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## Confronting Memory Loss

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## CONFRONTING MEMORY LOSS

*Paul F. Rothstein\* & Ronald J. Coleman†*

*The Confrontation Clause of the Sixth Amendment grants “the accused” in “all criminal prosecutions” a right “to be confronted with the witnesses against him.” A particular problem occurs when there is a gap in time between the testimony that is offered and the cross-examination of it, as where—pursuant to a hearsay exception or exemption—evidence of a current witness’s prior statement is offered and, for some intervening reason, her current memory is impaired. Does this fatally affect the opportunity to “confront” the witness? The U.S. Supreme Court has, to date, left unclear the extent to which a memory-impaired witness can afford a criminal defendant her right to confront. Would, for instance, it be of any value to permit a defendant the opportunity to cross-examine a witness claiming no recollection of having seen the crime or having identified the defendant as the perpetrator? Should the right to confront simply imply the ability to look one’s accuser in the eye at trial, or should it necessitate some degree of opportunity for substantive cross-examination? Two petitions for certiorari that the U.S. Supreme Court denied in December 2019—White v. Louisiana and Tapia v. New York—could have permitted the Court to clarify confrontation rights in memory loss cases. This Article identifies and discusses eight key issues arising under the Confrontation Clause in connection with memory impairment in witnesses. Although the Court chose not to put these issues to rest in the context of White or Tapia, we anticipate federal and state courts will be called upon to answer these issues in the coming years, and we suspect the Court will eventually need to answer them.*

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## I. INTRODUCTION

The Confrontation Clause of the Sixth Amendment grants “the accused” in “all criminal prosecutions” a right “to be confronted with the witnesses against him.”<sup>1</sup> The U.S. Supreme Court’s landmark decision in *Crawford v. Washington* governs modern Confrontation Clause analysis.<sup>2</sup> Under the *Crawford* regime, the Confrontation Clause applies to hearsay statements offered against a criminal defendant pursuant to a hearsay exception or exemption, but only if such statements are the out-of-court equivalent of “bear[ing] testimony” at trial.<sup>3</sup> These “testimonial” statements cannot be entered against a criminal defendant unless the hearsay declarant either (1) appears as a witness for cross-examination or (2) is unavailable in a situation where there has been a prior, sufficient opportunity for cross-examination of such declarant.<sup>4</sup> While the *Crawford* opinion failed to fully define the class of testimonial statements,<sup>5</sup> this class seems to include out-of-court statements that are meant or understood to offer some type of evidence at trial,

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<sup>1</sup> U.S. CONST. amend. VI. The Fourteenth Amendment ensures that the Confrontation Clause also applies to state criminal proceedings. See *Pointer v. Texas*, 380 U.S. 400, 403 (1965) (“We hold today that the Sixth Amendment’s right of an accused to confront the witnesses against him is likewise a fundamental right and is made obligatory on the States by the Fourteenth Amendment.”).

<sup>2</sup> See 541 U.S. 36, 68–69 (2004) (“Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.”).

<sup>3</sup> *Id.* at 51. Not all out-of-court statements are testimonial. For instance, a statement that has the purpose of helping law enforcement meet an ongoing emergency—such as statements made to a 911 operator prior to the perpetrator being under control—would likely be found nontestimonial. See generally *Davis v. Washington*, 547 U.S. 813 (2006). Similarly, a statement in a medical report created for purposes of treating a patient—and without any contemplation it would be used against a future criminal defendant at trial—might also be found nontestimonial. See Ronald J. Coleman & Paul F. Rothstein, *A Game of Katso and Mouse: Current Theories for Getting Forensic Analysis Evidence Past the Confrontation Clause*, 57 AM. CRIM. L. REV. 27, 52 (2020) [hereinafter Coleman & Rothstein, *A Game of Katso and Mouse*].

<sup>4</sup> See *Crawford*, 541 U.S. at 53–54 (“[T]he Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.”).

<sup>5</sup> *Id.* at 68 (“We leave for another day any effort to spell out a comprehensive definition of ‘testimonial.’”).

particularly if such statements were made formally and directed to a state actor or agent.<sup>6</sup>

A problem occurs under *Crawford* and its progeny when there is a gap in time between the testimony that is offered and the cross-examination of it, as where—pursuant to a hearsay exception or exemption—evidence of a current witness’s prior statement is offered and for some intervening reason her current memory is impaired. Does this fatally affect the opportunity to “confront” the witness? For instance, suppose a witness is testifying at trial and the prosecution seeks to enter a prior testimonial statement that the witness made to law enforcement. Insofar as the rules of evidence are concerned, this statement might be admissible.<sup>7</sup> Normally, the fact that the witness is testifying at trial might be sufficient to meet the Confrontation Clause’s requirements for introducing the prior statement. However, suppose that the testifying witness has suffered some degree of memory loss since having made the prior statement, such that she cannot recall the prior statement, the incident described in it, or both.<sup>8</sup> Questions

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<sup>6</sup> See *id.* at 51–52.

<sup>7</sup> This might be attempted, for instance, using Federal Rule of Evidence 801(d)(1) or a state equivalent. That rule requires that the witness now be subject to cross-examination, and there is a similar question about whether cross-examination of a now memory-impaired witness can satisfy the rule. See FED. R. EVID. 801(d)(1). But jurisdictions do on occasion hold that it does satisfy the rule. See, e.g., *United States v. Owens*, 484 U.S. 554, 559–60 (1988).

<sup>8</sup> A similar issue could arise, for instance, where an individual lost her memory after direct examination at trial but before cross-examination. This Article generally uses hypotheticals focusing on the introduction of a prior statement through a memory-impaired witness; however, we suspect that any rule set by the Court would apply equally to other contexts, such as memory loss after direct examination but prior to cross-examination. Of course, memory loss purportedly taking place after direct examination but before cross-examination may be different from the hypotheticals we present (in which there may be a larger gap in time between the relevant statement and the cross-examination of it). For instance, when a trial witness recalls everything on direct examination and then is relatively immediately cross-examined and purports to forget all important items during cross-examination, a court may be more likely to question whether the memory loss is genuine unless a credible intervening cause of the memory loss exists. Memory loss where there is a gap between the statement and the cross-examination of it is somewhat different from memory loss where the witness makes the statement at trial and is thereupon cross-examined. In the latter case, the degree of memory during cross-examination necessarily bears on the veracity of the statement. But, where there is a substantial gap in time, the veracity of the statement could seem (at least to a jury) more independent of the witness’s memory at the later cross-examination. Before the Federal Rules of Evidence, a prior statement of a witness on the

arise when determining whether such a memory-impaired witness could afford the defendant her confrontation rights. For example, should the right to confront simply mean the right to look one's accuser in the eye at trial and pose questions on cross-examination, even if the witness lacks sufficient memory of the events to answer such questions? Would a witness only meet the requirements of confrontation if she had the capacity to answer all substantive questions posed? Should the degree of the declarant's memory impairment make a difference?<sup>9</sup>

In this regard, two petitions for certiorari that the U.S. Supreme Court denied in December 2019—*White v. Louisiana* and *Tapia v. New York*—could have permitted the Court to clarify the current state of confrontation rights in memory loss cases.<sup>10</sup> In each case, the prosecution sought to introduce a prior statement by a witness and the relevant witness testified at trial; but the witness suffered from memory loss.<sup>11</sup> According to the petitioners in each case, the memory-impaired witnesses were insufficient for purposes of the Confrontation Clause.<sup>12</sup>

The purpose of this Article is to identify and discuss eight key issues arising in connection with memory impairment in Confrontation Clause witnesses. Part II will offer background on the

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stand was still inadmissible hearsay, perhaps partly for this reason. *See State v. Saporen*, 285 N.W. 898, 901 (Minn. 1939) (“The chief merit of cross examination is not that at some future time it gives the party opponent the right to dissect adverse testimony. Its principal virtue is in its immediate application of the testing process. Its strokes fall while the iron is hot.”).

<sup>9</sup> Some degree of guidance may be drawn from a pre-*Crawford* line of cases on this issue culminating in *United States v. Owens*. *See* 484 U.S. at 557–60 (recounting the line of cases that preceded *Owens*). However, the *Owens* line of cases did not answer all relevant questions, and it is unclear the extent to which that precedent maintains vitality after *Crawford*. *See infra* Section II.C.

<sup>10</sup> *See* Petition for a Writ of Certiorari at i, *White v. Louisiana*, 140 S. Ct. 647 (2019) (mem.) (No. 18-8862) [hereinafter *White Cert Petition*] (stating the question presented); Petition for a Writ of Certiorari at i, *Tapia v. New York*, 140 S. Ct. 643 (2019) (mem.) (No. 19-159) [hereinafter *Tapia Cert Petition*] (same); *see also White*, 140 S. Ct. at 647 (denying certiorari); *Tapia*, 140 S. Ct. at 643 (same).

<sup>11</sup> *See generally White Cert Petition*, *supra* note 10; *Tapia Cert Petition*, *supra* note 10. The situations in these two petitions are distinct, and this Article will discuss the facts of each case in more detail below. *See infra* Part III.

<sup>12</sup> *White Cert Petition*, *supra* note 10, at 18–19; *Tapia Cert Petition*, *supra* note 10, at 14–15.

Confrontation Clause; Part III will present recent certiorari petitions highlighting problems under the Confrontation Clause created by witnesses' memory loss; Part IV will identify and discuss eight key memory impairment issues; and Part V will conclude.

## II. CONFRONTATION CLAUSE BACKGROUND

Prior to *Crawford*, courts were guided in Confrontation Clause cases by *Ohio v. Roberts*.<sup>13</sup> Under *Roberts*, admission of hearsay statements consistent with the Confrontation Clause required the declarant's unavailability and sufficient "indicia of reliability."<sup>14</sup> *Crawford* and its progeny altered the paradigm, finding that only so-called "testimonial" statements would trigger the protections of the Confrontation Clause.<sup>15</sup>

### A. CRAWFORD & TESTIMONIAL STATEMENTS

In *Crawford*, the prosecution sought to offer "tape-recorded statement[s]" of the defendant's wife against the defendant.<sup>16</sup> The wife's statements had been made to the police, but the defendant was not afforded an opportunity to cross-examine the wife at trial.<sup>17</sup> Notwithstanding the defendant's argument that admitting the statements would violate his confrontation rights, the trial court permitted the prosecution to play the statements for the jury.<sup>18</sup> The defendant was convicted, and the U.S. Supreme Court ultimately "granted certiorari to determine whether the State's use of [the wife's] statement violated the Confrontation Clause."<sup>19</sup>

In an opinion authored by Justice Scalia, the Court found that admission of the taped testimony violated the defendant's

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<sup>13</sup> 448 U.S. 56 (1980), *abrogated by* *Crawford v. Washington*, 541 U.S. 36 (2004).

<sup>14</sup> *Id.* at 66 (stating that where evidence fell within "a firmly rooted hearsay exception," reliability could be inferred).

<sup>15</sup> 541 U.S. at 68.

<sup>16</sup> *Id.* at 38.

<sup>17</sup> *Id.* at 38–40. The wife was not able to testify at trial due to "state marital privilege." *Id.* at 40 (citing WASH. REV. CODE § 5.60.060(1) (1994)).

<sup>18</sup> *Id.* at 40.

<sup>19</sup> *Id.* at 42.

Confrontation Clause rights.<sup>20</sup> After reviewing the common law history of the confrontation right and the text of the Confrontation Clause, the Court determined that the Clause ensured a procedural right to cross-examination and was directed at those who “bear testimony” against the defendant.<sup>21</sup> The Court noted, “An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.”<sup>22</sup> Accordingly, there existed a core class of out-of-court “testimonial” statements with which the Confrontation Clause was concerned, and admission of these testimonial statements against a criminal defendant without the opportunity for cross-examination at trial would violate the Clause (absent the declarant’s unavailability and a prior opportunity to cross-examine the declarant).<sup>23</sup> The Court did not comprehensively define “testimonial,” but it noted that the term “applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.”<sup>24</sup>

Chief Justice Rehnquist, joined by Justice O’Connor, wrote a concurring opinion to denounce the Court’s overruling of *Roberts*<sup>25</sup> even though he believed “*Roberts* and its progeny” supported the Court’s result.<sup>26</sup> According to the Chief Justice, the Court’s “new

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<sup>20</sup> *Id.* at 68–69 (noting that admission of the wife’s “testimonial statement . . . despite the fact that [the defendant] had no opportunity to cross-examine her . . . is sufficient to make out a violation of the Sixth Amendment”).

<sup>21</sup> *Id.* at 42–61. Testimony, according to the Court, would typically be a “solemn declaration or affirmation made for the purpose of establishing or proving some fact.” *Id.* at 51 (quoting *Testimony*, NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 42–60, 68–69 (outlining the textual, historical, and precedential support for the Court’s interpretation of the Sixth Amendment).

<sup>24</sup> *Id.* at 68. In coming to its conclusion, the Court also discussed various formulations of the class of testimonial statements: (1) “*ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially”; (2) “extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions”; and (3) “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” *Id.* at 51–52 (alteration in original) (citations omitted).

<sup>25</sup> *Id.* at 69 (Rehnquist, C.J., concurring).

<sup>26</sup> *Id.* at 76.



interpretation of the Confrontation Clause” was unnecessary, was not supported “by sufficiently persuasive reasoning,” and would “cast[] a mantle of uncertainty over future criminal trials.”<sup>27</sup> He argued that neither the U.S. Supreme Court—nor any other court of which he was aware—had ever distinguished between nontestimonial and testimonial statements, and he saw “little value in trading [the Court’s] precedent for an imprecise approximation at this late date.”<sup>28</sup>

In footnote 9, Justice Scalia reiterated the following notable response to the Chief Justice’s criticisms:

[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. It is therefore irrelevant that the reliability of some out-of-court statements “cannot be replicated, even if the declarant testifies to the same matters in court.” The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it.<sup>29</sup>

Following *Crawford*, courts were left with the task of determining when a given statement would be considered testimonial. The Court has come to rely on an “objective primary purpose” analysis in making such determination.<sup>30</sup>

#### B. OBJECTIVE PRIMARY PURPOSE

The U.S. Supreme Court has found that a statement will be considered testimonial when its objective primary purpose is to create an out-of-court substitute for in-court trial testimony, but such a statement would be deemed non-testimonial if made for some

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<sup>27</sup> *Id.* at 69.

