The Burger Court Opinion Writing Database

Ohio v. Roberts

448 U.S. 56 (1980)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 4, 1980

RE: 78-756 - Ohio v. Roberts

Dear Harry:

I would join your initial circulation but in view of your memo dated May 21, I will await your revised draft.

Regards,

WEB

Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 12, 1980

RE: 78-756 - Ohio v. Roberts

Dear Harry:

I join.

Regards,

WEB

Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 15, 1980

RE: No. 78-756 Ohio v. Roberts

Dear Harry:

I'll be circulating a dissent in the above in due course. I'll try not to take too long but I do have several matters in the fire.

Sincerely,

Bill

Mr. Justice Blackmun

cc: The Conference

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brenn

Circulated: JUN 17 1980

Recirculated: _____

No. 78-756 - Ohio v. Herschel Roberts

MR. JUSTICE BRENNAN, dissenting.

The Court concludes that because Anita Isaacs' testimony at respondent's preliminary hearing was subjected to the equivalent of significant cross-examination, such hearsay evidence bore sufficient "indicia of reliability" to permit its introduction at respondent's trial without offending the Confrontation Clause of the Sixth Amendment. As the Court recognizes, however, the Constitution imposes the threshold requirement that the prosecution must demonstrate the unavailability of the witness whose pre-recorded testimony it wishes to use against the defendant. Because I cannot agree that the State has met its burden of establishing this predicate, I dissent. [1]

"There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's

To: The Chief Justice
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Brennan

1st PRINTED DRAFT

Circulated: _____

Recirculated: JUN 17 198

SUPREME COURT OF THE UNITED STATES

No. 78-756

State of Ohio, Petitioner,
v.
Herschel Roberts.

On Writ of Certiorari to the Supreme Court of Ohio.

[June —, 1980]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL and MR. JUSTICE STEVENS join, dissenting.

The Court concludes that because Anita Isaacs' testimony at respondent's preliminary hearing was subjected to the equivalent of significant cross-examination, such hearsay evidence bore sufficient "indicia of reliability" to permit its introduction at respondent's trial without offending the Confrontation Clause of the Sixth Amendment. As the Court recognizes, however, the Constitution imposes the threshold requirement that the prosecution must demonstrate the unavailability of the witness whose prerecorded testimony it wishes to use against the defendant. Because I cannot agree that the State has met its burden of establishing this predicate, I dissent.[1]

"There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's consti-

[1] Because I am convinced that the State failed to lay a proper foundation for the admission of Anita Isaacs' preliminary hearing testimony, I have no occasion to consider whether that testimony had in fact been subjected to full and effective adverse questioning and whether, even conceding the adequacy of the prior cross-examination, the significant differences in the nature and objectives of the preliminary hearing and the trial preclude substituting confrontation at the former proceeding for the constitutional requirement of confrontation at the latter. See *California v. Green*, 399 U. S. 149, 195–203 (1970) (BRENNAN, J., dissenting).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 13, 1980

Re: 78-756 - Ohio v. Roberts

Dear Harry:

I am glad to join your opinion for the Court.

Sincerely yours,

P.S.

Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 15, 1980

Re: 78-756 - Ohio v. Roberts

Dear Harry:

Although I have already joined your proposed opinion for the Court, I would have no objection whatever to modification along the lines suggested by Lewis.

Sincerely yours,

P.S.

Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 17, 1980

Re: No. 78-756, Ohio v. Roberts

Dear Harry,

I can gladly go along with your opinion as recirculated on June 16.

Sincerely yours,

P.S.

Mr. Justice Blackmun

Copy to Mr. Justice Rehnquist

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 17, 1980

Re: 78-756 - Ohio v. Roberts

Dear Harry,

Please join me in your current circulation.

Sincerely yours,

Mr. Justice Blackmun

Copies to the Conference

cmc

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 15, 1980

Re: No. 78-756 - Ohio v. Roberts

Dear Harry:

I await the dissent.

Sincerely,

T.M.

Mr. Justice Blackmun

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 17, 1980

Re: No. 78-756 - Ohio v. Roberts

Dear Bill:

Please join me in your dissent.

