No. 18-8862

IN THE
SUPREME COURT OF THE UNITED STATES

Roderick White,

Petitioner,

v.

State of Louisiana,

Respondent.

On Petition for a Writ of Certiorari
to the Court of Appeal of Louisiana, First Circuit

REPLY BRIEF FOR PETITIONER

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This case presents a crisp and straightforward question of constitutional law: Whether the Confrontation Clause permits the prosecution to introduce an out-of-court testimonial statement from a witness whom it calls to the stand but who has no memory of the events described in the statement *nor of giving the statement itself*. Try as the State might, it is unable to dispel the disagreement in the lower courts over whether mere physical presence in the courtroom in this situation satisfies the right to confrontation. Nor does the State provide any basis for believing this case is an unsuitable vehicle for resolving the question presented; to the contrary, this case is a perfect vehicle and places the issue in stark relief. Finally, the State's insistence that *United States v. Owens*, 484 U.S. 554 (1988), permitted it to introduce the videotaped police interrogation of Mr. Coleman underscores the need for this Court's intervention. Only this Court can decide whether *Owens* extends beyond its facts to the situation where a witness does not even remember giving the incriminating statement the prosecution seeks to introduce—and thus is unable to answer any questions not only about the events described in the statement but also concerning whether the statement itself was the product of coercion, improper suggestion, or any other infirmity.

A. The Conflict Is Real.

Contrary to the State's contentions, several other jurisdictions would have held that petitioner's right to confrontation was violated.

The State does not dispute that in *Goforth v. State*, 70 So.3d 174 (Miss. 2011), the Mississippi Supreme Court held on facts materially indistinguishable from this case that the defendant's right to confrontation was violated. The State suggests this does not matter, because even though the court's analysis turned entirely on *Owens* and other cases interpreting the Sixth Amendment, it stated at the end of its opinion that its holding was "based on the Mississippi Constitution." BIO 19 (emphasis removed). But this is not a petition seeking review of *Goforth*. So the critical inquiry here is not the jurisdictional question whether the *Goforth* decision rested on independent and adequate state grounds—itself a debatable question insofar as the Mississippi Supreme Court said the state constitution affords the "same right" as the Sixth Amendment's Confrontation Clause, 70 So.3d at 183, and relied exclusively on case law construing that Clause. *See, e.g.*, *Pennsylvania v. Muniz*, 496 U.S. 582, 588 n.4 (1990) (finding jurisdiction in similar circumstances). Instead, the key is whether the Mississippi Supreme Court interpreted federal law differently from the Louisiana Court of Appeal. There can be no doubt that it did.

The Seventh Circuit likewise has concluded that *Owens* does not permit introduction of an out-of-court statement where the witness does not remember the events described in his testimonial statement or giving the statement. *See Cookson v. Schwartz*, 556 F.3d 647, 651 (7th Cir. 2009). The State notes that the defendant in that case did not obtain relief because the witness there actually "remembered making" the statement. BIO 15-16. But that does not detract from the reality—which the State does not contest—that the Seventh Circuit has interpreted the

Confrontation Clause in a manner that, *on the facts here*, would have found a confrontation violation.

The State's categorical assertion that "no state court of last resort has decided a case in a way that conflicts with the Louisiana Court of Appeal[']s decision in Petitioner's case," BIO 18, also overlooks *In re N.C.*, 105 A.3d 1199 (Pa. 2014). In that case, a child witness answered questions regarding things like her "birthday" and her "family." *Id.* at 1216. But she was nonresponsive about "the substantive issues" she described in her prior testimonial statement. *Id.* Reasoning that the Confrontation Clause "require[s] an opportunity for *effective* cross-examination," the Pennsylvania Supreme Court distinguished *Owens* and held that the defendant's right to confrontation was violated. *Id.* at 1216-17 (emphasis added). Whatever distinctions might obtain between child witnesses and the testifying witness here, the Pennsylvania Supreme Court's insistence that the Confrontation Clause demands an "effective" opportunity to cross-examine on the substance and circumstances of a prior statement cannot be squared with the Louisiana Court of Appeal's holding here that mere physical presence on the stand is enough.

