No. 18-8862

In the Supreme Court of the United States

RODERICK WHITE,
Petitioner

vs.

STATE OF LOUISIANA
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF LOUISIANA,
FIRST CIRCUIT

BRIEF IN OPPOSITION BY THE STATE OF LOUISIANA

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QUESTION PRESENTED

Does the Sixth Amendment's Confrontation Clause prevent the admission of a videotaped police interrogation of a witness when the witness is a cooperative, competent witness physically present and testifying at trial, subject to cross-examination, but who claims no memory of the interrogation or the facts about which he was interrogated?

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INTRODUCTION

Certiorari should be denied in this case for three reasons: first, the alleged split among states courts or federal circuits is manufactured; second, it is a poor vehicle because the record below is mischaracterized, underdeveloped and, in any event, inadequate to decide the alleged issue; and third, the Louisiana appellate court correctly applied the rule.

The rule allegedly at issue, arising from a *footnote* in dicta from *Crawford v. Washington,* 541 U.S. 36, 59 n. 9 (2004) requiring presence in court to "defend or explain" a prior statement, involves a fact-intensive inquiry. And quite simply, there is no split in the courts applying it. Each court listed by Petitioner and his amici applied the rule to the facts of the case before it arriving at varying results, but not based on differing interpretations of the rule. The interpretation of the Confrontation Clause in *Crawford* is not inconsistent with the holding of *United States v. Owens*, 484 U.S. 554 (1988) and both the federal circuits and the state courts have been able to blend the two as they apply to witnesses who appear at trial but claim memory loss.

Furthermore, the record below, as characterized by Petitioner and amici, is misleading, underdeveloped, and wholly inadequate to decide the issue. Petitioner and amici dramatically claim an unjust, intolerable, and factually baseless conviction. Pet. 5 ("palpable injustice"), 14 ("unjust – and factually baseless"), Friedman Br. 2 ("intolerable decision"), 5 (result is intolerable), NACDL Br. 2 (evidence "confirmed White's lack of involvement"), 11 ("convicted the wrong man").

Their hyperbole deflects from the fact that the State court below found sufficient evidence to support the conviction, a finding that is not challenged here and is therefore binding on this Court. Petitioner's dramatic protestations also deflect from his own strategic choices. Defendant is only entitled to an *opportunity* for effective cross-examination. The fact that he chooses not to embrace it is not a violation of the Confrontation Clause. But even more to the point: The witness was *not* completely unavailable due to his memory loss. He was present, articulate, recognized himself on the videotape, and identified his own father. Because he was on the witness stand, Petitioner *could* have engaged in more vigorous questioning of the witness to intrinsically impeach him, including the use of his contradictory "affidavit." And inquiring into any deals struck with the prosecution. And he could have called other witnesses and presented other evidence to extrinsically impeach him but he did not do so, more than likely for strategic reasons.

This case is not well-suited for review of this issue because of the lack of any real divergence of opinion and the weak factual record, but also because the Louisiana court of appeal correctly identified and applied the law.

STATEMENT OF THE CASE[1]

At approximately 3 o'clock on the afternoon of January 6, 2015, Baton Rouge police were dispatched to respond to a shooting in a residential area in the 1900 block of Walnut Street – the first shooting in Baton Rouge in 2015. ROA 42. Upon arrival,

[1] Petitioner has misstated many facts, and attached no record documents to his petition. Petitioner complains that he was unable to obtain the record; however, based upon orders from both the trial court and the First Circuit ordering the clerk to send the record to the Louisiana State Penitentiary for his use, this appears not to be a correct representation.

they found an unoccupied Oldsmobile Cutlass in a ditch at the end of the Walnut Street. Id. They were told the driver, nineteen-year-old NaQuian Robinson, had been taken to the hospital by a friend due to multiple gunshot wounds. Id.

At the hospital, the police learned that a woman named Harris, who was a member of NaQuian's family, was called to the scene by her boyfriend.[2] ROA 94-95. Upon arrival, she found her boyfriend, later determined to be an eyewitness, ROA 94-95, helping remove NaQuian's body from his vehicle. ROA 50-52. He was still alive, so they put his body in her vehicle and transported him to the hospital. *Id*. A nurse informed police that NaQuian had multiple gunshot wounds to his upper torso and had been rushed into immediate surgery. Id. Police obtained and secured NaQuian's blood-stained clothing and found $1 in his jeans pocket. *Id*. His clothing was later swabbed for DNA samples. ROA 298. A DNA expert testified at trial that, with so many people touching the victim's body, the results of the DNA swabs were inconclusive. ROA 284, 285, 303-304.

NaQuian died in surgery. ROA 52. After his death, officers bagged his hands to secure any evidence, and he was transported to East Baton Rouge forensic facility for an autopsy during which he was photographed and DNA samples were taken from him, including from his hands and under his fingernails. ROA 57-60. The same DNA expert testified at trial that Petitioner was eliminated as a contributor to the DNA found on the victim's blood-coated hands and under his nails. ROA 284, 285, 303. A

[2] Neither Ms. Harris nor her boyfriend testified at the trial. These facts are taken from the police reports found in the record on appeal, to which Defendant had access prior to trial, and are included not only to tell the full story but also to demonstrate evidence that Defendant could have used to impeach Coleman's videotaped testimony.

projectile was collected from his back, a bullet jacket from his shoulder, and bullet fragments from his left chest and shoulder. ROA 57-60. The coroner found that his cause of death was multiple gunshots wounds: chest, abdomen, left shoulder, right upper arm. ROA 78-80. The coroner's report and cause of death were stipulated to at trial. ROA 286-87.

At the crime scene, detectives contacted several eyewitnesses who were, later that day, separately secured in police vehicles and taken to the victim crime unit (VCU) where they gave formal, videotaped statements. ROA 46.

