No.

IN THE

SUPREME COURT OF THE UNITED STATES

JESSE CASTILLO, Petitioner,
-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent.

On Petition For Writ Of Certiorari

To The Appellate Court of Illinois

PETITION FOR WRIT OF CERTIORARI

JAMES E. CHADD
State Appellate Defender

DOUGLAS R. HOFF
Deputy Defender

MICHAEL C. BENNETT
Counsel of Record
Supervisor
Office of the State Appellate Defender
First Judicial District
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
1stdistrict.eserve@osad.state.il.us

COUNSEL FOR PETITIONER

Of counsel:
Madison N. Heckel
Assistant Appellate Defender

QUESTION PRESENTED FOR REVIEW

The Sixth Amendment to the United States Constitution provides, in pertinent part, that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. In *United States v. Owens*, 484 U.S. 554, 559-60 (1988), this Court held that a defendant's confrontation rights are not violated by the introduction of a witness' out-of-court identification, even if the testifying witness has memory loss. This Court explained further in *Crawford v. Washington*, 541 U.S. 36, 59 fn. 9 (2004), that admission of out-of-court testimonial statements are admissible "so long as the declarant is present at trial to defend or explain it."

The question presented here is: When a witness makes recorded statements to police identifying the defendant as the perpetrator of a crime, but suffers *complete* memory loss prior to testifying at trial, does the introduction of that witness' out-of-court testimonial statements violate the Confrontation Clause?

TABLE OF CONTENTS

INDEX TO APPENDIX

TABLE OF AUTHORITIES

Federal Cases **Page**

State Cases

Constitutional Provisions:

Statutes:

No.

IN THE

SUPREME COURT OF THE UNITED STATES

JESSE CASTILLO, Petitioner,

-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent.

On Petition For Writ Of Certiorari

To The Illinois Appellate Court

The petitioner, Jesse Castillo, respectfully prays that a writ of certiorari issue to review the judgment below.

OPINION BELOW

The unpublished decision of the Illinois Appellate Court is reported at *People v. Castillo*, 2025 IL App (1st) 232118-U, and is attached as Appendix A. (App. A). The order of the Illinois Supreme Court denying leave to appeal is available in the Westlaw database at 2025 WL 3301393, and is attached as Appendix B. (App. B).

JURISDICTION

The judgment of the Illinois Appellate Court, First District, was entered on May 22, 2025. (App. A). The Illinois Supreme Court denied a timely petition for leave to appeal on November 26, 2025. (App. B). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI.

INTRODUCTION

This case requires the answer to a question that numerous lower courts have recognized remains unanswered: can a witness' memory loss be so complete, so absolute, that the admission of the witness' prior statements violates the Confrontation Clause due to the defendant's utter inability to effectively cross-examine the witness? The Illinois Appellate Court determined that this Court sufficiently answered that question in *People v. Owens*, 484 U.S. 554, 564 (1988), where it held that the Confrontation Clause is not violated by admission of an identification statement of a witness who is unable, due to memory loss, to testify concerning the basis of the identification. (App. A, ¶ 37). Courts across other jurisdictions, however, are less confident that this was fully addressed by *Owens*, and instead have indicated that it is still an "open question" whether a witness' memory loss can ever be so complete that

the admission of their prior statements would violate the Constitution. *See Yanez v. Minnesota*, 562 F.3d 958, 964 (8th Cir. 2009). Some courts have pointed specifically to language in *Crawford v. Washington*, 541 U.S. 36, 54 fn. 9 (2004), where this Court said out-of-court statements were admissible "so long as the declarant is present at trial to defend or explain it," to assert that a witness' physical presence alone was not sufficient for purposes of the Confrontation Clause. *See Cookson v. Schwartz*, 556 F.3d 647, 651 (7th Cir. 2009).

Jesse Castillo was convicted, *inter alia*, of two counts of first degree murder based on allegations that he intentionally struck a sedan with the vehicle he was driving, which resulted in two deaths and two injured passengers. Russell Wilusz was the only witness who both saw the crash and identified the driver of the offending car. Wilusz made numerous recorded statements to police, both immediately after the crash and weeks later. In these recorded interviews, Wilusz described the driver's appearance, said the driver looked "like he was about to do something," and, eventually, identified Castillo as the driver out of a photo array. In 2020, however, years after making recorded statements to police about the crash, but prior to testifying at trial, Wilusz himself was in a car accident that caused him to completely lose his memory. All parties, including the trial court, agreed that Wilusz remembered nothing prior to his accident, meaning he had no memory of the crash he witnessed in 2017, or any of the recorded conversations he had with police.

