Journal of Criminal Law and Criminology

Volume 79
Issue 3 *Fall*

Article 10

Fall 1988

Sixth Amendment--The Confrontation Clause, Witness Memory Loss and Hearsay Exceptions: What are the Defendant's Constitutional and Evidentiary Guarantees--Procedure or Substance

Claire L. Seltz

0091-4169/88/7903-866
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 79, No. 3
Printed in U.S.A.

SIXTH AMENDMENT—THE CONFRONTATION CLAUSE, WITNESS MEMORY LOSS AND HEARSAY EXCEPTIONS: WHAT ARE THE DEFENDANT'S CONSTITUTIONAL AND EVIDENTIARY GUARANTEES—PROCEDURE OR SUBSTANCE?

United States v. Owens, 108 S. Ct. 838 (1988).

I. INTRODUCTION

In *United States v. Owens*,[1] the United States Supreme Court concluded that the admission of prior, out-of-court statements of identification offered when the witness is not able to recall the basis for his or her identification does not violate the sixth amendment confrontation clause,[2] provided that the declarant testifies at trial and is subject to cross-examination.[3] The Supreme Court further held that the confrontation clause does not guarantee that cross-examination will be successful, but only that there will be an opportunity for effective cross-examination.[4] The Court also concluded that the admission of prior, out-of-court identifications is not violative of Federal Rule of Evidence 802,[5] provided that the declarant is subject to cross-examination concerning the statement.[6] The Court opined that the "subject to cross-examination concerning the statement" clause of Federal Rule of Evidence 801(d)(1)(C)[7] should be

---

[1] 108 S. Ct. 838 (1988).

[2] The sixth amendment confrontation clause provides, in pertinent part, that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI.

[3] *Owens*, 108 S. Ct. at 841-43.

[4] *Id.* at 842.

[5] Federal Rule of Evidence 802 states: "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress." FED. R. EVID. 802.

[6] *Owens*, 108 S. Ct. at 843-45.

[7] Federal Rule of Evidence 801(d)(1)(C) states: "A statement is not hearsay if . . . (1) the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (C) one of identification of a person made after perceiving the person." FED. R. EVID. 801(d)(1)(C).

interpreted to mean that as long as a sworn witness is placed on the stand and voluntarily answers questions, cross-examination is satisfied.[8]

This Note examines the *Owens* opinion and concludes that, although the Court achieved the correct result that the confrontation clause and Federal Rule of Evidence 802 were not violated, the Court's reasoning is erroneous, extreme, and not indicative of legislative history or precedent. This Note argues that the *Owens* Court misinterpreted both the case law relating to the history and purposes of the confrontation clause and the legislative history of Federal Rule of Evidence 801(d)(1)(C), and thus unjustifiably limited a defendant's constitutional right of confrontation and evidentiary right to exclude hearsay. This Note proposes a test for inquiry into the effectiveness of cross-examination which requires an evaluation of the totality of the circumstances. Ultimately, this Note concludes that, in the future, the Court's reasoning could lead to an erroneous and extreme result. A prior, out-of-court identification made by a cooperative witness, who has been sworn in and testifies at trial, but who claims absolutely no recollection of any circumstances surrounding the identification or the basis for the identification, will be admissible although obviously violative of the meaning of cross-examination under both the sixth amendment confrontation clause and Federal Rule of Evidence 801(d)(1)(C).

II. FACTUAL BACKGROUND

The respondent, James Joseph Owens, was tried and convicted in the United States District Court for the Central District of California of assault with intent to commit murder of Correctional Officer John Foster.[9] On appeal to the United States Court of Appeals for the Ninth Circuit, the court reversed and remanded.[10]

The events leading up to the trial were not in dispute. On April 12, 1982, Correctional Officer John Foster was hit over the head and severely beaten with a metal pipe while he was on duty in the federal prison in Lompoc, California.[11] Foster, suffering from a fractured skull and other bodily injuries, was subsequently hospitalized for nearly one month.[12] His beating resulted in severe memory impairment[13] and memory loss concerning the attack and regarding his

---

8 *Owens*, 108 S. Ct. at 844.

9 *See Id.* at 841.

10 United States v. Owens, 789 F.2d 750, 763 (9th Cir. 1986).

11 *Owens*, 108 S. Ct. at 840-41.

12 *Id.* at 841.

13 *Id.*

visitors during his hospital stay.[14]

On April 19, 1982, seven days after the attack, FBI Agent Thomas G. Mansfield unsuccessfully attempted to question Foster about the attack.[15] Mansfield found him groggy and lethargic; Foster had no memory of the name of his assailant.[16]

On May 5, 1982, before Foster was discharged from the hospital,[17] Mansfield interviewed him again.[18] Mansfield found Foster much improved and able to describe and answer questions about the assault.[19] In this interview, Mansfield asked Foster who had attacked him.[20] Foster responded that his attacker was Owens, an inmate in the Lompoc prison.[21]

At trial in the United States District Court for the Central District of California, Foster testified that, while he could remember events before the attack, the blows to his head, and the blood on the floor, he could not remember seeing his assailant. However, Foster could remember identifying Owens as his attacker during the interview he had had with Mansfield in the hospital in May.[22] Although Foster had had many other visitors during his hospital stay,[23] Foster could only recall seeing Mansfield.[24] Foster could not remember if any visitor implied or made suggestions that Owens had been Foster's assailant.[25]

Counsel for the defense unsuccessfully attempted to refresh Foster's memory by presenting Foster with hospital records. Although some of these records indicated that, at one time, Foster had named a person other than Owens as his assailant, Foster could remember only the statements he had made to Mansfield.[26] In fact, Foster testified at trial that his statement to Mansfield was "vivid" in his current memory and that he was also able to remember that when he made the identification he knew the basis for his identification.[27] However, Foster testified that he could not remember what

---

14 *Owens*, 789 F.2d at 752.

15 *Owens*, 108 S. Ct. at 841.

16 *Id.*

17 *Owens*, 789 F.2d at 752.

18 *Owens*, 108 S. Ct. at 841.

19 *Id.*

20 *Owens*, 789 F.2d at 752.

21 *Id.* When Mansfield showed Foster a group of photographs, Foster chose Owens' picture and identified Owens as his attacker. *Owens*, 108 S. Ct. at 841.

22 *Owens*, 108 S. Ct. at 841.

23 Foster's wife visited him on a daily basis. *Owens*, 789 F.2d at 752.

24 *Owens*, 108 S. Ct. at 841.

25 *Id.*

26 *Id.*

27 *Owens*, 789 F.2d at 753.

had led him to conclude that Owens was his assailant.[28]

Based on the evidence, Owens was convicted in the district court of assault with intent to commit murder and was sentenced to twenty years in prison.[29] On appeal, the United States Court of Appeals for the Ninth Circuit reversed the decision.[30] The court of appeals held that the confrontation clause of the sixth amendment[31] and Federal Rule of Evidence 802[32] were violated[33] when Foster's out-of-court identification was admitted.[34] The United States Supreme Court granted certiorari[35] to address the conflict between the decision of the Ninth Circuit and the decisions of other circuits concerning the issue of the meaning of cross-examination under the sixth amendment confrontation clause[36] and Federal Rule of Evidence 802[37] when the declarant of a prior out-of-court statement of identification suffers memory loss concerning the basis for his or her previous identification at trial.[38]

III. Supreme Court Opinions

A. Justice Scalia's Majority Opinion

In *United States v. Owens*,[39] the United States Supreme Court reversed and remanded the decision of the United States Court of Appeals for the Ninth Circuit and held that the admission of a prior statement of identification made out of court by a witness who suffered memory loss regarding the foundation of the identification is not contrary to the sixth amendment confrontation clause.[40] Furthermore, according to the Court, admission of the prior, out-of-

---

28 *Id.*

29 *Owens*, 108 S. Ct. at 841.

30 *Owens*, 789 F.2d at 763.

31 *See supra* note 2.

32 *See supra* note 5.

33 *Owens*, 108 S. Ct. at 841. The appellate court, however, found the violation of Rule 802 to be a harmless error. *Id.*

34 *Owens*, 789 F.2d at 752-53.

35 United States v. Owens, 107 S. Ct. 1284 (1987).

36 *See, e.g.*, United States ex rel. Thomas v. Cuyer, 548 F.2d 460, 463 (3d Cir. 1977)(holding that witness memory loss does not violate the sixth amendment confrontation clause, provided that the witness has been "sworn and made available for cross-examination to the extent possible").

37 *See, e.g.*, United States v. Lewis, 565 F.2d 1248, 1252 (2d Cir. 1977), *cert. denied*, 435 U.S. 973 (1978)(holding that the failure of the witness to make an in-court identification did not render the prior, out-of-court identification inadmissible under Federal Rule of Evidence 802, based on the legislative history of Federal Rule of Evidence 801(d)(1)(C)).

38 *Owens*, 108 S. Ct. at 841.

39 108 S. Ct. 838 (1988).

40 *Id.* at 845.

court identification does not violate Federal Rule of Evidence 802.[41] Justice Scalia, writing for the majority,[42] stated that, although the sixth amendment confrontation clause guarantees the accused, in criminal proceedings, the right to " 'be confronted with the witnesses against him,' "[43] this right guarantees only an opportunity to cross-examine a witness effectively, not effective cross-examination.[44] Justice Scalia subsequently interpreted the phrase "subject to cross-examination," found in Federal Rule of Evidence 801(d)(1)(C),[45] to mean that the sworn witness is placed on the stand and "responds willingly to questions," and no more.[46] The Court concluded that the admission of out-of-court testimony does not violate either the confrontation clause or Federal Rule of Evidence 802 where there exists memory loss resulting in an inability to testify at trial as to pertinent facts and events or an inability to testify to and elaborate upon an out-of-court identification.[47] As long as the witness who made the prior statement of identification is still able to be placed on the stand and cross-examined, the Court concluded that neither the confrontation clause nor Federal Rule of Evidence 802 is violated. For, according to the Court, the defense has been afforded an opportunity for cross-examination which satisfies the requirements of the confrontation clause,[48] and the exception in Federal Rule of Evidence 801(d)(1)(C)[49] applies, rendering such a statement not hearsay.[50]

Justice Scalia began the majority opinion of the Court with a history and description of the sixth amendment confrontation clause and its development in case law.[51] Justice Scalia stated that, although the sixth amendment confrontation clause has consistently

---

41 *Id.*

42 Justice Scalia delivered the opinion of the Court and was joined by Chief Justice Rehnquist and Justices White, Blackmun, Stevens, and O'Connor. Justice Kennedy took no part in the decision of this case. *Id.* at 840.

