No. 19-159

In the
Supreme Court of the United States

CARLOS TAPIA,
Petitioner,
v.
NEW YORK,
Respondent.

On Petition for Writ of Certiorari to the New York Court of Appeals

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the admission of a police officer's out-of-court statement regarding a crime, as contained in his grand jury testimony, comports with the Confrontation Clause of the Sixth Amendment to the United States Constitution, when the officer testifies at trial, is subject to cross-examination, but does not remember the incident.

STATEMENT OF RELATED PROCEEDINGS

There are no other court proceedings directly related to this case.

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INTRODUCTION

It is well established that the Confrontation Clause of the Sixth Amendment gives the accused the right "to be confronted with the witnesses against him[,]" which entails an opportunity to cross-examine adverse witnesses, as well as to face his accusers before a jury. *See* U.S. Const. amend. VI. But what happens if a live, testifying witness cannot remember the facts of the case, and his prior, out-of-court statement is introduced at trial? Does the witness' memory loss deprive the defendant of his promised opportunity for cross-examination in violation of his confrontation rights?

This Court has already addressed this issue in *United States v. Owens*, 484 U.S. 554 (1988): No, the Confrontation Clause does not bar the introduction of an out-of-court statement of a testifying witness with memory loss, because the Clause "guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *See id.* at 559 (citations and quotation marks omitted). Rather, "[i]t 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." *Id.* (citations omitted). Moreover, *Owens*' vitality is undisturbed by this Court's seminal decision in *Crawford v. Washington*, 541 U.S. 36 (2004), which underscored the Clause's traditional guarantee of a witness' presence at trial to be "test[ed] in the crucible of cross-examination." *Id.* at 61.

Accordingly, certiorari should be denied because there is no genuine split among the federal circuits or state courts of last resort in this long-resolved confrontation question, as the rule set forth in *Owens* has been applied consistently throughout the lower courts. Certiorari, therefore, should be reserved for a case that truly implicates a potential divide and can provide meaningful guidance in its resolution. This is not that case.

Moreover, the New York Court of Appeals correctly identified and applied *Owens* in this case, finding that the lack of memory of the retired police witness did not render him unavailable under the Confrontation Clause because he testified at trial, where his out-of-court statement from his grand jury testimony was admitted, and he was subjected to cross-examination. Although the witness could not remember the incident, his cross-examination was not, as petitioner contends, an "empty procedure" (petition, p. 1 (quoting *Crawford*, 541 U.S. at 74 (Rehnquist, C.J., concurring in the judgment))) as the defense was able to effectively emphasize the witness' lack of memory and impugn the accuracy of the transcription of his prior statement.

And even if this question were otherwise worthy of certiorari, this Court's judicial discretion cautions against reviewing this particular case because petitioner had demanded that this witness be called to testify, petitioner has been deported, and finally, any error regarding the witness' testimony was harmless.

STATEMENT OF THE CASE

At trial, Sergeant Charlie Bello testified that on November 2, 2008, he was driving Lieutenant James Cosgrove back to the police precinct at about 3:30 a.m. when he saw petitioner "body slam" the victim, Alejandro Mejia, in the street outside a bar and drag him between two parked cars. App. 2a. The officers exited their vehicle to intervene and, while Cosgrove pulled petitioner off the victim, Bello stopped another man who was "fidgeting with his waistband" and running towards the altercation. *Id.*; Court of Appeals Appendix (C.A. App.) 205. After Cosgrove separated the victim from petitioner, Bello noticed the victim was "bleeding profusely from his face and neck." *Id.*; *see* C.A. App. 219. Petitioner and the other man were arrested.[1] Bello observed a shattered beer bottle on the ground where the victim had been assaulted. App. 2A.

The victim testified at trial that the attack started when he was struck from behind and fell to the ground. C.A. App. 71. Defenseless, all the victim could do was try to cover himself with his arms while he was being punched, kicked, and slammed against parked cars. C.A. App. 73; *see* App. 2a-3a. The victim felt "something warm running down," and he realized that he had been bleeding from cuts "all over [his] face." C.A. App. 73, 167; *see* App. 2a-3a. Although the victim identified petitioner as one of his two assailants, he did not know which of the men had slashed his face. C.A. App. 184;

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[1] The People presented the case against the other apprehended individual to the grand jury, but the grand jury declined to vote a true bill.

see App. 3a.[2] The physician who treated the victim at the emergency room testified that the five lacerations to the victim's face and neck were "consistent with being struck with a sharp cutting instrument," such as a piece of glass. App. 3a; Court of Appeals Supplemental Appendix (C.A. Supp. App.) 33-34. The physician explained that the victim's neck lacerations were "potentially life threatening" because of their proximity to the carotid artery and the vena cava. App. 3a; C.A. Supp. App. 26-28, 83.

During the People's case, defense counsel informed the trial court that she would seek a missing witness[3] charge if the People did not call Cosgrove to testify. App. 3a. The People stated that Cosgrove had retired from the police department and had no independent recollection of the case. If required to call him to avoid a missing witness charge, the People would seek to introduce his grand jury testimony as a past recollection recorded. *Id.* As relevant here, defense counsel advanced two conflicting arguments. Counsel contended that Cosgrove's lack of memory rendered him unavailable for cross-examination, thus violating

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[2] Petitioner claims that the victim "could not see either of the [assailants] until the attack ended" (petition, p. 5). Petitioner, however, ignores the fact that the victim testified, "There were two people[] who were hitting me, and [petitioner] is one of the persons who did that" (C.A. App. 184), and that "I did see them hitting me, but I could not say whether it was him or the other guy [who did the slashing]." C.A. App. 184.

