

No. ____

IN THE SUPREME COURT OF THE UNITED STATES

SIDNEY BUTLER,

Petitioner,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of Illinois

PETITION FOR WRIT OF CERTIORARI

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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 explaining the parameters of the Confrontation Clause, this Court, in *Crawford v. Washington*, 541 U.S. 36, 59 fn. 9 (2004), held that admission of out-of-court testimonial statements are admissible “so long as the declarant is present at trial to defend or explain [them].”

In this case, the Illinois Supreme Court held that the declarant’s out-of-court statements were admissible despite her inability to remember not only the prior testimonial statements, but the offense itself. The question presented here is:

When a witness makes out-of-court, concededly testimonial statements accusing the defendant as the perpetrator of a crime, but at trial is unable to remember the offense itself or those prior accusations, was she available to defend or explain the statements under this Court’s holding in *Crawford*, and does the introduction of those testimonial statements violate the Confrontation Clause?

PARTIES TO THE PROCEEDING

Sidney Butler was Defendant-Appellant in the proceedings below and is Petitioner here.

People of the State of Illinois was Plaintiff-Appellee in the proceedings below and is Respondent here.

RELATED PROCEEDINGS

- *People v. Sidney Butler*, No. 2015 CR 09154, Circuit Court of Cook County, Illinois. Final judgment entered September 13, 2021.
- *People v. Butler*, No. 1-21-1175, Appellate Court of Illinois, First District. Decision and order affirming the judgment of the circuit court entered July 18, 2024.
- *People v. Butler*, No. 130998, Supreme Court of Illinois. Opinion and order affirming the judgement of the appellate court entered November 20, 2025.
- *People v. Butler*, No. 130998, Supreme Court of Illinois. Order denying Appellant's petition for rehearing entered January 26, 2026.

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

OPINION BELOW

The decision of the Illinois Supreme Court (Appendix A) is reported at 2025 IL 130988 and is published.

JURISDICTION

On November 20, 2025, the Illinois Supreme Court issued an opinion. A petition for rehearing was timely filed and denied on January 26, 2026. The jurisdiction of this Court is invoked pursuant to 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.

STATEMENT OF THE CASE

Sidney Butler was charged with committing several counts of sexual assault of his half-sister, K.P., when he was 17 to 18 years old. (C. 38-42, 44) At trial, K.P. made no accusations that Sidney committed any sexual offenses against her in her testimony. (R. 572-73, 577-78) The sole evidence of Sidney's guilt consisted of out-of-court statements K.P. made prior to trial, which she did not recall when she was on the stand. *People v. Butler*, 2025 IL 130988, ¶ 70 (“her memory prevented her from recalling details of the prior interview or the assault”). The Illinois Supreme Court found that K.P. was nonetheless available for cross-examination and affirmed Sidney's convictions. The Court held that Sidney's reliance on the requirement in *Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004)—that a witness must be present to defend or explain a prior accusation—was “taken out of context,” and that this case was controlled not by *Crawford*, but by *Delaware v. Fensterer*, 474 U.S. 15 (1985). *Butler*, 2025 IL 130988, ¶¶ 59, 73.

Pre-Trial Matters

On November 5, 2014, K.P. was beaten by her biological father and was hospitalized for her injuries. After her hospitalization, she was interviewed at the Child Advocacy Center (CAC) as part of an investigation into potential sex offenses. (R. 77, 524-27) The interview was conducted by a forensic interviewer and was observed by a detective. (R. 527-29) During the interview, for the first time, K.P. made sexual assault accusations against Sidney. (R. 196)

Prosecution's Case

When the State first called K.P. to the stand, she refused to answer any questions, and the State proceeded with other witnesses. (R. 519-20) That testimony showed that, after the CAC interview with Sidney, he became a suspect. (R. 528-30) Six months later, detectives interrogated Sidney about these charges. (R. 535) Sidney made no admissions and told them that K.P. was his sister and he used to babysit for her. (R. 535-36)