Mr. Greg Spears told police he received a phone call from his friend's son, the victim NaQuian, who wanted to purchase some CDs from him. ROA 96-97. Because he was at his mother-in-law's house on Walnut, he told NaQuian to meet him there. *Id*. He had just sold him four CDs for $10 when an unknown, thin, dark-skinned young black male[3] walked up to him and asked if he had any CDs in his trunk. *Id*. ROA 360. He said yes and turned to the trunk of his car to retrieve some. ROA 96-97. When he turned back around, the young man had produced a black semi-automatic handgun and said to NaQuian, "Give it up, empty your pockets." *Id*. ROA 359. At that point, NaQuian began to struggle with the suspect and Mr. Spears ran and hid behind his car. ROA 96-97. He heard several gunshots fired and observed NaQuian hopping toward his vehicle holding his side and saying "shit, damn." *Id*. He made it to his vehicle, got inside, and drove away. *Id*. He also observed the shooter flee the scene on foot but could not remember how he was dressed. *Id*. Mr. Spears, afraid for his life,

[3] Petitioner was 5'6" tall and weighed approximately 119 pounds at the time. ROA 34.

ran to the backyard of his mother-in-law's house, immediately called NaQuian's father, then hid there for a couple of hours. *Id*. Mr. Spears testified at trial but was not specifically asked if he could identify Petitioner in court. ROA 270-279, 286, 358-362.

Two other eyewitnesses were a mother and her adult daughter, Toni and Alexandria Edwards, who lived at 1970 Chestnut, right behind the scene of the shooting. ROA 72-73. They gave videotaped statements. *Id*. Toni told police she had just pulled into her driveway and exited her vehicle when she smelled gunpowder and observed a slim black male, sixteen to eighteen years old, with a "nappy" afro hairstyle and wearing jeans and a dark grey sweater running north bound from the rear of her residence with a black semi-automatic handgun in his hand. ROA 72-73. The gun was never recovered. He proceeded onto Chestnut Street where a black Toyota Camry was waiting for him. *Id*. He got into the vehicle, which travelled westbound, ran a stop sign, and made a left turn. *Id*. She did not know this person but said she could identify him if she saw him again. *Id*. Two days later, after a Crime Stopper tip named Petitioner as the shooter, ROA 101-103, she identified him in a photo lineup. ROA 92-93. Unfortunately, Toni died prior to trial and could not testify, ROA 344. Detective Derrick Evans and Alexandria Edwards both testified, indirectly, about the identification. ROA 242, 333-34.

Alexandria told officers she was lying in her bed when she heard approximately five to six gunshots. ROA 74-75. She immediately got out of bed, looked through her window, and observed an unknown slim dark skin black male who was approximately

5'8" to 5'10" tall, wearing a black colored sweater with a small afro hairstyle. *Id.* He was carrying a gun in his hand and got into a black Toyota Camry parked on Chestnut Street, which then travelled westbound and made a left turn onto North 17th Street. *Id*. She did not know the person and, and at the time, did not think she could identify him if she saw him again. *Id.* Nevertheless, she testified at trial the Petitioner was the person she saw running through her yard, albeit somewhat confusingly. ROA 343-344.

Defendant did not cross-examine this witness to further test her identification of White as the person running through her yard. ROA 348 ("I have no questions.").[4]

The following day, Wednesday, April 7th, police discovered a business on Scenic Highway (the street at the end of Walnut and Chestnut streets) with security cameras. ROA 88. They were able to obtain video footage taken around 3:00 p.m. the day before, which showed what appeared to be a black Camry passing by. *Id*. They obtained a copy of the footage and captured a still of the vehicle which was circulated to local media. ROA 44.

On Thursday, April 8th, police received their first tip. ROA 101-103. The caller stated that Roderick White was the person responsible for the homicide. *Id*. The caller said the victim was buying CDs and took money out of his pocket, White saw the money, and walked over to the victim with a gun to rob him. *Id*. The victim and White fought over the gun and White was shot in the thigh. *Id*. White then shot the victim

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[4] Another witness, Damian Wooders, was on his front porch at the time and gave police the same description of the event as Alexandria and Toni Edwards. ROA 76-77. He was not, however, called at trial.

two to three times before fleeing the scene with his friend, Brandon, in a black Toyota Camry that belonged to Brandon. *Id*. The caller said the victim had $600 in cash on him. *Id*. The caller also said Roderick's mother, who lived in New Orleans, was supposed to be bringing Roderick to his father and brother's home in Dallas that weekend. *Id*. The caller did not know the parents' names. *Id*. But the caller said Roderick's brother and mother knew about the homicide. *Id*. The caller was never identified and did not testify at trial.

Based upon this tip, officers brought a photographic identification card, with Petitioner's picture in position number 2, to Ms. Toni Edwards who positively identified White as the person running across her yard with a gun. ROA 92-93. Detective Evans testified, indirectly, that she (or "someone") looked at a lineup which developed Petitioner as a suspect. ROA 241-242. Defendant also elected not to cross-examine Detective Evans as to this identification. ROA 250.

Based on the tip and the eyewitness identification, an arrest warrant was obtained for White on January 8, 2015. ROA 39. He was not apprehended until another tip led police to White nine months later. ROA 104. He was arrested at home without incident on September 10, 2015, but refused to give any statement.[5]

Also, on January 8th, an anonymous tip informed police of the identity of the boyfriend who brought the victim to the hospital. ROA 94-95. Police contacted him, and he was anxious to do an interview. *Id*. He told police about hearing shots, seeing

[5] While Petitioner has accused the witness, Coleman, of "brandishing guns and dealing drugs" during the time in question (Pet. 26), it is actually Petitioner who has a lengthy arrest record and prior conviction. *See* ROA 34.

a person running through the shortcut, and finding the victim down the street. *Id*. Additionally, though, he told them that someone named "BJ" had been arguing with NaQuian because "BJ" dated NaQuian's girlfriend while the NaQuian was in jail. This person was not called as a witness at trial, by the State to corroborate Coleman's testimony, or by Defendant to show another person had a motive to harm the victim. ROA 331-332.