<sup>28</sup> *Id.* at 72.

<sup>29</sup> *Id.* at 60 n.9 (majority opinion) (citations omitted).

<sup>30</sup> *See infra* Section II.B.

other purpose.<sup>31</sup> The Court developed and refined its analysis in *Davis v. Washington*<sup>32</sup> and *Michigan v. Bryant*.<sup>33</sup>

*Davis* asked the Court to decide when statements directed to law enforcement personnel at the scene of a crime or on a 911 call would be testimonial.<sup>34</sup> *Davis* was a consolidated appeal of lower court domestic disturbance cases: *State v. Davis*<sup>35</sup> and *Hammon v. State*.<sup>36</sup> In the former, the prosecution sought to admit statements made by an alleged victim to a 911 operator prior to police reaching the scene.<sup>37</sup> In the latter, the prosecution sought to use an alleged victim's statements made to the police after officers had reached the scene and during a time when the accused appeared to be under control.<sup>38</sup> Neither alleged victim testified at trial.<sup>39</sup> In rendering its decision, the Court carved out an "emergency" exception to testimonial hearsay which relied on the statement's primary purpose:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the

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<sup>31</sup> See generally *Michigan v. Bryant*, 562 U.S. 344 (2011). Put differently, a statement would be testimonial where its objective primary purpose is "to establish or prove past events potentially relevant to later criminal prosecution." *Id.* at 356 (quoting *Davis v. Washington*, 547 U.S. 813, 822 (2006)).

<sup>32</sup> 547 U.S. 813 (2006).

<sup>33</sup> 562 U.S. 344 (2011).

<sup>34</sup> *Davis*, 547 U.S. at 817.

<sup>35</sup> 111 P.3d 844 (Wash. 2005), *aff'd*, 547 U.S. 813 (2006).

<sup>36</sup> 829 N.E.2d 444 (Ind. 2005), *rev'd sub nom.* *Davis v. Washington*, 547 U.S. 813 (2006).

<sup>37</sup> *Davis*, 547 U.S. at 817–18.

<sup>38</sup> *Id.* at 819–21. The Court noted that the accused was in the kitchen around the time the police entered the house, he spoke with the police, and one officer remained with the accused while the other spoke with the alleged victim. *Id.* at 819–20 (citing *Hammon*, 829 N.E.2d at 447).

<sup>39</sup> *Id.*

interrogation is to establish or prove past events potentially relevant to later criminal prosecution.<sup>40</sup>

As such, the Court determined that the statements in *State v. Davis* made prior to police arrival would be nontestimonial, but the statements in *Hammon* would be testimonial.<sup>41</sup>

In *Michigan v. Bryant*—which built upon *Davis*—the accused was convicted of second-degree murder after the prosecution successfully entered statements made by the mortally wounded alleged victim to the police in the parking lot of a gas station.<sup>42</sup> The alleged victim died within hours after leaving the gas station, and the police left the gas station to search for the accused.<sup>43</sup> *Bryant* differed from *Davis* in that it, among other things, involved “a fatal gunshot wound,” an alleged “victim found in a public location,” and an accused “whose location was unknown” when the police found the alleged victim.<sup>44</sup> Clarifying and refining its opinion in *Davis*, the U.S. Supreme Court found that an “ongoing emergency” may be one example of a situation where the primary purpose of a statement was not to create a trial record, but it was not the only example:

When, as in *Davis*, the primary purpose of an interrogation is to respond to an “ongoing emergency,” its purpose is not to create a record for trial and thus is not within the scope of the Clause. But there may be *other* circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony. . . . Where no such primary purpose exists, the admissibility of a statement is the concern of state

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<sup>40</sup> *Id.* at 822.

<sup>41</sup> *Id.* at 827–32. Justice Thomas filed a partial concurrence to register his disapproval of the Court’s primary purpose test, noting it was both “difficult for courts to apply” and “characterize[d] as ‘testimonial,’ and therefore inadmissible, evidence that bears little resemblance to what we have recognized as the evidence targeted by the Confrontation Clause.” *Id.* at 834 (Thomas, J., concurring in part and dissenting in part).

<sup>42</sup> 562 U.S. 344, 348–49 (2011).

<sup>43</sup> *Id.* at 349–50.

<sup>44</sup> *Id.* at 359.

and federal rules of evidence, not the Confrontation Clause.<sup>45</sup>

In assessing the primary purpose, the Court noted that “[a]n objective analysis of the circumstances of an encounter and the statements and actions of the parties to it provides the most accurate assessment.”<sup>46</sup> Applying the primary purpose analysis to the facts, the Court determined that the statements in *Bryant* were nontestimonial, and thus, “[t]he Confrontation Clause did not bar their admission” at trial.<sup>47</sup>

### C. MEMORY LOSS PRECEDENT

Since the present Article focuses on memory loss in the context of the Confrontation Clause, a discussion of the Court’s opinions in *California v. Green*,<sup>48</sup> *Delaware v. Fensterer*,<sup>49</sup> and *United States v. Owens*<sup>50</sup> may also prove instructive. One should note that the Court decided these cases before *Crawford*, so there is a question as to whether their logic would still govern the Court’s analysis.<sup>51</sup>

*Green* concerned a charge of “furnishing marihuana to a minor” against John Anthony Green.<sup>52</sup> The minor to whom Green allegedly gave drugs, Melvin Porter, had been “arrested for selling [marihuana] to an undercover police officer” and had “named” Green as his supplier.<sup>53</sup> As an officer, Officer Wade, later recounted,

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<sup>45</sup> *Id.* at 358–59.

<sup>46</sup> *Id.* at 360.

<sup>47</sup> *Id.* at 378. Justice Thomas again criticized the Court’s primary purpose analysis in *Bryant*. *Id.* at 378–79 (Thomas, J., concurring). Justices Scalia and Ginsburg both wrote dissenting opinions to criticize the Court’s opinion, with Justice Scalia charging that it “distorts our Confrontation Clause jurisprudence and leaves it in a shambles.” *Id.* at 380 (Scalia, J., dissenting); see also *id.* at 395–96 (Ginsburg, J., dissenting) (arguing that the majority’s decision “confounds our recent Confrontation Clause jurisprudence”).

<sup>48</sup> 399 U.S. 149 (1970).

<sup>49</sup> 474 U.S. 15, 16–23 (1985) (per curiam).

<sup>50</sup> 484 U.S. 554 (1988).

<sup>51</sup> Notably, Justice Scalia—who authored the Court’s opinion in *Crawford* and was perhaps its fiercest defender—also authored the Court’s opinion in *Owens*. See *id.* at 555. The *Owens* Court relied upon *Fensterer*, and Justice Scalia cited *Green* in *Crawford*. See *id.* at 558–60 (discussing *Fensterer*); see also *Crawford v. Washington*, 541 U.S. 36, 57, 60 n.9 (2004).

<sup>52</sup> *Green*, 399 U.S. at 151.

<sup>53</sup> *Id.*

Porter said that Green phoned him earlier in the month and “asked him to sell some ‘stuff’ or ‘grass,’ and had . . . personally delivered a shopping bag containing [twenty-nine] ‘baggies’ of marihuana.”<sup>54</sup> Porter sold some drugs from this supply to an undercover officer.<sup>55</sup> One week later, “Porter testified at [Green’s] preliminary hearing” and “again named [Green] as his supplier,” but Porter then asserted that Green “showed him where to pick up” the bag of drugs outside of Green’s parents’ house.<sup>56</sup> Porter’s preliminary hearing testimony was subject to “extensive cross-examination” by Green’s counsel.<sup>57</sup>

Approximately two months later, Porter took the stand at trial and was “markedly evasive and uncooperative.”<sup>58</sup> In particular, “Porter claimed that he was uncertain how he obtained the marihuana, primarily” due to the LSD he had taken twenty minutes prior to Green calling.<sup>59</sup> He claimed he was “unable” to recall events following the call and that the LSD prevented him from “distinguishing fact from fantasy.”<sup>60</sup> Parts of Porter’s preliminary hearing testimony were read by the prosecutor, and that evidence was admitted “for the truth of the matter contained therein.”<sup>61</sup> With Porter’s recollection “refreshed” by his preliminary hearing testimony, Porter “guessed” that he had indeed obtained the drugs from behind Green’s parents’ home and had given Green the money from the sale.<sup>62</sup> On cross, Porter indicated it was his recollection of the preliminary hearing testimony which was “mostly” refreshed, rather than of the events themselves.<sup>63</sup> Officer Wade later took the stand and recounted Porter’s earlier statement that Green delivered him the drugs; Wade’s statement was “admitted as substantive evidence.”<sup>64</sup> Porter stated that he had told the truth, “as he then believed it” to be, both at the preliminary hearing and to Officer

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* (quoting *People v. Green*, 451 P.2d 422, 423 (Cal. 1969)).

<sup>59</sup> *Id.* at 152.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

Wade.<sup>65</sup> He also insisted he was telling the truth at the trial regarding his “inability to remember the actual events.”<sup>66</sup> Green was convicted, and the U.S. Supreme Court agreed to hear the case.<sup>67</sup>

Justice White, writing for the Court, first focused on the admission of the preliminary hearing testimony.<sup>68</sup> The Court held that the Confrontation Clause did not require exclusion of a witness’s prior statements where the witness admitted making such statements and where the witness might be asked to explain or defend the inconsistency between a prior and present version of the relevant events, thereby opening the witness to “full cross-examination . . . as to both stories.”<sup>69</sup> The Court then turned to admission of Porter’s statements to Officer Wade.<sup>70</sup> Justice White noted that, “[i]n the typical case to which the [lower] court addressed itself,” the trial witness offers a different version of events “from that given on a prior occasion.”<sup>71</sup> In such a situation, the opportunity to cross-examine the witness at trial is “adequate” for purposes of the Confrontation Clause to make admissible “both the casual, off-hand remark to a stranger, and the carefully recorded testimony at a prior hearing.”<sup>72</sup> However, the Court noted that in the present case, Porter claimed he could not recall the events occurring after Green telephoned him, so Porter failed to provide any current version of more important events set out in his earlier statement.<sup>73</sup> Justice White did not reach the question of whether

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<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 153.

<sup>68</sup> *Id.* at 155–64. Neither Justice Marshall nor Justice Blackmun took part in the decision, and Justice Blackmun also did not take part in consideration of the case. *Id.* at 170.

<sup>69</sup> *Id.* at 164. The Court noted that “[v]iewed historically, . . . there is good reason to conclude that the Confrontation Clause is not violated by admitting a declarant’s out-of-court statements, as long as the declarant is testifying as a witness and subject to full and effective cross-examination.” *Id.* at 158. The Court also noted that admission of Porter’s preliminary hearing testimony would not have violated the Confrontation Clause had Porter “been actually unavailable,” and so a different result should not be reached when Porter was actually produced. *Id.* at 165.

<sup>70</sup> *Id.* at 168 (noting that “a narrow question” regarding “the admissibility of Porter’s statements to Officer Wade” was “lurking” in the case).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

Porter's purported loss of memory so affected Green's cross-examination right as to "make a critical difference" in application of the Confrontation Clause, since that issue was not yet ripe.<sup>74</sup>

Chief Justice Burger wrote a concurring opinion "to emphasize the importance of allowing the States to experiment"; Justice Harlan also authored a concurring opinion to discuss, among other things, the need to take a "fresh look" at the concept of confrontation.<sup>75</sup> In his concurrence, Justice Harlan stated:

The fact that the witness, though physically available, cannot recall either the underlying events that are the subject of an extra-judicial statement or previous testimony or recollect the circumstances under which the statement was given, does not have Sixth Amendment consequence. The prosecution has no less fulfilled its obligation simply because a witness has a lapse of memory. The witness is, in my view, available. To the extent that the witness is, in a practical sense, unavailable for cross-examination on the relevant facts, . . . I think confrontation is nonetheless satisfied.<sup>76</sup>

Justice Brennan dissented, arguing that the case raised two issues: (1) whether the Confrontation Clause permitted the extrajudicial statements of a witness to be admitted "as substantive evidence" when the witness claimed the inability to recall "the events with which his prior statement dealt," and (2) whether the Confrontation Clause allowed the "preliminary hearing statement" of a witness—"made under oath and subject to cross-examination"—to be used as substantive evidence where the witness claimed the

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<sup>74</sup> *Id.* at 168–69. The Court noted that the state court "did not focus" on that issue, nor did either party address the question. *Id.* at 169. The Court also pointed out, for instance, that since it had held "that the admission of Porter's preliminary hearing testimony is not barred by the Sixth Amendment despite his apparent lapse of memory, the reception into evidence of the Porter statement to Officer Wade may pose a harmless-error question which is more appropriately resolved by the California courts in the first instance." *Id.* at 170.

<sup>75</sup> *Id.* at 171 (Burger, C.J., concurring); *id.* at 173 (Harlan, J., concurring) ("[T]his state decision imperatively demonstrates the need for taking a fresh look at the constitutional concept of confrontation.") (internal quotation marks omitted).