[3] "The 'missing witness' instruction allows a jury to draw an unfavorable inference based on a party's failure to call a witness who would normally be expected to support that party's version of events." *People v. Savinon*, 100 N.Y.2d 192, 196 (2003).

petitioner's right to confrontation under *Crawford v. Washington*, 541 U.S. 36 (2004). Nonetheless, according to counsel, Cosgrove was available to the People for the purpose of the missing witness charge. App. 3a-4a. When confronted by the court with these inconsistent positions and offered the opportunity to withdraw her application for the missing witness charge, counsel declined. App. 3a-4a. Ultimately, the trial court found that Cosgrove was "literally subject to cross-examination by being on the witness stand under oath and passed to [the defense] as a witness for cross examination." App. 4a; C.A. App. 331. In addition, the trial court held that Cosgrove's prior grand jury testimony would potentially be admissible as a past recollection recorded because he was in attendance and subject to cross-examination. App. 4a.

The People called Cosgrove to the stand, and he testified that on November 2, 2008, he had been working an 11:00 p.m. to 7:45 a.m. shift, in uniform, with Bello. App. 4a. Based on his review of police paperwork, Cosgrove was also able to testify that he assisted in arresting two individuals at the scene, but he could not independently recall the circumstances leading to petitioner's arrest. *Id*. The People then sought to introduce Cosgrove's grand jury testimony as a past recollection recorded: Cosgrove testified that he appeared before the grand jury four days after the offense; that the event was fresh in his mind at the time; that he testified truthfully and accurately before the grand jury; and that his review of the stenographic transcript of his prior testimony did not refresh his present recollection of the events. App. 4a. Finding the appropriate evidentiary foundation established, the

court allowed a portion of Cosgrove's grand jury testimony to be read into the record (App. 4a), in which the prosecutor read the question and Cosgrove read the responses (C.A. App. 361-62, 364):

> Q: Question: Okay. Can you briefly describe the circumstances that le[d] up to the arrest that night, what you observed?
>
> A: Answer: I was in the passenger seat of a parked Police Department's vehicle. We proceeded southbound on Jerome Avenue from the vicinity of 178th Street. As we [were] going to East Clarke Place, we noticed a disturbance in front of a bar. We exited the vehicle. There was a van between myself and the crowd of people. Couldn't see what [was] going on. As I went around the rear of the van, I noticed a person standing above another person. The person on the floor was bleeding and the other person was kicking him in the head.
>
> Q: Question: The person that was kicking him in the head[,] that individual's name?
>
> A: Answer: Mr. Tapia.

C.A. App. 364-65. Another portion of the grand jury transcript was read into the record:

> Q: Question: Did you happen to recover anything of an evidentiary nature from either defendant?
>
> A: Answer: No.

Q: Question: Did you observe anything around on the floor by the – where the defendant was standing over the complainant?

A: Answer: Yes.

Q: [Question:] What was that?

A: Answer: There was glass all over the floor.

C.A. App. 365-66. The trial court then gave the limiting instruction that "a memorandum of a past recollection is not of itself independent evidence of the facts contained therein. It is auxiliary to the testimony of the witness." App. 5a; C.A. App. 366.

On cross-examination, defense counsel initially questioned Cosgrove about his partnership with Bello, and Cosgrove replied that Bello was his partner and driver on the night of petitioner's arrest. App. 5a. Cosgrove testified that he had been to the area of the assault, which was located "right across [the street] from the [police] precinct," on various occasions "to intervene in bar fights." App. 5a; C.A. App. 355, 373.

Defense counsel then focused her inquiry on the circumstances surrounding Cosgrove's grand jury testimony. Cosgrove repeatedly testified that he did not remember the circumstances leading to petitioner's arrest, even after reviewing his grand jury testimony, explaining that he "did midnights for most of [his] career and a fight outside of a bar [did not] really stick out in [his] mind [because he] responded to a lot of them." App. 5a; C.A. App. 355. Defense counsel not only focused on Cosgrove's lack of present recollection but also elicited that Cosgrove's grand jury testimony that

he had been a passenger in a "parked police department vehicle" was probably supposed to read "marked" police vehicle. App. 5a; C.A. App. 369. Although Cosgrove testified that "[he] could swear to [the grand jury transcript's] accuracy that if [he had] testified to something, that it's true" (C.A. App. 370-71), he admitted that he did not review a copy of the transcript other than in preparation for trial and could not swear that the official court reporter's transcription of his grand jury testimony was accurate because of his lack of independent recollection. App. 5a; C.A. App. 370-72.

After the close of evidence, the trial court submitted three counts to the jury under a theory of acting in concert: assault in the first degree; attempted assault in the first degree; and assault in the second degree. App. 6a. In its final charge, the trial court instructed the jury on how to consider Cosgrove's grand jury testimony as a past recollection recorded. The court reminded the jury that evidence of past recollection recorded was auxiliary to the witness's trial testimony and not independent evidence of the facts. The court further instructed as follows:

> A memorandum of a past recollection is not of itself independent evidence of the facts contained therein. Although it may be received in evidence in connection with and as an auxiliary to the testimony of the witness, its use is not regulated by the rules governing documentary evidence.
>
> The witness swears to the facts contained in the memorandum not from memory, but because of

> confidence in the correctness of the writing. The writing thus becomes a present evidentiary statement verified by the oath of that witness. Therefore, you may consider the witness had knowledge at the time the testimony was taken of the events he testified to and whether he saw the reported testimony at or near the time the testimony was taken and recognized it at the time as containing a true statement of facts within his own knowledge.
>
> You may consider the witness' testimony on this issue in deciding what weight to give the statements contained in the former testimony. You are at liberty to accept as much as you think accurate and disregard the rest or accept or disregard it in its entirety.

