ORIGINAL

In the

Supreme Court of the United States

STATE OF OHIO,

Petitioner,

--vs--

HERSCHEL ROBERTS,

Respondent.

Number: 78-756

Washington, D. C.
November 26, 1979

Pages 1 thru 47

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IN THE SUPREME COURT OF THE UNITED STATES

STATE OF OHIO,	:	
	:	
Petitioner,	:	
	:	
v.	:	No. 78-756
	:	
HERSCHEL ROBERTS,	:	
	:	
Respondent.	:	
	:	

Monday, November 26, 1979

Washington, D. C.

The above-entitled matter came on for argument at 1:03 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

JOHN E. SHOOP, ESQ., Prosecuting Attorney for the State of Ohio, Lake County Court House, Painesville, Ohio 44077; on behalf of the petitioner.

MARVIN R. PLASCO, Lake County Public Defender, 8430 Mentor Avenue, Mentor, Ohio 44060; on behalf of the respondent.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 78-756, Ohio against Roberts.

Mr. Shoop, I think you may proceed whenever you're ready.

ORAL ARGUMENT OF JOHN E. SHOOP, ESQ.,

ON BEHALF OF THE PETITIONER

MR. SHOOP: Mr. Chief Justice, and may it please the Court:

I am John Shoop, Lake County prosecuting attorney, representing the State of Ohio, petitioner herein.

I would like to take some time, with the Court's indulgence, to explain some of the facts that brought the case before this Court.

In January of 1975, one Herschel Roberts was arrested on the charge of forging a check. At that time he was afforded a preliminary hearing in the Mentor Municipal Court, at which hearing he was present; it was a hearing before a judicial tribunal, a judge; the hearing was recorded; witnesses were called and sworn; the defendant had the opportunity and the use of counsel; counsel was present; and other indicia of reliability were present at this time in that defendant had the opportunity to use the compulsory process of the state to force the attendance of witnesses.

QUESTION: Who called the witness that's in question

here?

MR. SHOOP: All right. At the preliminary hearing the witness was called by the defense counsel, and it was expected then that this witness would corroborate something in light of the defendant's testimony, or anticipated defense.

The case--the preliminary hearing proceeded, and after the calling of this witness and the discovery, then, by the defense counsel, that this witness was testifying adversely to his defendant, the defense counsel, without objection from the state, without objection from the court, began to ask leading and argumentative questions--

QUESTION: But he couldn't have objected, the other side couldn't have objected, could he have? Hadn't Ohio abolished the voucher rule?

MR. SHOOP: Technically, we have abolished the voucher rule. But we do have a provision that provides that in this type of situation, the counsel can ask the court to declare the witness hostile to allow him to cross-examine the witness.

Now, of course, with no objection--

QUESTION: He didn't need to invoke that, then?

MR. SHOOP: He did not require--or ask the court at that time; and that could be because there was no objection from either the court or the state at that point.

Without--

QUESTION: Well, you say there were some questions he wanted to but didn't ask, because of any rule of Ohio law?

MR. SHOOP: No. The question that he could have asked was, that he could have asked the court--

QUESTION: Well, I know, but he didn't. And--but do you think he terminated his examination of the witness he called?

MR. SHOOP: Of his own free will, yes.

QUESTION: But short of asking some questions that he wishes now he had asked?

MR. SHOOP: That's totally within the mind of the attorney. I can't tell you whether he had asked all of the questions. I feel that--

QUESTION: As far as the record shows, he was free to ask any question he wanted to?

MR. SHOOP: And I believe he did. And I feel he explored this witness, Anita Isaacs, as far as he could and wanted to at that point.

The hearing continued, and of course, the defendant--the probable cause was found, and the defendant was bound over to the grand jury. He was subsequently indicted.

Fourteen months later was the trial on the action. Now, this was in March of 1976. All of these delays were caused by either the absence of the defendant himself from the jurisdiction or, one delay was with the approval of the state;

there was one joint request for continuance.

At the trial, the case in chief was presented, and at one point in the hearing, Mrs. Isaacs, the mother of the absent witness, was asked if she knew the whereabouts of her daughter, Anita Isaacs, and her response to that was, "No," she did not.

Now, this was during the case in chief, the state's case in chief. Subsequent to this, the defendant put on his testimony and evidence, and the defense attorney, knowing the plan of the prosecution was to eventually submit evidence of a prior recorded testimony, under oath, of this absent and unavailable witness, requested before Mrs. Isaacs, the mother of the absent witness, could leave the courtroom, requested a voir dire examination for the purposes of discovering whether or not this witness was actually unavailable.

This was the defense counsel at trial.

QUESTION: Well, are you challenging here, Mr. Shoop, the finding--the Supreme Court of Ohio is generally for you in result. But as I read Justice O'Neill's opinion, he found quite clearly that the witness was unavailable. Are you challenging that finding?

MR. SHOOP: Not at all. We do not believe that the question of unavailability is actually present before this Court. We feel that the question of unavailability was not actually raised. It was not presented with our argument, in

our petition. We presumed, in our petition, that the unavailability of the witness has already been determined. It has been determined by the trial court and by the Supreme Court of Ohio.

And there seems to be no question of the unavailability of the witness, and the state's good faith attempts to locate that witness.

QUESTION: On that issue, the Supreme Court of Ohio was unanimous, was it not?

MR. SHOOP: It appears that--yes, even though we had a four to three decision in the Supreme Court of Ohio--

QUESTION: They all agree he was unavailable?

MR. SHOOP: Yes; both the majority and the minority agreed that the witness was unavailable.

QUESTION: Unavailable in the sense, ultimately, that she wasn't there, or unavailable in the traditional sense? How do you read the language of the Court on that?

