TRANSCRIPT OF PROCEEDINGS

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 86-877
	)	
JAMES JOSEPH OWENS	)	

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JAMES JOSEPH OWENS :

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Washington, D.C.

Wednesday, November 4, 1987

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:04 o'clock a.m.

APPEARANCES:

WILLIAM C. BRYSON, ESQUIRE, Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the petitioner.

ALLAN IDES, ESQUIRE, Los Angeles, California; on behalf of the respondent.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: We will hear argument next in No. 86-877, United States v. James Joseph Owens.

Mr. Bryson, you may proceed whenever you are ready.

ORAL ARGUMENT OF WILLIAM C. BRYSON, ESQUIRE

ON BEHALF OF THE PETITIONER

MR. BRYSON: Mr. Chief Justice, and may it please the Court, the issue in this case is whether the confrontation clause of the Sixth Amendment or the Federal Rules of Evidence bar the admission of a witness's prior identification of his assailant on the ground that at the time of the trial the witness had suffered a loss of memory concerning the facts of the assault.

Now, the facts of this case are as follows. The case arose from a prosecution of the respondent Owens, who is a federal prisoner, for assault against a federal correctional officer, John Foster, at the Lompoc Penitentiary in California. The assault occurred on the morning of April 12th, 1982, and it consisted of a series of blows to the head and arms of Foster that left him with very severe head injuries. Foster was immediately taken to the hospital and spent about a month in the hospital, during which time he suffered periods of grogginess and virtual incoherence, but during some period of which he was relatively lucid and coherent, particularly towards the end of the

period, in fact, on May 5th, 1982, Foster was visited by an FBI agent, who interviewed him to determine as much as he could about the events of the assault. At that time, according to both Foster's testimony at trial and according to the FBI agent's testimony, Foster gave a statement that described in great detail all the events leading up to the assault and the facts of the assault, including identifying the respondent Owens as his assailant. He identified Owens and then he also picked Owens out of a photo lineup as his assailant.

Now, at trial, by the time trial came around about a year and a half later, Foster had suffered a memory loss to some degree about the events of the assault. He was able to remember much of the background of what had happened that day. He was able to remember some of the facts of what had happened when he went into the TV room where he was assaulted.

But the critical fact that he couldn't remember was the identity of his assailant. He could not remember in trial, he could not identify Owens as his assailant.

However, he could remember, and indeed he said he remembered vividly the statement that he made to Agent Mansfield, the FBI agent who had interviewed him at the hospital. He remembered that statement, and in particular he remembered both that he had identified Owens as his assailant at that time, that he had identified Owens from

the photo ID and that he was confident at that time that his identification was correct.

QUESTION: Did he remember what Owens looked like at the time he was testifying? But he remembered identifying him in the hospital, did he remember what the picture looked like that he identified as --

MR. BRYSON: He remembered picking out that particular picture, yes. He was familiar --

QUESTION: Yes, but would he have been able to pick it out in the courtroom?

MR. BRYSON: He would have been able to pick that picture out as Owens, but what he would not have been able to do in the courtroom was to pick that picture out as his assailant based on his memory at the time of trial. In other words --

QUESTION: He remembered that he picked that picture out in the hospital?

MR. BRYSON: Yes, that's correct, and he knew that he picked out Owens, he knew what Owens looked like. What he was unable to say, and this is a mark in a sense of the precision of his testimony, was that he was able to say, no, that I said it was Owens at the time, but he said, I honestly cannot tell you now that based on my current recollection that I have a picture in my mind of the assailant being Owens. He remembered a great deal about the assault, but --

QUESTION: But he has got a picture in his mind of what the picture was that he picked out.

MR. BRYSON: That's right. That's right.

QUESTION: And he remembers that he -- at that time thought that that pciture was his assailant.

MR. BRYSON: Precisely, and he was confident that he was right at that time, but of course, because he has no current recollection of the identity of the assailant, that is to say, the person who actually assaulted him at the time, because he has no recollection of that, he can't honestly say, yes, the person who assaulted me was Owens, except to the extent he can say that the statement that I made I believed at the time to be accurate and I was confident --

QUESTION: Mr. Bryson, is that recollection that the man had sufficient to qualify him under the rule of evidence 602 that the witness may not testify as to a matter unless the evidence is sufficient to show he has personal knowledge of it?

MR. BRYSON: Well, we believe that Rule 602 is satisfied here for several reasons, including the testimony that Foster gave on the stand. Of course, Rule 602 allows personal knowledge to be established by means other than the testimony of the declarant, but I would have to point out that the Court of Appeals, and this includes both the majority and the dissent, felt that Rule 602 had not been

satisfied, the majority didn't find it necessary to dispose of the case on that ground because of the harmless error rule.

QUESTION: Well, the District Court never ruled on that did it?

MR. BRYSON: Well, the District Court did conclude that there was a basis for personal knowledge. The Court of Appeals disagreed with that conclusion.--

QUESTION: I see. Okay, right.

MR. BRYSON: -- on the ground that they felt that there was a disparity between the offer of proof that was made at the beginning of the case and the actual proof that came in, but we feel that --

QUESTION: What do you think we need to do with regard to Rule 602?

MR. BRYSON: Well, I don't think it is necessary for this Court to rule on Rule 602. It would seem to me if the Court reverses on the confrontation clause and the Rule 801(d)(1)(C) issues that are before the Court, the Court is going to have to send the case back in any event to the Court of Appeals, which can then decide whether a further remand is necessary. They may not think it necessary on the harmless error ground, but --

QUESTION: Well, I guess typically you don't get to the constitutional question if you can go off on some

other ground.

