No. 18-8862

In The

Supreme Court of the United States

RODERICK WHITE,

Petitioner,

v.

LOUISIANA,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeal Of Louisiana, First Circuit

BRIEF OF RICHARD D. FRIEDMAN, AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF *AMICUS CURIAE*[1]

I am a legal academic, and since 1982 I have taught Evidence law. Much of my academic work has dealt with the confrontation right, and since 2004 I have maintained The Confrontation Blog, http://confrontationright.blogspot.com, to report and comment on developments related to that right. In *Crawford v. Washington*, 541 U.S. 36 (2004), I was author of a law professors' *amicus* brief, which was discussed in oral argument. In 2005-06, I successfully represented the petitioner in *Hammon v. Indiana* (decided together with *Davis v. Washington*, 547 U.S. 813 (2006)), and in 2009-10 I successfully represented the petitioners in *Briscoe v. Virginia*, 559 U.S. 32 (2010). I have submitted amicus briefs to this Court on behalf of myself in several prior Confrontation Clause cases, both on the prosecution side and on the defense side, often making some points favoring one side and some favoring the other. In accordance with my usual practice, I am submitting this brief on behalf of myself only; I have not asked any other person or entity to join in it. I am doing this so that I can express my own thoughts, entirely in my own voice. I am entirely neutral in this case, in the sense that my interest is not to promote an outcome good for one

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[1] *Amicus* has given the parties more than ten days' notice of his intention to file this brief, and the parties have consented to the filing. Part of the cost of preparing and submitting this brief was paid for by research funds provided by the University of Michigan Law School to *amicus* and under his control. The brief does not necessarily reflect the views of that Law School or of any of its faculty other than *amicus*. Except as just noted, no persons or entities other than the *amicus* made any monetary contribution to the preparation or submission of this brief, which was not authored in any part by counsel for either party.

party or the other, or for prosecutors or defendants as a class. Rather, my interest, in accordance with my academic work, is to promote a sound understanding of the confrontation right, one that recognizes the importance of the right in our system of criminal justice and at the same time is practical in administration and does not unduly hamper prosecution of crime. In this brief, I support the petition for *certiorari*, brought by a criminal defendant, because I believe that this is an ideal case for the Court to begin a necessary re-examination of the Confrontation Clause implications of a prosecution witness's inability or refusal to answer material questions at trial. At the same time, I do not believe that the law in this area will ever reach an entirely satisfactory state unless the Court reconsiders the restrictive doctrine of forfeiture it enunciated in *Giles v. California*, 554 U.S. 353 (2008).

FACTUAL BACKGROUND

This is the type of case that should make any reasonable observer – from layperson to Confrontation Clause maven – react sharply, "That can't be the law. And if it is, it has to be changed." Only this Court can ensure that the law is not as the Louisiana Court of Appeals stated it in this case, and this is a perfect case in which to begin to eliminate the conditions that made such an intolerable decision possible.

The Petitioner, Roderick White, was convicted on murder charges. The only evidence identifying him as the gunman, or placing him at the scene altogether, was a videotaped statement by Brandon Coleman, made to police officers. Coleman was not under oath

when he made the statement, and White did not then have an opportunity to cross-examine him. Coleman took the witness stand at White's trial, but in the intervening months he had suffered an accident that caused a catastrophic memory loss. As a result, Coleman had no memory either of the homicide or of his statement. Nevertheless, over White's Confrontation Clause objection, the trial court admitted the videotaped statement. It did *not* admit an affidavit that Coleman signed, before his accident, retracting the substance of that statement and asserting that it was the product of coercion. White was convicted at trial, and sentenced to life imprisonment at hard labor, without benefit of probation, parole, or suspension of sentence. The Louisiana Court of Appeals affirmed the conviction, and the Louisiana Supreme Court, over the dissenting votes of two justices, denied review. The Petition in this case followed.

SUMMARY OF ARGUMENT

Crawford v. Washington, 541 U.S. 36 (2004), reclaimed the meaning of the Confrontation Clause, recognizing that it sets forth not a substantive rule designating certain species of evidence as reliable but a categorical procedural right that prosecution witnesses testify face to face with the accused, subject to cross-examination, rather than by any other means. The lower courts are divided in implementing an aspect of *Crawford* that is critical to this case, its assertion that there is no Confrontation Clause problem "when the declarant appears for cross-examination at trial," or, put another way, when the declarant "is present at trial to defend or explain" the statement. 541 U.S. at 59 n.9.