The following day, Friday, April 9th, another tip was received. ROA 101-103. This caller said that the full name of the male who drove the getaway car was Brandon Coleman, whose Facebook page name was "Beezo Esb." *Id*. This was the first time police learned Brandon Coleman's full name. This caller also identified White. *Id*.

On Saturday, April 10th, police received another tip. ROA 101-103. This caller also wanted to report that the driver of the getaway vehicle was Coleman, who drove a newer model Toyota Camry 4-door with license number XXD069. *Id*. He knew where Coleman's grandfather lived and said Coleman frequented the house but did not live there; however, the Camry was currently parked there. *Id*. According to the caller, the vehicle belonged to Coleman's mother. *Id*. He also stated that White was involved in the homicide. *Id*.

The police verified the information in all of the tips and, on Tuesday, April 13th, a week after the murder, they contacted Coleman's father, who was a law enforcement officer,[6] at 7:00 pm. ROA 81-82. Coleman's father immediately brought

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[6] There is nothing in the record to indicate Coleman's father was associated with the investigating agency.

Coleman in for an interview. ROA 81-82, 89-91. The interview began at 7:18 pm and was videotaped. ROA 89-91. This was the videotape shown to the jurors at trial. Tr. Ex. S22, ROA 326. Two detectives and Coleman's father were in the interview room. ROA 89-91. Coleman was read his Miranda rights and made three statements within less than two hours. *Id.* In his initial statement, Coleman advised detectives that he was on Walnut Street that day with White and that they saw a man selling CDs. *Id*. He said White got into a fight with someone and came back to the car after the fight and that White had dropped him off in "Ghost Town." *Id*.

After that statement, the detectives told him they knew he was lying and also told him that he was being charged as a principal to the murder. *Id*. He then changed his story and said he, "BJ", and White were in the car. *Id*. He said *White* saw the man selling CDs and that's why they stopped on Walnut. *Id*. He said he never heard any shots fired. *Id*. He admitted he picked White up on the next street. *Id*. He said White only told him he was going to buy a movie from the CD man. *Id*. He said a black male in the car known as "BJ" pointed NaQuian out to White (Coleman only knew "BJ" by his initials, and BJ has never been further identified or located by the State.). ROA 331-32. Coleman then requested a lawyer and the interview stopped. ROA 89-91.

Coleman's father asked if he could speak to him. *Id*. After their discussion, at 8:05p.m. (less than an hour since the interview originally began), Coleman advised waived his right to an attorney and asked speak with the detectives agin. *Id*.

In his third statement, Coleman said "BJ" advised White that NaQuian had money and that is when White asked Coleman to pull over at the car wash on the

corner. *Id*. Coleman said he knew something was going to go down but he did not know White had the automatic handgun on him at the time. *Id*. After White got out of the car, he heard gunshots and saw White run after shooting towards NaQuian's direction. *Id*. White admitted after getting back into the car that he had gotten money from NaQuian. *Id*. Coleman learned White shot himself in the leg while fighting with NaQuian, but White told him not to bring him to the hospital. *Id*. He dropped "BJ" off in a neighborhood south of the Interstate. *Id*. He later spoke with White on the phone and White told him not to speak to police. *Id*. He positively identified White in a photo lineup, which was admitted at trial. *Id*. ROA 334-337. Coleman was then arrested, charged with being an accessory after the fact to the homicide, and transported to the Parish prison. ROA 82.

Coleman, represented by counsel, willingly appeared at trial and, after being informed of his right not to testify, waived his Fifth Amendment rights. ROA 308-310. Once on the witness stand, though, he claimed he had no memory of the incident or the interview. ROA 312-316. He did, however, identify himself as the person in the videotaped interview, identify his father in the interview room with him, and admit his father is a police officer. The trial court ruled on admissibility of the tape outside the presence of the jury, ROA 316-323, admitted it into evidence, ROA 326, and played it for the jury over defense objection. ROA 326-329.

The defense attempted little to no cross-examination or impeachment of this witness, intrinsically or extrinsically, including asking any questions about his claimed memory loss or the "affidavit" he had allegedly executed later. ROA 329-330.

Although the "affidavit" was never offered into evidence or published to the jury, both the State and the Defendant proffered it for the record. S24 and A3, ROA 328, 329-330. When Coleman stated that he did not recognize the photo ID, ROA 327-328, the State re-called the detective who handled the identification to testify, over defense objection, that this was the card and the markings and signature were made by Coleman. ROA 334-337.

The same day as his arrest, Coleman's black Toyota Camry was photographed and processed for prints, swabbed for DNA evidence, ROA 65-67, and processed with Luminol looking for blood. ROA 68-69. No prints, DNA, ROA 65, or traces of blood were found; however, the vehicle had been cleaned with cleaning detergents during the week since the crime was committed. ROA 69.

Months later, on September 10th after Petitioner was arrested, two officers went to the holding cell to observe White's upper left thigh where multiple witnesses said he shot himself in the struggle with NaQuian. ROA 108-109. As expected, there was a scar on his upper left thigh. *Id*. Photographs were taken and entered into evidence at trial, along with the testimony of the EMS officer who observed the wound. S27 in globo, ROA 351-352.

