No. 19-159

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

This petition raises a recurring and important constitutional question on which the lower courts are divided: Does it violate the Confrontation Clause to introduce a witness's out-of-court testimonial statement if the prosecution calls the witness to the stand but he remembers nothing about his previous statement? A bare majority of New York's highest court erred in concluding that the confrontation right can be vindicated by the witness's mere physical presence on the witness stand, even if intervening memory loss deprives the defendant of any meaningful opportunity for cross-examination. Respondent's objections to certiorari are meritless. There is an acknowledged division of authority on the question presented, the decision below diminishes the confrontation right to an empty formality when a witness experiences total memory loss, and this case offers a perfect vehicle for the Court to resolve the question. The petition should be granted.

I. The Conflict Is Real.

If petitioner had been prosecuted in the State of Mississippi, a federal district court in the Seventh Circuit, or the Commonwealth of Pennsylvania, those courts would not have stopped their Sixth Amendment analysis upon observing that Lieutenant Cosgrove was physically present on the witness stand. Instead, those courts would have asked whether petitioner had an "effective" opportunity to cross-examine Cosgrove about his grand jury testimony when Cosgrove could not "'defend or explain'" his testimony and defense counsel could not test the credibility of his

prior statement. *See Goforth v. State*, 70 So. 3d 174, 186-87 (Miss. 2011) (quoting *Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004)); *Cookson v. Schwartz*, 556 F.3d 647, 651 (7th Cir. 2009); *In re N.C.*, 105 A.3d 1199, 1216-17 (Pa. 2014); Pet. 10-14.

Respondent's efforts to muddy the split fall short. It is true that in *Goforth*, the Mississippi Supreme Court framed its holding as an application of that state's constitution. But the court interpreted the Mississippi Constitution as providing the "same right" as the Sixth Amendment's Confrontation Clause, grounded the state right exclusively in federal precedent (namely, *Crawford* and *Cookson*), and used that federal precedent to distinguish both its own prior holdings and this Court's decision in *United States v. Owens*, 484 U.S. 554 (1988). *See Goforth*, 70 So. 3d at 185-87. Whether *Goforth* can be said to rest on an adequate and independent state ground is debatable, *see Pennsylvania v. Muniz*, 596 U.S. 582, 588 n.4 (1990), but ultimately beside the point. For purposes of this petition, what matters is that the Mississippi Supreme Court interpreted the federal confrontation right differently than the New York Court of Appeals did here. *See Goforth*, 70 So. 3d at 185 (rejecting the position of "many courts" that "a declarant's appearance and subjection to cross-examination … are all that is necessary to satisfy the Confrontation Clause").

Respondent makes no meaningful attempt to argue that the Seventh Circuit would have decided the question presented differently, other than to dismiss as mere "dicta" that court's statements that the Confrontation Clause bars the introduction of an out-of-

court statement where the witness can no longer recall the events or the prior statement. BIO 14 (citing *Cookson*, 556 F.3d 647, and *United States v. Ghilarducci*, 480 F.3d 542 (7th Cir. 2007)). The Seventh Circuit found no confrontation violation on the facts presented in those cases, where the witness "could remember the underlying events described in the hearsay statements," *Cookson*, 556 F.3d at 652, or "did not claim a total loss of memory regarding the events," *Ghilarducci*, 480 F.3d at 549. But the rule the Seventh Circuit articulated is irreconcilable with the one the New York Court of Appeals applied here: in the Seventh Circuit, a witness's mere physical presence is not dispositive. *See Cookson*, 556 F.3d at 651 (rejecting the categorical argument "that there is no Confrontation Clause problem" where the defendant is "able to cross-examine [the witness] at trial").

Nor can respondent contest that Pennsylvania and New Jersey appellate courts have understood the Sixth Amendment to require "an opportunity for effective cross-examination" that goes beyond the witness's physical presence. *N.C.*, 105 A.3d at 1209, 1216; *accord 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). Respondent ignores *Nyhammer* entirely, and would treat *N.C.* as "inapposite" because it involved a "child witness." BIO 16. That distinction misses the point: When a witness is unable to testify about her prior account for whatever reason—be it privilege, incapacity, or memory loss—the defendant

is deprived of the opportunity for cross-examination that the Sixth Amendment secures. *See* Pet. 17-19.[1]

Any way the split is sliced, there is irreconcilable and acknowledged disagreement among federal courts and state courts of last resort over the meaning of this Confrontation Clause question.[2] Respondent's brief puts the question well: "[W]hat happens if a live, testifying witness cannot remember the facts of the case, and his prior, out-of-court statement is introduced at trial?" BIO 1. A litigant who compared the opinion of the New York Court of Appeals (and like-minded courts) to *Goforth*, *Cookson*, and *N.C.* would see no clear answer. Unless this Court intervenes, the validity of a conviction based on out-of-court testimony that the declarant has forgotten will depend on where the defendant is prosecuted.

