrontation issues moved to the forefront in state constitutional litigation and presented a problem for the *Roberts* court as well.

Relying on the early case of *Mattox v. United States*[27] and Wigmore's

[22] *Id.* at 405, 185 N.E. at 546.
[23] 55 Ohio St. 2d at 195, 378 N.E.2d at 495-96.
[24] *Id.* at 197, 378 N.E.2d at 496.
[25] 194 U.S. 258 (1904).
[26] Pointer v. Texas, 380 U.S. 400 (1965).
[27] 156 U.S. 237 (1895).

treatise on evidence,[28] the court in *Roberts* concluded that the right of confrontation meant the right to cross-examine, and that the purpose of the Confrontation Clause was to guarantee to defendants the right to cross-examine adverse witnesses. If a witness who was unavailable to testify at the trial had testified, subject to cross-examination, at a prior proceeding in which the issues were substantially the same, the purpose of the Confrontation Clause had been fulfilled and it was permissible to admit the witness' prior recorded testimony. However, a secondary purpose of the Confrontation Clause was to require the witness' attendance in court so that the jury might assess his demeanor. Therefore, if the witness was available the state still had to produce him at the trial, even if he had been previously cross-examined, for the sake of the demeanor evidence.[29]

In *Mattox* the defendant had been first tried and convicted of murder in 1891. He had appealed that conviction to the Supreme Court where it was reversed and remanded for a new trial.[30] Two years later he was again convicted. In the second trial, although the district court had allowed as evidence reporter's notes of the testimony of two witnesses at the former trial who had since died,[31] the defendant was denied the opportunity to bring in testimony to impeach the testimony of one of the witnesses. On review the Supreme Court determined, however, that Mattox had not been denied his right to confrontation because he had cross-examined the witnesses during the prior trial.[32]

Throughout its opinion in *Mattox,* the Court used the terms "confrontation" and "cross-examination" as though they were synonymous, but stated that ideally the cross-examination should be face to face and in front of the trier of fact.[33] The Court found that the right was not absolute, however, and exceptions to any of the rules "must occasionally give way to considerations of public policy and the necessities of the case."[34] However, the Court went on to state that since in this case the defendant had not only seen the witnesses face to face, but had also subjected them to cross-examination before a trier of fact, he had had all the advantages of confrontation and public policy considerations were not even in issue.[35]

In determining that the right to confront was the right to cross-

[28] 5 J. WIGMORE, *supra* note 16.
[29] 55 Ohio St. 2d at 194, 378 N.E.2d at 495.
[30] 156 U.S. at 238.
[31] *Id.*
[32] *Id.* at 244.
[33] *Id.* at 242.
[34] *Id.* at 243.
[35] *Id.* at 244.

examine, the Supreme Court stated in *Mattox* that "the primary object of the Constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, from being used against the prisoner in lieu of a personal examination and cross-examination of the witness"[36] and it was this passage that was relied upon by the majority in *Roberts.*

Wigmore shared the view that the main purpose of the Confrontation Clause was to insure the right of cross-examination.[37] He felt that "if the accused . . . had the benefit of cross-examination, he . . . had the very privilege secured to him by the Constitution."[38] Although he recognized demeanor evidence as a secondary advantage of confrontation, he stated that it was not essential and could be dispensed with if the witness were not available.[39]

Until 1970 this appeared to be the settled interpretation of the Supreme Court.[40] However, in that year the case of *Dutton v. Evans*[41] and its companion case, *California v. Green,*[42] introduced a note of uncertainty into the subject.

In *Green* the defendant was convicted of furnishing narcotics to a minor. The minor, Melvin Porter, had testified at a preliminary hearing and again at trial; the testimony, however, was not consistent. In the preliminary hearing he testified that Green had been the supplier of the marijuana, but at trial he testified that he was uncertain as to how he had obtained the drugs since he was on LSD at the time.[43] The defendant's lawyer cross-examined Porter at both the preliminary hearing and at trial. The testimony of a police officer to whom Porter had named Green as his supplier was also admitted as substantive evidence.[44]

The trial court allowed the substantive use of the inconsistent statement under Section 1235 of the California Evidence Code.[45] The district court

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[36] *Id.* at 242.

[37] 5 J. WIGMORE, *supra* note 16, § 1397.

[38] *Id.*

[39] *Id.*

[40] *E.g.,* Mattox v. United States, 156 U.S. 237 (1895), *quoted with approval in* California v. Green, 399 U.S. 149, 158 (1970); Barber v. Page, 390 U.S. 719, 721 (1968); Douglas v. Alabama, 380 U.S. 415, 420 (1965).

