No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

ENRIQUE AUCH, *Petitioner*

v.

MASSACHUSETTS, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MASSACHUSETTS APPEALS COURT

PETITION FOR WRIT OF CERTIORARI

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Question Presented

Whether the Confrontation Clause permits the prosecution to introduce out-of-court testimonial statements from a witness who is feigning memory loss and who then refuses to defend or explain his out-of-court testimonial statements on cross-examination by the defense?

Parties to the Proceedings

The parties to the proceeding below are contained in the caption of the case.

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Enrique Auch respectfully petitions this Court for a writ of certiorari to review the judgment of the Massachusetts Appeals Court in his case.[1]

Opinions Below

The slip opinion of the Massachusetts Appeals Court in this case is included in Appendix A. The opinion is unpublished, but

[1] References to Appendix A and Appendix B to this petition will be cited by page number respectively as "App. A. Page" and "App. B. Page". The transcript of the Petitioner's trial in the Suffolk County Superior Court will be cited by volume number and page number as "Tr. Volume/Page". Since some volumes of the trial transcript were not consecutively designated by the court reporters, the undesignated volumes will be referred to herein as follows: October 5, 2017 (afternoon session) – Volume IX (A); October 6, 2017 – Volume X; October 10, 2017 – Volume XI.

the disposition is reported at 96 Mass. App. Ct. 1106 (2019) (table). The slip opinion is available at 2019 WL 5395609. The order of the Massachusetts Supreme Judicial Court denying further appellate review is included in Appendix A. That disposition is reported at 483 Mass. 1107 (2019)(table) and 2019 WL 7424755.

Jurisdiction

The Massachusetts Appeals Court entered its judgment on October 22, 2019. The Massachusetts Supreme Judicial Court entered an order denying discretionary review on December 23, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (a).

Constitutional Provisions Involved

The relevant federal constitutional provisions that are involved in this case are the Sixth Amendment and the Fourteenth Amendment. They are set forth in Appendix B.

Statement of the Case

Procedural History

On March 24, 2016, the Grand Jury of the Suffolk County Superior Court returned six indictments against the Petitioner.

The Grand Jury accused the Petitioner of the murder of D'Andre King-Settles.[2]

The Petitioner's jury trial in the Suffolk County Superior Court commenced on September 25, 2017 with Associate Justice Mitchell H. Kaplan presiding. Tr. I/14.[3] The Petitioner was tried with his co-defendant Tsunami Ortiz. Tr. I/15.

The jury began its deliberations on October 4, 2017 and returned its verdicts on October 6, 2017. Tr. VIII/110, Tr. X/4.

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[2] Indictment Number 1684CR00216-001 accused the Petitioner of the crime of murder, in violation of Mass. Gen. Laws c. 265, § 1. Indictment Number 1684CR00216-002 accused the Petitioner of the crime of armed assault with intent to murder (victim Jaquan McIver-Bennett) in violation of Mass. Gen. Laws c. 265, § 18(b). Indictment Number 1684CR00216-003 accused the Petitioner of the crime of armed assault with intent to murder (victim Juan Carlos Garcia) in violation of Mass. Gen. Laws c. 265, § 18(b). Indictment Number 1684CR00216-004 accused the Petitioner of the crime of assault and battery by means of a dangerous weapon (victim Jaquan McIver-Bennett) in violation of Mass. Gen. Laws c. 265, § 15A. Indictment Number 1684CR00216-005 accused the Petitioner of the crime of carrying a firearm without a license in violation of Mass. Gen. Laws c. 269, § 10(a). Indictment Number 1684CR00216-006 accused the Petitioner of the crime of carrying a loaded firearm in violation of Mass. Gen. Laws c. 269, § 10(n).

