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

PETITION FOR A WRIT OF CERTIORARI

RODERICK WHITE, #723682
PRO SE PETITIONER
MAIN PRISON WEST, PINE-1
LOUISIANA STATE PENITENTIARY
ANGOLA, LA 70712

QUESTION PRESENTED

Whether the rule of *United States* v. *Owens*, 484 U.S. 554 (1988), as used by courts to admit testimonial hearsay from witnesses not amenable to cross-examination because of *genuine* and *complete* memory loss, is consistent with the Confrontation Clause as interpreted by *Crawford* v. *Washington*, 541 U.S. 36 (2004)?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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1 Petitioner has not been able to obtain access to the record, *see infra* note 2, and therefore cannot append the portion of the trial transcript where the trial court ruled on this issue. There is no question as to preservation, however, as the Court of Appeal's opinion clearly states: "Defense counsel objected to the playing of the video, arguing it violated the Confrontation Clause. . . . The trial court overruled the objection . . . ." Pet. 4a.

Federal Rules

Federal Statutes

Treatises

Petitioner respectfully prays that a writ of certiorari issue to review the decision of the Court of Appeal of Louisiana, First Circuit, denying his claim under the Confrontation Clause of the Sixth Amendment to the United States Constitution.

OPINIONS BELOW

The order of the Louisiana Supreme Court, No. 2018-KA-0379, denying discretionary review appears at Appendix B to the petition and the accompanying dissent appears at Appendix C; both have been designated for publication but not yet reported. The opinion of the Court of Appeal appears in Appendix A and is reported at *State* v. *White*, 17-1256 (La. App. 1 Cir. 2/16/18); 243 So. 3d 12.

JURISDICTION

The Louisiana Supreme Court entered final judgment against Petitioner on January 14, 2019. Pet. 8a. As such, this Court has jurisdiction under 28 U.S.C. § 1257(a) and Rule 13(1) of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .

STATEMENT OF THE CASE

Roderick White was convicted of shooting NaQuian Robinson to death and thereafter received the mandatory sentence for second-degree murder in Louisiana, life without parole. No forensic evidence linked the twenty-year-old White to the crime. Pet. 17a-18a.[2] White's DNA did not match the biological material taken from the victim's clothing and from underneath the victim's fingernails, both believed to come from the shooter as they struggled for the gun. *Id.* The getaway car contained no evidence linking it to White, despite the shooter having been himself shot, and therefore presumably having bled extensively. *Id.* at 17a, 19a. At least two witnesses failed to identify White as the perpetrator. *Id.* at 18a. No one—not a single witness—testified that White was the shooter or even involved.

A single witness, the getaway-car driver Brandon Coleman, did implicate White while exonerating himself in a videotaped statement to police shortly after the murder. *Id.* at 18a-19a. Some time after that, however, Coleman suffered a fall and brain injury severe enough to require extended, out-of-state rehabilitation. *Id.* at 3a-4a. At trial Coleman could recall neither (a) the crime itself nor (b) his statement to the police. *Id.* at 2a, 20a.

2 White was scheduled to review legal materials that he suspects are the record on March 26, 2019, or sixty-nine days into his ninety-day period for seeking certiorari and more than a year after he was required to brief his claims *pro se* to the Louisiana Supreme Court. The review was canceled for unspecified reasons, however, and White does not know when it will be rescheduled. All citations are therefore to the briefs written by counsel to the Louisiana First Circuit Court of Appeal, which briefs contain citations to the record.

The State never contested the genuineness or completeness of Coleman's memory loss. The trial court nevertheless allowed the State, over defense counsel's Confrontation Clause objection, to play Coleman's unsworn video statement during its case-in-chief. Pet. 20a. Then, inexplicably, the trial court excluded an affidavit from Coleman, executed post-statement but pre-brain injury, that renounced his inculpation of White. *Id.* The affidavit explained Coleman gave the earlier statements while intoxicated and under extreme pressure from the police—including from his father, a police officer.[3] *Id.* (citing Defense Proffer A-3).