[41] 400 U.S. 74 (1970).

[42] 399 U.S. 149 (1970).

[43] *Id.* at 151-52.

[44] *Id.* at 152.

[45] CAL. EVID. CODE § 1235 (West 1966) provides that "[e]vidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770." (Section 770

of appeals reversed the conviction, holding that the defendant had been denied his right of confrontation.[46] This was affirmed by the California Supreme Court which rather reluctantly held Section 1235 to be unconstitutional.[47] The U.S. Supreme Court reversed, holding that the California Supreme Court was not "impelled" to find Section 1235 unconstitutional merely because it adopted a minority view that inconsistent statements may be used as substantive evidence where the witness is present and subject to cross-examination at trial.[48]

The Court declared that while common law hearsay rules and the Confrontation Clause shared the same general concerns, they could not be considered interchangeable.

> While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence . . . .[49]

Therefore, "merely because evidence is admitted in violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied."[50] On the other hand, even though a piece of evidence might satisfy the requirements of a common law or statutory hearsay exception, it could still violate the Confrontation Clause.[51] That was the constitutional problem presented in *Roberts*. Both the minority and the majority in *Roberts* looked to *Green* to support their positions. The state contended,[52] and the dissent agreed,[53] that *Green* held that the *opportunity* to cross-examine at the preliminary hearing was sufficient to satisfy the sixth amendment. In *Green*, after holding that the witness' preliminary hearing testimony was properly admitted because he was available for cross-examination at the trial, the court stated that it was also admissible because the

requires that the witness be given an opportunity to explain or deny the person's statement at some point in the trial).

[46] 399 U.S. at 153.

[47] *Id.*

[48] *Id.* at 154-55.

[49] *Id.* at 155, *cited with approval in* Dutton v. Evans, 400 U.S. at 81-82.

[50] *Id.* at 156.

[51] *Id.* Wigmore's opinion was that they are the same thing: "[t]he rule sanctioned by the Constitution is the hearsay rule as to cross-examination, with all the exceptions that may legitimately be found, developed, or created therein." 5 J. WIGMORE, *supra* note 16, § 1397.

[52] 55 Ohio St. 2d at 198, 378 N.E.2d at 497.

[53] *Id.* at 200, 378 N.E.2d at 498.

"respondent had [had] every *opportunity* [at the hearing] to cross-examine Porter as to his statement,"[54] and that "the *right* of cross-examination then afforded [provided] substantial compliance with the purposes behind the confrontation requirement."[55] The *Roberts* majority characterized these statements as dicta and distinguished *Green* on its facts since Porter, unlike Anita Isaacs, was cross-examined at the preliminary hearing and did appear at the trial.

They felt that despite the state's argument that this dicta supported the contention that the mere opportunity to cross-examine in a preliminary hearing was sufficient, the statement had to be viewed under the specific circumstances of the *Green* case in which there had been extensive cross-examination during the preliminary hearing and that such a case was therefore "atypical." The witness against Roberts was not only unavailable at trial but had not been cross-examined at all in the preliminary hearing. The dissent, on the other hand, maintained that the opportunity to cross-examine was a trial tactic and did not warrant a constitutional sanction.[56]

Justice Brennan, in his dissent in *Green,* identified the problem as follows: "how extensive must cross-examination at the preliminary hearing be before constitutional confrontation is deemed to have occurred? Is the mere opportunity for face-to-face encounter sufficient?"[57]

The validity of the holding in *Roberts* thus depends to a large extent on the interpretation given to the holding in *Green.* The passages which the Ohio court called dicta could also properly be considered as an alternate holding. *Green* could therefore be read to mean that the opportunity for cross-examination at a preliminary hearing was all that was required. However, the fact that there was also actual cross-examination in *Green* tends to make the exact basis of the decision unclear.

In *Dutton v. Evans,*[58] a companion case to *Green,* the testimony of a co-conspirator had been admitted. The Court there made another attempt to clarify its stand on confrontation and cross-examination but succeeded only in further confusing the issue by abandoning the previous cross-examination test and substituting an "indicia of reliability" test instead.[59]

In *Dutton,* Defendant Evans was one of three alleged conspirators

[54] 399 U.S. at 165 (emphasis added).

[55] *Id.* at 166 (emphasis added).

