No. 19-

IN THE

Supreme Court of the United States

CARLOS TAPIA,

Petitioner,

v.

NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE NEW YORK COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

Christina A. Swarns
David Bernstein
OFFICE OF THE
APPELLATE DEFENDER
11 Park Place
Suite 1601
New York, NY 10007

Daniel A. Rubens
Counsel of Record
Matthew R. Shahabian
ORRICK, HERRINGTON &
SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000
drubens@orrick.com

Counsel for Petitioner

QUESTION PRESENTED

Whether, when a witness's total memory loss prevents him from testifying about his prior out-of-court testimonial statement, the witness's mere presence at trial is enough to provide the defendant with the opportunity for cross-examination guaranteed by the Confrontation Clause.

STATEMENT OF RELATED PROCEEDINGS

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

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

STATEMENT OF RELATED PROCEEDINGS ii

TABLE OF AUTHORITIES iv

INTRODUCTION 1

OPINIONS AND ORDERS BELOW 3

JURISDICTION 3

PERTINENT CONSTITUTIONAL PROVISION 3

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 10

I. The Lower Courts Disagree On How To Apply The Confrontation Clause To Prior Testimonial Statements In Cases Involving Memory Loss. 10

II. The Decision Below Is Wrong. 14

III. The Issue Presented Is Recurring And Important. 22

IV. This Case Is An Ideal Vehicle For Resolving This Issue. 25

CONCLUSION 27

APPENDIX A: Court Of Appeals Opinion (April 2, 2019) 1a

APPENDIX B: Appellate Division Decision And Order (June 6, 2017) 41a

TABLE OF AUTHORITIES

Page(s)

Cases

California v. Green,
399 U.S. 149 (1970).....16, 19

Cookson v. Schwartz,
556 F.3d 647 (7th Cir. 2009).....12, 21

Crawford v. Washington,
541 U.S. 36 (2004).....*passim*

Davis v. Alaska,
415 U.S. 308 (1974).....16, 17

Davis v. Ayala,
135 S. Ct. 2187 (2015).....23

Delaware v. Fensterer,
474 U.S. 15 (1985).....19

Douglas v. Alabama,
380 U.S. 415 (1965).....18

Goforth v. State,
70 So. 3d 174 (Miss. 2011).....11, 12, 21, 23

Johnson v. State,
878 A.2d 422 (Del. 2005).....14

Kentucky v. Stincer,
482 U.S. 730 (1987).....1

Mercer v. United States,
864 A.2d 110 (D.C. 2004).....14

Michigan v. Long,
463 U.S. 1032 (1983).....12

In re N.C.,
105 A.3d 1199 (Pa. 2014).....13

People v. Geraci,
649 N.E.2d 817 (N.Y. 1995).....24

People v. Sutton,
908 N.E.2d 50 (Ill. 2009).....14

Pointer v. Texas,
380 U.S. 400 (1965).....15, 18

Preston v. Superintendent Graterford SCI,
902 F.3d 365 (3d Cir. 2018).....18

State v. Delos Santos,
238 P.3d 162 (Haw. 2010).....14

State v. Gagne,
159 A.3d 316 (Me. 2017).....21

State v. Holliday,
745 N.W.2d 556 (Minn. 2008).....14

State v. Nyhammer,
932 A.2d 33 (N.J. App. Div. 2007).....13, 21, 23

State v. Price,
146 P.3d 1183 (Wash. 2006).....14

State v. White,
243 So. 3d 12 (La. Ct. App. 2018), *petition for cert. pending*, No. 18-8862 (U.S.) 14, 22

United States v. Calandra,
414 U.S. 338 (1974).....24

United States v. Ghilarducci,
480 F.3d 542 (7th Cir. 2007).....12

United States v. Owens,
484 U.S. 554 (1988).....2, 9, 11, 20, 21

United States v. Torres-Ortega,
184 F.3d 1128 (10th Cir. 1999).....18

Woodall v. State,
336 S.W.3d 634 (Tex. Crim. App. 2011).....14

Yanez v. Minnesota,
562 F.3d 958 (8th Cir. 2009).....14

Statutes & Rules

28 U.S.C. § 1257(a).....3

Fed. R. Crim. P. 15.....25

N.Y. Crim. Proc. Law art. 660 25

N.Y. Crim. Proc. Law § 670.10 9

Other Authorities

Brief of Richard D. Friedman as *Amicus Curiae*, *White v. Louisiana*, No. 18-8862 (U.S. May 8, 2019), https://tinyurl.com/yydz99lz 19

Bureau of Justice Statistics, U.S. Dep't of Justice, *Felony Defendants in Large Urban Counties, 2009 – Statistical Tables* (Dec. 2013), https://tinyurl.com/yyg3ttte 23

William Glaberson, *Faltering Courts, Mired in Delays*, N.Y. Times, Apr. 13, 2013 23

Christopher B. Mueller, *Cross-Examination Earlier or Later: When Is It Enough To Satisfy* Crawford*?*, 19 Regent U.L. Rev. 319 (2007).....22

Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* (4th ed. 2019) 22

Ann M. Murphy, *Vanishing Point: Alzheimer's Disease and Its Challenges to the Federal Rules of Evidence*, 2012 Mich. St. L. Rev. 1245 .....22, 23

J. Wigmore, *Evidence* (2d ed. 1923).....16

INTRODUCTION

The Sixth Amendment's Confrontation Clause guarantees criminal defendants an "opportunity for full and effective cross-examination." *Kentucky v. Stincer*, 482 U.S. 730, 744 (1987). The Framers included that protection in the Bill of Rights because they recognized cross-examination's unparalleled effectiveness as a truth-generating "crucible," and abhorred the use of "*ex parte* examinations as evidence against the accused." *Crawford v. Washington*, 541 U.S. 36, 50, 61 (2004).