<sup>76</sup> *Id.* at 188–89.

inability to recall “the events with which the statement dealt.”<sup>77</sup> Justice Brennan believed that neither statement could “be introduced without unconstitutionally restricting” the accused’s right “to challenge incriminating evidence” before the factfinder.<sup>78</sup>

Fifteen years after *Green*, in *Fensterer*, the U.S. Supreme Court had the opportunity to consider whether admitting opinion testimony from the prosecution’s expert—who could not “recall the basis for his opinion”—violated the Confrontation Clause.<sup>79</sup> William Fensterer had been convicted for murdering his fiancée.<sup>80</sup> In order to prove that two hairs found on the alleged murder weapon were the victim’s—and that one of the hairs had been removed forcibly—the state relied upon testimony from an FBI special agent.<sup>81</sup> At trial, the special agent testified that one of the hairs was forcibly removed and explained that “there are three methods of determining that a hair has forcibly been removed.”<sup>82</sup> Later on, however, he testified that, after reviewing his notes, he had “no specific knowledge as to the particular way that [he] determined the hair was forcibly removed other than the fact that one of those hairs was forcibly removed.”<sup>83</sup> On cross-examination, the special agent again could not remember “which method” he used.<sup>84</sup> The trial court overruled Fensterer’s objection that the special agent’s testimony “precluded adequate cross-examination,” explaining that such objection went to weight, rather than admissibility.<sup>85</sup> The Delaware Supreme Court reversed on the basis of the Confrontation Clause, noting among other things, that “[e]ffective cross-examination and discrediting of [the special agent’s] opinion at a minimum required that he commit himself to the basis of his opinion.”<sup>86</sup>

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<sup>77</sup> *Id.* at 191 (Brennan, J., dissenting).

<sup>78</sup> *Id.*

<sup>79</sup> *Delaware v. Fensterer*, 474 U.S. 15, 16 (1985) (per curiam).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 16–17.

<sup>83</sup> *Id.* at 17 (quoting *Fensterer v. State*, 493 A.2d 959, 963 (Del. 1985)).

<sup>84</sup> *Id.* The defense’s expert also attacked the special agent’s theory regarding forcible removal as the defense expert understood it to be. *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 18 (first alteration in original) (quoting *Fensterer*, 493 A.2d at 964).



The U.S. Supreme Court reversed the Delaware Supreme Court, finding no Confrontation Clause violation.<sup>87</sup> The Court stated that, in general, the Confrontation Clause guaranteed “an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.”<sup>88</sup> As the Court noted:

The Confrontation Clause includes no guarantee that every witness called by the prosecution will refrain from giving testimony that is marred by forgetfulness, confusion, or evasion. To the contrary, the Confrontation Clause is generally satisfied when the defense is given a full and fair opportunity to probe and expose these infirmities through cross-examination, thereby calling to the attention of the factfinder the reasons for giving scant weight to the witness’ testimony.<sup>89</sup>

The Court noted that cross-examination of the special agent’s testimony revealed to the jury that the special agent could not even remember the theory forming the basis of his opinion, and the defense’s expert was able to suggest the special agent’s theory was “baseless.”<sup>90</sup> According to the Court, the Confrontation Clause required “no more than this.”<sup>91</sup> The Court, however, did not foreclose the possibility that memory loss could theoretically form the basis

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<sup>87</sup> *Id.* (“We now reverse the Delaware Supreme Court’s holding that [the special agent’s] inability to recall the method whereby he arrived at his opinion rendered the admission of that opinion violative of [Fensterer’s] rights under the Confrontation Clause.”). It was a *per curiam* decision, in which Justice Marshall dissented from the “summary disposition,” Justice Blackmun would have granted certiorari, and Justice Stevens “reluctantly concur[red]” and noted that he thought *Fensterer* should not have been “decided without full argument.” *Id.* at 23–24 (Stevens, J., concurring).

<sup>88</sup> *Id.* at 20 (majority opinion). That conclusion, the Court found, was “confirmed by the fact that the assurances of reliability our cases have found in the right of cross-examination are fully satisfied in cases such as this one, notwithstanding the witness’ inability to recall the basis for his opinion: the factfinder can observe the witness’ demeanor under cross-examination, and the witness is testifying under oath and in the presence of the accused.” *Id.* (citing *Ohio v. Roberts*, 448 U.S. 56, 63 n.6 (1980)).

<sup>89</sup> *Id.* at 21–22.

<sup>90</sup> *Id.* at 20.

<sup>91</sup> *Id.*

of a Confrontation Clause violation, stating that the Court “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.”<sup>92</sup>

A few years later, *Owens* required the Court to consider whether the Confrontation Clause barred testimony regarding a previous, “out-of-court identification when the identifying witness” could not explain the basis for such identification due to memory loss.<sup>93</sup> A correctional counselor at a prison, John Foster, had been beaten, and he suffered a skull fracture and was hospitalized for nearly a month.<sup>94</sup> When interviewed by an FBI agent approximately a week after the incident, Foster seemed “lethargic” and was “unable to remember his attacker’s name.”<sup>95</sup> A little over two weeks later, on May 5, the FBI agent again spoke with Foster, and this time Foster’s memory seemed much improved.<sup>96</sup> Foster was able to describe the attack, name the accused as his attacker, and identify the accused from a set of photographs.<sup>97</sup>

At trial, Foster testified to his activities just prior to the attack, recounted “seeing blood on the floor” and “feeling the blows to his head,” and stated that he remembered identifying the accused as his attacker during his FBI interview on May 5, 1982.<sup>98</sup> On cross-examination, Foster conceded that he could not remember: (1) seeing his attacker; (2) any visitors he received in the hospital, aside from the FBI agent, even though evidence suggested there were numerous such visitors; and (3) whether any of the visitors he received had suggested the accused was the attacker.<sup>99</sup> The defense

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<sup>92</sup> *Id.* In that connection, the Court declined to decide the question raised by *Green*, but not decided by it: “[w]hether [the witness’s] apparent lapse of memory so affected [the accused’s] right to cross-examine as to make a critical difference in the application of the Confrontation Clause.” *Id.* at 21 (first alteration in original) (quoting *California v. Green*, 399 U.S. 149, 168 (1970)).

<sup>93</sup> *United States v. Owens*, 484 U.S. 554, 555–56 (1988). Note that Justice Kennedy did not take “part in the consideration or decision of this case.” *Id.* at 564.

<sup>94</sup> *Id.* at 556 (describing Foster’s injuries).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

“unsuccessfully sought to refresh” Foster’s recollection using hospital records, including one record that indicated Foster had attributed the attack to someone other than the accused.<sup>100</sup> The accused was convicted, and the U.S. Supreme Court eventually granted certiorari.<sup>101</sup>

Justice Scalia, writing for the Court, found that the Confrontation Clause was not violated.<sup>102</sup> He began by noting that the Court had “never held that a Confrontation Clause violation” could be founded upon the memory loss of a witness.<sup>103</sup> After reviewing past precedent, Justice Scalia reiterated that the Confrontation Clause only guaranteed “an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.”<sup>104</sup> He argued that this “opportunity is not denied” where a witness testified to a current belief but was not able to recall “the reason for that belief.”<sup>105</sup> It would be “sufficient,” the Court found, that a defendant could use cross-examination to make the jury aware of witness bias, lack of attentiveness or care, poor eyesight, and poor memory.<sup>106</sup> The Court stated that if the ability to inquire about these matters was a sufficient cross-examination opportunity as to

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<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 556–57.

<sup>102</sup> *Id.* at 564 (holding that the Confrontation Clause is not violated “by admission of an identification statement of a witness who is unable, because of a memory loss, to testify concerning the basis for the identification”).

<sup>103</sup> *Id.* at 557.

<sup>104</sup> *Id.* at 559 (quoting *Kentucky v. Stincer*, 482 U.S. 730, 739 (1987)). Notably, in the context of discussing cross-examination under the Federal Rules of Evidence, Justice Scalia stated:

Ordinarily a witness is regarded as “subject to cross-examination” when he is placed on the stand, under oath, and responds willingly to questions. Just as with the constitutional prohibition, limitations on the scope of examination by the trial court or assertions of privilege by the witness may undermine the process to such a degree that meaningful cross-examination within the intent of the Rule no longer exists. But that effect is not produced by the witness’ assertion of memory loss—which, as discussed earlier, is often the very result sought to be produced by cross-examination, and can be effective in destroying the force of the prior statement.

*Id.* at 561–62.

<sup>105</sup> *Id.* at 559 (citing *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985)).

<sup>106</sup> *Id.* The Court suggested that highlighting a witness’s bad memory “is often a prime objective of cross-examination.” *Id.*

a witness's current belief (the basis for which the witness could not recall), there was no reason why it should be an insufficient opportunity in connection with a past belief, the basis of which the witness could not recall.<sup>107</sup> In both instances, the belief's foundation could not "effectively be elicited, but other means of impugning the belief" exist.<sup>108</sup> The Court found that "memory-testing" was not required in the latter case, as the Court had previously found in connection with the former case.<sup>109</sup> Although the means of impugning a witness who asserted memory loss would not always be effective, the Constitution does not "guarantee" success.<sup>110</sup>

Justice Brennan, joined by Justice Marshall, dissented from the Court's opinion.<sup>111</sup> Justice Brennan argued that if Foster had died from his injuries, there would be no doubt that the Confrontation Clause would have barred the FBI agent from recounting Foster's identification; Foster's "profound memory loss" rendered him "no less a conduit for stale and inscrutable evidence" than the FBI agent would have been.<sup>112</sup> In Justice Brennan's view, the Court's opinion reduced the confrontation right to a "markedly hollow," purely procedural protection, whereas he believed criminal defendants were guaranteed a right to cross-examination "sufficient to afford the trier of fact a satisfactory basis for evaluating the truth of a prior statement."<sup>113</sup> According to Justice Brennan, the accused's real

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<sup>107</sup> *Id.*

<sup>108</sup> *Id.* The Court continued:

[I]f there is any difference in persuasive impact between the statement "I believe this to be the man who assaulted me, but can't remember why" and the statement "I don't know whether this is the man who assaulted me, but I told the police I believed so earlier," the former would seem, if anything, more damaging and hence give rise to a greater need for memory-testing, if that is to be considered essential to an opportunity for effective cross-examination.

*Id.* at 559–60.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 560. The Court also pointed out that the defense does have realistic weapons, as demonstrated by Owens's counsel's summation, "which emphasized Foster's memory loss and argued that his identification" of the accused resulted from suggestions provided by hospital visitors Foster received. *Id.*

<sup>111</sup> *Id.* at 564 (Brennan, J., dissenting).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 565 (alterations omitted) (quotations omitted).

“accuser” was the Foster from May 5, not the Foster on the stand.<sup>114</sup> He pointed to Court precedent suggesting that the right to confront ensures “an opportunity for *effective* cross-examination.”<sup>115</sup> Justice Brennan believed that the Confrontation Clause guaranteed “more than the right to ask questions of a live witness, no matter how dead that witness’ memory proves to be,” and he would have found a Confrontation Clause violation.<sup>116</sup>

*Owens* remains the leading U.S. Supreme Court case on memory impairment in the context of the Confrontation Clause, but it leaves many issues unresolved. In particular, even assuming *Owens* survives *Crawford*, it is unclear whether *Owens* would govern the Court’s analysis in a case where the witness has an arguably lesser degree of recollection than the witness in *Owens*.<sup>117</sup> This issue was raised by two recent certiorari petitions, and we turn to these petitions in Part III.

### III. THE RECENT SUPREME COURT PETITIONS

The U.S. Supreme Court considered the certiorari petitions in *White v. Louisiana* and *Tapia v. New York* in December 2019.<sup>118</sup> Both afforded the Court an opportunity to clarify confrontation rights in memory loss cases.<sup>119</sup>

In *White*, a defendant—Roderick White—had been convicted of second-degree murder.<sup>120</sup> White was one of three passengers with Brandon Coleman, who was driving around Baton Rouge.<sup>121</sup> Nearby, Gregory Spears was selling compact discs out of his car, and

<sup>114</sup> *Id.* at 566 (“The principal witness against respondent was not the John Foster who took the stand . . .”).

<sup>115</sup> *Id.* at 567 (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985)).

<sup>116</sup> *Id.* at 572.

<sup>117</sup> Importantly, the Court did not face the situation in *Green*, *Fensterer*, or *Owens* where a witness completely forgot the criminal incident *and* her statements to law enforcement about the underlying incident. *See infra* Part IV.

<sup>118</sup> *See White v. Louisiana*, 140 S. Ct. 647, 647 (2019) (mem.) (denying certiorari); *Tapia v. New York*, 140 S. Ct. 643, 643 (2019) (mem.) (same).

<sup>119</sup> *See White* Cert Petition, *supra* note 10, at i; *Tapia* Cert Petition, *supra* note 10, at i.

<sup>120</sup> *White* Cert Petition, *supra* note 10, app. at 2. In the absence of full U.S. Supreme Court opinions in *White* and *Tapia*, the facts of these cases are derived from the lower court rulings, rather than from any assertions of the parties in their petition-related briefings.

<sup>121</sup> *Id.*

NaQuian Robinson drove by, got out, and purchased some discs from Spears.<sup>122</sup> As Spears and Robinson stood talking, Coleman stopped at a carwash nearby.<sup>123</sup> White exited the car, walked over to Spears and Robinson, and asked Spears about some discs.<sup>124</sup> Spears turned to look in the trunk, and White pulled out a gun and attempted to rob Robinson.<sup>125</sup> Robinson and White “wrestled over the gun,” and Robinson “was shot multiple times.”<sup>126</sup> White ran away and was eventually picked up and driven away by Coleman.<sup>127</sup>

After getting into his car and driving a short distance, Robinson “crashed into a fence.”<sup>128</sup> His family brought him to the hospital, where he died from his wounds.<sup>129</sup> Spears could not identify the shooter.<sup>130</sup> The police brought Coleman in for questioning, and he implicated White in the shooting.<sup>131</sup>

White did not testify at the trial,<sup>132</sup> but Coleman did.<sup>133</sup> The prosecutor noted that Coleman had “had a fall” and “may or may not have some issues with the memory.”<sup>134</sup> During the direct examination, Coleman knew his birth date and age, but testified to having some memory issues that began around September of the prior year.<sup>135</sup> He testified that he could “not remember anything” about the incident in which Robinson was shot, nor could he recall “talking to the police about the shooting.”<sup>136</sup> Coleman was able to identify himself when the prosecutor played a “snippet” of his videotaped statement.<sup>137</sup> Over defense counsel’s Confrontation Clause objection, Coleman’s videotaped statement was played at

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<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* app. at 3.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* app. at 3–4.

