No.19A400

IN THE SUPREME COURT OF THE UNITED STATES

JUAN SANCHEZ, *Petitioner*,

v.

STATE OF CALIFORNIA, *Respondent*.

ON A PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA SUPREME COURT

(DEATH PENALTY CASE)

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CAPITAL CASE

QUESTION PRESENTED

Whether a defendant in a criminal case is denied the opportunity for full and effective cross-examination in violation of the Confrontation Clause by the admission of a prosecution witness' prior out-of-court testimonial statements and identifications when the witness, although physically present at trial, has no memory of the prior identifications or statements.

STATEMENT OF RELATED PROCEEDINGS

There are no other related court proceedings pending in this Court. A state petition for writ of habeas corpus is pending in the California Supreme Court.

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No. 19A400

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2019

JUAN SANCHEZ, *Petitioner*,

v.

STATE OF CALIFORNIA, *Respondent*.

ON A PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

(DEATH PENALTY CASE)

Petitioner Juan Sanchez respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of California affirming his conviction of murder and sentence of death.

INTRODUCTION

Petitioner's case is the third case filed in this Court within the last year asserting the same violation of each of the petitioner's rights under the Confrontation Clause and pointing out the same conflict among the lower courts. *See Tapia v. New York*, No. 19-159 (2019) and *White v. Louisiana*, No. 18-8862 (2019). Each case involves a conviction based on out-of-court testimonial statements of a witness whose memory loss effectively

shields him from cross-examination. Although the petitions for writ of certiorari were denied in both *Tapia* and *White*, these actions do not detract from the fact that their common confrontation issue is recurrent, important and a source of conflict among the lower courts. *Tapia v. New York,* __ S. Ct. __, 2019 WL 6689666 (Mem); *White v. Louisiana*, __ S. Ct. __, 2019 WL 6689875 (Mem). Because of this, the Court should grant certiorari in this case to resolve this recurring issue.

On its own merits, this case is an excellent vehicle for resolving the lingering question: whether the Confrontation Clause requires only that the witness be available at trial to testify, or whether the Clause's guarantee of the "opportunity for full and effective cross-examination" requires more than the witness' physical presence in the courtroom. The need for resolution is heightened, moreover, in that this is a capital case where petitioner's conviction largely rested on out-of-court identifications made by a witness who remembered nothing about the identifications or why he made them, and where cross-examination of the witness was a completely futile and "empty procedure." *Crawford v. Washington*, 541 U.S. 36, 74 (2004) (Rehnquist, C.J., concurring in the judgment).

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were petitioner, Juan Sanchez, and Respondent, the People of the State of California.

OPINION BELOW

The decision of the California Supreme Court is reported at 7 Cal. 5th 14 (2019).

JURISDICTION

The California Supreme Court issued its original opinion on petitioner's automatic appeal from a judgment of death on April 29, 2019. *People v. Sanchez*, 7 Cal. 5th 14. A copy of the published opinion is attached as Appendix A. Petitioner filed a timely petition for rehearing which was denied on July 24, 2019. A copy of the order denying rehearing is attached as Appendix B. Justice Kagan extended the time to file a petition for writ of certiorari to and including December 21, 2019. Docket No. 19A400. This Court has jurisdiction under 28 U.S.C. § 1257(a).

PERTINENT CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the U.S. Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."

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STATEMENT OF THE CASE

I. Trial Court Proceedings

Petitioner, Juan Sanchez, was convicted and sentenced to death for the murder of Ermanda Perez and her teenage daughter Lorena Martinez. The only other person in the home at the time of the shootings, which took place sometime between 4:00 and 5:00 a.m., was Ms. Perez's five-year-old son, Oscar Hernandez, who was asleep in her bed. He awoke to the sound of gunshots and saw his mother, who had been shot, come into the bedroom followed by a man. When he saw the man, Oscar hid under the covers and did not come out until he was sure the man had left. By then, his mother had died from the gunshots. Oscar then went into his sister's bedroom, where he discovered that she had also been fatally shot.

