

10-18-1985

## 10-18-1985 Correspondence from Brennan to O'Connor

William J. Brennan  
*US Supreme Court Justice*

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HAB

Supreme Court of the United States  
Washington, D. C. 20543

CHAMBERS OF  
JUSTICE Wm. J. BRENNAN, JR.

October 18, 1985

No. 85-214

Delaware v. Fensterer

Dear Sandra,

At conference I voted to hold this case for Delaware v. Van Arsdall, No. 84-1279. Although I still prefer that disposition, I wonder if you would consider making some changes in your per curiam so that I could join it. My suggestions are the following:

Page 4, lines 32-36

Strike out the sentence beginning "Accordingly, ...." It suggests to me that we hold that under no circumstances can a witness' memory lapse constitute a violation of the Confrontation Clause. I have trouble with that, and, in any event, is such a holding necessary to decide this case? Too, should we reach the issue without briefing and argument? Perhaps something like the following would avoid the dilemma:

In this case, defense counsel attacked Agent Robillard's opinion by eliciting testimony during cross-examination that Robillard could not even recall the theory on which that opinion was based. This was highly successful, not frustrated, cross-examination. Moreover, the defense was able to put Robillard's theory before the jury and attack its validity through its own expert witness. We thus need not decide whether and under what circumstances a witness' memory lapse may so frustrate the opportunity for cross-examination that admission of the witness' direct testimony violates the Sixth Amendment in order to conclude that no violation occurred here.

Page 5, lines 14-17

For the same reason, should you not strike the language in the first sentence referring to "the theory that a witness' inability to recall matters that might open up a particular line of attack to the cross-examiner violates the Confrontation Clause," and state simply that Green "lends no support to petitioner"?

Page 6, line 23

Also for the same reason, I suggest that <sup>you</sup> emphasize that the Confrontation Clause "is generally satisfied" when the defense is given a full and fair opportunity to cross-examine.

Sincerely,

*Bull*

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