[56] 55 Ohio St. 2d at 200, 378 N.E.2d at 498. "The extent of cross-examination, whether at a preliminary hearing or at a trial, is a trial tactic. The manner of use of that trial tactic does not create a constitutional right."

[57] 399 U.S. at 200 n.8,

[58] 400 U.S. 74,

[59] *Id.* at 89,

in the murder of some Georgia police officers. Truett, a second conspirator, was granted immunity for his testimony. Noble, the third conspirator, did not testify but a statement he allegedly made to Shaw, a fellow inmate at the federal penitentiary in Atlanta, was admitted.[60]

Noble's out-of-court statement was never cross-examined; nevertheless, the Court concluded that its admission did not violate the Confrontation Clause because it contained "indicia of reliability" which were an adequate substitute for confrontation.[61] The Court felt that the primary purpose of the Confrontation Clause was not to insure the right of cross-examination, but "to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact [had] a satisfactory basis for evaluating the truth of the prior statement.' "[62] This appears to be a much more subjective test than merely determining whether or not the defendant cross-examined the witness and this makes it difficult to predict how the Court would react to any specific case. One commentator, in light of the four different opinions written in *Dutton,* concluded that there were now at least six possible interpretations of the Confrontation Clause.[63]

Nevertheless, on the premise that the core value of the Confrontation Clause was cross-examination, the *Roberts* court concluded that the clause had been violated for two reasons: the issues at the preliminary hearing and the trial were different, and the witness had not been cross-examined at the preliminary hearing.

> [T]he restriction of the factual issue at preliminary hearing restricts the scope of the cross-examination which defense counsel can prudently conduct . . . ; the mere opportunity to cross-examine at the preliminary hearing cannot be said to afford confrontation for purposes of the trial. Accordingly, we hold that, where a witness who testified against the defendant at preliminary hearing and was not cross-examined is later unavailable to testify at the trial, the Sixth Amendment precludes the state's use of the witness' recorded testimony, notwithstanding R.C. 2945.49.[64]

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[60] *Id.* at 77. Lynwood W. Shaw testified that the day following his arraignment Williams told him "if it hadn't been for that dirty son-of-a-bitch, Alex Evans, we wouldn't be in this now."

[61] *Id.* at 88-89. These indicia were (1) whether the statement contained an express assertion about past fact; (2) personal knowledge of the declarant; (3) low possibility of faulty recollection; and (4) reason to suppose that the declarant did not misrepresent. They correspond roughly to the hearsay principles of narration, perception, recollection and sincerity. Graham, *The Confrontation Clause, the Hearsay Rule, and the Forgetful Witness,* 56 TEX. L. REV. 151, 186 n.163 (1978).

[62] 400 U.S. at 89, *quoting* California v. Green, 399 U.S. at 161.

[63] Read, *The New Confrontation-Hearsay Dilemma,* 45 S. CAL. L. REV. 1, 40 (1972).

[64] 55 Ohio St. 2d at 196-97, 378 N.E.2d at 496.

The minority disagreed, citing dicta in *Pointer v. Texas*[65] and *Barber v. Page*[66] which suggest that there may be some circumstances when an adequate opportunity to cross-examine at the preliminary hearing, coupled with genuine unavailability of the witness at the trial, would be sufficient to satisfy the Confrontation Clause.

Pointer v. Texas[67] is best remembered as the case that reversed the previous position of the Court[68] and held that the Confrontation Clause was incorporated in the fourteenth amendment and was therefore applicable to the states. The Court had already determined that the right to counsel provision of the sixth amendment was guaranteed under the fourteenth amendment,[69] but declined to decide *Pointer* on the basis of denial of legal assistance in a preliminary hearing.[70] Instead, it ruled that since no attorney was present at this preliminary hearing, the use of the transcript at the trial of the witness' statements in that hearing "denied petitioner any opportunity to have the benefit of counsel's cross-examination of the principle witness against him."[71]

The dissent in *Roberts* felt that the narrow holding in *Pointer* was that the admission of the testimony was denied because there had been no opportunity to cross-examine, but that under different circumstances the testimony could have been admitted.[72] However, during the preliminary hearing in *Pointer,* a co-defendant had tried to cross-examine the witness whose testimony was in question, and although Pointer had not tried to cross-examine this witness, he had tried to cross-examine other witnesses.[73] Thus, it could be argued that *Pointer* was not decided on the basis of the opportunity to cross-examine but on the adequacy of that opportunity.

In a companion case argued the same day, *Douglas v. Alabama,*[74] the Court did make its decision based on the adequacy of the opportunity to cross-examine. In *Douglas* the solicitor had used the ploy of asking to have

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[65] 380 U.S. 400.