MR. BRYSON: That's right. In this case, however, we would be content -- we think it is possible for this Court to decide, if the COurt wants to, that Rule 605 is satisfied. On the other hand, since Judge Boochever in dissent felt, as did the majority, that Rule 602 was not satisfied, it may be necessary in this case -- the Court may prefer to send the case back to the Court of Appeals for further development of the Rule 602 issue, which in Judge Boochever's view would have required a further remand to the District Court, and we wouldn't have any objection to that, although I would like to point out a few facts that would support a finding and indeed do support a finding of the District Court that Rule 602 was satisfied, one of which is that the testimony that Owens gave from the stand and testimony that was in his statement that he jammed his finger into the chest of his assailant, which suggests that he was facing his assailant. Number 2, the location of his injuries. His injuries were on the front of his body, and they were injuries to the side of his head and injuries to his arms, which were obviously in a defensive posture, indicating he was facing his assailant.

He commented that he knew that -- or believed that the instrument that had been used to injure him was a pipe because of its size, and that indicates that he must have

seen the pipe. Also, there was an eye witness. I think it was inmate Jeffery who testified that the two were facing one another. Now, that is not a statement by the witness from the stand that, yes, I saw my assailant, but it is circumstantial evidence from which the District Court's finding on Rule 602 could be supported. I don't think that it is necessary for this Court to reach that question because it was left up in the air by the Court of Appeals. However, I do think there is an ample basis on which the Court either could reach that question or the Court of Appeals could dispose of it either on their own or the issue could be disposed of by the District Court on further remand, which is what Judge Boochever would have suggested.

Now, the District Court admitted the evidence that was offered, which is the out of court statement made by Mrv Foster on May 5th on the ground that Foster was there, available for cross examination, and therefore the confrontation clause and Rule 801(b)(1)(C), which is the rule that is designed to permit prior identification testimony in over hearsay objection, that both were satisfied by Foster's availability for cross examination.

The Court of Appeals disagreed. The Court of Appeals disagreed both on the confrontation clause issue and on the Rule 801(d)(1)(C) question because in their view the cross examination that was available in this case of

Foster due to his memory loss was just constitutionally and under the rules insufficient, was insufficiently effective to satisfy the confrontation clause, and it was insufficient to satisfy the rule.

Our view is that, turning first to the confrontation clause, that memory loss on the subject of an out of court statement should not be a bar to the admission of that out of court statement. Now, the purposes of confrontation clause are, the Court has said on numerous occasions, both to allow the witness to confront, physically confront -- excuse me, the defendant to physically confront the witnesses against him in court, and, of course, part and parcel of that is, have an opportunity for cross examination of the witnesses.

Now, the fact of memory loss does not in our view interfere with those basic principles of the confrontation clause. Memory loss is a fact of life in criminal and civil cases. There is typically some memory loss in virtually every case, particularly if a case comes on for trial a year, a year and a half after the fact, even if there has been no trauma, as there was in this case, and even if there is no intentional effort to dissemble on the part of the witness, as there has been in some other Courts of Appeals' cases, still there is going to be memory loss on the part of a witness.

That memory loss does not render the cross examination ineffective. In some respects it may render cross examination more difficult. On the other hand, in some respects it makes cross examination more fruitful, because obviously if you can demonstrate that a witness has a shaky memory about the events, it can often be very useful in persuading the jury that in fact this witness is not very observant, doesn't hold facts in his mind very well, that this is not a careful person, and that this is a person who is apt to have made either a mistake or be now guilty of a failure of recollection.

Now, in our view, based on these principles, we would say that the confrontation clause is satisfied if, Number One, the scope of the cross examination is not improperly restricted by the District Court or by statute or rule. This is a principle that comes from this Court's decisions in cases like Davis against Alaska.

Number Two, if the witness is competent, that is to say, if the witness is able to engage in a question and answer dialogue, if the witness is mentally and physically able to engage in cross examination. And Number Three, if the witness does in fact engage in this cross examination process by answering questions as opposed to simply refusing to answer questions altogether.

Now, the respondent contends that in this case

the problem with the -- the confrontational problem is much worse than it is when you are talking about a witness who is testifying about matters that he observed that he is testifying in court but has suffered loss of memory with respect to those matters.

He concedes for the most part, I think, that there is no violation of the confrontation clause if, as in a case such as this Court's decision in Delaware against Fensterer, the witness simply has a shaky memory as to some events as to which he is testifying. Even if there is a substantial loss of memory on the part of the witness so that the witness as, again, in Delaware against Fensterer, says, well, I know what my opinion is but I can't remember any of the reasons why I reached that opinion, because he is testifying about his current opinion in Court, the respondent says, that is different from this case, where the witness is not testifying about his in court observations, or is testifying about his observations, while he is standing there is present recollection of his observations while he is in court, but is testifying about an out of court statement.

In our view, there is no such clearcut line to be drawn between an out of court statement and in court testimony about one's current recollection, and I think the example that perhaps can best make this point --

QUESTION: May I ask, Mr. Bryson, didn't Fensterer

as screened leave open this question?

MR. BRYSON: It certainly did, Your Honor. This case is here --

QUESTION: And yet you rely on Fensterer.

MR. BRYSON: We rely on it, Your Honor, because we think the analysis, while the question was clearly left open, we think that the analysis of Fensterer is helpful in indicating the way that that question should be answered. We certainly concede that that question has been left open and this Court has never answered the question, but we do think that features of Fensterer suggest the answer that this Court should reach.

The difference, the absence of any significant difference between the two kinds of statements it seems to me is perhaps best pointed out by the following example. Suppose I am walking down the street and someone comes out of a bank wearing a mask. Enough of the face is showing so that I can recognize the person, and I say to myself, well, that is Jones coming out of the bank. There is a person standing with me as I say that.

Now, trial time comes, and by the time of trial I have forgotten a lot about what happened. Two different events can occur. Either I can get into trial and the prosecutor can ask me, who came out of the bank, and I will say to myself, I don't remember much about the incident,

I don't remember much about that day, but I remember saying to myself and thinking, that's Jones, my recollection is now, in court testimony of the Fensterer sort. A second thing that could happen is, I could say, well, I remember saying to my associate, that's Jones coming out of the bank. Now, if I have forgotten the basis, in large part or in whole, of either of those two statements, either the one I made to myself, in effect, or the one I made to my associate, if I have forgotten why it was that I made those statements, Fensterer would still allow the admission of the first statement. We submit that there is no real difference between that and the admission of the second statement, that the degree of the effectiveness of cross examination, the way the cross examination would go would not be in any significant degree different in those two cases. We don't see a reason to draw a line between those two cases.