MR. SHOOP: I read that as unavailable in the sense that there was no way the State could produce this witness attthe trial, in order to present her testimony. And for the purposes of the statute, 2945.49 of the Ohio Revised Code, which permits the use of prior recorded testimony under oath, when, for any reason, the witness is unavailable, the Supreme Court determined then that this fact is established: this witness is unavailable for the purpose of this statute.

QUESTION: Under Ohio law--going back now to the preliminary hearing--under Ohio law is it required that the person have been subjected to cross-examination, or simply that the witness was available for cross-examination by the adverse party?

MR. SHOOP: That's the very essence, I believe, of our argument here before the Court, that the opportunity for cross-examination, inthe proper circumstances, satisfies the confrontation clause of the Sixth Amendment, whether or not actual cross-examination transpires.

QUESTION: Mr. Shoop, may I ask a question on availability?

Do you read the state court's opinion to hold that as a matter of state law, the witness was unavailable and--which is what it seems to say; it relies on the statute.

And then my second question--I put them both to you at the same time--is there also a federal requirement of unavailability, and did the court find that that requirement was met?

MR. SHOOP: I read the Supreme Court's argument, or decision, as that both unavailabilities are satisfied in this case, both for the purposes of any Federal implications, and for the purposes of the State statute.

QUESTION: Do you agree there is a Federal constitutional requirement on availability?

MR. SHOOP: Yes, I do. I believe that is the predicate for the introduction of prior recorded testimony.

QUESTION: You, in effect--you read the Ohio court as, in effect, having decided two questions on availability. Issue one is, that as a matter of the state statute, the witness was unavailable. And two, the a sufficient showing was made to avoid the confrontation clause problem.

MR. SHOOP: Yes, I do.

QUESTION: You really could hardly argue otherwise, could you, in light of page 19 of the petition, the blue volume, where it says, chief justice--the late Chief Justice O'Neill as saying, at the beginning of the paragraph, "In the instant cause the appellee argues that the state failed to show a good-faith effort to produce the witness in person, as required by the rule in Barber.

And of course Barber is a case from this Court.

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

QUESTION: That's right, but if you read the last sentence of the paragraph, the reference is just to state law; that's how he answered the question.

And I think the court may have assumed the two tests were the same. I wonder if you assume they're the same?

MR. SHOOP: I'm assuming that they are, Your Honor.

QUESTION: They are the same? Whatever would satisfy a state requirement on availability automatically satisfies

the Federal requirement?

MR. SHOOP: And in this case, that's what I believe was decided.

Subsequent to the preliminary hearing and eventual trial, the introduction of the testimony was permitted of the unavailable and absent witness. That was over the objection of defense counsel, and defense counsel's objection was to the Sixth Amendment confrontation clause.

There were two appeals, of course, prior to the case coming here, and the first appeal going to the Eleventh District Court of Appeals for the State of Ohio. In that appeal the Court of Appeals decided that a good-faith effort on the part of the state was not shown, and that the defendant was denied his Sixth Amendment right to confrontation.

It is from that decision that we, the state of Ohio, appealed to the Supreme Court of the State of Ohio. And at that point, the Supreme Court of the State of Ohio ruled that the witness was unavailable; we had made every good-faith effort we could make; and decided that question; but held that the Sixth Amendment right of the defendant to confront and cross-examine the witnesses, pursuant to this state statute, was denied to the defendant when actual cross-examination at the preliminary hearing did not take place.

It is from that decision the case was presented

and is here before the Court.

QUESTION: Now let me get that straight. What you just described, is that the holding of the Ohio Supreme Court or of an intermediate court?

MR. SHOOP: That is the holding of the Ohio Supreme Court.

QUESTION: Did the Ohio Supreme Court actually hold that you had made a good-faith effort?

MR. SHOOP: They found that--

QUESTION: Or did they say that due diligence would not have procured the witness? And are those two not different?

MR. SHOOP: I don't think that they are that different, significantly different. I believe that the due diligence argument, or the statement of the court, satisfies the fact that we have done what we could do in good faith to provide for this witness--

QUESTION: Well, it seems to me the Ohio courts put some gloss on the good-faith standard.

MR. SHOOP: I believe it's a matter of semantics, Your Honor. I'm not convinced that that is--that they said otherwise.

QUESTION: Are you relying on the ancient maxim that people aren't required to do what is fruitless and pointless?

MR. SHOOP: That is one, Your Honor, yes. But I also believe that the question of unavailability is not even before this Court. Now, we have mentioned it, and we have talked about it, but the question is not properly presented here.

QUESTION: But Chief Justice O'Neill's opinion states, "Therefore the trial judge could properly hold that the witness was unavailable to testify in person." That ties right in with what Mr. Justice Blackmun was asking you.

And your argument is that in the face of that paragraph, of which I read only the last sentence, there was no need to show any effort; that the record taken as a whole demonstrated that it would have done no good to telephone California or the social worker or anyone else?

MR. SHOOP: That's correct, Your Honor. There is no place for us to go. The question of unavailability, or whether or not a good faith effort has been shown, relies and presumes knowledge of the whereabouts of the unavailable witness.

Now, in every instance of the cases that have been cited, where either the defendant was incarcerated in a Federal penitentiary, was located in an absent state, was out of the country in Sweden; in any of those situations, the critical factor on unavailability, if we're going to argue unavailability, is that knowledge of where that absent witness is, exists.

Absent that knowledge--

QUESTION: What did the prosecution do other than

to serve these subpoenas at the residence of the parents?

MR. SHOOP: In the--

QUESTION: What did you do when the requested telephone calls did not come in?

MR. SHOOP: At that time we were in contact with Mrs. Isaacs. And we knew, even though we have on the form, on some of these subpoenas--it's a stamp that the prosecutor's office applies to the stamp, in order to help us know whether or not our subpoenas are actually being served or not--in this case we knew that the witness was gone and absent. WE had prior contact with Mrs. Isaacs, the mother. And we've already indicated that at page 10 of the Appendix, where Mr. Perez was questioning Mrs. Isaacs on direct examination, and he talked to her about the fact that "I talked to you some five months earlier in November. And at that time you indicated your daughter had been gone and absent for some time." And in fact, we had knowledge of this.