The trial court allowed Wilusz's recorded statements to be admitted, over Castillo's objection. On direct examination, Wilusz's testimony mainly consisted of statements such as, "I don't know," "I don't remember," and even "I guess." When the

State asked Wilusz if he was the person talking to police in the videos, Wilusz answered, "I guess it was me. I'm not sure. It looked like me." The defense, the State, and the trial court all agreed that Wilusz had no memory of the year in question, with the trial court going so far as to interrupt the State's questioning on direct examination by saying, "I think we have gone far enough now in this line of questioning. It's very clear the witness has no memory of 2017."

After his conviction, Castillo argued to the Illinois Appellate Court that the admission of Wilusz's out-of-court statements violated his right to confront his accusers. The appellate court held Wilusz's questioning to be sufficient, stating that, while he "professed to not being able to remember witnessing the collision and making statements . . . he willingly answered the questions posed to him by the State and acknowledged his signature on several exhibits." (App. A, ¶ 34). The appellate court said Castillo could have "further inquired about the basis and extent of his memory loss, and the circumstances surrounding his signing of the photo array and advisory forms," had he chosen to cross-examine Wilusz. (App. A, ¶ 34). The court therefore did not find the admission of Wilusz's out-of-court statements to violate the Confrontation Clause. (App. A, ¶ 44). The appellate court repeatedly referred to Wilusz's "claimed" or "professed" memory loss, even though all parties, including the trial court, agreed that Wilusz's memory loss was complete. (App. A, ¶¶ 24, 25, 36, 37).

Wilusz's memory loss was so complete that it is factually distinct from all preceding federal caselaw, as Wilusz could not testify to either his belief that Castillo was the driver or the foundations of that belief. This Court should therefore grant certiorari to answer the question of how complete memory loss impacts the

Confrontation Clause. Numerous courts, including this one, have pointed to the gap in the law remaining post-*Owens* and post-*Crawford*, but no case has come forward yet for that gap to be addressed. This is that case.

STATEMENT OF THE CASE

Jesse Castillo was charged with first degree murder, aggravated leaving the scene of an accident involving death, aggravated leaving the scene of an accident involving injury, and other related charges. The charges were based on allegations that Castillo intentionally struck a Toyota Corolla on July 10, 2017, resulting in the death of Michael Lumino and Stephanie Gallegos, as well as injuries to Angel Perez and Samantha Mercado. Castillo was convicted in a jury trial and sentenced to a mandatory term of life imprisonment.

The Crash

Perez was driving Mercado, Lumino, and Gallegos in his white sedan sometime after 1:00 a.m. on July 10, 2017. While at a stoplight, the car was struck from behind by a "big green square truck," which Perez identified as either a Chevrolet Tahoe or Suburban SUV. The SUV followed as Perez continued driving. The SUV struck the sedan again as it was turning, causing the car to crash into a nearby building, which seriously injured Perez and Mercado and killed Lumino and Gallegos. Neither Perez nor Mercado saw the driver or remembered anything after the second collision prior to waking up in the hospital.

Russell Wilusz witnessed the crash and spoke to police at the scene about what he had witnessed, including that he had seen the SUV hit the sedan shortly before the accident occurred. The officer's squad car camera recorded this conversation. Wilusz was also interviewed on camera in September 2017 by a detective and Assistant State's Attorney, where he identified Castillo out of a photo array as the driver of the SUV. In this recording, Wilusz said that he made eye contact with the driver for about 30

seconds, and said the driver looked "like he was about to do something."

The green SUV was found on a public street in Chicago a few weeks after the crash. Castillo was listed on the title as the owner of the SUV, and police found a wallet containing Castillo's driver's license in an interior door compartment.

Eyewitness Wilusz and Trial

Wilusz was the only witness to identify Castillo as the driver of the SUV. In 2020, however, Wilusz was in a car accident that caused him to lose all prior memories. He therefore had no memories from 2017, meaning he could not remember witnessing the car crash, nor making statements to police about the car crash.