Two months after Petitioner was finally arrested and ten months after his videotaped statement to police, Coleman allegedly went to a notary and filled out a form "affidavit" stating, *in toto*, "They pressured me and he's not making me sign it. I was under the influence and the story I told wasn't true." Tr. Ex. A3, ROA 41. It was notarized by Elaine Williams, but it was not witnessed. *Id*. Although proffered,

no mention of the affidavit was every made on the record or to the jury, no attempt was made to actually *enter it into evidence*, and Petitioner did not attempt to question Mr. Coleman about it or to call the Notary. Coleman was not even asked to verify his signature. It is mentioned here only because Petitioner and amici repeatedly raise and mischaracterize it in their briefing. Contrary to their claims, there is no record that any judge excluded the affidavit from being submitted to the jury.

In approximately September 2016, Coleman allegedly had some "traumatic incident" which caused him to lose his memory. ROA 310-311, 313-314. Seven months later, at the time of trial in April 2017, he allegedly was seeing a doctor in Florida for treatment. ROA 314.

Discovery was conducted in the interim between Petitioner's arrest and trial. ROA 15, 18, 20, 21, 22, 31. The State offered an "open file" discovery. ROA 30. Defendant was given redacted copies of all police reports outlining the witnesses' statements, ROA 42-110, Coleman's videotaped confession, and Coleman's "affidavit," and was informed of Coleman's alleged memory loss long before the trial. ROA 30. And yet, the only pretrial motion in the record is a Motion in Limine filed by Defendant addressing the admission of ballistic evidence. ROA 26.

The trial began Monday, April 10, 2017. ROA 213. At the end of the second day, the Defendant asserted his right not to testify, ROA 366, and the defense rested without calling any witnesses or offering any evidence in rebuttal to the State's case. ROA 367. Day three began with closing arguments, ROA 375-402, and moved to jury deliberation. At approximately 1:00 pm, after nearly two hours of deliberation, the

jury returned with a unanimous verdict of guilty of second degree murder. ROA 425-426.

After trial but prior to sentencing, the Defense filed a Motion for Acquittal and a Motion for New Trial, both based upon the admission into evidence of Coleman's videotaped statement. ROA 431-440. These Motions were heard July 6, 2017, with defense counsel offering a confusing mix of confrontation, hearsay, and impeachment law to substantiate his claim, which the trial court subsequently denied. *Id*.

Petitioner was sentenced to life in prison. ROA 446-447. He appealed and filed a counseled brief with the First Circuit Court of Appeals raising only one error: the trial court's evidentiary rulings allowing Coleman's videotaped statement to be played for the jury violated Petitioner's constitutional right to confrontation. Although his claim was based on his right to confrontation, his legal *argument* focused on due process, citing *Chambers v. Mississippi*, 410 U.S. 284 (1973), and did not mention *Crawford v. Washington.* He *footnoted U.S. v. Owens*, 484 U.S. 557 (1988), arguing that, although controlling, it should be ignored because "it would be a miscarriage of justice to allow this conviction to stand."

After considering *Crawford, California v. Green*, 399 U.S. 149 (1970), and *Owens*, as well as state precedent, the First Circuit denied his claim. *State v. White*, 2017-1256 (La. App. 1 Cir. 2/16/18), 243 So.3d 12. The First Circuit noted that the person must be present at trial "to defend or explain" the statement and subjected to cross-examination but that the cross examination did not have to be "effective in whatever way, and to whatever extent, the defense may wish." *Id*. at 15-16, citing

State v. Kennedy, 2005-1981 (La. 5/22/17), 957 So.2d 757, 775-78, *rev'd on other grounds*, 554 U.S. 407 (2008) (which was citing *Owens,* 484 U.S. at 561 (1988) (quoting *Kentucky v. Stincer,* 482 U.S. 730, 739 (1987) (quoting *Delaware v. Fensterer,* 474 U.S. 15, 20 (1985)). It is sufficient, the Court held, that "the defendant has the opportunity to bring out such matters as the witness' bias, his lack of care and attentiveness, his poor eyesight, and even (what is often the prime objective of cross-examination …) the very fact that he has a bad memory." *Id*. citing *Owens*, 484 U.S. at 559.

Petitioner filed a pro se writ for review with the Louisiana Supreme Court, which was denied. *State v. White*, 2018-0379 (La. 1/14/19), 261 So.3d 763.

REASONS FOR DENYING THE WRIT

I. NEITHER FEDERAL NOR STATE COURT ARE SPLIT .

Petitioner[8] presents a garbled argument that this Court should grant certiorari because the lower courts, state and federal, are "in conflict" over whether the rule of *Owens* applies to witnesses with complete memory loss. He makes no distinction between federal and state court rulings, sometimes comparing one with the other, and sometimes citing state lower court decisions. He also spends much of his argument discussing whether it matters if the loss of memory is genuine or feigned and confuses confrontation clause jurisprudence with hearsay exception

[8] Petitioner frequently complains that he is not a lawyer and, in fact, does not even possess a G.E.D. Pet. 14. He also complains that he did not have access to legal materials at the Louisiana State Penitentiary; however, he apparently received assistance from law students at Tulane University School of Law. Pet. 8, n. 5; Pet. 11, n. 6.

jurisprudence. *See* Pet. 10-12.

Only Petitioner, and Amicus Professor Friedman to a much lesser degree, suggest a split in the circuits. And even Professor Friedman spends no more than two paragraphs on the topic of a split in the courts and cites only one federal case, *Cookson v. Schwartz*, 556 F.3d 647 (7th Cir. 2009), in which the Seventh Circuit found, as in this case, no confrontation violation. He cites no other federal circuit court which would disagree with the holding or conclusion of *Cookson*.