The trial court's rulings left defense counsel in a very sorry situation indeed. He could not impeach the State's star witness intrinsically, as Coleman could recall neither the crime nor his subsequent, contradictory statements about it. *Id.* Defense counsel could not impeach Coleman extrinsically either; the trial court excluded Coleman's *sworn* testimonial hearsay in the affidavit even after allowing in his *unsworn* testimonial hearsay to the police. *Id.*

Defense counsel's cross-examination of Coleman, the State's sole witness against White was thus, as the Court of Appeal put it, "brief." *Id.* at 4a. It was also

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3 Coleman's father took his twenty-year-old son to the station to make the statement, was present in the interrogation room during filming, and spoke to Coleman off tape before Coleman began to cooperate. Pet. 19a. The video shows the father's colleagues threatening Coleman with a potentially capital offense (principal to first-degree murder) if he refuses to cooperate while dangling accessory after the fact for cooperation. *Id.* Coleman received only the accessory charge, which carries a sentencing range of zero to five years, with or without hard labor, or zero to one year after factoring in good-time diminution of sentence. *Id.* at 3a.

wholly ineffectual. The jury sent Roderick White away for life based solely on an out-of-court, unsworn, un-cross-examined, testimonial statement to colleagues of the twenty-year-old Coleman's police officer father, never knowing that Coleman had later renounced it in an affidavit.

On appeal White assigned a single error, asserting that "the trial court erred in allowing the jury to hear the videotaped statement Brandon Coleman gave to police . . . [and] violated the defendant's right to confrontation, because Mr. Coleman could not be effectively or meaningfully cross examined about his videotaped statement." Pet. 2a. In a published opinion, the Louisiana Court of Appeal for the First Circuit rejected White's federal Confrontation Clause argument citing *Crawford* v. *Washington*, 541 U.S. 36 (2004), and *United States* v. *Owens*, 484 U.S. 554 (1988). Pet. 5a-6a.

The Supreme Court of Louisiana entered an order summarily denying certiorari by a vote of five to two, with one justice assigning reasons. *Id.* at 8a. The dissent concerned itself with Louisiana's Confrontation Clause, evidently accepting *Crawford* and *Owens* as dispositive of White's federal claim. *Id.* at 9a-11a. This timely petition for a writ of certiorari limited to the federal question follows.

REASONS FOR GRANTING THE PETITION

Sometime in the future, after another perhaps forty or fifty years toiling under a hot southern sun in the fields of Angola, Roderick White will die in this prison for a crime there is no evidence, subject to cross-examination, that he committed. That palpable injustice may be no reason to grant this petition. But the lower courts are also confused concerning the pair of closely related Confrontation Clause issues on which White's life sentence hangs: (1) whether the rule of *United States* v. *Owens*, 484 U.S. 554 (1988), permits the introduction of a witness's testimonial, out-of-court statements when the witness has *complete* memory loss; and (2) whether *Owens* can be reconciled with *Crawford* v. *Washington*, 541 U.S. 36 (2004), in cases of *genuine* memory loss.

The lower courts' confusion is particularly problematic in light of medical advances that increase the frequency with which trial judges will confront witnesses like Coleman, whether as survivors of traumatic injury or dementia, or any of the many other disabled persons who in times gone by would have died or been institutionalized and ignored. The Court would make an efficient use of its scarce resources by settling this controversy now, after a number of courts have considered the issue but no consensus has emerged or seems to be emerging.

The Court would make a just use of its scarce resources by settling this controversy in White's favor, before the growing number of persons with genuine memory impairment become mere potted plants prosecutors put on the stand to introduce testimonial hearsay. Coleman's memory loss rendered him useless as a witness except for one purpose: to provide a vehicle for the admission of an *ex parte* police interrogation. That kind of "civil law mode of criminal procedure" was "the principal evil at which the Confrontation Clause was directed." *Crawford*, 541 U.S. at 50. The Court should once again weed its criminal procedure garden of this perennial evil.

Just resolution of this issue is especially important now in light of the trend towards prosecuting older matters to remedy past wrongs against vulnerable groups. The need to give members of these groups the justice they deserve must be balanced against the rights defendants deserve for a fair trial, of which the right to confrontation is the crown. Is a years-old statement by a victim or co-conspirator with a sweetheart deal, never sworn to or cross-examined and neither presently remembered by the accuser nor otherwise corroborated (worse still, in cases without a videotape, perhaps testified to only by an enemy), really enough to send someone away for life? In Louisiana, the present answer is yes. That the statement here was two-years old rather than twenty has no legal significance.

I. The lower courts, state and federal, are in conflict over whether the rule of *Owens* applies to witnesses with complete memory loss.

Three categories of memory loss are relevant to determining a witness' availability for confrontation and therefore the admissibility of that witness' hearsay. A witness may remember the incident but not remember a subsequent statement about it. The witness may not remember the incident itself but be able to remember a statement about it. Or, as in this case, the witness may not remember the incident or the statement. The first two categories are fairly termed partial memory loss, while the third constitutes complete or total memory loss.