Where to look? We had no knowledge.

QUESTION: Mr. Shoop, is your answer to Justice Blackmun, that because of the prior history, you did nothing more?

MR. SHOOP: There was nothing more for us to do.

QUESTION: You did nothing more than he described in his question?

MR. SHOOP: That is correct.

QUESTION: Yes.

QUESTION: Your answer to both my questions is: "Nothing"?

MR. SHOOP: I--I apparently have forgotten the other question.

QUESTION: I asked, generally, what you did other than serve the subpoenas at the residence of the missing witness' parents.

MR. SHOOP: We did talk with the parents.

QUESTION: And I take it the answer to that is nothing, and I asked you positively what else you did. And I guess the answer to that is nothing, other than talk to the parents, and know she was gone.

MR. SHOOP: Yes; and they did not know where she was.

QUESTION: But you also knew she had been in San FRancisco, some other places, didn't you?

MR. SHOOP: Yes, we knew there had been a contact in San Francisco. That was one month after--one or two months after the original incident, which would have been in April or May of '75. Subsequent to that hearing, or that notice, there was a notice in the summer--

QUESTION: Are you referring to page 11 of the transcript, where the question is: Oh, you talked to your daughter, and is that the last time you talked to her? And

the answer is, no, she called again later in the summer. We don't know where she called from?

MR. SHOOP: Correct, Your Honor. That's what I'm referring to.

And at least in November the state was aware of the fact that this witness was gone and absent. And we had no knowledge of where to go from that point to locate her.

Now, what more the rules would require of us, I cannot imagine.

QUESTION: Well, suppose there hadn't been this opportunity to cross-examine at the preliminary hearing. Suppose she hadn't been a witness there at all. And yet you had a--sufficient for the purpose of the preliminary hearing. Would you have done any more?

It's convenient to have this preliminary hearing transcript available, isn't it?

MR. SHOOP: Oh, it's--yes, Your Honor, it is. It is convenient. If that is the application that is used of this. But in this case the witness was unavailable. And it is not unavailability due to any neglect on the part of the prosecutor, or any hindrance by the prosecutor.

What more we could have done, whether or not this witness was here, if this were a crucial witness, crucial to the facts and to the establishment of the crime, the prosecutor might be left with no alternative but to decide

whether or not to proceed on the case. Because this was not a crucial witness at this point, we were left with whatever means we could have at our disposal to find the witness, once we have some indication of where that witness might be.

The question then presented is, where a witness, called by a criminal defendant at a preliminary hearing, testifies in a manner incriminating the defendant, and was not cross-examined, although there was opportunity to do so, and that witness is later shown to be unavailable to testify at the trial, the same defendant on the same charge, does the confrontation clause of the Sixth Amendment of the constitution of the United States preclude the state's use of an unavailable witness' prior recorded testimony?

The use of prior recorded testimony of a witness who is unavailable for trial is not repugnant to the constitution or the confrontation clause of the Sixth Amendment, when there are certain indicia of reliability. Those indicia of reliability outlined by the various cases that have been cited include a full-fledged judicial hearing with sworn and recorded testimony; the defendant being present; counsel being present; and the opportunity to cross-examine the witness.

We submit that all of the indicia of reliability were present in this case, plus others.

Secondly, the opportunity to cross-examine the

witness is the key to whether the demands of theconfrontation clause are met, not whether actual cross-examination took place. And the Ohio Supreme Court, in its dissent, summarizing, Barber, Green and Pointer, which are United States Supreme Court cases on this, said that the extent of the 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.

Thirdly, the unavailability, the question I believe is not properly before this Court, and the question presented in the petition for certiorari presumes the unavailability, and the respondent did not cross-petition on this issue, which he now attempts to raise.

Further, both the trial court and the Supreme Court of Ohio have determined the witness to be unavailable as a matter of fact, and that determination should not be disturbed.

Finally, where the testimony is taken at a full-fledged judicial hearing, the opportunity to cross-examine satisfies the confrontation clause of the Sixth Amendment, regardless of the use made of that opportunity. A full-fledged judicial hearing existed here in this case, which closely approximates a trial.

Green mentions factors of a full-fledged hearing. And they are, as I mentioned before, the judge hearing the case,

the witnesses under oath, the counsel and defendant present, the judicial record to assure the accuracy of the statement and the recording, the opportunity to cross-examine.

QUESTION: Well, frequently, counsel, at a preliminary hearing, your defense lawyer's best tactic is to keep his mouth shut, because all the prosecution has to produce is a probable cause to bind over.

I take it here the defense lawyer went further and called a witness of his own?

MR. SHOOP: That is correct.

QUESTION: And that is this particular witness.

MR. SHOOP: And that is this particular witness that we are now confronting this Court with.

Furthermore, besides the standards laid out in Green for a full-fledged hearing, this defendant was afforded, in addition, the use of the rules of evidence in the state of Ohio, full use of evidence. The rules of evidence are mandated for preliminary hearings in the state of Ohio. Compulsory process, the full panoply of the criminal rules and the trial procedures are available for the defendant's use.

Now once we've established that the prior recorded testimony was taken at a full-fledged judicial hearing, then we submit that the opportunity to cross-examine satisfies the confrontation clause, regardless of what use was made of that opportunity.

That can be explained by the fact that a witness called on direct knows that they will be subject to cross-examination, and yet whether actual cross-examination takes place is not known until thecompletiongof the direct examination.

Therefore, the motivation to testify truthfully is just as valid before the cross-examination as it could be afterwards.