A. The Federal Circuits Are Not Split.

Petitioner unable to show a split in the Circuit Courts in application of Confrontation Clause jurisprudence to these highly factual memory loss cases. Where the courts are applying the same rule, differences in *outcome* based on different factual situations do not a split make. As to whether *Owens* applies to witnesses with a complete memory loss, Petitioner cites seven cases, of which two are from the Seventh Circuit, three involve the interpretation of the federal rules of evidence with no discussion of the Confrontation Clause, and none involve complete memory loss.

In both *Cookson v. Schwartz*, 556 F.3d 647 (7th Cir. 2009) and *United States v. Ghilarducci*, 480 F.3d 542 (7th Cir. 2007), the Seventh Circuit, as in this case, concluded the defendant's confrontation rights had *not* been violated (and neither case involved a complete memory loss). *Cookson,* 556 F.3d at 652; *Ghilarducci*, 480 F.3d at 549. *Cookson*, , involved a child sex abuse victim who had made statements to numerous people, including two law enforcement officers. She testified at trial but did not remember making the statements to the police officers. In *Cookson*, the

Seventh Circuit noted that *Crawford* required that the witness be available "to defend or explain" her prior statement, *Cookson*, 556 F.3d at 651, and also that *Owens* allowed admission of an out-of-court statement that the witness remembered making but did not remember the substance of it. *Id*. Based on the facts before it, the court pointed out that the child witness had testified to the facts surrounding the sexual abuse and that, to the extent her out of court statements were consistent with her trial testimony, the defendant had been allowed a full opportunity to cross-examine her on that. To the extent they were inconsistent with her trial testimony, defendant had an opportunity to cross-examine her about that too and to point the inconsistencies out to the jury.

Likewise, in *Ghilarducci*, the Seventh Circuit, citing *Crawford, Owens*, and *Fensterer*, found that, *on the facts before it*, defendant's "opportunity to cross-examine [the witness] did *not* fall below constitutional standards" because he had been able to effectively cross-examine the witness. *Ghilarducci*, 480 F.3d at 549. At trial, the witness, who suffered from memory loss, had been allowed to read into evidence his grand jury testimony. The witness had not claimed a complete memory loss about the events, had cooperated with defense counsel's questioning, and answered numerous questions. Like in this case, Ghilarducci's counsel had been able to test Sova's credibility, probe the severity of Sova's grand mal seizure, ask whether Sova had been compensated for his trial or grand jury testimony, and determine the extensiveness of his contact with government attorneys or agents, among other things. *Id.*

Petitioner cites two other Circuit Court cases in passing, which he claims

demonstrate that the Circuits are in conflict on this issue. But neither of these cases support this claim. *Preston* v. *Superintendent*, 902 F.3d 365, 371 (3d Cir. 2018) involved a witness who refused to cooperate at trial and replied "no comment" to nearly every question he faced. The issue was *not* memory loss. The language appellant cites from *United States* v. *Spotted War Bonnet*, 933 F.2d 1471, 1474 (8th Cir. 1991) is about young children who are "too young and too frightened" to appear as witnesses, which the 8th Circuit was in fact contrasting with the permissible admissibility under *Owens* of testimony from a witness with memory loss. These cases, despite Petitioner's mischaracterization of them, do not demonstrate a conflict on this issue.

Petitioner cites to *United States v. Mornan*, 413 F.3d 372, 279 (3d Cir. 2005) and *United States v. Hadley*, 431 F.3d 484, 512 (6th Cir. 2005) to show a split regarding feigned versus genuine memory loss. However, both cases involve only an interpretation of memory loss for purposes of Federal Rule of Evidence art. 801(D)(1)(A) and neither case discusses the Confrontation Clause or *Crawford*. He also cites *United State v DiCaro*, 772 F.2d 1314, 1323 (7th Cir. 1985) which is a pre-*Crawford* case.

There is simply no split in the federal circuit courts as to whether the rule of *Owens* applies to witnesses with complete memory loss or how *Crawford* affects that analysis. For this reason, this Court should deny the petition.

B. The State Courts of Last Resort Are Not Split.

Petitioner claims that such a conflict between state courts of last resort exists.

Petitioner has failed to demonstrate such a split and, in fact, no state court of last resort has decided a case in a way that conflicts with the Louisiana Court of Appeals decision in Petitioner's case. For this reason, this Court should deny the Petition.

As Petitioner correctly notes, many state courts of last resort have reached the same conclusion that the Louisiana Court of Appeals did here. For example, in *State v. Holliday*, 745 N. W. 2d 556 (Minn. 2008),[9] the Minnesota Supreme Court found no confrontation clause violation under either the Minnesota or the United States Constitution when a witness, due to long-term drug use, could remember neither underlying events nor giving pre-trial testimony, but his pre-trial testimony still was admitted at trial. Holliday petitioned this Court for a writ of certiorari, but this Court denied it. *Holliday v. Minnesota,* 555 U.S. 856 (2008).

Likewise, in *Woodall v. State*, 336 S. W. 3d 634 (Tex. Crim. App. 2011), the Texas court found no confrontation violation when a witness could remember neither the underlying events nor give pre-trial testimony due to a car accident, but her pre-trial testimony still was admitted at trial. In *State v. Delos Santos*, 238 P.3d 162 (Haw. 2010), the Supreme Court of Hawai'i found no violation of the confrontation clause when a witness could remember neither the underlying events nor making a pre-trial statement due to intoxication, but her pre-trial testimony was admitted at trial. In *State v. Price*, 146 P.3d 1183 (Wash. 2006), the Washington Supreme Court, sitting *en banc*, also found no violation when a child sex abuse victim could remember neither underlying events nor giving pre-trial testimony, but her testimony was

[9]

admitted at trial. In two other cases cited by Petitioner, State courts of last resort have reached the same conclusion when a witness claimed complete memory loss, but the witness' pre-trial testimony was nonetheless admitted. *See, e.g., State v. Davis*, 466 S. W. 3d 49 (Tenn. 2015) (fifteen-year-old witness feigned lack of memory), *State v. Real*, 150 P.3d 805 (Ariz. 2007) (police officer read from his report after he could not remember DWI stop). If anything, these cases demonstrate the breadth of factual scenarios that may arise with memory loss claims.