The State called K.P. to the witness stand a second time. (R. 550) At the time of her testimony, she was 13 years old. (R. 551) At first she remained silent, and answered many of the preliminary questions with nods of the head. (R. 550-58) The court took a brief recess. (R. 560-62) When the trial resumed, K.P. was able to answer some preliminary questions. She remembered that when she was nine years old, she was living at 932 Latrobe Ave. with her mother and father, brothers, and sister. (R. 573) When she was still nine, the family moved to 911 Latrobe. (R. 570) K.P. identified Sidney Butler as her brother and said he lived with her family until he was grown. (R. 555-58, 572-73) K.P. answered questions from both parties about her father beating her and the injuries she sustained. (R. 576, 588-92) When asked about the allegations against Sidney, K.P. said she did not remember. (R. 572)

The prosecutor then asked questions about K.P.'s out-of-court statements. At first, K.P. did not remember the interview at all. (R. 573) When shown a photo of herself and the interviewer, K.P. remembered that she was interviewed by a lady after her hospital visit, but she did not remember what they discussed, nor did she remember making accusations against Sidney; she did not remember being sexually assaulted, and throughout questioning, K.P. did not verbally respond to numerous questions. (R. 596, 577-78) The following excerpt is an example of the prosecutor's questions about her prior accusations, and her response:

Q Do you remember getting this question and giving this answer:

["Tell me about the last time he did something to you. Answer. 2013. That was the last time because he moved out."]

Do you remember giving that answer to that question?

A No.

(R. 578)

None of K.P.'s prior statements were admitted into evidence during her testimony.

Following K.P.'s testimony, the court recessed and the jury returned to the jury room. (R. 598-99) Defense counsel's objection to allowing the State to play the CAC interview was heard and overruled. (R. 599, 627) The jury then returned to court and the State played the video of the interview. (R. 599, 627)

In the interview, K.P. first discussed her father's beating of her. K.P. was injured and examining the wounds inflicted by her father throughout the interview. (St. Ex. 1 6:40-9:20) She then began accusing Sidney, her other brother, her cousin, and her mother's friends and their sons with sexual assault and abuse. (St. Ex. 1 *passim*) These incidents began from the time K.P. was four or five years old and the last time was a few weeks before the interview. (St. Ex. 1 28:50-32:41)

Defense Case

Defense counsel called T.P., K.P.'s and Sidney's mother to the stand. She never noticed any evidence of sexual abuse on either of her daughters' bodies. (R. 602-03) She would take them for physicals and their doctor never told her that her girls were sexually abused. (R. 604) T.P. confirmed that she witnessed K.P.'s beating with a belt and extension cord at the hand of her father. (R. 608-09)

Verdict and Post-Trial Proceedings

The jury returned guilty verdicts on all seven counts. (R. 767-70; Imp CLR. 4-10) In his post-trial motion, defense counsel challenged the admission of K.P.'s out-of-court interview. (C. 355, 359-62, 369; R. 935) After vacating two of Sidney's seven convictions, the judge denied the post-trial motion. (R. 972-80)

Sentencing

The court imposed consecutive terms of nine, nine and three years for an aggregate sentence of 21 years. (R. 1069, 1073-76)

Direct Appeal

On direct appeal, Sidney argued, *inter alia*, that the admission of K.P.'s out-of-court interview violated his constitutional and statutory rights. The appellate court affirmed Sidney's convictions. *People v. Butler*, 2024 IL App (1st) 211175-U, ¶¶ 39-42. The Illinois Supreme Court affirmed the appellate court's decision. *People v. Butler*, 2025 IL 130988.

In affirming, the Court considered a witness available for cross-examination, for purposes of the Confrontation Clause, "when she is placed on the stand, under oath, and willingly responds to questions." *Butler*, 2025 IL 130988, ¶ 78. The Court then concluded "that K.P. appeared for cross-examination even though she testified that she did not remember her prior statements or the sex offenses at issue." *Butler*, 2025 IL 130988, ¶¶ 78, 80. The Court disagreed that *Crawford* required that the witness appear to "defend or explain" her prior statements, *Crawford*, 541 U.S. 59, n. 9, finding that this "defies reason." *Butler*, 2025 IL 130988, ¶ 59. In interpreting "defend or explain" in this way, the Court relied on *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985); *Unites States v. Owens*, 484 U.S. 554, 558 (1988); and the Illinois State Supreme Court case grounded in those opinions, *People v. Flores*, 128 Ill. 2d 66, 87, 90 (1989). *Butler*, 2025 IL 13098, ¶ 73-77. These cases were all decided long before *Crawford*. This decision, therefore, merits review.