This case presents a recurring question under the Confrontation Clause that has divided lower courts: does the Clause permit introduction of testimonial out-of-court statements as long as the declarant is physically present on the witness stand at trial, even when the declarant can no longer recall the statement or his basis for making it? Under *Crawford*, the answer should be straightforward. In that circumstance, meaningful cross-examination is impossible. To permit a conviction based on such evidence would reduce cross-examination to an "empty procedure." *Id.* at 74 (Rehnquist, C.J., concurring in the judgment).

Yet most courts that have considered this question have come out the other way. In the decision below, a bare majority of the New York Court of Appeals upheld a conviction that depended on a police officer's *ex parte* eyewitness account of a fight outside a bar as set forth in his grand jury testimony. By the time of trial nearly four years later, the since-retired officer had forgotten everything about the incident, and his complete memory loss thwarted any possibility of

meaningful cross-examination. Relying on this Court's decision in *United States v. Owens*, 484 U.S. 554 (1988), the Court of Appeals nonetheless held that the officer's presence at trial categorically foreclosed petitioner's Confrontation Clause objection.

Numerous federal courts and state courts of last resort have adopted similar holdings, reasoning that as long as the witness is present at trial and responds to questioning, the defendant's confrontation right is vindicated. A significant minority of courts, however, have recognized that a witness's total memory loss can interfere with the constitutionally guaranteed opportunity for meaningful cross-examination. The division of authority on this important question warrants this Court's review.

The decision below cannot be squared with first principles of the confrontation right. The Court of Appeals' holding replicates "the principal evil at which the Confrontation Clause was directed": convictions based on *ex parte* evidence that is never subjected to meaningful cross-examination. *Crawford*, 541 U.S. at 50. It draws an irrational distinction between prior out-of-court statements that cannot be tested through cross-examination due to a witness's total memory loss, and those that cannot be tested because the witness invokes a privilege or refuses to respond to questioning. And it rests on an overreading of *Owens*, a case involving partial (rather than total) memory loss, and where—unlike here—the defense could at least use the witness's impaired memory to cast doubt on the reliability of his prior identification.

Without this Court's intervention, lower courts will continue to diverge in their attempts to apply *Crawford* to witnesses who, by the time of trial, can no longer recall anything about their prior out-of-court statements. Many courts will persist in upholding convictions founded on evidence the defense has no opportunity to test through cross-examination. This case presents an ideal vehicle for the Court to resolve the question and confirm that an out-of-court testimonial statement is admissible only if the witness can meaningfully "defend or explain" it at trial. *Id.* at 59 n.9.

OPINIONS AND ORDERS BELOW

The decision of the New York Court of Appeals is reported at 33 N.Y.3d 257, 124 N.E.3d 210, and reproduced in the Appendix (App.) at 1a-40a. The decision of the New York Supreme Court, Appellate Division, First Department, is reported at 151 A.D.3d 437, 56 N.Y.S.3d 78, and reproduced at App. 41a-50a.

JURISDICTION

The New York Court of Appeals issued its decision on April 2, 2019. On June 19, 2019, Justice Ginsburg extended the time to file a petition for a writ of certiorari to and including July 31, 2019. This Court has jurisdiction under 28 U.S.C. § 1257(a).

PERTINENT CONSTITUTIONAL PROVISION

The Sixth Amendment of the U.S. Constitution provides in relevant part: "In all criminal pros-

ecutions, the accused shall enjoy the right … to be confronted with the witnesses against him ….”

STATEMENT OF THE CASE

1. Petitioner was convicted of attempted first-degree assault with a dangerous instrument following a November 2008 altercation that took place late at night outside a bar in the Bronx. At some point during the incident, the victim suffered several slash wounds to his face and neck. Two police officers witnessed parts of the attack and arrested petitioner as well as a man named Torres. The grand jury declined to indict Torres, but in 2012, petitioner went to trial on several assault charges. As relevant here, three witnesses testified for the prosecution about petitioner's role in the attack:

a. Sergeant Charlie Bello testified that at about 3:30 a.m. on the night of the incident, he was driving southbound to take Lieutenant James Cosgrove back to the police precinct. Bello observed petitioner “body slam” the victim in the street and drag him between two parked cars. App. 2a. Bello “lost visual[]” briefly while he drove the car to the northbound side of the street. Court of Appeals Appendix (C.A. App.) 205, 280. The officers then exited the vehicle and ran toward the scene. Bello saw another man, later identified as Torres, “fidgeting with his waistband” and running toward petitioner and the victim. C.A. App. 205. Bello went to stop Torres while Cosgrove pulled petitioner off of the victim. Bello testified that the victim was “bleeding profusely from his face and neck” at that point. App. 2a. Bello observed pieces of broken glass at the scene, but did not check them for blood or

fingerprints, and did not otherwise locate a weapon or sharp object that could have been used to inflict slash wounds. *Id.*

b. The victim testified at trial that he was attacked from behind by two men but could not see either of them until the attack ended. He could not identify which of the attackers cut him. At some point during the attack, he felt "something warm … running down … [his] face," but "could not realize at what time" he was slashed, and he did not know what object was used to slash him. C.A. App. 73, 168.