43 *Owens*, 108 S. Ct. at 841 (quoting U.S. CONST. amend. VI).

44 *Id.* at 841-42 (citing Mattox v. United States, 156 U.S. 237, 242-43 (1985); Douglas v. Alabama, 380 U.S. 415, 418 (1965)). The Court noted that, Justice Harlan, in his concurring opinion in California v. Green, 399 U.S. 149 (1970), suggested such an interpretation when he stated that a witness' memory loss concerning a prior or out-of-court statement " 'does not have Sixth Amendment consequence.' " *Owens*, 108 S. Ct. at 842 (quoting *Green*, 399 U.S. at 188 (Harlan, J., concurring)).

45 *See supra* note 7.

46 *Owens*, 108 S. Ct. at 844.

47 *Id.* at 845.

48 *Id.* at 842-43.

49 Federal Rule of Evidence 801(d) in general concerns statements which are not hearsay. FED. R. EVID. 801(d).

50 *Owens*, 108 S. Ct. at 844-45.

51 *Id.* at 841.

been interpreted by the United States Supreme Court as providing a sufficient opportunity to cross-examine "adverse witnesses,"[52] the Supreme Court has never held that the memory loss of a witness results in a violation of the confrontation clause of the sixth amendment.[53] However, the Court added that it had twice left open the possibility that memory loss could lead to a confrontation clause violation.[54]

For example, Justice Scalia noted that, while the Court in *California v. Green*[55] found testimony given at a preliminary hearing to be constitutionally admissible when the witness was cross-examined at the trial,[56] the Court did not rule on the question of whether or not the witness' out-of-court statements about certain events to a police officer were admissible when the witness could not remember the events during the trial.[57] However, Justice Scalia stated that Justice Harlan's concurring opinion in *Green* spoke to the issue. Justice Harlan would have held that out-of-court statements about events are constitutionally admissible under the sixth amendment, even if the witness cannot remember the statement or the basis for the statement.[58]

---

52 *Id. See* Mattox v. United States, 156 U.S. 237, 242-43 (1985)(holding that the sixth amendment confrontation clause affords the accused an opportunity to test witness memory and allows the jury the opportunity to evaluate the witness' demeanor); Douglas v. Alabama, 380 U.S. 415, 418 (1965)(holding that the sixth amendment confrontation clause guarantees an "adequate opportunity for cross-examination," which is violated if cross-examination is denied).

53 *Owens*, 108 S. Ct. at 841.

54 *Id. See* California v. Green, 399 U.S. 149, 168-69 (1970)(noting that the issue of whether the memory loss at trial of a witness with respect to his or her prior, out-of-court statement could result in a violation of the confrontation clause was not "ripe for decision"); Delaware v. Fensterer, 474 U.S. 15, 17, 21 (1985)(per curiam)(because the case did not involve the admissibility of a prior, out-of-court statement, but instead involved the admission of expert testimony when the expert cannot remember the basis for his opinion, the Court did not address whether the declarant's memory loss resulted in a violation of the confrontation clause).

55 399 U.S. 149 (1970).

56 *Id.* at 157-64.

57 *Owens*, 108 S. Ct. at 841-42 (citing *Green*, 399 U.S. at 168-69). The *Green* Court remanded on this issue, stating that neither the state nor the parties considered whether the witness' loss of memory affected the petitioner's right to cross-examine the witness and thus violated the sixth amendment confrontation clause. *Id.* (citing *Green*, 399 U.S. at 168-69). However, Justice Scalia noted that the California Supreme Court held, on remand, that the confrontation clause was not violated when the sworn witness was cross-examined and observable to the jury. *Id.* at 842 n.2 (citing People v. Green, 3 Cal. 3d 981, 479 P.2d 998, 92 Cal. Rptr. 494, *cert. dismissed*, 404 U.S. 801 (1971)).

58 *Owens*, 108 S. Ct. at 842 (citing *Green*, 399 U.S. at 188 (Harlan, J., concurring)). Justice Harlan stated that even a witness with memory loss is available for cross-examination. However, "to the extent that the witness is, in a practical sense, unavailable for cross-examination on the relevant facts," Justice Harlan would still find no violation of the sixth amendment confrontation clause. *Green*, 399 U.S. at 188-89 (Harlan, J., con-

As a further illustration of the possibility of witness memory loss leading to a violation of the confrontation clause, Justice Scalia cited *Delaware v. Fensterer*.[59] In that case, the Supreme Court concluded that, although the expert witness could testify as to his opinion but could not recall the foundation for his opinion, the confrontation clause was not violated.[60] In justifying its holding, the *Fensterer* Court stated:

> The Confrontation Clause includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion. To the contrary, the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony.[61]

Justice Scalia added in *Owens* that an expert witness who cannot remember the basis for his or her opinion can still be discredited, for the jury may find " 'that his opinion is as unreliable as his memory.' "[62]

The majority next characterized the main issue in *Owens* to be the question left unresolved by the Court in *Green*. The Court stated that it must decide the issue of whether the memory loss of a witness significantly affects cross-examination so as to result in a violation of the confrontation clause.[63] The answer, according to the Court, is found in the suggestion made by Justice Harlan in his concurrence in *Green*.[64]

Justice Scalia recapitulated that " '[t]he Confrontation Clause guarantees only "an *opportunity* for effective cross-examination, not

---

curring). Justice Harlan did qualify his conclusion by adding that the prosecution must act reasonably and in good faith to produce a witness before attempting to admit out-of-court statements. *Id.* at 189 n.22 (Harlan, J., concurring).

59 474 U.S. 15 (1985)(per curiam). The *Fensterer* Court noted that the issue in *Fensterer* is distinguishable from the issue left open in *Green* in that only the latter involved the admission of out-of-court statements. *Owens*, 108 S. Ct. at 842 (citing *Fensterer*, 474 U.S. at 18). However, Justice Stevens, in a concurring opinion, found the open issue in *Green* to be "quite close" to the main issue in *Fensterer*, in that while *Green* involved an out-of-court statement and memory loss by the witness of that statement, *Fensterer* involved an out-of-court conclusion and memory loss of the basis for that conclusion. *Owens*, 108 S. Ct. at 842 (citing *Fensterer*, 474 U.S. at 23-24 (Stevens, J., concurring)).

60 *Owens*, 108 S. Ct. at 842 (citing generally *Fensterer*, 474 U.S. 15). The *Fensterer* Court held that the confrontation clause guarantees only the opportunity for cross-examination and not successful cross-examination. The opportunity, according to the Court, involves revealing any "forgetfulness, confusion, or evasion." *Fensterer*, 474 U.S. at 21-22.

61 *Fensterer*, 474 U.S. at 21-22.

62 *Owens*, 108 S. Ct. at 842 (quoting *Fensterer*, 474 U.S. at 19).

63 *Id.*

64 *Id.* *See supra* note 58 and accompanying text.

cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." ' "[65] Justice Scalia continued by stating that *Fensterer* illustrates that the opportunity still exists when a witness testifies to his or her current belief, but cannot remember the basis for his or her belief.[66] Consequently, Justice Scalia reasoned that, as long as the defendant "has the opportunity to bring out such matters as the witness's bias, his lack of care and attentiveness, his poor eyesight, and even . . . the very fact that he has a bad memory," the opportunity for cross-examination is satisfied.[67] Thus, according to the Court, it follows that because an inquiry into these matters satisfies the constitutional requirement of an opportunity for cross-examination when a witness testifies as to his or her current belief, but cannot remember the basis for this belief, the same inquiry should be constitutionally sufficient when the witness testifies as to a past belief but cannot remember the basis for this belief.[68] The Court reasoned that, in cases such as these, cross-examination cannot elicit from the witness the basis for the belief.[69] However, there are various methods available to discredit the belief.[70]

Justice Scalia gave two examples of testimony of current and past beliefs coupled with memory loss of the basis for the beliefs.[71] The Court reasoned that testifying "I believe this to be the man who assaulted me, but can't remember why" would appear more injurious and thus require further "memory testing"[72] than the statement "I don't know whether this is the man who assaulted me, but I told the police I believed so earlier."[73] Justice Scalia concluded that such memory-testing is not necessary in order to achieve an opportunity for effective cross-examination.[74] Instead, according to the Court, there are other methods which can be used to discredit

---

65 *Id.* at 842 (quoting Kentucky v. Stincer, 107 S. Ct. 2658, 2664 (1987)(quoting *Fensterer*, 474 U.S. at 20 (emphasis in original)))(citations omitted).

66 *Id.*

67 *Id.* Justice Scalia noted that, according to Wigmore, a main purpose of cross-examination is to test the memory of the witness. *See* 3A J. WIGMORE, EVIDENCE § 995 (J. Chadbourn rev. ed. 1970).

68 *Owens*, 108 S. Ct. at 842.

69 *Id.*

70 *Id. See supra* note 67 and accompanying text.

71 *Id.* at 843.