Petitioner heavily relies on *Goforth v. Mississippi*, 70 So.3d 174 (Miss. 2011) (Pet. 9, 10, 15; Friedman 15; NACDL 7, 8). While Petitioner claims that *Goforth* conflicts with the cases discussed above, but it does not. The Mississippi Supreme Court expressly and unambiguously stated that its conclusion was based on the *Mississippi Constitution*, and was not compelled by the United States Constitution or this Court's jurisprudence, writing: "[s]ince Article 3, Section 26 of the Mississippi Constitution provides defendants a constitutional right to confront the witnesses against them, we base our opinion on its provisions. Federal caselaw serves as our guide, but Mississippi jurisprudence compels the result." *Id*. at 183 (internal citations omitted.) In fact, the court cited this Court's opinion in *Michigan v. Long*, which states that:

> If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached … If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.

463 U.S. 1032, 1041 (1983). Thus, the Mississippi Supreme Court left no doubt that its ruling was compelled by and independently based on Mississippi jurisprudence and the Mississippi Constitution, not this Court's jurisprudence or the United States Constitution. Therefore, it is not in conflict with any of the decisions of the other state courts of last resort discussed above. *State v. Delos Santos*, 238 P.3d 162 (Haw. 2010) also involved interpretation and application of the state constitution.

Even if *Goforth* had been decided under the United States Constitution rather than the Mississippi Constitution and its crucial factual distinctions from Petitioner's case were ignored, this single decision would not generate a wide and mature conflict on this issue. Because no conflict exists in the state high courts over how the rule of *Owens* applies to witnesses with complete memory loss after *Crawford*, the Court should deny the petition.

Petitioner cites numerous cases that did not involve memory loss in attempting to demonstrate a conflict. These cases are factually inapposite, although the courts still allowed the out-of-court testimony to be admitted. In *State v. Toohey*, 816 N.W.2d 120, 125-126 (S.D. 2012), the child witness answered many questions but simply did not answer the more graphic ones and began to cry. She never claimed not to remember, though. In *Johnson v. State*, 878 A. 2d 422 (Del. 2005), the witness asserted his Fifth Amendment right not to testify and did not take the witness stand. The *only* case Petitioner cites where the court excluded testimony based on the Confrontation Clause is *In re N.C.*, 105 A.3d 1199 (Pa. 2014), where a child witness

was unresponsive at trial and curled into the fetal position making it *impossible* for either side to question her at all. *Id.* at 1213. The Pennsylvania Supreme Court expressly contrasted this "physical recoiling" with the permissible admission of testimony of a forgetful witness. *Id.* at 1217.

Finally, Petitioner cites four cases, two from Louisiana, that are not from state courts of last resort and do not represent the highest law of those states: *State v. Manuel*, 685 N.W.2d 525 (Wisc. Ct. App. 2004); *People v. Vannote*, 970 N. E. 2d 72 (Ill. App. Ct. 2012); *State v. Moore*, 10-0314 (La. App. 4 Cir. 10/13/10), 57 So.3d 1033 (former co-defendant refused to testify claiming lack of memory, held in contempt); and *State v. Williams*, 04-608 (La. App. 5 Cir. 11/30/04), 889 So.2d 1093 (witness claimed he never made the statement). Those cases, also factually inapposite, do not represent the view of the Louisiana Supreme Court.

II. THIS CASE IS A POOR VEHICLE FOR REVIEW BECAUSE IT HAS A WOEFULLY INADEQUATE AND UNIQUE RECORD

A. White Repeatedly Mischaracterizes the Facts and Reasons for Judgment Through Misstatement or Omission

White has failed to present to the Court - with accuracy, brevity, or clarity - what is essential to the Court's ready and adequate understanding of the points necessary to rule in this case. Furthermore, he and his amici have mischaracterized the facts and the reasons given for the State court judgments.

B. The Record Has Not Been Sufficiently Developed for This Court to Rule Address the Issue Presented.

To determine whether a Confrontation Clause issue exists such that review would even potentially be possible in this case, this Court needs an adequately

developed factual record to determine two key issues: 1) To what extent, if any, did the witness suffer memory loss and 2) To what extent, if any, was the defendant deprived of an opportunity for an effective cross-examination. The record is woefully underdeveloped on both issues.

Memory Loss. The State has never taken the position that Coleman was "unavailable" due to his memory loss. In fact, it has taken the opposite position arguing, as the judge held, that Coleman was in court and subject to cross-examination. ROA 318, 322. Coleman's prior videotaped statement was offered, and accepted by the trial court, as a recorded recollection pursuant to Louisiana Code of Evidence article 803(5). ROA 317, 431. Thus, to raise a Confrontation Clause violation under these circumstances, Petitioner needed to prove – at trial - that Coleman was "unavailable," as that term is used in *Crawford*. *Petitioner made no attempt to do that at trial*. Thus, even if in theory memory loss raises Confrontation Clause issues, he forfeited the claim in this case.

In advance of his testimony, the State told the judge that Coleman "may or may not have some issues with the memory." ROA 311. However, Coleman was able to testify about his date of birth and age, where he currently lives, and that he used to live in Baton Rouge. He was able to identify himself and his father on the videotape of his police interrogation, and he knew that his father was a police officer.