Prior to trial, Castillo filed a motion *in limine* regarding Wilusz's testimony, arguing that, because Wilusz had no memory of either witnessing the crash or talking to police about what he had seen, none of his prior statements could be subject to effective cross-examination, and he should therefore be precluded from testifying. Castillo also asserted that all of Wilusz's recorded statements were hearsay. At argument, the State asserted that Wilusz testifying was "no different" from a witness who refused to testify out of retaliation. The trial court determined that, while Wilusz had completely lost his memory, he would "still [be] subject to cross-examination" as there were other types of cross-examination "besides just his memory of this identification." The court ultimately ruled Wilusz could testify. It also determined that Wilusz's statements were not hearsay, but prior identifications. Castillo requested that Wilusz's testimony and the admitted statements be "limited to the fact that he made an identification as opposed to detailing that he cannot testify to at all because of his memory loss." The trial court agreed that the State did not have "free reign" to admit

Wilusz's entire statement, but no specific limits were imposed on what was and was not admissible.

At trial, Wilusz repeatedly responded to the State's questions on direct examination with "I don't know," or "I don't remember." Wilusz said he could not remember if he had reviewed a photo array in 2017, nor could he remember if he had made any video-recorded statements to police. Wilusz confirmed that the State had shown him video recordings of statements he made to police from 2017 in preparation for trial. However, Wilusz was not even sure that it was him in the videos: when asked if he recognized himself in the videos, Wilusz responded, "I guess it was me. I'm not sure. It looked like me," and "Looks like me." The trial judge eventually interrupted the State's questioning, stating, "I think we have gone far enough now in this line of questioning. It's very clear the witness has no memory of 2017."

In a sidebar, the State expressed its belief that it had laid sufficient foundation for admitting Wilusz's prior statements, inquiring as to whether it was necessary to continue with line-by-line questioning. The trial judge and both parties agreed that Wilusz had no memory of the year in question, and the trial judge determined line-by-line questioning was unnecessary, as foundation had been satisfied by Wilusz identifying himself by name and testifying that it "looked like" him in the video. The trial judge said the statements would be admissible upon authentication by another witness, as the State agreed that Wilusz could not authenticate the video. The statements were later authenticated by the ASA who interviewed Wilusz in the video. After the trial judge stated numerous times that he did not want "line-by-line" questioning of Wilusz, trial counsel did not cross-examine him.

The jury ultimately convicted Castillo of two counts of first degree murder, two counts of aggravated leaving the scene of an accident involving death, and two counts of aggravated leaving the scene of an accident involving personal injury. Castillo was sentenced to a mandatory term of life imprisonment.

Direct Appeal

Castillo appealed his conviction, arguing, *inter alia*, that the trial judge improperly admitted Wilusz's out-of-court statements in violation of Castillo's right to confrontation under the Sixth Amendment, as well as 725 ILCS 5/155-10.1 and 115-12. (App. A). The Illinois Appellate Court affirmed Castillo's convictions, holding that Wilusz's appearance at trial and willingness to answer questions qualified him as an available witness, and that Castillo had the opportunity for cross-examination, as he "could have further inquired about the basis and extent of [Wilusz's] memory loss, and the circumstances surrounding his signing of the photo array and advisory forms." (App. A at ¶ 34). The appellate court pointed to numerous cases that found *Owens*, 484 U.S. 554 (1988), to be determinative, all of which included a witness' "professed" memory loss, or a "gap in the witness' recollection." (App. A at ¶¶ 38-39). The Illinois Appellate Court ultimately reasoned that *Owens* did not distinguish between partial and complete memory loss, and neither the Confrontation Clause nor the rule against hearsay was violated by the admission of identifying statements of a witness who is unable to testify concerning the basis of the statements due to memory loss. (App. A at ¶ 43).

Castillo filed a petition for leave to appeal with the Illinois Supreme Court, which it denied. (App. B).

REASONS FOR GRANTING CERTIORARI

This Court has never fully answered whether a witness' memory loss may be so severe as to deny a defendant their right to cross-examination and violate the Confrontation Clause, but it has mentioned the possibility in *dicta*. *See Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) ("We need not decide whether there are circumstances in which a witness' lapse of memory may so frustrate any opportunity for cross-examination that admission of the witness' direct testimony violates the Confrontation Clause."); *California v. Green*, 399 U.S. 149, 168-69 (1970) ("Whether [the witness]'s apparent lapse of memory so affected [defendant]'s right to cross-examine as to make a critical difference in the application of the Confrontation Clause in this case is an issue which is not ripe for decision at this juncture."). This Court first considered the issue in *United States v. Owens*, 484 U.S. 554 (1988), where the defendant claimed the witness' partial memory loss impacted his right to cross-examine his accusers.