<sup>136</sup> *Id.* app. at 4.

<sup>137</sup> *Id.*

trial.<sup>138</sup> On cross-examination, Coleman testified that he could not recall speaking with his father—who was in the videotaped statement—and could not recall any event on the day of the shooting, stating that “[a]fter September, I don’t remember nothing.”<sup>139</sup>

On appeal, White argued that the trial court erred in permitting the jury to hear Coleman’s videotaped statement to the police.<sup>140</sup> More specifically, White contended that Coleman’s failure to recall at trial the events surrounding Robinson’s shooting or the giving of Coleman’s videotaped statement violated White’s right to confrontation as Coleman could not “be effectively or meaningfully cross examined” regarding his videotaped statement.<sup>141</sup>

The Louisiana Court of Appeal, First Circuit, considered, among other things, *Crawford*’s footnote nine and *Owens*, and it determined that the trial court had not erred in admitting Coleman’s statement.<sup>142</sup> As the court said, “a declarant’s appearance and subjection to cross examination at trial are all that is necessary to satisfy the right to confrontation, even if the declarant suffers from memory loss.”<sup>143</sup>

On January 14, 2019, the Louisiana Supreme Court denied certiorari.<sup>144</sup> On April 11, 2019, White filed a certiorari petition to the U.S. Supreme Court, arguing, among other things, that: (1) Coleman’s memory loss made him useless as a trial witness, aside from his value as a “vehicle” for admitting “an *ex parte* police interrogation”;<sup>145</sup> (2) lower courts were “in conflict” as to the application of *Owens* to cases of “complete” memory loss<sup>146</sup> and as to

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* app. at 2.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* app. at 5, 7 (“In footnote nine of its opinion, the *Crawford* court stated that ‘when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.’ It further stated, ‘[t]he Clause does not bar admission of a statement as long as the declarant is present at trial to defend or explain it.’”) (second alteration in original) (citation omitted).

<sup>143</sup> *Id.* app. at 6.

<sup>144</sup> *Id.* app. at 8. One justice dissented from the denial of certiorari, but the dissent primarily focused on considerations in the Louisiana Constitution, specifically “whether the Louisiana Constitution requires greater safeguards than the Sixth Amendment.” *Id.* app. at 11.

<sup>145</sup> *Id.* at 6.

<sup>146</sup> The petition argues:

whether *Owens* could be reconciled with *Crawford* in “genuine” memory loss cases; and (3) federal and state courts were opposed in result in genuine memory loss cases.<sup>147</sup>

In particular, the *White* certiorari petition sought to distinguish three categories of memory loss: (1) the witness recalled the incident but not the statement about it, (2) the witness recalled the statement but not the incident, and (3) the witness recalled neither the statement nor the incident.<sup>148</sup> The petition termed the third type of memory loss “complete” memory loss and the first two types “partial” memory loss.<sup>149</sup> *White* asserted that *Owens* only concerned partial memory loss because the relevant witness recalled the statement but not the incident.<sup>150</sup> The petition then argued that, prior to *White*, the U.S. Supreme Court had never “squarely confronted” a case of “complete memory loss.”<sup>151</sup>

In *Tapia*, filed some months after *White*, Sergeant Charlie Bello had testified that he had been driving Lieutenant James Cosgrove when Bello saw the defendant “body slam” the alleged victim and “drag” the victim between parked cars.<sup>152</sup> Bello testified that after separating the victim from the defendant, he noticed that the victim was “bleeding profusely from his face and neck.”<sup>153</sup> Bello saw shattered glass, and the victim had sustained several injuries

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Three categories of memory loss are relevant to determining a witness’ availability for confrontation and therefore the admissibility of that witness’ hearsay. A witness may remember the incident but not remember a subsequent statement about it. The witness may not remember the incident itself but be able to remember a statement about it. Or, as in this case, the witness may not remember the incident or the statement. The first two categories are fairly termed partial memory loss, while the third constitutes complete or total memory loss.

*Id.* at 7. The petition asserts that the witness in *Owens* “suffered from partial memory loss of the second kind; he did not remember the incident, but he did remember making the statement sought to be introduced.” *Id.*

<sup>147</sup> *Id.* at 11–12.

<sup>148</sup> See *supra* note 146.

<sup>149</sup> *Id.*

<sup>150</sup> *White* Cert Petition, *supra* note 10, at 7.

<sup>151</sup> *Id.* at 2, 7 (“At trial Coleman could recall neither (a) the crime itself nor (b) his statement to the police.”). The petition also advanced the point that Louisiana “never contested the genuineness or completeness of Coleman’s memory loss.” *Id.* at 3.

<sup>152</sup> *Tapia* Cert Petition, *supra* note 10, app. at 2a.

<sup>153</sup> *Id.*



consistent with having been cut with a dangerous instrument.<sup>154</sup> The victim also testified to having been attacked “from behind” and identified the defendant as one of the attackers.<sup>155</sup>

The prosecution produced Cosgrove to testify, but he could not independently recall the incident.<sup>156</sup> When the prosecution sought to introduce Cosgrove’s prior grand jury testimony as a “past recollection recorded,” the defense objected on Confrontation Clause grounds, arguing that Cosgrove’s memory loss meant he could not be meaningfully cross-examined.<sup>157</sup>

On the stand, Cosgrove testified to having worked the shift with Bello, and, based on a review of paperwork, he was able to testify to assisting in the arrest of two individuals.<sup>158</sup> He was, however, unable to recall the circumstances which led to the defendant’s arrest.<sup>159</sup> Cosgrove also provided testimony to support admission of his prior grand jury testimony, stating that the prior testimony “did not refresh his present recollection of the events.”<sup>160</sup>

A portion of Cosgrove’s prior grand jury testimony was read into the record.<sup>161</sup> The grand jury testimony added that Cosgrove witnessed the defendant “kick the victim in the head.”<sup>162</sup> On cross-examination, Cosgrove admitted, among other things, that he had been to the area of the attack on various occasions due to altercations there, that he could not recall details of such altercations, and that he could not swear the court reporter’s transcript of his grand jury testimony was accurate due to his lack of independent recollection.<sup>163</sup> The jury found the defendant guilty of attempted first-degree assault, and the Appellate Division affirmed, based in part on its finding of no Confrontation Clause violation.<sup>164</sup>

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<sup>154</sup> *Id.*

<sup>155</sup> *Id.* app. at 2a–4a.

<sup>156</sup> *Id.* app. at 3a.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* app. at 4a.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* The court noted that “Cosgrove’s grand jury testimony, which was consistent with Bello’s trial testimony, was brief and not particularly detailed.” *Id.* app. at 5a.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* app. at 7a.

The New York Court of Appeals also affirmed the conviction.<sup>165</sup> The court found unavailing defendant's argument that, despite Cosgrove testifying at trial, his memory failure rendered Cosgrove unavailable for cross-examination for purposes of the Confrontation Clause.<sup>166</sup> The court stated that the right to confront includes both the right to cross-examine witnesses and the right to confront the accuser "in a face-to-face encounter before the trier of fact."<sup>167</sup> The court cited *Owens* as directly on point where a witness could not explain the basis for a past out-of-court statement because of memory loss,<sup>168</sup> and stated that *Crawford* "maintained the fundamental importance of a witness's presence at trial" even though that decision "changed the landscape."<sup>169</sup> Accordingly, the court held that Cosgrove's presence at the trial as a witness where Cosgrove was subject to cross-examination precluded the defendant's Confrontation Clause argument.<sup>170</sup>

On July 31, 2019, the defendant (then petitioner), filed a certiorari petition to the U.S. Supreme Court.<sup>171</sup> The petition argued, among other things, that the decision below was incorrect and that lower appellate courts disagreed concerning how the Confrontation Clause applied to prior testimonial statements where memory loss was involved.<sup>172</sup> Similar to the petition in *White*, the *Tapia* petition argued that *Owens* only "involv[ed] partial (rather than total) memory loss" and that, unlike in *Tapia*, the defendant

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<sup>165</sup> *Id.*; see also *People v. Tapia*, 124 N.E.3d 210, 220 (N.Y. 2019).

<sup>166</sup> *Tapia* Cert Petition, *supra* note 10, app. at 9a–10a.

<sup>167</sup> *Id.* app. at 16a (citations omitted).

<sup>168</sup> *Id.* app. at 16a–17a.

<sup>169</sup> *Id.* app. at 17a. The court also quoted the following text from footnote nine of *Crawford*: "[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. . . . The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it." *Id.* (alterations in original) (quoting *Crawford v. Washington*, 541 U.S. 36, 60 n.9 (2004)).

<sup>170</sup> *Id.* The dissent did not really deal with the Confrontation Clause issue, but it did raise questions about the applicability of *Owens* and the value of cross-examining a memory-impaired witness in the context of discussing a state criminal procedure law. See *id.* app. at 18a–40a (Wilson, J., dissenting).

<sup>171</sup> See generally *Tapia* Cert Petition, *supra* note 10.

<sup>172</sup> See *id.* at 10–11, 14.

in *Owens* “could at least use the witness’s impaired memory to cast doubt on the reliability of his prior identification.”<sup>173</sup>

On December 9, 2019, the U.S. Supreme Court denied certiorari in both *White* and *Tapia*.<sup>174</sup> Although neither *White* nor *Tapia* squarely raised all the issues we believe need resolution in the memory loss area, the Court arguably could have used either petition as a vehicle for clarifying the law.<sup>175</sup> If nothing else, that two such petitions were recently filed reflects the need for greater clarity. In Part IV, we will identify and discuss eight issues we believe require resolution in this area.

#### IV. CONFRONTATION CLAUSE & MEMORY LOSS

There are at least eight important issues arising in the context of memory loss in Confrontation Clause witnesses. We will discuss each of these issues in turn using illustrative hypotheticals. For each hypothetical, we will assume that all relevant witness statements are testimonial, that the statements are otherwise admissible,<sup>176</sup> and that the only potential basis for exclusion would be that the witnesses’ memory-impaired trial testimony is insufficient to meet the standards of the Confrontation Clause.<sup>177</sup>

Prior to discussing the issues, we must set out four assumptions. First, whatever we may think of *Owens*, we accept it as a given for purposes of our discussion.<sup>178</sup> We assume the U.S. Supreme Court would still consider *Owens* binding post-*Crawford*, in particular because Justice Scalia authored both opinions and likely would have

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<sup>173</sup> *Id.* at 2. Although the *Tapia* petition uses the word “total” to describe the memory loss here, it elsewhere uses the word “complete,” so we assume it intends these terms to be interchangeable. *See id.* at 11.

<sup>174</sup> *See White v. Louisiana*, 140 S. Ct. 647, 647 (2019) (mem.) (denying certiorari); *Tapia v. New York*, 140 S. Ct. 643, 643 (2019) (mem.) (same).

<sup>175</sup> Of the two petitions, we believe that *White* would have been the better vehicle.

<sup>176</sup> For instance, we will assume the prior out-of-court statements are admissible pursuant to federal or state hearsay rules. *See, e.g.*, FED. R. EVID. 801(d).

<sup>177</sup> In our discussion of each issue, we will also seek to focus on only the specific issue we are considering. As such, any facts or issues not presented should be treated as held constant. For instance, when discussing the *cause* of the memory loss, we focus only on the *cause* and we control for other issues, such as whether the memory loss is *genuine*.

<sup>178</sup> For a discussion of *Owens*, see *supra* notes 93–116 and accompanying text.

anticipated that they could be interpreted consistently.<sup>179</sup> Second, flowing from our acceptance of *Owens*, we suspect that the logic underpinning any rule the Court may set on our eight issues would be what *minimum opportunity* for cross-examination is sufficient under the circumstances to test witness credibility.<sup>180</sup> Third, we believe the Court would prefer to set a bright-line rule rather than to adopt a case-by-case approach, and we take that as a given for purposes of our discussion.<sup>181</sup> Finally, because we anticipate that a

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<sup>179</sup> See *supra* note 51 and accompanying text. That *Green* was cited in *Crawford* may further suggest that pre-*Crawford* memory loss cases such as *Owens* were intended to survive *Crawford*. See *Crawford v. Washington*, 541 U.S. 36, 57 (2004) (citing *California v. Green*, 399 U.S. 149, 165–68 (1970)).

<sup>180</sup> See, e.g., *United States v. Owens*, 484 U.S. 554, 559 (1988) (“[T]he Confrontation Clause guarantees only ‘an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.’ . . . [T]hat opportunity is not denied when a witness testifies as to his current belief but is unable to recollect the reason for that belief. It is sufficient that the defendant has the opportunity to bring out such matters as the witness’ bias, his lack of care and attentiveness, his poor eyesight, and even [ ]what is often a prime objective of cross-examination, . . . the very fact that he has a bad memory.” (first alteration in original) (quoting *Kentucky v. Stincer*, 482 U.S. 730, 739 (1987))). Albeit outside the memory loss context, the U.S. Supreme Court has been deeply divided recently on what degree of cross-examination is required to satisfy the Confrontation Clause. See *infra* note 240; see also Paul F. Rothstein, *Unwrapping the Box the Supreme Court Justices Have Gotten Themselves Into: Internal Confrontations over Confronting the Confrontation Clause*, 58 *HOW. L.J.* 479, 481 (2015) (“[A] majority of Justices on the Court may be looking for a way . . . to escape what they regard as the rigid box the Court has gotten itself into with *Crawford*.”). We suspect the Court will be similarly divided in memory loss cases.