Now, the case is harder, of course, if in fact the witness himself has no recollection of the prior statements other than the prior statement has to come in through a third party. But even in that case, which is not this case, in this case there was a prior recollection by the witness of the statement, even in that case there is fruitful line of cross examination that can be engaged in.

For example, the witness could be probed for bias. The witness's general credibility can be probed under cross

examination.

QUESTION: Mr. Bryson, can I interrupt you to ask you a question about your hypothetical? You do agree, I take it, that the associate who heard you say "That's Jones" could not testify to that fact?

MR. BRYSON: No, we would think that the associate could testify, Your Honor, under 801(d)(1)(C). The Court of Appeals cases do establish that as long as I am available for cross examination, even if my memory is not good, as long as I am available for cross examination, it would be our contention that that associate could testify as to the out of court statement.

Now, there is some disagreement, to be sure, among the Courts of Appeals as to exactly how much recollection I have to have concerning the statement in order for the statement of the third party to be introduced, but I don't --

QUESTION: In this case did the FBI agent testify?

MR. BRYSON: He did, but he testified merely to corroborate the fact that the statement was made. The testimony of Foster was, as to the contents of the statement was as complete as anything the FBI agent --

QUESTION: Well, Mr. Bryson, I gather if Owens had died after the FBI interview and before the trial, the agent could not have testified.

MR. BRYSON: I think that is probably right, at least not under 801(d)(1)(C). Probably no --

QUESTION: Well, in this case didn't Owens finally die?

MR. BRYSON: Well, Your Honor, Owens --

QUESTION: Didn't he?

MR. BRYSON: Owens' memory died in part in this case in only a small, admittedly critical but nonetheless narrow part of the recollection of the --

QUESTION: Well, to the extent admittedly critical, then why is this any different than had Owens died?

MR. BRYSON: Because there is so much more that can be done with Foster on the stand, available for cross examination, than if Foster were not there. You can probe such matters as his bias. Suppose, for example -- it wasn't true in this case, but suppose he had been trying to get Owens for months, and Owens knew this, and he passed this on to his attorney, that this was -- that his attorney could try to make use of that fact to impeach Foster's testimony on the grounds of bias, something that would have been much harder to do if Foster were not present.

Similarly, the question of Foster's credibility can be probed, whether his demeanor suggested that he was a careful person or a person who was quite careless, the

inconsistency, for that matter, between features of the statement that he made and Mansfield's testimony about his statement would have been a fruitful line of cross examination. It is true, to be sure, that none of these lines of cross examination were pursued in this case, but that is only because Foster did such a good job and was such a believable witness.

This was somebody who was not easily impeached, not because there was any impairment -- the hospital. Foster had not been able to identify his assailant, or had suggested, asked a question, was it Leo who hit me -- there was another inmate in the penitentiary whose name was Leo, as established by defense counsel, and that was made the basis of the suggestion that in fact the Owens idea came up late in the day and wasn't the product of his observation at all.

So there was a lot that could be done and there was some fair amount that actually was done by virtue of having Foster there, even though his memory had, as you say, died with respect to the question of identity. But, Your Honor, memory dies like that a lot in these kinds of cases, not just cases of trauma where the person's memory may be thought to have died because he was hit on the head, but in cases that come up every day where a bank teller, let's say --

QUESTION: Yes, but it is -- the most crucial fact here was the identification.

MR. BRYSON: Absolutely, Your Honor, but if we take this case, which does come up every day, the bank teller has a robber come in, put a gun in his or her face, and the bank teller gives over the money, and then later that afternoon a suspect is captured. The bank teller goes down to the police station, and there is an ID. The bank teller selects, without any doubt, selects Number 3 as the person who put the gun in her face. A year and a half later, trial comes on and the bank teller cannot make an identification in court, just can't pick the defendant out.

Well, that is exactly the case for which 801(d)(1)(C) was devised, cases where memory at trial has in your words died. There is no recollection as to identification Certainly it is a critical fact. It is the most critical fact in the case. Nonetheless, we submit that the rule is satisfied, and we submit that because the bank teller is available for cross examination, particularly if she can remember making the statement and the details of the statement, that in that case the confrontation clause is satisfied as well.

QUESTION: Mr. Bryson, if Rule 804 says a witness is unavailable when he doesn't recall the substance of his prior statements, then how can the same witness be subject to cross examination for purposes of Rule 801? Do you plan to --

MR. BRYSON: Well, Rule 801 has very different language, Your Honor. They could have -- Congress could have said that the witness has to be subject to cross examination about the statement -- subject to cross examination about the subject matter of the statement. Instead, it didn't say that, and it, and it is interesting and to us probative that in fact Congress in sections that were so close together used very different language.

He clearly was in this case by any fair construction of the terms subject to cross examination about or concerning the statement. He remembered the statement. He was subject to cross examination. He was cross examined about the statement.

The only thing he was not subject -- well, he was subject to cross examination, but the only thing he could not fruitfully be cross examined on was the underlying basis for the statement, to wit: the -- how it was that he observed Owens. That in our view does not make Rule 801(d)(1)(C) --

QUESTION: Well, he could also be asked whether or not he remembers the defendant who is sitting there in the courtroom, does he remember him as the one who --

MR. BRYSON: He could be asked that, and he was, and he denied it. He said, I don't remember now the defendant; however, what he did say was --

QUESTION: He is the same one as in the picture.

MR. BRYSON: -- he is the one in the picture. He is the one I picked out, he is the one I identified, and of course another line of cross examination could have been fruitful on this score, but wasn't because of the circumstances of the case. Suppose Foster had not known Owens for very long, Owens had just arrived in the cell area. The question whether he would recognize Owens could be raised, but in fact, of course, because he knew Owens very well, it was difficult to make that point on cross examination.