c. A few days after the attack, Lieutenant Cosgrove testified to a grand jury about the events leading up to petitioner's arrest. By the time of petitioner's trial three-and-a-half years later, however, Cosgrove had retired from the police department and lacked any memory of the incident. App. 3a-4a. After the trial court refused to rule out the possibility it would deliver a missing witness charge, the prosecution called Cosgrove as a trial witness and sought to introduce his grand jury testimony under the hearsay exception for past recollection recorded. Defense counsel objected to that request on several grounds, including that the introduction of the testimony would violate the Sixth Amendment right to confrontation because Cosgrove's memory loss precluded meaningful cross-examination. C.A. App. 326-27, 339; *see also* App. 3a. The trial court overruled that objection. C.A. App. 331 (concluding that Cosgrove was "literally subject to cross-examination by being on the witness stand under oath and passed to [petitioner] as a witness for cross[-]examination.").

At trial, Cosgrove testified that based on his review of police department paperwork, he knew that two people were arrested on the night of the incident. He lacked, however, "any independent recollection of the circumstances leading to those arrests." C.A. App. 352. As he put it, "I did midnights for most of my career and a fight outside of a bar doesn't really stick out in my mind. I have responded to a lot of them and I can't give you a clear depiction of what happened this night." C.A. App. 355. Cosgrove was adamant that reviewing his grand jury testimony did nothing to refresh his recollection. C.A. App. 354, 357 (testifying that reading his grand jury testimony "didn't create any kind of a memory").

The trial court then permitted the prosecution to read Cosgrove's grand jury testimony into the record. That testimony included the following exchange:

> Q: Okay. Can you briefly describe the circumstances that le[d] up to that arrest that night, what you observed?
>
> A: I was in the passenger seat of a parked Police Department's vehicle. We proceeded southbound on Jerome Avenue …. 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 kicking him in the head.

> Q: The person that was kicking him in the head[,] that individual's name?
>
> A: Mr. Tapia.

C.A. App. 364-65.

On cross-examination, defense counsel questioned Cosgrove on an apparent error in the grand jury transcript. App. 5a. Cosgrove confirmed that although he had testified before the grand jury under oath, he had never reviewed the grand jury transcript to confirm its accuracy. *Id.* He reiterated that he did not "remember the incident," had no "independent recollection" of the actions described in his testimony, and could not give any additional details about what he saw that night. C.A. App. 372, 376-77.

d. The trial court submitted three counts to the jury: first-degree assault, attempted first-degree assault, and second-degree assault. App. 6a. Each of those counts alleged that petitioner, acting in concert with another person, assaulted or attempted to assault the victim with a dangerous instrument—namely, a sharp object.

The jury deliberated over four days and submitted sixteen notes, several of which requested instructions on what it means to act in concert, and one of which asked for an example to illustrate that concept. C.A. App. 540-41, 561-62, 580-81, 632. The jurors also sent notes stating that they were unable to arrive at an "agreement/understanding" on the first-degree assault charge, C.A. App. 613, and later informed the court that they had "come to an exasperating

stalemate," C.A. App. 662. Before the court could respond to that last note, the jurors reported that they had reached a verdict. The jury found petitioner not guilty of first-degree assault but guilty of attempted first-degree assault. The court sentenced petitioner to five years' imprisonment followed by three years' post-release supervision. C.A. App. 682.

2. A panel of the New York Supreme Court's Appellate Division, First Department, affirmed petitioner's conviction by a 3-2 vote. The panel majority rejected petitioner's challenge to the sufficiency of the evidence, concluding that "the jury could have drawn a reasonable inference that [petitioner] and Torres were acting in concert and one or the other caused the injuries to the victim's neck and face by using a sharp instrument at some point in the assault." App. 44a. The Appellate Division then held that the trial court "properly exercised its discretion in admitting Officer Cosgrove's grand jury testimony as past recollection recorded." App. 45a. The Appellate Division further concluded that "the admission of this evidence did not violate the Confrontation Clause since Cosgrove testified at trial and was subject to cross-examination." App. 46a.[1]

[1] The court went on to state that "[i]n any event, there was no prejudice to [petitioner]" from the introduction of Cosgrove's grand jury testimony "because it was entirely cumulative of Officer Bello's testimony." App. 46a. The Appellate Division reached that conclusion by mistakenly attributing to Bello testimony that petitioner was "kicking the victim in the head while the victim was bleeding." App. 44a. As the New York Court of Appeals correctly noted, it was Cosgrove's grand jury account

Two Appellate Division justices dissented on the question of sufficiency. In their view, "the evidence failed to establish beyond a reasonable doubt, directly or by inference circumstantially, that defendant carried a dangerous instrument, cut the victim's face with it, or was aware that the other attacker intended to or was cutting the victim with such an instrument." App. 50a (Kapnick, J., dissenting in part).