He then walked to his aunt Rosa Chandi's house. Chandi accompanied Oscar back to his house, where he again saw his deceased mother and sister. Chandi then called the police. As news of the crime spread, family members and neighbors gathered at Chandi's house.

Later that morning, Oscar was interviewed four times by the police. During the first interview, Oscar made no identification of the man he saw in the house. In the next interview, he identified the person in his mother's bedroom as the man who bought him ice cream the day before. Oscar's older brother, Victor, who was not at home the night of

the crime, told the police that the man who bought Oscar ice cream was petitioner, Juan Sanchez.

The police next showed Oscar a booking photograph of petitioner, taken from a prior arrest for a traffic violation. After Oscar identified petitioner from the single photo, petitioner was arrested. Oscar was then shown a six-pack photo lineup with petitioner's new booking photograph. Oscar identified petitioner as the person he saw in his mother's bedroom. But that same morning, and over the course of the next few years, Oscar placed a number of different persons in the bedroom and described a variety of actions that were, as the State acknowledged in its appellate briefing in the court below, "implausible, impossible, contradictory scenarios."

The crimes in this case occurred in August 1997, and petitioner was tried three times, in April, June, and October of 1999. The first two trials resulted in deadlocked juries, with the jury in the second trial divided 10-2 for acquittal. Oscar, the only witness to place petitioner inside the house at the time of the shootings, testified at all three trials. The core evidence at all three trials was essentially the same, Oscar's prior identifications and petitioner's disputed confession. At the third trial, Oscar exhibited extensive memory loss as to the events of the night of the incident, and no memory at all of what he told the police or whom he identified at any time.

As the prosecutor acknowledged, "My only purpose for putting [Oscar] on the stand was solely to establish a [] prior ID situation." (59 RT 11976.)[1] The prosecutor's direct examination of Oscar was limited accordingly. (59 RT 11969-71.)

On cross-examination, Oscar identified the photograph of a man, not petitioner, as a man he saw in the house; he then identified petitioner but could not remember where he had seen him. (60 RT 12216, 12218-19.)

Over petitioner's objection, the trial court allowed the investigating officers to relate Oscar's prior identifications of petitioner on the morning of the crimes.

II. California Supreme Court Decision

On automatic appeal to the California Supreme Court, petitioner challenged the admission of Oscar's prior out-of-court identifications. The California Supreme Court rejected petitioner's challenge, holding that Oscar's prior statements were properly admitted under the state's rules of evidence, and that the admission of the statements did not violate petitioner's constitutional right to confront and cross-examine witnesses, citing *Crawford v. Washington*, 541 U.S. 36, 59-60 (2004) (*Crawford*), for the proposition that, "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." *People v. Sanchez*, 7 Cal. 5th at 42. The court added, "This is true even if

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[1] "RT" refers to the Reporter's Transcript of the trial.

the witness cannot recall the statement." *Ibid*, citing *United States v. Owens*, 484 U.S. 554, 559-60 (1988) (observing that "[n]othing in *Crawford* casts doubt on the continuing vitality of *Owens*").

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REASONS FOR GRANTING THE WRIT

The Framers of the Constitution included the Confrontation Clause in the Bill of Rights because they recognized cross-examination's unparalleled effectiveness as a truth-generating "crucible" and abhorred the use of "*ex parte* examinations as evidence against the accused." *Crawford*, 541 U.S. at 50, 61. The Confrontation Clause cannot guarantee cross-examination that "is effective in whatever way, or to whatever extent, the defense might wish." *United States v. Owens*, 484 U.S. 554, 559 (1988) (*Owens*), quoting *Kentucky v. Stincer*, 482 U.S. 730, 744 (1987). But it does guarantee criminal defendants the "opportunity for full and effective cross-examination." *Id.*; *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985).