[66] 390 U.S. 719.

[67] 380 U.S. 400.

[68] 194 U.S. 258.

[69] Gideon v. Wainwright, 372 U.S. 335 (1963).

[70] The Court did not specifically recognize the right to counsel at a preliminary hearing until Coleman v. Alabama, 399 U.S. 1 (1970).

[71] 380 U.S. at 403.

[72] 55 Ohio St. 2d at 200, 378 N.E.2d at 498. The dissenting opinion in *Roberts* quotes Pointer v. Texas, 380 U.S. at 407, as follows: "[t]he case before us would be quite a different one had . . . [the witness'] statement been taken at a full-fledged hearing at which petitioner had been represented by counsel who had been given a complete and adequate opportunity to cross-examine." (Celebrezze, J., dissenting).

[73] 380 U.S. at 401.

[74] 380 U.S. 415 (1965).

a witness who the state had called to the stand declared a hostile witness and, therefore, subject to cross-examination, in an attempt to bring in that witness' prior confession. The witness, Loyd, had been previously convicted of the same crime for which Douglas was being tried, and since his own case was on appeal, invoked the fifth amendment. The alleged confession had implicated Douglas and the Court ruled that "effective confrontation would only be possible if Loyd affirmed the statement as his."[75] The Court did not, however, raise the question of what the results would have been if Loyd had been unavailable at the time of trial and the Solicitor had asked that the evidence be admitted under the hearsay exception of a co-conspirator.

As previously discussed, the majority in *Roberts* denied the defendant's argument that the state had failed to make a good faith effort to produce the witness in person as required by *Barber v. Page.*[76] However, they cited *Barber* as a case that required them to hold that a mere opportunity to cross-examine at a preliminary hearing was insufficient to meet the constitutional mandate.[77]

In *Barber* the defendant and a Mr. Woods were jointly charged with robbery.[78] In the preliminary hearing they were both represented by the same attorney who had not cross-examined Woods during the hearing and who subsequently objected that the admission of the transcript of Woods' testimony violated Barber's right to confrontation.[79] The objection was overruled and the Oklahoma Court of Criminal Appeals affirmed the subsequent conviction.[80] In the federal habeas corpus action that followed, the state argued that the transcript was admissible because although Woods was not available at the time of trial, Barber had been given the opportunity to confront him during the preliminary hearing and had chosen to waive that right by not cross-examining him.[81] The U.S. Supreme Court reversed and remanded the case on the basis that the state had not made a good faith effort to obtain the witness since he was in a federal penitentiary in a neighboring state and there were a number of ways he could have been brought in to testify.[82] They also held that the defendant could not have waived

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[75] *Id.* at 420.

[76] 390 U.S. 719.

[77] 55 Ohio St. 2d at 197, 378 N.E.2d at 496.

[78] 390 U.S. at 720.

[79] *Id.*

[80] *Id.* at 721.

[81] *Id.* at 725.

[82] This takes into consideration the increased cooperation between states such as the Uniform Act to Secure Attendance of Witnesses from Without a State in Criminal Proceedings, the writs of habeas corpus *ad testificandum* available to the prosecutor through the United

his right to confront the witness at the preliminary hearing when he was unaware that the witness would be unavailable for trial or that the state would not make a good faith effort to produce him.[83]

Again, the majority and the dissent in *Roberts* turned to the same Supreme Court case and interpreted it to support their positions. The majority emphasized the fact that the defendant's attorney in *Barber,* like Roberts' attorney, had not cross-examined the witness in the preliminary hearing even though he technically had the opportunity, and they therefore contended that *Barber v. Page* compelled their decision. The dissent, on the other hand, appears to be correct in having argued that the holding in *Barber* was only based on the state's failure to make a good faith effort to produce a witness whose whereabouts were known to them,[84] whereas in *Roberts,* the witness was actually unavailable and could not be located.

The *Roberts* majority also looked to *Government of the Virgin Islands v. Aquino*[85] to support its stand on why cross-examination at a preliminary hearing was not sufficient. In this case, the court based its decision on the denial of the assistance of counsel for the one defendant and an error in the charges for the other,[86] rather than on the confrontation issue which they did, however, discuss at length.