[3] On October 3, 2017, the Petitioner's motion for a required finding of not guilty at the close the Commonwealth's case pursuant to Rule 25 of the Massachusetts Rules of Criminal Procedure was denied except with respect to Indictment Number 1684CR00216-004 accusing the Petitioner of the crime of assault and battery by means of a dangerous weapon (victim Jaquan McIver-Bennett) which was dismissed. Tr. VII/133. The Petitioner's motion for a required finding of not guilty at the close of all the evidence was also denied. Tr. VII/133.

The jury found the Petitioner guilty of second-degree murder. Tr. X/4.[4]

On October 10, 2017, the Court imposed a life sentence in state prison on the Petitioner for his second-degree murder conviction with the possibility of parole in 15 years. Tr. XI/17-18.[5] The Petitioner timely appealed his convictions.

The Petitioner's case was entered on the docket of the Massachusetts Appeals Court on August 27, 2016. Oral argument was heard on September 11, 2019. On October 22, 2019, the Appeals Court released a Memorandum and Order Pursuant to Rule 1:28, a copy of which is appended hereto, which affirmed the judgments.

The Petitioner filed an application for further appellate review of his convictions in the Massachusetts Supreme Judicial Court on November 12, 2019 (Docket No. FAR-27160). On December 23, 2019, further appellate review was denied.

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[4] The jury found the Petitioner guilty of the lesser included offenses of assault with a dangerous weapon, in violation of Mass. Gen. Laws c. 265, § 15B(b), on both of the indictments for armed assault with intent to murder (victims Jaquan McIver-Bennett and Juan Carlos Garcia). Tr. X/4-5. The jury returned not guilty verdicts on the indictments for carrying a firearm without a license and for carrying a loaded firearm. Tr. X/5.

[5] The Petitioner was sentenced to four years to five years in state prison on his convictions for assault with a dangerous weapon. Tr. VIII/9. Both sentences run concurrently with the sentence imposed on the second-degree murder conviction. Tr. XI/16-17.

Facts Relating to The Underlying Offenses

The Boston Police Respond to a Shooting

On December 18, 2015 at about 4:00 PM, Officer Timothy Cullen of the Boston Police Department went to Annunciation Road in the Roxbury section of Boston in response to a radio call for shots fired. Tr. IV/141, Tr. 143-144, Tr. V/98.[6] Officer Cullen walked around until he found a dead body positioned face down in the middle of a grassy area. Tr. IV/144-146.[7] The deceased was subsequently identified as D'Andre King-Settles. Tr. IV/46, Tr. VII/14, Tr. VII/72.

The Shooting Outside 58 Annunciation Road

Juan Carlos Garcia was friends with D'Andre King-Settles. Tr. III/113, Tr. III/121, Tr. III/155. He hung out with him every day after school. Tr. III/122.

Garcia was with King-Settles on the day King-Settles died. Tr. III/116. That day, Garcia happened to encounter King-Settles on the street near King-Settles's mother's house. Tr. III/122-

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[6] This area is referred to variously as Annunciation Road, the Annunciation Road development, or the Annunciation projects. Tr. IV/142, Tr. VII/34. It is in the Mission Hill neighborhood. Tr. IV/142, Tr. VII/39. This is a large apartment complex with many residents. Tr. IV/149. The residences are owned by the Boston Housing Authority and are known as the Alice Taylor Housing Development. Tr. V/98, Tr. V/100, Tr. VII/39, Tr. VII/53.

[7] There was other testimony that most of the body was located on pavement; the feet were on mulch and grass facing Albert Street and Prentiss Street in a diagonal manner and the head was on pavement facing Annunciation Road. Tr. VII/25-26.