Secondly, we submit that the confrontation clause is not a right which must be knowingly and voluntarily waived, as certain other Sixth Amendment rights, for example, the right to counsel.

We submit that the confrontation clause, and the opportunity to cross-examine is comparable to the compulsory process clause which was afforded the defendant. And regardless of whether or not the defendant makes use of that compulsory process clause, or waives that right, he does not have to waive, or give a knowing and voluntary waiver, of that right to compulsory process.

We submit that the opportunity to cross-examine falls within that Sixth Amendment right.

There have been some objections throughout the briefs raised to this opportunity alone satisfying the confrontation clause. The Eleventh district Court of Appeals for the State of Ohio stated that confrontation is a trial right; and that is correct. We do not dispute the fact that

the confrontation right is a trial right.

But it is not an absolute right. It is a preferential right, as Mattox so noted. According to Mattox, the law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused.

The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face-to-face, and of subjecting him to cross-examination.

The second argument that has been raised is the difference in structure between the preliminary hearing and the structure of the trial.

In Ohio the structure of the preliminary hearing follows close to the criminal rules, and provides a full panoply of constitutional safeguards. The defendant has the absolute right to be present; the absolute right to counsel; the absolute right to compulsory process; the absolute right to cross-examination; the full use of the rules of evidence. He has--he's entitled to witnesses under oath and a judicial tribunal.

These are absolute rights preserved to a defendant in a preliminary hearing, and they so closely approximate the trial that there is rarely much of a difference in the structure.

Thirdly, there is a strategy argument, where counsel at a preliminary hearing may be--may not use the same strategy as he would at trial. But as an advisory opinion, and I believe a well-reasoned opinion, the Sixth federal Circuit Court of Appeals, in Havey v. Kropp, cited in our brief, states that where a state statute exists which allows use of prior recorded testimony, and counsel has notice of the statute, and the attorney chooses not to use the preliminary hearing--or chooses to use the preliminary hearing as a fishing expedition or to fail to explore the weaknesses in the State's case, does so at his client's risk.

In this case, we do have a state statute in question which was in existence at the time of thepreliminary hearing, and was well known to defense counsel. And that state statute, 2945.49 of the Ohio Revised Code provides that prior recorded testimony under oath can be used at a subsequent hearing when the witness is unavailable.

Finally, the defendant in this case actually did make use of his right to confront the witness here, which establishes compliance with the confrontation clause. There was de facto cross-examination of the witness. The totality of the circumstances under which the testimony is taken, including the leading and argumentative questions afforded the jury at trial, a satisfactory basis for evaluating the truth of the testimony.

Thus we submit that the Supreme Court of Ohio was in error when it held that the prior recorded testimony of an unavailable witness was constitutionally inadmissible. The judgment of that court should be reversed.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Plasco?

ORAL ARGUMENT OF MARVIN R. PLASCO, ESQ.,

ON BEHALF OF THE RESPONDENT.

MR. PLASCO: Mr. Chief Justice, and may it please the Court:

We would wish to expand upon the facts for this Court that petitioner has given to give you some additional information.

In the case at bar, the defendant was arrested--petitioner was arrested on January 7th, 1975. His preliminary hearing was had three days later, January 10, 1975. At that time he had appointed counsel. I don't know if the counsel had seen him prior to the preliminary hearing or not.

His entire defense--this is a forgery case, and also some receiving stolen property, some items, a chalice, some silverware--his entire defense was that his, quote, girlfriend had given him certain items, that she had given him a checkbook written by her father, the complaining witness, and that she gave him permission to use these items.

At the preliminary hearing, which is a probable

cause hearing--and we respectfully differ: It is not a trial, the constitutional rights are different--at the preliminary hearing in this matter, the complaining witness, Mr. Isaacs, Bernard Isaacs, was present , I assume, since I was not the attorney then, because he was to identify the checkbook and to identify the stolen objects, alleged stolen objects.

At that time, the defense counsel saw Anita Isaacs in the hallway. She was not subpoenaed. He called her to the stand. He called her to the stand as his witness, subject to direct examination.

There were three or four leading questions, not objected to by the city prosecutor in that jurisdiction. The witness testified adversely.

The Court of Appeals below stated that you can infer from her actions and her credibility that she was closely linked to the defendant.

QUESTION: That's pretty much of a tactical judgment, isn't it, on the part of a defense lawyer at a preliminary hearing, whether you call any witness or not, and if you call anyone, how much you ask him?

MR. PLASCO: Yes, Mr. Justice Rehnquist, that is correct. Whether or not I would have called this witness or not is really not at issue. He did call this issue on direct. But it certainly was not a cross-examination--

QUESTION: Well, you say it's not cross-examination,

but when he saw she was beginning to crawfish on him, so to speak, he began asking her adverse questions.

MR. PLASCO: Well, he asked her adverse questions right from the start--I shouldn't say adverse; he asked her leading questions right from the start.

QUESTION: Yes, and when the leads weren't followed, he began asking really genuinely hostile questions, the way you would on cross-examination?

MR. PLASCO: I would respectfully disagree. Reading the transcript, I don't think anything was more difficult than it would take somebody to answer in 30 seconds, or so. I don't think it was a trial type of cross-examination.

QUESTION: Well, I don't mean an extended thing. But it was not the kind of questions that you would ask of your own witness whom you were assured was going to answer the questions the way you thought the person was.

MR. PLASCO: I can assume not; that's correct.

But again, I don't believe it was an extensive cross-examination. At any event, the defendant-petitioner was bound over to a grand jury, subsequently indicted. The matter came up for trial. I was appointed his defense counsel approximately in February of '76, a little bit over a year later.

The matter was set for jury trial March of '76--I don't have the date in front of me; March 4th, I think, 1976. And it went to trial.

At the trial, in--after the witness for the state, Mrs. Isaacs, testified, I as defense counsel requested a voir dire of Mrs. Isaacs to determine unavailability. There is nothing in the record to show unavailability up until the point that I as defense counsel requested it.