C.A. App. 511-12; *see* App. 6a-7a.

The jury convicted petitioner of attempted assault in the first degree, acquitting him of the top count of assault in the first degree. App. 7a.

On direct appeal, the New York Supreme Court's Appellate Division, First Department, affirmed petitioner's conviction by a vote of 3-2. *Id.* The court held that it was a proper exercise of discretion for the trial court to admit Cosgrove's grand jury testimony as a past recollection recorded. App. 45a. The court found that the People had laid a proper foundation for the admission of Cosgrove's grand jury testimony and there was no violation of the Confrontation Clause because Cosgrove testified at trial and was subject to cross-examination. App. 46a. The court further held, "[i]n

any event, there was no prejudice to defendant because [the grand jury testimony] was entirely cumulative of Officer Bello's testimony." *Id.*[4] The court also concluded that the evidence was legally sufficient to support the conviction (App. 44a-45a), but two Appellate Division justices dissented on that sole ground and would have reduced petitioner's conviction to attempted second degree assault. App. 46a. The dissenters contended that the evidence was not legally sufficient because it did not establish beyond a reasonable doubt that petitioner, alone or acting in concert, cut the victim with a dangerous instrument. *Id*. One of the dissenting Justices granted petitioner leave to appeal to the New York Court of Appeals. App. 7a.

The New York Court of Appeals affirmed by a 4-3 vote. Pertinently, the majority held that the admission of Cosgrove's grand jury testimony did not violate the Confrontation Clause under the Sixth Amendment of the United States Constitution, relying on this Court's decision in *United States v. Owens*, 484 U.S. 554 (1988), in which this Court "directly addressed the situation

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[4] Petitioner claims that the Appellate Division reached this conclusion by "mistakenly attributing to Bello testimony that petitioner was 'kicking the victim in the head while the victim was bleeding'" (petition, p. 8, n.1). While it is true that the Appellate Division misattributed this observation to Bello, it is not clear how dispositive this was to the court's conclusion that Cosgrove's grand jury testimony was cumulative. The court's conclusion was supported by the fact that Cosgrove's grand jury testimony was, as the New York Court of Appeals found, "consistent with Bello's trial testimony" (App. 5a) and, therefore, added little to the evidence already presented at trial with the exception of the additional "fact that Cosgrove saw [petitioner] kick the victim in the head" (App. 5a).

where a witness was unable to explain the basis for a prior out-of-court identification due to memory loss." *See* App. 15a-16a. In light of this Court's clear precedent, the court observed that "the right to confrontation guarantees not only the right to cross-examine all witnesses, but also the ability to literally confront the witness who is providing testimony against the accused in a face-to-face encounter before the trier of fact." *Id*. Accordingly, "[t]he Confrontation Clause is satisfied when these requirements are fulfilled – even if the witness's memory is faulty." App. 16a. The majority, therefore, concluded that "Cosgrove's presence at trial as a testifying witness, where he was subjected to cross-examination before the trier of fact who must assess the credence and weight to be accorded to his testimony as a whole, precludes [petitioner's] Confrontation Clause argument." App. 17a.

After petitioner completed his sentence, he was deported from the United States. *See* App. 7a, n.3.[5]

[5] During the pendency of petitioner's appeal to the New York Court of Appeals, the People moved to dismiss the appeal because of petitioner's removal from the United States, which was independent of his criminal conviction. The Court of Appeals denied the motion to dismiss the appeal. *People v. Tapia*, 32 N.Y.3d 1017 (2018).

REASONS TO DENY THE WRIT

I. THERE IS NO GENUINE CONFLICT AMONG THE LOWER COURTS.

Petitioner fails to identify any genuine split of authority among any of the federal circuit courts or state courts of last resort that requires this Court's intervention. Petitioner argues that the writ should be granted because "[t]he decision below deepens a split among federal courts of appeals and state appellate courts on whether a witness's physical presence at trial is enough to vindicate the defendant's confrontation right when intervening memory loss prevents the witness from defending or explaining his prior testimonial statement" (petition, pp. 10-11). However, no such split exists because there is no such case from any federal circuit court or state court of last resort that holds that where a live testifying witness' out-of-court statement is introduced at trial, the defendant's federal confrontation rights are violated if the witness cannot remember the facts described in his prior statement, and therefore, cannot defend or explain his statement on cross-examination.

In asserting discord among the lower courts' Confrontation Clause jurisprudence, petitioner principally relies on the Supreme Court of Mississippi's decision in *Goforth v. State*, 70 So. 3d 174 (Miss. 2011). The *Goforth* court "squarely held that it violates a defendant's confrontation right to admit a witness's prior out-of-court testimonial statement, where, by the time of trial, the witness experienced a 'total lack of memory' regarding the events described in a prior statement" (petition, p. 11). Petitioner's reliance is

misplaced because the Supreme Court of Mississippi expressly decided the confrontation issue on state constitutional grounds: "Since 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). The court even later reiterated, "We find that, under the Mississippi Constitution, [the defendant] did not have a constitutionally adequate opportunity to cross-examine [the witness] at trial or beforehand." *Id*. at 187.