123, Tr. III/157. King-Settles was with another person named Jaquan McIver-Bennett. Tr. III/123, Tr. III/151, Tr. III/152, Tr. III/157.[8]

After Garcia met up with King-Settles and McIver-Bennett that day, because it was raining out, the three of them walked towards the building located at 58 Annunciation Road to stay dry. Tr. III/124-125, Tr. III/154. King-Settles went off to his mother's house to throw out her trash. Tr. III/125. The plan was for Garcia and McIver-Bennett to wait inside the building for King-Settles. Tr. III/125.[9]

While waiting a short period of time for King-Settles to arrive, Garcia and McIver-Bennett stayed dry and talked in the hallway on the third floor of 58 Annunciation Road. Tr. III/125-126, Tr. III/153, Tr. III/154. King-Settles came up about five to seven minutes later. Tr. III/126.[10]

When King-Settles arrived, the three men dapped (e.g., shook hands) in the hallway and got into the elevator. Tr. III/126-127. They eventually got off the elevator and left the building.

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[8] McIver-Bennett refused to testify at the Petitioner's trial and was jailed for civil contempt. Tr. VII/77-78, Tr. VII/139-141.

[9] 58 Annunciation Road is a high-rise building that abuts Albert Street. Tr. VII/28, Tr. VII/37. The front doors to the building are never locked; the locks are either unlocked or broken. Tr. VII/32.

[10] There was testimony that it would not be unusual for the Boston Housing Authority Police to receive calls to about kids hanging out in the stairwells or hallways. Tr. V/104-105.

Tr. III/127, Tr. III/128. McIver-Bennett walked out of the building first, followed by King-Settles, and then Garcia. Tr. III/128. Garcia did not see anyone behind him or observe anyone leaving the building after him. Tr. III/128-129.

After leaving the building, the three men took a right and walked side-by-side together. Tr. III/131, Tr. III/132, Tr. III/133. Garcia then heard three gunshots coming from behind him. Tr. III/133, Tr. III/134, Tr. III/135. During the gunshots, he turned around for a quick second to see what was happening. Tr. III/134, Tr. III/135. Garcia saw one person shooting at them. Tr. III/137. He did not actually see a gun, but he saw flashes. Tr. III/137.

Garcia ran off through a parking lot and saw a woman with a stroller next to a car. Tr. III/138, Tr. III/164. Garcia was not injured. Tr. III/140. He ran home. Tr. III/161, Tr. III/165. King-Settles and McIver-Bennett ran off in the same direction. Tr. III/139.

The Surveillance Videos

The police obtained video surveillance from the Boston Housing Authority. Tr. V/100, Tr. V/120, Tr. V/154-155.[11]

[11] There were no exterior surveillance cameras in the Annunciation Road housing development. Tr. V/99-100. Inside the building at 58 Annunciation Road, there were surveillance cameras in the front lobby, the rear entrance, and in the elevator. Tr.

Portions of the video surveillance obtained by the police from inside 58 Annunciation Road were played for the jury showing the Petitioner and another individual at the main entrance and the rear entrance of the building. Tr. V/155; Exhibit 74/Scenes 5, 6, 7, 13, 16.[12]

At 3:51 PM, the video surveillance from the main entrance camera shows the Petitioner and another individual coming into 58 Annunciation Road. Exhibit 74/Scene 13.

At 3:53 PM, the video surveillance from the front entrance camera shows two individuals, whom the jury could reasonably infer were Garcia and McIver-Bennett, coming into 58 Annunciation Road and entering the elevator. Exhibit 74/Scene 14. At 3:57 PM, the video surveillance from the main entrance camera shows an individual, whom the jury could reasonably infer was King-Settles, coming into 58 Annunciation Road and entering the elevator. Exhibit 74/Scene 15.

At 3:59 PM, the surveillance video from the front entrance camera shows King-Settles, McIver-Bennett, and Garcia coming out of the elevator and going out of the building. Exhibit 74/Scene 16. About 9 seconds later, surveillance video from the front

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V/100. There were no surveillance cameras in the hallways or stairways at 58 Annunciation Road. Tr. V/101.