Sincerely,

T.M.

T.M.

Mr. Justice Brennan

cc: The Conference

HAB

May 12, 1980

Re: No. 78-756 - Ohio v. Roberts

Dear Potter:

Whenever I work on an Ohio case, I feel somewhat uneasy about that strange syllabus rule. If you find anything in this proposed opinion that seems out of line with that rule, please let me know.

Sincerely,

HAB

Mr. Justice Stewart

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: MAY 12 1980

Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78–756

State of Ohio, Petitioner, *v.* Herschel Roberts. | On Writ of Certiorari to the Supreme Court of Ohio.

[May —, 1980]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents issues concerning the constitutional propriety of the introduction in evidence of the preliminary hearing testimony of a witness not produced at the defendant's subsequent state criminal trial.

I

Local police arrested respondent, Herschel Roberts, on January 7, 1975, in Lake County, Ohio. Roberts was charged with forgery of a check in the name of Bernard Isaacs, and with possession of stolen credit cards belonging to Isaacs and his wife Amy.

A preliminary hearing was held in municipal court on January 10. The prosecution called several witnesses, including Mr. Isaacs. Respondent's appointed counsel had seen the Isaacs' daughter, Anita, in the courthouse hallway, and called her as the defense's only witness. Anita Isaacs testified that she knew respondent, and that she had permitted him to use her apartment for several days while she was away. Defense counsel questioned Anita at some length and attempted to elicit from her an admission that she had given respondent checks and the credit cards without informing him that she did not have permission to use them. Anita, however, denied this. Respondent's attorney did not ask to have the witness declared hostile and did not request permission to place her

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 16, 1980

Re: No. 78-756 - Ohio v. Roberts

Dear Lewis:

Thank you for your letter of May 15. I took the word "effective" from Mancusi v. Stubbs, 408 U.S. 204 (1972). There the Court upheld admission of prior-trial testimony, observing that the defendant, at the earlier proceeding, "was represented by counsel who could and did effectively cross-examine prosecution witnesses." Id., at 213-214. Although it may be possible to read Mancusi to support the view you advance, I thought the thrust of that opinion could fairly be said to support the proposition that cross-examination might sometimes be sufficiently ineffective to bar later admission of transcribed testimony. See id., at 213 ("Before it can be said that [the defendant's] constitutional right to confront witnesses was not infringed . . ., the adequacy of [the witness'] examination at the first trial must be taken into consideration."); id., at 214-215 (discussing "effectiveness," "efficacy," and "adequa[cy]" of earlier cross-examination). Analysis perhaps is further complicated by the holding in Coleman v. Alabama, 399 U.S. 1 (1970), that a defendant is entitled to the assistance of counsel at a preliminary hearing. If so, and if his lawyer ineffectively cross-examines a witness, is exclusion of the witness' testimony a proper remedy? Cf. Pointer v. Texas, 380 U.S. 400 (1965) (exclusion proper if counsel denied altogether, even though lay co-defendant cross-examined witness at preliminary hearing).

Given these considerations, plus counsels' failure to focus on them, and the rejection by some lower courts of the theory you advocate, I felt it better not to decide whether the Confrontation Clause is satisfied regardless of the nature of the prior cross-examination. I thought I reserved this issue in the sentence you quote in your letter, and I certainly did not mean to imply anything to the contrary to the lower courts.

These comments are not intended in any way to express disagreement with the "test" you set forth in your letter. Indeed, I think there is much to be said for the

at even the unexercised option to cross-examine is ent. I had concluded, however, that this is not oper case in which to go beyond the facts and to in- into the propriety of either of these rules. As I out on page 3, the Court has been particularly care- to follow the common-law method in hearsay/confronta- cases. In this case, I did not see the need to take ore sweeping approach than that outlined. Indeed, I w the principal contribution of the opinion as focusing e lines of battle for future confrontation cases involv- g prior testimony.

Of course, if you and three others want the more far-reaching approach, I shall be glad to counsider revision.

