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Law clerk, US Supreme Court

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October 20, 1985

Mr. Justice:

Re: Delaware v. Fensterer, No. 85-214 (proposed per curiam written by SOC)

As the Court has granted cert on two Confrontation Clause cases, I think this case should be held. New Mexico v. Earnest, No. 85-162 (Oct. 18 Conference), which raises the question whether the Clause precluded admitting a hearsay confession of a codefendant without first considering the statement's reliability, will discuss issues of reliability and will reinterpret Ohio v. Roberts, 448 U.S. 56 (1980) in ways that are certain to be relevant to this case. Delaware v. Van Arsdall, No. 84-1279, raises the question of whether barring the defendant from cross-examining a witness about a possible deal with the prosecutors in exchange for his testimony was per se reversible error. This case does not present the harmless error issue, and the trial court here took no action to restrict cross-examination. However, Van Arsdall will probably discuss the adequacy of cross-examination which would be relevant here.

On the merits, I agree with the per curiam that the trial judge did not restrict the scope of cross examination and that the reliability of the trial was saved by the jury's viewing the expert's forgetfulness. The reliability of the trial is also protected by Del. Rule Evid. 705, which states that expert opinion testimony is not admissible unless the expert discloses the basis for his opinion. However, since as Justice Stevens' memo

...nts out the linedrawing it not at all clear, and since the
lower courts appear to be having trouble with the Confrontation
Clause, I do not think it would be helpful to summarily reverse
at this time.

HM