[12] The Commonwealth and the Petitioner stipulated, "[O]ne of the two individuals seen walking together in the apartment building on Annunciation Road is Mr. Enrique Auch. He is the individual in those videos who was wearing the black, red and white jacket and khaki pants." Tr. VII/82.

entrance camera shows the Petitioner going out the building followed by the individual who entered the building with him. Exhibit 74/Scene 16.

Juan Carlos Garcia's Testimony

The Commonwealth called Juan Carlos Garcia as a witness. Tr. III/112-150.[13] After Garcia gave non-responsive answers to some preliminary questions from the Commonwealth, the trial judge declared Garcia was feigning lack of memory. Tr. III/117. The trial judge then permitted the Commonwealth to read to the jury questions and answers from Garcia's previous grand jury testimony.[14]

The Petitioner expressed his concern that if Garcia's grand jury testimony was read to the jury and could be used as substantive evidence, "that's going to effectively do away with my right to a meaningful cross examination." Tr. III/118-119. The trial judge ruled, "[Y]ou can cross-examine because he's here in court and capable of being cross-examined." Tr. III/119. The

[13] The complete transcript of Garcia's testimony is reproduced in Appendix A. Citations herein are to the original trial transcript page numbers.

[14] The Court permitted this in accordance with Commonwealth v. Daye, 393 Mass. 55 (1984). See also Commonwealth v. Maldonado, 466 Mass. 742, 754-755 (2014), citing Commonwealth v. Sineiro, 432 Mass. 735, 745 & n.12 (2000)(extending Daye to encompass grand jury testimony of a witness who judge determines is "falsifying a lack of memory.").

Petitioner and his co-defendant objected. Tr. III/119. The Petitioner subsequently renewed his objection. Tr. III/141.

The Commonwealth was able to present its factual version of what happened inside and outside of 58 Annunciation Road on the day of the shooting by reading the questions and answers from Garcia's grand jury testimony to the jury. Most importantly from the Commonwealth's perspective, the Commonwealth was able to read to the jury the description Garcia gave of the shooter to the grand jury. Tr. III/143-147.[15]

The Petitioner and his co-defendant then futilely attempted to cross-examine Garcia and essentially obtained the same non-responsive, "I don't recall" answers like those previously elicited by the Commonwealth. Tr. III/150-166, Tr. IV/74-86.[16]

The Decision of the Massachusetts Appeals Court

The principal issue on appeal was the denial of the Petitioner's confrontation rights. The Massachusetts Appeals Court issued its Memorandum and Order Pursuant to Rule 1:28 on October 22, 2019 affirming the Petitioner's convictions. Quoting Commonwealth v. Andrade, 481 Mass. 139, 143 (2018), the Appeals

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[15] Garcia described the shooter as a man having a little darker skin color than himself. Tr. III/144. He did not see the person's face. Tr. III/146-147. The shooter was wearing a gray or black hoodie (with the hood up) and a thin black rain jacket that went down past his belt. Tr. III/145-146. He was wearing khaki pants. Tr. III/145.

[16] Garcia claimed he did not remember testifying in the grand jury. Tr. III/117; Tr. IV/75-76, Tr. IV/80-81.

Court noted, "any limitation on the effectiveness of a cross-examination of a witness who has been found to have feigned memory loss generally does not implicate the confrontation clause" (quotations and citation omitted). Slip op. at 4. The Appeals Court held, "Because under the case law the Petitioner had the opportunity effectively to cross-examine the witness, we conclude that the confrontation clause was not violated by the Commonwealth's introduction of Garcia's grand jury testimony." Slip op. at 5.

Reasons for Granting the Petition

I. Introduction

This Court should grant the petition because the decision of the Massachusetts Appeals Court contradicts the Supreme Court's holdings that the Sixth Amendment guarantees the Petitioner an adequate opportunity to cross-examine the declarant with respect to out-of-court testimony.

This Court has made clear that an adequate opportunity to cross-examine is not satisfied by merely affording the Petitioner *any* opportunity to cross-examine the declarant at trial. "Confrontation means more than being allowed 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 witness be "subject to full and effective cross-examination").