Again, cross examination was not rendered ineffective for constitutional purposes simply because it didn't work.

Now, as I have indicated, the effectiveness test that respondent has suggested is one that has a lot of problems. To try to make the confrontation clause turn on the extent to which confrontation of cross examination may be effective in a particular case runs into what this Court said in Roberts is an inevitably nebulous threshold of effectiveness. Respondent has offered no real standard for determining in any class of cases when cross examination is effective and when it is not effective.

And in fact, as we have suggested, memory loss may not render cross examination less effective. It may render it more effective. It just depends on the particular circumstances of the case, and what really has more effect on effectiveness than simple fact memory loss is what

vulnerability the witness may have in other spheres of attack on its bias, credibility, powers of observation, and so forth. To try to assess effectiveness in every given case, to say that the constitutional principle of confrontation turns on whether or not the cross examination was effective in a particular case would, we submit, be chaotic as an approach to try to give the lower courts and the state courts in applying the confrontation clause any guidance at all as to how the admissibility of statements should be judged.

That is a principle that ought to be reserved for the rules of evidence as this Court, Congress, and the states work them out. It should not be a constitutionally binding principle for all time that turns on a court's impression as to how effective the opportunity for cross examination was on a particular fact situation.

And I would point out finally that the -- to the extent that effectiveness is a question, as I have suggested in this case, the cross examination was effective. There were things that were brought out about prior statements Foster had made in the hospital, and --

QUESTION: What it says under the rule is that the cross examination contemplated must be sufficient to provide the jury with an adequate basis for assessing the reliability and truthfulness of the statement. Is that satisfied here?

MR. BRYSON: We think so, and we don't think that that's -- we think that the language of the rule doesn't require that the jury be satisfied to any degree. All that the language of the rule requires is that the declarant be subject to cross examination concerning the statement. Even if he has a virtually total lack of recollection as to the statement, that is a fact that the jury can assess in determining his credibility or determining the likely reliability of the statement.

We don't think that he has to have any specific degree of recollection with respect to the contents of the statement, or certainly not with respect to the basis of the statement, that is, why he reached the conclusion that he did.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Bryson.

We will hear now from you, Mr. Ides.

ORAL ARGUMENT OF ALLAN IDES, ESQUIRE

ON BEHALF OF THE RESPONDENT

MR. IDES: Mr. Chief Justice, and may it please the Court, I would like to immediately address some of the points that were raised during Mr. Bryson's argument. First, Justice O'Connor, on the question of personal knowledge, the government is mistaken. The District Court made absolutely no finding on the question of personal knowledge. The District Court stated that personal knowledge merely goes to the

weight of the evidence. No finding was made and the Court of Appeals recognized that no finding was made by the District Court on that issue. We agree completely that if at all possible, this case ought to be resolved on the statutory questions, and in fact before the Ninth Circuit our argument was based largely on Rule 602 and Rule 801(d)(1)(C). As to the evidence of personal knowledge that the government for the first time brings up today.--

QUESTION: Do you argue that as an alternate basis for affirmance in your brief here, Mr. Ides, the 601 point?

MR. IDES: 602 point?

QUESTION: 602 point.

MR. IDES: The alternate basis for affirmance we have relied on is 801(d)(1)(C), although we have mentioned the 602 point in the brief and discussed it.

QUESTION: But you haven't really relied on it as an alternate basis for affirmance?

MR. IDES: We did not because the Court of Appeals didn't resolve that issue.

I would like to just mention a couple of points on the factual statements the government made, the fact that it was a pipe, that he saw that it was a pipe somehow indicates that he saw what was going on. Well, the testimony was that "I heard something hit my head and it sounded like a pipe," that doesn't indicate that he saw anybody. His

testimony also indicated that he was attacked from behind. In the eyewitness testimony that someone saw him facing, Foster facing his assailant, that is not what the testimony was. The testimony was that the assailant was hovering over Mr. Foster. We don't know which direction Mr. Foster's face was pointing in. Of course, no findings have been made on these points.

The other point that I think is very important, Mr. Justice White, you mentioned the photograph, and the photographic spread that Foster recalls having identified Owens in. It is irrelevant, and it is irrelevant for this reason. Foster knew Owens intimately. They worked together every day. When he identified him in the photo spread, he merely said, yes, that's Owens.

So the fact that he could say, yes, Owens struck me, and that's a picture of this person who I have known for the past year or so doesn't indicate a circumstance where he has made an identification of an anonymous person and then in court says, yes, that's the person I identified. It is merely affirming the fact that he knows Owens, so the photographic spread really adds no weight to the government's case whatsoever.

At issue in this case is a right of trial procedure that goes to the integrity of the factfinding process. We are not talking about an exclusionary rule. We are not

talking about Miranda. We are not talking about a rule designed to protect or to allow police an adequate amount of discretion in the field. We are talking about a very important rule of trial procedure that goes to the fairness of the trial and the ultimate integrity of the factfinding process.

This Court has stated on numerous occasions, the most recently Kentucky v. Stincer, that the confrontation clause and the right of cross examination are functional rights designed to protect the integrity of the factfinding process and to create a basis upon which the reliability of testimonial evidence can be assessed by the trier of fact. The question in this case is not whether a memory loss precludes confrontation. The question is what is the impact on cross examination, regardless of whether it is a memory loss or, as the government concedes, an assertion of the Fifth Amendment a refusal to testify on other grounds, incapacity of the witness, or some trial court restriction on the scope of cross examination. In all this Court's cases the focus is not on the particular intrusion, but on the impact of that intrusion, and that is what the issue is in this case.

According to the government, the confrontation clause is satisfied essentially by presence at trial, a physical presence model, and I think it is fair to say that there is neither judicial nor scholarly support for

that position, with the possible exception of Justice Harland who, as I will discuss, if I can get to it, has a very similar model for assessing reliability under the due process clause. The government is really staking out radically new grounds for this Court, and it is an illogical ground.