In *Owens*, the witness suffered from partial memory loss of the second kind; he did not remember the incident, but he did remember making the statement sought to be introduced. 484 U.S. at 556. The Court has not squarely confronted a case involving complete memory loss, so lower courts faced with this categorically distinct problem have been forced to extrapolate from *Owens*, despite it having involved a memory impairment different not in degree but in kind.

Some courts, like the Louisiana courts in this instance, have treated complete memory loss the same as the partial loss in *Owens* and deemed an absolutely amnesic witness available for confrontation purposes, writing, for example: "Although the factual scenario in *Owens* is distinguishable from this case because the witness in *Owens* remembered making his prior identification, . . . a witness

appears for cross-examination at trial despite her inability to recall the incident and making her prior statements." *State* v. *Delos Santos*, 238 P.3d 162, 176 (Haw. 2010); *accord State* v. *Real*, 150 P.3d 805, 808 (Ariz. 2007) (rejecting "complete lack of memory" distinction to *Owens*).[4] But those rulings have also often split the courts and triggered lengthy dissents. *Delos Santos*, 238 P.3d at 182-201 (Acoba, J., concurring in the judgment only); *Price*, 146 P.3d at 1188 (Alexander, C.J., dissenting); *Vannote*, 970 N.E.2d at 83-86 (Cook, J., dissenting).[5] And the reasoning employed by the majority can be dubious, relying on a purposive approach to the Confrontation Clause that *Crawford* rejected in favor of historical analysis. *Price*, 146 P.3d at 1192 ("When analyzing the three purposes of the confrontation clause set forth in *Green*, it becomes clear that a witness testifying to a lapse in memory can satisfy those purposes.").

Other courts, including at least two Louisiana Courts of Appeal, *State* v. *Moore*, No. 10-0314 (La. App. 4 Cir. 10/13/10), 57 So. 3d 1033, 1038; *State* v.

4 *See also State* v. *Price*, 146 P.3d 1183, 1186 (Wash. 2006) (witness shrugged or could not remember when asked about prior statements and underlying event); *Johnson* v. *State*, 878 A.2d 422, 428 (Del. 2005) (reluctant witness claimed memory loss of both contents of overheard conversation and prior statements concerning what she overheard); *State* v. *Manuel*, 685 N.W.2d 525, 532 n.7 (Wis. Ct. App. 2004); *People* v. *Vannote*, 970 N.E.2d 72, 75, 78-80 (Ill. App. Ct. 2012) (witness testified he could not remember underlying event or prior statements about it).

5 Petitioner's institution provides access to Louisiana and federal cases only. This has limited his ability to explore fully the split among state courts of last resort. The cases cited from other states were gathered from a treatise and generous law students, including the Spring 2019 research assistants of Professor Katherine Mattes at Tulane University School of Law, mailed copies to him, but he has not been able to complete a fifty-state survey.

Williams, 04-608 (La. App. 5 Cir. 11/30/04), 889 So. 2d 1093, 1100-02, have perceived a distinction between partial and complete memory loss and tied determination of the witness' availability for confrontation to the degree of memory loss. *Goforth* v. *State*, 10-KA-01341-SCT (¶¶ 25, 53-54), 70 So. 3d 174, 179 (Miss. 2011); *see Cookson* v. *Schwartz*, 567 F.3d 657, 651 (7th Cir. 2009) (involving a witness who "did not remember the statements but *did* remember—and was available to be cross-examined on—" the underlying event (emphasis in original)); *United States* v. *Ghilarducci*, 480 F.3d 542, 549 (7th Cir. 2007) (noting witness "did not claim a total loss of memory regarding the events"). *Cf. Preston* v. *Superintendent*, 902 F.3d 365, 383 & n.15 (3d Cir. 2018) (involving no "answer [to] any substantive questions on cross-examination"); *United States* v. *Spotted War Bonnet*, 933 F.2d 1471, 1474 (8th Cir. 1991) ("Physical[] presen[ce] in the courtroom should not, in and of itself, satisfy the demands of the Clause."); *In re N.C.*, 105 A.3d 1199, 1214 (Pa. 2014) (non-responsive witness).

As explained in Part III below, Petitioner submits that courts perceptive of a difference between partial and complete memory loss have the better rule, even if they also appear to be in the minority according to the materials at Petitioner's disposal. *See State* v. *Holliday*, 745 N.W.2d 556, 566-67 (Minn. 2008) (collecting cases); *State* v. *Real*, 150 P.3d 805, 807 (Ariz. 2007) (same); *Woodall* v. *State*, 336

S.W.3d 634, 644 (Tex. Crim. App. 2011) (same). Petitioner's point here, however, is descriptive rather than normative: there exists a wide and mature conflict on the point, no consensus seems to be emerging, and the various authorities are thus ready for, and require, final arbitration by this Court at this time.