In *Aquino* two defendants were charged with the rape of a ship stewardess. The woman had been drinking at a bar and accepted a ride from the defendants. At the preliminary hearing, the woman testified that defendant Aquino was driving while defendant Reyes made amorous advances which she rejected. She did not remember anything else until she she awoke lying almost naked on the ground; a subsequent medical examination indicated sperm in her vagina. The arresting officers told the men what the charges were,

States Code or by the general policy of the United States Bureau of Prisons to issue such writs through the state courts.

[83] 390 U.S. at 725. The Court stated:

> The State argues that petitioner waived his right to confront Woods at trial by not cross-examining him at the preliminary hearing. That contention is untenable. Not only was petitioner unaware that Woods could be in a federal prison at the time of his trial, but he was also unaware that, even assuming Woods' incarceration, the State would make no effort to produce Woods at trial. To suggest that failure to cross-examine in such circumstances constitutes a waiver of the right of confrontation at a subsequent trial hardly comports with this Court's definition of a waiver as an "intentional relinquishment or abandonment of a known right or privilege." (citations omitted).

[84] "[W]e decided only that Oklahoma could not invoke that concept [unavailability] to use the preliminary hearing transcript in that case without showing 'a good-faith effort' to obtain the witness' presence at the trial." Dutton v. Evans, 400 U.S. at 85.

[85] 378 F.2d 540 (3d Cir. 1967).

[86] Aquino was acquitted because he was charged with rape but found guilty as an accessory after the fact, which, unlike an accessory before the fact, was not an element of the crime.

but did not warn the defendants of their right to remain silent. In their conversation they elicited a statement from Reyes that although he had had intercourse with the woman, she had consented.[87] The court ruled that the holding in *Escobedo*[88] mandated that the statement be considered illegally obtained.

However, since the reversal required a new trial, the court considered the alleged error of the admission of the transcript of the complainant's testimony at the preliminary hearing when she was not present at the trial.[89] The court discussed the different purposes of cross-examination in a preliminary hearing and in a trial,[90] and it was this discussion on which the majority in *Roberts* relied.[91]

The *Roberts* court stated that while the "basic factual issues" in the preliminary hearing and the trial were the same, *i.e.*, whether the defendant had stolen the credit cards, the "ultimate factual issues" were very different.[92] In a preliminary hearing the ultimate issue is whether there is probable cause to believe that the defendant has committed a crime, while in a trial the ultimate issue is whether or not there is proof beyond a reasonable doubt that the defendant committed the crime.[93] This difference in objective, the court reasoned, would lead to important differences in the kind of cross-examination that an attorney would conduct in the two proceedings. At a trial a defense attorney will often cross-examine extensively, both to bring

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[87] 378 F.2d at 543-44. Reyes thought this was an exculpatory statement since he did not know that the law provides that rape occurs when intoxication prevents the victim from giving consent.

[88] Escobedo v. Illinois, 378 U.S. 478 (1964).

[89] 378 F.2d at 551-52.

[90] *Id.* at 549. In the case of a prior trial, the goal of the cross-examiner is precisely the same as that which he would have followed at the second trial—acquittal of the defendant. At the preliminary hearing, however, the cross-examiner is much more narrowly confined by the nature of the proceeding. The government's aim is merely to show a prima facie case and its tactic is to withhold as much of its evidence as it can, once it has crossed that line.

[91] 55 Ohio St. 2d at 196, 378 N.E.2d at 496.
The fear of adding to the government's case by extensive cross-examination weighs heavily on a defendant's counsel at a preliminary hearing, where much of the government's case still remains in doubt . . . . Everyday experience confirms the difference [between trial and preliminary hearing], for it is rare indeed that on a preliminary hearing there will be that full and detailed cross-examination which the witness would undergo at the trial. . . . All the arts of cross-examination which are exerted to impair the credibility of a witness are useless in a preliminary hearing.

[92] *Id.*

[93] *Id.* There is support for this view in both Ohio statutory and case law. *See, e.g.*, State v. Swiger, 5 Ohio St. 2d 151, 214 N.E.2d 417 (1966); Henderson v. Maxwell, 176 Ohio St. 187, 198 N.E.2d 456 (1964); White v. Maxwell, 174 Ohio St. 186, 187 N.E.2d 878 (1963); OHIO REV. CODE ANN. §§ 2937.09, 2937.12 (Page 1975) (procedure at arraignment and preliminary hearing in felony cases); Meletzke, *The New Criminal Preliminary Examination in Ohio: An Historical Contrast*, 20 OHIO ST. L.J. 652, 665 (1959).

out additional facts and to impeach the credibility of the witness. At a preliminary hearing, on the other hand, an attorney may be reluctant to do so, for fear of disclosing unfavorable facts to the prosecution and of revealing too much of his case.[94] Relying on *United States v. Allen,*[95] the dissent in *Roberts* took issue with this argument, stating that it was just a matter of trial strategy.