Although petitioner appears to recognize this obstacle, he nonetheless suggests that the purported split survives because "[*Goforth*] turned exclusively on *Crawford* and federal precedent" (petition, p. 12, n.2). On the contrary, in *Michigan v. Long*, 463 U.S. 1032 (1983), which was even cited in *Goforth* (70 So. 3d at 183), this Court held:

> 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. In this way, both justice and judicial administration will be greatly improved. 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.

Long, 463 U.S. at 1041. Accordingly, there can be no serious dispute that the decision in *Goforth* was based on the Mississippi Constitution and its jurisprudence and, therefore, does not implicate the federal confrontation rights at issue in this case.

Petitioner's reliance on Seventh Circuit dicta fares no better. 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 hypothesized that a witness' total memory loss could possibly render him unavailable for confrontation purposes. *See Cookson*, 556 F.3d at 651; *Ghilarducci*, 480 F.3d at 548-49. Initially, in both cases, the Seventh Circuit concluded the defendants' confrontation rights had not been violated, and neither case involved a witness with total memory loss, as petitioner asserts was the case for Cosgrove. *See Cookson*, 556 F.3d at 652; *Ghilarducci*, 480 F.3d at 549.

Cookson theorized that *Crawford*'s footnote nine, which states that "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on this use of his prior testimonial statements" (*Crawford*, 541 U.S. at 59 n.9), is "not dispositive" as to whether he is available, pointing to subsequent language in the footnote that the Clause does not bar admission of a statement if the declarant is present at trial "to defend or explain it." *See Cookson*, 556 F.3d at 651. But ultimately, *Cookson*'s remarks about the potential implications of a witness' total memory loss on the defendant's federal

confrontation rights went unaddressed, since the witness in the case was able to recall the underlying incident (but could not recall making the prior statement) during cross-examination, and, therefore, the Seventh Circuit held that there was no violation of the Confrontation Clause. *Id.* at 652. To the extent *Cookson*'s reading of *Crawford*'s footnote nine has any value in establishing a split, that interpretation has not percolated in any other federal circuit court of appeals.

Moreover, *Ghilarducci* casts doubt on whether it can be said that Cosgrove suffered the sort of "total memory loss" speculated about in *Cookson*. In *Ghilarducci*, the Seventh Circuit determined that the witness did not suffer total memory loss because "[b]y referencing documents that memorialized his interactions with [the defendant], [the witness] was also able to answer some questions on that topic." 480 F.3d at 549. Similarly, with the aid of police paperwork, Cosgrove was able to answer background questions about his police career, the night of the arrest, and the circumstances surrounding his grand jury testimony. *See* App. 4a-5a.

Indeed, Cosgrove's lack of memory is not even analogous to the "total memory loss" experienced by the witness in *Goforth*. In *Goforth*, the witness made his statement to police, but before trial, he was injured in an automobile accident that "substantially impaired his physical and mental conditions," and he testified that "he could not remember anything that had occurred two years prior to the wreck." 70 So.3d at 182. The witness' memory loss was so severe, he stated at trial,

"I can't remember probably half my life." *Id.* He recalled neither the incident nor giving his statement to police, and he could only "guess" that he had written the statement based on his signature. *Id.* In contrast, Cosgrove stated that "[t]he case happened almost five years ago. I left the police department a year ago. When I left, I put the police department behind me. I concentrate on what I do now[,] which is be[ing] with my family." C.A. App. 352. Cosgrove later added that memories of "certain [arrests] stick out and this doesn't" because he "did midnights for most of [his] career and a fight outside of a bar [did not] really stick out in [his] mind. [He] responded to a lot of them . . ." C.A. App. 355. Thus, unlike the witness in *Goforth*, Cosgrove's memory of this specific incident faded through the natural passage of time and was not the result of any physical disability or mental impairment.

Finally, petitioner cites to some cases, including decisions of lower state courts, that "have recognized that even when a witness is physically present in the courtroom, the witness can be so nonresponsive as to implicate the confrontation right" (petition, p. 13). In particular, he cites *In re N.C.*, 105 A.3d 1199 (Pa. 2014), a case in which the Pennsylvania Supreme Court excluded testimony where a child witness curled into a fetal position at trial and remained unresponsive and unable to speak. *Id.* at 1206, 1209. Petitioner's observation is unremarkable and inapposite to resolving the question presented here. Moreover, *In re N.C.* drew a notable distinction between the child witness' unresponsiveness with the situation of a forgetful witness, like Cosgrove, who was otherwise

responsive to questioning and did not lack the capacity to offer testimony. *See id.* at 1216-17.

Accordingly, there is no genuine conflict among the lower courts and no reason to think that further guidance is necessary.

II. THE NEW YORK COURT OF APPEALS CORRECTLY HELD THAT THE ADMISSION OF COSGROVE'S GRAND JURY TESTIMONY DID NOT VIOLATE THE CONFRONTATION CLAUSE.

Unsurprisingly, in light of the overwhelming weight of authority on this confrontation issue, the New York Court of Appeals ruled precisely in accord with this Court's precedent. This Court has long held that when a witness appears at trial, is placed under oath, answers questions to the best of his ability, but cannot answer some questions due to a lack of memory, the admission of his prior, out-of-court statements does not run afoul of the Confrontation Clause. *See*, *e.g.*, *Owens*, 484 U.S. at 559-60; *California v. Green*, 399 U.S. 149 (1970).