REASONS FOR GRANTING CERTIORARI

This case asks the question of whether a witness who could not remember her out-of-court accusatory statements, had no memory of the offense, and made no accusations against defendant from the stand is unavailable for cross-examination such that the admission of her out-court statements violates the Sixth Amendment. In *Crawford v. Washington*, 541 U.S. 36 (2004), this Court held that, under the Sixth Amendment’s Confrontation Clause, which applies to the States through the Fourteenth Amendment, testimonial out-of-court statements are inadmissible if the witness is unavailable to “defend or explain” those statements at trial, and the defendant did not have a prior opportunity to cross-examine the witness. *Crawford*, 541 U.S. at 59, n.9, 68; *see also Smith v. Arizona*, 602 U.S. 779, 784 (2024) (“the Clause bars the admission at trial of an absent witness’s statements . . . unless the witness is unavailable and the defendant had a prior chance to subject her to cross-examination”); U.S. Const. amends. VI, XIV. On numerous occasions, this Court has addressed the “testimonial” aspect of this axiomatic principle of the Confrontation Clause. *See generally Ohio v. Clark*, 576 U.S. 237 (2015); *Bullcoming v. New Mexico*, 564 U.S. 647 (2011); *Michigan v. Bryant*, 562 U.S. 344 (2011); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009); *Davis v. Washington*, 547 U.S. 813 (2006).

However, subsequent to *Crawford*, this Court has never addressed what it means to be available to “defend or explain” a testimonial out-of-court statement. Allowing out-of-court statements of declarants who, while appearing in court, recall neither the events underlying the charges nor making statements regarding the events—as the Illinois Supreme Court here and courts in other jurisdictions endorse—is contrary to the core

principle behind *Crawford*. Additionally, different jurisdictions are in conflict regarding whether the admission of a witness's out-of-court statements violates the Confrontation Clause under such circumstances. Further, *Crawford* provides contradictory guidance on what it means to be "available" for cross-examination. Finally, the question presented herein is one that repeatedly confronts lower courts and frequently serves as the basis for petitions for writ of certiorari before this Court, demonstrating the magnitude of its national importance and the need for this Court to ultimately address the question. This Court should thus grant this petition.

I. The Illinois Supreme Court's decision allowing the admission of a declarant's testimonial out-of-court statements concerning the charged incident when she appeared in court but did not recall the charged incident or making the out-of-court statements violates *Crawford*.

The Illinois Supreme Court's opinion allows *ex parte* examinations to be used against a defendant so long as the declarant physically appears in court and answers questions unrelated to either the charged offense or to the declarant's prior accusations. If allowed to stand, this decision would permit the government to move the entirety of an accuser's *relevant* testimony to outside the courtroom. This erroneous interpretation of the Confrontation Clause strikes at the "core" of the clause's protection against *ex parte* testimony or its equivalent. *Crawford*, 541 U.S. at 51.

The Confrontation Clause, which guarantees a defendant the right "to be confronted with the witnesses against him," is meant to protect the criminal defendant's right to cross-examine witnesses. *Douglas v. Alabama*, 380 U.S. 415, 418 (1965); U.S. Const. amend. VI. Prior to *Crawford*, *Ohio v. Roberts*, 448 U.S. 56 (1980), governed issues concerning the Confrontation Clause and out-of-court statements. Under the *Roberts* framework, for an out-of-court statement to be admissible, the declarant must

have been present at trial or, if unavailable, the statement sought to be introduced had to fall within a recognized hearsay exception or show “particularized guarantees of trustworthiness.” *Roberts*, 448 U.S. at 65-66.

Prior to adopting the malleable and incorrect standard set forth in *Roberts*, however, in *Douglas*, this Court recognized that the purpose of the Confrontation Clause was “to prevent depositions or *ex parte* affidavits * * * being used against the prisoner in lieu of a personal examination and cross-examination of the witness,” during which the defendant is provided the opportunity “of testing the recollection and sifting the conscience of the witness.” *Douglas*, 380 U.S. at 418-19 (quoting *Mattox v. United States*, 156 U.S. 237, 242-43 (1895)). In *Douglas*, the prosecutor questioned a testifying co-defendant by reading his confession to him at the defendant’s trial after the co-defendant claimed his right against self-incrimination while testifying. *Id.* at 416-17. This Court determined that the admission of the confession violated the Confrontation Clause, *inter alia*, because the co-defendant “could not be cross-examined on a statement imputed to but not admitted by him.” *Id.* at 419. This Court concluded that “effective confrontation of [the co-defendant] was possible only if [he] affirmed the statement as his.” *Id.* at 420.