"Confrontation means more than being able to confront the witness physically." *Davis v. Alaska*, 415 U.S. 308, 315 (1974); *see also California v. Green*, 399 U.S. 149, 158 (1970) (Confrontation Clause requires that witness be "subject to full and effective cross-examination). Or, as stated in *Crawford*, an adequate opportunity to cross-examine means that a witness is at least capable of "defend[ing] or explain[ing] his prior statement." 541 U.S. at 59 n. 9.

In applying these principles to a witness who presents with total memory loss, this Court has stated that the opportunity for effective cross-examination is not denied where the witness testifies as to his past or current belief but is unable to recollect the reason for

that belief, as long as the defendant has the opportunity to bring out such matters as the witness' "bias, his lack of care and attentiveness, his poor eyesight, and even (what is often the prime objective of cross-examination [citation]) the very fact that he has a bad memory." *Owens*, 484 U.S. at 559.

A number of courts, including this Court, have expressly affirmed that physical presence at trial is not alone dispositive under the Confrontation Clause. In *Douglas v. Alabama*, 380 U.S. 415, 420 (1965), this Court held that the Confrontation Clause had been violated even though the witness took the stand and was subjected to cross-examination but responded to questions with an invocation of the privilege against self-incrimination. The vitality of this principle was confirmed in *Crawford*, 541 U.S. at 57, where this Court described *Douglas* as "an example" of when a defendant lacks an "opportunity to cross-examine" for Confrontation Clause purposes, even though the declarant was on the witness stand and subjected to the formality of cross-examination. *See also Goforth v. State*, 70 So. 3d 174, 185-87 (Miss. 2011), citing *Cookson v. Schwartz*, 556 F.3d 647, 651 (7th Cir. 2009) (recognizing that the defendant simply had no opportunity to cross-examine the witness where witness' memory loss was genuine and he had no recollection of events underlying his statement or having spoken to the police); *In re N.C.*, 105 A.3d 1199 1216-17 (Pa. 2014) (confrontation element of

Crawford, requiring an opportunity for effective cross-examination, not met where child witness' memory loss and behavior rendered any examination, at best, *pro forma*).

Nevertheless, the majority of courts, relying on *Owens*, have practically written the "*opportunity for full and effective cross-examination*" out of the Confrontation Clause, finding no violation so long as the witness was physically present at trial. *See, e.g., Woodall v. State*, 336 S.W.3d 634, 644 (Tex. Crim. App. 2011); *People v. Cowan*, 50 Cal. 4th 401, 458 (2010); *People v. Sutton*, 908 N.W.2d 50, 70-71 (Ill. 2009); *State v. Holliday*, 754 N.W.2d 556, 564-68 (Minn. 2008); *Mercer v. United States*, 864 A.2d 110, 114 (D.C. 2004).

This conflict among the lower courts is not based on factual distinctions, but rather on a fundamentally different view of the right to confrontation and the sweep of this Court's decision in *Owens*. *Owens* did not reject the core, historical requirement of a fair opportunity for cross-examination. Rather, *Owens* had to resolve the vexing conflict between confrontation principles and fundamental notions of justice and fairness, where to find a violation of confrontation rights would allow the defendant to benefit from the memory loss that resulted from the injuries he himself inflicted on the victim witness. The witness' memory loss, moreover, was only partial. He remembered some details from before and after the attack, and he clearly remembered that he had identified the

defendant as his assailant during the interview that took place shortly after the assault. 484 U.S. at 556. In addition, as this Court noted, defense counsel in *Owens* was able to use the memory loss to impugn the witness' prior identification. *Id.* at 560.

None of the factors underpinning the holding in *Owens* are present in petitioner's case.[2] Here, Oscar's memory loss resulted from the passage of time and, as a result, he had no recall of his prior statements to the police or any identifications he made. As critical, the memory loss, which the trial court found to be genuine, completely insulated Oscar from any examination impacting the reliability of his out-of-court statements and identifications.