II. State courts of last resort are in conflict over whether *Owens* can be reconciled with *Crawford* when a witness' memory loss is genuine.

The witness in *Owens*, like the witness in this case, had a medically documented reason for being unable to recall the relevant material. *United States* v. *Owens*, 484 U.S. 554, 556 (1988); Pet. 3a-4a. In the absence of some intervening change in law, *Owens* would therefore dispose of any argument for a difference between cases involving feigned memory loss and those where the memory impairment is demonstrably genuine.

At least one state supreme court believes *Crawford* was such an intervening change. *Goforth* v. *State*, 10-KA-01341-SCT (¶¶ 25, 50-54), 70 So. 3d 174, 179 (Miss. 2011). Other courts clearly disagree. *State* v. *Davis*, 466 S.W.3d 49, 63, 69 (Tenn. 2014) (rejecting genuine-versus-feigned distinction under both rules of evidence and Confrontation Clause); *see State* v. *Delos Santos*, 238 P.3d 162, 176 (Haw. 2010) (allowing hearsay when witness' memory loss was probably genuine from excessive drinking on night in question); *Holliday*, 745 N.W.2d at 566-67 (same, noting "regular ecstasy use possibly affected [witness'] ability to

remember"); *Woodall*, 336 S.W.3d at 644 (same, car accident caused memory loss); *Real*, 150 P.3d at 807 (same, DUI expert could not recall administering a specific field sobriety test, presumably from the ordinary passage of time).

As further explained in Part III, Petitioner believes the sea change wrought by *Crawford* has swept *Owens* away. But as above, Petitioner's point here is merely descriptive: there can be little disputing that the lower courts require guidance on the effect of *Crawford* on *Owens*.[6]

III. The state and federal courts are opposed in result when a witness' memory loss is genuine.

This genuine-versus-feigned memory loss split is even wider than it appears at first glance. "A well-settled body of case law holds that where a declarant's memory loss is contrived" testimonial hearsay is admissible as a prior inconsistent statement under Federal Rule of Evidence 801. *United States* v. *Knox*, 124 F.3d 1360, 1364 (10th Cir. 1997). But "a prior statement should not be admitted if the witness' current memory loss regarding that statement is genuine." *United States* v. *Mornan*, 413 F.3d 372, 379 (3d Cir. 2005); *accord United States* v. *Hadley*, 431

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6 For the reasons explained in Part III *infra*, those states the evidence law of which conducts a genuine-versus-feigned memory loss inquiry for purposes of their analogue to Federal Rule of Evidence 801(d)(1)(A)'s hearsay exclusion for prior inconsistent statements will be in effective conflict with these other authorities. Petitioner does not have a means to research this issue, however, which may be masking the full extent of the conflict.

F.3d 484, 512 (6th Cir. 2005); *United States* v. *DiCaro*, 772 F.2d 1314, 1323 (7th Cir. 1985); 4 WEINSTEIN'S EVIDENCE § 801(d)(1)(A)(04), at 801-98.

Thus in many, perhaps most, federal prosecutions involving genuine memory loss (both before and after *Owens*) the federal courts have had no need to reach the Confrontation Clause issue because the statement, if offered as a prior inconsistent statement, was not admissible as a matter of the Rules.[7] At least as a practical matter, therefore, whether a defendant finds himself in federal court or state court may determine whether testimonial hearsay, the core concern of the Confrontation Clause, is admissible against him. Such dramatic jurisdictional (and, as noted *supra* note 6, possibly geographical) variation undermines the consistency ordinarily desired when core constitutional interests are implicated.

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7 A memory-loss-related Confrontation Clause issue can arise in just four of the eight potentially relevant hearsay carve-outs under the Rules: (i) the exclusion for prior inconsistent statements, FED R. EVID. 801(d)(1)(A), to which this genuine-versus-feigned distinction applies, and (ii) the exclusion for prior identifications, *id.* R. 801(d)(1)(C), the exception for statements against interest, *id.* R. 804(b)(3), and the exception for statements of personal or family history, *id.* R. 804(b)(4), in which this distinction is not made. As for the other exceptions and exclusions, almost all Rule 803 evidence will be non-testimonial and its exception firmly rooted, meaning there can never be a Confrontation Clause violation. The Rule 804 exception for former testimony requires both unavailability and a prior opportunity for cross-examination, *id.* R. 804(b)(1), meaning that rule and the Clause have the same requirements. That rule's exceptions for dying declarations and forfeiture by wrongdoing are immune from Confrontation Clause scrutiny. *Giles* v. *California*, 554 U.S. 353, 358-59 (2008). The exclusion for "consistent with the declarant's testimony" assumes the witness has sufficient memory to give testimony on the underlying event, another statement, or both. FED R. EVID. 801(d)(1)(B). Perusal of federal evidence cases reveals that the exclusions for prior inconsistent statements and prior identifications are used much more often than the exceptions for statements against interest and of personal or family history. Thus there already exists a genuine-versus-feigned memory loss test in a great number of federal cases.

