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# State v. Roberts: A Persuasive but Unsupported Position

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# NOTE

## *State v. Roberts:* A PERSUASIVE BUT UNSUPPORTED POSITION

THE OHIO SUPREME COURT RECENTLY HELD in *State v. Roberts*[1] that when a witness is unavailable at the trial of a criminal defendant, the state may not introduce the witness' preliminary hearing testimony into evidence unless he had been cross-examined at the preliminary hearing.[2] The court found that the defendant, Roberts, had been denied his right to confront an adverse witness when the trial court admitted the preliminary hearing testimony of a witness who was not present at trial,[3] and held that mere opportunity to cross-examine at a preliminary hearing, unexercised, did not satisfy the demands of the Confrontation Clause of the sixth amendment.[4]

### I. THE DECISION IN *State v. Roberts*

In January, 1975, Herschel Roberts appeared in the Mentor, Ohio municipal court and was charged with several counts of forgery and receiving stolen property. The prosecution alleged that Roberts had stolen and used credit cards belonging to Bernard and Amy Isaacs. At a preliminary hearing, Roberts' defense counsel called Anita Isaacs, the daughter of the alleged victims, as a witness and attempted to elicit testimony that she knew the defendant and had given him permission to use her parents' cards. While Anita admitted that she knew the defendant and occasionally allowed him to use her apartment, she denied giving him permission to use the credit cards. Despite this damaging testimony, defense counsel did not request that she be declared a hostile witness,[5] and therefore did not subject her to cross-examination. At the conclusion of the preliminary hearing, the judge found that probable cause existed and ordered Roberts bound over to the common pleas court. Roberts was subsequently indicted for receiving stolen property, forgery and possession of heroin.

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[1] 55 Ohio St. 2d 191, 378 N.E.2d 492 (1978), *cert. granted*, 99 S. Ct. 1990 (1979).

[2] Although preliminary hearing testimony may be classified as hearsay evidence, the Ohio legislature has provided an exception to the hearsay rule:

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

OHIO REV. CODE ANN. § 2945.49 (Page 1975). *See also* FED. R. EVID. 804(b)(1).

[3] 55 Ohio St. 2d at 197, 378 N.E.2d at 496.

[4] U.S. CONST. amend. VI provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury. . . ; *to be confronted with the witnesses against him;* to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defence." (emphasis added).

[5] A trial judge has discretionary power to declare a witness hostile. *See* State v. Parrott, 27 Ohio St. 2d 205, 211, 272 N.E.2d 112, 116 (1970), *cert. denied*, 405 U.S. 1040 (1972).

At trial,[6] the prosecution was unable to produce Anita Isaacs as a witness. Although the State had issued five subpoenas for Anita to her parents' address, she failed to appear in court on the day of trial. Accordingly, the prosecution moved to have her declared unavailable as a witness and to admit her preliminary hearing testimony into evidence.[7] At a hearing on the motion, Anita's mother was questioned by both the prosecution and defense about her daughter's whereabouts.[8] The trial court was satisfied that Anita was actually unavailable and admitted her preliminary hearing testimony over the objection of defense counsel. At the trial's conclusion, Roberts was convicted on all counts.

Roberts appealed the verdict, and his conviction was reversed. The Lake County Court of Appeals held that the admission of Anita Isaacs' preliminary hearing testimony into evidence had violated Roberts' sixth amendment right to confront adverse witnesses because the State had made insufficient efforts to produce the witness.[9] On appeal by the State, the Ohio Supreme Court affirmed the court of appeals decision on different grounds. The court held that Anita Isaacs was properly classified as an unavailable witness because the State had met its burden of showing a diligent effort to produce her.[10] Nevertheless, the court held that Roberts' sixth amendment rights had been violated because Anita Isaacs had not been actually cross-examined at the preliminary hearing. The majority concluded that the mere opportunity to cross-examine a witness at a preliminary hearing did not satisfy the demands of the sixth amendment where recorded testimony from the hearing was later admitted at trial because of witness unavailability.[11]

In explaining the result, the court noted the inherent differences in defense counsel strategy for cross-examining witnesses at preliminary hearings and at trial.[12] These variances developed to a great extent because different burdens of proof are placed upon the prosecution at each proceeding. At preliminary hearings, the State is required only to show probable cause for the belief that the defendant committed the crime with which he is charged.[13] Because the State often establishes probable cause without difficulty, defense attorneys are often unwilling to engage in extensive cross-examinations when they have

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[6] Roberts' trial did not take place until March, 1976. During the interim, he was compelled to retain new counsel to replace the attorney who had represented him in the preliminary hearing, for his first lawyer was elected to a municipal judgeship. 55 Ohio St. 2d at 192, 378 N.E.2d at 494.