In *California v. Green*, this 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. at 162. Notably, Justice Harlan concurred, stating that when a witness is available but cannot recall making the out-of-court statement, or even the events described in the statement, there is no confrontation issue, since "[t]he

prosecution has no less fulfilled its obligation simply because a witness has a lapse of memory." *Id.* at 188.

In *Delaware v. Fensterer*, this Court emphasized, "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. 15, 20 (1985) (emphasis in original). This Court further held:

> 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.

In *United States v. Owens*, 484 U.S. 554 (1988), this Court, in a decision authored by Justice Scalia, 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." *Id.* at 564. In *Owens*, the victim had been beaten with a metal pipe, resulting in severe memory impairment. *Id.* at 556. Despite his injuries, the victim identified the defendant as his assailant when interviewed by investigators several weeks after the assault. *Id.* At

trial, the victim remembered identifying the defendant as his assailant during his interview with investigators, but he could not remember the attack, thus limiting the defendant's ability to cross-examine the victim. *See id.* at 556-57.

This Court found no violation of the Confrontation Clause, "agree[ing] with the answer suggested 18 years ago by Justice Harlan," referring to his "scholarly concurrence" in *Green*, 399 U.S. at 157-164, and echoing *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." *Owens*, 484 U.S. at 559. Since the witness was present at trial and subject to unfettered cross-examination, the Confrontation Clause was not implicated. *See id.* at 560.

This Court further emphasized, "We do not think that a constitutional line drawn by the Confrontation Clause falls between a forgetful witness' live testimony that he once believed this defendant to be the perpetrator of the crime, and the introduction of the witness' earlier statement to that effect." *Id.* at 560. Indeed, the Court observed, "The weapons available to impugn the witness' statement when memory loss is asserted will of course not always achieve success, but successful cross-examination is not the constitutional guarantee. They are, however, realistic weapons, as is demonstrated by defense counsel's summation in this very case, which emphasized [the witness'] memory loss . . ." *Id.* at 560. Thus, because "the traditional protections of the oath, cross-examination, and

opportunity for the jury to observe the witness' demeanor" were satisfied, there was no Confrontation Clause violation. *Id.* at 560.

Finally, in *Crawford v. Washington*, this Court held, in another decision written by Justice Scalia, that the admission of an out-of-court testimonial statement by a witness who does not appear at trial violates a defendant's Sixth Amendment right to confront the witness, unless the defendant had a prior opportunity for cross-examination. 541 U.S. 36, 53-54 (2004). This Court reiterated 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. . . . The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it." *Id.* at 59 n.9.

Here, the New York Court of Appeals correctly applied this Court's precedent, as set forth in *Green*, *Fensterer*, *Owens*, and *Crawford*, and held that although Cosgrove lacked memory of the circumstances surrounding petitioner's arrest, the introduction of his grand jury testimony at trial did not violate the Confrontation Clause because he testified "under oath and in the presence of the accused" (*Fensterer*, 474 U.S. at 20) and was subjected to cross-examination. *See* App. 15a-17a.

The main thrust of petitioner's argument is that Cosgrove's lack of memory of the incident rendered him unable "to defend or explain" his prior statement, so cross-examination was "futile" (petition, p. 14). In making this argument, petitioner seizes onto *Crawford*'s remark in footnote nine, "[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). Thus, petitioner contends that the footnote in *Crawford* "made clear that the confrontation right depends on a witness's ability to 'defend or explain' his prior statement" (petition, p. 21). In essence, despite that memory lapse was not at issue in *Crawford* and that Justice Scalia authored both decisions, petitioner suggests that *Crawford* abrogates, *sub silentio*, *Owens*' holding that the Confrontation Clause is not implicated when a witness, whose memory has failed, is present at trial and available for cross-examination.

This Court should reject petitioner's interpretation of *Crawford*, as has virtually every state court of last resort that has addressed this issue. *See*, *e.g.*, *State v. Pierre*, 277 Conn. 42, 86 (2006); *Smith v. State*, 25 So. 2d 264, 270 (Miss. 2009); *State v. Legere*, 157 N.H. 746, 754-755 (2008); *Woodall v. State*, 336 S.W.3d 634, 644 (Tex. Crim. App. 2011); *State v. Price*, 146 P.3d 1183, 1191 (Wash. 2006); *see also Blunt v. United States*, 959 A.2d 721, 727-31 (D.C. 2008) (holding that a witness' asserted inability to remember the events of the charged incident or the contents of her grand jury testimony did not deprive the defendant of his Sixth Amendment right of confrontation).

Petitioner's isolation of the "to defend or explain it" language divorces it from the proper context of the rest of the footnote. Indeed, the Supreme Court of Minnesota in *State v. Holliday*, 745 N.W.2d 556 (Minn. 2008), rejected the argument that *Crawford* required "the declarant [to] actually defend or explain his

statement" because "such interpretation both ignores the fact that the Court's language still focuses on presence and ability to act without requiring that the record show the declarant actually did defend or explain the statement, and is at odds with the Court's more explicit assertion 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." 745 N.W.2d at 565-66 (internal citations and quotation marks omitted). Even *Goforth* similarly held, "[i]mportantly, the pertinent language does not require the record to actually show that the defendant did in fact defend or explain the statement. The language, rather, focuses on 'presence and ability to act.'" 70 So. 3d at 186 (internal citations omitted).

Succinctly stated, "[t]he rule set forth by [this Court] in *Crawford* neither conflicts with nor abrogates its earlier holding in *Owens*. *Crawford* considered the admissibility of a prior statement made by a declarant who was *absent from trial*, while *Owens* considered the admissibility of a prior statement made by a declarant *testifying at trial*." *Smith*, 25 So. 3d at 270-71 (emphasis in original).