IV. The Supreme Court of Louisiana has wrongly decided an important Confrontation Clause issue that has not been, but should be, settled by this Court.

The only evidence supporting Roderick White's life-without-parole sentence is the drunken statement of a twenty-year-old Brandon Coleman, made while sitting next to his police officer father, and only after they spoke privately and Coleman had been threatened with a capitalizable charge. Pet. 19a-20a. We have no idea what went on before the elder Coleman's colleagues-*cum*-chums turned on the tape.[8] We have no idea what happened while the tape was stopped so Coleman could speak privately with his father.[9] And we have not a single answer to a single other question except those the police chose to elicit unsworn, un-cross-examined, and now forever lost in the tangle of Coleman's damaged neurons.

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8 And they must have been quite chummy. Although the Court of Appeal's opinion states "the police brought Mr. Coleman in for questioning," Pet. 2a, Petitioner's counseled brief to that court states "Mr. Coleman's father is a police officer, so the police officers investigating this shooting contacted Mr. Coleman's father who brought Mr. Coleman to police headquarters to give a statement," *Id.* 18a. Rarely is a murder suspect's parent given advanced warning of an interrogation for a potentially capital charge, perhaps because some less-well-connected, and therefore less-confident-of-a-deal, parents might assist a child to flee.

9 This is in contrast to the situation in *Owens*. There the defendant could at least question the witness concerning the circumstances under which he made the proffered statement, since the witness remembered making it. *United States* v. *Owens*, 484 U.S. 554, 556 (1988). If the police had beaten the witness with hoses or promised him riches beyond avarice or simply suggested whom to identify, the *Owens* witness would have had memory of it. Under the theory of the adversarial system, the jury could execute its truth-seeking function by observing the witness's demeanor as defense counsel questioned him concerning such possibilities.

A murder is a terrible thing, but so too is an unjust—and factually baseless—sentence to die in prison. Nothing can remedy that first tragedy, though justice may salve it. Instead, Louisiana has chosen to compound the tragedy by imprisoning Roderick White till death based on "evidence" that would make Sir Walter Raleigh's judges blush the color of their crimson robes.

A. The Historical Treatment of Memory-Impaired Witnesses

"The Constitution's text does not alone resolve this case. . . . We must therefore turn to the historical background of the Clause to understand its meaning." *Crawford* v. *Washington*, 541 U.S. 36, 42-43 (2004). Unfortunately, Petitioner's institution does not (and to be reasonable, cannot as a practical matter) provide the resources necessary for such an analysis, *viz*., Framing-era cases, dictionaries, treatises, orations, and their historical underpinnings in the sources and accounts of the common law in England. *See id.* at 43-56, 60.

The difficulty is compounded by Petitioner's limited educational attainment (he lacks even a GED), which makes it difficult for him to conceive how historical sources, both medical and legal, would have described traumatic brain injuries and other instances of genuine memory loss in ages gone by. He imagines as well that many such instances were resolved as issues of competency, which modern law has

significantly liberalized to unshackle witnesses disabled by the common law's many prejudices, further complicating the research project.

In light of the foregoing impediments, Petitioner respectfully requests that the Court undertake at least a cursory inquiry into this part of the Confrontation Clause analysis on its own or appoint *amicus* to research it. Petitioner's poverty and limited education should not prevent him from properly asserting a meritorious claim on which his death-in-prison sentence depends.

B. Louisiana Has Failed To Resolve *Crawford*'s "Footnote 9 Problem" Correctly.

The Mississippi Supreme Court, *Goforth* v. *State*, 10-KA-01341-SCT (¶ 51), 70 So. 3d 174, 179 (Miss. 2011), and the Seventh Circuit, *Cookson* v. *Schwartz*, 556 F.3d 647, 651 (7th Cir. 2009), have both recognized that the proper resolution of cases such as this turns, at least as a matter of doctrine, on the proper interpretation of two sentences in *Crawford* v. *Washington*, 541 U.S. 36, 59 n.9 (2004). In the second paragraph of footnote 9, the Court wrote: "Finally, we reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." Two sentences later: "The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it."