In particular, some courts recognize that the Clause's guarantee of "an *opportunity* for effective cross-examination," *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985), is precluded in some circumstances by memory loss on the part of the witness. Others, such as those in this case, appear to believe that so long as the witness is able to appear and take an oath that is sufficient. The Court should resolve this dispute, clarifying that the latter position makes a mockery of the Confrontation Clause. This is a particularly good case in which to do so, because here there can be no serious contention that the accused benefitted from showing the witness's lack of memory as of the time of trial. The witness lost his memory suddenly as the result of an accident that occurred between the making of the statement and the trial. The memory loss has no bearing whatsoever on the credibility of the witness in making the prior statement, but it provides a complete shield against any meaningful cross-examination.

The case is therefore materially different from *United States v. Owens*, 484 U.S. 554 (1988), in which the witness was the victim of the assault and the cause of the memory loss was the assault itself; there, the witness's bad memory may have cast some doubt on the credibility of the statement.

A candid view, though, recognizes that in *Owens* as well there was very substantial impairment of the accused's ability to cross-examine. This does not mean that the result of *Owens* was wrong. Under a sound doctrine, the trial court in that case should have been able to determine that the cause of the memory loss was the accused's own wrongdoing, and that therefore he forfeited the confrontation right. At the moment, such a sensible resolution appears to be precluded by this Court's decision in *Giles v.*

California, 554 U.S. 353 (2008). This case does not present a good opportunity for re-examining *Giles*, but it would help in the development of a stable, comprehensible, and reasonable doctrine of the Confrontation Clause if the Court recognized that in this respect (among others) *Giles* constitutes a significant impediment to achieving that goal.

More broadly, that goal will not be fully achieved until the Court recognizes a general point that is reflected in traditional hearsay law, that the ability of an accused to cross-examine a witness with respect to a prior statement is in most circumstances severely impaired if the witness does not assert the substance of that statement in direct examination. Deciding this case does not require transformation of the law in this area. But, because its facts are so extreme and the result so intolerable, this case provides an ideal vehicle to begin re-examination of the unsatisfactory state of the law in this corner of confrontation doctrine.

ARGUMENT

I. THE COURTS ARE DIVIDED AS TO WHETHER THERE IS A PER SE RULE THAT MEMORY LOSS DOES NOT PRECLUDE AN ADEQUATE OPPORTUNITY FOR CROSS-EXAMINATION.

Crawford v. Washington, 541 U.S. 36 (2004), transformed the law of the Confrontation Clause, properly restoring its place as protecting a central procedural feature of our criminal justice system. The Clause does not attempt to sort out good evidence from bad. Rather, it provides a categorical procedural rule on how the testimony of prosecution witnesses must

be given: under oath, subject to cross-examination, in the presence of the accused, and, if reasonably possible, in the presence of the trier of fact as well. Thus, if an out-of-court statement is testimonial in nature – that is, the type of statement that a witness makes – it may not (putting aside cases of forfeiture and of dying declarations) be introduced against an accused unless the witness is unavailable to testify at trial and the accused has had "an adequate opportunity to cross-examine." *Crawford*, 541 U.S. at 57.

And what if, as in this case, the accused has had no pre-trial opportunity for confrontation but the witness – the person who made the testimonial statement – takes the stand at trial? The *Crawford* Court said:

> 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. See *California* v. *Green*, 399 U. S. 149, 162 (1970). . . . The 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.

As the Petition demonstrates, the lower courts have divided over the meaning of this passage. The Louisiana courts have sided with those that have held in effect that there is a *per se* rule that if the witness comes to the stand and takes the oath, then (at least, presumably, if the witness does not refuse to testify on grounds of privilege, *see Douglas v. Alabama*, 380 U.S. 415 (1965)), the accused shall be deemed to have had an adequate opportunity for cross-examination – no matter how profound a memory loss the witness may have suffered. *E.g.*, *Woodall v. State,* 336 S.W.3d 634,

642-43 (Tex. Crim. App. 2011); *State v. Holliday,* 745 N.W.2d 556 (Minn. 2008); *State v. Price*, 158 Wash.2d 630 (2006).[2]

Other courts disagree. *E.g., Cookson v. Schwartz*, 556 F.3d 647, 651 (7th Cir. 2009) (appearance is "not dispositive" given the "defend or explain" language of *Crawford*); *Goforth v. State,* 70 So.3d 174, 186 (Miss. 2011) (holding that accused "simply had no opportunity to cross-examine" witness who (as in this case) after making a testimonial statement had an accident causing catastrophic memory loss). They recognize that the accused has a right to "an *opportunity* for effective cross-examination," *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985); see also *California v. Green*, 399 U.S. 149, 161 (1970) (cross-examination that will "afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement"). And memory loss can preclude that opportunity.

