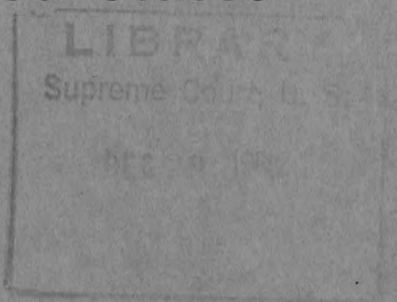


Supreme Court of the United States

October
[REDACTED] TERM, 1969



In the Matter of:

-----X
 :
 JOHN HENRY COLEMAN AND :
 OTIS STEPHENS, :
 :
 Petitioners, :
 :
 vs. :
 :
 ALABAMA, :
 :
 Respondent. :
 -----X

Docket No. 72

RECEIVED
SUPREME COURT, U.S.
MARSHALL'S OFFICE
DEC 2 9 12 AM '69

Place Washington, D. C.
Date November 18, 1969

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

C O N T E N T S

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

ORAL ARGUMENT

P A G E

Charles Tarter, Esq.
on behalf of Petitioners 2

David W. Clark, Assistant Attorney General
of Alabama, on behalf of the Respondent 19

REBUTTAL ARGUMENT OF:

Charles Tartar, Esq.
on behalf of Petitioners 34

11HAM

IN THE SUPREME COURT OF THE UNITED STATES

October

TERM 1969

JOHN HENRY COLEMAN AND)	
OTIS STEPHENS,)	
)	
Petitioners)	
)	
vs)	No. 72
)	
ALABAMA,)	
)	
Respondent)	
)	

Washington, D. C.
November 18, 1969

The above-entitled matter came on for argument at
11:43 o'clock a.m.

BEFORE:

WARREN E. BURGER; Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THEURGOOD MARSHALL, Associate Justice

APPEARANCES:

CHARLES E. TARTAR, ESQ.
1327 City Federal Building
Birmingham, Alabama
Counsel for Petitioners

DAVID W. CLARK,
Assistant Attorney General
State of Alabama
Montgomery, Alabama
Counsel for Respondent

1 hearing.

2 The Sixth Amendment says: "In all criminal prosecu-
3 tions the accused shall enjoy the right to have the assistance
4 of counsel for his defense."

5 And I suggest to you that were it not for the fact
6 that these defendants are poor they would not be here today.

7 The Court has interpreted the Sixth Amendment to
8 mean that Counsel is needed at the accusatory stage; at the
9 interrogation; at the lineup; at the arraignment; at the
10 trial; at the appeal; at the prostration hearing. But it has
11 excused and ignored the preliminary hearing, which is probably
12 the single-most important phase of criminal procedure.

13 In my county these defendants could be tried at the
14 Court Courthouse without a lawyer at the preliminary hearing.
15 They could walk three blocks down the street and have a lawyer
16 at the preliminary hearing at the Federal Court. To me that is
17 not equal and exact justice.

18 Q You are going to tell us, I hope, in the courses
19 of your argument, just what is the function of a preliminary
20 hearing in your state and what happens there?

21 A I'm getting to it in just a moment, if Your
22 Honor please. I have listed 17 reasons in my brief.

23 The Court in the past has refused to call the pre-
24 liminary hearing critical because a plea was not required.
25 In White versus Maryland and once again, in Pointer versus

1 Texas.

2 Q Well, let me clear up one thing for my own
3 situation. At the time that the accused or a person, goes to
4 preliminary hearing in Alabama, is he then a defendant? Has
5 any charge been lodged against him?

6 A Yes, Your Honor. A warrant is obtained after
7 his arrest. He is lodged in the city jail; a warrant is
8 obtained after his arrest; he is taken over to the county
9 jail; a bond is set by the Sheriff, with the exception of a
10 capital case and then he is taken forthwith within ten days
11 before a Magistrate -- usually within ten days before a
12 Magistrate and there a preliminary hearing is held, or semb-
13 lance of a preliminary hearing, without a lawyer.

14 Q This is not the same animal that was before
15 the Court in Hamilton against Alabama.

16 A That's a very confusing case.

17 Q That was an arraignment; was it not?

18 A They called it an arraignment and they they
19 called it -- the Court talks about a preliminary hearing.

20 Q But it was, in fact, an arraignment after in-
21 dictment; was it not?

22 A It was an arraignment; yes, sir.

23 Q After indictment.

24 A Yes, sir.

25 Q Or information. And this is quite different.

1 This is pre-indictment.

2 A Yes, sir. This is the preliminary hearing,
3 which after the preliminary hearing comes the --

4 Q He is probably charged --

5 A -- then comes the indictment; then comes the
6 arraignment; then comes the trial.

7 Q Now, /was the arraignment that was involved in
8 Hamilton?
it

9 A Yes, sir.

10 Q Thank you.

11 A It's understandable however that the Hamilton
12 case is confusing, because of it being called a preliminary
13 hearing and it really is not; it's an arraignment where a plea
14 is required.

15 Our statute is very similar to the statute in Pointer
16 versus Texas, where the Court said the preliminary hearing is
17 not a critical stage because a plea was not required. Almost
18 the verbatim statement that was in the White case. However,
19 the Court said, and I quote from the opinion: "Whether there
20 might be other circumstances making a preliminary hearing so
21 critical to the defendant as to call for appointment of
22 counsel, at that stage we need not decide on this record and
23 that question we reserve." It is the question in which you
24 have decided -- in which you have reserved, in Pointer versus
25 Texas, that we raise here.

1 Q To answer Mr. Chief Justice and Mr. Justice
2 Stewart we would offer these reasons as to why preliminary
3 hearing is important and encompasses more than simply probable
4 cause or whether or not a plea is required.

5 (1) It is the first opportunity the defendant has to
6 be adequately informed by an allegedly impartial person for
7 that with which he is charged.

8 (2) It is the first opportunity to be confronted by
9 those who will testify against him.

10 (3) It is the first opportunity to examine those who
11 will testify against him and have their testimony reduced to
12 writing.

13 Q Let me ask you -- if I may interrupt you --
14 do you say you examine the witnesses against him. Do you mean
15 by that the witnesses who are produced at the hearing or all
16 the witnesses who will be produced at the trial.

17 A All the witnesses produced at the hearing and
18 all the witnesses subpoenaed by the defendant to testify on his
19 own behalf. And any other witnesses that counsel can find to
20 subpoena or to have present at the preliminary hearing.