[7] The prosecution based its motion on OHIO REV. CODE ANN. § 2945.49 (Page 1975). *See* note 2 *supra*.

[8] Mrs. Isaacs testified that she had spoken with her daughter in early 1975 after learning that she had applied for welfare in California. During the summer of 1975, Anita had telephoned and indicated that she would be traveling outside of Ohio. Mrs. Isaacs had not heard from her daughter since that time. 55 Ohio St. 2d at 192, 378 N.E.2d at 494.

[9] 55 Ohio St. 2d at 193, 378 N.E.2d at 494. The court of appeals based its decision on Barber v. Page, 390 U.S. 719 (1968).

[10] 55 Ohio St. 2d at 195, 378 N.E.2d at 495-96.

[11] *Id.* at 196, 378 N.E.2d at 496.

[12] *Id.*

[13] *See* OHIO R. CRIM. P. 5(B)(4) ("Upon conclusion of all the evidence . . . the court [at a preliminary hearing] shall do one of the following: (a) Find that there is probable cause to believe the crime alleged or another felony has been committed . . . (b) Find that there is probable cause to believe that a misdemeanor was committed . . .").

little hope of defeating the State's case and, instead, might unnecessarily expose elements of defense strategy to the prosecution in advance of trial.[14] In contrast, at trial the State must establish a defendant's guilt beyond a reasonable doubt.[15] Accordingly, defense attorneys are likely to conduct extensive cross-examinations of adverse witnesses whenever there is any hope of raising reasonable doubt in the minds of the jurors.

Due to these considerations, the Ohio Supreme Court implied that a nonexercise of the right to cross-examine at a preliminary hearing should not be construed as a waiver of that right at trial.[16] The court held that the preliminary hearing testimony of an unavailable witness may be introduced into evidence at trial only if the witness had been cross-examined at the preliminary hearing.[17] An unexercised opportunity to cross-examine, in the court's analysis, simply did not satisfy constitutional guarantees.

## II. Preliminary Hearing Testimony and the Confrontation Clause

The sixth amendment Confrontation Clause guarantees criminal defendants the opportunity to cross-examine adverse witnesses.[18] Secondarily, the amendment affords triers of fact opportunities to evaluate the demeanor of such witnesses.[19] The first major treatment of the sixth amendment's Confrontation Clause was undertaken by the United States Supreme Court in the 1895 decision of *Mattox v. United States*.[20] Application of the Confrontation Clause was considerably broadened in 1965 when the Supreme Court, in *Pointer v. Texas*,[21] held for the first time that its provisions were applicable, through the fourteenth amendment, to state criminal

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[14] *See* California v. Green, 399 U.S. 149, 195 (Brennan, J., dissenting); Virgin Islands v. Aquino, 378 F.2d 540, 549 (3d Cir. 1967) ("The fear of adding to government's case by extensive cross-examination weighs heavily on a defendant's counsel at a preliminary hearing. . ."); *but see* Havey v. Kropp, 458 F.2d 1054 (6th Cir. 1972) (acknowledging the different burdens at each proceeding but holding that no error had occurred because of a statute providing notice to counsel that the preliminary hearing testimony would be admissible at trial). The *Havey* decision was recognized as the prevailing interpretation of the Confrontation Clause in the sixth circuit in Glenn v. Dallman, No. C-1-78-289 (S.D. Ohio, January 19, 1979), where the court was bound to follow the federal court interpretation of the Constitution in *Havey* and thus was forced to reverse its earlier decision which adhered to the Ohio position found in *Roberts*.

[15] *See* Ohio Rev. Code Ann. § 2901.05 (Page Supp. 1978) ("Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt . . .").

[16] 55 Ohio St. 2d at 196, 378 N.E.2d at 496-97; *see* notes 62-66 *infra* and accompanying text.

[17] 55 Ohio St. 2d at 196-97, 378 N.E.2d at 496.

[18] *Id.* at 194, 378 N.E.2d at 495.

[19] The dual purposes of the Confrontation Clause were explained by the United States Supreme Court in Mattox v. United States, 156 U.S. 237 (1895):

> The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face-to-face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

*Id.* at 242-43.