At the very least, the Confrontation Clause requires that the witness must be willing and able "to defend or explain" his out-of-court statement. Crawford v. Washington, 541 U.S. 36, 59 n.9 (2004). The record shows that did not happen in this case. Regardless of the reason why Garcia would not or could not answer questions about his grand jury testimony, the Petitioner was deprived of his ability to "try to expose [the declarant's] accusation as a lie" through questioning. Crawford v. Washington, 541 U.S. at 62.

II. The Petitioner was denied his constitutional rights to the opportunity to fully and effectively cross-examine the prosecution's principal identification witness.

The Sixth Amendment and the Fourteenth Amendment to the Constitution guarantee to the criminal defendant the right to be confronted with the witnesses against him. Bullcoming v. New Mexico, 564 U.S. 647, 658 (2011); Melendez-Diaz v. Massachusetts, 557 U.S. 305, 309 (2009).[17] See Crawford v. Washington, 541 U.S. 36, 51 (2004)(noting defendant's right to confront and cross-examine witnesses against him under Confrontation Clause of Sixth Amendment applies to those who bear testimony against him).

"The Confrontation Clause provides two types of protections for a criminal defendant: the right physically to face those who

[17] The Confrontation Clause of the Sixth Amendment was made obligatory on the states by the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 403 (1965).

testify against him, and the right to conduct cross-examination." Pennsylvania v. Ritchie, 480 U.S. 39, 51 (1987).

Not only does the "right to confront and cross-examine adverse witnesses" under the Sixth Amendment contribute to the perception as well as the reality of fairness in the criminal justice system, it is "primarily a *functional* right that promotes reliability in criminal trials." Lee v. Illinois, 476 U.S. 530, 540 (1986)(emphasis added). See Kentucky v. Stincer, 482 U.S. 730, 737 (1987)(noting the right to cross-examination is a functional right designed to promote reliability in the truth-finding functions of criminal trials); Berger v. California, 393 U.S. 314, 315 (1969)(observing inability to cross-examine critical witness may have had significant effect on the integrity of fact-finding process); Barber v. Page, 390 U.S. 719, 721 (1968)(noting important objective of right of confrontation is to guarantee factfinder has adequate opportunity to assess the credibility of witnesses).[18]

The Supreme Court's Sixth Amendment Confrontation Clause jurisprudence primarily comprises two broad categories of

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[18] The denial of the criminal defendant's right to cross-examination under the Sixth Amendment also implicates due process. See In re Oliver, 333 U.S. 257, 273 (1948)(noting failure to afford defendant the right to cross-examine witnesses is a denial of due process). See also Pointer v. Texas, 380 U.S. 400, 405 (1965)("the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.").

decisions, cases involving the admission of out-of-court statements against the defendant and cases restricting the scope of the defendant's cross-examination. Delaware v. Fensterer, 474 U.S. 15, 18 (1985)(per curiam).

The first category of cases raises Confrontation Clause issues because "hearsay evidence was admitted as substantive evidence against the defendants." Tennessee v. Street, 471 U.S. 409, 413 (1985).[19]

The second category of cases raises Confrontation Clause issues because although the court permitted some cross-examination of the prosecution witness, the court did not allow the defendant to "expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." Davis v. Alaska, 415 U.S. 308, 318 (1974).[20]

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[19] See e.g., Crawford v. Washington, 541 U.S. 36, 51 (2004) (ruling inadmissible statement given to police by non-testifying witness where non-testifying witness not subject to prior cross-examination); Melendez-Diaz v. Massachusetts, 557 U.S. 305, 309 (2009)(ruling inadmissible drug composition certificate prepared by non-testifying witness where non-testifying witness not subject to prior cross-examination); Bruton v. United States, 391 U.S. 123, 126-128 (1968)(ruling inadmissible non-testifying accomplice confession against defendant accompanied by limiting instruction where non-testifying accomplice not subject to prior cross-examination). This category of cases plainly acknowledges the Court's historical recognition that the "literal right to 'confront' the witness at the time of trial . . . forms the core of the values furthered by the Confrontation Clause." California v. Green, 399 U.S. 149, 157 (1970).