Sincerely,

Harry

Mr. Justice Powell

cc: The Conference

HAB

May 19, 1980

Re: No. 78-756 - Ohio v. Roberts

Dear Potter:

Our discussion by telephone the other day about the correct title of Members of the Supreme Court of Ohio sent me to the books. The fly-leaf on a recent volume of Ohio State Reports referred to them as "Justices." Section 2503.01 of Ohio Rev. Code Ann. (1954) speaks "of a chief justice and six judges." This, however, was amended by Amended Substitute House Bill No. 18 to refer to "a chief justice and six justices." That Bill was approved November 18, 1971, to take effect July 1, 1972.

Other States are doing the same thing. My own State did it some time ago, and I still have trouble remembering which is correct.

Sincerely,

HAB

Mr. Justice Stewart

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 21, 1980

MEMORANDUM TO THE CONFERENCE

Re: No. 78-756 - Ohio v. Roberts

In view of the position Lewis has taken in this case, and Potter's acquiescence in it, and with the presumed consent of Bill Rehnquist, who has already joined me, and one other, I am willing to attempt a modification of my proposed opinion to accommodate Lewis. I suspect it is better not to have the Court completely fractionated. I shall get a draft to you as soon as possible.

HAB.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 12, 1980

Re: No. 78-756 - Ohio v. Roberts

Dear Lewis:

In an effort to accommodate your concerns as set forth in your letter of May 15, I enclose a proposed revision of certain pages of my circulation of May 12.

This material would replace pages 13-21 inclusive (except for the carry-over part of n. 10 on p. 13, which, of course, would remain, and except for old n. 14 which now becomes n. 11). The first 12 pages of my circulation would be retained, and pages 22-25 would also be retained but would follow the revised material. In other words, I am making no changes in Parts I, II, and IV (except as to footnote numbers) or in that portion of Part III which appeared on pages 10-12. Old pages 14-17 inclusive are eliminated.

Would you please let me know whether this revision meets your concern. If it does, then I gather, from their letters, that the Chief, Potter, and Bill Rehnquist would go along. If this is not acceptable, then perhaps I should consider adhering to my original writing with which the Chief, Potter, and Bill Rehnquist have shown an inclination to join.

Sincerely,

Harry

Mr. Justice Powell

cc: The Chief Justice
Mr. Justice Stewart
Mr. Justice Rehnquist

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: _____

Recirculated: JUN 16 1980

New text pages 13-16 replace previous text pp. 13-21

Changes also pp. 11, 14, 16-17, 19-20

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78–756

State of Ohio, Petitioner, *v.* Herschel Roberts. | On Writ of Certiorari to the Supreme Court of Ohio.

[May —, 1980]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case presents issues concerning the constitutional propriety of the introduction in evidence of the preliminary hearing testimony of a witness not produced at the defendant's subsequent state criminal trial.

I

Local police arrested respondent, Herschel Roberts, on January 7, 1975, in Lake County, Ohio. Roberts was charged with forgery of a check in the name of Bernard Isaacs, and with possession of stolen credit cards belonging to Isaacs and his wife Amy.

A preliminary hearing was held in municipal court on January 10. The prosecution called several witnesses, including Mr. Isaacs. Respondent's appointed counsel had seen the Isaacs' daughter, Anita, in the courthouse hallway, and called her as the defense's only witness. Anita Isaacs testified that she knew respondent, and that she had permitted him to use her apartment for several days while she was away. Defense counsel questioned Anita at some length and attempted to elicit from her an admission that she had given respondent checks and the credit cards without informing him that she did not have permission to use them. Anita, however, denied this. Respondent's attorney did not ask to have the witness declared hostile and did not request permission to place her

HAB

June 17, 1980

Re: No. 78-756 - Ohio v. Roberts

Dear Potter and Bill:

The enclosed revision is what Lewis has agreed to and, I must assume, is what the Chief has agreed to with his joinder of June 12. Although each of you joined the original draft, perhaps you will let me know whether you can go along with this one.