After Mrs. Isaacs testified, and then--the defendant testified--when they rested, the defendant testified, the State of Ohio as rebuttal brought in the transcript of Anita Isaacs.

The trial court said that--over my objection; Sixth Amendment objections--that she was unavailable, and allowed the transcript in pursuant to 2945.49 of the Ohio Revised Code, prior recorded testimony under oath regarding preliminary hearings.

The defendant was convicted. The matter went to the Court of Appeals, where it was reversed and remanded. The court adopted the Honorable Justice Marshall's opinion in Barber v. Page at length, and said that the prosecuting attorney's office did not make a good faith effort to locate her.

In fact, there were some interesting issues that were not brought out. According to counsel herein, they knew of her unavailability in November of '75. Yet the record--and it's unobjected to, and as a matter of fact, the Supreme Court says it's allowed to issue---

QUESTION: But you didn't--you had a clear holding from the Ohio Court of Appeals that the showing of unavailability was insufficient. And yet you didn't cross-petition fromthe Supreme Court of Ohio's judgment on that.

MR. PLASCO: No, sir, I did not. I had raised the constitutionality of the statute in the Court of Appeals, and when I was successful, I dropped the statute--constitutionality question, and just went upon the issue of Barber v. Page.

QUESTION: So you didn't even argue to the Ohio Court of Appeals on the unavailability question?

MR. PLASCO: Yes, I did, sir.

QUESTION: But you don't--you didn't petition for certiorari here?

MR. PLASCO: That's correct. I did not.

QUESTION: Well, aren't you just defending the judgment?

MR. PLASCO: Yes, but I would--if I had it to do over again, I certainly would raise the issue.

QUESTION: Certainly the Ohio courts all the way along have considered the issue, have they not?

MR. PLASCO: Yes. I have won in two straight courts on this issue. The unavailability issue is our second point which we're going to come to later. We believe that there was not a good faith effort to locate her. Mere absence from the jurisdiction does not make her

unavailable. The Mancusi holding---

QUESTION: What do you have to say about the Ohio Supreme Court's statement in the opinion from the facts which you have recited and which the judge digested, that the trial judge could reasonably infer that Anita had left San Francisco, and that it would have been fruitless for the prosecutor to contact the San Francisco social worker in order to locate her? Therefore, the trial judge could properly hold that the witness was unavailable.

MR. PLASCO: Mr. Chief Justice Burger, I disagree with the late Chief Justice O'Neill in that holding.

QUESTION: Yes, I know you disagree with it. But what more do you have to say about it than that you disagree with it?

MR. PLASCO: The Court of Appeals--the Court of Appeals said there were about five different areas in which this could have--in which they could have done more investigation, or done things in; and they did nothing, the prosecutors' office. In fact, the Court of Appeals' decision , no matter what they said, they did nothing, absolutely nothing.

And they acknowledged that. They could have contacted the social worker. They could have---

QUESTION: Here's--this holding of the Ohio Supreme Court tells us, does it not, the statute is constitutional, in one sense, does it not?

MR. PLASCO: Well, the area--the issue was not

addressed in my brief in the Ohio Supreme Court; it was only addressed in the Court of Appeals. And after being successful, I dropped the issue of 2945.49 being unconstitutional.

I don't think the issue---

QUESTION: Well then are we not confronted with a statute held constitutional by the highest court of the state which had authority to pass on it, and a further factual determination that it would have been fruitless for them to do any of the things which you now complain they did not do?

MR. PLASCO: We are here before the Court with a statute which must be presumed to be constitutional, yes, although I personally have other feelings. This is not an issue is not an issue at hand; I acknowledge that, because I did not raise it.

The factual determination at the Court of Appeals and at the Ohio Supreme Court were different. I will argue in a few minutes--maybe I should argue it now--that regardless of whether she was available or not, because of the indicia of reliability, the Sixth Amendment is such that any recorded testimony under oath should not be admissible.

I don't--but our asecond argument, Barber v. Page, is that they didn't make the good faith effort to locate her. In the--they didn't do anything, actually. And if they claimed they had notice in November of '75 that she was unavailable, when, then, did they issue five subpoenas, the

last of which was in February of '76? There's some confusion there.

QUESTION: Well, perhaps to anticipate the argument that you're now making that they didn't do anything.

MR. PLASCO: Well, the subpoenas indicate, according to the record, that they were served upon her. To me, they had a transcript in hand, and why bother doing anything more, since they had the transcript in hand? And just use the recorded transcript to convict the defendant. I think that was the approach they took.

QUESTION: Do they still have the "syllabus rule" in Ohio?

MR. PLASCO: I'm sorry, sir, syllabus rule?

QUESTION: Yes.

MR. PLASCO: I don't know.

QUESTION: If they do, then the opinion of Chief Justice O'Neill is just a little essay, and the law of the case is in this one paragraph syllabus.

MR. PLASCO: Oh, yes, yes, we would---

QUESTION: You still have that rule?

MR. PLASCO: Yes, I do believe we have it, now that I think about it.

Our main premise is that petitioner failed to show that Anita Isaacs, the witness herein, was unavailable and--

excuse me, strike that. Let me go to the second argument.

The preliminary hearing testimony of Anita Isaacs lacked the indicia of reliability necessary for admission as an exception to the confrontation clause.

To put it on a more national frame, it's our position that where a witness testifies at a preliminary hearing, or any prior recorded matter, be it an examining trial like in Texas, like a magistrate's court in some other jurisdictions, or a preliminary hearing in Ohio, the Sixth Amendment to the U.S. Constitution, the confrontation clause, specifically precludes the use of such recorded testimony, notwithstanding 2945.49, if the witness is not cross-examined, and even if there is cross-examination, if the cross-examination is brief and ineffective, therefore lacking the indicia of reliability.