To prove he had a memory loss for purposes of the recorded recollection exception to the hearsay rule, the State asked him a number of "Do you

remember…" questions, including whether he remembered the shooting or meeting with police, to which he replied "no," "nah," or "uh-uh" to the point that the Petitioner *objected* to the State leading the witness, *effectively shutting down any foundation for the extent of his memory loss*. ROA 313-315

When asked if there had been a "traumatic incident" that occurred in his life, he said he did not know.ROA 313-314. After counsel suggested an incident happened in September and asked him when he first started experiencing memory issues, he answered, "around September." ROA 314 He testified that he didn't remember what happened, just waking up. *Id.* When asked if someone told him what happened to him, his answer was "Nah." *Id.* When asked if he was getting any treatment for his memory issues he simply said, "Yeah, I'm seeing somebody. It's somewhere in Florida, though." *Id*

Petitioner argues that, like in *Owens*, he had a medically documented reason for being unable to recall relevant material. The record does not, however, substantiate that assertion. When asked if he had documentation from the doctors that he *actually* had real memory issues, he responded "Yeah," but no such documentation was every produced he was not even asked to identify the doctors. No medical report outlining Coleman's condition, abilities, or prognosis was ever entered into evidence. Petitioner did not call any medical professional or attempt to proffer a statement from one. No attempt was even made to have the witness describe, *generally*, what he could and could not remember or what he was doing to improve his memory.

Furthermore, there was no ruling by the trial court that the witness even suffered from genuine memory loss. To the contrary, the trial judge appeared to question the witness' veracity saying, at one point, "Then every witness in America would come in here and say I have a head injury and I don't remember what I said", noting, again, at the hearing on Defendant's Motion for New Trial that "the witness would come in and say I don't remember anything [and] nothing could be prosecuted."

Even if Petitioner had not forfeited his claim, this record is simply insufficient to provide a proper factual predicate to resolve the question presented.

Effective cross-examination and impeachment. The right to confrontation includes, primarily, the right to a physical confrontation of the witness on the witness stand in the courtroom so that the witness has to look the defendant in the eye and the jury can judge the witness' physical demeanor. Coleman was present in court, took the stand, was sworn in, provided a knowing and intelligent waived of his Fifth Amendment right against self-incrimination, and cooperated with both counsels' questioning. Furthermore, the jury was also allowed to see the videotape of Coleman making the prior statement to the police, so it was also able to judge Coleman's physical demeanor at the time he made the prior statement in addition to all the circumstances surrounding the interrogation – including whether he was intoxicated or pressured.

The right to confrontation also includes, however, a corollary right to an opportunity to cross-examine the witness to reveal credibility issues with the

witness or his testimony. Defendant had the opportunity to cross-examine Coleman and, didsoby asking him four questions:

> Q: Mr. Coleman – your father was in that taped statement. You talked to your father. Do you remember that?
>
> A: Nah. I don't remember, but I see he was in there.
>
> Q: Okay. What does your fathere do for a living? Is he a cop?
>
> A: Yeah.
>
> Q: He's a police officer?
>
> A: Uh-huh.
>
> Q: Okay. And to be clear for the record, you – you were 20 years old in 2015, because you're 22 now, right?
>
> A: Right.
>
> Q: So you were 20 then, right?
>
> A: Right.
>
> Q: But to be quite honest, you have no recollection of any event in January of – the 6th of January of 2015?
>
> A: Yeah. After September, I don't remember nothing.
>
> Q: Okay.

ROA 329-330. Defendant made no further effort to cross-examine this witness, to impeach him, intrinsically or extrinsically,[11] or to timely and effectively have his videotape excluded. Although he filed a Motion in Limine prior to trial, he did not request a pretrial ruling on *this* issue although he knew of the alleged memory loss and the recorded statement at that time.[12]

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[11] In particular, one potential witness, BJ, was never called to testify at this trial. BJ, allegedly, was in the car with Coleman and would have been able to testify to the incident and, perhaps, exculpate Petitioner. There was also evidence that BJ had a beef with the victim and may have been motivated to rob or hurt him. This could have been brought out through his or others' testimony or, inferentially, through cross-examination of the police investigators.

[12] In fact, this concerned, if not annoyed, the trial judge. In response to counsel's request for a stay to take a supervisory writ to the First Circuit, the judge said, "I'm sorry, Mr. Town. We're moving forward with this. You have been sitting on this case with Mr. Jordan for quite some time. You knew what the

After asking his questions, Petitioner's counsel proffered A3 (what the State had previously proferred as S24), with no objection from the State, other than that it not be published to the jury. Tr. Ex. A3, ROA 41, 329-330. The document proferred as A3 was the "affidavit" Coleman allegedly executed in November 2016. Other than this proffer, the record is devoid of any evidence Petitioner actually tried to bring this "affidavit" to Coleman's attention – even if only to identify his signature. *Because Coleman was present and on the stand*, he could have asked Coleman any number of other questions to lay a foundation for its introduction.

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Additionally, Petitioner also made no effort to impeach this witness regarding his current state of mind, motives, or character for truth. Coleman , presumanly knew *at the time he testified* charges still were pending against him as an accessory after the fact He was even in court with his defensse attorney. He could have tied the current pending reduced charges back to the videotape to draw an inference that Coleman was motivated to name White as the shooter to obtain a lighter sentence. Presumably, he did not do so for his own strategic reasons. He did not even make that argument in his closing. ROA 395-398. Although he was able to bring out – *through Coleman*– that Coleman's father was a police officer and was in the room with him during the interrogation, Petitioner did not call the father to question him about any events surrounding the interrogation.

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issues were. Okay?" ROA 325.

Coleman's alleged lack of memory did not *prevent* Defendant from a meaningful and effective cross-examination and impeachment of Brandon.

