No. _____

In the
Supreme Court of the United States

_____

DeMichael Tyrone Moore and Derrick Darnell Moore,
***Petitioners*,**

vs.

State of Tennessee,
***Respondent*.**

_____

On Petition For A Writ of Certiorari
To The Supreme Court of Tennessee

_____

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Confrontation Clause is violated by admitting a prior recorded statement of a witness who testifies he has no memory of making the statement or the underlying events, thereby denying a defendant the "opportunity for effective cross-examination."

PARTIES TO THE PROCEEDINGS

There are no parties to the proceedings other than those listed in the caption. Petitioners are brothers DeMichael Moore and Derrick D. Moore, whose state trial and appellate cases were consolidated into a single matter. Respondent is the State of Tennessee.

STATEMENT OF RELATED PROCEEDINGS

Tennessee Supreme Court, No. M2018-01764-SC-R11-CD, *State of Tennessee v. Derrick Darnell Moore and DeMichael Tyrone Moore*, Order denying Application for Permission to Appeal entered on September 16, 2020.

Tennessee Court of Criminal Appeals, No. M2018-01764-CCA-R3-CD, *State of Tennessee v. Derrick Darnell Moore and DeMichael Tyrone Moore*, Opinion entered on May 15, 2020.

Criminal Court of Davidson County, Tennessee, Indictment No. 2014-B-907, *State of Tennessee v. Derrick Darnell Moore and DeMichael Tyrone Moore*, final judgment entered May 8, 2017.

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STATEMENT OF JURISDICTION

The opinion of the Tennessee Court of Criminal Appeals was issued on May 15, 2020. The Tennessee Supreme Court denied Petitioners' application to appeal on September 16, 2020.

This Court has jurisdiction under 28 U.S.C. § 1257(a), which confers jurisdiction over an appeal of a final judgment rendered by the highest court of a State where any title, right, privilege, or immunity is specially set up or claimed under the Constitution.

CONSTITUTIONAL PROVISION INVOLVED

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

Section One of the Fourteenth Amendment to the United States Constitution provides in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

INTRODUCTION

In this first-degree murder case, the only direct evidence against brothers DeMichael Moore and Derrick Moore was a surreptitiously-recorded conversation from a purported eyewitness and two police officers. This individual, David Miller, first denied knowledge of the shooting but later told police he would name the killers in exchange for reward money. When the police instructed him for receiving such payment, he immediately implicated Derrick and DeMichael Moore.

At trial, David Miller testified he sustained a traumatic brain injury the year after the incident and could no longer remember anything about the shooting or speaking with the police. The prosecution offered no evidence or argument that Mr. Miller was feigning his memory loss, and the trial court did not find him incredible. Mr. Miller was not a recanting or reluctant witness.

Over the Defendants' objection, the trial court admitted the surreptitiously-recorded conversation as a "prior inconsistent statement of a testifying witness" under Tennessee Rule of Evidence 803(26). This unique hearsay rule admits prior recorded statements as substantive evidence if the witness offers an inconsistent statement at trial and the statement was "made under circumstances indicating trustworthiness." Few other jurisdictions admit prior statements as substantive evidence under such circumstances.

This Court has long held that prior statements of a testifying witness only satisfy the Confrontation Clause "as long as the defendant is assured of full and effective cross-examination at the time of trial" of the witness who made the statement. *California v. Green*, 399 U.S. 149, 159 (1970). Although a defendant is not

guaranteed "cross-examination that is effective in whatever way, and to whatever extent, the defense might wish," the Confrontation Clause does require "an *opportunity* for effective cross-examination." *Pennsylvania v. Ritchie*, 480 U.S. 39, 53 (1987).

The issue of a prior statement from testifying witness with *partial* memory loss has arisen in at least two of this Court's prior decisions: *Delaware v. Fensterer*, 474 U.S. 15 (1985) and *United States v. Owens*, 484 U.S. 554 (1988). In each case, the Court held the Confrontation Clause was not offended because the defendants could "bring out such matters as the witness' bias, his lack of care and attentiveness, his poor eyesight, and even . . . the very fact that he has a bad memory." *Owens*, 484 U.S. at 559.