For example, the government tells us that clearly if a witness refuses to tesify based on the Fifth Amendment, as in Douglas versus Alabama, that would violate the confrontation clause. Clearly, if a court, as in Davis versus Alaska, restricts the ability to cross examine a witness with respect to impeachment, that would be a violation of the confrontation clause.

Yet what is the difference between those cases and our case? Suppose, for example, instead of saying I don't remember, Mr. Foster said, I take the Fifth Amendment. Or suppose Mr. Foster said, or suppose the Court said, I am not going to permit you to inquire into the basis, or suppose Mr. Foster merely said, I don't understand these questions, they are just too confusing for me to answer.

In all of those cases the government would say there was a violation of the confrontation clause. It must be because the defendant's ability to assess the reliability of the testimony and to provide a basis for reliability testing is lacking in all of those cases.

A memory loss has the same effect. If, as in this

case, and it is a narrow case, it is a small case, if there is a total memory loss, and in this case a medically certifiable memory loss. We are not talking about circumstances which it is a partial memory loss or which the witness can't remember a few cursory details. We are talking about a case in --

QUESTION: That will be the next case, though, if we decide this case the way you want us to.

MR. IDES: I disagree respectfully, Justice Rehnquist. I think this opinion can be written very narrowly, and I think this Court has created a basis for a very narrow opinion here. In a number of cases the Court has said, in only the most extraordinary case where there has been questioning of the witness will we inquire into effectiveness, and by the way, effectiveness is not our standard. It is a standard derived from this Court's cases, beginning with California versus Green, so there must be some substance to it, and I think this Court can establish that this is an extraordinary case by first indicating its close relationship to cases such as Douglas versus Alabama and Davis versus Alaska.

You appear to want to ask a question.

QUESTION: How do you distinguish this from the bank teller example that government counsel gave?

MR. IDES: The bank teller --

QUESTION: Or would that be covered as well?

MR. IDES: It would depend again on the circumstances of the bank teller example. If the bank teller could not remember -- if there were no facts, including a lack of memory indicating that the bank teller even looked at the robber in the face, then there would be substantial problems in that case.

The typical case of the bank teller, though, is the circumstance where, when it comes three years later and you come to trial, the bank teller can say, I was working at the bank, a person walked up to me, put a gun in my face. I looked at that person, they told me to turn over the money, I turned over the money, on that day the bank was well lit, it took about 35 or 40 seconds, to tell you the truth, I can't remember exactly what the person looked like today, though one week after that I did identify that person in a photograph spread, that is very different.

We now have an opportunity to cross examine that bank teller as to the basis for the identification. He or she may not remember now who the exact person was, but they are available to be tested as to the basis for making that identification, and that is the key to identification evidence.

And the government has pointed out, and Justice Brennan has pointed out, it was the critical evidence in this case.

QUESTION: What if you asked the bank teller, was the lighting bright or dim, and he says, gee, I can't remember that. Did you see him for 30 seconds or a minute? Gee, I really can't remember. Did you see him head on or profile? Gee, I really can't remember that. All she really remembers is that she saw him well enough to identify him and did identify him at a later time. WOuld that come within your rule here or not?

MR. IDES: No, I don't think it would, and the reason it wouldn't is because we have now established a basis for the trier of fact to sit down and look at what the teller actually saw.

QUESTION: No, she doesn't remember. She doesn't remember whether it was bright or dim. She hasn't given any information on these subjects. What I am saying is that the Chief Justice's concern is a real one. How much does the teller have to remember about the actual identification day in order not to fall within the rule you are espousing?

MR. IDES: She has to remember at least this, that she saw the person and had an opportunity to observe the person. That is critical, and I think Louisell and Mueller point out in their text that in 801(d)(1)(C) as with the confrontation clause there is a critical relationship between personal knowledge and the identification.

QUESTION: But how does that make cross examination

effective? All she says is, I remember I saw him. Did you see him profile or head on? Was he close or far? I don't remember any of that. All I remember is that I saw him.

MR. IDES: But she did say that I remember that I saw him, and Foster in this case could not remember whether he had ever seen his assailant. He never testified that I saw him but I now can't remember what he looked like. What he testified to was, I don't remember if I ever saw him.

QUESTION: I understand that that distinguishes this case. What I am asking is, why that should make a difference between one teller who remembers no more than that and the next one who remembers one additional factor.

MR. IDES: Well, again, that is going to depend on a case by case analysis. There is no question about this. But it seems to me what we are going to have to look at is first, is the loss of memory directed toward a critical part of the case; second, is the loss of memory such that you cannot assess the credibility of the person based on that loss of memory; and third, is the loss of memory complete?

And in this case, as to the only critical evidence that Foster could give, it was complete. There was no way to cross examine him on that point. No way to establish his personal knowledge or lack of personal knowledge. No way to establish his opportunity to observe.

QUESTION: May I ask, confining it to the

confrontation clause and putting these rules to one side for a moment --

MR. IDES: Yes.

QUESTION: -- supposing that immediately or even during the interview with the FBI agent, right after saying, identifying his assailant, supposing he had died, so you have a dying declaration, and they tried to put in the -- through the FBI agent what he had said. A, would you think that would violate the confrontation clause, and if not, how do you distinguish the case?

MR. IDES: I do think it would violate the confrontation clause for exactly the same reasons.

QUESTION: So all dying declarations violate the confrontation clause?

MR. IDES: Under those circumstances it seems to me they would unless you could establish that there were independent indicia of reliability, and it may be, in fact, this Court has held that a dying declaration is firmly rooted in our jurisprudence, and therefore under those circumstances it would be reliable. This exception to the hearsay rule is not firmly routed.

QUESTION: I am hypothesizing a dying declaration where you have no reason to believe there was any motive to lie, which I think is this case. I don't think there is any claim that this man was not credible to the extent --

MR. IDES: That is true.

QUESTION: But you do have total absence of ability to find out why the declarant concluded that the person he or she identified was the assailant.