3. In a 4-3 decision, the New York Court of Appeals affirmed. As an initial matter, the majority held that the prosecution met the foundational requirements for introducing the grand jury testimony as a past recollection recorded, and that introducing that testimony did not violate § 670.10 of New York's Criminal Procedure Law, which addresses the trial use of testimony given at prior criminal proceedings.

The majority then rejected petitioner's Sixth Amendment arguments, concluding that the "Confrontation Clause is satisfied" when the defendant has "the right to cross-examine all witnesses" as well as "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"—"even if the witness's memory is faulty." App. 15a-16a. The majority regarded this Court's decision in *United States v. Owens*, 484 U.S. 554 (1988), as foreclosing any Confrontation Clause objection "where a witness was unable to explain the basis for a prior out-of-court identification due to memory loss." App. 16a. The majority further observed that in *Crawford v.*

---

that "added" to Bello's trial testimony "that Cosgrove saw [petitioner] kick the victim in the head." App. 5a.

Washington, 541 U.S. 36 (2004), this Court "clearly maintained the fundamental importance of a witness's presence at trial." App. 17a. For those reasons, the majority treated Cosgrove's "presence at trial as a testifying witness" as "preclud[ing] [petitioner's] Confrontation Clause argument." *Id.*

Judge Wilson, joined by Judges Rivera and Fahey, dissented. In the dissenters' view, the introduction of Cosgrove's grand jury testimony "violated [the Court of Appeals'] settled decisional law, rooted in the common law, prohibiting the introduction of grand jury testimony in the People's case-in-chief." App. 31a. The dissenters maintained that the majority's holding "turns our common-law and statutory rules on their head, admitting that the grand jury testimony of a dead witness could not be offered at trial for the truth of the matters contained therein, but permitting the wholesale introduction of prior testimony not subjected to cross-examination if the witness is alive." App. 35a. And because Cosgrove's grand jury testimony was "essential to supporting" the only potentially viable "theory for conviction," the dissent concluded that the erroneous admission of that testimony "cannot be said to be harmless." App. 39a-40a.

REASONS FOR GRANTING THE WRIT

I. The Lower Courts Disagree On How To Apply The Confrontation Clause To Prior Testimonial Statements In Cases Involving Memory Loss.

The 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. Most courts confronting this question—including the New York Court of Appeals majority here—have treated this Court's decision in *Owens*, 484 U.S. 554, as establishing a blanket rule foreclosing a witness's memory loss from implicating the Sixth Amendment confrontation right. But a significant minority of courts recognize that the Confrontation Clause demands a *meaningful* opportunity for cross-examination that requires more than the declarant's mere presence on the witness stand at trial. As those courts recognize, the witness must also be in a position to provide testimony that would "defend or explain" the prior statement. *Crawford*, 541 U.S. at 59 n.9. Only this Court can reconcile that division of authority.

A. Several courts have concluded that the Confrontation Clause forbids the admission of testimonial prior statements when the declarant cannot be adequately cross-examined for whatever reason, including due to a complete lack of memory about the subject matter of his previous testimony. The Supreme Court of Mississippi has 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. *Goforth v. State*, 70 So. 3d 174, 186-87 (Miss. 2011). As that court explained, the witness's lack of memory "deprived [the defendant] any opportunity to inquire about potential bias or the

circumstances surrounding [the witness's] statement," such that defense counsel "simply had no opportunity to cross-examine [the witness] about his statement." *Id.* at 186.[2]

To support its holding, the Mississippi Supreme Court found "insightful and persuasive" a Seventh Circuit opinion, *Cookson v. Schwartz*, 556 F.3d 647 (7th Cir. 2009). There, the Seventh Circuit rejected the argument that a witness need only be physically present on the stand because, so long as "the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." *Id.* at 651 (quoting *Crawford*, 541 U.S. at 59 n.9). To the contrary, as the Seventh Circuit explained, the *rest* of footnote 9 in *Crawford* makes clear that the declarant must not only be physically on the witness stand, but must also be "present at trial *to defend or explain* [the statement]." *Id.* (emphasis added); *see also, e.g.*, *United States v. Ghilarducci*, 480 F.3d 542, 549 (7th Cir. 2007) (suggesting that memory loss can lead to Confrontation Clause violation when it is "total" or

---

[2] Although the Mississippi Supreme Court framed its holding as an application of the Mississippi Constitution's confrontation right, it used "Federal caselaw … as [its] guide" on the scope of the confrontation right, and its holding turned exclusively on *Crawford* and federal precedent. 70 S.3d at 183, 186-87; *cf. Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983) ("[W]hen … a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law … , we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.").

where cross-examination is inadequate to "test[] [the witness's] credibility").