72 *Id.* The Court qualified this statement by stating that "memory testing" would be required if such an inquiry is necessary to satisfy the opportunity for effective cross-examination guaranteed by the sixth amendment. *Id.*

73 *Id.*

74 *Id.* Justice Scalia followed *Fensterer* in which the Court concluded that memory-testing is not the only method of cross-examination which could be used to discredit the witness. *See* Delaware v. Fensterer, 474 U.S. 15, 19-20 (1985)(per curiam).

the statement made by a witness with memory loss. Justice Scalia qualified this assertion by adding that, although the alternative methods may not always be successful in impugning the witness' testimony, success in cross-examination is not guaranteed by the Constitution.[75]

In the second part of the majority opinion, Justice Scalia recognized that, traditionally, out-of-court identifications would be characterized as hearsay and that there is somewhat of an overlap between the requirements of the sixth amendment confrontation clause and the hearsay rule.[76] The majority then noted that the court of appeals was aware of, and influenced by, the dangers that accompany hearsay. Thus, the court of appeals had reasoned that the Constitution required statements to undergo testing for " 'indicia of reliability' "[77] or " 'particularized guarantees of trustworthiness.' "[78]

Justice Scalia disagreed with the analysis of the court of appeals. According to the majority, inquiries into "indicia of reliability" or "particularized guarantees of trustworthiness" are not necessary "when a hearsay declarant is present at trial and subject to unrestricted cross-examination."[79] The Court agreed with *Green* and acknowledged that the constitutional requirements of the confrontation clause are satisfied by the oath the witness takes, the opportunity given the defense to cross-examine, and jury observation of the witness' demeanor.[80] Thus, Justice Scalia concluded that testimony by a forgetful witness that he or she had previously believed the defendant was his or her assailant is not constitutionally different,

---

75 *Owens*, 108 S. Ct. at 843. *See supra* note 67 and accompanying text. According to the majority, alternative methods are very real, as illustrated by the argument of counsel for the respondent that emphasized Foster's memory loss by stating that Foster's hospital visitors suggested to Foster that Owens was the assailant. *Id.*

76 *Id.* For the proposition that there is an overlap, Justice Scalia cited California v. Green, 399 U.S. 149, 155-56 (1970). The Court in *Green* made it clear that the overlap is not complete and the confrontation clause could not substitute for the hearsay rule and vice-versa. Thus, according to the Court, there can be a violation of one without a violation of the other. *Owens*, 108 S. Ct. at 843.

77 United States v. Owens, 789 F.2d 750, 760-61 (9th Cir. 1986); *Owens*, 108 S. Ct. at 843 (quoting Dutton v. Evans, 400 U.S. 74, 89 (1970)). According to the Court in *Dutton*, "indicia of reliability" determine whether a jury can hear certain testimony so as not to violate the confrontation clause. *Dutton*, 400 U.S. at 89.

78 *Owens*, 108 S. Ct. at 843 (quoting Ohio v. Roberts, 448 U.S. 56, 66 (1980)). The Court in *Roberts* held that "indicia of reliability" determine whether or not a statement is admissible. If the statement falls within a hearsay exception, then reliability can be inferred. Otherwise, when reliability is not shown, the statement is inadmissible unless "particularized guarantees of trustworthiness" exist. *Roberts*, 448 U.S. at 66.

79 *Owens*, 108 S. Ct. at 843.

80 *Id.* (citing *Green*, 399 U.S. at 158-61).

under the confrontation clause, from admission of the witness' prior statement of identification.[81]

The Court next answered the respondent's argument that statements concerning identification are subject to certain dangers and that cross-examination is very important where hearsay testimony is concerned.[82] Justice Scalia stated that the respondent did not argue that Foster's identification was subject to suggestive procedures. Thus, the Court was unwilling to hold that a "mere possibility of suggestive procedures" renders out-of-court statements of identification "inherently less reliable than other out-of-court statements."[83]

In answer to the respondent's alternative argument that Federal Rule of Evidence 802 was violated,[84] Justice Scalia stated that Federal Rule of Evidence 802[85] excludes hearsay, but Federal Rule of Evidence 801(d)(1)(C)[86] is an exception to Federal Rule of Evidence 802.[87] The Court further noted that the court of appeals found that Foster's memory loss precluded him from being "subject to cross-examination concerning the statement."[88] The Court disagreed with this construction of "subject to cross-examination concerning the statement." According to Justice Scalia, a better interpretation would be that a sworn witness is placed on the stand and willingly answers questions.[89] The Court justified its interpretation by comparing Federal Rule of Evidence 801(d)(1)(C) with Federal Rule of Evidence 804(a)(3).[90] The Court noted that Congress was aware that witness forgetfulness is a "recurrent evidentiary problem," for

---

81 *Id.*

82 *Id.* (citations omitted).

83 *Id.*

84 *Id.*

85 *See supra* note 5.

86 *See supra* note 7.

87 *Owens*, 108 S. Ct. at 843.

88 *Id.* However, the Court mentioned that the court of appeals held that the violation of the Federal Rules of Evidence was harmless (a "more-probable-than-not" standard was applied instead of the "beyond-a-reasonable-doubt" standard which applies to confrontation clause violations). *Id.* at 843-44.

89 *Id.* at 844. The majority noted that the cross-examination that had occurred in *Owens* comports with this interpretation. Furthermore, the Court recognized that the trial court can place limits on the scope of cross-examination or the witness can assert the defense of privilege, both of which would diminish the significance of cross-examination. However, the Court qualified these limits by asserting that the memory loss of a witness does not preclude effective cross-examination. Instead, cross-examination often results in a finding that the witness has lost his or her memory with respect to a statement which can be used to defeat any effect the previous statement had. This is all that Federal Rule of Evidence 801(d)(1)(C) requires with respect to the provision that the cross-examination must "concern the statement." *Id.*

90 Federal Rule of Evidence 804(a)(3) states: "(a) . . . 'Unavailability as a witness'

Federal Rule of Evidence 804(a)(3) provides for situations of witness memory loss.[91] Thus, Congress obviously chose not to include witness forgetfulness in the exceptions to Federal Rule of Evidence 801(d)(1)(C).[92]

The majority explained that, according to the legislative history of Federal Rule of Evidence 801(d)(1)(C), Congress' basis for the Rule was that, in general, out-of-court identifications are preferable to in-court identifications, provided that there are protections against suggestiveness.[93] Thus, the Court concluded that Federal Rule of Evidence 801(d)(1)(C) applies to problems such as the one in *Owens* in which a witness' memory loss precludes him or her from making an in-court identification or from elaborating upon the details or the foundation for the previous, out-of-court identification.[94]

In answer to the respondent's contention that the Court's interpretation of Federal Rule of Evidence 801(d)(1)(C) creates an inconsistency within the Federal Rules of Evidence,[95] Justice Scalia stated that this is not a substantive inconsistency but a "semantic oddity," which is caused by the fact that Federal Rule of Evidence 804(a) describes hearsay exceptions in situations in which the witness will be deemed "unavailable" to provide for convenient referencing to Federal Rule of Evidence 804(b).[96] Justice Scalia continued by asserting that, if the heading of Federal Rule of Evi-

---

includes situations in which the declarant: . . . (3) Testifies to a lack of memory of the subject matter of his statement . . ." FED. R. EVID. 804(a)(3).

91 *Owens*, 108 S. Ct. at 844.

92 *Id.*

93 *Id.* In essence, Congress established a preference in favor of out-of-court identifications. Both House and Senate Reports note that, with time, a witness' memory becomes less reliable. Thus, identifications made shortly after perception should be admitted, for this deters " 'cases falling through because the witness can no longer recall the identity of the person he saw commit the crime.' " *Id.* (quoting H.R. REP. No. 355, 94th Cong., 1st Sess. 3, *reprinted in* 1975 U.S. CODE CONG. & ADMIN. NEWS 1092, 1094). *See also* S. REP. No. 199, 94th Cong., 1st Sess. 2 (1975)(stating that "[b]oth experience and psychological studies suggest that identifications consisting of nonsuggestive lineups, photographic spreads, or similar identifications, made reasonably soon after the offense, are most [sic] reliable than in-court identifications. . . . Their exclusion would thus be detrimental to the fair administration of justice.").

94 *Owens*, 108 S. Ct. at 844.

95 According to the respondent, if the Court's interpretation were accepted, the witness who forgets is found to be "subject to cross-examination " under Federal Rule of Evidence 801(d)(1)(C) and, at the same time, "unavailable" under Federal Rule of Evidence 804(a)(3). *Id.* The Court noted that this argument is found in 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE 801-120 to -121, 801-178 (1987). *Owens*, 108 S. Ct. at 844.

96 *Owens*, 108 S. Ct. at 844. Federal Rule of Evidence 804(b) begins: "The following are not excluded by the hearsay rule if the declarant is unavailable as a witness . . ." FED. R. EVID. 804(b). The situations include privilege, refusing to testify following a court order to do so, inability to testify because of memory loss, death, physical or mental

dence 804(a) had been "Unavailability as a witness, memory loss, and other special circumstances,"[97] there would be no visible inconsistency with Federal Rule of Evidence 801 which defines exceptions to hearsay.[98]

Justice Scalia concluded the opinion of the Court by recognizing that the situation in *Owens* illustrates the "verbal curiosity" that a witness can be "subject to cross-examination" under Federal Rule of Evidence 801(d)(1) and simultaneously "unavailable" under Federal Rule of Evidence 804(a)(3).[99] However, Justice Scalia concluded that it is obvious that the two phrases pertain to separate circumstances and are not required or expected to coincide.[100]

The Court held that there was no violation of either the sixth amendment confrontation clause or Federal Rule of Evidence 802 when the trial court admitted an out-of-court statement of identification made by a witness with memory loss who was unable to recall the basis for his identification.[101] Consequently, the Court reversed and remanded the decision of the court of appeals.[102]

B. JUSTICE BRENNAN'S DISSENTING OPINION

Justice Brennan dissented from the Court's opinion.[103] Justice Brennan concluded that the constitutional right of confrontation is more than the mere procedural protection afforded by the majority.[104] According to the dissent, the sixth amendment guarantees the defendant in a criminal proceeding the right of cross-examination in order " 'to affor[d] the trier of fact a satisfactory basis for evaluating the truth of [a] prior statement.' "[105] Justice Brennan

---

illness, and absence from the hearing. *Owens*, 108 S. Ct. at 844 (citing FED. R. EVID. 804(a)(3)).

97 Federal Rule of Evidence 804(a)(3) is entitled: "Hearsay Exceptions: Declarant Unavailable. (a) Definition of Unavailability—'Unavailability as a witness' includes situations in which the declarant . . ." FED. R. EVID. 804 (a)(3).

98 *Owens*, 108 S. Ct. at 844-45. Justice Scalia noted that there also is a semantic inconsistency between Federal Rule of Evidence 804(a) and Federal Rules of Evidence 801(d)(1)(A),(B) and (C). The majority asserted, for example, that it would be odd for a witness who claims a memory loss of the underlying facts of his or her testimony from a previous proceeding to be able to avoid introducing statements from that previous proceeding which are inconsistent with his or her testimony at trial. *Id.* (citations omitted). *See also* FED. R. EVID. 801(d)(1)(A), quoted *infra* note 242.

99 *Owens*, 108 S. Ct. at 845.