[20] See e.g., Delaware v. Van Arsdall, 475 U.S. 673 (1986) (judge's ruling prohibiting defendant's cross-examination

These two categories of Confrontation Clause cases demonstrate the primary interest secured by the Confrontation Clause is the right to cross-examination. See Douglas v. Alabama, 380 U.S. 400, 418 (1965)(noting an adequate opportunity for cross-examination may satisfy the requirements of the Confrontation Clause even in the absence of physical confrontation). The right to cross-examination remains so important to our justice system because it "reflects a judgment" that the reliability of a witness' testimony is best determined by adversarial testing in the "crucible of cross-examination." Crawford v. Washington, 541 U.S. 36, 61 (2004).

The Supreme Court has reviewed Confrontation Clause cases which do not fit into either category. The Court has considered situations where the witness' lapse of memory, actual or professed, or the witness' evasion or refusal to answer questions may so frustrate the defendant's opportunity for cross-examination that admission of the witness' direct testimony may violate the Confrontation Clause.[21]

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regarding potential bias resulting from state's dismissal of witness' pending charge violated Confrontation Clause); Chambers v. Mississippi, 410 U.S. 284, 294-295 (1973)(holding evidentiary rule prohibiting cross-examination or impeachment of party's own witness denied defendant due process and recognizing "the rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process.").

[21] See e.g., Delaware v. Fensterer, 474 U.S. 15, 22 (1985) (Confrontation Clause not offended where FBI expert witness opinion admitted despite expert being unable to recall the basis

The Confrontation Clause does not offer the defendant a guarantee that every prosecution witness will not give forgetful, confused, or evasive testimony. Delaware v. Fensterer, 474 U.S. 15, 21-22 (1985). Instead, "the Confrontation Clause is generally satisfied when the defense is given *a full and fair opportunity* to probe and expose those infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witnesses testimony." Id. at 22 (emphasis added).

A. The Confrontation Clause tolerates the admissibility for substantive purposes of a declarant's inconsistent out-of-court statements where the declarant testifies at trial, but only so long as the defendant has a full and effective opportunity for cross-examination.

The Confrontation Clause is not violated when a declarant's out-of-court inconsistent statements are admitted for substantive purposes if the factfinder can observe the declarant testify as a witness and is subject to full and effective cross examination.

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for his own expert opinion); United States v. Owens, 484 U.S. 554 (1988)(introduction of memory impaired victim's out-of-court identification of defendant admissible even though victim testified at trial that he could not remember seeing his assailant or whether any hospital visitor had suggested the defendant was his assailant); California v. Green, 399 U.S. 149, 164 (1970)("[T]he Confrontation Clause does not require excluding from evidence the prior statements of a markedly evasive and uncooperative witness who concedes making the statements and who may be asked to defend or otherwise explain the inconsistency between his prior and his present version of the events in question, thus opening himself to full-cross examination at trial as to both stories.").

See California v. Green, 399 U.S. 149, 158 (1970)(noting it is "the literal right to 'confront' the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause"). The theory is that as long as the defendant is assured of full and effective cross examination of the declarant at the time of trial, the usual dangers of hearsay resulting from the substantive use of the prior out-of-court inconsistent statements are largely nonexistent. Id. at 155, 158-159. But in Green, the Court had to remand the case to determine whether the declarant's apparent lapse of memory at trial so affected the defendant's right to cross-examine the declarant so as to make a critical difference in the application of the Confrontation Clause. Id. at 168-169 & n.18.