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[2] Many of the cases taking this view involve statements by young children. *E.g., Price*, *supra; Bush v. Mitchell*, 329 F.3d 496 (6th Cir. 2003). These should not dominate consideration of the question presented by this case. In most cases, statements by very young children are not testimonial, so no Confrontation Clause problem is presented. *Ohio v. Clark*, 135 S. Ct. 2173 (2015). In fact, *amicus* has contended that very young children should not be considered capable of being witnesses for Confrontation Clause purposes at all. They are, however, sources of potentially useful evidence, and the accused should have some right of examination with respect to them. But that right should be measured by the Constitution's Due Process Clause, rather than by the Confrontation Clause, and the examination need not be either by an attorney or in court. Richard D. Friedman & Stephen J. Ceci, *The Child QuasiWitness*, 82 U. Chi. L. Rev. 89 (2015).

II. THERE WAS CLEARLY NO GENUINE OPPORTUNITY FOR CROSS-EXAMINATION IN THIS CASE. FAILURE OF THE LOUISIANA COURT OF APPEALS TO RECOGNIZE THIS INDICATES THE NEED FOR THIS COURT TO CLARIFY THE GOVERNING DOCTRINE.

This is an extreme example of a case in which memory loss precludes an opportunity for cross-examination, in two respects. First, the witness had no memory either of the underlying incident or of the testimonial statement he made with respect to it. Second, the loss of memory here was not a gradual matter, leading to a possible inference that the witness may have had significant memory loss by the time of the pre-trial statement. Rather, the witness suffered a catastrophic memory loss as a result of an unrelated accident between the time he made his testimonial statement and the time he took the witness stand at trial.

Of course, "[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." *Delaware v. Fensterer*, 474 U.S. 15, 21-22 (1985). And the Court has held that the 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.* *See also United States v. Owens,* 484 U.S. 554, 559 (1988) ("It is sufficient 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 a prime objective of cross-examination, . . .) the very fact that he has a bad memory."). But

what is generally so is not always so, and such probing and exposure was not possible in this case.

Here, the accused had no meaningful opportunity to ask the witness questions about the underlying incident or even about the witness's testimonial statement concerning it, because the witness had no memory of either. But the witness's "bad memory" provided no reason to accord "scant weight" to his testimony, because the witness gave that testimony *before* he suffered the accident that caused the memory loss. What the memory loss *did* do was shield the witness from any effective questioning that might have revealed defects in his testimony. Was he lying, and did he have reason to be insincere? Very plausibly so. Was there any failure of memory *before* the time he gave his testimony, or of perception or communicative ability? Perhaps. But the accused had no opportunity to explore any of these potential problems in cross-examination.

Thus, the situation was not functionally different from what it would have been had the witness failed to appear at trial, or legitimately invoked a privilege that prevented him from testifying at trial, *see Douglas v. Alabama*, 380 U.S. 415 (1965), or simply refused to testify at trial without benefit of a legitimate privilege, *see United States v. Torrez-Ortega*, 184 F.3d 1128, 1133 (10th Cir. 1999); *Barksdale v. State*, 265 Ga. 9, 13 (1995); *State v. Hutton*, 188 Conn. App. 481, 487 (2019) ("despite Williams' physical presence on the witness stand, the defendant was not afforded a meaningful opportunity to cross-examine Williams about his prior statement due to Williams' outright refusal to answer questions") – in all of which cases there would have been a clear Confrontation Clause violation. True, in the language used by *Crawford*, the witness appeared

at trial, but in no meaningful sense did he "appear for cross-examination"; he was present at trial, but he was not present "to defend or explain" his statement.