21 Q In this respect, then, it's parallel to the
22 Federal situation?

23 A Yes, Your Honor; in the sense that in the Federal
24 Court obviously the reason why preliminary hearings are not --
25 numerous preliminary hearings are not held is because of the

1 liberal discovery rules in the Federal Court. However, in the
2 State Court there are practically no discovery rules whatso-
3 ever. When a lawyer is appointed, as I was in this case, just
4 before the arraignment, I knew absolutely nothing about the
5 case; nothing. As a matter of fact, I was appointed the day
6 before the case was arraigned and this was a case with great
7 publicity. They were out for two months before they were
8 arrested; newspaper headlines for weeks and days and months
9 until they were arrested; people were upset; money was
10 solicited by groups to help pay for the hospital bill and this
11 sort of thing of the victims. And it was a heinous and
12 terrible crime.

13 But the point is that I had nothing -- I couldn't
14 even talk to the witness until the day the motions were tried
15 by His Honor, Judge Gibson, on the direction of the District
16 Attorney.

17 Q Well, are you suggesting that the Alabama
18 statute contemplates that the preliminary hearing is a dis-
19 covery mechanism?

20 A It says, if Your Honor please, that it is to
21 determine probable cause and to --

22 Q Probable cause for what -- a holding?

23 A To bind the defendant over to the grand jury.

24 Now, as Your Honor is well aware, "probable cause"
25 means more than just a brief statement by some individual that

1 an act occurred in a particular venue and jurisdiction.

2 Q What's the difference between this preliminary
3 hearing and the one that was before us in Hamilton and
4 Alabama?

5 A In Hamilton the case was an arraignment and not
6 a preliminary hearing, if Your Honor please.

7 Q Oh, I see.

8 A It is contended.

9 Q What is the arraignment stage; is it after the
10 preliminary hearing?

11 A The arraignment comes after the preliminary
12 hearing and subsequent to the indictment. Arraignment is
13 where the indictment is read to the defendant and a plea is
14 entered at that time.

15 But, no lawyer who has ever tried a criminal case,
16 in Alabama or anywhere else in a state court where a pre-
17 liminary hearing is offered, would dare testify that it is not
18 important. It is probably the single-most critical stage of
19 all the proceedings. It reduces a trial to a mere formality.

20 Q Let me ask you this question: Under your
21 Alabama procedure, could the state have bypassed the pre-
22 liminary hearing and have gone right before the grand jury?

23 A It could, if Your Honor please. It could do
24 that, however we have introduced in our brief and into the
25 trial of the motion before His Honor Judge Gibson that 95

1 percent of all cases tried in Jefferson County are taken by
2 way of the preliminary hearing. Very, very few -- as a matter
3 of fact, I can't even remember one since I have been practicing
4 law which has been for five years, where a case was taken
5 directly to the grand jury without going through a preliminary
6 hearing. It's just a matter of procedure.

7 Q It would be open to the state to do that? Even
8 if you prevailed in this case.

9 A They could do it. But if they did, courts in a
10 populous county such as Jefferson County, they might be there
11 five years before they ever got to trial if every case had to
12 go before the grand jury, upon which a warrant is sworn out
13 and on a felony it's just not possible.

14 So that the preliminary hearing weeds the cases out,
15 so to speak, before they get to the grand jury.

16 So, there are 17 reasons listed in my brief. You,
17 of course, have a collective mind and you will read my brief.
18 There is really no need in my just reading out of my brief the
19 17 points that just first came into my mind and on Page 11 and
20 Page 12 and Page 13 of my brief, which list the many, many
21 reasons for preliminary hearings.

22 Q On a selected basis, I read your 17 points.
23 What do you lay the most emphasis on?

24 A Discovery is the most emphasis. The motion to
25 suppress many times has been very favorable, and many cases

1 have been dismissed in the preliminary hearing as a result of
2 a motion to suppress. Therefore, the man hasn't had to sit in
3 jail and hasn't had his liberty restrained for the six months
4 or nine months that it takes to get to the trial or the merits
5 of the issue; not to mention the practical aspect of it: if
6 you have a good motion to suppress then the state will let it
7 pass for two years and then eventually maybe it will be dis-
8 missed. But your client -- and I have several of these, as
9 many lawyers do, rather than the case just being dismissed.

10 But it is the question reserved in Pointer versus
11 Texas that we apply to this particular case. Now --

12 Q I'm reading the sections of your statute on
13 Pages 3 and 4 of your brief and it talks about when the defen-
14 dant must be discharged and that's Section 139 and then Section
15 140 it talks about what happens if probable cause is shown.
16 He must be discharged on bail if he can make bail. But if
17 sufficient bail is not given he must be committed to jail.
18 Then what happens?

19 A Well, then he awaits the action of the grand
20 jury. Then the grand jury acts then the indictment is presen-
21 ted; then an arraignment is held and counsel appointed, if
22 necessary; and then a plea is entered and then a trial.

23 Q Yes. The grand jury might not indict him.

24 A Well, that's possible; it is possible.

25 Q And do you have any practice of charges brought

1 by informations?

2 A No. Just indictments. It's possible, of
3 course, the grand jury wouldn't indict him, but I suggest to
4 you that if the grand jury wouldn't indict him it would have
5 been dismissed at the preliminary hearing.

6 Q Well, probably, but not always.

7 A Well, anything is possible, I guess. But in
8 over the years in trying cases -- criminal cases before the
9 preliminary hearing. Most of them that are dismissed are
10 simply dismissed.

11 Q Don't your grand juries sometimes ignore it?

12 A Our District Attorney controls the grand juries
13 Your Honor and he's the only one --

14 Q Could you talk a little louder?

15 A The District Attorney controls the grand jury
16 and he's the only one in the grand jury room and it's his
17 witnesses that testify before the grand jury, so I would be
18 shocked that if the case were dismissed by the preliminary
19 hearing magistrate that the case would be picked up by the
20 grand jury.

21 Q No, I mean at the opposite. The opposite.

22 A Oh, just the opposite. Both of them would be--

23 Q Roughly, what's the interval of time between
24 preliminary hearing and grand jury action?

25 A Anywhere from 30 to 90 days.

1 Q And is the defendant entitled to bail during
2 that period?

3 A Well, that's another question. He is entitled
4 to bail, of course, but my clients, due to the publicity of
5 the case, had \$20,000 bond set on both of them at the pre-
6 liminary hearing without a lawyer and they have been sitting
7 in jail since July 29 -- ever since September 29, 1969. Of
8 course they couldn't make a \$200 bond, but they had a \$20,000
9 bond on each of them.

10 Of course they had no counsel at the preliminary
11 hearing. If they had counsel at the preliminary hearing this
12 case very well could have been won, if you will read my brief
13 carefully.

14 Q Can you tell me why the testimony at the pre-
15 liminary hearing is transcribed and what is done with it after
16 it goes to the --

17 A That's an unusual thing. Justice Black is
18 probably aware of this. For over 75 years we have had a
19 statute which requires that the testimony be transcribed,
20 recorded and certified to the Circuit Court. It has never
21 been done; ever.