There can be little dispute that Coleman was unable to "defend or explain" his prior statement. There can also be little dispute that, reading the two sentences together with the interstitial sentence concerning a declarant's repetition of out-of-court statements, the Court clearly had in mind a witness able, unlike Coleman, to testify to *something* factual.

But setting those two observations to the side and engaging on its own terms Louisiana's approach, which simply concatenates the two sentences and ignores their potential for conflict, it is still nonsensical to claim a declarant "appears for cross-examination at trial" when he cannot answer a single question about the event in question or his prior statements about it. While it may be fair to say a witness who simply shows up, is sworn in, and sits on the stand without offering relevant information has "appear[ed]," that is not the question. He must "appear[] *for cross-examination*." A pianist paid "to appear for a recital" would cheat his ticket holders if he showed up, bowed, sat down, and then announced he had forgotten all the music.[10]

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10 For similar reasons, Louisiana's reliance on *Owens' dictum* that "[o]rdinarily, a witness is regarded as 'subject to cross-examination' when he is placed on the stand, under oath, and responds willingly to questions" is misplaced. *United States* v. *Owens*, 484 U.S. 554, 561 (1988). The *dictum*, stretched to cover the cases Louisiana wishes, proves too much; it would deem "available for cross-examination" a witness who suffers a psychotic break on the stand during or after direct and "willingly responds" to cross with a tossed word salad. That may be an instance out of the "ordinar[y]," but so too should be the putting of a witness with no usable memory on the stand.

Somewhat more closely related to the issue at hand, a debtor ordered "to appear for examination" who shows up, is sworn in, and sits on the stand only to respond "No comment" to every single question about the location of his assets would undoubtedly be held in contempt. Yes, he "appear[ed]," but that would not save him, because no court is likely to conclude he "appear[ed] for examination."

The fact that mere physical appearance at trial is insufficient finds substantial support in the Court's earlier cases. "Confrontation means more than being allowed to confront the witness physically." *Davis* v. *Alaska*, 415 U.S. 308, 315 (1974). That is, "'[t]he opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers.'" *Id.* at 315-16 (quoting 5 J. WIGMORE, EVIDENCE § 1395, at 123 (3d ed. 1940)). Thus, a witness who responds to every question with the assertion of a privilege is not available for confrontation. *Douglas* v. *Alabama*, 380 U.S. 415, 419-20 (1965).

Yet "I cannot provide that information" (because of memory loss) and "I will not provide that information" (because of a privilege, such as in *Douglas*) cannot be meaningfully distinguished. Neither contains information useful to the trier of fact. Neither is an "immediate answer[]" in the sense of "the satisfying of a

question, demand, call, or need." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 51 (11th ed. 2003) (distinguishing "answer" from "response, reply, rejoinder, retort"). To the extent Louisiana wishes to broaden the definition of "answer" to include "I cannot remember," which is to say, to define "answer" as any utterance in reaction to a question regardless whether the utterance contains useful information, the argument proves too much. Such a definition would encompass "I decline to answer based on the privilege against self-incrimination," or gibberish like "Yabba Dabba Do" for that matter.

No court has been able to explain, or could explain, why it should treat hearsay from a witness absolutely unable to provide useful information differently from a witness absolutely unwilling to do so. The bottom line is the same. If anything, a witness forever *unable* to provide information is a far less reliable vehicle for the admissions of hearsay, because the truth is no longer known even to him in the private recesses of his mind, than one who knows the truth but, at least at the moment and without immunity, refuses to speak it.

C. Louisiana's Approach to Witnesses with Memory Loss Is in Tension with the Remainder of Confrontation Clause Jurisprudence.

The Court's Confrontation Clause cases stand for one central, discernable principle: Defendants deserve a meaningful opportunity for effective cross-examination of their accusers. *E.g.*, *California* v. *Green*, 399 U.S. 149, 159 (1970).

A putative accuser unable to answer any questions—where he was, with whom he was, how he was perceiving what was, what he saw or said, what he was thinking and doing while seeing or saying (and why)—about the matter *sub judice* cannot be cross-examined effectively because he cannot give useful testimony at all, whether on direct or on cross-examination. There was no more an opportunity to cross-examine Coleman than there was to cross-examine the videotape player through which the state introduced the only accusatory information offered at trial.

The dissent in *Owens* concerned itself with metaphysical speculations about the nature of personhood, questioning whether a person without present memory of an event is really the same person as the one who once possessed, and spoke about, the memory. *United States* v. *Owens*, 484 U.S. 554, 566 (1988) (Brennan, J., dissenting). The Court need not resolve this twist to the Ship of Theseus problem, whither permanence in a world of change. Unlike the witness in *Owens*, who could at least testify to his prior statement, Coleman's memory loss was complete. Perhaps he was the same Brandon Coleman as before the injury. But the same or not, he was not a *witness*—"one that gives evidence." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1439 (11th ed. 2003). He was a mere conduit for hearsay.