However, these decisions left unsettled the precise question at issue here. *See Fensterer*, 474 U.S. at 20 ("We need not decide whether there are circumstances in which a witness' lapse of memory may so frustrate any opportunity for cross-examination that admission of the witness' direct testimony violates the Confrontation Clause.").

Petitioners urge this Court to accept this case to determine whether this question has been effectively answered by subsequent Confrontation Clause cases, or else to resolve the matter now. The issue has been fully raised and preserved for this Court's consideration.

In this unique situation, the witness's mere physical presence on the witness stand did not afford the Petitioners even an opportunity for effective cross-

examination about the underlying statements. Because the witness had a total memory loss about the entire incident and the statement itself, Petitioners had no way to elicit any information that would have enabled the jury to evaluate the trustworthiness or reliability of his prior statement.

This Court's review is justified to clarify that the Confrontation Clause does not permit introduction of a witness's prior statement where the witness's memory loss completely prevents effective cross-examination regarding the substance and reliability of the statement that the factfinder lacks an adequate basis upon which to assess its truth. It is incumbent on the Court to intervene and correct the injustice for Petitioners and prevent similar injustices in the future. The petition for certiorari should be granted.

STATEMENT OF THE CASE

A. The Indictment.

On September 27, 2013, Spencer Beasley was shot to death during an apparent robbery during a dice game. On April 15, 2014, an indictment was returned charging brothers Derrick and DeMichael Moore with First-Degree Murder, Felony Murder, and Especially Aggravated Robbery. App. 3. Derrick and DeMichael Moore entered pleas of not guilty.

B. David Miller's surreptitiously-recorded statement.

The day after the murder, two detectives canvassed the scene and interviewed David Miller, who said he knew nothing about the shooting. App. 6. As the detectives drove away, they saw Mr. Miller standing on the street, "and he just got in the back seat." App. 7. Police recorded the conversation but did not tell Mr. Miller they were doing so. App. 18.

Almost immediately, Mr. Miller asked them for money and conditioned his cooperation on payment:

> MILLER: I'm gonna show y'all exactly where the dude live at who done it, you feel me?
>
> DETECTIVE: Okay.
>
> MILLER: **Y'all gotta pay me though. Got to pay me**.
>
> DETECTIVE: I tell you what, we, we can definitely talk about that. Crime Stoppers pays money.
>
> MILLER: What'd you say?
>
> DETECTIVE: **I said Crime Stoppers pays money. I tell you what we can do.**
>
> MILLER: Nah, I can't go to no Crime Stoppers.

DETECTIVE: Nah, nah, nah, nah, nah, what I'm saying is you, here's, here's what you do. **Show us now, show us what you're talking about.**

MILLER: Uh-huh.

DETECTIVE: **And then I'm gonna give you a number to call and then just do the same thing.**

. . .

MILLER: You see what I'm saying? **But I got to get paid or I ain't**

DETECTIVE: Yeah, we, we, **we have ways to get you paid** but me and him **can't do that right now** here in this car cause we don't have the money and we're not

MILLER: Look –

DETECTIVE: The bosses of doing that but **we have ways** of getting where we can –

DETECTIVE: Look **there's an anonymous number**, when you call and you stay, in fact it makes you stay anonymous. It won't even let you give your name.

MILLER: Uh-huh.

DETECTIVE: And **that one will pay you up to a grand** whereas he and I ain't gonna be able to pay you nothing but cigarette money.

MILLER: **What's the number?** Just back up and go up. Otay. Back up and go up Otay, **Ima show y'all dude now**, name he go, listen, **he go by "D-Face."**

DETECTIVE: Heard, I

MILLER: **His real name is Demichael**. See what I'm saying?

App. 29-32. (emphasis added).

At the eventual jury trial, this recorded interview was played in its entirety for the jury. It was the only direct evidence of guilt against either defendant. App. 12.