Petitioner claims that the New York Court of Appeals erred, "elevat[ing] *form over substance* by ignoring the fact that memory loss defeats the entire purpose of cross-examination . . ." (petition, p. 15) (emphasis added) and that "a declarant's memory loss renders cross-examination a meaningless *formality*" (petition, p. 22) (emphasis added). But this complaint ignores the central rationale of *Crawford*, that the

"Clause's ultimate goal is to ensure reliability of evidence, but it is a *procedural rather than a substantive guarantee*. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross examination." *Crawford*, 541 U.S. at 61 (emphasis added). Thus, in *Crawford*, this Court maintained the Confrontation Clause's *procedural* guarantee: a defendant must have the opportunity to cross-examine a testifying witness. This Court, however, did not rollback its longstanding precedent 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." *Fensterer*, 474 U.S. at 21-22.

Crucially, petitioner effectively cross-examined Cosgrove, therefore, undermining his complaint. Not only was defense counsel able to establish Cosgrove's poor memory from his failure to recall the incident, which is indeed, "often a prime objective of cross-examination" (*see Owens*, 484 U.S. at 559), she capitalized on his lack of memory to undermine the testimony of his partner, Bello, in her summation:

> But you then have Lieutenant Cosgrove who remembers nothing about this incident, which by the way is probably much more consistent with life than Sergeant [Bello] remember[ing]. . . . every single thing about this incident, even though it was four years ago and he's had several arrests since then, he had five years at the 44[th] Precinct and had been up and down the street making arrests before, and before that and after

> that, Lieutenant Cosgrove came in and he said he didn't remember a thing, didn't remember a thing. He was a lieutenant in the police force.

C.A. App. 451. Counsel's summation, therefore, demonstrates the fruitful employment of effective cross-examination as a "realistic weapon." *See Owens*, 484 U.S. at 560 ("The weapons available to impugn the witness' statement when memory loss is asserted will of course not always achieve success . . . They are, however, realistic weapons, as is demonstrated by defense counsel's summation in this very case, which emphasized [the witness'] memory loss . . .").

Notably, to the extent that defense counsel's tactics may have been limited by Cosgrove's lack of memory regarding the incident, she nonetheless called into question the accuracy of the transcription of his grand jury testimony. Drawing from an apparent typographical error in the transcript (C.A. App. 369; *see* App. 5a), counsel asked Cosgrove, "having no memory, independent of what you are reading, you cannot tell this jury with any certainty that every single thing you said was written down accurately; is that correct?" C. A. App. 372. Cosgrove had no choice but to concede, "No, I can't, I guess." *Id*. Thus, while Cosgrove lacked memory of the incident, "other means of impugning" Cosgrove's prior statement were "available," which counsel exploited by attacking the grand jury transcript. *See Owens*, 484 U.S. at 559. At bottom, petitioner essentially complains about the result, the lack of complete success in cross-examining Cosgrove, "but successful cross-examination is not the constitutional guarantee." *Owens*, 484 U.S. at 560.

Petitioner analogizes Cosgrove's lack of memory with a witness who invoked the privilege against self-incrimination and "refused to answer any questions concerning the alleged crime" (petition, p. 18) (citing *Douglas v. Alabama*, 380 U.S. 415, 416 (1965)). In *Douglas*, this Court concluded that the defendant's "inability to cross-examine [the witness] . . . denied him the right of cross-examination secured by the Confrontation Clause." *Id*. at 420. Therefore, petitioner urges this Court to apply, "[t]hat same logic . . . where the declarant has a complete failure of memory on the witness stand" (petition, p. 18).

This argument is meritless; this Court has already explicitly differentiated these two situations that petitioner hopes to analogize. While *Owens* recognized that "limitations on the scope of examination by the trial court or *assertions of privilege by the witness* may undermine the process to such a degree that meaningful cross-examination . . . no longer exists" (484 U.S. at 561-62 (emphasis added)), "that effect is not produced by the witness' assertion of memory loss—which . . . is often the very result sought to be produced by cross-examination, and can be effective in destroying the force of the prior statement." *Id*. at 562; *see also United States v. Torrez-Ortega*, 184 F.3d 1128, 1132-34 (10th Cir. 1999) (holding witness' refusal to answer questions "because of his obstinate and repeated assertion of the privilege against self-incrimination" made him not subject to cross-examination under *Douglas*, and rejecting "the government's attempt to link by analogy cases in which a witness professes loss of memory—real or otherwise—and cases in which a witness simply

refuses to testify on the basis of an assertion of privilege"). Here, Cosgrove asserted no privilege, did not refuse to answer questions, and as discussed, was subjected to effective cross-examination.

Finally, petitioner's attempts to distinguish this case from *Owens* fail. First, petitioner claims that "*Owens* did not involve a witness's *total* memory loss" (petition, p. 19) (emphasis in original). Second, petitioner argues, "that because [the witness'] memory was already impaired at the time of his prior identification, defense counsel was able to emphasize [the witness'] memory loss as a way to undercut his reliability" (petition, p. 20-21).