MR. IDES: Well, I think the first argument in that case would be personal knowledge, and again we come back to that because it is really -- it is the essence of this evidence. We come back to that because it is really the essence of this evidence, if Foster doesn't have personal knowledge of who his assailant was, then the evidence shouldn't be admissible, and we have that problem in that same circumstance. Because of the nature of what Foster told Mansfield, he didn't tell Mansfield the details of the crime. The question was, who did it, Owens did it. I jammed my finger into the chest of the person who assaulted me. Period. That's all we got.

So it seems to me it would present the same problems of confrontation. Let's assume, in fact, Foster never testfiied. I think that is -- it may not have been a dying declaration, but then he may have died six months later or a year later. Assume he hadn't testified, and the only evidence we had was Mansfield on the stand saying he made that statement to me.

There is no way that that would satisfy the confrontation clause under this Court's rulings, and in essence the

defendant is in no better position having Foster take the stand. In fact, he is in a worse position because he has a man take the stand and say, one day I vividly remember identifying this person, and it seems that even the government would agree if only Mansfield was testifying as to this evidence it would violate the confrontation clause. The cases are on the same footing.

QUESTION: Well, there is some fact that indicates the grounds for his identification through the photograph, I suppose. Didn't he know Owens?

MR. IDES: Yes. I don't know if that would -- that indicates to me that he knew Owens. He knew him personally. And there is also another grounds indicated in the record for his identification.

QUESTION: Well, he not only looked at the photograph and says, that's the man who assaulted me, but his name is Owens.

MR. IDES: Well, he did it in reverse order. He said, Owens, who I personally know, assaulted me, and here's his picture.

QUESTION: Yes.

MR. IDES: And I think that -- again, a photo spread doesn't add anything.

QUESTION: Well, I know, but you say there is a fatal absence here of -- how did you know it was Owens?

At the time, in the hospital.

MR. IDES: Yes.

QUESTION: You think that there should be some basis for asking him, how did you know it was Owens?

MR. IDES: Exactly, and one of the answers that was suggested, and again he had no memory of this, and he couldn't remember anyone who visited him prior to the FBI agent nor could he remember anyone who visited him after the FBI agent, yet the evidence was that he was visited by prison personnel and by his wife every day. He couldn't remember those visits, and it is quite possible that one of them said, Owens is under investigation. He is the guy who hit you.

QUESTION: So he didn't -- he couldn't answer any reason, give any reason for identifying Owens in that picture?

MR. IDES: Absolutely none.

QUESTION: He said, I may not have seen him.

MR. IDES: He wasn't asked.

QUESTION: I may not have seen him. I may just have smelled him, or listened to his voice.

MR. IDES: Or I may be guessing.

QUESTION: You put all the weight on he wasn't asked. Whose duty was it to ask?

MR. IDES: When I say he wasn't asked at the time he was interviewed by the FBI agent, he was not asked.

During cross examination --

QUESTION: Was that necessary?

MR. IDES: It wasn't necessary. It again is --

QUESTION: Well, why do you emphasize it if it wasn't necessary?

MR. IDES: Well, I emphasize it only in answer to Justice White's question. The point is, he was asked on cross examination, do you remember anything about the person who struck you?

QUESTION: Well, suppose after he said this is Joe Dokes, he wrote it down in a note to his brother. Would that help him?

MR. IDES: The fact that he just wrote it down is just merely another out of court identification. Again, the crucial evidence in this case is, I saw the person who struck me, and that is what we want to explore in this case. It is locked in a little box which you never know.

QUESTION: How do you do that?

MR. IDES: We can only explore it if Foster has some independent recollection of having seen his assailant or if the --

QUESTION: Well, why couldn't you have asked the question without anybody saying anything?

MR. IDES: Asked --

QUESTION: Yes.

MR. IDES: He was asked whether he recalled at the time of trial seeing his assailant. His answer was, no, I can't remember.

QUESTION: So, what is wrong with that?

MR. IDES: Well, the problem with that -- I think the best way to answer that is contrasting this case with the Fensterer case. In the Fensterer case, this Court was confronted with a situation in which an expert couldn't remember the basis for which three hairs had been forcibly pulled -- his conclusion that three hairs had been forcibly pulled from the victim's head. And this Court held that there was no violation of the confrontation clause, but I think as Justice Blackmun pointed out in his concurring opinion in Pennsylvania versus Ritchie, the essence of Fensterer was that in failing to remember the expert undermined his credibility, and that was the key to the Fensterer case, The credibility assessment could be made.

QUESTION: This witness could just as easily say, yes, I identified him, and told a lie, and then everything would be all right.

MR. IDES: But he didn't.

It seems to me this case is different from Fensterer, and the reason it is different from Fensterer is because, and again, this goes to Justice Rehnquist's point about a narrow decision, the memory loss in this case is

independent of credibility, completely independent of credibility, just as the Fifth Amendment assertion --

QUESTION: Yes, but your distinction, if I understand you, with Fensterer, is that that testimony is more -- it is easier to admit that because it is less credible.

MR. IDES: No, it is easier to admit that because the basis for judging credibility has been established. It isn't -- the purpose of the confrontation --

QUESTION: Well, the basis for questioning the reliability has been established, namely, he didn't remember the basis for the consluion. That is exactly what you have here.

MR. IDES: No, I respectfully disagree. We have a very different situation here. In Fensterer, the lack of memory went to the expert's ability as an expert. In this case the lack of memory --

QUESTION: This goes to the ability of the victim as a witness.

MR. IDES: But it has no bearing on --

QUESTION: It is the ability of the witness to testify to the truth of the ultimate proposition. In both cases they are unable to do so because they can't explain the basis for their conclusion.

MR. IDES: But in the one, Fensterer, a basis is created through the questioning and through the admission of

a lack of memory for the trier of fact to assess whether this is a credible witness. In our case, you don't have that. It is the same as if it had been a Fifth Amendment assertion. If a declarant says, I'm not going to testify based on the Fifth Amendment, that has nothing to do with the credibility of an out of court confession that perhaps is being introduced.