100 *Id.*

101 *Id.*

102 *Id.*

103 Justice Brennan was joined by Justice Marshall in dissent. *Id.* at 845.

104 *Owens*, 108 S. Ct. at 845 (Brennan, J., dissenting).

105 *Id.* (Brennan, J., dissenting)(quoting *Green*, 399 U.S. at 161).

stated that Owens was denied this guarantee,[106] arguing that Foster's severe loss of memory precluded any attempts at cross-examination to determine the "trustworthiness or reliability of the identification."[107] Thus, according to the dissent, cross-examination of Foster would not have mitigated some of the dangers associated with out-of-court testimony.[108]

Justice Brennan also criticized the Court's narrow holding that the confrontation clause merely protects the defendant's right to cross-examine "live witnesses," notwithstanding the witnesses' answers.[109] The dissent argued that, in deciding whether or not to admit out-of-court testimony, the Court should determine whether the loss of memory so severely hinders cross-examination that the jury would not be able to determine the truth of the evidence.[110]

Justice Brennan began his analysis by noting that, if Foster had died from the beating, both the sixth amendment and the Federal Rules of Evidence would have prohibited Mansfield from testifying as to Foster's out-of-court statement of identification.[111] However, Foster lived. His memory, on the other hand, did not.[112] Thus, Justice Brennan argued that the John Foster on the stand in 1983 was not the real witness; instead, the John Foster who had previously given Mansfield the out-of-court identification of Owens was the witness who took the stand.[113] Because of Foster's memory loss, the dissent believed that cross-examination would not have helped the jury in its evaluation of "the trustworthiness or reliability of the identification."[114] Indeed, according to the dissent, counsel for the respondent would not have been able to investigate Foster's " 'lack

106 *Id.* (Brennan, J., dissenting).

107 *Id.* at 846 (Brennan, J., dissenting).

108 *Id.* (Brennan, J., dissenting). Justice Brennan stated that both " 'misperception and failure of memory' " could not be mitigated by cross-examination of Foster. *Id.* (Brennan, J., dissenting)(quoting *Owens*, 789 F.2d at 759).

109 *Id.* at 847 (Brennan, J., dissenting).

110 *Id.* at 848 (Brennan, J., dissenting).

111 *Id.* at 845 (Brennan, J., dissenting).

112 *Id.* (Brennan, J., dissenting). Justice Brennan argued that, because of Foster's memory loss, he could not give anything more than "stale and inscrutable evidence." This situation, according to the dissent, is analogous to the hypothetical in which Foster died because of his beating. For, if the court had allowed Mansfield to testify in that situation, he would have been able to give nothing more than "stale and inscrutable evidence." Thus, the dissent reasoned that, just as in the latter case, in which Mansfield would not be allowed to testify as to Foster's out-of-court identification, in the former case, Foster should also not be allowed to testify. *Id.* (Brennan, J., dissenting).

113 *Id.* at 846 (Brennan, J., dissenting). According to the dissent John Foster's memory was dead, and thus, Foster was incapable of expounding on his story. *Id.* (Brennan, J., dissenting).

114 *Id.* (Brennan, J., dissenting).

of care and attentiveness' " or " 'bad memory.' "[115] For Foster could not elaborate upon either his prior identification or the basis for it.[116]

Based on its analysis, the dissent directly confronted the Court's conclusion that there was no violation of the sixth amendment confrontation clause. Instead of asserting that the right to confront one's witnesses is a "procedural trial right" guaranteeing the " '*opportunity* for effective cross-examination,' "[117] the dissent argued that the Court has never held that the confrontation clause only guarantees the "right to question live witnesses, no matter how futile that questioning might be."[118] The dissent continued by noting that prior case law has upheld the notion that the confrontation clause guarantees " 'an opportunity for *effective* cross-examination.' "[119] Justice Brennan added that, while the Court has never determined "effectiveness" by success, the Court has also never "equated effectiveness with the mere opportunity to pose questions."[120] Instead, the dissent argued, the Court has implied in the past that effectiveness involves determining whether cross-examination has presented the jury with " ' "a satisfactory basis for evaluating the truth of the prior statement." ' "[121] When cross-examination is not available, according to Justice Brennan, out-of-court statements are admissible under the sixth amendment only if they contain " 'indicia of reliability.' "[122]

The dissent then criticized the Court's reliance on *Fensterer*,[123] a case which the dissent argued did not concern the admission of

---

115 *Id.* (Brennan, J., dissenting)(quoting *Owens*, 108 S. Ct. at 842).

116 *Id.* (Brennan, J., dissenting). Thus, according to the dissent, " 'misperception and failure of memory' " could not be abated by cross-examination of Foster. *Id.* (Brennan, J., dissenting)(quoting United States v. Owens, 789 F.2d 750, 759 (9th Cir. 1986)).

117 *Id.* (Brennan, J., dissenting)(quoting *Owens*, 108 S. Ct. at 846 (citations omitted)(emphasis in original)).

118 *Id.* at 847 (Brennan, J., dissenting).

119 *Id.* (Brennan, J., dissenting)(quoting Delaware v. Fensterer, 474 U.S. 15, 20 (1985)(per curiam)(emphasis added)). Other cases cited by the dissent include: Nelson v. O'Neil, 402 U.S. 622, 629 (1971)(the confrontation clause does not prohibit the admission of an out-of-court statement when the defendant has the "opportunity or the benefit of full and effective cross-examination"); California v. Green, 399 U.S. 149,159 (1970)(an out-of-court statement is admissible "as long as the defendant is assured of full and effective cross-examination at the time of trial"). *Owens*, 108 S. Ct. at 847 (Brennan, J., dissenting).

120 *Owens*, 108 S. Ct. at 847 (Brennan, J., dissenting).

121 *Id.* (Brennan, J., dissenting)(quoting Dutton v. Evans, 400 U.S. 74, 89 (1970)(quoting *Green*, 399 U.S. at 161))(citations omitted).

122 *Owens*, 108 S. Ct. at 847 (Brennan, J., dissenting)(quoting *Dutton*, 400 U.S. at 89). *See supra* note 77 and accompanying text.

123 Delaware v. Fensterer, 474 U.S. 15 (1985)(per curiam).

prior statements.[124] Justice Brennan stated that the constitutional guarantee of the confrontation clause is that the defendant will be able to present the jury with enough information with which it can "assess[] the validity of the evidence offered."[125] Consequently, because the expert's memory loss in *Fensterer* was "self-impeaching," the confrontation clause was satisfied.[126] Thus, Justice Brennan did not believe that *Fensterer* departed from traditional confrontation clause philosophy.

The dissent further disagreed with the Court's adoption of *Fensterer* for the principle that "all live testimony as to a witness's past belief is constitutionally admissible, provided the defendant is afforded an opportunity to question the witnesses."[127] The dissent criticized this reasoning for erroneously broadening *Fensterer*'s rule. The dissent argued that, while the memory loss in *Fensterer* was "self-impeaching," such a characterization does not extend to all instances of forgetting.[128] According to the dissent's standard for admitting out-of-court statements,[129] Foster's severe memory loss prevented "meaningful examination or assessment of his out-of-court statement," and should not have been admitted.[130]

Justice Brennan recognized that the majority might fear that such an argument could result in a plethora of constitutional challenges to the admissibility of out-of-court statements. However, he responded that there is no reason for such fear.[131] First, Justice Brennan stated that cases of *complete* memory loss, such as *Owens*, are rare. Usually, the cases will involve partial memory loss or complete memory loss coupled with deception, in which the jury can determine the "reliability and trustworthiness of the out-of-court statement."[132] Second, if the jury cannot determine the "reliability and trustworthiness of the out-of-court statement," the statement is ad-

---

124 *Owens*, 108 S. Ct. at 847-48 (Brennan, J., dissenting). In *Fensterer*, the dissent noted, an expert witness could not remember which scientific theory he had used to formulate his opinion. *Id.* at 848 (Brennan, J., dissenting).

125 *Id.* at 848 (Brennan, J., dissenting).

126 *Id.* (Brennan, J., dissenting). The dissent noted that, although the witness' memory of which scientific theory he had used would have resulted in very effective cross-examination, such cross-examination is not the constitutional minimum. *Id.* (Brennan, J., dissenting).

127 *Id.* (Brennan, J., dissenting).

128 *Id.* (Brennan, J., dissenting).

129 The dissent argued that determining whether or not to admit out-of-court statements when a memory loss is involved "depend[s] on whether the memory loss so seriously impedes cross-examination that the factfinder lacks an adequate basis upon which to assess the truth of the proffered evidence." *Id.* (Brennan, J., dissenting).

130 *Id.* (Brennan, J., dissenting).

131 *Id.* (Brennan, J., dissenting).

132 *Id.* (Brennan, J., dissenting).

missible if it contains "indicia of reliability."[133] Third, "effectiveness" can be determined for confrontation clause issues in the same way it is determined with evidentiary issues in order to protect "individual liberty," even at the possible expense of "efficient judicial administration."[134]

The dissent concluded that, while it agreed with the Court that the confrontation clause does not ensure that every witness will not give testimony "marred by forgetfulness, confusion, or evasion" and that giving the defendant " ' "a full and fair opportunity to probe and expose these infirmities through cross-examination" ' " satisfies the requirements of the confrontation clause,[135] the right of cross-examination primarily functions to " 'promote reliability in the truth-finding functions of a criminal trial.' "[136] Justice Brennan found cross-examination of Foster to be futile. Thus, according to the dissent, the majority's holding that Foster's cross-examination satisfied the requirements of the confrontation clause is a reduction of "the right of confrontation to a hollow formalism."[137] Consequently, Justice Brennan completed his argument by stating that no matter how severe a witness' loss of memory is, the confrontation clause ensures more than the defendant's right to question a "live witness."[138]

IV. HISTORICAL OVERVIEW

A. THE CONFRONTATION CLAUSE

The sixth amendment confrontation clause guarantees the con-

---

133 *Id.* (Brennan, J., dissenting).