After *Douglas*, this Court had occasion to address specific instances where a witness did not directly affirm the validity of a prior statement, although this Court never addressed a scenario where a witness had no memory of making the prior statement.

First, in *California v. Green*, a witness gave trial testimony inconsistent with his prior, out-of-court statements. This Court held there is no violation of the Confrontation Clause if an out-of-court statement is admitted and the declarant is present to testify “subject to full and effective cross-examination.” *California v. Green*, 399 U.S. 149, 151-52, 158 (1970). In reaching its decision, this Court framed its inquiry as determining whether

the trier of fact has “a satisfactory basis for evaluating the truth of the prior statement” and noted that, if the witness were to testify inconsistently at trial with his prior statement (thus not affirming it), that alone accomplishes the task of successful contemporaneous cross-examination, as the witness appears incredible. *Green*, 399 U.S. at 159, 161.

In *Delaware v. Fensterer*, this Court noted that the Confrontation Clause merely guarantees an opportunity for effective cross-examination and not cross-examination “that is effective in whatever way, and to whatever extent, the defense might wish.” *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985). This Court then held that a witness’s failure to remember the basis for expert opinion testimony does not violate the Clause, as the Clause “includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion.” *Fensterer*, 474 U.S. at 21-22.

Finally, in *United States vs. Owens*, this Court reaffirmed *Fensterer*, noting that the Confrontation Clause is not violated “when a witness testifies as to his current belief but is unable to recollect the reason for that belief,” because the defendant can always address the witness’s bias, his failure to be attentive, factors impacting his ability to observe, and his poor memory. *United States v. Owens*, 484 U.S. 554, 559 (1988). There, the witness recalled his prior statement identifying the defendant, but he had no memory of the offense itself. *Id.* at 559-60. This Court held that it is permissible under the Sixth Amendment to admit a witness’s out-of-court statement even if the witness cannot remember the basis for the statement, as the defense can attack the witness on cross-examination using similar methods. *Owens*, 484 U.S. at 558-60 (quoting *Green*, 399 U.S. at 188 (Harlan, J. concurring)).

Crawford and its axiomatic rule arguably overturned these decisions, but at least limited them to their facts to the extent that testimonial out-of-court statements can be introduced as substantive evidence, and it represented a revolutionary shift in the way that Confrontation Clause issues concerning such statements are analyzed. *Crawford*, 541 U.S. at 60. In reaching its holding, this Court recognized that “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. This premise, along with the revolutionary nature of *Crawford*, undermines the conceptions of availability that existed pre-*Crawford*, but post-*Douglas*, and signals a shift back towards *Douglas*’s conception of availability.

The Illinois Supreme Court’s decision in the case at bar is at odds with *Crawford*. Indeed, this is apparent from the Illinois Supreme Court’s reliance on *Owens* and *Fensterer*, pre-*Crawford* cases, in issuing its decision. *Butler*, 2025 IL 130988, ¶¶ 69, 73-76 In this case, K.P. was interviewed at the Child Advocacy Center after she was beaten by her father. During the course of the interview, K.P. disclosed for the first and only time that she was sexually assaulted by her brother, Sidney Butler. However, when K.P. took the stand, she had no memory of Sidney assaulting her, or discussing these accusations with the interviewer. This created the untenable situation where Sidney could not cross-examine K.P. concerning her out-of-court statements regarding the offense at the time they were made because he was not present, and he could not do so when she testified at trial because she did not recall what happened, or making the accusatory out-of-court statements. Indeed, at the close of the State’s direct examination of K.P., none of the prior statements had even been admitted into evidence.