C. David Miller's subsequent injury and total memory loss.

Both Defendants moved to suppress Mr. Miller's statement. At a pre-trial hearing, Mr. Miller testified he lost significant portions of his memory after sustaining a serious brain injury:

> I had an accident in Gallatin where some dude jumped on me and I was hit with a lamp and I had -- they life flighted me from Sumner to Vanderbilt and I just had a bunch of surgery in my brain. I lost a lot of memory.
>
> So I mean, I have been messed up for the last two years. I don't even remember a lot of stuff. And then I've been doing drugs and that ain't helping, you know what I'm saying.

App. 35, lines 15-23. When asked by the trial court for verification of his injuries, Mr. Miller demonstrated a scar where "they had to put my eye back." App. 44, lines 1-15.

Mr. Miller had no recollection of giving an interview to police about the shooting. App. 38 lines 4-13 & 45 lines 8-19.

Mr. Miller stated he had no memory of an incident from 2013 involving Derrick and DeMichael Moore and did not recall having ever witnessed a shooting. App. 36 lines 17-20 & 44 lines 19-20. He said he recognized the Defendants in the courtroom, but only by nicknames and not their given names. App. 37. He did not remember the name of the decedent, Spencer Beasley. App. 44 lines 21-23.

In 2013, Mr. Miller was using crack, powder cocaine, marijuana, and pills, explaining: "I was just going through a depression man, I lost all of my loved ones." App. 40. He testified that if he was asking the police for money in the interview, "I had to have been high." App. 41 lines 19-21.

Mr. Miller testified he still has problems with memory retention: "sometimes I still don't even remember my little girl's birthday and stuff. I ask my girlfriend's her birthday yesterday. There is a whole bunch of stuff wrong with me, all kinds of stuff. I had a court date in Nashville a month ago, F.T.A. [failure to appear] where I didn't go to it. I didn't even remember I had a court date." App. 43 lines 19-21.

The Defendants moved to exclude David Miller's out-of-court statement arguing it was testimonial hearsay precluded by this Court's holding in *Crawford v. Washington*, 541 U.S. 36 (2004). App. 18-19. The trial court reserved ruling for resolution during the trial.

D. Testimony and ruling during the jury trial.

At trial, David Miller again testified about his memory problems and lack of recall regarding the incident. Mr. Miller told the jury he did not recall the shooting that occurred on September 27th, 2013, anyone named Spencer Beasley, DeMichael Moore, or Derrick Moore anything that happened during that time whatsoever, or speaking with detectives when the interview was surreptitiously recorded. App. 5-6, 18.

After a jury-out hearing, the trial court ruled that the interview was admissible as substantive evidence under Tenn. R. Evid. 803(26), which admits as substantive evidence prior inconstant statements of a testifying witness. App. 55-60.

The trial court's analysis was limited to the factors in the state hearsay exception and neglected to consider whether admitting the statement violated the Confrontation Clause. Specifically, the court did not offer any analysis or findings

regarding whether the Defendants had the "opportunity for effective cross-examination" of the declarant.

E. The verdict and sentences.

The jury found DeMichael Moore guilty of (1) Especially Aggravated Robbery, (2) Felony Murder, and (3) Second Degree Murder (as a lesser-included offense of First Degree Murder). The jury found Derrick Moore guilty of (1) Especially Aggravated Robbery, (2) Felony Murder, and (3) Criminally Negligent Homicide (as a lesser-included offense of First Degree Murder). App. 2.

The trial court immediately sentenced both men to a mandatory life sentence for the Felony Murder convictions. Their additional homicide convictions were merged. For their Especially Aggravated Robbery convictions, DeMichael and Derrick Moore received additional sentences of thirty-two years and twenty years, respectively. App. 2.

F. Appellate proceedings in state court.

Both Defendants filed a consolidated appeal. The intermediate appellate court's analysis on the Confrontation Clause was limited to a single sentence: "Mr. Miller testified at the trial, and the Defendants had the opportunity to cross-examine him." App. 23. The court then quoted a Tennessee Supreme Court decision for the proposition that:

> even when a trial court admits a witness' hearsay statements as substantive evidence, and the witness claims at trial not to remember the information contained within the hearsay statements, the Confrontation Clause is not violated when a defendant has an opportunity to cross-examine the witness at trial.