[2] This case is distinguishable from *Owens* in another significant respect. In *Owens*, the defendant argued that this Court's jurisprudence concerning suggestive identification procedures showed the special dangers of identification testimony and the special importance of cross-examination when such hearsay is proffered. *Owens*, 484 U.S. at 561. This Court rejected the argument on two grounds: first, that the defendant had not argued that the identification procedure used in his case was suggestive, and second, that the mere possibility of suggestive procedures did not render out-of-court identification statements inherently less reliable. (*Id.*) Here, in contrast, the identification procedures used in obtaining Oscar's identifications were vigorously challenged (*see Sanchez*, 7 Cal. 5th 34-38), and there is mounting scientific and empirical evidence regarding the problematic reliability on eyewitness identification in criminal cases. *See*, *e.g.,* Brandon L. Garrett, Convicting the Innocent: Where Criminal Prosecutions Go Wrong 50 (Harvard University Press) (2011) (finding that 190 of the first 250 inmates (76%) exonerated by DNA testing since 1989 were misidentified by an eyewitness).

Indeed, no fair opportunity for cross-examination could exist in the face of Oscar's answers to the prosecutor's questions:

> Q. Okay. I want to show you something that's been marked People's 75 [single photo show-up]? I'm gonna show you this. Why don't you look at it for a bit. Do you see that?
>
> A. Yeah. . . .
>
> Q. Okay. I'm gonna show you one other before I ask you some questions. This is an item, we've called this People's 76 [six-photo lineup].
>
> A. Huh?
>
> Q. Okay. I'm gonna ask you some questions. Do you need time to look at it some more?
>
> A. But who are these people right here?
>
> Q. Okay. I'm gonna ask you some questions. And I understand there's a lot you don't remember, and so really what I'm only interested in is what you do remember. . . .
>
> Q. . . . do you remember being shown the pictures that I just showed you, the groups of pictures by police officers?
>
> A. I don't remember.
>
> Q. For the record, that's People's 75. Not asking you if you remember the person in the picture. I'm asking you if you remember being shown a picture by a police officer and asked some questions?
>
> A. I don't remember that picture.
>
> Q. But you remember being asked some questions - - about pictures?

A. I don't remember.

Q. Okay. We went back in the room here a little bit ago and [defense counsel] read you some questions and - - and do you remember there being a bunch of questions on the day that your mom died, your mom and your sister?

A. I just don't remember.

Q. . . . This is an item, People's 76. Remember an officer showing you some pictures like this?

A. I don't remember.

(60 RT 12212-15.)[3]

Oscar's memory loss was thus optimal for the prosecution's strategy – to have the out-of-court identifications admitted in lieu of contested live testimony – and created an insurmountable problem for the defense in foreclosing any opportunity to impeach the reliability of Oscar's prior out-of-court identifications.[4]

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[3] Oscar also testified that he did not remember the day his mother and sister were killed or specific details of the incident. (59 RT 11967, 11970, 11978-79, 11983, 11988-89; 11991, 11993-96, 11998, 12000-02; 60 RT 12188-94, 12194, 12196-97, 12206-08, 12221-22).

[4] Oscar's testimony from the prior two trials was excluded under the state's rules of evidence. As noted above, the first two trials, at which Oscar testified at length and was effectively cross-examined regarding the reliability of his out-of-court identifications, resulted in deadlocked juries.

Thus, petitioner's case presents a compelling vehicle for resolving the lingering question, resulting in conflicting opinions and outcomes, whether a witness' mere physical presence at trial is sufficient to satisfy the requirements of the Confrontation Clause, where the witness' memory loss forecloses any opportunity for effective cross-examination and impeachment. This question is fully resolved by affirming the long-settled principle that "Confrontation means more than being able to confront the witness physically." *Davis v. Alaska*, 415 U.S. at 315.

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CONCLUSION

For the foregoing reasons, the petition should be granted.

Dated: December 18, 2019

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