In *Allen,* the defendant was convicted of a violation of the Mann Act. Two of the witnesses against Allen, a woman named Davis and a woman named Whitehurst, had allegedly been transported interstate for the purposes of prostitution.[96] Both witnesses had testified at the preliminary hearing but invoked the fifth amendment at the trial and the defendant objected to having transcripts of their preliminary hearing testimony be admitted, but he was overruled.[97]

The United States Court of Appeals, Tenth Circuit, in denying the appeal discussed three issues: (1) whether the requirement of unavailability had been met when the witnesses were physically available; (2) whether the use of the transcripts which denied the ability of the fact finder to observe the demeanor of the witnesses denied the defendant his rights; and (3) whether the difference between a preliminary hearing and a trial denied his rights.[98] The court resolved the first issue on the basis that it was the testimony which was unavailable and, therefore, the transcript could be substituted.[99] The second issue was resolved on the basis of the precedent that since testimony at a former trial was admissible without demeanor evidence, it had already been determined that it was "not an essential ingredient of confrontation."[100]

Discussion of the last issue was the part of the opinion relied on by the dissent in *Roberts;* in quoting from *Allen,* they stated that "the test is the opportunity for full and complete cross-examination rather than the use which is made of that opportunity."[101] They would therefore have held

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[94] 55 Ohio St. 2d at 196, 378 N.E.2d at 496.

[95] 409 F.2d 611 (10th Cir. 1969).

[96] *Id.* at 612.

[97] *Id.*

[98] *Id.* at 613.

[99] *Id.*

[100] *Id.* at 613-14, *relying on* Mattox v. United States, 156 U.S. 237.

[101] 55 Ohio St. 2d at 200, 378 N.E.2d at 498. "The principle requiring a testing of testimonial statements by cross-examination has always been understood as requiring, not necessarily an actual cross-examination, but merely an *opportunity to exercise the right to cross-examine if desired,*" 5 J. WIGMORE, *supra* note 16, § 1371. *But see* 4 J. WEINSTEIN'S EVIDENCE ¶ 804(b)(1)[02] at 804-52-53 (1975) and C. MCCORMICK, EVIDENCE § 255 (2d ed. 1972), which suggest that the opportunity must be meaningful in light of the circumstances which prevail at the time the former testimony is offered.

that the testimony of Anita Isaacs was properly admitted at the trial and that the defendant's sixth amendment rights had not been violated.[102]

The state petitioned the U.S. Supreme Court for a writ of certiorari on September 20, 1978. The Court has decided to hear the *Roberts* case.[103] How will *Roberts* be viewed?

It would appear from a review of the cases relied upon in *Roberts* that the basic confrontation/cross-examination questions of "how extensive must cross-examination at the preliminary hearing be before constitutional confrontation is deemed to have occurred?" and "[i]s the mere opportunity for face-to-face encounter sufficient?"[104] have not yet been answered by the Supreme Court.

In *Green,*[105] although dictum indicated that opportunity might be sufficient, the case was ultimately decided on the fact that the witnesses had been extensively cross-examined in the preliminary hearing. It was also noted that a preliminary hearing which afforded such extensive cross-examination was atypical. *Dutton v. Evans,*[106] a case not relied upon by *Roberts* but a companion case to *Green,* re-emphasized the importance of "vigorous and effective" cross-examination while at the same time allowing the lack of cross-examination on what the majority of the Court considered to be non-crucial evidence.

In *Mattox*[107] the Court ruled that although confrontation was a right that included cross-examination in front of the trier of fact, the right was not absolute. Exceptions noted in *Mattox* included prior testimony that had been subjected to cross-examination.

Pointer v. Texas,[108] which incorporated the sixth amendment into the fourteenth amendment, emphasized the opportunity to cross-examine in the preliminary hearing. However, in that case there was no attorney present in the preliminary hearing and the Court gave no clear statement as to what the results would have been if an attorney had been present and had either not cross-examined or had done so on a less than "extensive" basis. *Douglas v. Alabama,*[109] the companion case to *Pointer,* did determine that

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[102] 55 Ohio St. 2d at 200, 378 N.E.2d at 498.
[103] 47 U.S.L.W. 3677 (Apr. 17, 1979).
[104] California v. Green, 399 U.S. at 200 n.8 (Brennan, J. dissenting).
[105] *Id.*
[106] 400 U.S. 74.
[107] 156 U.S. 237.
[108] 380 U.S. 400.
[109] 380 U.S. 415.