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[1] Respondent also suggests that the Pennsylvania Supreme Court distinguished the "nonresponsive" witness in *N.C.* from "a forgetful witness … who was otherwise responsive to questioning and did not lack the capacity to offer testimony." BIO 16-17 (citing *N.C.*, 105 A.3d at 1216-17). That is incorrect. That court framed the critical inquiry as whether the defendant had "an opportunity for effective cross-examination," and noted that the witness there failed to testify "on the substantive issues of the case." 105 A.3d at 1216. In distinguishing other "caselaw" cited by the prosecution involving witnesses who "could not remember certain details," *id.* at 1217, the court was not suggesting that the Confrontation Clause tolerates the introduction of prior testimony where memory loss prevents the witness from testifying at all about the *substance* of his prior statement.

[2] *See, e.g.*, *State v. Cameron M.*, 55 A.3d 272, 282 n.18 (Conn. 2012) (addressing *Goforth* and *Nyhammer*); *People v. Leverton*, 405 P.3d 402, 410 (Colo. Ct. App. 2017) (*Cookson* and *Goforth*), *cert. denied*, 138 S. Ct. 1265 (2018).

II. The Decision Below Is Wrong.

Given the conflict over the question presented, respondent's lengthy arguments on the merits are unresponsive to the need for certiorari review. In any event, those arguments are misguided both in their failure to defend the decision below and on their own terms.

1. Respondent has remarkably little to say about the New York Court of Appeals' actual holding. The court ruled categorically that the Confrontation Clause is satisfied by a witness's "presence at trial." App. 17a. The majority upheld the use of Cosgrove's out-of-court statements solely because of Cosgrove's "presence at trial as a testifying witness, where he was subjected to cross-examination before the trier of fact." *Id.* As the petition explains (at 14-17), this Court's precedents demand more: the defendant must have "an *adequate* opportunity to cross-examine." *Crawford*, 541 U.S. at 57 (emphasis added). And that opportunity, in turn, requires "more than being allowed to confront the witness physically" in the courtroom. *Davis v. Alaska*, 415 U.S. 308, 315 (1974).

The same principles animated this Court's holding in *Douglas v. Alabama*, 380 U.S. 415 (1965), where the witness took the stand but, invoking his privilege against self-incrimination, refused to answer questions about the alleged crime. The Court concluded that "effective confrontation" was impossible in those circumstances, thereby "plainly den[ying] [the defendant] the right of cross-examination secured by the Confrontation Clause." *Id.* at 419-20. Respondent purports to distinguish *Douglas* by pointing

to the Court's statement in *Owens* that "assertions of privilege by the witness may undermine the process to such a degree that meaningful cross-examination … no longer exists." BIO 25. But the same can be said about a witness who can no longer remember previous events or testimony at all.

For purposes of the Confrontation Clause, what matters is that meaningful cross-examination about the prior statement is impossible. Again, whatever the reason the defendant is left unable to cross-examine the witness, the effect is the same: "The engine of cross-examination [i]s left unengaged, and the Sixth Amendment [i]s violated." *Stuart v. Alabama*, 139 S. Ct. 36, 36 (2018) (Gorsuch, J., dissenting from denial of certiorari).

Although respondent suggests otherwise (at 17-20), no prior decision of this Court supports a rule that treats a witness's physical presence as dispositive in cases involving memory loss. *California v. Green* and *Delaware v. Fensterer* both expressly reserved decision on the question whether a witness's memory loss "so affected [the] right to cross-examine as to make a critical difference in the application of the Confrontation Clause." *California v. Green*, 399 U.S. 149, 168 (1970); *accord Delaware v. Fensterer*, 474 U.S. 15, 20 (1985). And both cases emphasized the importance of securing defendants "an *effective* opportunity for confrontation." *Green*, 399 U.S. at 165; *accord Fensterer*, 474 U.S. at 20.