If testimonial out-of-court statements are admissible under the Confrontation Clause where the declarant is physically present at trial but cannot answer questions about the statements or the events underlying them, the end result allows the use of *ex parte* examinations against the accused, “the principal evil at which the Confrontation Clause was directed,” and the validity of which cannot be tested by cross-examination of the declarant herself. All the prosecution would need is a warm body on the stand who is “available” only in the purest technical form, in that she is physically present. The Confrontation Clause after *Crawford* demands more — that a witness be able to “defend or explain” her statement. *Crawford*, 541 U.S. at 59 n.9; *see also Davis v. Alaska*, 415 U.S. at 315-16 (quoting 5 J. Wigmore, *Evidence* § 1395, p. 123 (3d ed. 1940)) (“Confrontation means more than being allowed to confront the witness physically. . . . The opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination, which cannot be had except by the direct and personal putting of questions and obtaining immediate answers.”).

The Illinois Supreme Court’s holding reduces *Crawford*’s “defend or explain” language to mere presence on the stand, creating an end-around that guts this Court’s holding in *Crawford*. This cannot be permissible. This Court recently indicated its disapproval of practices that “allow for easy evasion of the Confrontation Clause.” *Smith v. Arizona*, 602 U.S. 779, 798 (2024).

Moreover, the Illinois Supreme Court is not alone in undermining *Crawford*. In many other jurisdictions, courts have found no Confrontation Clause violation where prior out-of-court statements were admitted after the declarant at trial did not recall

making the out-of-court statements or the events underlying them, some of them even relying on the post-*Douglas*, pre-*Crawford* cases discussed above. See, e.g., *Yanez v. Minnesota*, 562 F.3d 958, 960-61, 963-65 (8th Cir. 2009); *State v. Gorman*, 854 A.2d 1164, 1167-69, 1177-78 (Me. 2004); *Mercer v. United States*, 864 A.2d 110, 113-14, 114 n.4 (D.C. Cir. 2004); *State v. Fields*, 201 P.3d 586, 587-88, 590, 596-600 (Haw. 2005); *State v. Price*, 146 P.3d 1183, 1183-85, 1187-88, 1190-92 (Wash. 2006); *State v. Pierre*, 890 A.2d 474, 497-502 (Conn. 2006); *State v. Holliday*, 745 N.W.2d 556, 561, 564-66 (Minn. 2008); *People v. Legere*, 958 A.2d 969, 973-79 (N.H. 2008); *State v. McManus*, 990 A.2d 1229, 1232-33, 1237-38 (R.I. 2010); *Woodall v. State*, 336 S.W.3d 634, 637-38, 641-44 (Tex. Crim. App. 2011); *State v. White*, 243 So.3d 12, 13-16 (La. Ct. App. 2018). However, for the same reasons as discussed above, this is contrary to this Court's declaration that the purpose of the Confrontation Clause is to prevent the "use of *ex parte* examinations as evidence against the accused" and the concept that the defense should have the opportunity to subject such statements to the rigors of adversarial testing. *Crawford*, 541 U.S. at 43, 50; *Davis*, 415 U.S. at 316.

In sum, the Illinois Supreme Court as well as courts in other jurisdictions have undercut *Crawford* by condoning the admission into evidence of a declarant's testimonial out-of-court statements when she recalls neither the events the statements describe nor making the statements themselves. This Court should thus grant certiorari to protect the sanctity of the confrontation clause and this Court's decision in *Crawford*.

II. At least in part because of footnote nine in *Crawford*, courts across the United States are in conflict regarding whether a declarant’s out-of-court statements are admissible under the Confrontation Clause when she recalls neither making the statements nor the events underlying them, leading to frequent litigation and appeals, thus demonstrating the important need for this Court to address this question.

The conflict that exists in how courts address issues involving the “unavailability” of a witness for purposes of cross-examination is, in part, attributable to the ninth footnote in *Crawford*. This has resulted in this issue frequently recurring in courts across the country, including in petitions for writ of certiorari before this Court, demonstrating the critical need for this Court to address this issue and ensure national uniformity concerning the issue.

A. A conflict among courts exists as to whether the admission of a declarant’s testimonial out-of-court statements violates the Confrontation Clause when she fails to recall making the statements and the events the statements describe.

