No. 19-7097

In the Supreme Court of the United States

JUAN SANCHEZ

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

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

BRIEF IN OPPOSITION

XAVIER BECERRA
Attorney General of California
MICHAEL J. MONGAN
Solicitor General
LANCE E. WINTERS
Chief Assistant Attorney General
DONALD E. DENICOLA
Deputy Solicitor General
KEVIN L. QUADE
Deputy Attorney General
ANGELO S. EDRALIN
Deputy Attorney General
KENNETH N. SOKOLER*
Deputy Attorney General
**Counsel of Record*
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
(916) 210-7751
Kenneth.Sokoler@doj.ca.gov
Counsel for Respondent

CAPITAL CASE

QUESTION PRESENTED

Whether petitioner's Confrontation Clause rights were violated by the admission of a juvenile witness's prior out-of-court statements to police because the juvenile, who testified at petitioner's trial, could not remember the particular statements.

DIRECTLY RELATED PROCEEDINGS

California Supreme Court:

People v. Sanchez, No. S087569, judgment entered April 29, 2019 (this case below).

In re Juan Sanchez on Habeas Corpus, No. S249349 (pending).

Tulare County Superior Court:

People v. Sanchez, No. VCF040863-98, judgment entered March 31, 2000 (this case below).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

CONSTITUTIONAL PROVISIONS

STATEMENT

1. On the morning of August 4, 1997, petitioner Sanchez entered the home of Ermanda Reyes and her 17-year-old daughter, Lorena Martinez, sexually assaulted Lorena, and then shot and killed both mother and daughter. Pet. App. A 1. Oscar, Ermanda's five-year-old son, was in the house at the time of the murders. *Id.* Finding his mother and his sister unresponsive, Oscar walked down the street to the home of his aunt and told her that they were "bleeding." *Id.* The aunt went with Oscar back to his house and saw Ermanda's and Lorena's bodies in their respective bedrooms. *Id.* Reyes had been shot in the chest. *Id.* at 2. Lorena, whose underpants were around her knees, had been shot twice in the chest and had suffered bruising in her genital and anal areas. *Id.* In addition, there was a one-inch cut on her bra, and a steak knife lay under her bed. *Id.* The aunt returned to her house with Oscar and called 911. *Id.* at 1.

When the police arrived, Oscar—who was "emotional" and crying—told Sergeant Dempsie that he had been "awakened by firecrackers," that he had seen his mother coming toward the telephone next to where he was sleeping, and that his mother had grabbed the telephone and then had fallen backwards. Pet. App. A 2. Oscar also said that he had seen a man—a man who had "brought him ice cream"—in the room with his mother at the time. *Id.* Brushing his own chin with his hand, Oscar described the man as having a "wisp" on his chin. *Id.* Oscar's teenaged brother, Victor, informed the police

that petitioner had given Oscar ice cream a couple of days before the murders. *Id.* Later that morning, Sergeant Kroutil showed Oscar a photograph depicting petitioner with a mustache but no goatee. *Id.* Oscar identified the photograph as that of "Juan" and said that he was the man Oscar had seen in the house when the murders occurred. *Id.*

Petitioner was arrested in his home later that morning. Pet. App. A 3. On the same morning, Sergeant Dempsie in a videotaped interview showed Oscar a photo display containing a picture of petitioner taken after his arrest and depicting him with both a mustache and a goatee. *Id.* Oscar identified petitioner's photograph as that of the man who had given him ice cream and whom he had seen in the house. *Id.* Oscar also recounted some new details: that there had been two men, "Juan" and "Michael," in the room; that Oscar had struck Juan in the stomach; that Juan had a gun and a knife; and that Juan had departed in a yellow truck. *Id.*

The police interviewed petitioner twice on the day of his arrest and once on the day after, for a total of less than three hours. Pet. App. A 3-4. At first petitioner denied committing the crimes, but made inconsistent statements about a knife that seemed to be missing from his house. *Id.* at 3. On the second day, petitioner said, "I'm screwed," and admitted that he had shot both victims. *Id.* at 4.