Similarly in this case the fact that the man has suffered a memory loss has no relationship whatsoever to whether he ever observed his assailant. That is the credibility question in this case. The credibility question in Fensterer is, is this expert truly an expert if he cannot recall the basis for his testimony?

QUESTION: Well, that is only part of it. The ultimate question is, is his opinion one we should accept?

MR. IDES: And in Fensterer the trier of fact was given an opportunity to --

QUESTION: And one of the arguments for not accepting him is, he is not a good expert if he doesn't keep records and keep track of why he reaches his conclusion. He is not a very good witness for that proposition. You can make the same argument --

MR. IDES: But you can't say that about a man who has suffered a memory loss. You can't say --

QUESTION: Why not? He certainly is. He is a

much less reliable witness than one who could say, I saw him.

MR. IDES: I think we have to look at it -- from the point of view of lawyers and judges and justices, yes, we can look at that in a very sophisticated way, but from the point of view of jurors I don't think it is looked at in that way. The jurors see a very sympathetic witness get on the stand and say one day it was vivid, I vividly remember saying that this man did it to me, you know, I was injured, and maybe even by this man, this may be the man who did it, and now I can't remember whether I actually saw him do it. I think that kind of weight the jury is going to put on that under circumstances where --

QUESTION: You are certainly free to make all the arguments to the jury about the unreliability of that kind of evidence as to, you know -- all the arguments you are making to us you could also make to the jury, and they are not unable to understand the nuances of this sort of thing.

MR. IDES: But it seems to me the courts have a threshold responsibility to determine whether evidence has been subjected to effective cross examination, and I agree with Justice Blackmun that in the typical case, a simple case, simple questioning will resolve that question, but in some cases, unless the confrontation clause is just a formality once you put the witness on the stand, in some cases we have

to inquire whether there was any possibility of establishing a basis under which the trier of fact could assess credibility.

QUESTION: Well, Mr. Ides --

MR. IDES: Yes.

QUESTION: -- what if at the time he made the photo identification the officer had asked him, did you see him, how long did you see him, et cetera, and he answered fully, and at trial he remembered that very conversation, and said, yes, I did say that, but I don't remember now whether I saw him or not, would your case be any different?

MR. IDES: The case would be different, and I think it would be analyzed differently.

QUESTION: Why would it be different?

MR. IDES: All right, it would be analyzed differently. First, there's two parts to the confrontation clause. One is entitlement to confrontation, to cross examination, and I think in both cases, the hypothetical you have just described and in this case, there was not an opportunity for effective cross examination.

Then we go to the next step. Despite this lack of an opportunity for effective cross examination, are there indicia of reliability that indicate that this evidence ought to be admitted anyway? In your hypothetical, there may be indicia of reliability that would permit it. In this

case there aren't, and the government doesn't agree with that. The government has never challenged the Court of Appeals' ruling that this was unreliable under the factors articulated in Dutton versus Evans and Ohio versus Roberts. So I think the hypotheticals are different although they would be analyzed under the same structure.

QUESTION: Could this have been cured by instruction?

MR. IDES: No, I don't believe it could be cured by instruction.

QUESTION: Why not?

MR. IDES: Because, again, it is the type of evidence that the Court must make an initial assessment whether this evidence is the kind of evidence that the jury can now at this point assess for its reliability. That is a threshold question for the Court.

QUESTION: It should have been excluded?

MR. IDES: It should have been excluded.

QUESTION: Well, I thought your argument was that he couldn't cross examine on it.

MR. IDES: Could not cross examine on it.

QUESTION: Well, if it is excluded you couldn't cross examine.

MR. IDES: Well, if it were excluded we probably wouldn't be here today. If it were excluded, it was the

crucial element in the government's case. The government admits that. This critical evidence, Owens was my assailant, and then we have this black box, why, and the box is locked, and it is just as effectively locked with a memory loss as it is with the Fifth Amendment or as it is with a trial court ruling that you can't ask that question.

QUESTION: (Inaudible) identification?

MR. IDES: The only point.

QUESTION: What have we got to do with the box?

MR. IDES: The box. I am sorry, Your Honor. I am using an analogy. I am essentially saying the information that is crucial to this case, namely, the basis for the identification, is not accessible to the trier of fact in the same way that it wouldn't be accessible if Foster had taken the Fifth Amendment or if the trial court had said you can't ask questions on those grounds.

QUESTION: Mr. Ides, let me get back to the bank teller again. You say it makes the difference if the bank teller just says, I don't remember anything about it. All I remember is that I saw him. That would be enough to get that out of the rule that you are urging on us.

MR. IDES: It may be enough. I think I would want more facts. I am certain that in your bank teller --

QUESTION: Oh, I see. So it is going to come to a case by case, we really can't --

MR. IDES: Well, Ohio versus Roberts said that it is a case by case analysis. I believe that if we are going to look into the indicia of reliability component of the case it is a case by case analysis. That is the rule articulated by this Court.

QUESTION: Take the effective cross examination on a case by case analysis, just not for 600 district judges in the federal system that are conducting trials, but for thousands and thousands of state court judges that are conducting trials.

MR. IDES: I have two responses to that, and I will go backwards. One is, we can avoid making this a rule for thousands and thousands of state court judges by focusing on 801(d)(1)(C) and concluding that this evidence should not have been admitted under that rule.

QUESTION: (Inaudible) for 600 federal judges.

MR. IDES: So we have narrowed it down to 600 federal judges, and I think federal judges are competent to assess this kind of a question. Again, the court opinion, it seemed to me, would say this is the extraordinary case we referred to in Ohio versus Roberts. It is California-Green revisited in a sense, and I read California versus Green a little differently than the government. It seems to me the question wasn't reserved in California versus Green.

The Court said there was a constitutional issue

lurking in this case, but the facts in this record aren't sufficient for us to answer it. The facts in this record are sufficient. It was remanded to the California Supreme Court and they concluded that the evidence in California versus Green was reliable.

QUESTION: May I ask one other question, following up on Justice Scalia's thought? If one of the other witnesses, not the victim himself, has testified that they were facing one another when the assault occurred, then would you agree that his testimony would be admissible?