It's our position, therefore, that even if this Court, this Honorable Court, determines that she was unavailable, since it was direct examination, since it was not cross-examination, since the preliminary hearing lacked the indicia of reliability as brought out in Dutton v. Evans, the preliminary hearings testimony, the recorded testimony, should not have been admitted in the court in the case at bar below.

We cite to the Court a number of cases: the Ohio Supreme Court in the Roberts case below talked about--that

the issues must--at the preliminary hearing--must be similar to the issues at the trial court; they use the words "similar enough."

And we argue that a preliminary hearing is a probable cause hearing. They believe a crime has been committed, and that a defendant has committed it. While a trial is certainly proof beyond a reasonable doubt.

As a trial attorney, the burdens are so odifferent. One is a perfunctory type of matter which lasts only a few minutes. I would respectfully disagree with counsel that the constitutional rights are not the same.

QUESTION: Does this record show how long this preliminary hearing--

MR. PLASCO: Well, I don't really know, timewise, but I would gather it was less than an hour.

QUESTION: Well, that's more than a few minutes, isn't it?

MR. PLASCO: I'm talking about all the witnesses. We are fortunate in my county that they do have witness chairs where teh witnesses take the stand and are asked questions under oath in a more formal standard. In some jurisdictions, such as Cogga County, Ohio, Cleveland area, there's no--the witness are all brought up to the bench, and in the middle of direct examination, the municipal judge, says, bound over, and that's it.

QUESTION: Mr. Plasco?

MR. PLASCO: Yes, sir.

QUESTION: On page 28 of your brief, you have a quotation from Green v. California, an opinion offered for the Court by Mr. Justice White, where you set forth four elements. There is no specific citation to California v. Green, to the--no page citation to it. And the opinion has several concurrences. And I simply have not had time to check it through page by page.

I simply don't find the specific language, one, two three, four, that you set out and underscore in your--although you do say--put an "emphasis supplied." But are you confident that's in the opinion?

MR. PLASCO: Yes, sir.

QUESTION: Okay.

QUESTION: Well, on--if we're talking about pages 24 and 25 of your brief, you say it's from Justice Brennan's dissenting opinion in Green.

QUESTION: I was talking about page 28 of the brief.

QUESTION: Oh, I beg your pardon. I beg your pardon.

QUESTION: Mr. Plasco?

MR. PLASCO: Yes, Your Honor.

QUESTION: I take it that you feel Green was inapplicable here for one reason only, and that is that

there was not the same counsel at the two--

MR. PLASCO: They certainly were not the same counsel. But in Green, if my memory serves me correctly the witness, whose name was Porter, was extensively cross-examined at the preliminary hearing, and actually, in fact, Porter was cross-examined at the trial.

QUESTION: Yes, but your quotation on page 18 doesn't emphasize that at all--or page 28 , it is.

MR. PLASCO: 28?

QUESTION: It goes off on the opportunity aspect.

MR. PLASCO: Yes. The Court in Green--

QUESTION: Who was the defense counsel at the preliminary hearing?

MR. PLASCO: His name was Richard Swain.

QUESTION: Was he from your office?

MR. PLASCO: No, no. He was a then-private attorney.

QUESTION: Was he retained?

MR. PLASCO: I'm sorry, sir.

QUESTION: Was he retained?

MR. PLASCO: He was appointed.

QUESTION: Appointed?

MR. PLASCO: Yes. And then I was subsequently appointed as a private attorney. And since that time I became head of the public defender's office. He is now a judge in the area. And I certainly don't claim that there was any

ineffectual counsel issue here.

(Laughter.)

MR. PLASCO: The answer to the question on Green, Green--

QUESTION: If the first counsel had been someone else in your office, would Green fit this case like a glove?

MR. PLASCO: Not like a glove, sir, because again the indicia of reliability, there was extensive cross-examination of the witness. And there was not extensive cross-examination--in fact, we say there's no cross-examination of Anita Isaacs in the case at bar.

QUESTION: But if your quotation on page 28 is a correct one, there is no reliance there that I see on the extensiveness of the cross-examination.

MR. PLASCO: In that part of it, yes, sir, that's correct. They--the court said--I think it was a chart somewhere in the case where it gave the comparisons on some things. And it talked about the same counsel representing both persons--both defendants at the preliminary hearing and at the trial. And we don't have that here. I was using that for that one purpose only.

QUESTION: You don't think that the court was merely emphasizing, stressing, everything that was present to support its conclusion, and that it would reach the same conclusion whether or not number two were there? You don't think so?

MR. PLASCO: No, I don't. Green argued substantial compliance. But I think Green definitely did not say that just because there's an opportunity to cross-examine, one has cross-examination. There are two separate and distinct animals.

And I think that's--throughout all our history, all the cases that we've brought before this Court, the Reynolds, Mattox, Motes, Pointer--which is a right of counsel case, Barber, Green, Dutton, Mancusi, the facts are such, where there's either a separate trial, and therefore there's cross-examination at an earlier trial, or there's cross-examination at the preliminary hearing.

In the case at bar, we do not have any cross-examination at the preliminary hearing, and therefore, there's no indicia of reliability.

Now, we say that--as counsel said--that confrontation is basically a trial right, as cited in, I believe, Barber v. Page, '68, that confrontation begins at the time of cross-examination. The Roberts decision below, Chief Justice--the late Chief Justice O'Neill stated that--in quoting Widmore on evidence--that confrontation and cross-examination are the same.

We think they can be the same, not always being the same. If counsel does not do an adequate job at a preliminary hearing on cross-examination, there is no indicia of reliability

Therefore, the recorded testimony should not be admissible in the later jury trial before the trial court.

We think the holdings of the different courts are on all fours on these issues.