In *Owens*, the witness at issue was attacked and beaten so severely as to result in significant memory loss. 484 U.S. at 556. The witness could not remember seeing his assailant, but he "clearly remembered" identifying the defendant as his assailant when talking to investigators. *Id*. The defendant argued that the witness' inability to remember the attack denied him the right to confront his accusers, which this Court ultimately refuted. *Id*., at 560. This Court held that the Confrontation Clause guarantees only an opportunity for *effective* cross-examination, stating that "that opportunity is not denied when a witness testifies as to his current belief but is unable to recollect the reason for that belief." *Id*., at 559. In making this holding, this Court only addressed natural and partial memory loss, and did not say anything to indicate

it had also considered complete memory loss. *Id*. The witness' ability to, at least in part, substantively answer questions either regarding the incident or his statement provided the defendant with "means of impugning the belief." *Id*. ("If the ability to inquire into these matters [bias, inattentiveness, bad memory] suffices to establish the constitutionally requisite opportunity for cross-examination when a witness testifies as to his current belief, the basis for which he cannot recall, we see no reason why it should not suffice when the witness' past belief is introduced and he is unable to recollect the reason for that past belief.").

This Court later examined the admission of out-of-court statements in *Crawford v. Washington*, 541 U.S. 36 (2004). In *Crawford*, this Court determined that out-of-court statements that are testimonial in nature are inadmissible under the Constitution unless the witness was unavailable to testify at trial, and the defendant had been given a prior opportunity to cross-examine the witness on those statements. *Id*., at 53-54. Statements are deemed to be testimonial when they "bear testimony," meaning the statement is made "for the purpose of establishing or proving some fact." *Id*., at 51 (citing 2 N. Webster, An American Dictionary of the English Language (1828)). *Crawford*, however, never defined what it meant for a witness to be "unavailable."

The Seventh Circuit considered whether a witness could testify at trial and still be considered unavailable in *Cookson v. Schwartz*, 556 F.3d 647 (7th Cir. 2009). In *Cookson*, a child witness testified for the prosecution, where she alleged the defendant had sexually abused her, but then stated on cross-examination that she "did not remember" making statements to detectives. *Id*., at 649. The defendant argued the

witness' inability to remember making statements to police and his inability to cross-examine her on those statements violated the Confrontation Clause. *Id.*, at 650. The State asserted this did not violate the Confrontation Clause by pointing to language in *Crawford* that stated, "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." *Id.*, at 651 (quoting *Crawford*, 541 U.S. at 59 n. 9). The Seventh Circuit, however, said this language was "not dispositive," because this Court said only two sentences later, "the Clause does not bar admission of a statement so long as the declarant is present at trial *to defend or explain it*." *Cookson*, 556 F.3d at 651 (quoting *Crawford*, 541 U.S. at 59 n. 9) (emphasis in *Cookson*). Therefore, according to the Seventh Circuit, the question became whether the witness' "lack of memory made her unable to defend or explain her statements." *Cookson*, 556 F.3d at 651. The *Cookson* court ultimately determined the defendant's rights were not violated, but it did so on a factual basis, rather than due to this legal analysis. *Id.*, at 652.

The question in this case requires one to examine the facts through both an *Owens* and *Crawford* lens. At first glance, the facts of this case appear to mimic those in *Owens*. However, Wilusz, the witness at issue in this case, did not remember *anything* related to this case, whereas the witness in *Owens* remembered making statements to police. *Owens*, 484 U.S. at 556. Wilusz had no memory of either his "belief" that Castillo was the driver of the SUV, to borrow the language of *Owens*, or the "reason for that belief." *Id.*, at 559. No amount of cross-examination could "impugn[ ] the belief," as all Wilusz could testify to was *not* remembering anything related to the crash. In contrast to the witness in *Owens*, Wilusz could not remember

either witnessing the crash *or* identifying Castillo as the driver to police. All parties, including the trial judge, agreed this was the case, and nothing in the record points to any suspicion that Wilusz could be feigning this memory loss.

This case addresses a gap in the law that remains after *Crawford* and *Owens* regarding how a witness's complete memory loss affects the Confrontation Clause. Looking to footnote 9 of *Crawford*, it is unclear whether Wilusz's complete memory loss made him unable to "defend or explain" his prior statements, regardless of his presence at trial. *Crawford*, 541 U.S. at 59, n. 9. Furthermore, this case asks whether the admission of prior statements of a witness with complete memory loss has any impact on the defendant's constitutional rights, a question that was not fully addressed by *Owens*.