Thus, while it is true that "[t]he 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," a witness who gives no usable testimony at all is not simply "marred by forgetfulness." *Delaware* v. *Fensterer*, 474 U.S. 15, 21-22 (1985) (per curiam). He is entirely defined by it. A painting scribbled upon is a painting "marred by ink." A painting burned to ash is not "marred by fire," but a painting no more.

D. Petitioner's Rule Is Workable and Produces Sensible Results, While Louisiana's Approach Requires Legalisms and Permits Absurd Outcomes.

As demonstrated by the cases cited *supra* Part I, courts can readily distinguish between cases of complete and partial memory loss. As noted *supra* Part III, courts are already routinely tasked with determining whether a witness' alleged memory loss is genuine or feigned, and the further progress of medicine along with some common sense, as in the case of the DUI expert who had probably performed hundreds of tests in the meantime and had no incentive to lie, have proven sufficient to the task.[11]

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11 Petitioner leaves to the discussion of more qualified legal technicians issues such as the parties' respective burdens, the standard of proof, the notice, if any, required, and other determination-related procedural matters, most of which can probably be imported wholesale from the federal jurisprudence governing feigned-versus-genuine determinations under Federal Rule of Evidence 801(d)(1)(A).

The "genuine-versus-feigned" distinction makes intuitive sense when judged against the core concern of the Confrontation Clause: the use of testimonial hearsay as the substantive evidence to convict a person. Testimonial hearsay from a witness with genuine memory loss can only be offered for its truth; there is nothing in the witness' blank mind to impeach. Testimonial hearsay from a witness with feigned memory loss can be offered for other than its truth, however, because it reveals the witness to be a liar.[12]

So too does the "complete-versus-partial" distinction make intuitive sense. Memory loss great or small revealed by cross-examination, so long as it is not complete, assists the trier of fact to determine the reliability of the witness' account. It can be self-impeaching, as a very poor memory might be, or self-bolstering, as the forgetting of minor details—a common occurrence—might tend to suggest the witness is being honest and not making up too-perfect a story.

Complete memory loss, in contrast, tells a jury nothing other than that there is some present neurological misfire in the witness' brain. While that may be self-impeaching in theory, to impeach a witness who has given no accusatory testimony is useless; there is no story to believe or disbelieve. No story, that is, *unless* the state pursues that useless impeachment using the "guise of cross-examination" to

12 A witness with feigned memory loss must still give some accusatory testimony for the fact he is a liar to be useful to the trier of fact.

put an accusation before the jury in the form of testimonial hearsay that though "not technically testimony . . . may well have been the equivalent in the jury's mind of testimony." *Douglas* v. *Alabama*, 380 U.S. 415, 419-20 (1965). That is not only bad faith; the clearly established law of this Court holds that a witness cannot "be cross-examined on a statement imputed to but not admitted by him." *Id.* at 419.

The absurdity of Louisiana's approach can be visualized when one considers how the cross of the Coleman that now is would contrast with the cross of the Coleman he once was. Today, a piteous creature, face locked in a rictus of pain, arms seized in a tetanus of agony, he sweetly, meekly—and entirely honestly—can say, gee willikers Mr. DA, "[a]fter September, I don't remember nothing." Pet. 4a. How could such a sweet boy, probably looking terrified on the video of the interrogation, have been lying to those nice police officers before?

Perhaps had the jurors seen the Brandon Coleman who lied to save his own skin and used Roderick White's name to settle a street score, had they seen the shifty eyed miscreant with a short temper who could never keep his stories straight, had they seen him swagger up to the stand, maybe wink at his "ol' lady," and then promptly wilt under the pressure of sustained cross-examination, they would have

seen the video "confession" for what it was: the lies of a little boy being guided out of a life-threatening logjam by his police officer father.

And he would have wilted under cross-examination. When asked "What did you and your father discuss off camera?" and the old Coleman evasively responded "Just about me telling the truth," defense counsel could have pointed to the length of time the camera was off to suggest surely there must have been something more. Also, "if it was just about telling the truth, why did you have to go off camera?" And by the way, "Why did you need to be reminded to tell the truth, have there been times you didn't?" "No? Never?" "Oh ok, never when it was important—please give us an example of when you've lied before but it wasn't important."