<sup>181</sup> We believe the Court would prefer a bright-line approach due to its criticism of the subjectivity of the *Roberts* reliability approach. See *Crawford*, 541 U.S. at 63 (“Reliability is an amorphous, if not entirely subjective, concept. There are countless factors bearing on whether a statement is reliable . . .”). We recognize that the primary purpose test used in the Confrontation Clause context incorporates some degree of subjectivity, but that test has been accordingly criticized. See, e.g., *Davis v. Washington*, 547 U.S. 813, 834 (2006) (Thomas, J., concurring in part and dissenting in part) (“Today, a mere two years after the Court decided *Crawford*, it adopts an equally unpredictable test, under which district courts are charged with divining the ‘primary purpose’ of police interrogations.”); *Michigan v. Bryant*, 562 U.S. 344, 379 (2011) (Thomas, J., concurring) (“I have criticized the primary-purpose test as ‘an exercise in fiction’ that is ‘disconnected from history’ and ‘yields no predictable results.’” (citation omitted)); *id.* at 383 (Scalia, J., dissenting) (“The only virtue of the Court’s approach (if it can be misnamed a virtue) is that it leaves judges free to reach the ‘fairest’ result under the totality of the circumstances.”). A case-by-case approach could also make it difficult for criminal defendants to prepare their defenses. Specifically, depending on the subjectivity of

bright-line approach would be the Court's preference, our discussion generally focuses on witnesses *completely* forgetting the criminal incident, their statements to law enforcement, or both, rather than merely forgetting certain details. Although it would be an interesting exercise to consider whether recollection of certain types of details—or a certain number—provides an optimal level of credibility testing, we believe a test based on such fine distinctions would lead to the very type of discretionary case-by-case determination the Court would likely disfavor. With those assumptions set, we proceed to discuss the eight issues.

#### A. PARTIAL OR COMPLETE MEMORY LOSS

Alison, Bobby, and Caitlin are the prosecutions' witnesses in three separate battery trials. They had each previously provided statements to the police, and they each now suffer from some degree of memory loss. Alison recalls the incident but cannot recall making her statements to the police. Bobby can remember making his statements to the police but can no longer remember the incident. Caitlin can recall neither the incident nor her statements to the police. Each witness willingly takes the stand, but their direct and cross-examinations are limited due to their memory impairments. The prosecution in each case seeks to enter each witness's prior statements to the police, and the defense in each case raises an objection pursuant to the Confrontation Clause. Should Alison, Bobby, or Caitlin's prior statements be excluded?

As an initial matter, one might refer to witnesses like Alison and Bobby—who recall either the incident or their statements—as suffering from only “partial” memory loss, and witnesses like Caitlin—who can recall neither the incident nor their statements—as suffering from “complete” memory loss.<sup>182</sup> The witness in *Owens* notably fell into the former category—he could recall making the

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the approach, defense attorneys may not be able to adequately advise defendants as to which evidence would be deemed admissible in any given case.

<sup>182</sup> We borrow this “partial” and “complete” memory loss terminology from the certiorari petition in *White*. See *White Cert Petition*, *supra* note 10, at 7.

identification of his assailant but not seeing his assailant—and so *Owens* did not directly speak to complete memory loss.<sup>183</sup>

In resolving the Alison-Bobby-Caitlin hypothetical, then, the Court could theoretically take several approaches. First, the Court could extend *Owens* and simply find that memory loss of any form fails to raise a confrontation issue. We will refer to this as the “*Owens-Plus*” approach.<sup>184</sup> Under such an approach, the statements of Alison (recalls the incident but not the statements), Bobby (recalls the statements but not the incident), and Caitlin (recalls neither the incident nor the statements) would all be entered into evidence. Second, the Court could decide that *Owens* does not survive *Crawford* and that a witness who cannot recall the incident or statements is now procedurally insufficient for the Confrontation Clause. *Owens* was decided pursuant to the *Roberts* regime, which had focused on “reliability.”<sup>185</sup> *Crawford* recognized that the Confrontation Clause’s “ultimate goal [was] to ensure reliability of evidence,” but the Court stated “that reliability [must] be assessed in a particular manner: by testing in the crucible of cross-examination.”<sup>186</sup> The primacy *Crawford* placed on testing through cross-examination could cause the current Court to no longer feel

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<sup>183</sup> *Owens*, 484 U.S. at 556 (“At trial, Foster recounted his activities just before the attack, and described feeling the blows to his head and seeing blood on the floor. He testified that he clearly remembered identifying respondent as his assailant during his May 5th interview with Mansfield. On cross-examination, he admitted that he could not remember seeing his assailant.”); see also Motion for Leave to File Amicus Curiae Brief and Brief of National Ass’n of Criminal Defense Lawyers as Amicus Curiae in Support of Petitioner at 9–10, *White v. Louisiana*, 140 S. Ct. 647 (2019) (mem.) (No. 18-8862) [hereinafter NACDL Brief]. Of course, an important distinction exists between a witness who recalls only the incident and one who recalls only the statement, and we will address this issue further below.

<sup>184</sup> We call this the *Owens-Plus* approach to denote that *Owens* itself did not foreclose the possibility that complete memory loss could render a witness insufficient for Confrontation Clause purposes.

<sup>185</sup> *Owens*, 484 U.S. at 560 (focusing on “indicia of reliability” (quoting *Dutton v. Evans*, 400 U.S. 74, 89 (1970))); see also *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) (“In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate ‘indicia of reliability.’ Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception.”).

<sup>186</sup> *Crawford v. Washington*, 541 U.S. 36, 61–62 (2004) (finding that the Confrontation Clause provided “a procedural rather than a substantive guarantee”).

bound by *Owens*.<sup>187</sup> Under an approach where *Owens* no longer governed, possibly none of Alison, Bobby, or Caitlin’s statements would be admitted. Finally, the Court could opt for a middle approach, pursuant to which recollection of the criminal incident and/or the statements to law enforcement, or both, were sufficient for Confrontation Clause purposes.<sup>188</sup> We will refer to this as the “Middle” approach.<sup>189</sup> Under such an approach, the Court might conclude, for instance, that witnesses with partial memory loss—or certain types of partial memory loss—can satisfy the Confrontation Clause, but witnesses with complete memory loss cannot.

Some logic would support the Court taking the Middle approach and drawing some Confrontation Clause distinction between the situations of Alison (recalls incident but not statements), Bobby (recalls statements but not incident), and Caitlin (recalls neither incident nor statements). The Court may feel, as it did in *Owens*, that the Clause necessitates only some “*opportunity* for effective cross-examination, [but] not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.”<sup>190</sup>

For instance, a witness like Alison (recalls the incident but not the statements) or Bobby (recalls the statements but not the incident) might offer the defense some opportunity for cross-examination on substantive matters,<sup>191</sup> while the defense retains

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<sup>187</sup> Perhaps the Court would reason that, if *Owens* had arisen after *Crawford*, it might have been decided differently.

<sup>188</sup> Recall that, because we believe the Court would prefer a bright-line approach, we are focused here on a witness completely forgetting the incident or their statements. We do not consider approaches that, for instance, would require lower courts to consider which specific details or how many details would be sufficient in a given case. If the Court were to take an approach focused on, for instance, recalling certain details, we suspect that the most important details to recall would include: (1) the fact making the event criminal and (2) the identity of the culprit. Accordingly, we suspect that lack of memory regarding other details might be comparatively less relevant.

<sup>189</sup> Of course, more extreme approaches than those we set out here are possible—such as overruling *Crawford*—but such approaches are beyond the scope of this Article. See, e.g., Brief of Fern and Charles Nesson as *Amici Curiae* in Support of Petitioner at 3, 9–10, *White v. Louisiana*, 140 S. Ct. 647 (2019) (mem.) (No. 18-8862) (urging the Court to overrule *Crawford*); David Crump, *Overruling Crawford v. Washington: Why and How*, 88 NOTRE DAME L. REV. 115, 115 (2012) (discussing the overruling of *Crawford*).

<sup>190</sup> *Owens*, 484 U.S. at 559 (quoting *Kentucky v. Stincer*, 482 U.S. 730, 739 (1987)).

<sup>191</sup> For instance, in a case where the witness can at least recall making the statement:

the ability to highlight the areas Alison and Bobby cannot recall to diminish credibility. In contrast, Caitlin (recalls neither the incident nor the statements) would not afford the defense almost any substantive opportunity for cross-examination,<sup>192</sup> and would merely permit the defendant to highlight her forgetfulness for the jury.<sup>193</sup> The Court could draw support for such a Middle approach from *Crawford's* footnote nine, in which the Court made two potentially conflicting statements: (1) “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”; and (2) “[t]he Clause does not bar admission of a statement so long as the declarant is *present at trial to defend or explain it*.”<sup>194</sup> The former statement appears to support an *Owens-Plus* approach, but the latter appears to support a Middle approach. Specifically, it would be nearly impossible for a witness like Caitlin (recalls neither

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The defendant can elicit testimony from such a witness about . . . whether he was under the influence of any substance at the time he made his statement; whether he felt any compulsive pressure from the police; or whether there were any other circumstances that created a motive to lie.

NACDL Brief, *supra* note 183, at 9–10. Again, a witness recalling the incident only and one recalling the statements only would arguably not offer the *same* degree of credibility testing, as discussed further below.

<sup>192</sup> See, e.g., Brief of Richard D. Friedman, as *Amicus Curiae* in Support of Petition for Writ of Certiorari at 4, *White*, 140 S. Ct. 647 (No. 18-8862) [hereinafter Friedman Brief] (“Others, such as those in this case, appear to believe that so long as the witness is able to appear and take an oath that is sufficient. The Court should resolve this dispute, clarifying that the latter position makes a mockery of the Confrontation Clause.”); NACDL Brief, *supra* note 183, at 10 (“A declarant who, though he cannot recall witnessing the crime itself, can remember making his accusatory statement to the police may still be subject to useful, if imperfect, cross-examination. But a declarant who . . . can recall neither the events he supposedly witnessed nor accusing the defendant, is no better than a witness who fails to appear for cross examination at all.”).

<sup>193</sup> See Claire L. Seltz, *Sixth Amendment—The Confrontation Clause, Witness Memory Loss and Hearsay Exceptions: What Are the Defendant’s Constitutional and Evidentiary Guarantees—Procedure or Substance?*, 79 J. CRIM. L. & CRIMINOLOGY 866, 896 (1988) (“Indeed, if carried to the greatest extreme, Justice Scalia’s reasoning [in *Owens*] would allow the admission of a prior, out-of-court identification of any willing witness on the stand who answers questions, even if all of the answers were ‘I forget’ or ‘I do not know.’”).

<sup>194</sup> *Crawford v. Washington*, 541 U.S. 36, 60 n.9 (emphasis added); see also Friedman Brief, *supra* note 192, at 6–7 (discussing division among lower courts regarding the meaning of *Crawford's* footnote nine).



the incident nor the statements) to explain or defend her statements, since the most she could do would be to testify that she cannot recall them.<sup>195</sup>

The Court could also, for example, see differences between the situations of Alison—who recalls the incident but not her statements—and Bobby—who recalls his statements but not the incident. Arguably, Alison would permit the defense a greater possibility for cross-examination than Bobby. Alison’s recollection of the criminal incident would permit the defense to question Alison on all aspects of the alleged crime, whereas the defense could not question Bobby regarding what he saw or heard at the scene. Instead, the defense in Bobby’s case could only probe him on his belief at the time he made his statements to the police. For this reason, the Court could determine that a witness like Bobby (recalls the statements but not the incident) would not afford a defendant sufficient cross-examination, but a witness like Alison (recalls the incident but not the statements) would.

Since we take *Owens* as a baseline and assume a bright-line approach, we think that the Court would most likely support either an *Owens-Plus* approach (memory loss is no bar) or an extremely permissive version of the Middle approach (recollection of incident or statements is sufficient). If the Court opted for a permissive Middle approach, we believe one rule with some merit would be: the ability to answer *any* non-*de minimis* questions about the event or statement renders a witness sufficient for Confrontation Clause purposes.<sup>196</sup> “Non-*de minimis*” makes clear that nearly *any* recollection is sufficient, and courts should not need to excessively weigh the nature or degree of recollection.

At a minimum, if the Court opts for any type of a Middle approach, we anticipate the Court would generally treat those who fully recall either the incident or their prior statements similarly.<sup>197</sup>

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<sup>195</sup> Notably, the witness in *Owens* not only recalled having subsequently identified the respondent, but he also recalled at least some piece of the incident, and this could have subtly influenced the Court. See *Owens*, 484 U.S. at 556 (“Foster recounted his activities just before the attack, and described feeling the blows to his head and seeing blood on the floor.”).

<sup>196</sup> Although use of the term “non-*de minimis*” in particular still introduces some element of subjectivity, we believe lower courts could more easily and consistently apply this approach than if terms such as “substantial” or “substantive” were used.

<sup>197</sup> Many fine distinctions—which could theoretically offer different degrees of witness credibility testing—exist, such as the following four. First, a witness could recall the facts

We think the Court could reasonably determine that a witness who recalls only the incident offers a greater opportunity for cross-examination than a witness who recalls only their statements. However, in *Owens*, the Court found no violation of the Confrontation Clause where the witness could not recall seeing the assailant but could recall later identifying the accused as his assailant.<sup>198</sup> Although the witness in *Owens* could seemingly recall some aspects relating to the incident,<sup>199</sup> and although the Court could theoretically retrench from *Owens*, the Court would most likely treat a witness like Alison (recalls the incident but not the statements) and Bobby (recalls the statement but not the incident) similarly.