Similarly, some courts 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. The Pennsylvania Supreme Court addressed a case where the witness—a young child—testified at trial but "provided virtually no verbal responses on direct examination." *In re N.C.*, 105 A.3d 1199, 1216-17 (Pa. 2014). In those circumstances, the court held, admitting the witness's prior videotaped interview violated the defendant's Confrontation Clause rights, "for *Crawford* and its progeny require an opportunity for effective cross-examination which [the defendant] simply did not have." *Id.* at 1216 (noting "any attempt" at cross-examination "would have been, at best, *pro forma*"). Likewise, the New Jersey Appellate Division held that a defendant's Confrontation Clause rights were violated where the witness's prior videotaped statement to the police was admitted, but the witness was "unresponsive" to questions about her prior statement and demonstrated a "complete inability to present current beliefs about any of the material facts" of her prior statement. *State v. Nyhammer*, 932 A.2d 33, 42-43 (N.J. App. Div. 2007), *rev'd on other grounds*, 963 A.2d 316, 334 (N.J. 2009) (declining to reach question of whether the witness's "silence or unresponsiveness effectively denied defendant his constitutional right of confrontation" upon concluding that defense counsel "chose not to cross-examine [the witness] about [her] core accusations").

B. By contrast, the majority of courts to consider this issue have ruled, as the New York Court of Appeals did here, that as long as the "declarant of [the] out-of-court statement [i]s a live witness at trial, [a] defendant's Sixth Amendment right to confrontation [i]s not violated." App. 2a. These courts read *Owens* as categorically foreclosing any argument that a witness's memory loss can preclude the opportunity for cross-examination that the Sixth Amendment guarantees, notwithstanding this Court's subsequent decision in *Crawford*. *See, e.g.*, *Yanez v. Minnesota*, 562 F.3d 958, 963 (8th Cir. 2009); *State v. White*, 243 So. 3d 12, 16 (La. Ct. App. 2018), *petition for cert. pending*, No. 18-8862 (U.S.); *Woodall v. State*, 336 S.W.3d 634, 644 (Tex. Crim. App. 2011); *State v. Delos Santos*, 238 P.3d 162, 177-82 (Haw. 2010); *People v. Sutton*, 908 N.E.2d 50, 70-71 (Ill. 2009); *State v. Holliday*, 745 N.W.2d 556, 564-68 (Minn. 2008); *State v. Price*, 146 P.3d 1183, 1192 (Wash. 2006); *Johnson v. State*, 878 A.2d 422, 428-29 (Del. 2005); *Mercer v. United States*, 864 A.2d 110, 114 (D.C. 2004). In these courts' view, all that the Confrontation Clause requires is that "the declarant be available at trial to testify." *E.g.*, *White*, 240 So. 3d at 16.

II. The Decision Below Is Wrong.

The New York Court of Appeals erred by concluding that the confrontation right was satisfied here because Cosgrove was "presen[t] at trial as a testifying witness" and "subjected to cross-examination," App. 17a—even though his total memory loss rendered that examination futile. This Court's seminal decision in *Crawford* is clear: a "testimonial" out-of-court statement cannot be admitted against a criminal

defendant—even if it falls under a recognized exception to the hearsay rule—if the defendant did not have an "adequate opportunity to cross-examine" the declarant about the prior statement. 541 U.S. at 57. Where, as here, the declarant experiences total memory loss by the time of trial, the defendant lacks any meaningful opportunity to subject the prior statement to "testing in the crucible of cross-examination," *id.* at 61, as the Confrontation Clause requires. The New York Court of Appeals' contrary decision elevates form over substance by ignoring the fact that memory loss defeats the entire purpose of cross-examination: the opportunity to "expose [the] accusation as a lie." *Crawford*, 541 U.S. at 62.

A. By virtue of its placement in the Sixth Amendment, the right of confrontation "reflects the belief of the Framers … that confrontation was a fundamental right essential to a fair trial in a criminal prosecution." *Pointer v. Texas*, 380 U.S. 400, 404 (1965). "Moreover, the decisions of this Court and other courts throughout the years have constantly emphasized the necessity for cross-examination as a protection for defendants in criminal cases." *Id.* (footnote omitted). The decision below strikes at the core of that right by "reinstating the very procedures the common law deemed illegitimate: trial by declaration or affidavit." App. 35a (Wilson, J., dissenting).

History makes clear that the constitutionally guaranteed opportunity for cross-examination requires more than a living, breathing witness who appears on the witness stand, even when memory loss or some other incapacity renders cross-examination completely ineffectual. It has long been recognized

that the right of face-to-face confrontation on the stand is a "minor advantage" that is "subordinate" to the "indispensable" and "essential object" of that right: "securing the *opportunity* of Cross-examination." 3 J. Wigmore, *Evidence* § 1365 at p.25 (2d ed. 1923) (emphasis added). Or, as this Court has put it, "Confrontation means more than being allowed to confront the witness physically." *Davis v. Alaska*, 415 U.S. 308, 315 (1974)); *see also California v. Green*, 399 U.S. 149, 158 (1970) (Confrontation Clause requires that witness be "subject to full and effective cross-examination"). An "adequate" opportunity for cross-examination means that the witness is at least capable of "defend[ing] or explain[ing]" his prior statement. *Crawford*, 541 U.S. at 57, 59 n.9.