The issue of whether the admission of out-of-court identification testimony violated the Confrontation Clause, where declarant was subject to cross-examination and had actual and complete memory loss regarding the basis for his out-of-court identification of the defendant, was squarely presented in United States v. Owens, 484 U.S. 554 (1988).[22] The Court allowed the declarant's out-of-court identification despite the declarant's

[22] The Supreme Court has not held that a Confrontation Clause violation can be grounded on a witness' loss of memory, but in two older cases, Delaware v. Fensterer, 474 U.S. 15, 18, 24 (1985)(per curiam) and California v. Green, 399 U.S. 149, 157-164 (1970), the Court left that possibility open. United States v. Owens, 484 U.S. 554, 557-558 (1988).

severely impaired memory because "[t]he 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'". Id. at 559, quoting Kentucky v. Stincer, 482 U.S. 730, 739 (1987). The Court ruled in Owens that the defendant was not denied a full and fair opportunity for cross-examination where the declarant testified at trial and the defendant could bring out the declarant's bad memory and other facts tending to discredit his testimony. 484 U.S. at 559-560.[23]

Most recently, in the Supreme Court's landmark Sixth Amendment Confrontation Clause decision, Crawford v. Washington, 541 U.S. 36, 59 n.9 (2004), the Court, citing California v. Green, 399 U.S. 149, 162 (1970), reiterated that when the declarant is subject to cross-examination, "the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." But Justice Scalia added an all-important caveat: "The Clause does not bar admission of a statement *so long as the declarant is present at trial to defend or explain it*." Id. (emphasis added).

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[23] There is nothing in the Owens opinion to suggest that the victim was feigning memory loss. The victim was a correctional counselor in a federal prison who was brutally beaten with a metal pipe. United States v. Owens, 484 U.S. 554, 556 (1988).

B. The decision below misconstrues the Confrontation Clause. The Petitioner was denied his rights under the Sixth Amendment's Confrontation Clause when Juan Carlos Garcia refused to answer any substantive questions on cross-examination.

The Petitioner expressed his concern that if Garcia's grand jury testimony was read to the jury and could be used a substantive evidence, "that's going to effectively do away with my right to a meaningful cross examination." Tr. III/118-119. The trial judge ruled, "[Y]ou can cross-examine because he's here in court and capable of being cross-examined." Tr. III/119.[24]

The Massachusetts Appeals Court accepted the trial judge's ruling. Relying on Commonwealth v. Andrade, 481 Mass. 139, 143 (2018), it explained, "any limitation on the effectiveness of a cross-examination of a witness who has been found to have feigned memory loss generally does not implicate the confrontation clause" (quotations and citation omitted). Slip op. at 4. This

[24] This statement is inconsistent with current controlling United States Supreme Court Confrontation Clause jurisprudence; it reflects the narrow view of Justice Harlan in his concurrence in California v. Green, 399 U.S. 149, 183 (1970), that the Confrontation Clause is "confined to an availability rule, one that requires only the production of a witness when he is available to testify". See United States v. Torrez-Ortega, 184 F.3d 1128, 1133-1134 (10th Cir. 1999)(noting the Supreme Court has made clear Justice Harlan's position on the Confrontation Clause was and remains a decidedly minority view), citing White v. Illinois, 502 U.S. 346, 352-353 & n.5 (1992). It is also inconsistent with the modern view of the Confrontation Clause that Justice Scalia expressed in Crawford, "The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it." Crawford v. Washington, 541 U.S. 36, 59 n.9 (2004).

decision misconstrues the Confrontation Clause. Confidence in a statement's reliability "cannot be had except by direct and personal putting of questions and obtaining immediate answers." Davis v. Alaska, 415 U.S. 308, 316 (1974), quoting 5 John Wigmore, Evidence § 1395, at 123 (3d ed. 1940). A witness who physically takes the stand but is unable or unwilling to provide "immediate answers" to questions about his prior statement is no different than a witness who declines to take the witness stand at all. In either case, the defendant's right to "try to expose [the declarant's] accusation as a lie" through questioning is thwarted. Crawford v. Washington, 541 U.S. 36, 62 (2004).