"effective confrontation" was necessary; however, in that case the witness had actually been present at trial.

In the *Barber* case,[110] an attorney was present and chose not to cross-examine although given the opportunity. Here, however, the holding was not based on the lack of cross-examination at this stage, but rather on the fact that the state had not made a good faith effort to produce the witness.

In *Aquino,*[111] as in *Douglas,* the witness had been cross-examined in a preliminary hearing but had invoked the fifth amendment at trial so there could be no cross-examination at that point. But like *Barber,* the holding was based on the potential availability of the witness. In dictum the Court did express its concern about the differences between a preliminary hearing and a trial, but indicated it would accept as testimony a transcript of an unavailable witness who had been subjected to cross examination.

In *Allen,*[112] the case relied on by the dissent in support of the view that mere opportunity was sufficient and that to not use that opportunity was a "tactic," the holding was again based on a fact situation in which there had actually been cross-examination in the preliminary hearing.

In reviewing the preceding cases, although it is hazardous to attempt to predict what the Supreme Court will do in any specific situation, the clear trend in recent years has been toward making the admission of hearsay evidence easier. Even the Warren Court indicated that "there may be some justification for holding that the opportunity for cross-examination of a witness at a preliminary hearing satisfies the demand of the confrontation clause where the witness is shown to be actually unavailable. . . ."[113] With certiorari having been granted, this is the first case of a truly unavailable witness which the Court will consider.

Applying the "indicia of reliability" test set forth in *Dutton*[114] appears to yield mixed results. The first element of the test was whether the statement contained an express assertion of past fact, with the statement being admissible if it does not. The statement in *Roberts* does not appear to meet this test, since the testimony of Anita Isaacs that she did not give the items to the defendant is such an assertion. The second and third elements were personal knowledge of the declarant and the possibility of faulty memory. The *Roberts* statement does pass these tests, since Anita Isaacs certainly would have had personal knowledge of her own conduct, and the possibility

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[110] 390 U.S. 719.
[111] 378 F.2d 540.
[112] 409 F.2d 611.
[113] Barber v. Page, 390 U.S. at 725.
[114] 400 U.S. at 88-89.

of her recollection being incorrect is small inasmuch as her testimony took place only about two weeks after the events in question. The fourth part of the test, reason to suppose that the declarant had not misrepresented, poses a problem for it is possible that Anita might have lied about giving the credit cards to Roberts. The defendant was indicted only for receiving stolen property; if Anita was under suspicion for having given it to him, she would have had a motive to lie at the hearing; the fact that she disappeared shortly after giving this testimony further tends to cast doubt on her reliability.

An interesting point to consider is whether the sixth amendment necessarily requires *cross*-examination. The defendant did question her on *direct* examination; could that be a sufficient confrontation? Compare in this regard Federal Rule of Evidence 804(b)(1),[115] which approves the admission of former testimony which has been subjected to "direct, cross or redirect examination." Since Anita was subjected to direct examination, the *Roberts* holding in effect says that Rule 804(b)(1) is unconstitutional; yet the language approving direct examination was contained in the original rule promulgated by the Supreme Court. Although this does not guarantee that the rule would be held constitutional by the Court, it nevertheless appears to justify a strong presumption of validity.

Apparently ignored by all concerned was the fact that the Ohio Constitution also contains a confrontation clause. Article I, Section 10 provides in part: "[i]n any trial, in any court, the party accused shall be allowed . . . to meet the witnesses face to face . . . ." How does this affect the problem of former testimony in a state trial?

Possibly, the reason it was not mentioned in the *Roberts* case is the way that it was first construed. The clause was initially considered by the Ohio Supreme Court in 1856, five years after its adoption. In *Summons v. State,*[116] the court had before it the issue of the former testimony of a deceased witness. In deciding that the testimony was properly admitted, the court held that the witness who had to be confronted was the person in court narrating the former testimony, not the out-of-court declarant whose

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[115] (b) Hearsay exceptions. The following [is] not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

[116] 5 Ohio St. 325 (1856).

testimony was being recited.[117] This mistaken[118] interpretation makes Ohio's confrontation clause meaningless, since under this view a defendant's confrontation right is not violated as long as he is present while a witness repeats an out-of-court statement. Construed literally, it would leave no restrictions at all on the admission of hearsay. Perhaps for this reason, the section has been virtually ignored since the turn of the century and since *Pointer v. Texas*[119] applied the federal sixth amendment to the states.