Initially, petitioner's delineation between "partial" and "total memory loss" is unhelpful, as courts below have already rejected similar confrontation challenges addressing "genuine or feigned" memory loss. *See*, *e.g.*, *Diggs v. United States*, 28 A.3d 585, 594 (D.C. 2011); *Blunt v. United States*, 959 A.2d 721, 729-30 (D.C. 2008) (finding no Confrontation Clause violation in admission at trial of witness's grand jury testimony even if her inability to remember the crimes at trial was feigned). That is because this Court has already established that 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." *Owens*, 484 U.S. at 558 (quoting *Fensterer*, 474 U.S. at 21-22). "Thus[,] it is settled that memory loss . . . does not deprive the defendant of the meaningful opportunity to cross-examine that the Confrontation Clause requires," and a "witness's claimed inability to recall is regarded as a

form of the 'forgetfulness, confusion, or evasion' that cross-examination is designed to emphasize, rather than as a barrier to cross-examination." *Diggs*, 28 A.3d at 594.

In any event, the fact that the witness in *Owens* remembered having made the prior identification is of no moment; *Owens* explicitly rejected such a distinction by "agree[ing] with the answer suggested 18 years ago by Justice Harlan," "that a witness' inability to 'recall either the underlying events that are the subject of an extra-judicial statement or previous testimony or recollect the circumstances under which the statement was given, does not have Sixth Amendment consequence.'" *Id*. at 558-59 (quoting *Green*, 399 U.S. at 188 (Harlan, J., concurring)).[6]

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[6] Additionally, in *United States. v. Milton*, the D.C. Circuit squarely rejected petitioner's argument:

> The Miltons nevertheless insist that Jones' taking the stand and responding to defense counsel's questions satisfied neither the rule, nor the Sixth Amendment's confrontation clause, because Jones "could not remember the events underlying her prior testimony, [ ]or the fact that she had given it." The idea is that if the witness recalls his prior testimony while forgetting why he said what he did, cross-examination is more meaningful than if, like Jones, the witness does not even recall his earlier testimony. We believe the Supreme Court in *Owens* put this argument to rest. It is true that in *Owens* the witness at least recalled having identified the defendant. But the Court did not restrict its reasoning to such situations. Instead, the Court "agree[d] with the answer suggested" in "Justice Harlan's scholarly concurrence" in *California v. Green*, that "a witness' inability to 'recall either the underlying events that are the subject of an extra-judicial

Moreover, here, as in *Owens*, "defense counsel was able to emphasize [the witness'] memory loss as a way to undercut his reliability" (*see* petition, pp. 20-21). Counsel was similarly able to utilize "other means of impugning" the prior statement by attacking the accuracy of the grand jury transcript. *Owens*, 484 U.S. at 559. Indeed, Cosgrove candidly conceded that he could not attest to the accuracy of the grand jury transcript. C.A. App. 372. Thus, "the traditional protections of the oath, cross-examination, and opportunity for the jury to observe the witness' demeanor satisfy the constitutional requirements." *Owens*, 484 U.S. at 560. Any shortcomings in the witness' memory may be made known to the jury, as was done in this case.

Furthermore, as discussed in Point I, it cannot be said that the extent of Cosgrove's memory loss (or as petitioner puts it, "total memory loss") rendered his cross-examination constitutionally infirm. At trial, Cosgrove was able to testify that he had been working from 11:00 p.m. to 7:45 a.m. with his partner, Bello, on November 2, 2008. After referring to some police paperwork, Cosgrove was able to further testify that he had arrested two individuals on Jerome Avenue. C.A. App. 350-51. Cosgrove, however, could not remember the names of the arrestees or the circumstances surrounding the arrests. C.A. App. 351-52. But

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> statement or previous testimony or recollect the circumstances under which the statement was given, does not have Sixth Amendment consequence.'"

8 F.3d 39, 47 (D.C. Cir. 1993), *cert denied*, 513 U.S. 919 (1994) (internal citations omitted; alterations in original).

Cosgrove testified that he appeared before the grand jury on November 6, 2008, that the event was fresh in his mind at that time, that he testified truthfully and accurately before the grand jury, and that his review of the certified grand jury transcript did not refresh his recollection. C.A. App. 352-53.

Thus, because petitioner was able "to literally confront [Cosgrove] who . . . provid[ed] testimony against [him] in a face-to-face encounter before the trier of fact," (App. 16a) even though Cosgrove's memory was faulty, the New York Court of Appeals correctly determined that "Cosgrove's presence at trial as a testifying witness, where he was subjected to cross-examination before the trier of fact who must assess the credence and weight to be accorded to his testimony as a whole, precludes [petitioner's] Confrontation Clause argument." App. 17a.[7]

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[7] Petitioner echoes the dissenters below (*see* App. 35a), complaining that under this "majority rule . . . New York and many other jurisdictions now routinely permit defendants to be convicted based on untested evidence that is tantamount to an *ex parte* affidavit" (petition, pp. 22-23). This Court should reject this sensational contention. As highlighted by the majority below in countering the dissent's "dire warning" (*see* App. 14a, n.5), petitioner, here, similarly ignores the fact that Cosgrove testified and was cross-examined, that the court repeatedly instructed the jury that the past recollection recorded merely supplemented Cosgrove's trial testimony (*see* App. 5a-7a), and that it was the jury's role to consider the proper weight to accord to his testimony. *See* App. 6a-7a.

III. THIS CASE IS A POOR VEHICLE FOR RESOLVING THIS ISSUE.

This Court should not reward petitioner's gamesmanship by granting certiorari. By highlighting that the issue has been fully preserved (*see* petition, p. 25) for this Court's review, petitioner ignores the fact that this issue was entirely manufactured. Primarily, this issue arose out of cynical gamesmanship in that defense counsel demanded the People to call Cosgrove to testify. The record below makes clear that the People had no intention of calling Cosgrove to testify at trial, precisely because he lacked memory and had been retired for over a year. App. 3a. Defense counsel, however, forced the issue by seeking a missing witness charge if the prosecutor did not call Cosgrove to testify. App. 3a. In producing Cosgrove, as defense counsel had demanded, the prosecutor sought to admit the retired officer's grand jury testimony as a past recollection recorded. App. 3a.