#### B. SIMPLY FORGOTTEN OR DEMONSTRABLE-CAUSE MEMORY LOSS

Two individuals—Larry and Tammy—are slated to testify against accused murderers at upcoming trials. Both have claimed complete memory loss since giving statements to law enforcement immediately after the alleged murders. Larry claims to have lost his memory due to the passage of time since the incident, and Tammy claims to have lost her memory due to head trauma suffered in a car

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stated in her former statement and vouch that they are true. Second, the witness could recall making the statement and testify that (a) “I do not recall the underlying facts, but I recall having made a true statement”; (b) “my statement must have been true”; (c) “if I said it, it was true”; (d) “I said it, but it was not true”; (e) “I did not say it and it was not true”; or (f) “I said it, but I cannot say whether it was true or not.” Third, the witness could fail to recall whether she made the statement, and (a) deny the underlying facts reported in the statement; (b) affirm those underlying facts; (c) fail to recall those underlying facts; or (d) now tell a different story. Fourth, the witness could refuse to avow or disavow the statement, while admitting that she made it. Certain similar distinctions could arise in the context of deciding whether or not a witness’s former statement is hearsay. See PAUL F. ROTHSTEIN, DAVID CRUMP & RONALD J. COLEMAN, EVIDENCE IN A NUTSHELL ch. 8, § I (7th ed., forthcoming). Although each of these situations could afford the defense a slightly different range and degree of cross-examination, we suspect that the Court would not require lower courts to make such distinctions for purposes of the Confrontation Clause.

<sup>198</sup> *Owens*, 484 U.S. at 556 (“[The witness] testified that he clearly remembered identifying [the defendant] . . . . On cross-examination, [the witness] admitted that he could not remember seeing his assailant.”).

<sup>199</sup> The *Owens* witness could recall certain parts of having been at the scene: activities directly prior to the attack, having felt blows to his head, and having seen blood on the floor. *Id.*

accident a few months after the incident. After Larry and Tammy provide their memory-impaired testimony at trial, the State seeks to enter their prior statements to law enforcement. Would admission of such statements violate the Confrontation Clause?

The Larry and Tammy hypothetical raises the question of whether the law should treat someone who loses memory due to forgetfulness or the natural passage of time differently from someone who loses memory due to a demonstrable cause.<sup>200</sup> The U.S. Supreme Court could find that demonstrable-cause memory loss (here, Tammy's head trauma) permits a slightly lesser opportunity to challenge credibility. For instance, a cross-examiner in Larry's case (natural forgetfulness) could attempt to imply to the jury that if the murder really took place—or took place the way Larry described it—Larry would recall it. The same might not apply in Tammy's case (memory loss due to head trauma), where the jury would presumably have an understandable rationale for her memory loss. As such, the Court could take the position that Larry (the forgetful witness) satisfies the Confrontation Clause, but Tammy (the witness suffering from demonstrable-cause memory loss) does not.

The Court may also have good reason to find that demonstrable-cause memory loss witnesses should meet the Confrontation Clause, at least in the case of certain causes. Consider, for instance, dementia. Millions of Americans suffer from Alzheimer's or other forms of dementia.<sup>201</sup> As the U.S. population aged sixty-five and above continues to increase in size and proportion, the number of Americans suffering from Alzheimer's or other forms of dementia will only increase.<sup>202</sup> This number is expected to escalate rapidly in

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<sup>200</sup> By “demonstrable cause” we mean recognized causes other than merely forgetting or having a poor memory, such as trauma or some type of clinical condition.

<sup>201</sup> See Alzheimer's Ass'n, *2019 Alzheimer's Disease Facts and Figures*, 15 ALZHEIMER'S & DEMENTIA 321, 330 (2019) (“Millions of Americans have Alzheimer's or other dementias.”); see also Ann M. Murphy, *Vanishing Point: Alzheimer's Disease and Its Challenges to the Federal Rules of Evidence*, 2012 MICH. ST. L. REV. 1245, 1276 (2012) (“It is beyond question that there will be a dramatic increase in the number of people within the justice system who suffer from [Alzheimer's Disease] in the years ahead.”).

<sup>202</sup> See Alzheimer's Ass'n, *supra* note 201, at 330 (“[T]he population of Americans age [sixty-five] and older is projected to grow from [fifty-five] million in 2019 to [eighty-eight] million by 2050.”).

the coming years.<sup>203</sup> Given the scale of Alzheimer's and dementia in the United States, if individuals with such conditions are precluded from acting as Confrontation Clause witnesses, a great quantum of evidence could be excluded from U.S. trials.<sup>204</sup> Although the Court may ignore these practical considerations—such as how its rule impacts law enforcement—the impact on law enforcement policy could be profound, and the Court should at least be aware of it. By the same token, however, finding a demonstrable-cause memory loss witness sufficient means a tremendous number of largely untested convictions may pass constitutional muster.

Drawing a distinction between forgetfulness and memory loss due to a demonstrable cause may be difficult, particularly given that a sharp dividing line between the two may not always exist. Even with input from trustworthy medical professionals, it may not always be clear whether someone has an unusually poor memory, forgets events due to the natural passage of time, or suffers from a

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<sup>203</sup> *Id.*

<sup>204</sup> This may be particularly problematic in the context of crimes lacking a statute of limitations, where dementia and related conditions could act as an informal statute of limitations in at least a percentage of cases. See Ronald J. Coleman & Paul F. Rothstein, *Grabbing the Bullcoming by the Horns: How the Supreme Court Could Have Used Bullcoming v. New Mexico to Clarify Confrontation Clause Requirements for CSI-Type Reports*, 90 NEB. L. REV. 502, 546 (2011) [hereinafter Coleman & Rothstein, *Grabbing the Bullcoming*] (discussing the risk of an effective statute of limitations on murder in a different context); see also Carolyn Zabrycki, Comment, *Toward a Definition of "Testimonial": How Autopsy Reports Do Not Embody the Qualities of a Testimonial Statement*, 96 CALIF. L. REV. 1093, 1115 (2008) (“[E]xcluding the autopsy report where a medical examiner dies effectively functions as a statute of limitations for murder, at least in the many situations in which the use of autopsy reports is integral to obtaining convictions by establishing the time and cause of death.”). For instance, suppose that an accused was recently charged with, among other things, murder in connection with the rape and killing of a female high school student that took place many years ago. Assume no statute of limitations exists for murder in the state where charges are brought. Around the time of the killing, an elderly janitor had informed the police that he witnessed the victim speak to the accused and get into the accused's car, and then witnessed the car drive away. Due to lack of other physical evidence at the time, however, the State did not have enough evidence to bring a case against the accused. Years later, some physical evidence is uncovered implicating the perpetrator, but the State still needs the janitor's testimony to make its case. By the time charges are brought, the janitor is retired and has developed Alzheimer's. In a case such as this, even though state lawmakers specifically decided to leave open the possibility of bringing an action against an accused many years after a murder, the State would be effectively precluded from getting a conviction if a memory-impaired witness, such as the janitor, was insufficient for Confrontation Clause purposes.

known or unknown demonstrable condition. Since we take *Owens* as a given and believe the Court will prefer a bright-line approach, we suspect that the Court's rule will not turn solely on whether the memory loss is due to forgetfulness or a demonstrable cause. We believe that a witness suffering demonstrable-cause memory loss generally offers the defense a lesser opportunity for cross-examination than a witness who lost memory due to natural forgetfulness; however, we suspect the Court would not require lower courts and local stakeholders to make case-by-case determinations as to which is which for every relevant witness.

#### C. MEMORY LOSS INITIATED BY DEMONSTRABLE CAUSE PRIOR TO STATEMENT OR AFTER STATEMENT

Mia and Jacklyn testify at different theft trials. Both previously gave statements to law enforcement, and both now testify to having suffered complete memory loss. At trial, Mia testifies to having complete memory loss triggered by a blow to the head she suffered prior to giving statements to law enforcement. Jacklyn has complete memory loss due to a blow to the head she suffered after giving her statements but prior to trial. Should the court treat Mia and Jacklyn differently from a Confrontation Clause standpoint?

This hypothetical raises the issue of whether it should matter if the memory loss is initiated by a demonstrable cause prior to giving statements to law enforcement or after giving such statements. Memory loss initiated by a demonstrable cause prior to giving statements—as in Mia's case—certainly seems to call the credibility of the statements into question more than memory loss initiated by a demonstrable cause after giving the statements—as in Jacklyn's case. The defense in Mia's case (demonstrable cause prior to statements) might more easily imply that Mia's statements could not have been credible when made, given that her memory was already impaired when she initially made the statements. In contrast, the defense in Jacklyn's case (demonstrable cause after statements) would not have the opportunity to make a corresponding attack.

The witness in *Owens* suffered memory loss as a result of injuries sustained during the course of the events recounted.<sup>205</sup> When the FBI first attempted to interview the *Owens* witness, the interviewing FBI agent found him “lethargic and unable to remember his attacker’s name.”<sup>206</sup> The witness named Owens as his attacker only in a subsequent interview.<sup>207</sup> Although the *Owens* witness may not have permanently lost his memory prior to making the identification, the very fact that some memory loss could have taken place prior to the identification arguably provides the defense with an avenue to attack witness credibility in a way not available to the defense when the memory loss is initiated by a demonstrable cause after the statements.<sup>208</sup>

In setting its rule, the Court will need to decide whether to give such a credibility distinction decisive weight. If the Court did seek to make a distinction between memory loss initiated by a demonstrable cause prior to the statement on one hand and memory loss initiated by a demonstrable cause after the statement on the other, the difficulties in any given case could include the following: (1) knowing whether there was a demonstrable cause (as discussed above); (2) understanding whether the demonstrable cause came before the statement (particularly if the alleged cause is a clinical condition); and (3) identifying when the memory loss was actually initiated. In connection with initiation of the memory loss, must counsel conclusively show that some memory loss took place prior to the statements? Would the Court require medical or other expert testimony? Would it be sufficient that the defense could show that

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<sup>205</sup> See *United States v. Owens*, 484 U.S. 554, 556 (1988) (stating the witness’s “memory was severely impaired” after he was “beaten with a metal pipe”).

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* (noting that the witness identified Owens “from an array of photographs” during his second interview with an FBI agent).

<sup>208</sup> See *id.* at 559 (noting that the defense could use cross-examination to undermine witness credibility by highlighting “the very fact that he has a bad memory”); Friedman Brief, *supra* note 192, at 4 (“The witness [in *White v. Louisiana*] lost his memory suddenly as the result of an accident that occurred between the making of the statement and the trial. The memory loss has no bearing whatsoever on the credibility of the witness in making the prior statement, but it provides a complete shield against any meaningful cross-examination. The case is therefore materially different from [*Owens*], in which the witness was the victim of the assault and the cause of the memory loss was the assault itself; there, the witness’s bad memory may have cast some doubt on the credibility of the statement.” (citation omitted)).

some memory loss *could* have taken place prior to the statement? What if the witness lost some memory prior to the statement, regained complete memory after the statement without affirming or disaffirming the statement, but then completely lost memory prior to trial? Given that we suspect the Court will adopt a bright-line approach which discourages case-by-case determinations, we anticipate that the Court will not require local courts to determine when memory loss was initiated or whether a demonstrable cause existed prior to the statement. Accordingly, although we believe it is an important factor for credibility testing, we do not believe the Court's rule will turn solely on whether the memory loss was initiated by a demonstrable cause prior to, or after, the statement.

#### D. ACCUSED INVOLVED OR UNINVOLVED WITH MEMORY LOSS

Mara and Roger are prosecution witnesses in upcoming battery and arson trials. Both witnesses were inside the relevant structures when the fires began, both informed officers on the scene about what they saw, and both have now suffered complete memory loss. Mara's memory loss resulted from the accused striking her on the head with a crowbar while attempting to flee the crime scene, but her memory loss did not set in until sometime after she made her statements to the officers. Roger's memory loss was unrelated to the incident or the accused but instead resulted from an injury at work sometime after he made his statements to the officers. If the State attempts to introduce Mara and Roger's previous statements in connection with their testimony, would the Confrontation Clause prevent admission of the statements?<sup>209</sup>

An important question raised by this hypothetical is if it should matter whether the accused caused the witness's memory loss. One could argue that, for reasons of fairness, if a witness's inability to provide sufficient Confrontation Clause testimony resulted from wrongful acts of the accused, the accused has forfeited her confrontation rights.

In *Crawford*, the Court specifically accepted "forfeiture by wrongdoing" as a continuing "exception[]" to the Confrontation

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<sup>209</sup> One should note that, like Mara, the witness's memory impairment in *Owens* resulted from injuries allegedly inflicted by the accused hitting him on the head "with a metal pipe." See *Owens*, 484 U.S. at 556.

Clause.”<sup>210</sup> Currently, the leading case on this forfeiture exception is *Giles v. California*.<sup>211</sup> In *Giles*, the Court considered whether a defendant would forfeit her Confrontation Clause right to cross-examine a witness when the defendant’s “wrongful act” caused the witness to be unavailable to testify.<sup>212</sup> Justice Scalia, writing for the Court, found that the defendant only forfeits his or her Confrontation Clause rights if “the defendant engaged in conduct *designed* to prevent the witness from testifying.”<sup>213</sup> Although *Giles* has been criticized,<sup>214</sup> we assume for the purposes of this discussion that it represents the present state of the law on the forfeiture exception.

Applying the *Giles* rule to Mara’s hypothetical situation (memory loss due to the defendant striking her with a crowbar during the

<sup>210</sup> *Crawford v. Washington*, 541 U.S. 36, 62 (2004). The *Crawford* Court recognized that the forfeiture exception “extinguishe[d] confrontation claims on essentially equitable grounds.” *Id.*

<sup>211</sup> 554 U.S. 353 (2008).

<sup>212</sup> *Id.* at 355, 358–59 (discussing whether the forfeiture exception “is a founding-era exception to the confrontation right”). In *Giles*, the accused had allegedly shot his ex-girlfriend six times, and the State sought to introduce certain prior statements by her against him. *Id.* at 356 (noting that she had made statements “to a police officer responding to a domestic-violence report about three weeks before the shooting”).

<sup>213</sup> *Id.* at 359. There is some indication that, in certain circumstances, the requisite “intent” might be more broadly construed. *Id.* at 377 (“Acts of domestic violence often are intended to dissuade a victim from resorting to outside help, and include conduct designed to prevent testimony to police officers or cooperation in criminal prosecutions. Where such an abusive relationship culminates in murder, the evidence may support a finding that the crime expressed the intent to isolate the victim and to stop her from reporting abuse to the authorities or cooperating with a criminal prosecution—rendering her prior statements admissible under the forfeiture doctrine.”); Eileen A. Scallen, *Coping with Crawford: Confrontation of Children and Other Challenging Witnesses*, 35 WM. MITCHELL L. REV. 1558, 1571 (2009) (“Although Justice Scalia would require a showing of specific intent to make the witness unavailable for the forfeiture doctrine to apply, he opined that this showing could be met in many domestic violence cases when it culminates in murder because of the ‘intent to isolate the victim.’” (quoting *Giles*, 554 U.S. at 377)).