[20] 156 U.S. 237 (1895).

[21] 380 U.S. 400 (1965).

proceedings.[22] In *Pointer*, the Court determined that the petitioner's sixth amendment rights were violated when the preliminary hearing testimony of a key witness, who was unavailable to testify at trial, was admitted into evidence.[23] At the preliminary hearing, Pointer had not been represented by counsel and had made no effort to cross-examine the witness. While the Court did not decide whether the State's failure to provide Pointer with an attorney at the preliminary hearing was violative of the fourteenth amendment,[24] it did find that the absence of counsel at the hearing and the subsequent unavailability of the witness at trial combined to deny Pointer his right to confront an adverse witness.[25] The Court suggested, however, that a different holding would have emerged if Pointer had been represented at his preliminary hearing by an attorney who had been given a "complete and adequate opportunity to cross-examine" the witness.[26]

Three years later, in *Barber v. Page*,[27] the Supreme Court made a second major pronouncement on the admissibility of preliminary hearing testimony and the application of the Confrontation Clause to state criminal proceedings. In *Barber*, as in *Pointer*, a state trial court had admitted into evidence the preliminary hearing testimony of a key witness whom the prosecution had asserted was unavailable to testify at trial.[28] The Court found that the witness was not actually unavailable because the prosecution had failed to make a good faith effort to secure the presence of the adverse witness at trial.[29] This determination led the Court to conclude that the introduction into evidence of the adverse witness' preliminary hearing testimony had deprived Barber of his sixth amendment right of confrontation.[30]

Unlike the petitioner in *Pointer*, Barber had been represented by counsel at his preliminary hearing.[31] This led the State to contend that Barber had waived his right to confront by failing to engage in cross-examination at his

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[22] The Court previously held that the Confrontation Clause was not applicable to the states. *See* West v. Louisiana, 194 U.S. 258 (1904); *see generally* Graham, *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99 (1972).

[23] 380 U.S. at 406. The alleged robbery victim, Kenneth Phillips, had moved out of the state by the time of trial. He had testified against the petitioner at the preliminary hearing. *Id.* at 401.

[24] The Court in *Pointer* specifically reserved the issue of whether a failure to provide counsel at preliminary hearings is violative of a defendant's constitutional rights. *Id.* at 403. That question was ultimately resolved in Coleman v. Alabama, 399 U.S. 1 (1970), where the Court found that a preliminary hearing was a "critical stage" in the state's criminal procedure and required that an indigent be represented by counsel at that point.

[25] 380 U.S. at 406.

[26] "The case before us would be quite a different one had Phillips' statement been taken at a full-fledged hearing at which petitioner had been represented by counsel who had been given a complete and adequate *opportunity* to cross-examine." *Id.* (emphasis added).

[27] 390 U.S. 719 (1968).

[28] The prosecution had not attempted to compel attendance of the witness at trial because he was incarcerated outside the trial court's jurisdiction in the federal prison of an adjacent state. *Id.* at 723.

[29] The Court stated that increased cooperation between state and federal authorities and the enactment in forty-nine states of the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings made it likely that the witness could have been produced at trial. *Id.* at 723 n.4.

[30] *Id.* at 724-25. Justice Harlan, however, thought the constitutional infirmity in Barber's conviction was a due process violation. *Id.* at 726.

[31] *Id.* at 720.

preliminary hearing.[32] The Court, however, dismissed this argument as "untenable," and found that "no intelligent relinquishment or abandonment of a known right or privilege" had been made, particularly in light of the defendant's legitimate expectation that the State would make a good faith effort to produce the adverse witness at trial.[33] Supplementing its response to the State's waiver argument, the Court noted that the sixth amendment would not have been satisfied even if the adverse witness had actually been cross-examined at the preliminary hearing.[34] As in *Pointer*, the Court concluded with the dictum that an opportunity to cross-examine at a preliminary hearing might meet the requirements of the Confrontation Clause if actual unavailability could be established at trial.[35]

Thus, while in *Pointer* the Supreme Court broadly considered the relationship between an inadequate opportunity to confront an adverse witness at a preliminary hearing and that witness' subsequent unavailability at trial as combining to create a sixth amendment violation, the Court in *Barber* more narrowly focused on the factual issue of witness unavailability itself as it related to a defendant's sixth amendment rights. *Barber*, in effect, stressed the proposition that the right to confront adverse witnesses was, in the first instance, a trial right, and that only a showing of necessity, as when a witness is unavailable, would induce the Court to consider whether the right might have been satisfied in another proceeding, such as a preliminary hearing. *Barber* also found untenable the proffered argument that failure to cross-examine at a preliminary hearing constitutes a waiver of the right of confrontation.

