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Ronald K. Olson

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But the *Gibbons* decision brings in focus once again the rule that in custody proceedings paramount concern should always be: *What is in the best interests of the child.*

William D. Nay

EVIDENCE—A New Restriction On An Exception To The Hearsay Rule

In *Barber* v. *Page*[1] testimony which incriminated the petitioner, Barber, was given at a preliminary hearing by a co-defendant, Woods. When the petitioner was brought to trial, the transcript made at the preliminary hearing was offered in evidence rather than the testimony of Woods himself who was in a federal penitentiary in Texas. The admission of the transcript by the trial court was objected to by the defendant as a violation of his right to confrontation guaranteed by the sixth amendment to the United States Constitution.[2] The objection was overruled; petitioner was convicted in the trial court, and on appeal his conviction was affirmed.[3] The United States Supreme Court reversed and held that a witness is not "unavailable" for the purpose of allowing the admission into evidence the transcript of his testimony, ". . . unless the prosecutorial authorities have made a good faith effort to obtain his presence at trial."[4]

Testimony given at a former proceeding and later offered at a trial in transcribed form as an evidentiary substitute for the actual presence of that witness has been most frequently characterized, ". . . as an exception to the hearsay

child rather than awarding custody to the mother simply because she was the mother.

[1] 390 U.S. 719 (1968).
[2] U.S. CONST. amend. VI.
[3] Barber v. State, 388 P.2d 320 (Okla. Crim. 1963).
[4] Barber v. Page, 390 U.S. 719, 725 (1968).

prohibition. . . ."[5] This exception is a product of necessity and is allowed only upon a sufficient showing of the unavailability of the witness.[6] The obvious unavailability of a deceased witness has caused the Supreme Court to recognize the admissibility of dying declarations[7] and testimony from a former trial given by a witness who died prior to the second trial.[8] Unavailability has also been recognized as having been established when the accused has procured the absence of the witness.[9] However, in *Motes v. United States* the court held that where unavailability was occasioned by the negligence of the prosecutor, in that the witness who was in the courthouse within an hour of the time he was to testify simply disappeared, the testimony transcribed at a preliminary hearing was not admissible since it was "not within any of the recognized exceptions to the general rule prescribed in the Constitution."[10]

In *Pointer v. Texas*[11] the state introduced into evidence the transcript of testimony which had been given at a preliminary hearing. This was necessitated by the fact that Phillips, the key witness, had moved to California and ". . . did not intend to return to Texas. . . ."[12] Unavailability was therefore the basis upon which the state sought to achieve admission under the exception to the hearsay rule. This was consistent with the generally accepted doctrine that unavailability is sufficiently shown by proving that the witness is

[5] McCORMICK, EVIDENCE § 230 (1954).
[6] *Id.* § 231.
[7] Mattox v. United States, 146 U.S. 140 (1892). *See also* Carver v. United States, 164 U.S. 694 (1897). In *Carver* the Court points out that although dying declarations clearly are admissible as exceptions to the hearsay rule, they may also be impeached.
[8] Mattox v. United States, 156 U.S. 237 (1895).
[9] Reynolds v. United States, 98 U.S. 145 (1878).
[10] 178 U.S. 458, 474 (1900).
[11] 380 U.S. 400 (1965).
[12] *Id.* at 401.

"out of the jurisdiction."[13] Although the *Pointer* holding denied the use of the transcript the ruling was based on the absence of a cross-examination of the witness and arguably lack of counsel at the preliminary hearing, and not on the unavailability of the witness at the trial. Indeed, the Court strongly implied that it would not raise any barrier to hearsay evidence of this type absent any denial of the rights of the accused.[14]

In applying ". . . the confrontation guarantee of the Sixth Amendment . . ."[15] to the states, the Court citing from *Malloy v. Hogan*[16] held that the federal standard for confrontation would be applied to the states.[17] This new "doctrine of uncertain reach"[18] must, therefore, be evaluated in terms of its impact on existing standards in the individual jurisdictions.

Oklahoma's requirements concerning unavailability as a requisite to the admission of former testimony was first set forth in *Jeffries v. State*.[19] To qualify as an exception to the hearsay rule, the absent witness whose testimony is at issue must be dead, insane, sick, out of the state, or it must be shown that ". . . their whereabouts cannot with due diligence

[13] 5 WIGMORE, EVIDENCE §1404 (3d ed. 1940). In §1404 (b) Wigmore notes, "To persuade the witness' voluntary attendance" is a meritorious endeavor but contends "it is unnecessary to prescribe this as a general rule." *See also,* MCCORMICK, EVIDENCE §234 (1954).