The Confrontation Clause stems from the Framers' recognition of the injustice and error that result when a criminal defendant is subject to trial-by-transcript. As *Crawford* explained, "the principal evil at which the Confrontation Clause was directed was … [the] use of *ex parte* examinations as evidence against the accused." *Id.* at 50. That evil manifested in "notorious" English trials, such as Walter Raleigh's treason trial, as well as "controversial" colonial trials where depositions or private examinations were admitted as evidence against a defendant who could not cross-examine the declarant on what he previously said. *Id.* at 43-50 (surveying history).

For this reason, during the debates on Ratification, the Antifederalists objected to the omission of a right of confrontation in the original Constitution: "Nothing can be more essential than the cross examining [of] witnesses, and generally before the triers of

the facts in question .... [W]ritten evidence ... [is] almost useless; it must be frequently taken ex parte, and but very seldom leads to the proper discovery of truth." *Id.* at 49 (alterations in original) (quoting R. Lee, Letter IV by the Federal Farmer (Oct. 15, 1787), reprinted in 1 Bernard Schwartz, *The Bill of Rights: A Documentary History* 469, 473 (1971)). The First Congress responded by introducing the Confrontation Clause in what would become the Sixth Amendment. *Id.* The Framers appreciated that there is no adequate substitute for testing the accuracy of a witness's statement through cross-examination, a process that requires "the direct and personal putting of questions and obtaining immediate answers." *Davis*, 415 U.S. at 316 (quoting 5 J. Wigmore, *Evidence* § 1395 at p.123 (3d ed. 1940)).

By "permitting the wholesale introduction of prior testimony not subjected to cross-examination," the decision below in effect authorizes trial by *ex parte* examination. App. 35a (Wilson, J., dissenting). And the fact that memory loss is involved does nothing to diminish the constitutional violation: "A witness's lack of memory at the time of trial does not render such testimony any more reliable or less threatening to the rights of the accused than the introduction of that testimony when a witness has perfect recall; indeed, it has a greater potential to undermine the rights of the accused …." *Id.*

B. The decision below is also irreconcilable with the settled proposition that a witness's refusal to answer questions on privilege grounds can infringe a defendant's Confrontation Clause right. In that context, this Court has already established that the

opportunity for cross-examination requires more than a witness who is physically present on the stand. In *Douglas v. Alabama*, the Court held that the Confrontation Clause is violated where the witness takes the stand and is subjected to cross-examination by the defense but responds to questions about his prior testimony with an invocation of the privilege against self-incrimination. 380 U.S. 415, 420 (1965). *Crawford* itself describes *Douglas* as an example of when a defendant lacks an "opportunity to cross-examine" the declarant for Confrontation Clause purposes, even though he was on the witness stand and subjected to the formality of "cross-examination." *Crawford*, 541 U.S. at 57 (citing *Douglas*, 380 U.S. at 418-20).

Accordingly, under *Crawford*, "the use of a witness's prior statement against a criminal defendant violates the defendant's Confrontation Clause rights when the witness refuses to answer any substantive questions on cross-examination." *Preston v. Superintendent Graterford SCI*, 902 F.3d 365, 379 (3d Cir. 2018), *cert. denied*, 139 S. Ct. 1163 (2019); *accord, e.g.*, *United States v. Torres-Ortega*, 184 F.3d 1128, 1132-34 (10th Cir. 1999). As the Third Circuit recently held, when the assertion of a privilege thwarts "[a] full and fair opportunity to test the veracity of a witness's statement," the Sixth Amendment bars admission of the prior statement into evidence. *Preston*, 902 F.3d at 380.

That same logic should apply where the declarant has a complete failure of memory on the witness stand. The fact that the impediment to truth-testing comes in the form of memory loss instead of a privilege assertion does not change the Confrontation

Clause analysis. A complete lack of recall still deprives the defendant of his constitutional right to "try to expose [the] accusation as a lie" through cross-examination. *Crawford*, 541 U.S. at 62. As a leading commentator has put it, "[i]t 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." Brief of Richard D. Friedman as *Amicus Curiae* at 10, *White*, No. 18-8862 (U.S. May 8, 2019), https://tinyurl.com/yydz99lz.

C. The cases that hold a witness's memory loss can *never* give rise to a Confrontation Clause violation—including the decision below—all rest on an overbroad reading of this Court's decision in *Owens*. *See* App. 16a-17a. Properly understood, *Owens* does not give the prosecution a free pass to introduce prior testimonial statements over a Confrontation Clause objection as long as the declarant appears at trial.

Prior to *Owens*, the Court had left open the possibility that a witness's memory loss could "so affect[] [the defendant's] right to cross-examine as to make a critical difference in the application of the Confrontation Clause." *Green*, 399 U.S. at 168-69; *accord Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) (per curiam). Although *Owens* offered a partial answer to that question, its holding must be viewed in the context of the facts of that case: Importantly, *Owens* did not involve a witness's *total* memory loss, but it did involve a witness whose memory was already compromised at the time of the prior statement. The witness there, Foster, was the victim of an assault that impaired his

memory. By the time of trial, Foster remembered some details from before and after the attack but could not recall seeing his assailant. He "clearly remembered," however, that he had identified the defendant as his assailant during an interview that took place a few weeks after the assault while he was still in the hospital. 484 U.S. at 556.