Neither the *Barber* nor *Pointer* Courts considered the specific circumstances in which the right to confront witnesses might be satisfied at a proceeding other than a trial. These important considerations were subsequently addressed by the Supreme Court in *California v. Green*.[36] A prosecution witness, Porter, had testified favorably for the prosecution at a preliminary hearing. At trial, he became forgetful and evasive. To prove its case, the prosecution was permitted to introduce portions from the transcript of Porter's preliminary hearing testimony into evidence under section 1235 of the California Evidence Code, which permitted the use of preliminary hearing testimony at trial whenever that testimony was inconsistent with a witness' trial testimony.[37] Although the defendant's attorney conducted a

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[32] *Id.* at 725.

[33] *Id.* The *Barber* Court adopted the standard used in Johnson v. Zerbst, 304 U.S. 458 (1938), for determining whether a waiver of rights was effected. The *Zerbst* decision held that a waiver was "an intentional relinquishment or abandonment of a known right or privilege" and further stated that the determination of whether a waiver existed would depend on the particular facts surrounding the case. 304 U.S. at 464.

[34] 390 U.S. at 725.

[35] *Id.* at 725-26 (dictum).

[36] 399 U.S. 149 (1970).

[37] Section 1235 provides in part: "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with section 770." CAL. EVID. CODE § 1235 (1966). Section 770 provides:

> Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless:

cross-examination of Porter's "refreshed" memory, the defendant was convicted. Ultimately the California Supreme Court analyzed section 1235 and held that the statute was unconstitutional because it violated a defendant's right to confront adverse witnesses, even if the witness had been subjected to cross-examination by defense counsel at the preliminary hearing.[38]

The Supreme Court reversed the California decision and held, on alternative grounds, that section 1235 of the California Evidence Code had not deprived Green of his right to confront adverse witnesses.[39] The Court first observed that the operative circumstances which gave rise to the introduction of preliminary hearing testimony at trial under the evidentiary rule negated any assertion that the defendant had been denied his right to confront an adverse witness. By its terms, section 1235 permitted use of a witness' preliminary hearing testimony at trial only where the witness actually appeared at trial and gave inconsistent testimony.[40] Therefore, a defendant would necessarily receive the opportunity at trial to confront the witness as to the preliminary hearing testimony, and the trier of fact would be afforded an opportunity to evaluate the demeanor of the witness as he attempted to explain the inconsistent testimony. Thus, the Court concluded that the strict requirements of the Confrontation Clause had been fully satisfied at Green's trial.[41]

On its second line of reasoning, the Court further noted that its decision would have been the same even if Porter had been actually unavailable at trial.[42] In so reasoning, the Court relied upon the important dicta in *Pointer* and *Barber*,[43] and set standards for evaluating compliance with the Confrontation Clause where a necessity prevents the State from affording a criminal defendant an opportunity at trial to cross-examine an adverse witness. In determining that preliminary hearing testimony might constitutionally be admitted into evidence when a defendant was unable to exercise his right to cross-examine the adverse witness at trial, the Court observed that the determinative issue was whether the preliminary hearing testimony "had . . . been given under circumstances closely approximating those that surround the typical trial."[44] The Court explained that such circumstances included: (1) whether testimony was given under oath; (2) whether the defendant was represented by counsel; (3) whether the defendant had an opportunity to cross-examine the witness at the time the testimony was taken; and (4) whether the proceedings were conducted before a judicial tribunal equipped to provide a record of the hearing.[45]

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(a) the witness was so examined while testifying as to give him an opportunity to explain or deny the statement;
or
(b) the witness has not been excused from giving further testimony in the action.

*Id.* § 770.

[38] People v. Green, 70 Cal. 2d 654, 451 P.2d 442 (1969).

[39] 399 U.S. at 153.

[40] *See* note 37 *supra*.

[41] 399 U.S. at 164.

[42] *Id.* at 165.

[43] *See* notes 26 and 35 *supra* and accompanying text.

[44] 399 U.S. at 165.