<sup>214</sup> See, e.g., Scallen, *supra* note 213, at 1571 (“[I]nstead of establishing a bright-line rule, the *Giles* Court splintered, producing only a murky plurality decision. All of the justices agreed that common law recognized a forfeiture doctrine that allowed ‘the introduction of statements of a witness who was “detained” or “kept away” by the “means or procurement” of the defendant.’ But the Court could not agree on the standard for finding forfeiture.” (quoting *Giles*, 554 U.S. at 359)); Friedman Brief, *supra* note 192, at 15 (noting “that *Giles* was a most unfortunate development, and that it inhibits development of sound confrontation doctrine in various respects”).



incident), the accused in her case would still seemingly not have forfeited his confrontation rights—assuming he was intending to flee the scene when he struck Mara rather than trying to prevent her from testifying.<sup>215</sup> However, if the Court ultimately determines that memory loss can sometimes offend the Confrontation Clause, a rethinking of the forfeiture by wrongdoing doctrine could help mitigate some of the negative law enforcement consequences that may follow. Given that the forfeiture exception is based on equitable principles, it certainly seems perverse for the accused in Mara’s case to benefit procedurally from having knocked her in the head with a crowbar.<sup>216</sup> Although the Court need not revisit its interpretation of the forfeiture exception to clarify its position in memory loss cases, it may be wise for the Court to consider doing so soon after.

#### E. GENUINE OR SUSPECT MEMORY LOSS

Suppose James and Bella take the stand as prosecution witnesses in cybercrime trials, and both claim complete memory loss. Further suppose that in James’s case, the defense suspects that James has fabricated his memory loss.<sup>217</sup> In Bella’s case, however, all involved parties agree that Bella’s memory loss is genuine.<sup>218</sup> When the State seeks to enter prior statements James and Bella provided to law enforcement, should the Confrontation Clause apply differently in each case?

The above hypothetical raises the issue of how courts should treat memory loss that is suspect in the context of confrontation rights. If the Court takes the position that—in certain or in all instances—a memory-impaired witness is sufficient for the Confrontation Clause, courts will likely face situations where a witness lies about having suffered memory loss. For instance, in the

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<sup>215</sup> See *Giles*, 554 U.S. at 361 (“The manner in which the rule was applied makes plain that unconfrosted testimony would *not* be admitted without a showing that the defendant intended to prevent a witness from testifying.”).

<sup>216</sup> See Friedman Brief, *supra* note 192, at 14 (“If in fact Owens assaulted Foster, and caused his grievous injury, it would be highly inequitable to allow Owens to keep Foster’s statement from the jury on the ground that Owens had been unable to cross-examine Foster.”).

<sup>217</sup> Perhaps, for example, James’s behavior and actions suggest he may actually recall his prior statements and the underlying criminal event.

<sup>218</sup> Suppose, for instance, that voluminous medical records and the opinions of respected medical personnel support the genuineness of Bella’s memory loss.

above hypothetical, suppose James (suspected of fabricating memory loss) was the true perpetrator of the cybercrime, and he invented his prior statements to law enforcement in order to help convict the accused. Suppose further that James is now concerned that inconsistencies may arise between his prior statements and his present testimony on the stand, so he feigns complete memory loss.

Should the Court eventually face this issue, we anticipate that the Court would rely on cross-examination of the witness at trial to uncover any fabricated memory loss. Cross-examination appears fit to this purpose and is otherwise relied upon in the Confrontation Clause context to test reliability and credibility.<sup>219</sup>

#### F. MEMORY LOSS VERSUS ASSERTION OF PRIVILEGE

Imagine Megan and Stewart testify for the prosecution in securities-related criminal matters. Both have provided statements to government regulators prior to the trials. Megan takes the stand but then asserts her privilege against self-incrimination in response to all the questions posed to her. When Stewart takes the stand, he answers “I cannot recall,” due to complete memory loss, to all the questions posed to him. If the defense raises a Confrontation Clause objection to the admission of Megan and Stewart’s prior statements, should the trial court exclude the statements?

This hypothetical raises the question of whether the Confrontation Clause should apply differently in assertion of privilege cases and complete memory loss cases. The U.S. Supreme Court has already ruled on the assertion of privilege issue.<sup>220</sup> In *Douglas v. Alabama*, a witness had asserted the privilege against self-incrimination and “refused to answer any questions concerning

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<sup>219</sup> See *Crawford v. Washington*, 541 U.S. 36, 61 (2004) (“[The Confrontation Clause] commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.”); *United States v. Owens*, 484 U.S. 554, 559 (1988) (discussing use of cross-examination to “bring out such matters as the witness’ bias, his lack of care and attentiveness, his poor eyesight, and . . . that he has a bad memory” (citation omitted)); *Bullcoming v. New Mexico*, 564 U.S. 647, 652 (2011) (“The accused’s right is to be confronted with the analyst who made the certification [in the forensic report], unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist.”).

<sup>220</sup> See generally *Douglas v. Alabama*, 380 U.S. 415 (1965).

the alleged crime.”<sup>221</sup> Nevertheless, the trial judge declared that the witness was a hostile witness and allowed the state solicitor to read the witness’s confession as part of cross-examining the witness.<sup>222</sup> The Court found that the accused’s “inability to cross-examine [the witness] as to the alleged confession plainly denied him the right of cross-examination secured by the Confrontation Clause.”<sup>223</sup>

Applying *Douglas* to Megan’s hypothetical case (assertion of privilege), the trial court would likely exclude Megan’s prior statements.<sup>224</sup> One might argue, then, that the court should exclude Stewart’s (complete memory loss) prior statements, too. After all, a witness answering substantive questions with “I cannot recall” would hardly seem to offer a greater degree of cross-examination than one asserting privilege in connection with those same questions.

On the other hand, at least two possibly relevant distinctions between memory loss and privilege exist. First, the assertion of privilege is generally a voluntary decision, whereas genuine memory loss is normally involuntary.<sup>225</sup> Second, and perhaps more importantly, the defense can attack the witness’s credibility in a memory loss case by forcing the witness to repeatedly answer “I

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<sup>221</sup> *Id.* at 416.

<sup>222</sup> *Id.* (“Under the guise of cross-examination to refresh [the witness’s] recollection, the Solicitor purported to read from the document [that supposedly contained the witness’s signed confession].”). Three law enforcement officers then identified the confession document, but although it was marked as an exhibit, it was not entered into evidence. *Id.* at 417.

<sup>223</sup> *Id.* at 419. The Court noted the following:

Although the Solicitor’s reading of [the witness’s] alleged statement, and [the witness’s] refusals to answer, were not technically testimony, the Solicitor’s reading may well have been the equivalent in the jury’s mind of testimony that [the witness] in fact made the statement; and [the witness’s] reliance upon the privilege created a situation in which the jury might improperly infer both that the statement had been made and that it was true.

*Id.* (first citing *Slochower v. Bd. of Higher Educ.*, 350 U.S. 551, 557–58 (1956); then citing *United States v. Maloney*, 262 F.2d 535, 537 (2d Cir. 1959)).

<sup>224</sup> For purposes of the hypothetical, we will assume that the lower court finds that *Douglas* remains good law.

<sup>225</sup> Death, however, is often involuntary, and it is unclear that the Court would treat death and complete memory loss similarly. Death is further removed than privilege, of course, in that the defendant at least has the literal opportunity to face a witness asserting privilege at trial.

cannot recall” in front of the jury. The testimony of a witness like Stewart—who cannot recall anything about the incident or statements he purportedly gave—may raise serious doubts in the jury’s mind as to the accuracy and credibility of his statements.<sup>226</sup> In contrast, the testimony of a witness like Megan—who simply asserts privilege—would not afford the defendant a corresponding opportunity to attack her credibility in front of the jury.<sup>227</sup> Accordingly, we do not believe that the Court would feel constrained to treat assertion of privilege and complete memory loss similarly.

#### G. CHILD VERSUS ADULT MEMORY LOSS

Jenny, five years old, told police one year ago about an incident of sexual abuse involving her father. The State has now charged Jenny’s father with crimes relating to the alleged assault. Upon taking the stand at her father’s trial today, Jenny testified that she was no longer able to recall the incident or her statements to the police. She testified that she was not aware of any specific reason for her memory loss and that she had no reason to doubt that she would have been truthful at the time. The State seeks to enter Jenny’s out-of-court statements to the police as evidence against Jenny’s father. Should the Confrontation Clause bar their entry?

If the U.S. Supreme Court takes the position that a witness with complete memory loss is insufficient for Confrontation Clause purposes, the above hypothetical raises the question of whether the Court would treat statements by children differently. The Court might be sensitive to how interpretations of the Confrontation Clause impact the hearsay statements of children, particularly in cases involving child sexual abuse and domestic violence.<sup>228</sup> As one commenter notes:

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<sup>226</sup> As Justice Scalia stated in *Owens*, “[A] defendant seeking to discredit a forgetful expert witness is not without ammunition, since the jury may be persuaded that ‘his opinion is as unreliable as his memory.’” *United States v. Owens*, 484 U.S. 554, 558 (1988) (citing *Delaware v. Fensterer*, 474 U.S. 15, 19 (1985)).

<sup>227</sup> Of course, depending on the privilege claimed, in some instances the jury may in fact believe the witness is hiding something. *See Douglas*, 380 U.S. at 419 (“[The witness’s] reliance upon the privilege created a situation in which the jury might improperly infer both that the statement had been made and that it was true.”).

<sup>228</sup> *See Ohio v. Clark*, 576 U.S. 237, 247–48 (2015) (“Statements by very young children will rarely, if ever, implicate the Confrontation Clause.”); Friedman Brief, *supra* note 192, at 7

[P]olicy and public pressure on the courts mitigate in favor of interpretations that allow continued use of child hearsay exceptions. . . .

. . . .  
 . . . Because of the damaging impact to prosecutions in the already politically-charged context of child sexual abuse, there will be public pressure on courts to narrow the definition of testimonial statements, and to expand

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n.2 (arguing right of examination with respect to children “should be measured by the Constitution’s Due Process Clause, rather than by the Confrontation Clause, and the examination need not be either by an attorney or in court” (citing Richard D. Friedman & Stephen J. Ceci, *The Child QuasiWitness*, 82 U. CHI. L. REV. 89 (2015))); Michael H. Graham, *Indicia of Reliability and Face to Face Confrontation: Emerging Issues in Child Sexual Abuse Prosecutions*, 40 U. MIAMI L. REV. 19, 92 (1985) (“With respect to establishing unavailability, legislatures and courts should amend current statutes and rules to provide specifically for unavailability based upon the presence of, or potential for, severe psychological injury to a child witness if forced to face the defendant in open court.”); Laurie E. Martin, Note, *Child Abuse Witness Protections Confront Crawford v. Washington*, 39 IND. L. REV. 113, 114 (2005) (arguing that “*Crawford* should not affect protection of child witnesses”); Robert P. Mosteller, *Crawford’s Impact on Hearsay Statements in Domestic Violence and Child Sexual Abuse Cases*, 71 BROOK. L. REV. 411, 412 (2005) [hereinafter Mosteller, *Crawford’s Impact*] (discussing *Crawford*’s potential impact on statements in domestic violence and child abuse context); Robert P. Mosteller, *Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions*, 1993 U. ILL. L. REV. 691, 791 [hereinafter Mosteller, *Remaking Confrontation Clause*] (“[W]here the state uses videotaped depositions, the only deviation from the Confrontation Clause’s ideal is that the child’s testimony is videotaped outside the jury’s physical presence, which preserves the detail and demeanor of the witness’s testimony. The important tradition of public trials and live testimony should mean that courts should not accept videotaped testimony without some justification but that a very minimal showing should be sufficient.”); Paul F. Rothstein, *Ambiguous-Purpose Statements of Children and Other Victims of Abuse under the Confrontation Clause*, 44 SW. L. REV. 508, 551–52 (2015) (“[I]f [the Court] were to affirm the lower court’s decision . . . that the teacher’s duty to report child abuse brings the child’s statement to her within the Confrontation Clause, this would outlaw a broad range of prosecution evidence . . .”); Scallen, *supra* note 213, at 1590–91 (“[T]here are times when the right to confrontation must give way to other powerful societal interests, such as protecting children from additional trauma by testifying in the physical presence of their alleged abuser.” (citing *Maryland v. Craig*, 497 U.S. 836, 853 (1990))). Notably, use of hearsay may be particularly important in this context. See, e.g., Mosteller, *Crawford’s Impact*, *supra* at 426 (“Cases involving child sexual abuse and domestic violence are particularly susceptible to negative consequences because they often critically depend on hearsay to prove the case. Domestic violence cases in particular rely on statements especially likely to be considered testimonial because they are given to government agents in a context that suggests to everyone involved that a criminal prosecution is likely to ensue.”).

the scope of other exceptions, to minimize *Crawford's* impact. This public and political pressure, as well as the uncertainty about whether *Crawford's* mandates will further the truth-seeking goals of confrontation, supports lower court interpretations that minimize or eliminate any impact *Crawford* may have on child hearsay exceptions and protective in-court procedures for child witnesses.<sup>229</sup>

Another commenter has argued, for instance:

[B]ecause children obviously differ from adults, society is willing to rethink procedures and evidentiary rules. We begin almost with a presumption that the ground rules should be different. Thus, the initial inquiry is what changes to make in the process rather than whether it should be altered at all. That inquiry, in turn, quickly moves to how fundamental the modifications should be.<sup>230</sup>

As such, the Court could—at least in theory—seek to interpret confrontation rules differently in connection with memory impairment in children.<sup>231</sup>

If the Court did choose to set a different confrontation rule in child memory loss cases, the challenge would be how to technically and consistently do so. One option would be for the Court to set a separate bright-line rule for children, the most obvious of which

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<sup>229</sup> Martin, *supra* note 228, at 142–43 (footnote omitted).