The Pointer case talks about complete and adequate opportunity to cross-examine. The Barber case, of course, good faith effort. The California case was substantial compliance. In not one of these cases was there a thing where the defense attorney waive cross-examination at a prelim, and then the prior recorded testimony was admissible.

If we go back to history, if we go back to Mattox, Mattox v. U.S., I think 1895, an Indian territory case on a murder matter, there there was a prior trial. The witness--witnesses, two witnesses, died. And the testimony was admitted for the second trial.

The Court said, although the purpose of the confrontation clause is to protect ex parte affidavits or depositions, we allow it in out of necessity and occasion. I would summarize that as an interest-in-justice type of argument.

We would say that where justice would not be met by now allowing it in, the Court would not take that position.

I would differ with counsel in his arguments about Anita Isaacs being a crucial witness. She was a very crucial witness to the case, and therefore the Dutton of, you know, crucial and devastating witness--there were 20 witnesses who

testified in Dutton--is not applicable.

We strongly ask this Court to consider the fact that a preliminary hearing, a probable cause hearing, and a jury trial, are two different, if I may use the term, animals, that one purpose is just, I think as Justice Rehnquist said earlier, is just to determine probable cause. The strategy may be to use minimal cross-examination.

QUESTION: How often is a preliminary hearing waived by the--in your county?

MR. PLASCO: In my office, never. I don't appreciate my staff attorneys waiving the preliminary hearings. But many times most court-appointed attorneys or retained attorneys will waive a preliminary hearing, since it's---

QUESTION: Yes. That was pretty much the practice in Hamilton County when I was there.

MR. PLASCO: A lot of times it'll be done for information. They'll let you talk to the witnesses outside the courtroom that have been subpoenaed for the trial.

QUESTION: Suppose you don't waive, and you go, and the government puts on some--the state puts on some witnesses to show probabl ecause. Do you cross-examine?

MR. PLASCO: Yes, sir, I do.

QUESTION: Always?

MR. PLASCO: I've never waived cross-examination at a preliminary hearing.

QUESTION: You don't, habitually, though, call witnesses of your own, do you?

MR. PLASCO: No. I've never called witnesses of my own, except once in awhile I see a police officer outside--

QUESTION: --that's a probable cause hearing.

MR. PLASCO: Right. Unless I see a police officer outside the courtroom--

QUESTION: It's almost an ex parte--well, it's a onesided proposition, isn't it?

MR. PLASCO: Yes, yes. If I see a police officer--

QUESTION: Did you ever succeed in preventing a binding over because you cross-examined someone?

MR. PLASCO: I'm sorry, sir.

QUESTION: I say, have you ever succeeded in avoiding a binding over by cross-examination at a preliminary hearing?

MR. PLASCO: Yes.

QUESTION: You have?

MR. PLASCO: Yes, I've been lucky a couple of times.

QUESTION: You certainly have been lucky.

MR. PLASCO: It's not the usual rule.

QUESTION: It surely isn't.

MR. PLASCO: Usually it's--

QUESTION: In my state, as long as the witness testifies something that adds up to probable cause, the

magistrate doesn't even weigh credibility.

MR. PLASCO: I had one as an assistant prosecutor many years ago where they pointed out somebody in the back of the room and not the defendant at the trial table. So it can happen.

But as a general rule, it's a perfunctory, pro forma type of matter. So that--but I will call a witness if I see a police officer that the prosecuting attorney has not called, I will assume that he's not called this officer--

QUESTION: Well, why don't you waive? So that--at least you learn what you can learn, is that it?

MR. PLASCO: I learn what I can learn. I use it as a discovery tool, which is the argument I made to the trial court, so I can get some information, since it's just a probable cause hearing.

My third argument, later will be, and I might as well make it now, my third argument is that if the Court adopts the argument of the petitioner, and allows--and states a mere opportunity to cross-examine will be sufficient under the confrontation clause, it will force trial attorneys like myself to ask for continuances so we can investigate prior to having a preliminary hearing, to have lengthy cross-examinations, to bring in our own witnesses, because we want to make sure the record is well-protected.

When the defendant was arrested on the 7th of

January, and trial on the 10th of January, it's highly unlikely that his then appointed counsel even barely got to know him, or see him in the jail.

QUESTION: Why would it require you to bring in your own witnesses?

MR. PLASCO: Well, I might not bring in my own witnesses.

QUESTION: I would think not.

MR. PLASCO: Because then there testimony--well, it depends. If I think there's a witness that might be favorable, and the State has not had a chance to prepare these witnesses for the trial, even though they're state's witnesses, I may call them to the stand and put their testimony under oath, so later on, months later, they cannot take a different approach.

QUESTION: Well, you're talking about a very, very rare type of case where it's not your witness that you're calling--

MR. PLASCO: No, I would never--

QUESTION: --but a state's witness that the state is not calling.

MR. PLASCO: Correct, Mr. Justice--

QUESTION: Why would that be so wrong, anyway, as a matter of tactics?

MR. PLASCO: Because you're putting your own witness

under oath at a prior recorded testimony, and they cannot change--not that we would have them change their testimony; don't get me wrong. I'm certainly not insinuating that. It's just that at that point, we don't really have time to investigate to determine the full matter.

Initially, a lot of cases will look very good to the defense. And then as we get into them more and more, it turns out that may have seven or eight different witnesses that point the guy out as the one at the scene of the crime.

So our second argument was that this would create havoc in the municipal courts. It would require, maybe, half-day, all day preliminary hearings; or if the court only adopted his rule in part, it might force us to waive cross-examination on some cases rather than dare even cross-examine for fear of having the compliance with the Sixth Amendment.

But most likely it would cause extensive prelims. It would cause continuances so we can do investigations. And the municipal courts are not geared for that. Nor would the judges in the municipal court tolerate that.