To be sure, several other courts share the Louisiana Court of Appeal's permissive reading of *Owens* and *Crawford v. Washington*, 541 U.S. 36 (2004). But many of those decisions, too, reinforce the need for this Court's review. In *State v. Price*, 146 P.3d 1183 (Wash. 2006), three Justices on the Washington Supreme Court took the position—contrary to the Louisiana Court of Appeal—that the Confrontation Clause requires an opportunity for effective cross-examination and that a witness

who "cannot remember the contents of her hearsay statements or the acts described in those statements cannot be fully and effectively cross-examined." *Id.* at 1193 (Alexander, C.J., dissenting). In *State v. Delos Santos*, 238 P.3d 162 (Haw. 2010), the Hawaii Supreme Court rejected a confrontation claim like petitioner's. But the court conceded that "*Owens* is distinguishable" from this situation "because the witness in *Owens* remembered making his prior identification." *Id.* at 179. And in *State v. Holliday*, 745 N.W.2d 556 (Minn. 2008), the Minnesota Supreme Court likewise "acknowledge[d]" that "the witness in *Owens* actually remembered making his prior statement." *Id.* at 566 (citation omitted). The court also "recognize[d]" that this Court's explanation "that the Confrontation Clause does not bar admission of a prior testimonial statement 'so long as the declarant is present at trial to defend or explain it,' [*Crawford*, 541 U.S. at 59 n.9], could be interpreted to require that the declarant actually defend or explain the statement." *Holliday*, 745 N.W.2d at 565.

When even lower court opinions in accord with the decision below recognize such limitations and cross-currents in this Court's precedent, conflict and confusion is sure to persist until this Court steps in. It should do so now.

B. This Case Is an Excellent Vehicle.

The Louisiana Court of Appeal explained the pertinent facts as follows:

> On direct examination, . . . Mr. Coleman explained that he was getting treatment in Florida for . . . memory issues [related to a fall he took]. When asked about January 6, 2015, the day the defendant [allegedly] shot Mr. Robinson, Mr. Coleman stated that he did not remember anything about that incident. Mr. Coleman further stated he did not remember talking to the police about the shooting.

Pet. App. 3a-4a. The court then squarely rejected petitioner's argument that admitting Mr. Coleman's prior statement to the police in those circumstances violated the Confrontation Clause, reasoning that "a declarant's appearance and subjection to cross examination at trial are all that [are] necessary to satisfy the right to confrontation, even if the declarant suffers [such] memory loss." *Id.* 6a. The court offered no alternative holding, and the State has never argued that a confrontation violation here could possibly be harmless.

Nor could it. For decades, this Court has stressed that "th[e] truthfinding function of the Confrontation Clause is *uniquely threatened* when an accomplice's confession is sought to be introduced against a criminal defendant without the benefit of cross-examination." *Lee v. Illinois*, 476 U.S. 530, 541 (1986) (emphasis added). "Due to his strong motivation to implicate the defendant and to exonerate himself," an accomplice's statements that shift or spread blame are "inherently unreliable." *Lilly v. Virginia*, 527 U.S. 116, 131, 133 (1999) (plurality opinion) (internal quotation marks and citation omitted). This concern is all the more pronounced where, as here, the accomplice's unchallengeable statement is the centerpiece of the prosecution's case; there is good reason even apart from blame-shifting to doubt the veracity of the statement; and little, if any, physical evidence supports the accomplice's key accusations.

The State nevertheless contends for various reasons that this case is an unsuitable vehicle for addressing the question presented. Each of the State's arguments is baseless.

1. The State first suggests petitioner has "forfeited" his confrontation argument because he did not do enough at trial to probe the truthfulness and scope of Mr. Coleman's memory loss. BIO 22-24. This assertion—which the State has never made until now—is puzzling. The State itself elicited the testimony from Mr. Coleman that his post-crime injury wiped away his memory about the events he described to the police and giving the statement. Pet. App. 3a-4a. The State presumably would not have elicited that testimony and allowed it to stand if it had reason to doubt it. *Cf. Napue v. Illinois*, 360 U.S. 264, 269 (1959). At any rate, the facts Mr. Coleman described, which supplied the basis for the Louisiana Court of Appeal's analysis, provide a complete platform for petitioner's confrontation argument—which he has raised at every level of the state courts, and which the Louisiana Court of Appeal rejected on the merits.

It makes no difference whether Mr. Coleman was able to testify about other things, such as his current "age" and "where he currently lives." BIO 22; *see also Douglas v. Alabama*, 380 U.S. 415, 416 (1965) (finding confrontation violation even though the declarant took the stand and "gave his name and address"). Those facts have nothing to do with his *memory* as it pertained to his testimonial statement. On that score, it is undisputed Mr. Coleman was a blank slate. The question presented is thus squarely at issue.

For the same reason, the State is wrong to suggest the Louisiana Court of Appeal "simply made a factual determination" with which petitioner disagrees—namely, that petitioner actually had a sufficient opportunity to cross-examine Mr.

Coleman. BIO 27. The question whether a testifying witness's inability to remember either the underlying events or giving a prior testimonial statement forecloses the prosecution from introducing the statement—no matter what other questions about current realities the witness may be able to answer on the stand—is a pure question of law that is important and recurring. And the Louisiana Court of Appeal's decision unambiguously rested on its categorical legal holding that the Confrontation Clause "requires only that the declarant be available at trial to testify"—not on any determination that petitioner had any opportunity for *effective* cross-examination. Pet. App. 6a.