134 *Id.* at 848-49 (Brennan, J., dissenting). Justice Brennan noted that determining whether the defendant's opportunity for cross-examination meets the constitutional standard in cases concerning the confrontation clause is the same inquiry as in cases involving Federal Rule of Evidence 804(a)(3). *Id.* at 849 n.2 (Brennan, J., dissenting). Justice Brennan disagreed with the Court's reconciliation of Federal Rule of Evidence 804(a)(3) with Federal Rule of Evidence 801(d)(1)(C). Justice Scalia's interpretation would render a prior identification not hearsay as long as the declarant was subject to cross-examination concerning the statement, even if the declarant could not remember the basis for the statement. *See Owens*, 108 S. Ct. at 844-45. The dissent believed that Justice Scalia's interpretation of Federal Rule of Evidence 801(d)(1)(C) rendered it unconstitutional under the confrontation clause. Thus, Justice Brennan would have held that Federal Rule of Evidence 804(a) requires that the "declarant be subject to cross-examination as to the subject matter of the prior statement." *Id.* at 849 n.2 (Brennan, J., dissenting).

135 *Owens*, 108 S. Ct. at 849 (Brennan, J., dissenting)(quoting *Owens*, 108 S. Ct. at 842 (quoting Delaware v. Fensterer, 474 U.S. 15, 22 (1985)(per curiam))).

136 *Owens*, 108 S. Ct. at 849 (Brennan, J., dissenting)(quoting Kentucky v. Stincer, 107 S. Ct. 2658, 2662 (1987)).

137 *Owens*, 108 S. Ct. at 849 (Brennan, J., dissenting).

138 *Id.* (Brennan, J., dissenting).

stitutional right to confront one's witnesses in any criminal trial.[139] In 1965, the United States Supreme Court held, in *Pointer v. Texas*,[140] that the confrontation clause provides so fundamental a right that it applies to the states by means of the fourteenth amendment to the Constitution.[141]

The scope and purpose of the confrontation clause were explained by the Supreme Court in *Mattox v. United States*.[142] According to the *Mattox* Court, the essential purpose of the confrontation clause is:

> to prevent depositions or *ex parte* affidavits . . . [from] being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.[143]

Thus, through cross-examination, the accused is afforded the right to test the witness' memory and to place the witness on the stand so that the jury can observe the witness' demeanor and evaluate the credibility of the witness' testimony.[144] In this way, according to the Court in *Ohio v. Roberts*,[145] the confrontation clause "exclude[s] some hearsay" from admissibility.[146]

Furthermore, as the Supreme Court stated in *Douglas v. Alabama*,[147] cases such as *Mattox* articulate that the right of cross-examination is included in the confrontation clause and is an essential guarantee of the confrontation clause.[148] However, "an adequate opportunity for cross-examination may satisfy the [confrontation] clause even in the absence of physical confrontation."[149]

More recently, the Supreme Court asserted that " '[t]he main and essential purpose of confrontation is *to secure for the opponent the*

---

139 *See supra* note 2.

140 380 U.S. 400 (1965).

141 *Id.* at 403.

142 156 U.S. 237 (1895).

143 *Id.* at 242-43.

144 *Id.*

145 448 U.S. 56, 66 (1980)(The Court held that a showing of unavailability is required before a statement made by a hearsay declarant who is not at the trial will be considered for admissibility. Then, admission of the statement depends on whether the statement "bears adequate 'indicia of reliability' . . . [or contains] particularized guarantees of trustworthiness.").

146 *Id.* at 63.

147 380 U.S. 415 (1965).

148 *Id.* at 418.

149 *Id.*

opportunity of cross-examination. . . . [C]ross-examination . . . cannot be had except by the direct and personal putting of questions and obtaining immediate answers.' "[150] To cross-examine is to test the credibility of a witness' testimony.[151]

Such an interpretation exists today in decisions of the Supreme Court.[152] The Supreme Court has held that the confrontation clause functions "to promote reliability in the truth-finding functions of a criminal trial"[153] by guaranteeing the defendant the opportunity to cross-examine opposing witnesses at trial.[154] Consequently, the sixth amendment confrontation clause "guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish."[155]

B. FEDERAL RULE OF EVIDENCE 801(d)(1)(C)

Federal Rule of Evidence 801(d)(1)(C) provides that, if the declarant of an out-of-court statement of identification testifies at trial and is cross-examined with respect to this statement, the statement is not hearsay.[156] The legislative history surrounding the recommendation of Federal Rule of Evidence 801(d)(1)(C) by House and Senate Committees illustrates that the Rule was considered desirable for a variety of reasons.[157]

---

150 Davis v. Alaska, 415 U.S. 308, 315-16 (1974)(quoting 5 J. WIGMORE, EVIDENCE § 1395 (3d ed. 1940))(emphasis in original).

151 *Davis*, 415 U.S. at 316. The Court in *Davis* stated that "[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." *Id.*

152 *See generally* Kentucky v. Stincer, 107 S. Ct. 2658, 2663-64 (1987)(discussing the history and functions of the confrontation clause); California v. Green, 399 U.S. 149, 156-58 (1970)(discussing the history of the confrontation clause); Delaware v. Fensterer, 474 U.S. 15, 18-20 (1985)(per curiam)(discussing classification of confrontation clause cases).

153 *Stincer*, 107 S. Ct. at 2662.

154 *Id.* at 2664.

155 *Fensterer*, 474 U.S. at 20 (emphasis in original). The Court in *Stincer* noted that this "limitation is consistent with the concept that the right to confrontation is a functional one for the purpose of promoting reliability in a criminal trial." *Stincer*, 107 S. Ct. at 2664. Thus, while effectiveness is not the standard for cross-examination, at a minimum, reliability is the standard. Consequently, cross-examination must involve something more than mere procedure.

156 *See supra* note 7.

157 For example, the Senate and House Reports both state that Federal Rule of Evidence 801(d)(1)(C) was desirable because of the suggestiveness of the courtroom, because there is a limitation on the admission of the testimony that the declarant be present at trial and be cross-examined, and because memory fades with time and cases are not tried immediately due to crowded dockets. H.R. REP. No. 355, 94th Cong., 1st Sess. 3, *reprinted in* 1975 U.S. CODE CONG. & ADMIN. NEWS 1092, 1094; S. REP. No. 199, 94th Cong., 1st Sess. 2 (1975).

According to the Report of the House of Representatives, use of the exception to hearsay must meet two requisites.[158] First, the declarant must testify at trial and must be cross-examined concerning the statement. Second, once this requirement is fulfilled, constitutional standards must be met before the prior, out-of-court identification will be admitted.[159] These constitutional standards are the due process standards of the fifth[160] and fourteenth[161] amendments to the United States Constitution. Thus, all surrounding circumstances must be considered to ascertain "whether the identification procedure was 'unnecessarily suggestive and conducive to irreparably mistaken identification.' "[162]

The rationale behind Federal Rule of Evidence 801(d)(1)(C), according to the House Report, lies in the fact that in-court identifications can be quite suggestive.[163] On the other hand, out-of-court identifications are usually more reliable, for these statements are often made very soon after the perception, when the declarant's memory is fresh. With time the memory fades, and because there is often a great lapse of time between arrest and trial, out-of-court identifications can lead to increased fairness to defendants because the accuracy of the statements is ensured.[164] Furthermore, memory loss of a witness would no longer automatically result in dismissal of a case.[165]

The Senate discussed the same issue and came to the same conclusions as the House of Representatives.[166] The Senate Report noted that studies have shown that identifications made soon after perception are more reliable than those made in court. Reliability, in turn, increases fairness.[167] In connection with reliability, the Senate noted that the out-of-court identification usually takes place before the declarant has been bribed or forced to change his or her

158 H.R. Rep. No. 355, 94th Cong., 1st Sess. 2, *reprinted in* 1975 U.S. CODE CONG. & ADMIN. NEWS 1092, 1093.

159 *Id.*

160 The fifth amendment provides, in pertinent part, that, "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

161 The fourteenth amendment provides, in pertinent part, that, "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

162 H.R. REP. No. 355, 94th Cong., 1st Sess. 2, *reprinted in* 1975 U.S. CODE CONG. & ADMIN. NEWS 1092, 1093 (quoting Kirby v. Illinois, 406 U.S. 682, 691 (1972)).

163 *Id.* at 3.

164 *Id.*

165 *Id.*

166 S. Rep. No. 199, 94th Cong., 1st Sess. 2 (1975).

167 *Id.*

mind.[168]

Consequently, Federal Rule of Evidence 801(d)(1)(C) was adopted as an exception[169] to Federal Rule of Evidence 802.[170] The exception would simultaneously counteract "the generally unsatisfactory and inconclusive nature of courtroom identifications."[171]

V. Discussion and Legal Analysis

A. Cross-Examination under *Owens*

In *United States v. Owens*, Justice Scalia concluded that the Constitution does not guarantee successful cross-examination.[172] Instead, according to the majority, as long as the defendant is permitted to expose a variety of factors which a witness may carry with him or her, such as the witness' prejudices, bad eyesight, inattentiveness, and bad memory, the defendant's opportunity to cross-examine has been satisfied.[173] This interpretation of opportunity, according to the Court, is the constitutional guarantee.[174] For Justice Scalia, then, the processes of swearing in the witness, cross-examination of the witness, and jury observation of the witness' demeanor fulfill the requirements of the sixth amendment confrontation clause.[175]

In formulating his conclusions about the requirements of the confrontation clause, Justice Scalia relied on *California v. Green* and *Delaware v. Fensterer*, which the Court recognized as not answering the question of whether an out-of-court statement is admissible when the declarant suffers memory loss with respect to the basis for the statement.[176] However, by analogizing the facts of *Fensterer* to the facts of the case before the Court, Justice Scalia interpreted *Fensterer* too broadly, as *Fensterer* did not involve out-of-court statements, but rather involved the admission of an expert's opinion when the expert could not recall the basis for his opinion.[177] Fur-

168 *Id.*

169 Another exception to Federal Rule of Evidence 801(d)1)(C) is Federal Rule of Evidence 804(a)(3). *See supra* note 90 and accompanying text.

170 *See supra* note 5.

171 28 U.S.C. app. 717 (1982)(advisory committee's notes).

172 *Owens*, 108 S. Ct. at 843.

173 *Id.* at 842 (citing 3A J. Wigmore, Evidence § 995 (J. Chadbourn rev. ed. 1970)).

174 *Id.* Thus, even though Foster could not recall the basis for his identification of Owens as his assailant, Justice Scalia held that Owens' rights under the confrontation clause were not violated, because Owens had the opportunity to bring out factors which would tend to discredit Foster's testimony. *Id.* at 842-43. *See supra* notes 65-70 and accompanying text.