On those facts, the Court upheld the admission of Foster's prior identification against a Confrontation Clause challenge. Noting that the right for an "*opportunity* for effective cross-examination" is not a guarantee of "cross-examination that is effective in whatever way, and to whatever extent, the defense might wish," the Court held that the requisite "opportunity" is afforded "when a witness testifies as to his current belief but is unable to recollect the reason for that belief." *Id.* at 559 (quotation marks omitted). It is instead 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.* (citation omitted). Importantly, the defense counsel in *Owens* was able to use cross-examination as a "weapon" to impugn Foster's prior identification, as counsel's summation "emphasized Foster's memory loss and argued that his identification of respondent was the result of the suggestions of people who visited him in the hospital." *Id.* at 560.

Owens thus turned on two critical points: first, that Foster *remembered* the circumstances of his prior identification, and second, that because Foster's memory was *already impaired* at the time of his prior

identification, defense counsel was able to emphasize Foster's memory loss as a way to undercut his reliability. *See* App. 36a (Wilson, J., dissenting) (noting that the jury might take memory loss into account in weighing testimony "where the witness had a partial memory and his memory was impaired to some degree by the attack"). The situation here is entirely different: when a "police officer … testifies truthfully that he no longer has any recollection because of the passage of time, but who was under oath and testified truthfully before the grand jury when he did recall the incident, the jury has no basis to question the accuracy of the testimony based on memory loss." *Id*.

In any event, these sweeping readings of *Owens* cannot be squared with *Crawford*, which made clear that the confrontation right depends on a witness's ability to "defend or explain" his prior statement. Thus, as several courts have held[3]—and

[3] *See Goforth*, 70 So. 3d at 186-87 (distinguishing *Owens* on the basis that the witness in *Owens* "vividly recalled" the circumstances of the identification, and defense counsel "was able to cast doubt upon the identification and asserted that it had been based upon a suggestion by one of the individuals who had visited the defendant while he had been hospitalized"); *Cookson*, 556 F.3d at 651-52 (stating that a witness's "total amnesia" could render her "unable to defend or explain her statements," but concluding that the defendant had an opportunity for effective cross-examination because the witness in that case "could remember the underlying events described in the hearsay statements"); *Nyhammer*, 932 A.2d at 43 ("[The witness's] complete inability to present current beliefs about any of the material facts, or to testify about her prior statements, is distinguishable from a situation where a trial witness for the prosecution simply has a bad memory." (citing *Owens*, 484 U.S. 554)); *see also State v. Gagne*, 159 A.3d 316, 324 & n.6 (Me. 2017) (*Owens* permitted introduction of prior statement where witness "explained her loss of

commentators have urged[4]—*Owens* should not be extended to cases where the declarant's memory loss renders cross-examination a meaningless formality.

III. The Issue Presented Is Recurring And Important.

As reflected by the decisions cited above, the issue presented here arises regularly in courts across the country. And the majority rule—that the confrontation right is fully vindicated by the presence of "a live witness at trial," App. 2a—has been applied not only in the context of grand jury testimony, but also (as in *Owens* itself) to prior identifications and out-of-court statements to investigators. *See, e.g.*, *White*, 243 So. 3d at 16 (videotaped statement). The result is that New York and many other jurisdictions now routinely

---

memory of the details of [the] event[]" such that it did not involve a "complete loss of memory").

[4] *See* Ann M. Murphy, *Vanishing Point: Alzheimer's Disease and Its Challenges to the Federal Rules of Evidence*, 2012 Mich. St. L. Rev. 1245, 1269-70 (arguing that *Owens* rests on "unique" facts and "has been interpreted too broadly by lower courts," especially in light of *Crawford*); 4 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 8:29 (4th ed. 2019) ("Where it is plain that the witness remembers *neither* the acts, events, or conditions reported in the statement *nor* making the statement itself, the impediment to full and effective cross-examination is plain and palpable."); *see also* Christopher B. Mueller, *Cross-Examination Earlier or Later: When Is It Enough To Satisfy* Crawford*?*, 19 Regent U.L. Rev. 319, 335 (2007) ("'[F]ull and effective' cross-examination should mean that the witness has answered questions about both the acts, events, or conditions reported in the prior statement and about the statement itself.").

permit defendants to be convicted based on untested evidence that is tantamount to an *ex parte* affidavit.

Nor is there anything particularly unusual about the nature of the memory loss Cosgrove experienced here, three-and-a-half years after witnessing the event in question. Witnesses may forget what they said months or years prior. That lack of recall could be due to injury, *see, e.g.*, *Goforth*, 70 So. 3d at 180; youth, *see, e.g.*, *Nyhammer*, 932 A.2d at 37; or disease, *see, e.g.*, Murphy, *supra*, at 1270-77 (examining intersection of Alzheimer's disease and the Confrontation Clause). Or, as in this case, it could be due to a genuine lapse in memory over time for what the witness considered a routine event. After all, state criminal proceedings are often marked by extensive delays: "[M]any of the cases on [the New York Court of Appeals'] docket involve gaps between incident and trial of several years …." App. 36a. (Wilson, J., dissenting).[5] The predictable result is that witnesses' memories of critical incidents often fade by the time of trial.