[45] *Id.*

These standards may be viewed by state courts as unpersuasive, both because they were formulated to resolve an issue which was not necessary to the *Green* decision, and because the standards do not completely fit the facts in *Green*. For example, not only was there an *opportunity* to cross-examine the adverse witness at the preliminary hearing, Green's counsel actually did cross-examine him.[46] Nevertheless, *Green* represents the most extensive pronouncement by the Supreme Court in this area of the law, and it clearly indicates a preference by the Court to admit preliminary hearing testimony in evidence at trial where the testimony has been received under circumstances promoting its claim to reliability and protecting defendant's right to confront the merits of the testimony.[47]

## III. *Roberts* — A Problematic Majority Opinion

The Ohio Supreme Court in *Roberts* affirmed the decision of the Lake County Court of Appeals reversing Roberts' conviction, but on different grounds.[48] While the court of appeals centered its decision on a perceived failure by the State to meet the "witness unavailability" standard of *Barber*,[49] the Ohio Supreme Court instead found that the State had met its burden of establishing unavailability. Nevertheless, it held that Roberts had been denied his right to confront an adverse witness, since Anita Isaacs, the unavailable witness whose written testimony had been admitted into evidence at trial, had not been actually cross-examined at the preliminary hearing where her testimony had been taken.[50]

Chief Justice O'Neill began his majority opinion[51] in *Roberts* by recognizing that the requirements of the sixth amendment's Confrontation Clause have been applicable in state criminal proceedings since *Pointer v. Texas*.[52] The court then noted that the primary purpose of the Clause has been to guarantee an accused the right to cross-examine adverse witnesses.[53] Most importantly, the court articulated a two-pronged test for determining whether prior recorded testimony of a witness can be introduced at trial without defeating the primary purpose of the Confrontation Clause. According to the court, prior recorded testimony may be introduced only if (1) the testimony was taken "in judicial proceeding concerning substantially the same issues" and (2) the witness was subject to cross-examination by the defendant in the initial proceeding.[54]

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[46] *Id.* at 151.

[47] *Id.* at 165.

[48] 55 Ohio St. 2d at 196, 378 N.E.2d at 496; *see* notes 9-10 *supra* and accompanying text.

[49] 55 Ohio St. 2d at 193, 378 N.E.2d at 494.

[50] *Id.*

[51] Chief Justice O'Neill drafted the majority opinion and was joined by Justices William B. Brown, Paul W. Brown, and Sweeney. Justice Celebreeze issued a dissenting opinion joined by Justices Herbert and Lochner.

[52] 380 U.S. 400 (1965).

[53] 55 Ohio St. 2d at 194, 378 N.E.2d at 495. The court also indicated that the Confrontation Clause has a secondary purpose. It affords the trier of fact an opportunity to observe witness demeanor. *Id.*

[54] *Id.* at 194, 378 N.E.2d at 496. The court based its test on Mattox v. United States, 156 U.S. 237 (1895), and on 5 J. Wigmore, Evidence § 1397 (Chadbourne rev. 1974). The court's reliance on these authorities is arguably misplaced. The *Mattox* Court did not consider whether "identity of

When this test was applied to the case at bar, the court observed that, while the basic factual issue as to whether the defendant had in fact stolen the credit cards had been the same at trial and at the preliminary hearing, the *ultimate* factual issues were not identical.[55] The court noted that the ultimate factual issue at the preliminary hearing was "whether there was probable cause to believe that a crime had been committed and that the defendant had committed it."[56] On the other hand, the ultimate issue at trial was proof beyond a reasonable doubt that the defendant had committed each element of the crime.[57]

Under this reasoning, the court could have concluded that preliminary hearing testimony may never be used at trial without violating the Confrontation Clause because the ultimate factual issues are never the same at both proceedings. However, this general prohibition against use of prior testimony was not adopted. Instead, the majority correlated the distinction between the ultimate factual issues at trials and preliminary hearings to the second requirement of its test for admissibility, *i.e.*, that the testimony be given by a witness who was subject to cross-examination by the defendant.[58] As previously noted, the court observed that this difference in ultimate factual issues restricted the scope of cross-examination by prudent defense attorneys at preliminary hearings.[59] It stated that, because of the lower burden of proof imposed on the prosecution at a preliminary hearing, cautious defense attorneys were not likely to undertake extensive cross-examinations and risk exposure of major weaknesses in their defenses, particularly in light of the unlikelihood of defeating the prosecution at early stages of criminal proceedings.[60] By thus correlating the differences between the ultimate factual issues at a preliminary hearing and at trial with the concomitant restriction imposed on the prudent defense attorney's cross-examination of adverse witnesses at preliminary hearings, the court concluded that "where a witness, who testified against the defendant at preliminary hearing and was not cross-examined is later unavailable to testify at trial, the Sixth Amendment precludes the State's use of the witness' recorded testimony, notwithstanding R.C. 2945.49."[61]