I think the third argument that we have, which was addressed briefly, was the unavailability. I'm not going to address that. I'm just going to say that under Barber v. Page, it is our believe that in Justice Marshall there was not a good faith effort by the prosecuting attorney to show that this witness was unavailable, and they attempted to locate her.

They had the preliminary hearing transcript, and they used the Mancusi philosophy, "Just because we have a prelim transcript, let's bring it into evidence."

QUESTION: Under your Ohio syllabus rule that Mr. Justice Stewart, I think, referred to, what are we to do with respect to the popinion written by the--on behalf of the court? Just ignore it as though it had never been written?

MR. PLASCO: Well, I believe this Court has the authority to review the matters and make its own determination. It's not bound by the---

QUESTION: What's the status of the statement in the opinion that it would have been a waste of time for the state to try to pursue this witness, to find this witness?

MR. PLASCO: Well, the court below them said otherwise. And so we have two--

QUESTION: Well, the last word we have is from the Supreme Court of Ohio. If that is the last word under the syllabus rule?

MR. PLASCO: I don't know, sir, I--

QUESTION: Or is it just a law review article, like a law review article?

MR. PLASCO: Well, I would give it more weight than a law review article. But I think this Honorable Court, the Court of last resort, has the authority to look into the matter and to make its own determination.

But even if she is unavailable, which we differ on, and we did not cross-petition on it, and I acknowledge that, we're arguing strenuously that the Sixth Amendment still precludes prior recorded testimony where there's no indicia of reliability, hence, no cross-examination, or where cross-examination is ineffectual.

The Ohio Supreme Court, after deciding Roberts, decided State v. Smith, cited in one of the amicus briefs and I think in petitioner's brief. There, they felt in a rape case that the cross-examination was so ineffectual that there was no indiciaof reliability. They didn't use the words, "indicia of reliability," but again, there was nothing there for them to introduce it at trial. Therefore, it would be a Sixth Amendment violation.

We would ask this Honorable Court to affirm the decisions of both the Eleventh appellate district and the Ohio Supreme Court.

QUESTION: Just very briefly. I had the same difficulty Justice Rehnquist did with the quote on page 28 of your brief, and I wonder--you won't be able to take care of it now, but perhaps you could write a letter to the Court and tell us where it came from. I'm quite sure it didn't come from the--

QUESTION: That's exactly what I was going to ask you, too.

MR. PLASCO: I would be happy to.

Again, we would ask this Honorable Court to affirm the decisions of the courts below to find that the witness--even if finding the witness unavailable, the differences between preliminary hearings and trials are so different that without cross-examination there cannot be any indicia of reliability.

And even with cross-examination, there still may not be indicia of reliability. And therefore, there may be a violation of the Sixth Amendment of the U.S. Constitution.

There being no other questions, thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen--I guess you have a couple of minutes, don't you? Excuse me, Mr. Shoop. Yes, you have three minutes.

MR. SHOOP: Thank you, Mr. Justice--Mr. Chief Justice.

REBUTTAL ARGUMENT OF JOHN E. SHOOP, ESQ.,

ON BEHALF OF THE PETITIONER

MR. SHOOP: Mr. Chief Justice, and may it please the Court:

Just a couple of points. Ohio is a syllabus rule state, in case there's any question about that.

A fact in the forgery that defense counsel attempted to--

QUESTION: What do you take it that the opinion

of Chief Justice O'Neill is? Is that the opinion of the Court?

MR. SHOOP: The headnote is--

QUESTION: The headnote, the syllabus.

MR. SHOOP: Correct.

QUESTION: The one paragraph?

MR. SHOOP: That's it.

QUESTION: That's it. That's what my father concluded after 12 years sitting there.

MR. SHOOP: The forgery in this case, it might be critical to listen to the facts of the forgery. This forgery is of a check. There were credit cards involved, but we're not talking about forgery of a credit card, or if the defendant is going to call this absent witness to say that, well, she gave him the checks, or whatever.

The check was not signed prior to the time. There was testimony in the trial transcript--I believe the Court has that transcript--where the clerk at the store the defendant actually signing the check. And it was from that--at that point, then, that the complex where the store existed the--had been alerted to the fact that someone--this defendant had been in a prior store trying to use these credit cards. They were then searching through the mall to attempt to locate this individual.

Five subpoenas were issued to the residence. We

were hoping that if this absent witness return, or come anyplace within the state, it would be back to the parents' home, yes. We did continue to serve subpoenas at the residence. And they were all residence service. There was no personal service that we were able to obtain.

QUESTION: Could you have used this testimony in your case in chief?

MR. SHOOP: Which testimony? About the residence service?

QUESTION: No, no, about the prior--did you use this in your case in chief? I thought you used it in rebuttal, didn't you?

MR. SHOOP: No, we didn't bring this testimony in.

QUESTION: No, the--

MR. SHOOP: The unavailable witness? We used that in rebuttal. It was not used in our case in chief.

QUESTION: Well, could you have? I suppose you--on your presentation, you could.

MR. SHOOP: We probably could have. It would depend on the essence of whether or not the defendant is going to take the stand and say that "She is the cause of this."

Until that point--

QUESTION: It may not have been relevant at all?

MR. SHOOP: It may not have been relevant.

As to the argument of lengthy preliminary hearings,

causing court congestion, we've heard a number of arguments from defense counsel about timely trial. And of course the state of Ohio has rules about time to trial, for speedy trial, and they're statutory. The rules require that a criminal defendant, once he has been arrested, be brought to trial with 270 days. If he's incarcerated on that charge without bond, he must be brought to trial within 90 days.

These stipulations and charges that this would cause court congestion were raised, of course, when those statutes came into effect. To say that to adopt our position would cause lengthy cross-esaminations I feel is unjustified and should not be sustained by this Court.

Thank you.

MR.CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 2:02 o'clock, p.m., the case in the above-entitled matter was submitted.)