Defense counsel objected, asserting the confrontation violation, but, nonetheless, declined to withdraw her request for a missing witness charge, inconsistently arguing that Cosgrove's lack of memory rendered him unavailable for cross-examination, but available to the People for the missing witness charge:

> THE COURT: Mr. Reynolds, am I right that the only reason you were seeking to have him testify was because you ... don't want a missing witness charge?
>
> PROSECUTOR: Yes.

> THE COURT: If the Court rules that it was not giving a missing witness charge, you would therefore not be calling him?
>
> PROSECUTOR: That's correct.
>
> THE COURT: So since he's physically available and the People would only call him to defeat your request for a missing witness charge, will you now withdraw your request for a missing witness charge, which means I will not have to rule on this application and this issue of whether this comes in or not is gone?
>
> COUNSEL: I will not withdraw my application because he –
>
> THE COURT: Very well.
>
> COUNSEL: -- because he still stands as a witness who if he were called would not be favorable to the People.

C.A. App. 334-35; *see* App. 3a-4a. Accordingly, petitioner's argument that the decision below "[e]ncourag[es] the use of grand jury testimony as part of the prosecution's case-in-chief" (petition, p. 24) is especially ironic, given that the People had no intention of using it.

Thus, the record makes clear that defense counsel demanded Cosgrove's testimony as part of her "heads-I win-tails-you lose" strategy, so petitioner should not be heard to complain about Cosgrove's testimony now. *See*, *e.g.*, *United States v. Torres*, 845 F.2d 1165, 1170 (2d Cir. 1988) ("courts have been reluctant to find a

witness practically unavailable when it appears that the defense has no real interest in calling the witness to the stand, but merely is engaged in a form of gamesmanship in an effort to obtain a missing witness charge").

Additionally, during the pendency of his appeal, petitioner was removed from the United States. *See* App. 7a, n.3. Although, his removal might not render the appeal completely moot under *Sibron v. New York*, 392 U.S. 40 (1968), this Court should decline granting a writ of certiorari because further review would be of marginal value to petitioner.

IV. THERE IS NO COMPELLING REASON TO REVIEW THIS ISSUE NOW.

This Court has routinely denied petitions that have raised this issue, including as recently as March 5, 2018, when this Court denied a petition for writ of certiorari for a case from Colorado that raised similar arguments. *See State v. Leverton*, 405 P.3d 402 (Colo. App. 2017) *cert. denied*, No. 17SC311, 2017 WL 4391829 (Colo. Oct. 2, 2017), and *cert. denied sub nom. Leverton v. Colorado*, 138 S. Ct. 1265 (2018); *see*, *e.g.*, *State v. Holliday*, 745 N.W.2d 556 (Minn. 2008), *cert. denied sub nom. Holliday v. Minnesota*, 555 U.S. 856 (2008).

Thus, there is no need now for this Court once again to revisit its Confrontation Clause jurisprudence.

V. ANY ERROR WAS HARMLESS.

Although the New York Court of Appeals did not rule on whether any error regarding the admission of Cosgrove's grand jury testimony was harmless, the Appellate Division correctly determined that the testimony was cumulative to the testimony of other witnesses, even though the Appellate Division misattributed Cosgrove's observation from his grand jury testimony to Bello's trial testimony. App. 44a. Indeed, the New York Court of Appeals determined that Cosgrove's grand jury testimony "was consistent with Bello's trial testimony, was brief and not particularly detailed." App. 5a.

All that was required to convict petitioner of attempted assault in the first degree was evidence that he acted in concert with another to inflict serious physical injury with a dangerous instrument.[8] Thus, the conviction did not require evidence specifically showing that petitioner was the man who slashed the victim or, as described by Cosgrove's grand jury testimony, that petitioner kicked the victim in the head while the victim was on the ground, bleeding.

Rather, there was ample evidence that petitioner physically assaulted the victim in the altercation that left the victim with "multiple injuries consistent with being cut by a dangerous instrument." App. 2a. Bello saw petitioner "body slam" the victim onto the street

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[8] Under New York law, "[t]he key to understanding accessorial liability is that whether one is the actual perpetrator of the offense or an accomplice is, with respect to criminal liability for the offense, irrelevant." *People v. Rivera*, 84 N.Y.2d 766, 771 (1995) (internal citations and quotation marks omitted).

and then drag him between the two parked cars. App. 2a; C.A. App. 204-206. After the officers broke up the attack, Bello observed the victim bleeding profusely from his face and neck. App. 2a; C.A. App. 206, 219.

The victim testified, "There were two people[] who were hitting me, and [petitioner] [wa]s one of the persons who did that" (C.A. App. 184), and that "I did see them hitting me, but I could not say whether it was him or the other guy [who was the slasher]." C.A. App. 184. The victim also testified that his assailants "were kicking me everywhere" and "[t]hey were hitting me in the head and other places . . ." C.A. App. 73, 91, 166.

Tellingly, the People did not even seek to call to Cosgrove but for defense counsel's application for the missing witness charge. Thus, Cosgrove's testimony added little to the evidence that had already been presented at trial and any error in its admission was harmless.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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