The Confrontation Clause's status as a "'procedural … guarantee,'" BIO 23 (quoting *Crawford*, 541 U.S. at 61), only reinforces the point. That a

constitutional right is procedural does not mean that it can be reduced to an empty formality. Without some check to ensure the opportunity for cross-examination is "adequate" or "effective" in cases involving memory loss, the confrontation right would hardly function as the truth-testing "crucible" that *Crawford* envisioned. 541 U.S. at 61. That is why *Crawford* conditions the admissibility of a prior statement on a witness who is "present at trial to defend or explain it." *Id.* at 59 n.9.

Respondent contends that *Crawford* cannot be read as "requir[ing] 'the declarant [to] *actually* defend or explain his statement.'" BIO 21-22 (emphasis added) (quoting *State v. Holliday*, 745 N.W.2d 556, 565 (Minn. 2008)). But *Holliday* recognized *Crawford* "could be interpreted" to mean that, 745 N.W.2d at 565, and it is unclear what work the words "defend or explain" are doing in the *Crawford* footnote on respondent's proposed reading. *See Green*, 399 U.S. at 157 (the confrontation right is satisfied if "the witness [i]s present at trial to repeat his story and to explain or repudiate any conflicting prior stories before the trier of fact"). Even if those words are best read as tolerating something short of "actually" defending or explaining the prior statement "in fact," they at the very least require that the witness have some "minimal ability or capacity" to defend or explain the statement—something the witness lacks in a case of total memory loss. *Goforth*, 70 So. 3d at 186.

Predictably, then, respondent rests much of its merits discussion on *Owens*. That is hardly a reason to deny certiorari, given the lower-court division on how *Owens* applies on facts like these. *See supra* 1-4; Pet. 10-14. Moreover, as the petition explains (at 19-

22), *Owens* did not purport to establish a categorical rule that the confrontation right is satisfied by a witness's in-court presence. Instead, the Court held that there was no confrontation violation where a witness remembered some details of the prior identification, and where defense counsel could make use of that memory loss to cast doubt on the credibility of the prior identification. 484 U.S. at 559-60.

2. Instead of defending the decision below, respondent devotes the bulk of its opposition to addressing a different question: whether, if *Owens* indeed requires more than a witness's mere physical presence at trial, the Sixth Amendment was nonetheless satisfied here because "petitioner *effectively* cross-examined Cosgrove" at trial. BIO 23 (emphasis added). That question is not before the Court because the Court of Appeals did not resolve that issue. That court instead held that the confrontation right was categorically satisfied because Cosgrove was "presen[t] at trial" and "subjected to cross-examination before the trier of fact." App. 17a. Respondent's contention that Cosgrove's cross-examination was "effective" is, at most, an issue for the Court of Appeals to consider on remand, if this Court were to reverse. *See, e.g.*, *McFadden v. United States*, 135 S. Ct. 2298, 2307 (2015).

Respondent's argument is at any rate meritless. Respondent notes that defense counsel's cross-examination was able to "call[] into question the accuracy of the transcription of [Cosgrove's] grand jury testimony." BIO 23-24. But the typographical error in the grand jury transcript concerned an ancillary issue: whether Cosgrove was initially sitting in a "marked"

or "parked" police vehicle. App. 5a; C.A. App. 369. Left entirely unrebutted was Cosgrove's critical identification of petitioner as the assailant.

Respondent also seeks to liken this case to *Owens*—and minimize the tension with decisions like *Goforth* and *Ghilarducci*—by downplaying the extent of Cosgrove's memory loss by the time of trial. *See* BIO 15-16, 28-29. But the fact that Cosgrove could remember when he retired from the police force, and that his review of "police paperwork" allowed him to testify as to where and when the arrest occurred, C.A. App. 350-51, has nothing to do with the critical gap in his memory: his inability to recall the attack or his identification of petitioner. *Cf. Douglas*, 380 U.S. at 416 (finding Confrontation Clause violation even where witness answered preliminary questions about his name and address). Cosgrove could not have been clearer that he lacked "any independent recollection of the circumstances leading to [petitioner's] arrest[]," even after reviewing the paperwork. C.A. App. 352. He could not identify petitioner by name or face in the courtroom. C.A. App. 351-52. On cross-examination, Cosgrove could not answer defense counsel's questions regarding the events other than to confirm repeatedly that he had no memory of them. C.A. App. 371-78. And he admitted that he could not recall his prior testimony such that he could not attest to the accuracy of the court reporter's transcription. C.A. App. 372. There can be no doubt that Cosgrove's memory loss here was "total" in every sense relevant to the confrontation right.