22 Q As far as you know then it's never gone to the
23 grand jury. And we, as defense lawyers, pay for a court
24 reporter to go to the preliminary hearing and record the
25 testimony and use it later on, in view of the statute.

1 Incidentally, this statute also calls for punishment
2 for His Honor failing to record and transcribe this testimony
3 and of course, I have never had courage enough to enforce it.

4 But, it is not only true in Alabama; it is true in
5 many other states of things such as this being ignored and --

6 Q So, if you want the testimony you take it your-
7 self.

8 A And if I had been appointed at the preliminary
9 hearing I would have paid for it out of my own pocket and had
10 one made in this case, as I did in another case. Now, I
11 represent no group and I represent no organization; I represent
12 my clients, period; from the beginning to the end in this
13 costs me.

14 Q Does the transcript, when you make it at your
15 own instance, have official status?

16 A Yes, because I bring the court reporter in to
17 testify to its validity, you see. It does not have official
18 status in the sense that it's a part of the court record. Only
19 when I introduce it in evidence and prove its validity and
20 accuracy.

21 Q Is it done by the court reporter -- the official
22 court reporter?

23 A Yes, it is.

24 Q Well, doesn't the state ever record these --

25 A No, and they try to get mine -- my copy once I

1 get it done. As a matter of fact, it's really ridiculous and
2 it's a vicious circle, so to speak, but let me give you a
3 prime example of a preliminary hearing which occurred three
4 weeks ago with the permission of the Court.

5 MR. CHIEF JUSTICE BURGER: We will hear that after
6 lunch.

7 (Whereupon, at 12:00 o'clock p.m. the above-entitled
8 proceedings were recessed to be resumed at 12:30 o'clock p.m.
9 this same day)

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

AFTERNOON SESSION

1
2 MR. CHIEF JUSTICE BURGER: You may proceed, Mr.
3 Tartar.

4 MR. TARTAR: Mr. Chief Justice and Members of the
5 Supreme Court: All but three minutes of my time -- the first
6 20 minutes have expired and I haven't even gotten to the
7 second point yet.

8 However, I was about to tell you of a case, and I
9 will say this preliminary: the state contends that the pre-
10 liminary hearing is not critical and counsel is not necessary.
11 You will, however, note from my brief that the state always
12 has counsel present at the preliminary hearing. They always
13 have counsel present to represent them and to examine the
14 witness at the preliminary hearing. Now, my clients did not
15 have counsel.

16 Q They always do?

17 A They always do; yes, sir.

18 Q How long has this custom been in effect?

19 A Ever since I can remember, if Your Honor
20 please. Of course, I can't remember back when you were Dist-
21 rict Attorney, but Mr. Bellow informs me that it was during
22 his time, as far as he can remember.

23 I will say this: this case was brought home to me.

24 Q If you will pardon me, I think I established when
25 I was Solicitor that having attorneys present in Birmingham at

1 preliminary trials..

2 A Defense lawyers, Mr. Justice?

3 Q I think --

4 A Defense lawyers or solicitors?

5 Q Prosecuting attorneys.

6 A Prosecuting attorneys, yes. We have two full-
7 time prosecuting attorneys at the preliminary hearing in
8 Birmingham now.

9 As I said, this case was brought home to me -- the
10 importance of it was brought home to me three weeks ago. My
11 clients in this case did not have counsel. Three weeks ago at
12 a preliminary hearing which was held sometime subsequent to the
13 trial I was present, examined the witnesses and we recorded and
14 and transcribed the testimony. Two witnesses appeared against
15 my client in that particular matter. We recorded it. Sub-
16 sequent to that, nine months later when we got to trial of
17 the case one of the witnesses for the state did not appear.
18 He had a record and he did not appear to testify against the
19 defendant.

20 One witness did but he had forgotten what he said
21 at the preliminary hearing, but we had it transcribed and
22 recorded. He got up and committed perjury on the witness
23 stand in an effort to convict the defendants. This is clear;
24 it's a matter of record. But with the transcript of the pre-
25 liminary hearing, my client was found "not guilty."

1 This was only because of the transcript. Without
2 the transcript he would have been in the penitentiary today.
3 There is no doubt and no question about it whatsoever.

4 Three experienced lawyers in the City of
5 Birmingham with about 60 or 70 years total experience between
6 the three of them, testified that in their opinion the pre-
7 liminary hearing was the critical stage in Alabama.

8 The Assistant Attorney General who argued the case
9 before the Court of Appeals at Alabama admitted before the
10 Court of Appeals that the preliminary hearing in the State of
11 Alabama is a critical stage of the proceedings. He's no
12 longer with the Attorney General's office.

13 Q This is not -- at the preliminary hearings with
14 which I am familiar in the jurisdiction where I used to live
15 the -- all the prosecution would do would be to make a prima
16 facie case and the magistrate wouldn't even hear from the
17 defense witnesses. I gather from your statute that yours is
18 quite different; that it imposes the duty upon a magistrate
19 -- Section 138, "to examine all the witnesses having any
20 knowledge of any facts relevant to such investigation, whether
21 such witnesses were summoned in behalf of the state or the
22 defendant."

23 But since you have already told us that at least
24 some of these statutes are dead letters, I wonder what the
25 actual practice is in your district.

1 A The actual practice is to allow the defendant
2 to subpoena witnesses and to put them on for himself and
3 for the state. The state may put on one or two witnesses.
4 They may have a list of witnesses that they have subpoenaed.
5 But they don't put them on, I do, to examine them and to get
6 their statement down on a typewritten record. Most every
7 lawyer that I know of does it. This is true in many many
8 parts of the country that I have been in --

9 Q Even your own witnesses?

10 A Well, I may not put on my own witnesses, no;
11 I probably don't.

12 Q Well, this 138 says it's the duty of the
13 Magistrate to --

14 A Well, he can call them if he wishes to, but I
15 don't call them -- I don't subpoena, unless I have an excellent
16 case, if Your Honor please, I don't subpoena.

17 Q No; it wouldn't be tactically very wise.

18 A It wouldn't be tactically very correct. I don't
19 put on my witnesses, but I do put on their witnesses if they
20 don't.

21 Well, my time is up for the 20 minutes but I haven't
22 gotten to the identification question, but if you can visualize
23 in answer to your question, the courtroom there -- the judge,
24 or the magistrate, attempts when he doesn't have a lawyer to
25 try and convince him that he should waive for the grand jury,

1 and not examine the witnesses. If you can visualize a magis-
2 trate with a prosecutor and the witnesses and a defendant who
3 knows nothing about the law whatsoever. All he can think of
4 is getting out of jail, so he sees if he goes to the grand
5 jury he gets out that much quicker.