Petitioner then gave a videotaped statement. Pet. App. A 4. He acknowledged that, while armed with a gun, he had entered the victims' house

to look for Ermanda, who had insulted him and owed him money. *Id*. He said that, when he saw Ermanda, he "just shot" two or three times. *Id*. Petitioner also admitted shooting the other woman in the house "about two times." *Id*. Petitioner claimed that he did not know if he had hit them or why he had shot them, asserting that he had "blacked out." *Id*. But he nonetheless claimed that he had seen a knife in Lorena's hand and thought "she was going to kill me." *Id*. He denied sexually assaulting Lorena. *Id.*

2. The State charged petitioner with the Reyes and Martinez murders. Pet. App. A 1; 1 Clerk's Transcripts (CT) 252-254. The State also alleged, as "special circumstances" making the murders punishable by death, that petitioner had committed multiple murders and that he had murdered Lorena Martinez while in the course of committing rape-by-instrument. *Id*. Petitioner's first two trials resulted in deadlocked juries. Pet. App. A 1.

The prosecution's evidence at the third trial included the videotape of petitioner's confession and testimony that petitioner had sought to concoct evidence regarding an alleged alibi and a knife found by the police at the crime scene. Pet. App. A 1-5. Over various defense objections—witness-incompetence, hearsay, reliability, and alleged denial of an opportunity for cross-examination—the trial judge allowed evidence of Oscar's out-of-court statements from the day of the crimes. *Id.* at 6-14. Sergeants Dempsie and Kroutil testified for the prosecution about Oscar's series of statements—describing the scene and identifying petitioner—made to them on the morning

of the murders. *Id.* at 9. In addition, the videotape of Oscar's identification of petitioner's picture from the photo lineup was played for the jury. *Id.* at 3.

By the time of the third trial, more than two years after the murders, Oscar did not remember what he had said to the police or whether he had identified anyone as being in his house at the time of the murders. Pet. App. A 4. He testified that petitioner had brought him ice cream, although he could not remember when. *Id.* At one point on redirect examination by the prosecution, Oscar identified petitioner as a man he had seen on the day his mother was killed; but he then reiterated that he did not remember. *Id.*

On cross-examination, defense counsel was able to elicit detailed testimony from Oscar about the events surrounding his mother's murder. Oscar testified that, on the day his mother was murdered, he had spoken with the police about what had happened and had told them the truth. 59 Reporter's Transcript (RT) 11978. He also testified that it was dark outside; that he was sleeping in his mother's room at the time she died; and that, before he went to his aunt's house, he had seen his mother lying on the floor, his sister in a seated position, and blood on the floor in the kitchen. *Id.* at 11981-11983. He testified that he had gone to his aunt's house on the day of the murders, and that he told his aunt that his mother was "probably dead" and that she should go to his house. *Id.* at 11979, 11984. He stated, further, that his aunt had gone to his house and had confirmed that his mother and sister were dead. *Id.* He said that, while at his aunt's house, he had spoken to a man named Michael

Martinez but that he did not recall who that person was. *Id.* at 11986. He also testified that his brother Victor had arrived at his aunt's house that day, that the two of them spoke, and that Victor was crying. *Id.* at 11988. Finally, he testified that, while at his aunt's house, he was sure that he did not hear anyone there talking about what had happened to his mother. *Id.* at 12028.