App. 23 (quoting *State v. Davis*, 466 S.W.3d 49, 69 (Tenn. 2015)). The court neglected to consider Defendants' arguments that *Davis* was distinguishable because the witness there had at least *some* memories of the underlying incident, such as seeing "the victim lying bleeding in his grandmother's driveway" and "getting his grandmother a towel." 466 S.W.3d at 57. The convictions were thus affirmed.

The Defendants filed an Application for Permission to Appeal to the Tennessee Supreme Court,[1] which was denied without comment. App. 27.

[1] The aggrieved party at the intermediate appellate court proceeding must apply for permission to appeal to the Tennessee Supreme Court. Tenn. R. App. P. 11.

REASONS FOR GRANTING THE PETITION

This Court should grant review to clarify the Confrontation Clause bars introduction of a prior statement when the witness's complete memory loss deprives the defendant the opportunity for effective cross-examination.

The Confrontation Clause "commands" that the reliability of evidence be assessed "by testing in the crucible of cross-examination." *Crawford v. Washington*, 541 U.S. 36, 62 (2004). Thus, prior testimonial statements are only admissible if the defendant has "an opportunity" for "full and effective" cross-examination at trial (or, if the witness is unavailable, on a prior occasion). *Id.* at 68; *Pennsylvania v. Ritchie*, 480 U.S. 39, 53 (1987); *California v. Green*, 399 U.S. 149, 159 (1970).

To have any meaning, this "opportunity" requires something more than the witness's physical presence and ability to speak. Yet that is precisely what the Tennessee courts have held in this case.

The substance of witness David Miller's in-court testimony was that he received a traumatic brain injury which completely erased his memory about the shooting, the people involved, and making the statement itself (among other things). Petitioners were deprived of the opportunity to cross-examine him in *any way* regarding the damning accusations in his earlier statement. None of the standard tools of cross-examination were available, such as honesty, bias, memory (at the time), ability to observe, attentiveness, and degree of certainty.

If left unchecked, the Tennessee courts will have the green light to reduce the fundamental right of confrontation to a hollow formality. This is contrary to the Court's holding in *Crawford* and the historical right to engage in cross-examination

sufficient to "affor[d] the trier of fact a satisfactory basis for evaluating the truth of [a] prior statement." *Green*, 399 U.S. at 161.

I. David Miller's complete memory loss following his statement denied the Petitioners the opportunity for effective cross-examination.

The touchstone question is whether a defendant had the "opportunity for effective cross-examination" to satisfy the Confrontation Clause. The Court has held the Sixth Amendment guarantees criminal defendants the right to engage in cross-examination sufficient to "affor[d] the trier of fact a satisfactory basis for evaluating the truth of [a] prior statement." *Green*, 399 U.S. at 161. The right to cross-examination "is essentially a 'functional' right designed to promote reliability in the truth-finding functions of a criminal trial." *Kentucky v. Stincer*, 482 U.S. 730, 737 (1987).

In similar cases, this Court has always required at least *some* recollection from a witness before determining that the defendant had at least the "opportunity" for effective cross-examination. For example, in *United States v. Owens*, a victim identified the defendant as his assailant to an investigator but testified at trial he remembered making the statement but "admitted that he could not remember seeing his assailant." 484 U.S. 554, 556 (1988). This was sufficient to pass constitutional muster because the defendant nonetheless could "bring out such matters as the witness' bias, his lack of care and attentiveness, his poor eyesight, and even . . . the very fact that he has a bad memory." *Id.* at 559-60.[2] *See also Delaware v. Fensterer*,

[2] This passage was heavily relied upon by the Tennessee Supreme Court in the earlier *Davis* decision. 466 S.W.3d 49, 69 (Tenn. 2015).

474 U.S. 15, 22 (1985) ("[T]he Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination.").

By contrast, David Miller could not be questioned about any of these matters as they existed at the time he purportedly saw the incident and made his statement. Mr. Miller's testified he had no memory of anything whatsoever from that entire period of time. App. 5-6, 18. Eliciting testimony about Miller's memory and biases *at the time of trial* in no way could have cast doubt on the accuracy of his earlier statement in light of his intervening traumatic brain injury.