6 ORAL ARGUMENT BY DAVID W. CLARK, ASSISTANT
7 ATTORNEY GENERAL OF ALABAMA, ON BEHALF
8 OF THE RESPONDENT

9 MR. CLARK: Mr. Chief Justice and may it please the
10 Court. Only one matter has been discussed so far and that is
11 the question of the preliminary hearings in Alabama. I would
12 like to take issue with myopponent on that.

13 The preliminary hearing in Alabama is one of these
14 things in which an accused may ask for a preliminary hearing.
15 Now, when there is a preliminary hearing the magistrate looks
16 into the matter first, to determine if an offense has been com-
17 mitted and then to the probable cause that the question there
18 committed the offense. And then if that be so, then is it
19 such a matter which is subject to bail.

20 Now, in the largest cities, ^{is} practically the only place
21 the preliminary is used in Alabama. And the reason for that is
22 that these accused want to get out on bail. That's their
23 avenue to get bail in Alabama, is what it amounts to.

24 Q Doesn't anybody get out on bail except in the
25 big cities?

1 A Oh, if they want it they can request it. That's
2 what I say, they may request a preliminary in any part of the
3 state.

4 Q Well, in this case did the defendant ask for a
5 preliminary?

6 A He didask for a preliminary.

7 Q He asked for a preliminary.

8 A I think that is correct, sir. He asked for a
9 preliminary hearing; it was had on October 14 of 1966.

10 Q The record will show that he asked for it?

11 A I think that is correct, sir.

12 Q Well, can't he get bail without having a pre-
13 liminary hearing?

14 A You may; you could file for habeus corpus and
15 they would set bail.

16 Q Well, is it a rule that unless you have a pre-
17 liminary hearing you cannot get bail?

18 A It could be set by the judge or clerks of the
19 courts sometimes in small matters: misdemeanors and so forth.

20 Q Well, what is the rule? You said that the reason
21 they had preliminary hearings was to get bail --

22 A Is to get bail in a more serious offense.

23 Q Why? Why is that so?

24 A That's the only way they can get it.

25 Q Why?

1 A The law sets it out, sir.

2 Q The law says that unless you have a preliminary
3 hearing, no bail?

4 A It sets out the -- Title 15, Section 138 and 39
5 and 40, I think, sets out the ways of having a preliminary
6 hearing to set bail.

7 Q How about 140 on Page 4 of Petitioner's brief
8 is the one that imposes the duty to discharge him on bail.

9 Q I thought that was the case that the Sheriff
10 occasionally set bail. Is that just in minor offense?

11 A Very minor misdemeanor cases.

12 Q Well, what if the -- was it indicated a while
13 ago that a prosecutor could take his case directly to the
14 grand jury rather than have a preliminary hearing?

15 A If the accused does not ask for a preliminary
16 hearing then when the grand jury meets the matter may be
17 presented to the grand jury and an indictment returned and
18 then, of course, you have the arraignment and trial.

19 Q But if the accused says, "I waive a preliminary
20 hearing," is he also waiving bail?

21 A In a sense; yes.

22 Q He is?

23 A Yes, Your Honor.

24 Q Can he secure bail after the indictment by
25 applying to the court? --

1 A Yes, sir. Usually on that when there is an
2 indictment returned the judge sets bail on that.

3 Q At the time of the arraignment?

4 A At the time of the arraignment they are ready
5 to start trial then. The arraignment, sir is --

6 Q Would he plead guilty or not guilty or inter-
7 pose any other defenses in answer to an indictment and then
8 the trial starts two minutes after that in your state?

9 A No, not that quickly, but at that time of
10 arraignment, of course, they could interpose any pleas they
11 want to put in there at the time.

12 Q Mr. Clark, is there some other reason for a
13 preliminary examination other than bail?

14 A Well, naturally, as Mr. Tartar pointed out, to
15 determine if that -- if this particular person who is accused
16 is the one who --

17 Q So there is something more than just bail?

18 A Oh, yes. I wanted to point out that that was
19 one of the things.

20 Q What about the section about reducing all of
21 this to writing?

22 A That is a matter, as Mr. Tartar pointed out
23 that is required in the code and there is a provision that if
24 it's not done the magistrate could be fined. Now, that is
25 sometimes done and sometimes it isn't, I mean as far as the --

1 Q You mean that sometimes he's fined?

2 A No, no, I mean the recording of the --

3 Q Oh, I see.

4 What's the general policy in Birmingham where this
5 was?

6 A I think it is just as Mr. Tartar pointed out.
7 The defense attorneys have it done. I do have a case in the
8 Birmingham area now in which a preliminary was had and was
9 recorded and they use that sometimes to, as Mr. Tartar said,
10 rely on that to impeach a witness.

11 Q But the state didn't provide it?

12 A No.

13 Q Defendant paid for it. The poor defendant
14 couldn't pay for it; do you agree on that?

15 A I don't know his financial status at that time.
16 I think that Mr. Tartar said he was court-appointed, so I
17 assume the man did not have money to pay for it.

18 Now, one of the contentions of Mr. Tartar in his
19 17 contentions he has got in his brief for the reasons he
20 should have an attorney is that this matter could be used at
21 the main trial. The evidence, had it been there. And I
22 would like to call the Court's attention to it that if
23 defendants were not represented by counsel at the preliminary
24 any statements made by them would be inadmissible at the trial.

25 Now, that's Appendix, Page 50 and 69 and the rest of

1 Page 74. That was determined three times in the motion
2 in which Mr. Tartar asked for these matters.

3 Q Give me those pages again.

4 A Appendix Page 50, 69 and then, if Your Honors
5 want to use the big transcript of the record, Page 74.

6 Q Well, that was decided by this court in Pointer
7 against Texas.

8 A Yes, sir. That was one of the contentions,
9 though, that Mr. Tartar pointed out. But what I am saying is
10 that the testimony at the preliminary is only used occasionally
11 to impeach a witness.

12 So, that's really the only purpose.

13 Now, I would like to point out that that would not
14 be in conflict with the Barber versus Page which Mr. Justice
15 Marshall wrote the opinion in that particular case. I think
16 they read some of the evidence from the preliminary into the
17 main trial.

18 I would like to call the Court's attention to
19 Pages 7 and 8 of my brief in which I actually quoted the Court
20 of Appeals there, because of the purpose of the preliminary.
21 I couldn't say it better; I think that covers it.

22 It tells whether an offense has been committed and
23 whether to hold or release the accused and to determine bail
24 in the -- cases. That's the purpose of having the preliminary.

25 I would like now, if the Court has no further

1 questions, to go on this matter of lineup.