Sincerely,

HAB

Mr. Justice Stewart
Mr. Justice Rehnquist

cc: The Chief Justice

HAB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 20, 1980

MEMORANDUM TO THE CONFERENCE

Re: Holds for No. 78-756 - Ohio v. Roberts

No. 79-921, Ohio v. Smith, is the only hold. It is a rape case. At the preliminary hearing, the alleged victim identified respondent as the person who raped her. On cross-examination, defense counsel asked 11 questions, including what time the attack occurred, whether anyone else was there, whether the victim screamed, where and how far from her apartment the victim was when she first saw her attacker, and whether she had ever seen him before. At trial, the prosecutor stated that he had unsuccessfully subpoenaed the victim, that he had had "police officers . . . and other individuals looking for her," and that their efforts indicated that she did not live at her prior address or at the address she had given during the grand jury proceeding. The preliminary hearing testimony was admitted and respondent was convicted. The Ohio Court of Appeals affirmed.

Over the dissenting votes of those who dissented in Roberts, the Ohio Supreme Court reversed. It first characterized counsel's questioning as not "meaningful" and as "of no more value than no cross-examination." It consequently held the transcript inadmissible since "the Roberts' rule [as articulated by the Ohio Supreme Court] includes preclusion of an unavailable witness' testimony at the preliminary hearing where the record shows that the witness was cross-examined only briefly and ineffectively." The court held, in the alternative, that "[t]he state failed to prove that the prosecuting witness was unavailable and could not be produced at trial by diligent effort; thus, the state did not lay a proper foundation for using her preliminary hearing testimony pursuant to R.C. 2945.49." It reasoned that "[t]he evidence produced by the state must be based on the personal knowledge of the witnesses rather than upon hearsay not under oath."

Although there is room for disagreement, I shall vote to GVR. On the "indicia of reliability" issue, Roberts should provide some guidance. While Roberts leaves open the

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 15, 1980

78-756 Ohio v. Roberts

Dear Harry:

Although I am impressed by the thoroughness of your opinion, I am concerned - if I understand it correctly - by the standard you appear to approve: whether, in addition to the opportunity to cross examine, it must have been "effective" or the de facto equivalent of cross examination.

You note that Green may be read as requiring only that the defendant had "every opportunity to cross examine". Pp. 12-13. You go on to point out, correctly, that in Green the defense counsel in fact had cross examined at the preliminary hearing. Then, your draft states:

> "Nor need we decide whether de minimus cross examination, or ineffective questioning by counsel, is sufficient". P. 13.

The opinion then reviews in detail the questioning in this case and concludes that it was "effective".

I agree that there was more than de minimus cross examination, and yet I doubt that many experienced defense counsel would consider the examination to have been as full or as challenging as could have been expected at the subsequent jury trial. There were, in sum total, only about seven pages of examination of Anita and a good deal of this was singularly inept. It did not strike me as challenging both the memory and veracity of the witness, which is commonplace in cross examination in a case of this kind. I think I would have some difficulty concluding it was effective or a "de facto" cross examination. P. 20.

But apart from the facts of this particular case, I am reluctant to give the impression that we think the

[redacted]ard should be whether or not the prior examination was [redacted]amount to "effective cross examination". This, I am [redacted]id, will be the view taken by lower courts of our opinion [redacted]its present form. If so viewed, trial courts in cases of [redacted]is kind would be required to make a judgment as to whether [redacted]here had been an examination of the absent witness that is [redacted]airly comparable in effectiveness to what might have [redacted]ccurred at trial. I should think this likely to create a good deal of uncertainty as well as the probability of an uneven application of the standard. I am reminded, here, of the "thicket" we are in with respect to the "ineffective assistance of counsel" standard.

I would prefer to hold that the Confrontation Clause is satisfied whenever defense counsel had an unrestricted opportunity to examine the witness in any way he chose, and in fact availed himself of that opportunity to some extent. This would give clear guidance to courts and counsel, and would make it unnecessary to make fact-specific estimates in each case as to how well a defendant's lawyer had performed his duty.