175 *Id.* at 843 (citing California v. Green, 399 U.S. 149, 158-61 (1970)).

176 *Id.* at 841-42. The issue was left open until *Owens*. *Id.* at 842.

177 Delaware v. Fensterer, 474 U.S. 15, 20-21 (1985)(per curiam).

thermore, the *Fensterer* Court stated that it was not deciding the issue left open in *Green*,[178] as there was not an out-of-court statement involved in the case.[179] Thus, by analogizing *Fensterer* to *Owens*, the majority read *Fensterer* erroneously as deeming all out-of-court statements relating to a witness' past beliefs to be admissible, provided that the opposing side has the opportunity to question the witness and elicit any qualities of confusion, evasion, memory loss, or other discrediting qualities.[180]

The *Fensterer* Court could not have meant such a broad standard of admissibility, for the Court limited its interpretation of the right of cross-examination to expert witnesses. The Court stated that "[q]uite obviously, an expert witness who cannot recall the basis for his opinion invites the jury to find that his opinion is as unreliable as his memory."[181]

However, expert witnesses offer a special circumstance. Because expert testimony consists of the expert's opinion, if the expert cannot remember the basis for his or her opinion, the memory loss serves to be "self-impeaching."[182] But, not all memory loss or forgetfulness can be described in this way.[183] For instance, Foster's statement was not one of opinion, but one of identification. Although Foster could not recall the basis for his previous identification, statements of identification are not in the same category as expert opinions. An expert who cannot recall the basis for his or her opinion may appear to a jury to be less of an expert in the field than he or she is purporting to be. An ordinary person who cannot recall the basis for his or her identification, on the other hand, is merely forgetful. And, in Foster's case, the beating he sustained is the only reason his memory was severely impaired.[184] When coupled with Foster's ability to recall many of the events surrounding the attack, such as his injuries, how he was struck on the head, seeing blood on the floor, and jamming his finger into his assailant's chest,[185] Foster's memory loss does not appear to be "self-impeaching," as was the expert's memory loss in *Fensterer*.[186]

---

178 *See supra* note 176 and accompanying text.

179 *Fensterer*, 474 U.S. at 21.

180 *Id.* at 21-22; *Owens*, 108 S. Ct. at 848 (Brennan, J., dissenting).

181 *Fensterer*, 474 U.S. at 19.

182 *Owens*, 108 S. Ct. at 848 (Brennan, J., dissenting).

183 *Id.* (Brennan, J., dissenting).

184 Petition for Certiorari at 17-18 n.6, United States v. Owens, 108 S. Ct. 838 (1988)(No. 86-877).

185 Brief for Petitioner at 14, United States v. Owens, 108 S. Ct. 838 (1988)(No. 86-877).

186 *Owens*, 108 S. Ct. at 848 (Brennan, J., dissenting).

Consequently, Justice Scalia's analogy to *Fensterer* is not justifiable, and thus Justice Scalia merely begged the question by stating:

> If the ability to inquire into these matters [i.e., witness' prejudices, bad memory, etc.] suffices to establish the constitutionally requisite opportunity for cross-examination when a witness testifies as to his current belief, the basis for which he cannot recall [as in *Fensterer*], we see no reason why it should not suffice when the witness's past belief is introduced and he is unable to recollect the reason for that past belief.[187]

As previously argued however, such an analogy cannot work, for *Fensterer* involved an expert's opinion, while *Owens* did not.[188] By merely stating that if cross-examination is satisfied in *Fensterer*, then it is satisfied in *Owens*, a similar instance, Justice Scalia neglected to discuss fully the reasons why Foster's memory loss should be treated similarly in light of legislative history and precedent. Thus, the Court left a gap that it never filled, even through its further analysis.

It would have been more logical and instructive for the Court to have relied upon the history of the confrontation clause and general trends in the case law, instead of analogizing where no reasonable analogy exists, to determine the guarantees of the sixth amendment confrontation clause. As previously noted, the Supreme Court in *Mattox* established that the right of confrontation involves cross-examination which affords the accused both an opportunity for memory-testing and the benefit of scrutiny by the jury of the witness' demeanor.[189] However, successive case law has expanded upon this definition of confrontation.

For example, the *Pointer* Court stated that cross-examination is valuable "in exposing falsehood and bringing out the truth in the trial of a criminal case."[190] Furthermore, the Court in *Stincer* stated that the right of cross-examination functions to "promote reliability in the truth-finding functions of a criminal trial."[191] The *Roberts* Court added that "extraordinary cases" require an "inquiry into the 'effectiveness'" of cross-examination.[192] But, the Court further

---

187 *Id.* at 842.

188 *See supra* notes 181-87 and accompanying text.

189 Mattox v. United States, 156 U.S. 237, 242 (1985).

190 Pointer v. Texas, 380 U.S. 400, 404 (1965).

191 Kentucky v. Stincer, 107 S. Ct. 2658, 2662 (1987).

192 Ohio v. Roberts, 448 U.S. 56, 73 n.12 (1980). Such extraordinary cases involve unusual circumstances, such as the situation in Mancusi v. Stubbs, 408 U.S. 204 (1972). In *Mancusi*, the Court found it necessary to evaluate "the character of the actual cross-examination" because the defendant's representation was previously found to be inadequate, for counsel was appointed only four days before trial. *Roberts*, 448 U.S. at 73 n.12 (citing *Mancusi*, 408 U.S. at 209). Similarly, the situation in *Owens* seems to be extraordinary. The facts and Foster's memory of nearly everything except the basis for his previous statement of identification are not commonplace.

noted that inquiring into every case regarding out-of-court testimony would be an exercise in futility and would undermine any "certainty and consistency in the application of the Confrontation Clause."[193] More recently, the Court in *Fensterer* noted that an "*opportunity* for effective cross-examination" is a constitutional guarantee.[194]

Justice Scalia failed to recognize and consider these philosophies of cross-examination. Consequently, although the Court achieved the correct result that the confrontation clause was not violated, it did so in an illogical and presumptive way. The majority was overly concerned with the procedure of cross-examination and thus ignored the substance of cross-examination. The Court concluded that, as long as the sworn witness is placed on the stand for the jury to observe and is cross-examined without restriction, there is no reason to inquire into the reliability or trustworthiness of the testimony.[195] However, mere procedure is not constitutionally satisfactory. Even *Fensterer* stated that the opportunity for cross-examination involves searching for and exposing factors that can damage testimony, such as "forgetfulness, confusion, or evasion."[196] But, Justice Scalia would admit out-of-court testimony as long as the declarant is placed on the stand, under oath, and cross-examined.[197] However, cases such as *Owens* are probably somewhat rare,[198] and thus, according to *Roberts*, an inquiry into the *effectiveness* of the cross-examination that the defense had the opportunity to engage in is in order.[199]

At a minimum, such an inquiry requires an evaluation of the totality of the circumstances, including all of the evidence, testimony, facts, and events. Upon an evaluation of Foster's cross-examination, using this totality of the circumstances approach, it appears that Foster was effectively cross-examined. For purposes of this analysis, it is important to note several factors surrounding Foster's cross-examination. First, both the petitioner and the respondent were in agreement with respect to the events and circumstances of the attack.[200] Second, even though Foster could not remember the

193 *Roberts*, 448 U.S. at 73 n.12.

194 Delaware v. Fensterer, 474 U.S. 15, 20 (1985)(per curiam)(emphasis in original).

195 United States v. Owens, 108 S. Ct. 838, 843 (1988).

196 *Fensterer*, 474 U.S. at 22.

197 *Owens*, 108 S. Ct. at 843.

198 *Id.* at 848 (Brennan, J., dissenting).

199 Ohio v. Roberts, 448 U.S. 56, 73 n.12 (1980).

200 *See generally* Brief for Petitioner and Brief for Respondent, United States v. Owens, 108 S. Ct. 838 (1988)(No. 86-877)(neither petitioner nor respondent cited facts which were disputed by the opposing side).

basis for his identification and could not elaborate upon his prior identification of Owens as his assailant, Foster was able to recall several pertinent events surrounding the attack, "including the type of weapon that was used, the injuries he sustained, the location of the incident, and the fact that he jammed his finger into his assailant's chest."[201] Also, the jury could observe Foster's demeanor while he was on the stand. Third, counsel for respondent was able to show, through cross-examination, that Foster could not remember if he had seen his assailant during the attack. Respondent's counsel used this fact to discredit Foster's out-of-court identification.[202] These factors all lead to the conclusion that Foster was effectively cross-examined.[203] Thus, Owens' rights under the confrontation clause were not violated.

Indeed, even if the standards of "indicia of reliability"[204] and "particularized guarantees of trustworthiness"[205] are necessary for effective cross-examination, *Owens* passes both tests.[206] Each of these inquiries exists as a safeguard when the accused is not confronted by the hearsay declarant at trial because the hearsay declarant's absence from the trial renders him or her unable to be cross-examined at all.[207] Even if these inquiries were applicable to *Owens*, a case in which the hearsay declarant was present at trial and participated in cross-examination, *Owens* would still meet the requirements. First, Foster had no reason to lie or evade questioning. In fact, he answered that he did not remember seeing his assailant.[208] Second, even though Foster could not remember the basis for his identification, he did remember numerous circumstances surround-

---

201 Brief for Petitioner at 14, United States v. Owens, 108 S. Ct. 838 (1988)(No. 86-877).

202 *Id.*

203 For other pertinent facts and events surrounding the attack, see Brief for Petitioner at 2-9, United States v. Owens, 108 S. Ct. 838 (1988)(No. 86-877).

204 Dutton v. Evans, 400 U.S. 74, 89 (1970). *See supra* note 77 and accompanying text.

205 Ohio v. Roberts, 448 U.S. 56, 66 (1980). *See supra* note 78 and accompanying text.

206 Justice Scalia stated that these inquiries are not necessary. But, he did not say why. *See supra* notes 77-81 and accompanying text. By not discussing these inquiries and thoroughly analyzing case law and legislative history before dismissing the inquiries as unnecessary when the hearsay declarant is present at trial, Justice Scalia failed to address a very real and pertinent issue relating to cross-examination. It is, however, necessary to confront the issue of inquiry, for some cases other than *Roberts* have cited the standards relating to "indicia of reliability" and "particularized guarantees of trustworthiness." *See, e.g., Dutton*, 400 U.S. at 89; Mancusi v. Stubbs, 408 U.S. 204, 213 (1972).