[14] Pointer v. Texas, 380 U.S. 400, 407 (1965).

[15] *Id.* at 406.

[16] 378 U.S. 1 (1964).

[17] Pointer v. Texas, 380 U.S. 400, 406 (1965).

[18] 75 YALE L.J. 1434 (1966). This note suggests that the confrontation requirement be interpreted as a "canon of prosecutorial behavior." *Id.* at 1439. *See also* 19 U. MIAMI L. REV. 500 (1965).

[19] 13 Okla. Crim. 146, 162 P. 1137 (1917); *accord,* Fitzsimmons v. State, 14 Okla. Crim. 80, 166 P. 453 (1917).

be ascertained. . . ."[20] In deciding whether a witness is unavailable for the purpose of allowing the introduction of former testimony, the court is vested with a wide discretion.[21] Abuse of this discretion and severe stretching of the exception is illustrated by *Jolliffee v. State*[22] where it was held that a witness in custody of Kansas authorities was unavailable and that it was not incumbent upon the prosecutor to institute proceedings to have him returned. The case is consistent, however, with the general willingness of the Oklahoma courts to classify as unavailable any witness who has left the state and shows no inclination to return.[23] The basis for the admission of testimony given by an absent witness is still geared to a standard of unavailability which was correctly described in *Fletcher* v. *State* where the court observed that the "rule is based upon circumstances of necessity and the transcript . . . shall be excluded in all cases where the witness can be produced in person."[24]

The Supreme Court in *Barber* v. *Page* took the position that the Oklahoma prosecutor did not present a sufficient showing of unavailability.[25] The Court acknowledged that the exception to the hearsay rule was a product of necessity, and it was this aspect of the exception that the Court stressed as it pointed out that after it was ascertained that the witness was in a federal penitentiary in another state, "The State made absolutely no effort to obtain the presence of Woods at trial. . . ."[26] The Court went on to aim directly at the long-

[20] Valentine v. State, 16 Okla. Crim. 76, 194 P. 254, 161 (1919), *quoting from* Warren v. State, 6 Okla. Crim. 1, 115 P. 812 (1911); *accord,* Hamilton v. State, 95 Okla. Crim. 262, 244 P.2d 328 (1952). Here the court calls for a strict observance of the rule in admitting this type of evidence.
[21] Pittman v. State, 272 P.2d 458 (Okla. Crim. 1954).
[22] 21 Okla. Crim. 278, 207 P. 454 (1922).
[23] *Supra,* notes 19, 20.
[24] 364 P.2d 713, 715 (Okla. Crim. 1961).
[25] 390 U.S. 719 (1968).
[26] *Id.* at 723.

held concept that ". . . mere absence of a witness from the jurisdiction was sufficient ground for dispensing with confrontation. . . ."[27] The Court held that a witness who is simply absent from the jurisdiction is not "unavailable" for the purpose of invoking the exception and prosecutors must not merely try but must make a "good-faith" effort to bring the witness to the courtroom for confrontation with the accused.[28] Thus, under this holding, unavailability can no longer be adequately established by showing that the witness is *"out of the jurisdiction."*[29]

The Supreme Court was quite emphatic in its position and specifically directed attention to existing means provided in the Federal Statutes for bringing the absent witness to court.[30] Witness in the custody of federal officials can be sought with a writ of habeas corpus *ad testificandum.* The decision further implied that greater rigor must be displayed in obtaining the presence of out of state witness not in prison.[31]

As a result of *Barber,* unavailability now has a new and narrower dimension. One likely result will be that the introduction of this type of hearsay evidence will be increasingly difficult since *Barber* will cause a focusing of the courts' attention on the *limitation* of the exception. Immediate implications for Oklahoma prosecutors include the need to become familiar with and become sensitive to the use of the Uniform Act which is available to them.[32]

Ronald K. Olson

[27] *Id.*
[28] *Id.* at 725.
[29] *See* 5 WIGMORE, EVIDENCE § 1404 (3d ed. 1940).
[30] Barber v. Page, 390 U.S. 719, 724 (1968). The statute referred to by the court is 28 U.S.C. § 2241(c) (5).
[31] Barber v. Page, 390 U.S. 719, 723 (1968).
[32] OKLA. STAT. tit. 22, § 721-27 (1961).