---

[5] Bronx criminal proceedings have long been marked by particularly egregious delays. *See Davis v. Ayala*, 135 S. Ct. 2187, 2210 (2015) (Kennedy, J., concurring) (citing Michael Schwirtz & Michael Winerip, *Man, Held at Rikers for 3 Years Without Trial, Kills Himself*, N.Y. Times, June 9, 2015, at A18); *see also* William Glaberson, *Faltering Courts, Mired in Delays*, N.Y. Times, Apr. 13, 2013 (noting that felony cases in the Bronx have the longest delays in New York City, such that 7 of 10 cases violate the state's speedy trial guideline of 180 days, and the borough is responsible for "two-thirds of the defendants [in all five New York City boroughs] waiting for their trials in jail for more than five years"). Such delays are not confined to New York City; they are common in state criminal cases throughout the nation. *See* Bureau of Justice Statistics, U.S. Dep't of Justice, *Felony*

The Sixth Amendment question presented here is also important because it goes to the heart of the truth-seeking function of the criminal justice system. The majority rule harms the administration of justice by creating perverse incentives: it encourages the government to secure incriminating out-of-court testimonial statements and later use them at trial without ever affording the defendant a meaningful opportunity to test that evidence through cross-examination. In particular, as this case illustrates, the rule will encourage prosecutors to lock in grand jury testimony—a form of *ex parte* testimony taken in "conditions which tend to impair its reliability," *People v. Geraci*, 649 N.E.2d 817, 822 (N.Y. 1995)—and later use it as trial evidence whenever the witness's memory has dissipated over the intervening months or years.

Encouraging the use of grand jury testimony as part of the prosecution's case-in-chief disregards the important distinction between grand jury proceedings and criminal trials: "A grand jury proceeding is not an adversary hearing in which the guilt or innocence of the accused is adjudicated. Rather, it is an *ex parte* investigation to determine whether a crime has been committed and whether criminal proceedings should be instituted against any person." *United States v. Calandra*, 414 U.S. 338, 343-44 (1974). If the prosecution has a legitimate need to preserve a witness's

---

Defendants in Large Urban Counties, 2009 – Statistical Tables 23 tbl.20 (Dec. 2013), https://tinyurl.com/yyg3ttte (collecting statistics on felony defendants in large urban counties nationwide; reporting that 22% of violent offenses, and 67% of murder cases, are not adjudicated until more than one year post-arrest).

testimony for later use at trial, it may avail itself of procedures for doing so, as long as the defendant is afforded an opportunity for cross-examination. *See, e.g.*, N.Y. Crim. Proc. Law art. 660 (providing for conditional pretrial witness examinations where the defendant may cross-examine the witness); Fed. R. Crim. P. 15 (same). But the majority rule here, by "facilitat[ing] … convictions based on testimony that has not been subject to cross-examination," is "anathema to our system of justice." App. 36a (Wilson, J., dissenting).

IV. This Case Is An Ideal Vehicle For Resolving This Issue.

This case is an excellent vehicle for clarifying that a witness's memory loss about a prior statement can infringe a defendant's Confrontation Clause rights. This petition arises on direct appeal. Petitioner preserved his Sixth Amendment claim at every level of the state court proceedings, and each of the courts addressed it on its merits. *See supra* 5, 8-10. There is no dispute that the prior statement at issue here, which came in the form of grand jury testimony, is considered "testimonial" for Sixth Amendment purposes. The New York Court of Appeals issued a lengthy majority and dissenting opinions on the admissibility of that grand jury testimony, which the court treated as case-dispositive.[6]

---

[6] As noted above (at 8-9 n.1), although the Appellate Division inaccurately stated that Cosgrove's testimony was "cumulative" of other evidence, the Court of Appeals recognized that Cosgrove's testimony "added the fact that Cosgrove saw defendant kick the victim in the head." App. 5a. The Court of Appeals

Finally, the facts of this case—where a police officer credibly testified that he experienced total memory loss about his prior statement in the three-and-a-half years between the incident and the trial—place the constitutional violation in stark relief. It is hard to imagine a more compelling vehicle for revisiting the notion that memory loss can *never* inhibit the constitutionally guaranteed opportunity for cross-examination.

---

dissent concluded that "the admission of Lieutenant Cosgrove's testimony was not harmless error," noting that the "factfinders in the proceedings below clearly considered this case a close question when Lieutenant Cosgrove's grand jury testimony was part of the record." App. 38a, 40a. And even though respondent's brief in the Court of Appeals contended that Cosgrove's testimony was cumulative such that any error in its admission was harmless, *see* Resp. C.A. Br. 35-37, the Court of Appeals' majority opinion did not address that contention. Thus, the prejudicial effect of the error is at most a question for remand, and in no way impedes this Court's review of the constitutional issue presented.

CONCLUSION

The petition should be granted.

Respectfully submitted,

Christina A. Swarns
David Bernstein
OFFICE OF THE APPELLATE DEFENDER
11 Park Place
Suite 1601
New York, NY 10007

Daniel A. Rubens
Counsel of Record
Matthew R. Shahabian
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000
drubens@orrick.com

Date July 31, 2019