Several jurisdiction have held there to be no violation of the Confrontation Clause if the declarant, present at trial, testifies that she does not remember the events the defendant is charged with committing or making statements about them, as occurred in the case at a bar. (*See supra*, p. 14) However, others have found such a situation to violate the Clause.

For instance, the Seventh Circuit rejected an argument that, under *Crawford*, a declarant need only physically appear for cross-examination. *Cookson v. Schwartz*, 556 F.3d 647, 651 (7th Cir. 2009). Instead, the court noted, the declarant must be able to “defend or explain” the statement, implicitly suggesting the declarant must be able to answer questions concerning the statement or the event itself, necessarily requiring that she remember one, the other, or both. *Id.* (citing *Crawford*, 541 U.S. at 59, n.9).

One court has even suggested that a declarant's failure to recall the underlying events alone could be enough to violate the Confrontation Clause. *See United States v. Ausby*, 436 F.Supp.3d 134, 151 n.5 (D.D.C. 2019) ("If the witnesses are completely unable to provide testimony regarding the factual matter for which they are being called, due to the passage of time and withering memory not attributable to any action by the defendant, the defendant's ability to cross-examine the witnesses may be so compromised as to require that their prior testimony be excluded under the Confrontation Clause.").

Relying on *Cookson*, in a case similar to this one, the Mississippi Supreme Court found a Confrontation Clause violation after the declarant-witness's written statement was admitted into evidence despite his testimony that he did not remember making the statement or the events described in the statement. *Goforth v. State*, 70 So.3d 174, 180, 182, 185-86, 188 (Miss. 2011). In the written statement, the declarant made allegations against the defendant. *Goforth*, 70 So.3d at 182. The declarant testified that he "guessed" he could have written the statement. *Id.* at 180, 182. The prosecution called a police officer, who testified he was present when the witness wrote the statement, and the statement was admitted. *Id.* at 180, 182. Applying the reasoning of *Crawford's* footnote nine through its own state constitution, the court found a Confrontation Clause violation because the declarant's "total lack of memory deprived [the defendant] any opportunity to inquire about potential bias or the circumstances surrounding [the declarant's] statement." *Id.* at 186. Also contributing to its holding was the court's belief that the declarant's statements could not be subjected to adversarial testing. *Id.* at 187 (citing *Crawford v. Washington*, 541 U.S. 36, 60 (2004)). The court concluded that the defendant "simply had no opportunity to cross-examine [the declarant] about his statement." *Id.*

The court distinguished *Owens* on the grounds that the declarant in *Owens* recalled making his prior statement and thus the defendant had an opportunity to “cast doubt” on it, whereas the defendant in *Goforth* recalled neither the prior statement nor the events underlying it. *Id.* at 186-87.

Given the conflict in authority regarding the issue in the case at bar, and to ensure uniformity with regard to the issue across the country, this Court should grant this petition in order to address whether, under the circumstances present in this case, the Confrontation Clause is violated.

B. Footnote nine in *Crawford* is contradictory with regard to whether a witness’s mere presence at trial satisfies the availability requirement.

Not only should this Court grant certiorari in this case because of the previously discussed conflict in authority throughout the country, but it should also do so because this Court’s own decision in *Crawford*, specifically footnote nine in the decision, is contradictory and at least partly responsible for the conflict. This Court should take the opportunity this case provides to clarify footnote nine with regards to what it means to be “unavailable” for cross-examination

In *Crawford*’s ninth footnote, this Court noted, “[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.” *Crawford*, 541 U.S. at 59, n.9. Later in the footnote, this Court added, “The Clause does not bar admission of a statement so long as the declarant is present at trial *to defend or explain it.*” *Id.* (emphasis added). Plainly read, this Court’s former comment suggests that a declarant’s out-of-court statements are admissible as long as she appears physically, regardless of what she testifies to.

If this is true, K.P.'s out-of-court statement here would be admissible, as she was physically present at trial. On the other hand, also plainly read, the latter comment suggests that the declarant's mere presence is not enough; she must answer questions regarding her out-of-court statements or the offense itself, or at the very least have the ability do so. *Goforth*, 70 So.3d at 186 (quoting Roger W. Kirst, *Does Crawford Provide a Stable Foundation for Confrontation Doctrine?*, 71 BROOK. L. REV. 35, 76 (2005)). If this is correct, the admission of K.P.'s statements here violated the Confrontation Clause, as she was unable to answer any questions whatsoever about the offense or her out-of-court statements given her lack of memory.