It makes a mockery of the Confrontation Clause if, though it is a core violation if the witness does not come to court, the Clause can be satisfied by putting the witness on the stand though nothing of any significance can happen once he is there.

Owens highlights how extreme are the facts of this case – and therefore also the holding of the Louisiana Court of Appeals. *Owens* involved an assault, which *itself* caused the victim, Foster, to suffer significant memory loss. Foster had moments of relative lucidity afterwards, during one of which he identified Owens as the attacker. Even at trial, he "recounted his activities just before the attack, and described feeling the blows to his head and seeing the blood on the floor," and he "testified that he clearly remembered identifying [Owens] as his assailant" during the prior interview. 484 U.S. at 556. Cross-examination of Foster might therefore have had significant value to Owens. Owens could question Foster regarding his activities before the attack. Moreover, showing the extent of Foster's memory loss might have impeached him, because he made his testimonial statement after the event causing that loss, the attack itself.[3]

[3] Another critical distinction from *Owens* is that in that case, unlike the present one, at the time the witness made the prior statement he was clearly sufficiently vulnerable that the prosecution should have realized that he very plausibly would not be able to testify fully at trial. Accordingly, the prosecution could have protected itself by taking Foster's deposition, and it should be held to account for failure to do so. In the present case, there was no reason to suppose at the time of the earlier

III. THIS IS AN IDEAL CASE WITH WHICH TO BEGIN REPAIR OF UNSATISFACTORY ASPECTS OF CONFRONTATION CLAUSE DOCTRINE.

To decide this case, the Court need say no more than that (1) in some cases loss of memory *can* preclude an adequate opportunity to cross-examine, and (2) this is one of those cases, given that (a) the witness suffered a total loss of memory of both the underlying incident and his own testimonial statement describing it, and (b) the timing of the loss can be pinpointed, at a time subsequent to the making of that statement.

Though it is not necessary to decide this case, *amicus* believes that ultimately the law in this area will not be satisfactorily resolved until the Court establishes that an adequate opportunity for effective cross-examination requires "the opportunity to reveal weaknesses in the witness' testimony." *United States v. McHorse*, 179 F.3d 889, 900 (10th Cir. 1999). That is, the accused must have an opportunity to examine the witness in such a way that, if the accused's testimony is the result of a failure of one or more testimonial capacities – misperception, failed memory, insincerity, or communicative failure – the examination will have a chance of demonstrating that; the witness will be compelled either to testify truthfully to facts impeaching his testimony or to lie to cover up the defects in it.

Consider now a category of cases that includes this one: A witness has asserted a material proposition in a prior testimonial statement but has failed to do so on direct. As a general matter, in this situation the

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testimonial statement that the witness would not be able to testify fully at trial.

accused has not had a genuine opportunity to reveal the weaknesses in the witness's testimony. *Cf. Douglas*, *supra,* 380 U.S. at 420 ("effective confrontation" of a witness "was possible only if [the witness] affirmed the statement as his.").[4] This brief does not offer an opportunity to make the argument in full; *amicus* has presented it at length before, *e.g.*, in *Prior Statements of a Witness: A Nettlesome Corner of the Hearsay Thicket*, 1995 Sup. Ct. Rev. 277, 289-301. Two significant points, though, may be summarized briefly.

First, if (as in this case) it appears that the reason the witness has not just testified to a proposition that he asserted before is that there was some failure in testimonial capacity that occurred after the time of the prior statement, then cross-examination is unlikely to be of much use, because demonstrating that failure casts no doubt on the truthfulness of the earlier statement. Suppose, for example, that as in *California v. Green, supra,* a witness makes a testimonial statement identifying the accused as his drug supplier, but then at trial he professes not to remember who the supplier was. The jury will not likely believe that the purported memory loss

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[4] This consideration, *amicus* believes, explains the traditional rule that a statement is not removed from the hearsay bar by the fact that the declarant has become a trial witness. Fed. R. Evid. 801(d)(1), a product of the second half of the 20th century, cut back on that rule but did not eliminate it.

There is no problem under the Confrontation Clause if the witness is testifying to the results of a procedure that she routinely performs, such as a laboratory test, so that, even if she does not remember the precise instance at issue she can testify fully about her routine and about how she came to make her earlier statement.

undercuts the credibility of the prior statement. The more plausible inference will be that the witness felt intimidated or for some other reason declined to testify substantively at trial. And the claimed loss of memory will create an impervious shield against cross-examination.