2 This case occurred subsequent to the ruling in
3 Stovall versus Dennowich declared that any consultations
4 after, I believe June the 12th of 1967 that the Wade and
5 Gilbert decisions were not applicable as far as requiring an
6 attorney. This happened prior to Wade or Gilbert.

7 Therefore, this would come up before the Court on
8 the question of whether, at this pretrial lineup when the
9 defendant did not have counsel, whether based on the totality
10 of the circumstances the confrontation was such that, so
11 suggestive as to cause misidentification.

12 Now, this gets on the totality of circumstances which
13 to my way of thinking is just: does the evidence support it.
14 Now, reading the case over, the transcript, I notice that the
15 first 123 pages, and I think the Appendix cites those pages.
16 Now, that bill with a motion to suppress any statements made
17 by the defendants or any statements that the detectives who
18 interrogated the defendants would testify to, as well as any
19 identification by Casey Frank Reynolds, the Prosecuting wit-
20 ness in this case.

21 Now, the state confessed the motion as to any
22 confessions or statements made to the detective and any state-
23 ments made by the defendants in this case. There were two
24 defendants tried jointly, incidentally.

25 They confessed this motion so the only thing that the

1 Court overruled was the part about permitting Mr. Reynolds to
2 testify as to the identification.

3 Now, the -- that brings us really to the merits of
4 this case, which is in the record from Pages 143 to 240, in
5 the large record which as I understand, the Court, in addi-
6 tion to the little appendix, will look at.

7 Briefly, this case was one in which a man and his
8 wife had been to Coleman, Alabama on a Sunday -- I believe it
9 was July 24, 1966. They were returning to their home in
10 Bluff Park, which is a suburb of Birmingham. They had a flat
11 tire and the man got out to change the tire. While he was
12 crouched over changing the tire three men came across and
13 fired a shot. The first one hit him in the neck. And then
14 one grabbed his wife and he said that he was about three feet
15 away from the man who grabbed his wife and he saw his face
16 clearly.

17 That was John Henry Coleman. He identified him at
18 the trial.

19 Q What are you arguing now?

20 A On the merits of the case to show the lineup.
21 was all right. I don't know any way to show the lineup was
22 proper except in these ways. I want to show that the identi-
23 fication, included identification was based on something other
24 than viewing the lineup.

25 Therefore, if the Court will indulge me for a minute

1 I will go into this.

2 Now, he stated that about this time another car came
3 by; the lights flashed and these three man ran across the
4 road and this one was about ten feet away from him, facing
5 him. He took the pistol and shot him. He said, "I recognized
6 that man. He shot me," as Otis Stephens. "And I saw his
7 face." That's in the record.

8 Now, Mr. Casey Frank Stephens was in the hospital
9 for about eight or nine days. They took him to the hospital
10 and fortunately his life was saved.

11 Now, on September, I believe, the 29th, the police
12 brought in several suspects. They called Mr. Reynolds to come
13 and look at the lineup. There is a little discussion about
14 whether they told him that these were some of the people who
15 had shot him or not. He said that he doesn't recall them
16 telling him that, but that he assumed that that was the only
17 the purpose would have for calling him. He had done nothing;
18 no violation of the law on his part.

19 So, he went down there. They brought these men in
20 the lineup and I understand the lineup in the Birmingham area
21 is there is a stand about four feet high and the man used a
22 peephole. He was there by himself. Incidentally, there were
23 no other prosecuting witnesses there to compare notes and say
24 "this one is the one," and what not. Casey Frank Reynolds
25 looked. The first man he saw he said, "That's the man who

1 shot me." Identified Otis Stephens.

2 Then they had the other ones line up; there were six
3 of them. From this lineup he picked two of the men who had
4 been in the assault with intent to murder the night of July
5 the 24th.

6 Now, I would like to call the Court's attention to
7 Appendix Pages 88 and 89. There were six men in this lineup.
8 Otis Stephens, if you will notice, was six foot two and
9 weighed 173 pounds. They had three men of approximately
10 the six-foot variety and the same weight and size. Now,

11 Now, Coleman, on the other hand, was a short man
12 five foot four and a half inches tall. They had three men of
13 his approximate size. One was five-foot seven; one was five-
14 feet eight and of course, Coleman.

15 The reason I point out that, gentlemen, so many
16 cases are reversed because you might have something like this:
17 the prosecuting witness would say, "well, he was a bald-headed
18 man," so they bring in three or four and one is bald headed and
19 the other three have a lot of hair, and he says, well, that's
20 the one who did it.

21 What I'm pointing out here is that these were the
22 same size and types of people. Now, there is only one possible
23 flaw and I don't think that's a flaw in it. Coleman, one of
24 the defendants, had on a hat.

25 Now, there was no testimony at the trial on the

1 motion to suppress as to the fact of who caused him to wear
2 this hat; did the police require him to? He wore a hat at the
3 time of the assault, incidentally. Somewhere in the law we
4 have to give a problem common sense. What was his habit of
5 doing; did he wear a hat all the time?

6 Now, or did somebody require him to put it on. Now,
7 he testified on the motion to suppress. He testified again on
8 -- at the principal trial, I believe. Nowhere in there did he
9 say "they forced me to put on a hat." He had able counsel at
10 this point, I brought that out and they didn't bring it up.

11 So, it must be assumed that he wore a hat all the
12 time.

13 Q Where did this lineup take place?

14 A In Birmingham.

15 Q Well, in Birmingham, but where in Birmingham?

16 A In, I believe it was the city jail.

17 Q Inside.

18 A Yes, sir; it was inside.

19 Q Four walls and a roof?

20 A Yes, as I pointed out, there was a little stand
21 about four feet high that they walked across the stage.

22 Q In a room inside?

23 A In a room inside.

24 Q What building did you say?

25 A I think it was the Birmingham Jail.

1 Q You mean in jail?

2 A Yes, Your Honor.

3 Q And does the record show what kind of a hat
4 this was that the man wore?

5 A No, sir; they didn't say whether it was felt,
6 straw or what. They just said, "a hat."

7 Q Did it show it was the same hat that he was
8 wearing at the time of the offense for which he was being
9 charged?

10 A No, sir; never found out that. It just said he
11 had a hat and Mr. Casey Reynolds said that he had the hat down
12 on his face so he couldn't see his face and he asked him to
13 move his hat back and forward, which he did and I think he
14 took off and the identification was made. Mr. Reynolds said
15 he thought that was the man to start with and to make the
16 identification positive he had him remove his hat back so he
17 could see his face.

18 Q Move his hat down?

19 A You see he had it down first hiding most of his
20 face. So they had him push it to the back of his head.

21 Q And at the time of the offense was it testified
22 he had it down or up?

23 A Since you mentioned it, he said he saw his
24 face at the time that Coleman grabbed Mr. Reynolds' wife, who
25 he said he was three feet away from. He said, "I saw his face."