There were effectively two David Millers in this case: one who told police that the Moore brothers killed the victim during a dice game, and one who had no memory of the incident or the statement. The sole accuser was the first David Miller, whose recorded words were the only direct evidence of the Moore brothers' guilt. But the second David Miller was the only witness the brothers had the chance to question. Through no fault of the Petitioners, Mr. Miller's subsequent memory loss prevented him from affirming, recanting, or clarifying his out-of-court statement just as surely and completely as his death would have.

In *Crawford v. Washington*, this Court invoked the 1603 treason trial of Sir Walter Raleigh, whose alleged accomplice Lord Cobham implicated him in statements which were read to the jury. 541 U.S. 36, 44 (2004). "Suspecting that Cobham would recant, Raleigh demanded that the judges call him to appear" to "let him speak it." *Id.* English common law later "developed a right of confrontation that

limited these abuses." *Id.* But suppose Cobham was summoned to the trial following an injury which undisputedly erased his memory of the purported treason and the statements; Raleigh would hardly have been in a better position to challenge the statements.

It is fundamentally unfair for the Moore brothers to be condemned by the peculiar result of Mr. Miller's brain injury. Had the injury been more severe and deprived him of the ability to communicate in court, he could not have offered the "inconsistent" statement that he did not remember the shooting, thereby preventing the State from utilizing the hearsay exception. Conversely, had his injury been less severe such that he had at least some recollection of the relevant time period, the Petitioners might have had the "opportunity for effective cross-examination" guaranteed by the Constitution.

Allowing Mr. Miller's statement into evidence—despite the Petitioners' complete inability to confront him regarding it—is effectively an absurd result that should be avoided. Under this application of law, either side of a case could introduce a prior statement for the truth of the matter that is unchallengeable in cross-examination if the declarant claims not to remember anything.[3]

In the present case, the Moore brothers were afforded no opportunity to probe and expose the potential infirmities of Miller's September 28, 2013 statement. For

[3] For example, a defendant could simply record an accomplice reading an exculpatory statement and then pay that person to testify they do not remember the incident or the statement. Under the trial court's ruling, the statement would be admissible as substantive evidence.

here cross-examination, the "greatest legal engine ever invented for the discovery of truth," stood helpless before Miller's complete memory loss. *Green*, 399 U.S. at 158.

II. The Tennessee hearsay exception admitting prior inconsistent statements of a testifying witness.

The Tennessee Rule of Evidence at issue provides that a prior inconsistent statement of a testifying witness may be admitted as substantive evidence if there is an indicium of trustworthiness and the declarant is subject to cross-examination about the statement. Tenn. R. Evid. 803(26)(A).[4]

A few years before this case, the Tennessee Supreme Court reviewed a Confrontation Clause challenge to this hearsay rule and expanded this Court's holding in *Crawford* to its outermost limits without actually violating it. *State v. Davis*, 466 S.W.3d 49 (Tenn. 2015).

In *Davis*, the declarant said he did not recall giving the out-of-court statement but said he recalled "the victim lying bleeding in his grandmother's driveway" and "getting his grandmother a towel." *Davis*, 466 S.W.3d at 57. Since the declarant in *Davis* had *some* memories of the incident, the Tennessee Supreme Court held the defendant's right to confrontation was satisfied because he had the opportunity to inquire on collateral facts which might challenge the veracity of the statement despite the declarant not recalling the extrajudicial statement. *Id*. at 68-69.

[4] The trial court observed Rule 803(26) was submitted to the Tennessee Legislature by the District Attorney's Conference to address a reluctant witness in "domestic-violence-type situations" and "gang-type-situations" where the witness does not want to testify against "husband, boyfriend, gang member." App. 19, 56.

The state court holding in *Davis* was entirely consistent with this Court's holdings providing that the Confrontation Clause is satisfied as long as the witness has some memories about the incident or the statement on which a defendant can attempt to cross-examine. *See United States v. Owens*, 484 U.S. 554 (1988).