207 *Roberts*, 448 U.S. at 66. *See also Dutton*, 400 U.S. at 89 ("indicia of reliability . . . have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant.").

208 United States v. Owens, 108 S. Ct. 838, 841 (1988). *See supra* text accompanying note 22.

ing the attack, such as seeing blood on the floor, jamming his finger into his assailant's chest, the fact that a metal pipe was used, what injuries he sustained as a result of the beating, and where the attack occurred.[209] Taken as a whole and in light of all other corroborating testimony,[210] these facts are quite convincing that Foster's out-of-court testimony was both reliable and trustworthy.

Constitutional standards demand confrontation, which guarantees "an [opportunity] . . . for *effective* cross-examination."[211] *Fensterer*, itself, which the Court relied upon heavily to justify its argument that the constitutional guarantee is the simple procedure of cross-examination, stated that "the Confrontation Clause is generally satisfied when the defense is given a *full and fair opportunity to probe and expose . . . [certain] infirmities through cross-examination*, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony."[212]

"[A] full and fair opportunity to probe and expose these infirmities through cross-examination" is exactly what the totality of the circumstances approach is designed to guarantee. It ensures that the jury has reason to impute great weight to the declarant's testimony or none at all. Even though *effective* cross-examination is not guaranteed, the opportunity to explore and reveal[213] factors which hinder the truth-finding and reliability functions[214] of confrontation and cross-examination must exist in all cases, rare or common. The totality of the circumstances approach provides a simple and direct method to evaluate the opportunity afforded the defense to expose factors which mar testimony and possibly render the testimony unreliable. By utilizing the totality of the circumstances approach and examining both out-of-court and in-court testimony, a court is better able to justify the jury's reliance or lack of reliance on the out-of-court testimony in arriving at its verdict. Without the opportunity to expose witness deficiencies, the constitutional right of confrontation and accompanying cross-examination will be reduced "to a hollow formalism."[215]

---

209 Brief for Petitioner at 14, United States v. Owens, 108 S. Ct. 838 (1988)(No. 86-877).

210 *See supra* note 203 and accompanying text.

211 Delaware v. Fensterer, 474 U.S. 15, 20 (1985)(per curiam)(emphasis added).

212 *Id.* at 22 (emphasis added). *See supra* note 61 and accompanying text for the quote in its entirety.

213 *Id.* at 22.

214 Kentucky v. Stincer, 107 S. Ct. 2658, 2662, 2664 (1987).

215 United States v. Owens, 108 S. Ct. 838, 849 (1988)(Brennan, J., dissenting).

B. *OWENS*'S "SUBJECT TO CROSS-EXAMINATION" STANDARD UNDER FEDERAL RULE OF EVIDENCE 801(d)(1)(C)

As an alternative to the confrontation clause argument, the respondent argued that Federal Rule of Evidence 802 was violated by the admission of Foster's out-of-court identification.[216] Justice Scalia disagreed and read "subject to cross-examination" as merely guaranteeing the procedures of placing the sworn witness on the stand and obtaining answers voluntarily from the witness.[217] Once more, although Justice Scalia concluded correctly that Foster's out-of-court statement was not hearsay, Justice Scalia arrived at his conclusion with erroneous and unsupported reasoning.

The majority read the "subject to cross-examination" provision of Federal Rule of Evidence 801(d)(1)(C) very broadly and thus sacrificed the substantive aspect of the Rule in favor of procedure. Justice Scalia noted that memory loss does not undermine cross-examination, but can be used effectively in cross-examination to "destroy[] the force of the prior statement."[218] Such loss of memory, according to the Court, when accompanied by cross-examination, satisfies the "subject to cross-examination concerning the statement" provision of Federal Rule of Evidence 801(d)(1)(C).[219] Although "concerning the statement" does not involve the subject matter of the statement,[220] it does involve more than the simple procedure of cross-examination of a witness who has experienced memory loss, which precludes the witness from remembering the basis for the identification.[221]

The reports from the House and Senate Committees on the desirability of adopting Federal Rule of Evidence 801(d)(1)(C) illustrate the underlying reasons behind the recommendation for adoption of the Rule. The most important reason for adopting Federal Rule of Evidence 801(d)(1)(C) was because "the trier of fact . . .

---

216 *Id.* at 843. The court of appeals agreed and held that Foster's loss of memory precluded Foster from being "subject to cross-examination," a requirement of Federal Rule of Evidence 801(d)(1)(C), which is an exception to Federal Rule of Evidence 802. *Owens*, 789 F.2d at 757.

217 *Owens*, 108 S. Ct. at 844.

218 *Id.*

219 *Id.*

220 *See* Brief for Petitioner at 15, United States v. Owens, 108 S. Ct. 838 (1988)(No. 86-877).

221 *See generally* 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE 801-176 to -178 (1987); Brief for Respondent at 26, United States v. Owens, 108 S. Ct. 838 (1988)(No. 86-877); S. REP. No. 199, 94th Cong., 1st Sess. 2-3 (1975); H.R. REP. No. 355, 94th Cong., 1st Sess. 2, *reprinted in* 1975 U.S. CODE CONG. & ADMIN. NEWS 1092, 1093. (All sources agree that a court must examine all circumstances surrounding the identification before determining that confrontation standards have been met.).

cannot properly perform its function if highly *probative* and constitutional identification evidence is kept from it."[222] If the out-of-court identification has been considered "highly probative," then the qualities which make the identification probative should be able to be explored. This interpretation comports not only with the Senate Report, but also with the House Report which mandated not only that cross-examination concerning the statement be satisfied, but also that constitutional due process requirements be satisfied.[223] According to the House Report, "[t]he due process standard requires looking at the totality of the circumstances to determine whether the identification procedure was 'unnecessarily suggestive and conducive to irreparable mistaken identification.' "[224] If the constitutional standards are not met, then, according to the House Report, the out-of-court statement is not admissible.[225]

In order to enhance the policies behind Federal Rule of Evidence 801(d)(1)(C) and to examine the "totality of the circumstances," something more than the mere procedure of placing the sworn declarant on the stand and cross-examining him or her, without regard for the value of the responses obtained, is required. Indeed, the Senate Report confirms this interpretation. In justifying the desirability of Federal Rule of Evidence 801(d)(1)(C), the Senate Committee stated that cross-examination "assures that if any discrepancy occurs between the witness' in-court and out-of-court testimony, the opportunity is available to probe, with the witness under oath, the reasons for that discrepancy so that the trier of fact might determine which statement is to be believed."[226]

Thus, Federal Rule of Evidence 801(d)(1)(C) does require more than the mere procedure of cross-examination. In fact, Weinstein noted that, "if the identifying witness claims no memory of the events defendant is charged with and cannot testify to the basis for the identification, his cross-examination is of no value since there will be no way of evaluating the probative force of the identification."[227] While this interpretation may seem to be a little extreme at first glance, Weinstein's interpretation exemplifies that the important aspect of Federal Rule of Evidence 801(d)(1)(C) is the ability to "evaluat[e] the probative force of the identification."[228]

---

222 S. Rep. No. 199, 94th Cong., 1st Sess. 2-3 (1975)(emphasis added).

223 H.R. Rep. No. 355, 94th Cong., 1st Sess. 2, *reprinted in* 1975 U.S. CODE CONG. & ADMIN. NEWS 1092, 1093.

224 *Id.* (quoting Kirby v. Illinois, 406 U.S. 682, 691 (1972)).

225 *Id.*

226 S. Rep. No. 199, 94th Cong., 1st Sess. 2 (1975).

227 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE 801-178 (1987).

228 *Id.*

As a result, the Court's comparison of Federal Rule of Evidence 801(d)(1)(C) with Federal Rule of Evidence 804(a)(3)[229] approaches irrelevance. Although it is true that Federal Rule of Evidence 804(a)(3) contains a provision concerning witness memory loss of a statement made, while Federal Rule of Evidence 801(d)(1)(C) does not, it does not follow that witness memory loss does not enter into the determination of whether the witness was "subject to cross-examination concerning the statement."[230] As suggested by the House and Senate Committee Reports, the passage of time weakens one's memory and also opens up the opportunity for outside influences to cloud one's recollection.[231] While the very purpose, then, of allowing the admission of out-of-court statements of identification is to increase reliability and fairness during a criminal trial,[232] it does not follow that witness memory loss of the basis for the identification was a reason behind the desirability of Federal Rule of Evidence 801(d)(1)(C). Nowhere in the House and Senate Committee Reports does it discuss "witness forgetfulness of an underlying event."[233] Instead, the reports focus on the reliability and accuracy of out-of-court statements of identification. Any forgetfulness of the basis for the identification which may follow the out-of-court statement was not considered in the Committees' evaluations.[234]

In any event, cross-examination of Foster meets the requirements of Federal Rule of Evidence 801(d)(1)(C), which allows exceptions to hearsay. Cross-examination revealed that Foster could not remember seeing his assailant, but could recall that his assailant had used a metal pipe, what injuries were inflicted upon him by his assailant, the location of the beating, jamming his finger into his attacker's chest, and choosing Owens' picture from an array of photographs presented to Foster by Mansfield.[235] Foster could also recall that, when he initially identified Owens as his assailant to Mansfield, he knew why he had identified him, although at trial, Foster could

229 For the relevant text of Federal Rule of Evidence 804(a)(3), see *supra* note 90.

230 *See generally* H.R. REP. No. 355, 94th Cong., 1st Sess. 2, *reprinted in* 1975 U.S. CODE CONG. & ADMIN. NEWS 1092, 1093 (due process mandates looking at the "totality of the circumstances").

231 *Id.* at 3; S. REP. No. 199, 94th Cong., 1st Sess. 2 (1975).

232 *Id.*

233 United States v. Owens, 108 S. Ct. 838, 844 (1988).

234 *See generally* H.R. REP. No. 355, 94th Cong., 1st Sess. 2, *reprinted in* 1975 U.S. CODE CONG. & ADMIN. NEWS 1092, 1093; S. REP. No. 199, 94th Cong., 1st Sess. 3 (1975). (Neither committee cited forgetting the basis for an identification in determining whether to recommend FED. R. EVID. 801(d)(1)(C).).