MR. IDES: Again, I would -- that is very similar to Justice White's hypothetical. I think then we would have to assess it under the second component of confrontation clause analysis, whether there are sufficient indicia of reliability of this out of court statement, and I think we would have to look at that, but the same conclusion would be arrived at with respect to was there effective cross examination, and the answer, it seems to me, has to be no.

QUESTION: But if you say the other witness meets the indicia of reliability, no bias, and so forth, I am not sure -- then you would say it would still be inadmissible, the victim's testimony would still be inadmissible?

MR. IDES: No. Again, the two components of the confrontation clause are, was there an opportunity for effective cross examination -- that is the Douglas, Davis

line of cases -- and then the second line is, assuming there was no opportunity for effective cross examination, is the evidence still admissible because independently we say that it is reliable as judges, and I am saying under the hypothetical you have suggested we would get to the question of whether it is reliable despite the lack of cross examination, are there adequate indicia of reliability, and in this case the Ninth Circuit said there weren't.

QUESTION: I don't understand that. I just don't understand what you have said. If another witness -- you were in some doubt when the witness who forgets the whole thing says, I really can't say whether I saw it. I asked you, suppose that witness remembers only that I saw the individual, I don't remember how, I don't remember what the light was, I don't remember anything else, I saw him. You are not sure whether that would satisfy the rule, right?

MR. IDES: Well, again, there's two parts to the confrontation clause. The first part is whether the defendant had an opportunity for effective cross examination. That is the part that we have been talking about mostly now, whether the memory loss undermined that ability.

QUESTION: And you say there never is when there is a memory loss.

MR. IDES: No, I absolutely don't say that at all. I think there are circumstances when the memory loss may bear

on credibility. When memory loss is independent of the question of the credibility, the underlying credibility of the statement, then I think we have this question of whether the memory loss, if it is both critical and complete and independent of credibility, actually does undermine cross examination. Then we get to the second question. The evidence still may be admissible if it is otherwise reliable, either because it is based on a firmly rooted hearsay exception or because in this particular case based on your facts there are sufficient indicia of reliability, and that is Ohio versus Roberts.

It seems to me that this Court -- this case is a very straightforward application of that, and we have focused largely on whether there was an opportunity to effectively cross examine.

I think from a practical lawyer's point of view, whether you are talking about a prosecutor or a defense attorney, if you took this case aside, they would say, you know, I really couldn't effectively cross examine someone who had so complete a memory loss as to the most critical evidence in the case, and the confrontation clause is supposed to be a practical rule for advancing the integrity of the trial process, and I think we have to look at it like that.

I would like to finally answer the second part of my answer to your question, Justice Rehnquist, on a narrow

construction to this ruling, and it is a narrow one. First, I think we have to recognize that there is a certain illogic between saying a memory loss will not constitute a confrontation clause violation, whereas an assertion of the Fifth Amendment would, even though the same evidence is being excluded from the trier of fact, the same opportunity to cross examine is being eliminated in both cases. I think we have to recognize that. So then it seems to me the court's ruling should be modeled on cases such as Douglas versus Alabama, Davis versus Alaska, Smith versus Illinois, in which the Court found that some trial court imposed restriction undermined defendant's ability to cross examine.

So, first we would have to make that finding. Second, I think we have to talk about the fact that it is a critical part of evidence, as this Court recognized as important in Dutton versus Evans. And third, the fact that in this case we have a complete memory loss, a complete memory loss, and it's medically certifiable, and just like the Fifth Amendment, it is independent from the underlying credibility of the statement, I saw Owens do it. The fact that he has a memory loss doesn't undermine in any way that he may well have seen Owens do it. It doesn't add anything to it. It remains untouchable.

If there are no further questions, thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Ides.

Mr. Bryson, you have two minutes remaining.

ORAL ARGUMENT OF WILLIAM C. BRYSON, ESQUIRE

ON BEHALF OF THE PETITIONER - REBUTTAL

MR. BRYSON: Thank you.

Mr. Ides pointed out the line of questioning, line of argument that was followed by defense counsel in this case that was the most effective form of cross examination and exploitation of that cross examination, which was the suggestion that because there had been a number of visits of other people to Foster before Foster made his identification of Owens, perhaps Owens's name had been suggested to him by these other people.

That is precisely the kind of effective cross examination and exploitation of cross examination which was made possible in this case by the very fact that Foster was unable to say that I identified Owens as my assailant. He was unable to remember the reason for his identification, and therefore that opened up the arena for this precise kind of argument that Mr. Ides has pointed out that was made at trial, and it was made effectively by counsel.

Now, there is a further question which --

QUESTION: That is pretty effective itself, you are saying, to be able to point out that he doesn't remember the basis for his identification.

MR. BRYSON: Therefore it may have come from

somewhere else. That is -- if the test is whether the cross examination has to be effective, that opened up an avenue of effective cross examination for the defense.

Now, the focus has also been put on this whole question of whether there was actual opportunity to make the observation, whether for 602 reasons or for cross examination reasons. I would like to point out just two factual matters quickly. First of all, with respect to the pipe, he made two comments about the pipe. One was the sound of the pipe that Mr. Ides referred to. He also said at Page 27 of the appendix, thinking back, it did have to be a pipe, that is about the right size, which suggests that he actually saw the pipe.

Second, there were two witnesses, three, actually, who testified as to seeing Owens beating or hovering over Foster, one of whom was the person -- this was witness Bowers, who was hovering over Foster after the beating. There was another witness, however, Jeffery, who testified that --

CHIEF JUSTICE REHNQUIST: Mr. Bryson, your time has expired.

The case is submitted.

(Whereupon, at 12:02 o'clock p.m., the case in the above-entitled matter was submitted.)

REPORTER'S CERTIFICATE

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HEARING DATE: November 4, 1987

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Supreme Court of the United States and that this is a true and accurate transcript of the case.

Date: November 12, 1987

Margaret Daly

Official Reporter

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