However, in the case at bar, the Tennessee courts went astray in summarily applying *Davis* without considering that Mr. Miller's complete lack of memory is a significant distinction from *Davis* itself and the cases on which it relied.

III. The Tennessee decision is contrary to clearly established federal law because the state court departed from the governing law set forth in this Court's decisions on what constitutes an "opportunity for effective cross-examination."

A state court's decision is contrary to clearly established federal law "if the state court applies a rule different from the governing law set forth" in the Supreme Court's holdings "or if it decides a case differently than" the Supreme Court has "on a set of materially indistinguishable facts." *Bell v. Cone*, 535 U.S. 685, 694 (2002) (citing *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000)). A state court's "decision is an unreasonable application of [the Supreme Court's] clearly established precedent if it correctly identifies the governing legal rule but applies that rule unreasonably to the facts of a particular prisoner's case." *White v. Woodall*, 572 U.S. 415, 426 (2014). The Tennessee appellate court decision is contrary to the Court's decisions.

As noted above, this Court has held that a witness's *partial* lack of memory does not deprive a defendant of this "opportunity" so 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 . . . the very fact that he has a bad memory."

United States v. Owens, 484 U.S. 554, 559 (1988). *See also Delaware v. Fensterer*, 474 U.S. 15, 22 (1985) ("[T]he Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination.").

In *Fensterer*, the Court left unsettled the precise question at issue here: "We need not decide whether there are circumstances in which a witness' lapse of memory may so frustrate any opportunity for cross-examination that admission of the witness' direct testimony violates the Confrontation Clause." 474 U.S. 15, 20 (1985).

Petitioners submit that this Court's subsequent Confrontation Clause cases have established that such total memory lapses to frustrate the opportunity from cross-examination in violation of the Confrontation Clause, such that the Tennessee state court decision below "conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). Alternatively, should the question remain open, Petitioners submit that the state court "has decided an important question of federal law that has not been, but should be, settled by this Court." *Id.*

While the Court has rejected that effectiveness should be measured in terms of a defendant's ultimate success, effectiveness does not equate with the mere opportunity to pose questions. Consistent with the Confrontation Clause's purpose of "advanc[ing] a practical concern for the accuracy of the truth-determining process in criminal trials," the Court has held that the *touchstone of effectiveness* is whether the cross-examination affords " 'the trier of fact ... a satisfactory basis for evaluating the

truth of the prior statement.' " *Dutton v. Evans,* 400 U.S. 74, 89 (1970) (quoting *Green*, 399 U.S. at 161)).

Applying the Court's deep-seated standard of "effectiveness," the Court reiterated in *Ohio v. Roberts* the admissibility of an extrajudicial statement does not violate Confrontation Clause only where previous cross-examination of declarant "afforded the trier of fact a satisfactory basis for evaluating the truth of the prior statement." *Ohio v. Roberts*, 448 U.S. 56, 73 (1980).

Later, the Court held that partial memory impairments did not render the victim "unavailable for cross-examination" if the defendant has the opportunity to "bring out" on cross-examination the typical topics for impeachment such as bias and poor memory. *United States v. Owens*, 484 U.S. 554, 559 (1988). The standard is an objective test and not subjective, asking whether the defendant had the opportunity for effective cross-examination rather than whether the defendant achieved the desired result.

In consideration of admitting an extrajudicial statement by a witness with memory loss, the *Owens* Court acknowledged that such memory loss satisfies "unavailability" under Rule 804(a)(3) (defining witness as unavailable for additional hearsay exceptions) but not under Rule 801(d)(1)(C) (defining prior identification by declarant-witness as not hearsay). *Owens,* 484 U.S. at 562.[5]

[5] Relying on this Court's legal precedent, the drafters of the Federal Rules of Evidence have never strayed too far from *Crawford*. It is worth noting that Fed. R. Evid. 801(d)(1)(A) and 804(b)(1)(A) require the heightened safeguard that the prior statement sought to be admitted be given under penalty of perjury at a trial, hearing, deposition, or other proceedings. And under Rule 804, the opposing party must have had an opportunity and similar motive to question the witness. Rule 804(b)(1)(B).