The Ohio Supreme Court relied on *Barber*, which it said "requires this result."[62] In explaining this reliance, however, the *Roberts* court referred only to the decision's secondary holding: that a criminal defendant does not waive his right to cross-examine adverse witnesses at trial by failing to cross-examine

issues" is a focal concern for the sixth amendment. Moreover, the Wigmore section contains a discussion of the attributes of cross-examination which permit exceptions to the hearsay rule, rather than to the Confrontation Clause. In California v. Green, 399 U.S. 149 (1970), the Court stressed that, while there was overlap between the common law hearsay rules and the requirements of the Confrontation Clause, neither was to be viewed as a codification of the other.

[55] 55 Ohio St. 2d at 195, 378 N.E.2d at 496.

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *See* notes 12-15 *supra* and accompanying text.

[60] 55 Ohio St. 2d at 196, 378 N.E.2d at 496.

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

[62] *Id.*

them at the preliminary hearing.[63] The court's reliance on this aspect of *Barber* seems inapposite. The opinion does not indicate any assertion by the State that Roberts has waived his Confrontation Clause rights by failing to cross-examine Anita Isaacs at the preliminary hearing. It is clear that the issue in *Roberts* involved solely the issue of compliance with the sixth amendment's requirements by the State, and not the issue of respondent's waiver of any constitutional rights.

The court's arguably erroneous reliance on *Barber* may have resulted from a misapprehension of the major issues which traditionally appear in cases involving conflicts between the use of preliminary hearing testimony at trial and the Confrontation Clause. The Supreme Court has promulgated an exception to strict compliance with the requirements of the Confrontation Clause when guarantees for the reliability of non-trial testimonial evidence are present.[64] *Barber*, however, involved a collateral situation because the Court found that no necessity existed under the facts to warrant an exception from strict compliance with the Confrontation Clause.[65]

Thus, *Barber* is of little relevance to the Ohio Supreme Court's decision in *Roberts*, for in *Roberts* there was a need to develop an exception to strict compliance with the Confrontation Clause because the court found that Anita Isaacs was *unavailable* for trial. In holding that Robert's sixth amendment rights had been violated, the court relied on the *result* in *Barber, i.e.*, reversal of a state conviction premised on a failure to strictly comply with the Confrontation Clause, together with the *Barber* Court's discussion of the minor issue of waiver of Confrontation Clause rights. Had the Ohio Supreme Court correctly understood the issues involved when use of preliminary hearing testimony conflicts with the Confrontation Clause, it would have determined that the discussion of waiver in *Barber* was irrelevant to the ultimate decision in *Roberts*. As noted in Justice Celebreeze's dissenting opinion, *Barber* suggests that a contrary result should have been reached when deciding *Roberts* under the federal Constitution.[66]

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[63] The major holding of Barber v. Page, 390 U.S. 719 (1968), is that the preliminary hearing testimony of a witness cannot be admitted at trial unless the State makes a good faith effort to produce the witness and the witness is actually unavailable. *See* note 30 *supra* and accompanying text.

[64] *See* notes 44-45 *supra* and accompanying text.

[65] The state in *Barber* was attempting to invoke a traditionally recognized exception to the Confrontation Clause which permits the introduction of the testimony of a witness who was subject to cross-examination at a prior judicial proceeding but was unavailable to testify at a second proceeding. 390 U.S. at 722. The *Barber* court held that the state could not invoke this exception because under the facts of the case, the witness could *not* be considered unavailable. The holding did not involve the use of preliminary hearing testimony where a witness was legitimately unavailable.