"Now Mr. Coleman, did you know the detectives, your father's friends?" "Oh, you did?" "So what did y'all discuss before the camera came on?" "Nothing?" "But there are no pleasantries on tape, so you're saying despite knowing them, there was no small talk at all beforehand? Not even with your father?" "Oh, so there was, but nothing important—please tell us exactly what you discussed so the jurors can judge its importance for themselves." "Your life was on the line, but you can't remember what you talked about. So how often do you have memory problems like this?"

And so on. Louisiana says the above hypothetical cross-examination and what actually happened are equivalent for purposes of the Constitution. They are not. The legal fictions do not end there, however. Louisiana's approach also requires the double-speak that a witness may be "unavailable" for purposes of the rules of evidence but nonetheless "available" for purposes of the Confrontation Clause, an unseemly legalism, no matter how adroitly finessed by Justice Scalia in *Owens*. *United States* v. *Owens*, 484 U.S. 554, 563-64 (1988); *e.g.*, *State* v. *Toohey*, 816 N.W.2d 120, 129 n.2 (S.D. 2012) (quoting Rule 804(a)'s rule that "lack of memory of the subject matter of his statement renders witness unavailable" before stating that "[y]et memory loss may not render a witness 'unavailable' in the constitutional sense").

E. The Invisible Hand in Many Memory Loss Cases Is Child Abuse, Which Is Better Addressed Openly and Distinctly Rather than by Distorting Confrontation Clause Jurisprudence.

Many of the cases Petitioner has found dealing with memory loss involve a child victim of sexual abuse who, because of tender years or trauma or fear caused by the abuse (or all three), cannot give the Platonic ideal of testimony. *E.g.*, *State* v. *Kennedy*, 05-1981 (La. 5/22/07), 957 So. 2d 757, 775-78, *rev'd on other grounds*, 554 U.S. 407 (2008). These cases shock the conscience and every effort should be made to prosecute them vigorously, including allowance for the fact that,

if we are to protect young children, we must deal with young children as witnesses. Their testimony will necessarily be less precise, they will need more leading, and innovations should be encouraged that soothe the fear and anxiety they feel in a strange location with strange people asking uncomfortable questions. There is no need to distort Confrontation Clause jurisprudence to ensure the prosecutability of offenses against children, however, because the vast majority of children are, if old enough to be competent to testify, capable of giving some meaningful testimony. Such witnesses are therefore available for confrontation purposes because they do not satisfy Petitioner's twin requirements of genuine and complete memory loss for unavailability.

For example, the memory loss in *Kennedy* was by all appearances a genuine product of the victim's young age, but it was hardly complete. She "was able to answer the vast majority of the questions asked of her." *Id.* The defendant tried to allege "[t]he fact that she could not remember meeting with specific people during the investigation and that she did not remember making the first videotape" rendered her unavailable for cross-examination. *Id.* Those few lapses, the Louisiana Supreme Court held, "d[id] not render her 'unavailable' for purposes of the statute or the constitution." *Id.* *Kennedy* is thus entirely defensible on its facts,

but its rule is being applied in cases such as White's, *see State* v. *White*, 17-1256 (La. App. 1st Cir. 2/6/18), 243 So. 3d 12, 15-16, where it is not.

The Court should leave for another day, in another case, what if any effect the reinvigorated Confrontation Clause should have when dealing with very young witnesses. Roderick White is accused of murder, and if the witness against him might be mistaken for an innocent child today, no one would have made that mistake seeing him brandish guns and deal drugs during the time in question, long before an admittedly tragic injury put him back in our sympathies.

CONCLUSION

The Framers expressly rejected the prosecution's effort in this case to substitute a police interrogation—a civilian, *ex parte*, inquisitorial procedure—for the live testimony of a witness with personal knowledge, subject to cross-examination in the presence of a jury. That the state went to the trouble of hauling Coleman in from rehab in Florida to sit there, unable to answer a single meaningful question, shows the extent to which prosecutors will *overtly* seek an unjust conviction.

The opportunity for mischief and conspiracy that witnesses like Coleman open up for prosecutors, indeed, all politicians, to pursue *covertly* would delight the dread Lord Jeffreys or Torequmada but should give Americans citizens, black

and white, poor and rich, ordinary and powerful, accused of murder and accused of any other offense, pause. However much less evil testimonial hearsay may seem in a case with a videotaped statement, the rule the Court ultimately adopts will apply just the same to police "he told me so" testimony, which there can be no doubt lies at the heart of evidence inadmissible under the Sixth Amendment.

Petitioner respectfully requests that the Court grant this petition for a writ of certiorari and reverse the judgment below.

Respectfully submitted:

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