In affirming Castillo's conviction, the Illinois Appellate Court determined that *Owens*'s ruling applied to *all* instances of memory loss, both partial and complete. (App. A). However, numerous courts across jurisdictions have acknowledged that *Owens* did *not* address complete memory loss, and instead see this as a question that has yet to have been addressed by this Court. *See Yanez v. Minnesota*, 562 F.3d 958, 964 (8th Cir. 2009). Furthermore, the Mississippi Supreme Court heard an almost factually identical case, and determined that admitting out-of-court statements by a witness with complete memory loss violated the Confrontation Clause. *See Goforth v. State*, 70 So. 3d 174 (Miss. 2011).

This Court should therefore grant certiorari to answer this question.

I. Federal and state courts have acknowledged that *Owens v. United States* did not address how the Confrontation Clause is affected by complete memory loss.

Numerous courts, both federal and state, have noted that the holding in *Owens* does not fully address whether a witness' complete memory loss violates the Confrontation Clause. The Eighth Circuit Court of Appeals, in fact, explicitly said that, "whether there may ever be an instance in which memory loss can inhibit cross-examination to such a degree as to violate the Constitution is *still an 'open question.'* " *Yanez v. Minnesota*, 562 F.3d 958, 964 (8th Cir. 2009) (emphasis added). State courts have also said as much. *See People v. Leverton*, 405 P.3d 402, 411 (Colo. App. 2017) ("This case does not require us to determine whether total memory loss coupled with extreme physical disabilities could ever render a witness unavailable under the Confrontation Clause and we express no opinion on that question."); *State v. Holliday*, 745 N.W. 2d 556, 566 (Minn. 2008) ("We acknowledge that the Supreme Court in *Green* and *Fensterer* declined to decide whether a witness's memory loss can so impede cross-examination that admission of a prior statement violates the Confrontation Clause, and that the witness in *Owens* actually remembered making his prior statement."); *People v. Hampton*, 899 N.E. 2d 532, 544 (Ill. App. Ct. 2008) ("However, the Supreme Court [in *Crawford*] did not elaborate to what extent the witness must be able to 'defend or explain' the prior statements."). Multiple courts have pondered whether a witness can experience such extreme memory loss as to render any cross-examination useless, but the case before them was not the proper case to answer that question. This is the proper case.

The facts in this case are distinct from the numerous scenarios where *Owens* has

regularly been applied to determine whether the witness' memory loss violates the Confrontation Clause. For instance, this case does not involve a child witness, who may have issues testifying for myriad reasons. *See State v. Price*, 146 P.3d 1183, 1192 (Wash. 2006) (admission of child witness' prior statements did not violate the Confrontation Clause when witness only testified in court that she "did not remember"); *State v. Baker*, 300 P.3d 696, 700 (Mont. 2013) (admission of child witness' prior statements did not violate the Confrontation Clause when counsel simply chose not to cross-examine on those statements); *State v. Salazar*, 166 P.3d 107, 109-10 (Ariz. Ct. App. 2007) (use of child witness' out of court statements to refresh the witness' memory did not violate the Confrontation Clause). The witness in this case had no reason to lie or recant, either due to a pre-existing relationship with the defendant or out of a fear of retribution. *See People v. Foalima*, 192 Cal. Rptr. 3d 136, 148 (Cal. Ct. App. 2015) (admission of witness' prior statement did not violate the Confrontation Clause when witness was defendant's friend and failed to recall most of the events about which he was questioned); *Fowler v. State*, 829 N.E.2d 459, 471 (Ind. 2005) (admission of witness' prior statements did not violate the Confrontation Clause when witness said she did not want to testify against her abuser in domestic violence case). The witness here was never cross-examined about his testimony prior to his memory loss. *See People v. Alcala*, 842 P.2d 1192, 1217 (Cal. 1992) (admission of witness' prior testimony did not violate the Confrontation Clause when witness had testified under oath at prior trial before memory loss). All of the above-listed factual scenarios give a court reason to believe the defendant was given ample opportunity to cross-examine the witness in ways that simply do not exist in this case.