Summons, however, has never been overruled. If *Roberts* should be reversed by the U.S. Supreme Court and if it is still thought desirable to exclude preliminary hearing testimony of unavailable witnesses, one possible approach might be to dust off the Ohio confrontation clause, give it a more modern interpretation, that is, one more consistent with the sixth amendment, and re-establish the *Roberts* rule as a matter of state law. It is well recognized that a state is free to construe its own constitution more narrowly than the federal Constitution, even though the provisions involved are similar.[120]

If affirmed, the *Roberts* case will have wrought important changes in Ohio criminal trials. The case has clarified what the prosecution must do in order to show that a witness is unavailable by pointing out that there must be either an inability to find the witness after an actual search, or else there must be sufficient proof that a diligent search would be useless.

More importantly, former testimony of an unavailable witness is no longer automatically admissible. In addition to proving unavailability, the prosecution will now also have to show that the former proceeding concerned substantially the same issues, that the witness testified against the same defendant, and that the witness was subjected to cross-examination

[117] *Id.* at 341-42. The court explained:

> The requirement that the accused shall be confronted, on his trial, by the witnesses against him, has sole reference to the personal presence of the witnesses, and it in no wise affects the question of the competency of the testimony which to he may despose [*sic*]. When the accused has been allowed to confront, or meet face to face, all the witnesses called to testify against him on the trial, the constitutional requirement has been complied with.... [The declarant] [b]eing dead, it was an impossibility that she could be a witness on that trial. Logan, however, who was a witness, and did testify, did meet the accused face to face on trial. The provision in the bill of rights was complied with.

[118] 5 J. WIGMORE, *supra* note 16, § 1397

> [T]he erroneous [interpretation] has occasionally been advanced that the "witness" who is to be "brought face to face" is merely the person now reporting another's former testimony or dying declaration, and that thus the constitutional provision is satisfied by the production of the second person. The fallacy here is that the statements of the former witness or dying declarant are equally testimony, since they are offered as assertions offered to prove the truth of the fact asserted. . . (citation omitted).

[119] 380 U.S. 400.

[120] *E.g.,* Oregon v. Hass, 420 U.S. 714 (1975); People v. Disbrow, 16 Cal. 3d 101, 127 Cal. Rptr. 360, 545 P.2d 272 (1976).

by the defendant.[121] Where the former proceeding was a trial, this should not prove to be too difficult. However, where the former proceeding was a preliminary hearing and the witness was not actually cross-examined by the defendant, the testimony will not be admissible. Moreover, although the holding technically applies only to situations where there has been no cross-examination, in view of the court's comments on preliminary hearings,[122] the implication is strong that the court would still disapprove even if there has been actual cross-examination. It therefore appears that, at least in Ohio, it may be nearly impossible to use preliminary hearing testimony at a later trial because the state's highest court has decided that the mere opportunity to cross-examine will not be sufficient to guarantee a defendant his sixth amendment right to confront the witnesses against him.

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[121] 55 Ohio St. 2d at 194, 378 N.E.2d at 495.
[122] *Id.* at 196, 378 N.E.2d at 496.

FEDERAL GIFT TAXATION

Nontaxable Transfers • Interest-Free Loans

Crown v. Commissioner, 585 F.2d 234 (7th Cir. 1978).

INTEREST-FREE FAMILY LOANS remain outside the purview of the federal estate and gift tax statutes despite the recent efforts of the Internal Revenue Service to convince the judiciary that, in such loans, the fair market value of the foregone interest is a gift. This is an extrapolation of the Service's efforts to find income to the recipient in other interest-free money situations. In light of the Service's limited activity in dealing with tax consequences of the interest-free loans, the Seventh Circuit's decision in *Crown v. Commissioner*[1] will be an important reference for estate and tax planning. Doubtlessly, the Service will register its non-acquiescence[2] to *Crown* as it did with *Johnson v. United States*.[3] Consequently, the issue of interest-free family loans will be reviewed in the future by other circuits.

[1] 585 F.2d 234 (7th Cir. 1978).
[2] Rev. Rul. 73-61, 1973-1 CUM. BULL. 408. This ruling elaborates on §§ 2501, 2511, 2512(b) in the context of a loan between father and son. The Ruling explains the occurrence of a gift by evaluating the use of the money on the basis of each quarter such use was permitted.
[3] 254 F. Supp. 73 (N.D. Tex. 1966).