In Douglas v. Alabama, 380 U.S. 415, 419 (1965), the Supreme Court held the Sixth Amendment's Confrontation Clause barred the use of a witness' prior statement when the witness refused to answer questions on cross-examination. That is precisely what happened in the Petitioner's case with Garcia's feigned memory loss. The feigned memory loss, for all practical purposes, was the equivalent of an outright refusal to answer questions on cross-examination.

The inability of the Petitioner to force Garcia to "defend or explain" his grand jury testimony as required by Crawford resulted in a complete denial to the Petitioner of an effective opportunity for cross-examination. This Court cannot conclude that the Petitioner had "a full and fair opportunity to probe and

expose [the] infirmities" of Garcia's out-of-court testimony through "meaningful" and "effective" cross-examination. United States v. Owens, 484 U.S. 554, 559, 562 (1988); Delaware v. Fensterer, 474 U.S. 15, 22 (1985).[25] That was simply never going to happen with this witness in this case.

Since Garcia was the critical link in the Commonwealth's purported identification of the Petitioner as the shooter, this constitutional error was anything but harmless. The Defendant's rights to confront and cross-examine Garcia under the Sixth Amendment and Fourteenth Amendment to the federal Constitution were violated and the prejudice was overwhelming.

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[25] Three federal Circuit Courts of Appeal have found Sixth Amendment violations under similar factual circumstances. See Preston v. Superintendent Graterford SCI, 902 F.3d 365, 380 (3d Cir. 2018)(finding no full and fair opportunity through meaningful and effective cross-examination to probe and expose infirmities of witness' prior testimonial out-of-court statement where witness refused to answer any substantive questions and responded to nearly every question with "no comment"); United States v. Torrez-Ortega, 184 F.3d 1128, 1132-1134 (10th Cir. 1999)(witness not subject to cross-examination where admission of grand jury testimony violated Confrontation Clause when witness asserted illegitimate claim of privilege against self-incrimination and refused to answer questions except for elliptical and confusing answers when not asserting privilege); United States v. Fiore, 443 F.2d 112, 114-115(2d Cir. 1971) (Friendly, J.)(admission of grand jury testimony read to jury violated Confrontation Clause; witness responded to prosecutor's reading of grand jury questions with "I might have," "I don't recall", "I don't know whether I did or not", or "I refuse to answer" when asked whether witness had given certain testimony to grand jury).

III. This case is an excellent vehicle for addressing the question presented.

This case presents a straightforward question of constitutional law: whether the Confrontation Clause permits the prosecution to introduce out-of-court testimonial statements from a witness who is feigning memory loss and who then refuses to defend or explain his out-of-court testimonial statements on cross-examination by the defense. The Massachusetts Appeals Court, quoting prior Massachusetts caselaw, indicated, "any limitation on the effectiveness of a cross-examination of a witness who has been found to have feigned memory loss generally does not implicate the confrontation clause" and the Petitioner had the opportunity to effectively cross-examine the witness.

This case presents an excellent vehicle for addressing the question presented because Crawford and the record simply do not support the state court's decision. The Massachusetts Appeals Court is incorrect on the law. Any limitation on the effectiveness of cross-examination of a witness who has been found to have feigned memory loss does implicate the Confrontation Clause and the Petitioner had no opportunity to effectively cross-examine Garcia, the most important witness in the case. Because Garcia would not "defend or explain" his out-of-court statement, it is, for the purposes of the Confrontation Clause, as if this witness did not appear at all. Crawford v. Washington, 541 U.S. 36, 59 n.9 (2004).

Conclusion

The petition for writ of certiorari should be granted.

Respectfully submitted,

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