The Court's decision in *Owens* highlights the difference between a declarant who is forgetful or uncooperative and a declarant who because of death, privilege, or other physical or mental infirmity cannot be cross-examined and is deemed unavailable. In the former situation, a defendant has at least some opportunity to challenge the veracity of the declarant, whereas in the latter, the defendant has none.

Justice Brennan, dissenting in *Owens*, emphasized his interpretation of constitutionally "effective" cross-examination would not have been met characterizing the partial memory loss as virtually as abject as would have been the case if the declarant had been dead. *Id*. at 566.

This case is even more extreme than *Owens*, as David Miller had total memory loss and could not remember the shooting, the people involved, the Moore brothers he accused, the circumstances around giving the statement, and the statement itself. This Court has never held the Confrontation Clause is satisfied when the witness is essentially silent to questioning after invoking a testimonial privilege or physical or mental impairment. Under the Court's prior cases, the constitutional admissibility of Miller's prior statement should depend on whether the memory loss so seriously impeded cross-examination that the factfinder lacks an adequate basis upon which to assess the truth of the proffered evidence. It is clear in the case before the Court that Miller's total loss of memory precluded any meaningful examination or assessment of his out-of-court statement and thus it should not have been admitted before the jury.

The prosecution cannot circumvent the Confrontational Clause by simply putting a body on the witness stand incapable of responsive answers to cross-examination questions about the substance of the testimony being offered. *Cf. Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009); *Bullcoming v. New Mexico*, 564 U.S. 647 (2011) (holding that scientific reports could not be used as substantive evidence against a defendant unless the analyst who prepared and certified the report was subject to confrontation).

IV. The Tennessee courts' reliance on the "trustworthy" factor and dispensing with a confrontation analysis is contrary to the Court's decisions.

As discussed above, the trial court's ruling affirmed by the Tennessee appellate court admitted David Miller's surreptitiously recorded statement under their notion of "trustworthiness" dispensing with the Confrontation Clause. The trial court's ruling (App. 55) affirmed by the appellate court (App. 1) evidences the analysis focused almost exclusively on the hearsay exception rule's trustworthiness factors without considering if there was a Confrontation Clause violation.

The Tennessee courts' reasoning is little more than a return to the Court's overruled decision in *Ohio v. Roberts*, which held that evidence with "particularized guarantees of trustworthiness" was admissible notwithstanding the Confrontation Clause. 448 U.S. 56, 66 (1980). *Roberts* was criticized and abrogated by the Court's decision in *Crawford*. 541 U.S. at 58-68 (rejecting subjective reliability standard in holding that out-of-court testimonial statements are barred unless witness is

unavailable, and defendants had prior opportunity to cross-examine). The *Crawford* Court reasoned:

> Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of "reliability." . . . Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. ... Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.

Crawford, 541 U.S. at 61-62. Dispensing with the Confrontation Clause because the trial court deems the testimony as trustworthy is directly contrary to this Court's decision.

V. This case presents an ideal vehicle for addressing and resolving this important constitutional question.

This case has all the normal attributes of a good vehicle for addressing the question presented. The question was squarely raised and decided by the Tennessee Court of Criminal Appeals. There are no procedural or jurisdictional obstacles that could block the Court from reaching the merits. There are no contested material facts. The disputed evidence is potentially dispositive of the entire case, considering that it was the only direct evidence of guilt.

The sole issue for this Court to decide is whether the Sixth Amendment's Confrontation Clause is violated when a prior statement is admitted by a declarant who testifies at trial that he has a complete lack of memory about the underlying

incident and making the statement. This was the very question left undecided in *Fensterer*.

This is an important question needing the Court's intervention now to vindicate the Sixth Amendment's guarantee of the right of confrontation. The Court cannot allow to continue the practice of admitting prior statements where the declarant remains mute behind profound memory loss. The Confrontation Clause guarantees more than the right to ask questions of a live witness, no matter how dead that witness's memory proves to be. The Court's review is justified to prevent the unjust convictions of two brothers condemned to life sentences.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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