The Minnesota Supreme Court has recognized the contradictory nature of footnote nine. *State v. Holliday*, 745 N.W.2d 556, 565 (Minn. 2008). In *Holliday*, the court ultimately found no Confrontation Clause violation when a declarant physically appeared for trial and testified he did not recall making out-of-court statements or the events underlying them. *Holliday*, 745 N.W.2d at 565. The Court held there was no violation, in part, because the former comment in footnote nine is a "more explicit assertion." *Id.* 565-66. What the Minnesota Supreme Court failed to account for, however, is *Crawford's* repudiation of *ex parte* examinations; as discussed above, allowing out-of-court statements into evidence when the declarant does not recall either the statements or underlying events is directly inconsistent with the Confrontation Clause's purpose of preventing the "use of *ex parte* examinations as evidence against the accused," notwithstanding a declarant's presence at trial. *Crawford*, 541 U.S. at 50. The latter comment in footnote nine is more consistent with *Crawford*, as the declarant's statements are at least subject to adversarial testing (or the possibility of it), the ultimate purpose of cross-examination, rendering the statements not explicitly *ex parte*. *Davis v. Alaska*, 415 U.S. 308, 316 (1974); *Crawford*, 541 U.S. at 43.

Footnote nine's contradiction has indeed played a role in the conflict among jurisdictions, as different courts have read the footnote as requiring two differing things. In contrast to the Minnesota Supreme Court, the Seventh Circuit, pointing to the latter comment in *Crawford*'s ninth footnote, has recognized that the former comment is "not dispositive," implicitly recognizing that the Confrontation Clause and *Crawford* require more than just a declarant's mere presence on the stand. *Cookson*, 556 F.3d at 651.

This Court should grant this petition to clarify when a witness is available for cross-examination under *Crawford*'s ninth footnote.

C. This question repeatedly confronts reviewing courts across the country and has been the basis of numerous petitions for writ of certiorari, indicating this question's importance and a national need for this Court to address the question.

The need for review of this issue regarding "unavailability" for cross-examination is demonstrated further by the fact that it has been subject to no fewer than five petitions for writ of certiorari before this Court. *See* Petition for Writ of Certiorari, *Blakeney v. United States*, 562 U.S. 897 (2010) (No. 10-215) 2010 WL 3236719; Petition for Writ of Certiorari, *Tapia v. New York*, 140 S.Ct. 643 (2019) (No. 19-159) 2019 WL 3545864; Petition for Writ of Certiorari, *White v. Louisiana*, 140 S.Ct. 647 (2019) (No. 18-8862); Petition for Writ of Certiorari, *Moore v. Illinois*, 144 S.Ct. 1080; Petition for Writ of Certiorari, *Castillo v. Illinois*, 2026 WL 795084. Lower courts and practitioners clearly need guidance regarding when a witness is unavailable under *Crawford*, but this Court denied the petitions on all five occasions. *Blakeney*, 562 U.S. at 897; *Tapia*, 140 S.Ct. at 643; *White*, 140 S.Ct. at 647; *Moore*, 144 S.Ct. at 1080; *Castillo*, 2026 WL 795084. The frequency of the disparate opinions indicate the issue will continue to arise until this Court provides a definitive answer as to the question of "unavailability" as described in *Crawford*.

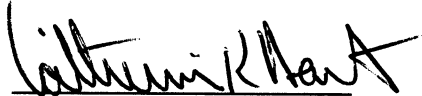
Conclusion

The Illinois Supreme Court's decision strikes at the core of *Crawford's* protection. Indeed, no post-*Crawford* decision of this Court authorizes what happened here, *i.e.*, the admission of prior testimonial accusations where a witness recalled neither the offense nor the prior statements, and where those statements were not even admitted into evidence until after the witness finished testifying, leaving defense counsel no actual opportunity to confront the witness about them. Accordingly, this Court should grant this petition.

CONCLUSION

For the foregoing reasons, petitioner, Sidney Butler, respectfully prays that a writ of certiorari issue to review the judgment of the Illinois Supreme Court.

Respectfully submitted,



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