Because the memory loss here is both complete *and* undisputed, Castillo's right to confront his accusers was impacted in ways that did not apply in prior cases. In *Owens*, when discussing the opportunity to cross-examine a witness with memory loss, this Court pointed to other things cross-examination could reveal, such as, "the witness' bias, his lack of care and attentiveness, his poor eyesight, and even . . . the very fact that he has a bad memory." 484 U.S. at 559. None of these could be revealed through cross-examination of Wilusz. No amount of cross-examination could give a jury any indication of Wilusz's credibility, because the only answer he could provide is that he does simply not remember. All parties agreed that Wilusz had complete memory loss, leading the trial judge to interrupt and say, "I think we have gone far enough now in this line of questioning. It's very clear the witness has no memory of 2017." Wilusz had no relationship with Castillo before or after the memory loss, and he had no motive to lie or refuse to testify. Wilusz's complete memory loss removed any ability for Castillo to sufficiently cross-examine him. The admission of Wilusz's prior statements violated Castillo's Sixth Amendment rights, and this Court should therefore grant certiorari.

II. The Mississippi Supreme Court had an almost factually identical case and held the admission of the witness' prior statements violated the Confrontation Clause.

The Illinois Supreme Court refused to hear Castillo's case, implying that it agreed with the appellate court's holding that *Owens* applies to both complete and partial memory loss. (App. B). In contrast, the Mississippi Supreme Court heard a case with strikingly similar facts and held otherwise. In *Goforth v. State*, 70 So. 3d 174, 180 (Miss. 2011), a witness gave a written statement to police that contained testimonial

evidence. In the time between giving that statement to police and testifying at trial, however, the witness was in an accident that caused him to have no memory of either having made the statement to police or even knowing the defendant. *Id*. At trial, like in this case, the witness affirmed that he recognized his signature at the bottom of the statement, and he "guessed" that the statement belonged to him, though he did not remember either making the statement to police or the contents of the statement. *Id*. After the defendant's conviction, she argued on appeal that the admission of this out-of-court statement violated her constitutional right to confront the witnesses against her. *Id*.

In its analysis, the Mississippi Supreme Court started by saying that, "[i]f the Confrontation Clause requires solely that the declarant be physically present and subject to cross-examination, its demands were satisfied in this case." *Id*., at 185. The *Goforth* court, however, turned to the analysis in *Cookson*, 556 F.3d at 651, where the Seventh Circuit had analyzed the language of footnote 9 in *Crawford*. Pointing to the requirement that the declarant be "present at trial *to defend or explain it*," *Crawford*, 541 U.S. at 59, n. 9, the *Goforth* court determined a witness' mere presence at trial was not dispositive. *Goforth*, 70 So.3d at 186 (emphasis in *Goforth*). The *Goforth* court found this examination to be "insightful and persuasive," stating the following:

> According to [the Seventh Circuit's interpretation], a fair reading of footnote nine [of *Crawford*] is that the Confrontation Clause does not bar admission of a prior testimonial statement if the declarant appears for cross-examination at trial to defend or explain his or her statement. Importantly, the pertinent language does not require the record to actually show that the declarant did in fact defend or explain the statement. The language, rather, focuses on "presence and ability to act."

Id. (citations omitted). The *Goforth* court determined that, while the witness was physically present at trial, his complete loss of memory did not give him the "requisite, minimal ability or capacity to act." *Id*. The court said, "[t]his total lack of memory deprived [defendant] any opportunity to inquire about potential bias or the circumstances surrounding [the witness]'s statement. In sum, [defendant] simply had no opportunity to cross-examine [the witness] about his statement." *Id*. The Mississippi Supreme Court therefore reversed the defendant's conviction, as the admission of the witness' written statement violated the Confrontation Clause. *Id*., at 186.

The *Goforth* court distinguished the facts before them from those in *Owens*, noting that the witness in *Owens* "vividly recalled identifying the defendant when he had spoken to authorities." *Goforth*, 70 So. at 186. The *Goforth* court also noted that the defendant in *Owens* was able to "cast doubt" on the declarant's identification through cross-examination, asserting it had been based upon suggestion by other individuals. *Id*., at 186-87. Nothing of the sort was possible in *Goforth*, leading the court to find that the defendant "did not have a constitutionally adequate opportunity to cross-examine" the witness, either at trial or beforehand. *Id*., at 187. The *Goforth* court also pointed out that no party "dispute[d] that [the witness]'s total loss of memory was genuine." *Id*., at 186. All of these factual distinctions between *Goforth* and *Owens* apply here, and the reasoning should also extend to this case.