235 Brief for Petitioner at 8-9, 14, United States v. Owens, 108 S. Ct. 838 (1988)(No. 86-877).

no longer remember why.[236] Consequently, Foster was subject to cross-examination concerning the statement, for the respondent was able to probe Foster's out-of-court statement of identification through cross-examination on account of Foster's detailed, but "selective," memory.[237]

C. THE COURT'S UNSUCCESSFUL RECONCILIATION OF FEDERAL RULE OF EVIDENCE 801(d)(1)(C) WITH FEDERAL RULE OF EVIDENCE 804(a)(3)

The respondent argued that applying Federal Rule of Evidence 801(d)(1)(C) to situations in which a witness' memory loss precludes him or her from making an in-court identification or from elaborating upon the details or the basis for a prior, out-of-court identification creates an inconsistency within the Rules between Federal Rule of Evidence 801(d)(1)(C) and Federal Rule of Evidence 804(a)(3).[238] Justice Scalia responded to this by stating that there is no "substantive inconsistency" but merely a "semantic oddity" between the two Rules.[239] Such an interpretation is an inadequate answer to a very real concern that it is impossible for a witness with memory loss to be "subject to cross-examination" under Federal Rule of Evidence 801(d)(1)(C), because a witness with memory loss is deemed "unavailable" under Federal Rule of Evidence 804(a)(3).[240]

The Court suggested that "Unavailability as a witness" is merely a "rubric" which could just as easily have been designated: "Unavailability as a witness, memory loss, and other special circumstances."[241] However, the Court did not give any support for this interpretation. In fact, Justice Scalia concluded the majority opinion with circular reasoning. The majority offered a hypothetical situation in which a witness claims memory loss of the facts of prior testimony which is inconsistent with the witness' present trial testimony.[242] Justice Scalia asserted that it would be odd to render the prior, inconsistent statement inadmissible because of the mem-

---

236 United States v. Owens, 789 F.2d 750, 764 (9th Cir. 1986)(Boochever, J., dissenting).

237 *Id.* (Boochever, J., dissenting).

238 *Owens*, 108 S. Ct. at 844.

239 *Id.*

240 *Id.*

241 *Id.*

242 *Id.* at 845. *See* FED. R. EVID. 801(d)(1)(A), which states:

> A statement is not hearsay if . . . (1) The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition.

ory loss.[243] The Court continued by reaffirming the "verbal curiosity" that the witness is simultaneously "subject to cross-examination" and "unavailable."[244] Justice Scalia completed his argument by stating what he termed the obvious: "[q]uite obviously, the two characterizations [i.e. "subject to cross-examination" under Federal Rule of Evidence 801(d)(1) and "unavailable" under Federal Rule of Evidence 804(a)(3)] are made for two entirely different purposes and there is no requirement or expectation that they should coincide."[245] Justice Scalia did not restate his "semantic oddity" argument, but instead, finished by coming full circle, back to the inconsistency argument he dismissed earlier. The "semantic oddity" characterization thus appears to have been an unnecessary diversion, for it adds nothing more to Justice Scalia's conclusion that neither the confrontation clause nor Federal Rule of Evidence 802 was violated by the admission of John Foster's out-of-court statement of identification.[246]

D. THE EFFECTS OF *OWENS* ON FUTURE INSTANCES OF WITNESS MEMORY LOSS

Finally, Justice Scalia failed to address the possible consequences of placing a sworn witness on the stand who "responds willingly to questions,"[247] but is not able to testify as to any circumstances surrounding the incident, nor as to the basis for the prior, out-of-court identification. According to Justice Scalia's procedure-before-substance interpretation of both the confrontation clause and Federal Rule of Evidence 801(d)(1)(C), the accused has been given the " ' "*opportunity* for effective cross-examination" ' " guaranteed by the confrontation clause[248] and the hypothetical witness has been "subject to cross-examination" under Federal Rule of Evidence 801(d)(1)(C).[249] Such a result, however, seems quite aberrant in light of the very real possibility that the witness could have been mistaken in his or her identification.[250]

---

243 *Owens*, 108 S. Ct. at 845. Thus, Justice Scalia noted that the semantic inconsistency exists with all the subsections of Federal Rule of Evidence 801(d)(1) and not just with Federal Rule of Evidence 801(d)(1)(C). *Id.*

244 *Id.*

245 *Id.*

246 *Id.*

247 *Id.* at 844.

248 *Id.* at 842 (quoting Kentucky v. Stincer, 107 S. Ct. 2658, 2664 (1987)(quoting Delaware v. Fensterer, 474 U.S. 15, 20 (1985)(per curiam))(emphasis in original)).

249 *Id.*

250 H.R. Rep. No. 355, 94th Cong., 1st Sess. 7, *reprinted in* 1975 U.S. CODE CONG. & ADMIN. NEWS 1092, 1096 (statement of Rep. Holtzman).

In essence, the Court left no room for future courts ever to hold out-of-court testimony to be inadmissible. For, under the Court's analysis, "[t]he identification could be admitted even if: (1) The witness subsequently retracted it, and (2) the identification were made under highly suggestive circumstances."[251] The majority's broad interpretation of cross-examination "open[s] the doors wide to the admission of all kinds of out-of-court eyewitness identification."[252] Such a flood of admissions would undermine the essential reasons for allowing out-of-court statements to be admissible, i.e., increased reliability and increased fairness in criminal trials.[253] Indeed, if carried to the greatest extreme, Justice Scalia's reasoning would allow the admission of a prior, out-of-court identification of any willing witness on the stand who answers questions, even if all of the answers were "I forget" or "I do not know."

Answers such as these are constitutionally insufficient, especially when the witness, unlike Foster, further claims no memory of the surrounding circumstances. Justice Scalia, by not mentioning in his analysis Foster's memory of some of the circumstances surrounding the attack, left open the possibility that a witness who testifies that he or she cannot remember the basis for his or her out-of-court testimony, and who also has no memory of any circumstances surrounding the incident, can effect the conviction of the accused.

Such an interpretation of the majority's reasoning is even more compelling in light of Justice Scalia's failure to define or explain what "willingly responds to questions" means. In its broadest interpretation, this phrase could mean that a witness willingly responds "I do not know" or "I forget," while never giving substantive answers. In its narrowest interpretation, this phrase could mean that a witness willingly and affirmatively responds to questions with known answers, while only sometimes responding "I do not remember" or "I do not know." Under either interpretation, the Court forces the conclusion that, any answer, as long as the sworn witness willingly responds, would satisfy the requirements of cross-examination. Consequently, the phrase could be interpreted by courts in the future to mean that a willing witness who is unable to answer affirmatively *any* questions has been cross-examined under constitutional and evidentiary standards.

By abandoning substantive standards of cross-examination and by misinterpreting the import of the relevant legislative history, the

---

251 *Id.*

252 *Id.*

253 *See* H.R. REP. No. 355, 94th Cong., 1st Sess. 3, *reprinted in* 1975 U.S. CODE CONG. & ADMIN. NEWS 1092, 1094; S. REP. No. 199, 94th Cong., 1st Sess. 2 (1975).

Court left in question the impact in the future on cases with witnesses whose memories of surrounding circumstances are not as good as Foster's. As a result, the Court's reasoning could lead us down the path to absurdity in the future.

VI. CONCLUSION

In *United States v. Owens*, the Supreme Court held that memory loss by a witness, resulting in no memory of the basis for a prior, out-of-court identification, does not violate either the sixth amendment confrontation clause or Federal Rule of Evidence 802.[254] By ignoring the limitations set forth in the relevant precedents and legislative history, the Court interpreted the scope of both the confrontation clause and Federal Rule of Evidence 801(d)(1)(C) in an overly broad and erroneous manner.

According to the Court, all that is constitutionally required by the confrontation clause is that the declarant be sworn in at trial and cross-examined without restriction. The Court rationalized this interpretation by asserting that an essential objective of cross-examination is to elicit the fact that the witness has a bad memory, accompanied by other discrediting factors, such as prejudices, carelessness, and the like.[255] The Court further argued that under Federal Rule of Evidence 801(d)(1)(C), "subject to cross-examination concerning the statement" is satisfied when a sworn witness is placed on the stand and willingly answers questions.[256]

The Court's reasoning is erroneous based upon the legislative history behind the Federal Rules of Evidence and a close reading of prior case law on the confrontation clause. The *Owens* Court failed to recognize substantive along with procedural aspects of cross-examination under the confrontation clause and "subject to cross-examination concerning the statement" under Federal Rule of Evidence 801(d)(1)(C). Unfortunately, this defect in reasoning undermines both the purposes behind the confrontation clause to give a complete opportunity to examine and expose the common deficiencies found in many witnesses' testimony, such as "forgetfulness, confusion, or evasion," and to aid in the truth-finding and reliability functions of confrontation and the purpose of Federal Rule of Evidence 801(d)(1)(C) to increase reliability and fairness by allowing prior, out-of-court identifications. By abandoning substance in favor of procedure, the Court created the illogical possibility that all

254 *Owens*, 108 S. Ct. at 845.
255 *Id.* at 842-43.
256 *Id.* at 844.

out-of-court identifications of any cooperative witness, regardless of the value of the cross-examination achieved, will be admissible at trial. The Court's erroneous and extreme reasoning could lead to an obstruction of constitutional and evidentiary justice with respect to the confrontation clause and the Federal Rules of Evidence.

A better test involves an analysis of the totality of the circumstances surrounding the witness' testimony, such as witness memory of facts and events and all of the evidence and testimony, to enable a jury to evaluate the reliability of the testimony and the credibility of the witness. Without such an approach, a defendant's confrontation and evidentiary rights could be severely reduced. Based on the totality of the circumstances approach, Owens' rights of confrontation were not violated, nor were his evidentiary rights to exclude hearsay.

Although the *Owens* Court's ultimate result that Owens' confrontation rights and evidentiary rights were not violated comports with present notions of justice, the Court's reasoning does not follow prior case law or legislative history. The Court's overly broad interpretation of cross-examination and "subject to cross-examination concerning the statement" will unfortunately increase the possibility that future defendants will be convicted by out-of-court identifications given without an oath and without recollection of either the basis for the identification or any of the circumstances surrounding the incident. The imminent possibility of such a result creates quite an unwarranted and dismal picture of the future of the rights of defendants in our system of criminal justice.

CLAIRE L. SELTZ