1 So, I assume the hat was up enough so that he could see the
2 man's face.

3 Q From where were these men brought into the
4 lineup room? From where were they brought?

5 A They were from the Birmingham area. I think
6 their addresses are in the record.

7 Q Well, I mean directly -- they came into the
8 lineup in this -- these -- they came into the lineup from
9 where? From outside?

10 A I know that two or three of them were definitely
11 arrested. Let's see, somewhere in the record there is evidence
12 that I believe it was Coleman and Hodges were arrested on
13 escape charges from the city, so they were brought in; they
14 were arrested for that. Whether the other two or three were
15 just people brought in -- I believe Robert Steele was also
16 brought in in custody.

17 Q Well, I'm interested in your theory that this
18 man just had a habit of wearing a hat 24 hours a day: lineup,
19 outside, and I just wondered when they came into the lineup --

20 A He had a hat on.

21 Q And where did he come from at that time? From
22 outside?

23 A He was in jail; inside.

24 Q Your suggestion is he just wears a hat all the
25 time; is it?

1 A Yes, sir; I realize that's unusual, but some
2 people do have peculiar habits of wearing things. And as I
3 point out, nowhere in there does he say, "They made me put a
4 hat on." Now, he does say in the record, he said, "They made
5 me say certain words." He says, "They made me say certain
6 words; they made Otis Stephens say certain words and they made
7 Hodges say certain words;"none of the others."

8 Now, that is at variance with the testimony of Mr.
9 Reynolds, the prosecuting witness. He said that he wanted him
10 to say something and the police would not let any of those
11 people say any words, those people in the lineup so he couldn't
12 identify them by the words "getting into the woods," or any-
13 thing of that nature.

14 Now, I believe Lieutenant Hawk, a detective said that
15 he thought all six of them did, but and then I believe another
16 one -- detective stated that "yes, they did it but it was
17 after Mr. Reynolds had made the identification."

18 Now, we feel that this lineup was fair; that this
19 prosecuting witness made the identification. He saw the people
20 who had shot him or were involved in that that night. Now,
21 when he came to trial --I will point this out, he made his
22 identification and he said "those are the men. Stephens is
23 the man that shot me and Coleman is the man that was three
24 feet away from me and grabbed my wife. I saw both of the
25 faces." So, what I'm pointing out is that the in-court

1
2 identification was not made from what he had seen in the line-
3 up, but rather what he had seen at the time the assault was
4 committed.

5 I feel that on the totality of the circumstances
6 that is the real meat in the coconut, so to speak, is whether
7 or not the identification was based on either some pictures or
8 somebody he saw in the lineup when he comes into court and
9 makes an in-court identification or whether it was something
10 separate and apart from the lineup. We maintain here it was
11 something separate and apart from the lineup.

12 Q What broke up this attempted assault; alleged
13 attempted assault?

14 A As I pointed out, Mr. Justice, there was a car
15 coming onto this dark road and the light flashed on these
16 people and the threemen who were involved in the assault
17 rushed across the road and got in their car and left. And
18 the person who was driving by stopped and picked up this
19 Casey Frank Reynolds and took him to the hospital. He was shot
20 once in the throat and once in the neck. There is a possi-
21 bility he could have bled to death had somebody not stopped.

22 Q Where did this occur, exactly?

23 A On the Green Springs Highway, which is, as I
24 understand, just off of Highway 31 going toward Bluff Park.
25 This is not a well-lighted highway, as your Honor probably
knows, in Jefferson County there.

1 Q In the trial of the case was there cross-
2 examination of the complaining witness as to the source of
3 his identification, whether he recalled the faces from the
4 night of the attack and that typical cross-examination of --

5 A Yes, Your Honor, I think --

6 In other words, the defense attorney had every
7 opportunity to cross-examine. The Court did not cut his
8 cross-examination off.

9 I feel that just about covers the matter. My time
10 is getting short here. If the Court would like to ask me any
11 further questions I would be glad to answer.

12 MR. CHIEF JUSTICE BURGER: I think not, Mr. Clark.

13 MR. CLARK: Thank you very much.

14 MR. CHIEF JUSTICE BURGER: Thank you very much.

15 REBUTTAL ARGUMENT BY CHARLES TARTAR, ESQ.

16 ON BEHALF OF PETITIONERS

17 MR. TARTAR: May it please the Court to answer the
18 Chief Justice's question with regard to cross-examination of
19 the eyewitness. The first time I ever had an opportunity to
20 see the man was on the witness stand. I was not allowed to
21 talk to him at any time before he got on the witness stand, at
22 the direction of the District attorney.

23 Q I didn't quite hear you.

24 A I beg your pardon?

25 I said that was the first opportunity I ever had to

was
1 to see the man, /on the witness stand, or to talk to him in
2 any fashion whatsoever, at the direction of the District
3 Attorney. He would not talk to me under any circumstances.

4 And I tried most vigorously.

5 Q But you did cross-examine him?

6 A I did cross-examine him but what did I cross-
7 examine him with, if Your Honor please. I had no transcript,
8 I had no prior testimony, no statements. Any defense lawyer
9 goes into a criminal courtroom without a prior statement of
10 the witness going to get on the witness stand, in my opinion
11 is negligent and in my judgment, is incompetent to examine a
12 witness on the witness stand.

13 But I could not do it because he did not have --

14 Q Of course many times they have to do it without
15 having a prior statement.

16 A Yes, sir; unfortunately that's true, and many
17 times some people are convicted and sentenced to jail as a
18 result of it.

19 Q Sometimes.

20 A Sometimes; yes, sir.

21 With regard to the totality of the circumstances the
22 lineup being unnecessarily suggestive, let's look at that just
23 a moment about the lineup and whether or not it was unnecessarily
24 suggestive.

25 This is in the record and I hope this Court will take

1 a careful look at the appendix and at the briefs in this par-
2 ticular case. On at least six different occasions prior to
3 the lineup and after viewing mug shots from the Sheriff's
4 office, the victim said, and I quote: "I don't believe I can
5 identify the people." He told the Sheriff's deputies this.

6 Q Where did you say that was?

7 A It's in the appendix, if Your Honor please. I
8 have had it cited numerous times in the general course of my
9 brief.

10 Here is the description that he gave the Sheriff's
11 deputies, not once but several times: "They were all black;
12 they were about the same age and they were about the same
13 height." Well, the only thing they had in common was the fact
14 that they were black, because they were not the same age.
15 One was 18, one was 28, a substantial difference in age. One
16 was six-feet two-inches and the other one was five-feet four
17 inches tall. I suggest that there is a substantial difference
18 between six-two and five-four.