[66] 55 Ohio St. 2d at 198, 378 N.E.2d at 497 (Celebreeze, J., dissenting). The Ohio Supreme Court's misapplication of the *Barber* case becomes even more apparent when the post-*Roberts* decision of State v. Smith, 58 Ohio St. 2d 344, 390 N.E.2d 778 (1979) is examined. In *Smith*, preliminary hearing testimony was excluded notwithstanding a cursory cross-examination of the witness at that proceeding, with the court holding that when a witness is unavailable at trial, preliminary hearing testimony is admissible only if defense counsel had engaged in a "meaningful cross examination" at the first proceeding. *Id.* at 347, 390 N.E.2d at 780. The major distinction between the *Roberts* and *Smith* cases is that in *Roberts*, the conviction was reversed *despite* a finding that the State has met its burden of proving the unavailability of the witness, as is required in *Barber*. In *Smith*, the "Roberts rule" was used in conjunction with a finding that the State had

Following its consideration of *Barber*, the *Roberts* majority attempted to distinguish *California v. Green*.[67] It recognized that much of the Supreme Court's reasoning in *Green* was dictum and that the facts did not fully coincide with the standards enunciated therein. Due to these facts, the *Roberts* majority concluded that *Green* "goes no further than to suggest that cross-examination actually conducted may afford adequate confrontation for purposes of a later trial."[68] The Ohio court's analysis of *Green* may be an overly restrictive interpretation of the import of that decision. In *Green*, the Supreme Court attempted to establish standards for evaluating compliance with the sixth amendment in situations where the prosecution is unable to afford a criminal defendant the opportunity to confront an adverse witness at trial. Even though the *Green* standards were enunciated in dictum, they are the only Supreme Court guidelines presently available to state courts for determining if criminal proceedings comply with the Confrontation Clause.[69]

When reviewing the *Roberts* opinion, a conscientious Ohio prosecutor might well voice a serious criticism of its result, a criticism which is equally applicable to the Supreme Court opinions in *Pointer*, *Barber*, and, to an extent, *Green*. While these decisions inform a prosecutor of several circumstances where use of preliminary hearing testimony at trial violates the Confrontation Clause, none of the decisions provides concise guidelines for avoiding sixth amendment problems. In other words, what is missing from *Roberts*, *Pointer*, *Barber* and *Green* is a clear delineation of sixth amendment requirements for use of a transcript of the preliminary hearing testimony of an unavailable witness at trial.[70]

## IV. An Alternative Rationale for *Roberts*

While the result in *Roberts* seems out of line with recent Supreme Court decisions on Confrontation Clause requirements and, further, shares with these decisions the shortcoming of failing to provide adequate guidance to

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*failed* to establish the witness' unavailability at trial. *Id.* at 349, 390 N.E.2d at 781. In other words, the holding in *Smith* could have easily been supported by the finding that the State failed to meet the burden imposed on it in *Barber*.

[67] 399 U.S. 149 (1970); *see* notes 36-45 *supra* and accompanying text.

[68] 55 Ohio St. 2d at 199, 378 N.E.2d at 497; *see generally* Graham, *The Rights of Confrontation and Rules of Evidence: Sir Walter Raleigh Rides Again*, 9 Alaska L.J. 3 (1971), in which the author lists a series of positions which may find support in *Green*. One such position is that a witness must be actually cross-examined at a preliminary hearing before this testimony will be admissible in a trial in which the declarant is legitimately unavailable. But the author notes: "The opinion is unclear on this point. At one place it speaks of 'opportunity to cross-examine' and at others the Court is at pains to point out that cross-examination was conducted without any apparent limitations." *Id.* at 21 n.89.

[69] The *Roberts* court's refusal to recognize and adhere to the standards set forth in *Green* is probably best explainable as self-serving. The majority's only concession to *Green* appears to be its self-imposed limitation on its holding, 55 Ohio St. 2d at 198-99, 378 N.E.2d at 497, leaving unanswered the question of whether *actual* cross-examination at a preliminary hearing will, under proper circumstances, satisfy the Confrontation Clause.

[70] Perhaps it is unfair to group the *Green* decision with the others, because it certainly reflects an effort by the United States Supreme Court to lay down such standards. However, as has been previously noted, *see* notes 46-47 *supra* and accompanying text, *Green* is not a strong precedent in this regard because of its susceptibility to charges that it represents mere dictum and because it is easily distinguishable on its facts from other potential fact patterns more closely concerned with developing exceptions to strict compliance with traditional Confrontation Clause requirements.

prosecutors, both of these problems would have been alleviated if the Ohio Supreme Court had adopted alternate reasoning. The majority opinion in *Roberts* persuasively exposed significant differences between preliminary hearings and trials which affect the decision of defense counsel to cross-examine at the earlier hearing. However, a close analysis of the Supreme Court decisions may have prevented the majority in *Roberts* from relying upon this observation to find a violation of the sixth amendment of the United States Constitution.[71]