Respondent defies common sense by claiming that defense counsel was nonetheless able to use

Cosgrove's memory loss at trial as a "'means of impugning'" his prior testimony. BIO 28. Cosgrove credibly testified that he did not remember the events in question, which took place nearly four years prior. His lack of recollection about a late-night bar fight that understandably did not stand out in his mind provided no reason for the jury to disbelieve his prior testimony. Thus, in this case, unlike in *Owens*, the witness's credible and complete inability to recall his prior statement caused the engine of cross-examination to grind to a halt. *Cf.* 484 U.S. at 560 (explaining that defense counsel was able to use witness's memory loss to "argue[] that his identification … was the result of the suggestions of people who visited him in the hospital").

III. There Are No Vehicle Problems.

Respondent cannot dispute that petitioner preserved his Sixth Amendment objection at every level and that the trial court, Appellate Division, and New York Court of Appeals all addressed the question presented on the merits. Respondent nonetheless raises several "vehicle" concerns, BIO 30-34, but none is an impediment to this Court's review.

1. Respondent contends that petitioner's trial counsel engaged in "gamesmanship" and invited any error by requesting that the court give the jury a missing witness instruction if Cosgrove did not testify. This is not a vehicle problem; it has nothing to do with the Court of Appeals' constitutional holding, which turned entirely on Cosgrove's presence at trial and participation in cross-examination. App. 17a. Moreover, respondent never explains why it was impossible

for the prosecution to call Cosgrove as a witness but limit his testimony to his lack of present recall, without eliciting the constitutionally infirm prior statements. Respondent's dissatisfaction with petitioner's decision to stand on his constitutional and procedural rights is no reason for this Court to deny certiorari.

2. Respondent next argues that the Court should not hear petitioner's case because federal authorities deported petitioner after he served his term of imprisonment, while his direct appeal was still pending. But respondent concedes that this case is not moot, and rightly so. The continuing collateral consequences of his conviction could preclude petitioner from ever returning to the United States. 18 U.S.C. § 1182(a)(2)(A), (9)(A); *see Sibron v. New York*, 392 U.S. 40, 57-58 (1968); *Fiswick v. United States*, 329 U.S. 211, 221-22 (1946). Moreover, as respondent acknowledges (at 11 n.5), it made a similar argument to the Court of Appeals in moving to dismiss petitioner's then-pending appeal on discretionary state law grounds—a motion the Court of Appeals summarily denied. App. 7a n.3.

3. Respondent fares no better in pointing to prior certiorari denials on related questions, as those petitions had vehicle problems not present here. In *Leverton*, Colorado's intermediate appellate court rejected the defendant's argument because the witnesses remembered "some of the events underlying their statements" and concluded that the defendant was able to effectively cross-examine those witnesses. 405 P.3d at 411. And in the 11-year-old *Holliday* decision, the Minnesota Supreme Court expressly held that any error was harmless, as the trial court in that

bench trial stated that the challenged out-of-court testimony did not affect its verdict. 745 N.W.2d at 568.

4. Finally, respondent argues that any error in admitting Cosgrove's testimony was harmless. Again, this cannot be a vehicle problem because, as respondent admits (at 33), the Court of Appeals did not address it. Harmless error is at most an issue for remand. *See, e.g.*, *Bullcoming v. New Mexico*, 564 U.S. 647, 668 n.11 (2011).

In any event, respondent's contention that Cosgrove's testimony was "cumulative," BIO 33, adds nothing to the facts recounted by the Court of Appeals majority. If the majority believed that any error was harmless, it presumably would have said so, given that the Appellate Division majority so concluded, and that the dissenting Court of Appeals judges maintained that the error "*cannot* be said to be harmless." App. 39a-40a (emphasis added). The majority's silence—and its decision to instead address the merits of petitioner's Confrontation Clause objection—speaks volumes.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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