19 Q Did you put your client on the stand?

20 A During the trial of the case? No, sir. The
21 case was lost when the defendant walked into the courtroom so
22 I didn't put him on -- put either one of them on the witness
23 stand.

24 Q Why was it lost when he walked into the court-
25 room?

1 A If Your Honor please, the publicity in this
2 case, the fact that I was unable to examine the eyewitness in
3 the case before getting into the courtroom, without any pre-
4 paration whatsoever. All we could do was cross-examine the
5 eyewitness. And that was about it.

6 We could not prepare any defense and in any way,
7 shape, fashion or form and as you very well know, of course,
8 it was a heinous crime.

9 Q What was the defense; not guilty?

10 A Not guilty. One of the defendants, John Henry
11 Coleman I am confident was not there that night. The other
12 one, Otis Stephens, was, in fact, there that night.

13 Q No alibi defense?

14 A He was with his mother and with his sister.

15 Q Did you put that on?

16 A No, sir. I was going from and this
17 point from the day that I got in on the case. I was bound by
18 the Supreme Court of the United States and I knew that that
19 was my defense, because to put two colored people on in a
20 case like this, a mother and a sister, saying, "Yes, he was
21 at home watching television," in this case would have been, to
22 say the least, "feeble."

23 Had I had a preliminary hearing and had I been at
24 the preliminary hearing I feel confident it would have been
25 substantially different, as it has in many cases.

1 Q Of course, the purpose of a preliminary hearing,
2 to
3 as I understand it, is/ascertain whether or not there is
4 probable cause to think that an offense has been committed and
5 that this is the man who committed it; is that right?

6 A Yes, Your Honor.

7 Q And has this been an advantageous use by
8 defense counsel that sprung up by defense counsel to take
9 advantage of that for their own benefit. It isn't designed,
10 really, for the purpose of later impeachment or discovery or
11 particularly for the purposes of getting a transcript of those
12 witnesses to impeach them. It's purpose simply is just what I
13 stated; is it not?

14 A To determine probable cause.

15 Q That an offense has been committed and that
16 this is the man who has done it.

17 A That is correct. That is the --

18 Q And if so, then he's held for the grand jury
19 and launched or not on bail in the meantime; right?

20 A That is the very purpose of it, if Your Honor
21 please.

22 Q Now, it's the only purpose.

23 A Well, what does probably cause consist of,
24 Your Honor, please. Probable cause in a motion to suppress,
25 search and
dealing with arrest or/seizure is an extremely complicated
problem and I am sure Your Honor would not say that counsel

1 is not necessary in a probable cause situation on a motion
2 to suppress in a confession or in an arrest/^{OR}in a certain
3 procedure, probable cause, many times consists of far more
4 than -- it consists of jurisdictional problems; it consists
5 of venire problems, it consists of confessions, it consists
6 of identification problems, or illegally-obtained evidence;
7 all of these.

8 Q But you can move on all of those things later;
9 can't you? You can move following the preliminary hearing,
10 motions on all of those subjects; can you not?

11 A Yes, sir, but my client remains in jail until
12 we are able to --

13 Q Well, I have not understood your argument to
14 be that if counsel had been there there would have been any
15 possibility in the world that these men would not have been
16 bound over to the grand jury. I understood your argument to
17 be that if counsel had been there he could have arranged for
18 a transcript of the testimony of the victims, the complaining
19 witnesses, to be used later at the trial of these people;
20 isn't that your argument?

21 A That is correct; it could be. But of course,
22 it's also possible I suppose -- and I suppose anything is
23 possible -- that they could have dismissed them. I don't know
24 what this eyewitness would have said in the preliminary hear-
25 ing ten days after they were arrested; that's what I'm saying.

1 I'm saying that six months to nine months later the
2 eyewitness said one thing. We aren't clairvoyant so we can't
3 say what would have happened at the preliminary hearing.

4 Q And you don't know what did happen; do you?

5 A I don't know what did happen at the preliminary
6 hearing. There is no way to know.

7 Q If you prevail here there cannot possibly be
8 a retrial and another conviction, can there? Because we can-
9 not turn back the clock; we cannot unring the bell; we cannot
10 now provide counsel at that preliminary hearing many years
11 ago.

12 A That is correct.

13 Q So these people will have to be discharged.

14 A The same that is true in other cases before thi
15 this Court. There is no other way.

16 Q Well, what do you say should be the result if
17 it were found he was entitled to have a lawyer on the prelimin-
18 ary hearing?

19 A If he was entitled to have a lawyer at the
20 preliminary hearing I assert that they should be turned loose.

21 Q Is that the only alternative that you can
22 suggest?

23 A That's the only alternative I can see, if Your
24 Honor please. There is no way to give us a new and fresh pre-
25 liminary trial. If you could, I really would rather it would

1 be that way. I would give anything in the world if this
2 Court could give us a new, fresh, preliminary hearing.

3 But, of course it cannot do that.

4 Q Well, now, what -- I just suggested that it
5 could not, but why do you think it could not?

6 A Well, the testimony is now that the eyewitness
7 is now committed, you see. He has now been -- well, we all
8 know as practicing lawyers that the District Attorney spends
9 a substantial time with a case like this on an eyewitness.
10 Now, I'm not saying he told him to say this, but the power of
11 suggestion is a magnificent thing and I'm saying that in this
12 particular case this witness has said numerous times that he
13 could not identify this -- these people. That he did not
14 believe he could identify them. He gave a description tot-
15 ally opposite from that of the defendants.

16 Q Did you offer that evidence?

17 A Yes, sir; it's in the record.

18 Q You offered that evidence to show the jury?
19 that he had made such statements?

20 A Yes, we did.

21 Q Was it admitted?

22 A As best I recall it was. I think he denied it.
23 He admitted it at the motion to suppress and denied it at the
24 trial, was my best judgment.

25 But the best example to you with regard to the state

1 believing in the confidence of the eyewitness, in answer to
2 your question, is believing in the confidence of an eye-
3 witness: They took a boy who was out there that night and
4 granted him immunity and put him on the witness stand in order
5 to support the testimony of the eyewitness which says to me
6 that they didn't have the confidence in the eyewitness's
7 testimony, either. But they put him on there and they had him
8 just as much dead to right, so to speak on the identification,
9 as they did the Petitioners.

10 Q And did he identify both of these Petitioners
11 as being his colleagues that night?

12 A He said that both of them were there and John
13 Hollis, another individual who was in the lineup. Otis
14 Stephens testified -- Otis Stephens, one of the defendants,
15 testified at the trial that John Coleman was not there. He
16 testified that Robert Steele, the prosecuting witness, granted
17 immunity, was, in fact there. Those were the four that were
18 there; not John Coleman. John Coleman was not there and Otis
19 Stephens admitted that he was there.