While the *Goforth* court stated it found the defendant did not have a "constitutionally adequate opportunity to cross-examine" the witness under the Mississippi Constitution, in actuality, the court's analysis was federally based. *Goforth*, 70 So. 3d at 187. The court said, "[f]ederal caselaw serves as our guide, but Mississippi

jurisprudence compels the result." *Id*. at 183. However, none of the precedent relied upon by the *Goforth* court interpreted the Mississippi Constitution more broadly or any differently from the federal Constitution. While the court applied federal caselaw to its state constitution, it did so by interpreting and applying federal precedent, as shown by the court's almost exclusive reliance on federal caselaw. *Id*. at 183-86 (citing *People v. Simmons*, 123 Cal. App. 3d 677, 679 (Cal. Ct. App. 1981), *Holliday*, 745 N.W.2d at 566-67, and *Cookson*, 556. F.3d at 651). Furthermore, the only Mississippi state case cited by the court, *Smith v. State*, 25 So.3d 265, 269-71 (Miss. 2009), solely relied on federal caselaw in its *Crawford* analysis. *Goforth* interpreted and applied the federal *Crawford* standard on the right to confront one's accusers: even if the disposition relates to the Mississippi Constitution, the court made no independent state analysis, meaning its analysis was, instead, a federal one. While *Goforth* is not binding on this case, its analysis of the U.S. Constitution using *Owens*, *Crawford*, and *Cookson* is persuasive, and should therefore extend outside of just Mississippi state jurisprudence.

The Illinois Appellate Court was incorrect in finding that *Owens* applied to witnesses with complete memory loss, and the Mississippi Supreme Court's analysis is correct. Here, like in *Goforth*, there is no dispute that Wilusz had absolutely no memory of either witnessing the crash or making statements to police. Wilusz was neither able to defend nor explain his prior statements due to this memory loss. *See Crawford*, 541 U.S. 36, 59, fn 9. No amount of cross-examination of Wilusz would give Castillo the ability to inquire about any potential bias or the circumstances surrounding Wilusz's statement, as all Wilusz could say about his statements was that he did not remember either making the statements or their content. This, essentially,

means that Castillo had no opportunity to cross-examine Wilusz about his statements, and the admission of said statements violates the Confrontation Clause.

III. This case is an ideal vehicle to answer this question.

The facts and procedural posture of this case makes it an excellent vehicle to answer the question of whether memory loss can ever be so complete as to violate the Confrontation Clause. The question is properly and clearly presented. It was raised by trial counsel in both pre-trial and post-trial litigation. It was raised on direct appeal before the Illinois Appellate Court, and was requested to be heard before the Illinois Supreme Court. It comes before this Court on direct review, without any of the complications that sometimes arise on collateral appeal.

The question presented is also outcome-determinative. If Wilusz's complete memory loss denied Castillo the right to effective cross-examination, then admitting Wilusz's out-of-court statements violated the Confrontation Clause. Nor could admitting Wilusz's statements constitute harmless error. A constitutional violation requires a new trial unless the prosecution demonstrates beyond a reasonable doubt that the error "did not contribute to the verdict obtained." *Weaver v. Massachusetts*, 582 U.S. 286, 294 (2017). The State provided no evidence outside of Wilusz's out-of-court statements to prove Castillo's mental state, a necessary element of first degree murder. Castillo's conviction simply cannot stand without Wilusz's statements.

Finally, the specific facts of this case make clear that this scenario was not addressed by *Owens*. All parties in this case, *including* the trial court, agreed that Wilusz had no memory prior his accident in to 2020. This is not a case of

"purported" memory loss, of a child not being mature enough to testify, or of a witness changing motives between making out-of-court statements and testifying at trial. This is a case where there is no doubt that the witness had absolute memory loss. This is the exact factual scenario that lower courts had in mind when they questioned whether there may be a case where memory loss is so absolute as to render cross-examination meaningless, and this Court should grant certiorari to examine that question.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

DOUGLAS R. HOFF
Deputy Defender

MICHAEL C. BENNETT
Counsel of Record
Supervisor
Office of the State Appellate Defender
First Judicial District
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
1stDistrict@osad.state.il.us

COUNSEL FOR PETITIONER

Of counsel:
Madison N. Heckel
Assistant Appellate Defender

APPENDIX A

APPENDIX B