The jury found petitioner guilty as charged. Pet. App. A 1. After a separate trial to determine punishment, the same jury returned a verdict of death. *Id.*

3. The California Supreme Court affirmed the judgment in a unanimous decision. Pet. App. A 29. As relevant here, the court considered petitioner's claim that the admission of evidence of Oscar's out-of-court statements describing petitioner as the man at his house and identifying his photograph violated the Confrontation Clause because, during cross-examination, Oscar could remember little about those statements. *Id.* at 13-14. The state court rejected that claim. It relied on *Crawford v. Washington,* 541 U.S. 36, 59-60 n.9 (2004), which explained 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." Pet. App. A 13. In concluding that *Crawford's* pronouncement remained true even if the witness cannot recall the prior statement, the court relied on *United States v. Owens,* 484 U.S. 554, 559-560 (1988), which held that, "'when a hearsay declarant is present at trial and subject to unrestricted cross-examination,' 'the traditional protections

of the oath, cross-examination, and opportunity for the jury to observe the witness'[s] demeanor satisfy the constitutional requirements,' notwithstanding the witness's claimed memory loss about the facts related in the hearsay statement." Pet. App. A 13.

The state court pointed out that petitioner had been permitted to cross-examine Oscar and that the jury was able to observe Oscar's demeanor during cross-examination. Pet. App. A 13-14. In addition, it noted that petitioner was able to cross-examine other witnesses, present evidence about the circumstances under which Oscar made the statements, and present other evidence relevant to the credibility of Oscar's statements. *Id*. The court concluded that "[t]his was sufficient to satisfy defendant's confrontation rights." *Id*. at 14.

ARGUMENT

Petitioner seeks review of the question whether, given Oscar's inability to recall what he had said to the police on the morning of the murders, petitioner was denied his right to confront Oscar about those statements. Pet. 2, 8-14. The California Supreme Court correctly applied this Court's precedent on the meaning of the confrontation right to the facts of this case in holding that there was no constitutional error. Petitioner fails in his attempt (Pet. 2, 9-11) to demonstrate a cert-worthy conflict among lower appellate courts on the question whether a hearsay declarant's mere "physical presence" on the witness stand satisfies the Confrontation Clause when he suffers a "total

memory loss"; indeed, this Court recently denied two petitions raising the same question and alleging the same conflict. In any event, Oscar proved able to testify on cross-examination about certain details of the events described in his out-of-court statements. The jury convicted petitioner after hearing that testimony and other incriminating evidence, including petitioner's videotaped confession. There is no need for further review.

1. The California Supreme Court's decision comports with this Court's precedent regarding how the Confrontation Clause applies to a witness who cannot recall his prior out-of-court statements. The state court applied this Court's teaching 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." Pet. App. A 13 (quoting *Crawford v. Washington,* 541 U.S. 36, 59-60, n. 9 (2004).) It also relied on this Court's more specific holding that, "'when a hearsay declarant is present at trial and subject to unrestricted cross-examination,' 'the traditional protections of the oath, cross-examination, and opportunity for the jury to observe the witness'[s] demeanor satisfy the constitutional requirements,' notwithstanding the witness's claimed memory loss about the facts related in the hearsay statement. *Id.* (quoting *United States v. Owens,* 484 U.S. 554, 559-560 (1988).)

The state court's quotations from *Crawford* and *Owens* accurately summarize this Court's jurisprudence. As this Court observed in *California v. Green*, 399 U.S. 149 (1970), "where the declarant is not absent, but is present

to testify and to submit to cross-examination, our cases, if anything, support the conclusion that the admission of his out-of-court statements does not create a confrontation problem." *Id.* at 162; *see also id.* at 188 (Harlan, J., concurring.) ("The fact that the witness, though physically available, cannot recall either the underlying events that are the subject of an extrajudicial statement or previous testimony or recollect the circumstances under which the statement was given does not have Sixth Amendment consequence."). Thus, the Confrontation Clause guarantees only "an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) (per curiam) (emphasis in original). In *Fensterer*, for example, the Court held that there was no confrontation violation even though the prosecution's expert witness no longer could remember the basis for his opinion. *Id.* at 20-21.