2. The State next maintains the record here is not "sufficiently developed" to provide a basis for resolving the question presented. BIO 21 (capitalization omitted); *see also id.* 24. Again: the facts the State itself elicited from its own witness—facts that the Louisiana Court of Appeal accepted—fully and completely raise the question presented. According to Mr. Coleman's testimony on direct examination, he was experiencing a medical problem that wiped out his memory of the events he described to the police or his making the statement at issue. That is all that is necessary to put the question presented to this Court.

3. Finally, the State argues that petitioner could have called other witnesses or introduced extrinsic evidence to try to undermine Mr. Coleman's testimonial statement. BIO 24-27. This is not really a vehicle argument; instead, it is an attempt to defend the Louisiana Court of Appeal's holding that petitioner's right to confrontation was not transgressed. The attempt is a nonstarter. The ability to cross-

examine *other* witnesses or introduce *other* evidence has never been a substitute for the right to cross-examine a testifying witness himself. *See, e.g.*, *Bullcoming v. New Mexico*, 564 U.S. 647, 659-63 (2011) (The Confrontation Clause "does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination."); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 319 (2009) (similar).

C. The Decision Below Misconstrues the Confrontation Clause.

The State's broader argument on the merits fares no better. The State stresses that "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." BIO 30. But "[c]onfrontation means more than being allowed to confront the witness physically" in front of the jury. *Davis v. Alaska*, 415 U.S. 308, 315 (1974). It includes a right to cross-examine to probe the "accuracy and truthfulness" of the witness's testimony. *Id.* at 317; *see also Crawford*, 541 U.S. at 57 (defendant is entitled to "an *adequate* opportunity to cross-examine" (emphasis added)). That was impossible here. And the jury's ability to observe a witness in the courtroom gives it no meaningful ability to judge the veracity of his out-of-court statements where, as here, the witness has no memory of *any* relevant events. *See* Pet. 22; Amicus Br. of Richard D. Friedman 9, 12-13.

The State is thus wrong to say this case can be "meaningfully distinguished" from *Douglas v. Alabama*. BIO 30. In both cases, the witness took the stand and gave

basic answers about his identity, but then did not answer any questions about the content or circumstances surrounding his prior statement accusing the defendant of committing the charged offense. The State says *Douglas* is different because the witness there invoked a privilege not to testify, whereas here the witness simply could not remember anything. *Id.* But the right to confrontation is the defendant's right, not the witness's—and from the defendant's standpoint, the two scenarios are identical.

If anything, this case is worse. At least in *Douglas* the witness presumably knew while on the stand whether his prior statement should be credited (and therefore the jury could at least try to discern from the witness's demeanor while refusing to answer questions whether he should be trusted). Here, by contrast, even the witness himself did not know whether his prior statement was trustworthy and accurate. *See* Amicus Br. of NACDL 5-7.[1]

* * *

A final word: Even if every other box regarding this Court's certiorari criteria were not checked, the facts here are so compelling that this is the exceptional case where a palpable injustice should propel this Court to act. The most the State can say

[1] Amici Fern and Charles Nesson agree that the Court should grant certiorari and hold that the Confrontation Clause was violated here. They also suggest that the Court use this case to reconsider the testimonial approach enunciated in *Crawford.* That latter suggestion is unfounded. This Court's confrontation jurisprudence—both before and after *Crawford*—has always required an adequate opportunity for cross-examination when a witness takes the stand. *See Crawford*, 541 U.S. at 59 n.9 (citing *California v. Green*, 399 U.S. 149, 162 (1970)); *see also Davis*, 415 U.S. at 315. That longstanding doctrine is all that is necessary to interpret and apply here.

for this prosecution is that the trial court "found sufficient evidence to support the conviction." BIO 2. But the court's assessment focused on the very evidence at issue here: Mr. Coleman's statement to the police shifting blame to petitioner, which petitioner was powerless to challenge.[2] Time and again, this Court has warned that accomplices' statements that "shift[] responsibility and implicate[] the defendant as the triggerman" are "'presumptively suspect and *must* be subjected to the scrutiny of cross-examination.'" *See Lilly*, 527 U.S. at 131-32 (plurality opinion) (emphasis added) (quoting *Lee*, 476 U.S. at 541); *see also id.* at 130-34 (collecting other cases). Those teachings should not be in vain. Petitioner should not be forced to serve life in prison at hard labor without this Court's considering his case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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Respectfully submitted,

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[2] The State also references a few anonymous tips that the police supposedly received in the days following the murder, which are contained in the police file the prosecution produced during discovery. BIO 6-8. None of these anonymous accusations were introduced at trial or otherwise relied on by the courts below.