In finding that either actual cross-examination at a preliminary hearing or cross-examination at trial would satisfy the sixth amendment in Ohio criminal proceedings, the majority in *Roberts* could have construed Article I, Section 10 of the Ohio Constitution to require this result.[72] Article I, Section 10 contains the Ohio counterpart to the Confrontation Clause of the sixth amendment to the United States Constitution. While requiring that criminal defendants "meet witnesses face to face," Article I, Section 10 does provide that deposition testimony of an absent witness may be used against an accused at trial if the accused had the means and opportunity to be present with counsel at the taking of the deposition and to examine the witness "face to face as fully and in the same manner as if in court. . . ."[73] Article I, Section 10 does not, however, expressly authorize the use at trial of preliminary hearing testimony from unavailable witnesses, although the legislature has attempted to provide for the introduction of such testimony in section 2945.49 of the Revised Code.[74] While the question has been addressed by a court of appeals,[75] the issue of a constitutional conflict between Ohio Revised Code section 2945.49 and Article I, Section 10 would be one of first impression in the Ohio Supreme Court. In light of the concerns expressed by the court in *Roberts*, there would seem to be no reason why its result could not have rested upon a liberal interpretation of Article I, Section 10, simply giving due process rights to a criminal defendant in addition to those established by the United States Constitution.

Further, by resting its decision on an interpretation of Article I, Section 10, rather than on the Confrontation Clause, the court could have drawn to the attention of the state prosecutors the use of criminal depositions, expressly authorized by Article I, Section 10, and currently provided for in Rule 15 of

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[71] *See* text accompanying notes 64-66 *supra*.

[72] OHIO CONST. art. I, § 10 provides:

> In any trial, in any court the party accused shall be allowed to appear and defend in person with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; *to meet the witnesses face to face* . . . ; but *provision may be made by law for the taking of the deposition* by the accused or by the state, *to be used* for or *against the accused, of any witness whose attendance cannot be had at trial*, always securing to the accused means and the *opportunity to be present* in person and *with counsel* at the taking of such deposition, *and to examine the witness face to face as fully and in the same manner as if in court* . . ."

(emphasis added).

[73] *Id.*

[74] *See* note 2 *supra*.

[75] *See* Mitchell v. State, 40 Ohio App. 367, 178 N.E. 325 (1931) (statute authorizing use of preliminary hearing testimony of an unavailable witness held constitutional under Article I, § 10 of the Ohio Constitution).

the Ohio Rules of Criminal Procedure.[76] While resort to taking criminal depositions may not always be as convenient or as feasible as the recordation of witness testimony at preliminary hearings, it may present a viable method of avoiding the ultimate result in *Roberts* in many cases where the prosecutor has cause to believe that an important witness may not be available at trial.

By interpreting Article I, Section 10 of the Ohio Constitution as prohibiting the Legislature from enacting such legislation as Ohio Revised Code section 2545.49, the court in *Roberts* could have embraced the reasoning of Justice Brennan in his *Green* dissent[77] and further pointed Ohio prosecutors in a different direction with respect to coping with the problem of unavailable witnesses at trial.

## V. Conclusion

The United States Supreme Court has granted certiorari to consider the constitutional validity of the decision in *State v. Roberts*.[78] It would appear that the time has come for a decisive opinion which will resolve the conflict between the use of preliminary hearing testimony at trial and the Confrontation Clause and which will allow the use of such testimony of unavailable witnesses at trial when the defendant received adequate counsel at the preliminary hearing. However, in light of the foregoing analysis of the *Roberts* decision, it appears likely that the United States Supreme Court will vacate the judgment of the Ohio Supreme Court in *Roberts*, as it did with the California Supreme Court's decision in *Green*, and remand the case for further proceedings. Perhaps at that point the Ohio Supreme Court will attempt to again reverse the trial court's judgment, utilizing the approach suggested within this note.

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[76] A part or all of a deposition may be used if the witness is dead, out-of-state, unable to attend due to sickness or infirmity, or if the party offering the deposition is unable to procure attendance of the witness by issuing a subpoena. Ohio R. Crim. P. 15(F); *see* State v. Court of Common Pleas, 9 Ohio St. 2d 159, 224 N.E.2d 906 (1967) (statute authorizing the taking of depositions in criminal cases held constitutional).

[77] 399 U.S. at 189 (Brennan, J., dissenting).

[78] 99 S. Ct. 1990 (1979).