Most pertinent here, this Court in *United States v. Owens* held that the Confrontation Clause was not violated by the "admission of an identification statement of a witness who is unable, because of memory loss, to testify concerning the basis for the identification." 484 U.S. at 564. The witness's memory was impaired as a result of an attack that left his skull fractured, and defense counsel was unable to refresh his memory on cross-examination. *Id.* at 556. Despite his injuries, the victim earlier had identified the defendant as his assailant when interviewed by investigators several weeks after the

assault. *Id.* At trial, the victim remembered identifying the defendant as his assailant during the interview with investigators, but could not remember the attack—circumstances that obviously limited the defendant's success in cross-examining him. *Id.*

In holding that there was no Confrontation Clause violation, the Court reiterated that "the Confrontation Clause guarantees only an opportunity for effective cross-examination." *Owens*, 484 U.S. at 559. The Court did "not think that a constitutional line drawn by the Confrontation Clause falls between a forgetful witness' live testimony that he once believed this defendant to be the perpetrator of the crime, and the introduction of the witness' earlier statement to that effect." *Id.* at 560. The Court recognized that, "[t]he weapons available to impugn the witness' statement when memory loss is asserted will of course not always achieve success, but successful cross-examination is not the constitutional guarantee." *Id.* As it had done in *California v. Green,* the Court in *Owens* explained that "the traditional protections of the oath, cross-examination, and opportunity for the jury to observe the witness' demeanor satisfy the constitutional requirements." *Id.*

The California Supreme Court faithfully applied this jurisprudence in rejecting petitioner's constitutional claim here. It noted that Oscar took the witness stand and answered defense counsel's questions on cross-examination "under oath and in the presence of the accused." Pet. App. A 13-14; *see Maryland v. Craig*, 497 U.S. 836, 846 (1990); *Delaware* v. *Fensterer*, 474 U.S.

at 21-22. And, by his doing so, the jury was able to observe Oscar's demeanor. Pet. App. A 14.

Indeed, Oscar's testimony provided both the basis for his out-of-court statements identifying petitioner and evidence bearing on the reliability of the statement. *See supra* at pp. 4-5. Informing his out-of-court statement about the intruder being the man who had brought him ice cream, Oscar testified in court that petitioner had brought him ice cream. Pet. App. A 4, 6. Oscar further testified that he had spoken with the police about what had happened on the morning of the murders and that he had told the police the truth. 59 RT 11978. And, in testimony bearing on the whether his extra-judicial identifications might have been influenced by others, Oscar testified that nobody at his aunt's house had spoken with him about what had occurred. *Id.* at 11978, 12028. In this regard, he gave responsive answers to questions posed by petitioner's counsel about interactions with other people, including his brother Victor that day. *Id.* at 11985-11988. Finally, Oscar testified to seeing his mother's and his sister's bodies, his observation of blood in the kitchen, and the identity of another person he had seen in his mother's room on the night she was killed. 59 RT 11981-11983; 60 RT 12222-12227. The scope of Oscar's testimony bearing on his out-of-court statements exceeded, or at least was equivalent to, that of the testimony offered by the victim in *Owens* who could not remember whether the defendant had attacked him at all. *See Owens*, 484 U.S. at 556-557.

2. Petitioner suggests that language in a footnote to this Court's *Crawford* opinion has called into question *Owen's* Confrontation Clause holding, and that a significant conflict has since developed in the lower courts on the issue of whether a witness' mere "physical presence" at trial satisfies the Confrontation Clause even where he suffers from a "total memory loss" and is unable to recall his statements or the events underlying them. Pet. 2, 9-11. But petitioner misconstrues *Crawford*; his assertion of a conflict is overstated; and, in light of the scope of Oscar's actual testimony, this case does not directly implicate the asserted conflict.