Second, when a witness fails to testifies on direct to a material proposition, the cross-examiner lacks an essential foothold for cross.[5] Suppose a witness testifies on direct to proposition **A**, but the cross-examiner believes that the witness would also testify to **B**, **C**, and **D**, and belief in **A** is incompatible, or at least made significantly less plausible, with belief in the other three propositions. Then the cross-examiner can effectively impeach the witness with a line of questioning that begins, "Now, you've just testified to **A**." But that is impossible if the witness has *not* just testified to **A**. Cross-examination becomes like pushing on a string – if it meets no resistance, it cannot accomplish anything.

In the view of *amicus*, then, the question is not whether memory loss is genuine or feigned, or whether it is total or partial. The question, rather, is whether the accused has had a genuine opportunity, not significantly impaired, to reveal weaknesses in the witness's testimony. If that testimony was given earlier, out of court, and the witness has not asserted its substance on direct examination, then that opportunity is almost certainly significantly impaired.

Owens should be re-examined in this light. In contrast to this case, as Part II has argued, cross-examination was not utterly worthless in *Owens*. But,

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[5] For a very perceptive elaboration of this problem from more than a half century ago, see Ruhala v. Roby, 150 N.W.2d 146, 156-58 (Mich. 1967).

in the view of *amicus*, candor requires recognition that the accused's ability to cross-examine *was* significantly impaired there. By the time Owens had an opportunity to cross-examine Foster, Foster could not remember who had assaulted him, whether or not he had seen his attacker, or whether any other person had suggested to him that Owens was the assailant. *Owens,* U.S. 484 at 556; *id.* at 565-66 (Brennan, J., dissenting). These would have been obvious areas to explore on cross-examination had Foster been able to testify fully. And the likely inference from his inability to answer questions on these matters was that Foster had made his prior statement at an earlier time when he thought (accurately or not) he had enough memory to describe the incident but that memory loss had since thrown a shield around him protecting him from inquiry. No competent defense lawyer would regard this as cross-examination comparable to that of a witness who had described the assault on direct examination.

The accused's opportunity for cross-examination was therefore significantly impaired in *Owens*. But this does not mean that the outcome of the case was wrong. The inability of Owens to cross-examine was probably caused by his own wrongdoing – that is, by brutally assaulting Foster. *Amicus* believes that this factor explains the easily understood impetus to admit Foster's prior testimonial statement, *notwithstanding* the significant impairment of cross-examination. *If* in fact Owens assaulted Foster, and caused his grievous injury, it would be highly inequitable to allow Owens to keep Foster's statement from the jury on the ground that Owens had been unable to cross-examine Foster. *See, e.g.,* Richard D. Friedman, *Confrontation and the Definition of Chutzpa*, 31 Isr. L. Rev. 506 (1997). *If*, therefore, the trial court were to find in a side hearing

that Owens had caused Foster's injuries and therefore precluded his own ability to cross-examine Foster, Owens should be held to have forfeited the confrontation right.

For now, such a resolution is precluded by *Giles v. California*, 554 U.S. 353 (2008), which holds that an accused does not forfeit the right unless he not only engages in wrongful conduct that renders the witness unavailable but does so *for that purpose*. *Amicus* believes that *Giles* was a most unfortunate development, and that it inhibits development of sound confrontation doctrine in various respects. *See, e.g.,* Richard D. Friedman, Giles v. California*: A Personal Reflection*, 13 Lewis & Clark L. Rev. 733, 745-48 (2009). Among those is that it makes it more difficult to put the *Owens* decision on a proper basis that does not involve minimizing genuine impairments of cross-examination caused by memory loss.

Here, unlike in *Owens*, there is no contention that the accused was responsible, by misconduct or otherwise, for the witness's memory loss. This is another critical factor, in addition to those discussed in Part II, *supra*, distinguishing this case from *Owens*. For now, it is enough to note the distinctions; to decide this case, there is no need to engage in broad reconsideration of *Owens* or of *Giles*. But the outcome of this case is so flagrant it shows that there is something seriously amiss in this corner of the doctrine of the Confrontation Clause, and that this case provides a good occasion to start making the necessary repairs.

CONCLUSION

For the foregoing reasons, the Petition should be granted.

Respectfully submitted,

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