C. Even Assuming Some Conflict at the Intersection of Memory Loss and the Confrontation Clause this Case Requests Little More than Error Correction In a Unique Case

At best, Petitioner appears to be objecting to no more than misapplication of settled law to a narrow issue regarding which a trial court's ruling must be sustained unless clearly erroneous. *See Snyder v. Louisiana*, 552 U.S. 472, 477 (2008). As this Court has stated, these factual determinations lie peculiarly within a trial judge's province. *Id.*

Under the jurisprudence of this Court, to determine if a defendant's right to confront a witness has been violated, a trial court has to determine whether the defendant has had "a full and fair opportunity to probe and expose the[witness'] infirmities [of forgetfulness, confusion, evasion] through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness' testimony," *Delaware v. Fensterer*, 474 U.S. 15, 21-22 (1985) and the witness must be "present at trial to defend or explain" the prior out-of-court statement. *Crawford*, 541 U.S. at 59 n. 9. *See also Owens*, 484 U.S. at 559 (It is sufficient that the defendant has the opportunity to bring out such matters as the witness' bias, … and even … the very fact that he has a bad memory.") Petitioner and his amici argue that such was not possible here - but the record belies this claim, which in any event is strictly a *factual* question. The Louisiana court of appeal properly recognized and applied the law, it simply made a factual determination Petitioner disagrees with. On this record, the determination was

clearly *not* erroneous. However, whether it was or it wasn't, Petitioner is simply asking for an error correction in a very unique case.

III. THE LOUISIANA FIRST CIRCUIT REACHED THE CORRECT RESULT.

In a series of memory-related cases, this Court has long held that when a witness appears at trial, is placed under oath, cooperates with counsel in questioning to the best of his ability, but cannot answer some question due to a lack of memory, his pretrial out-of-court statement can be admitted. As long ago as 1970, in *California v. Green,* the Court stated that "where the declarant is not absent, but is present to testify and to submit to cross-examination, our cases, if anything, support the conclusion that the admission of his out-of-court statements does not create a confrontation problem." 399 U.S. 149, 162 (1970). The Court held that "the Confrontation Clause does not require excluding from evidence the prior statements of a witness who concedes making the statements, and who may be *asked* to defend or otherwise explain the inconsistency between his prior and his present version of the events in question, thus opening himself to full cross-examination at trial as to both stories." *Id.* at 164, 90 S.Ct. 1930 (emphasis added). In a concurring opinion, the reasoning of which would later be adopted by the Court in *Owens*, 484 U.S. at 559, Justice John Marshall Harlan opined that where a witness is physically available but cannot recall making the out-of-court statement, or even the underlying events described in the statement, there is no confrontation clause consequence. *Id.* at 188, 90 S.Ct. 1930 (Harlan, J., concurring). "The prosecution has no less fulfilled its obligation simply because a witness has a lapse of memory." *Id.*

In 1985, the Court noted in *Delaware v. Fensterer* that "the 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." 474 U.S. at 20. The *Fensterer* Court concluded as follows:

> 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.

Id. at 21-22, 106 S.Ct. 292.

Finally, in 1988 in *Owens,* the Supreme Court held that the Confrontation Clause is not violated by the "admission of an identification statement of a witness who is unable, because of a memory loss, to testify concerning the basis for the identification." 484 U.S. at 564.

In *Crawford,* which did not involve the lack of memory by a testifying witness, the Supreme Court held that the Confrontation Clause prohibits the use of testimonial out-of-court statements if the declarant *does not testify* at trial, unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. 541 U.S. at 68 (emphasis added). But the Court stated in *dicta* that, where the declarant is subject to cross-examination at trial, "the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." *Id.* at 59 n. 9. Petitioner emphasizes the Court's further statement in *Crawford* that "[t]he [Confrontation] Clause does not bar admission of a statement

so long as the declarant is present at trial to *defend or explain it,*" 541 U.S. at 59 n. 9 (emphasis added), and contends that a declarant who lacks memory of prior events cannot "defend or explain" his statement. He and his amici argue that it is unclear from *Crawford* whether the Supreme Court intended to leave in place all of its prior case law concerning unavailability under the Confrontation Clause.

But the Court in *Crawford* did not expressly overrule *Owens* or any of the other cases allowing admission of out-of-court statements when a witness has memory problems. In fact, the *Crawford* Court cited *Green* and the author of the majority opinion in *Crawford* was also the author of the majority opinion in *Owens*. There is nothing to indicate that dicta in a footnote of Crawford was meant to overrule thirty-four years of specific precedent.

Here, Coleman willingly appeared at trial, willingly took the stand and answered every question in full view of the jury, who were able to judge his demeanor and credibility, one of the hallmarks of confrontation. He admitted to making the statements and identified himself in the video. He did not assert any testimonial or constitutional privilege that allowed him not to take the stand and made him unavailable for cross-examination, as the witness did in *Douglas v. Alabama*, 380 U.S. 415, 419-20 (1965) or in *Crawford*. In fact, he waived his constitutional right not to incriminate himself.

Petitioner argues that saying "I cannot provide that information" (because of memory loss) and "I will not provide that information" (because of a privilege) cannot be meaningfully distinguished. Not so. The witness has a right (often constitutional)

not to testify where the law grants him a privilege and this creates a *legal* bar to the testimony.

Furthermore, the Petitioner had the opportunity to effectively cross-examine, and, more importantly, impeach this witness on a multitude of issues. Neither the trial court nor any law in Louisiana restricted his ability to cross examine the witness, as in *Davis v. Alaska,* 415 U.S. 308, 318 (1974). As the Court said in *Fensterer*, "[i]t does not follow that the right to cross-examine is denied by the State whenever the witness' lapse of memory impedes *one* method of discrediting him." 474 U.S. at 20. Petitioner had multiple opportunities to test Coleman's credibility, reliability, *and* memory, but simply did not do so.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

_/s/ *Michelle W. Ghetti* _______________

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