Nor do I think this view would dilute the purpose of the Confrontation Clause. This merely requires at most that there be a full opportunity at some point in the judicial process for cross examination, and that counsel recognized the opportunity either by putting the witness on the stand himself or by electing to examine a witness called by the state. We need not decide in this case whether opportunity alone would be sufficient.

No doubt you have thought about this far more carefully than I have. Perhaps my tentative view will change upon further reflection and enlightenment. But at the moment, I would have considerable difficulty going along with what I believe will be understood as clearly implicit in the Court's holding under your opinion.

Sincerely,

Mr. Justice Blackmun

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 21, 1980

79-756 Ohio v. Roberts

Dear Harry:

Thank you for your full response to my letter.

Although I quite understand your position, I do read the cases - especially Green - somewhat differently, and I would prefer not to encourage District Courts to engage in the task of determining whether cross examination in fact had been "effective".

Accordingly, I will try to write a brief opinion concurring in the judgment. I will recognize that you leave the question I address open. I will say, however, that I view it as unnecessary to consider the sensitive factual issue whether the interrogation in this case was effective.

Sincerely,

Lewis

Mr. Justice Blackmun

lfp/ss

cc: The Conference

June 12, 1980

78-756 Ohio v. Roberts

Dear Harry:

Thank you for undertaking the unwelcome task of revising a portion of your opinion, and for now giving me an opportunity to take a look at the revision.

In your note 12, you would hold that except in extraordinary cases "no inquiry into 'effectiveness' of counsel's cross examination is required." This meets my primary concern.

You also expressly leave open whether the mere opportunity to cross examine, or de minimis questioning, is enough to satisfy the Confrontation Clause. I am inclined to agree that this would be sufficient. I also agree, however, that we need not reach this question in this case.

I will be happy to join your opinion with these proposed changes.

Sincerely,

Mr. Justice Blackmun

cc: The Chief Justice
Mr. Justice Stewart
Mr. Justice Rehnquist

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 18, 1980

78-756 Ohio v. Roberts

Dear Harry:

Please join me.

Sincerely,

Lewis

Mr. Justice Blackmun

lfp/ss

cc: The Conference

HAB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

November 27, 1979

MEMORANDUM TO THE CONFERENCE

Re: No. 78-756 - Ohio v. Roberts

Attached is a copy of a memorandum which Michael E. Gehringer, Assistant Librarian for Research Services, sent to John Stevens and me yesterday about our questioning of respondent as to the citation and underscoring of the quotation in his brief on page 28.

Sincerely,

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 13, 1980

Re: No. 78-756 State of Ohio v. Roberts

Dear Harry:

Please join me.

Sincerely,

Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 22, 1980

Re: No. 78-756 Ohio v. Roberts

Dear Harry:

As you "presumed" in your memo of May 21, 1980, to the Conference, I would not have any objection to holding that the opportunity for cross-examination of testimony given under oath in a preliminary hearing constitutes sufficient indicia of reliability to warrant admission of the evidence when the declarant is unavailable. I would note, however, that I think that the statement of applicable principles in Part II of your opinion is excellent, and I would not want to focus on the opportunity for cross-examination in a manner suggesting that such an opportunity is in all cases a necessary ingredient of the requisite "reliability". As your analysis of the principles presently suggests, other indicia of reliability may be present which would support the admission of the evidence. With that caveat, I have no objection to revisions of Part III along the lines Lewis suggested.

Sincerely,

Mr. Justice Blackmun

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 17, 1980

Re: No. 78-756 Ohio v. Roberts

Dear Harry:

Your present circulation in Ohio v. Roberts is entirely agreeable to me.

Sincerely,

Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 15, 1980

Re: 78-756 - Ohio v. Roberts

Dear Harry:

Because I have some doubt on the question whether the State made an adequate demonstration that Anita Isaacs was not available to testify, I shall await Bill Brennan's dissent.

Respectfully,

JPS

Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 17, 1980

Re: 78-756 - Ohio v. Roberts

Dear Bill:

Please join me.

Respectfully,

John

Mr. Justice Brennan

Copies to the Conference