20 So, John Coleman is the innocent party and I
21 appreciate the indulgence of the Court.

22 Q Of course, if the state had taken this case
23 before the grand jury you would have had the benefit of
24 anything before trial, would you?

25 A That's correct, if Your Honor please. They

1 don't do it 95 percent of the time.

2 Q And you don't deny that they have a right to
3 do that if they wish?

4 A I don't deny they have a right to do it and
5 once again I will say they do it in 95 percent of the cases.
6 I assume if it was decided that they were entitled to counsel
7 they could, in fact, reverse and go take all the cases to the
8 grand jury. If they did, then it would shock everyone, in-
9 cluding me.

10 Q Could I ask you one more question: Apart from
11 what you argue might have been done in aid of this man if the
12 preliminary hearing had been held with counsel, can you point
13 to any specific prejudice on the record that resulted from
14 the preliminary hearing that was held?

15 In other words, what I'm asking you: assuming you
16 prevail on your basic point, is there any margin for a harm-
17 less held rule in these cases?

18 A I don't think so, if Your Honor please. There
19 was a question brought up by Mr. Justice Stewart just a
20 moment ago with regard to the fact that Pointer versus Texas
21 pointed out that if a statement was made at the preliminary
22 hearing that it could not be used against him at the trial
23 without a lawyer. But I suggest to you that here is the point
24 that is fair to say: If a defendant without a lawyer makes a
25 statement at the preliminary hearing before the magistrate,

1 granted it's not admissible but what if he says at the pre-
2 liminary hearing: "Well, I was at home with my mother and my
3 sister." And then, okay, that's not admissible. But then,
4 let's say that he makes that statement at the trial of the
5 case and the police take the fruits of that statement that he
6 made at the preliminary hearing; the results of the statement
7 he made at the preliminary hearing and goes out to his mama
8 and his sister and says, "Was he there; what was he doing
9 there and blah, blah" and a full statement. So they have
10 taken the fruits of what they have said at the preliminary
11 hearing and it would be prejudiced.

12 Q Well, your man wasn't called by the state in
13 this preliminary hearing; was he?

14 A As I understand it the magistrate asked him
15 -- asked both of them if they wished to make a statement; asked
16 both of them if they wished to testify.

17 Now, whether or not they realized they did not have
18 to testify and that anything they said as a result of it could
19 be used against them, and so on and so forth; I don't know.

20 Q Did they testify?

21 A I believe that they did.

22 Q What?

23 A I believe that they did. There is not anything in
24 the record to indicate. I wasn't there; there was no record, so I
25 don't know, but they may not have testified; they may have

1 testified; I don't know whether they did or not.

2 Q That was my question: how do you have any idea
3 at all of what did happen at the preliminary hearing?

4 A Just the admission by the state that there was
5 a preliminary hearing; that they were bound over to the grand
6 jury and --

7 Q There was no transcript made.

8 A No transcript made. I don't know what --

9 Q What judge conducted the preliminary?

10 A Judge Robert W. Gwynn. If Your Honor recalls
11 he used to be with Mr. Douglas.

12 Q Could he have been called at your earliest
13 stages and asked to testify as to what had taken place in the
14 preliminary hearing and was any effort made to get his testi-
15 mony?

16 A The Petitioners?

17 Q The judge's testimony about what went on at the
18 preliminary hearing. To reconstruct it.

19 A Here's what happened on that, Mr. Chief Justice.
20 I attempted to subpoena the judge and the record and the three
21 lawyers to prove what happened at the preliminary hearing; the
22 opinion as to the criticalness of the preliminary hearing.
23 Judge Gibson refused to allow me to go into it and I was
24 almost --

25 Q Refused to let you examine the judge?

1 A Refused to let me go into this question of the
2 lawyer appointment -- the critical stage of the --

3 Q Well, did you call on the judge to attempt to
4 prove by him what had been said or --

5 A Yes, and Judge Gibson would not let me go into
6 it. I sent a proffer --

7 Q Is that one of your basis of appeal?

8 A No, that's an evidentiary question and I can't
9 that that question should be properly before this Court
10 as to whether or not it's admissible or not admissible, but
11 he did allow me to proffer what I would have offered if he
12 would have allowed it. That is what happened. I just made a
13 statement in the record that I would have offered the testimony
14 of statistics to show that 95 percent of all criminal cases
15 coming to the preliminary hearing before going to the grand
16 jury, that there was a preliminary hearing held and they were
17 bound over to the grand jury.

18 Q This is not the question that we have been
19 pointing at; at least that I have.

20 The question was: did anyone prevent you from
21 calling the judge who held the preliminary hearing to have that
22 that judge testify in the hearing as to what had taken place?

23 A Yes.

24 Q Just that one thing.

25 A Yes, to answer your question in a simple word;

1 yes.

2 Q Where is that?

3 A They would not let me go into anything --

4 Q Where is that in the record. That you
5 summoned the judge and had him there and offered to prove by
6 him what had happened on the preliminary trial.

7 Q Did you subpoena him?

8 A No, Your Honor, I didn't subpoena him.

9 Q You didn't have him in the courtroom, did you?

10 A No; neither did I have the three lawyers there.

11 Q And in your offer of proof you didn't say you
12 would have proved from the judge anything?

13 A To be honest with you, I don't recall.

14 Q I read that part of the transcript, counsel.
15 You offered to prove by lawyers the importance and the value
16 of the presence of a lawyer at the preliminary hearing and
17 I do not recall that you had anything in your proffer
18 relating to what the judge would say.

19 A I don't recall, if Your Honor please. I
20 remember Judge Gwynn was there earlier that morning when we
21 were in the motion and Judge Gibson informed me in his office
22 he would not let me go into it and would let me make a state-
23 ment the following morning about this. Now, whether or not I
24 did, I -- to say specifically that I did, I cannot recall.
25 I made a long statement in the record of what I had hoped to

1 prove if it had been allowed. But I do not recall specifi-
2 cally. I know that Judge Gwynn was on the same floor where
3 this was held; I know that he was there the morning before;
4 but I do not recall whether or not I actually or specifically
5 made the statement in the record.

6 MR. CHIEF JUSTICE BURGER: If you find anything, in
7 examining this record, anything that shed light on this you
8 are at liberty to call our attention to a specific part of the
9 record in which it appears. And of course, send your friend
10 a copy of whatever you send us.

11 MR. TARTAR: About the judge testifying, Your Honor?

12 MR. CHIEF JUSTICE BURGER: Right.

13 Now, Mr. Tartar, you acted at the appointment of the
14 Court and we thank you for accepting this appointment and
15 for your assistance. Thank you gentlemen. The case is sub-
16 mitted.

17 (Whereupon, at 1:21 o'clock p.m. the argument in
18 the above-entitled matter was concluded)