Petitioner quotes *Crawford*'s statement that "[t]he Clause does not bar admission of a statement so long as the declarant is *present at trial to defend or explain it."* Pet. 8; *Crawford,* 541 U.S. at 59, n.9 (emphasis added). But *Crawford* presented the question of what sort of out-of-court statements trigger Confrontation Clause protection in the first place; the *Crawford* Court was not presented with the separate question (at issue in *Owens*) of what is necessary to satisfy the requirement for in-court confrontation if prosecutors seek to admit a testimonial statement. In any event, the same *Crawford* footnote also states that, "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraint at all on the use of his prior testimonial statement," and cites *Green* in support. *Id.*

Other state courts of last resort have repeatedly rejected petitioner's interpretation of *Crawford*. *See, e.g.*, *White v. Louisiana*, 243 So. 3d 12, 15-16

(La. 2018), cert. denied 140 S.Ct. 647 (2019); *State v. Holliday*, 745 N.W.2d 556, 565-566 (Minn. 2008); *State v. Pierre*, 277 Conn. 42, 86 (Conn. 2006); *Woodall v. State*, 336 S.W.3d 634, 644 (Tex. Crim. App. 2011); *State v. Legere*, 157 N.H. 746, 755 (2008); *State v. Price*, 158 Wash. 2d 630, 647 (Wash. 2006); *cf. Goforth v. State*, 70 So. 3d 174, 186 (Miss. 2011). Indeed, petitioner recognizes that "the majority of courts, relying on *Owens* . . . find[ ] no violation as long as the witness was physically present at trial." Pet. 10.

The other appellate decisions that petitioner cites (Pet. 10-11) do not directly conflict with the California Supreme Court's decision in this case. In *Cookson v. Schwartz*, 556 F.3d 647 (7th Cir. 2009), the Seventh Circuit applied *Owens* and held that the defendant's confrontation rights had not been violated because, as here, "the witness could remember the underlying events described in the hearsay statements." *Id.* at 651-652. In *Goforth v. State*, 70 So. 3d 174, the Mississippi Supreme Court resolved the defendant's claim on state-law grounds—not on federal constitutional grounds. *Id.* at 187. And in *In re N.C.*, 105 A.3d 1199 (Pa. 2014), the Pennsylvania Supreme Court excluded testimony after a child witness curled into a fetal position and remained unresponsive and unable to speak at the trial during testimony. *Id.* at 1206, 1209. The court expressly distinguished between a witness who "became totally unresponsive" to questioning at trial, *id.* at 1216, and a witness who

answers questions "but could not remember certain details," *id*. at 1217.[1]

Moreover, although petitioner suggests (Pet. 11) that the Court should grant review to consider the application of the Confrontation Clause to the admission of statements made by a witness with "no recall" at trial, this case does not actually present that question. Oscar responded to many questions bearing on his out-of-court identifications, on both direct and on cross-examination. *See supra*, at pp. 4-5, 11. He gave answers, adduced on cross-examination, that were directly responsive to questions about what occurred on the night of the murders, who was present, and about factors that might weigh on the reliability of his out-of-court statements and identification. The California Supreme Court correctly applied this Court's precedent to the facts of petitioner's case; there is no need for further review.

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[1]This Court recently denied two petitions raising the same question and asserting a conflict based on the same cases. *See White v. Louisiana*, No. 18-8862 (Dec. 9, 2019); *Tapia v. New York*, No. 19-159 (Dec. 9, 2019).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

XAVIER BECERRA
Attorney General of California
MICHAEL J. MONGAN
Solicitor General
LANCE E. WINTERS
Chief Assistant Attorney General
DONALD E. DE NICOLA
Deputy Solicitor General
KEVIN L. QUADE
Deputy Attorney General

/s/ Kenneth N. Sokoler

KENNETH N. SOKOLER
Deputy Attorney General

FEBRUARY 27, 2020

DECLARATION OF SERVICE BY OVERNIGHT COURIER

Case Name: **People v. Sanchez**

No.: **19-7097**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550.

On February 27, 2020, I served the attached **Opposition of Certiorari** by placing a true copy thereof enclosed in a sealed envelope with the **FED EX**, addressed as follows:

Mr. Scott S. Harris
Clerk
Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543

Nina Wilder
1111 Broadway, Suite 1000
Oakland, CA 94607

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 27, 2020, at Sacramento, California.

M. Sanchez
Declarant

/s/ M. Sanchez
Signature

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