<sup>230</sup> Mosteller, *Remaking Confrontation Clause*, *supra* note 228, at 692.

<sup>231</sup> See, e.g., *Clark*, 576 U.S. at 246–51 (finding a three-year-old's statements to his teachers were nontestimonial); *Craig*, 497 U.S. at 840 (holding that the Confrontation Clause does not “categorically prohibits a child witness in a child abuse case from testifying against a defendant at trial, outside the defendant's physical presence, by one-way closed circuit television”); see also *supra* note 228 and accompanying text. Proof and cross-examination in child cases may also be problematic. See, e.g., Mosteller, *Remaking Confrontation Clause*, *supra* note 228, at 692 (“Children frequently have difficulty testifying effectively as a result of their different and somewhat limited abilities to remember, conceptualize, and communicate, and because of fear and the obstacles presented by the courtroom setting.”); Mosteller, *Crawford's Impact*, *supra* note 228, at 415 (“The reality is that cross-examining children is challenging in any situation and some defense attorneys may not be up to the task.”).

being that the *Owens-Plus* approach<sup>232</sup> applies to those below a certain age, even though it does not apply to those at or above that age. While possibly expedient, setting a fair and reasonable bright-line rule for child witnesses might be difficult. Another option would be for the Court to adopt a case-by-case approach, where courts would be required to balance the protection and well-being of the relevant child with the defendant's confrontation rights.<sup>233</sup> Perhaps this would entail the prosecution making a sufficient showing of necessity<sup>234</sup> or perhaps the Court would look to a set or open list of factors—such as the age and sophistication of the child, the cause of the memory loss, the degree of memory loss, which details are recalled and which are not, and the defendant's actions. As previously noted, the Court may be disinclined to use a balancing approach where the defendant's confrontation rights are at issue,<sup>235</sup> and Justice Scalia in *Crawford* specifically derided the subjective reliability approach that had existed under the *Roberts* regime.<sup>236</sup>

We suspect that the U.S. Supreme Court would not choose to address children witnesses' memory loss unless a case directly raised the issue to the Court. However, since lower courts are likely to face the issue prior to it reaching the Court, we think the Court should at least consider the implications of any rule it sets for child witnesses. Specifically, if the Court takes a position other than the *Owens-Plus* approach, it should—at a minimum—contemplate further developing the concept it raised in *Ohio v. Clark* that, under

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<sup>232</sup> Recall that, by the *Owens-Plus* approach, we mean that even a witness with complete memory loss could afford a defendant her confrontation rights. See *supra* note 184 and accompanying text.

<sup>233</sup> See, e.g., *Craig*, 497 U.S. at 853 (“We likewise conclude today that a State’s interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant’s right to face his or her accusers in court.”). For a discussion of the Court’s holding in *Craig*, see Martin, *supra* note 228, at 122–24; Scallen, *supra* note 213, at 1566.

<sup>234</sup> *Craig*, 497 U.S. at 855–56 (describing the case-specific nature of the necessity determination).

<sup>235</sup> See, e.g., *Crawford v. Washington*, 541 U.S. 36, 67–68 (2004) (“By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design.”); *Craig*, 497 U.S. at 860 (Scalia, J., dissenting) (“Seldom has this Court failed so conspicuously to sustain a categorical guarantee of the Constitution against the tide of prevailing current opinion.”); Martin, *supra* note 228, at 122–24.

<sup>236</sup> *Crawford*, 541 U.S. at 63 (“Reliability is an amorphous, if not entirely subjective, concept. There are countless factors bearing on whether a statement is reliable . . .”).

the primary purpose test, the statements of “very young children will rarely, if ever, implicate the Confrontation Clause.”<sup>237</sup> In determining whether a statement is testimonial, the primary purpose test analyzes whether the objective primary purpose of the conversation is to create a substitute for trial testimony; in *Clark*, the Court stated it was “extremely unlikely that a 3-year-old child in [the witness’s] position would intend his statements to be a substitute for trial testimony.”<sup>238</sup> If the Court were to expand upon this principle, it might help mitigate any potential negative consequences for children flowing from the memory loss rule the Court ultimately sets.<sup>239</sup>

#### H. EXPERT OR LAY WITNESS

Dr. Marie Planck conducted a forensic analysis which tied an accused to the crime. After rendering the analysis and authoring a report on its findings, Dr. Planck suffered complete memory loss. She could not recall being engaged to conduct the analysis, conducting the analysis, authoring the report, the basis for the report, whether it was accurate, or any other facts or circumstances regarding the analysis or the crime. No one else was involved in the analysis or the report’s creation, nor did anyone review or approve the report. Retesting the samples is now impossible. Dr. Planck takes the stand at the accused’s trial to support admission of her forensic report, but she can only testify that she lacks all memory of the facts and circumstances surrounding the report and the crime. Should the Confrontation Clause bar admission of her report?

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<sup>237</sup> 576 U.S. 237, 247–48 (2015).

<sup>238</sup> *Id.* at 248 (“Few preschool students understand the details of our criminal justice system. Rather, [r]esearch on children’s understanding of the legal system finds that’ young children ‘have little understanding of prosecution.’ . . . [A] young child in these circumstances would simply want the abuse to end, would want to protect other victims, or would have no discernible purpose at all.” (first alteration in original) (citation omitted)); *see also id.* (noting historical precedent suggesting statements in circumstances of *Clark* would have been admissible at common law).

<sup>239</sup> The Court could also consider whether other populations beyond children deserve special protections, such as domestic violence victims. *See, e.g.,* Deborah Weissman, Crawford v. Washington: *Implications for Public Health Policy and Practice in a Domestic Violence Context*, 121 PUB. HEALTH REP. 464, 464–66 (2006) (commenting on the impact of *Crawford* on domestic violence prosecutions).



In recent years, the Confrontation Clause’s application to expert witnesses and forensic reports has been hotly debated.<sup>240</sup> The relevant question for the purposes of this Article is whether the law would treat an expert witness with complete memory loss differently than a similarly situated lay witness. In *Fensterer*, the Court found no Confrontation Clause violation in admitting an expert’s opinion when the expert could not recall the theory forming its basis, noting that the expert’s impaired memory could be illustrated to the jury to diminish reliability of the evidence.<sup>241</sup> Notably, the expert in *Fensterer* did not appear to lose all memory of the relevant facts and circumstances of the case, given that he was still able to explain at trial that there were three methods for determining that a hair was forcibly removed (even if he could not recall which one was used to form the basis of his opinion), and that a hair was forcibly removed.<sup>242</sup> The *Fensterer* Court did not foreclose the possibility that more extreme memory loss could lead to a violation of confrontation rights.<sup>243</sup> A witness like Dr. Planck—who

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<sup>240</sup> See, e.g., *Stuart v. Alabama*, 139 S. Ct. 36, 36 (2018) (Gorsuch, J., dissenting) (lamenting that *Williams* “yielded no majority and its various opinions have sown confusion in courts across the country”). Indeed, recent opinions in this area have produced sharp disagreements among Justices. See *Williams v. Illinois*, 567 U.S. 50, 86 (2012) (plurality opinion) (finding that an expert witness from a state police laboratory could discuss a DNA profile prepared by an outside laboratory, that was not itself admitted, consistent with the Confrontation Clause); *Bullcoming v. New Mexico*, 564 U.S. 647, 652 (2011) (holding that the “Confrontation Clause [does not] permit[] the prosecution to introduce a forensic laboratory report containing a testimonial certification—made for the purpose of proving a particular fact—through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification”); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 309–311 (2009) (holding that affidavits reporting results of forensic analysis were testimonial); Coleman & Rothstein, *Grabbing the Bullcoming*, *supra* note 204, at 524–57 (discussing the status of open Confrontation Clause issues before and after *Bullcoming*); Ronald J. Coleman & Paul Rothstein, *Williams v. Illinois and the Confrontation Clause*, PUBLICSQUARE.NET (Dec. 6, 2011), <https://www.publicsquare.net/2011/12/williams-v-illinois-confrontation-clause/> (discussing items at issue in *Williams*); Coleman & Rothstein, *A Game of Katso and Mouse*, *supra* note 3, at 28 (reviewing six theories that could allow forensic evidence to be admissible under the Confrontation Clause).

<sup>241</sup> *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) (per curiam).

<sup>242</sup> *Id.* at 16–17 (describing what the expert could remember).

<sup>243</sup> *Id.* at 20 (“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.”).

forgets all facts and circumstances regarding the case or report—certainly seems to present a more extreme case than in *Fensterer*.

The Court could decide to treat memory-impaired expert witnesses differently than lay witnesses. For instance, one commenter has argued that since an expert's testimony consists of that expert's opinion, when the expert is unable to recall the basis of the opinion, the expert's memory loss may be seen as "self-impeaching" in a way not applicable to all memory loss contexts.<sup>244</sup> The commenter notes that an expert who cannot recall the basis of his opinion—such as the expert in *Fensterer*—"may appear to a jury to be less of an expert," and the jury may readily discount his opinion.<sup>245</sup> In contrast, the commenter states that a lay witness who offers an identification of an attacker—such as the witness in *Owens*—may be seen by a jury as credible but "merely forgetful."<sup>246</sup>

On the other hand, the Court could decide to treat expert and lay witnesses similarly. *Crawford* replaced the *Roberts* reliability approach with a focus on the procedural right to cross-examination. From a procedural standpoint, it is unclear that an expert like Dr. Planck offers the defense a much greater opportunity for cross-examination than a lay witness with complete memory loss would.

Moreover, although the Court has been sharply divided, a majority of the Court has, so far, seemed unwilling to draw a bright-line distinction between scientific witnesses and other types of witnesses in the forensic report context.<sup>247</sup> The view that analysts and conventional witnesses should be treated similarly is exemplified by Justice Scalia's majority opinion in *Melendez-Diaz v. Massachusetts*.<sup>248</sup> Justice Kennedy's dissenting opinion in *Melendez-Diaz* represents the opposing view.<sup>249</sup> Justice Kennedy chided the Court for not acknowledging the "real differences" between "conventional witnesses" on the one hand and "laboratory analysts who perform scientific tests" on the other.<sup>250</sup> According to Justice Kennedy, the Confrontation Clause's text refers to types of

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<sup>244</sup> Seltz, *supra* note 193, at 886.

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> See *supra* note 240 and accompanying text.

<sup>248</sup> See 557 U.S. 305, 307, 315–17 (2009).

<sup>249</sup> See *id.* at 330–57 (Kennedy, J., dissenting).

<sup>250</sup> *Id.* at 330.

persons, specifically to “witnesses against” a defendant.<sup>251</sup> Laboratory analysts were not “witnesses against” the accused as understood at the framing; the Clause instead targeted conventional witnesses, i.e., those who perceive an event giving them “personal knowledge of some aspect” of a defendant’s guilt.<sup>252</sup> For Justice Kennedy, analysts are distinct from conventional witnesses in at least three ways: (1) conventional witnesses recall past events while analysts’ reports contain “near-contemporaneous observations”; (2) analysts observe “neither the crime” itself, “nor any human action relat[ing] to it”; and (3) conventional witnesses “respond[] to questions under interrogation,” while laboratory tests do not.<sup>253</sup> Justice Scalia and the rest of the majority disagreed, finding Justice Kennedy’s three purported distinctions unavailing.<sup>254</sup>

Even though the issue was divisive—and even though Justices Gorsuch, Kavanaugh, and Barrett have now replaced Justices Scalia, Kennedy, and Ginsburg—it remains unclear whether the Court would rethink its position on treating analysts and lay witnesses similarly.<sup>255</sup> We anticipate Justice Gorsuch’s general position on the Confrontation Clause and forensic reports will be more similar to that of Justice Scalia than to that of Justice Kennedy,<sup>256</sup> and we would guess that the current Court would not draw a bright-line distinction between analysts and conventional witnesses in the forensic report context. For similar reasons,

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<sup>251</sup> *Id.* at 343.

<sup>252</sup> *Id.* at 343–44. Justice Kennedy pointed out, among other things, that both *Crawford* and *Davis* had concerned only conventional witnesses, and neither case held that anyone making a testimonial statement was a Confrontation Clause “witness.” *Id.* at 330–31.

<sup>253</sup> *Id.* at 345–46.

<sup>254</sup> *Id.* at 315–17. Justice Scalia recognized “that *ex parte* examinations of the sort used at [Sir Walter] Raleigh’s trial have ‘long been thought a paradigmatic confrontation violation’” but argued that Raleigh’s case identified the “core” of the confrontation right, “not its limits.” *Id.* at 315 (quoting *Crawford v. Washington*, 541 U.S. 36, 52 (2004)).

<sup>255</sup> See Coleman & Rothstein, *A Game of Katso and Mouse*, *supra* note 3, at 51 (“It is unclear exactly how [Justices Gorsuch and Kavanaugh] will rule on Confrontation Clause matters.”); see generally *United States v. King*, 910 F.3d 320 (7th Cir. 2018) (providing an opinion authored by then-Circuit Judge Barrett discussing the Confrontation Clause and a statement made by a non-testifying co-defendant admitted at bench trial); *United States v. Carnell*, 972 F.3d 932 (7th Cir. 2020) (discussing the Confrontation Clause and admission of laboratory reports for sentencing in a case before then-Circuit Judge Barrett).

<sup>256</sup> See Coleman & Rothstein, *A Game of Katso and Mouse*, *supra* note 3, at 51.

although analysts are only a subset of experts, we suspect that the Court might also be hesitant to apply a different confrontation standard to expert and lay witnesses in the memory loss context.

## V. CONCLUSION

The purpose of this Article was to identify and discuss eight key issues arising in connection with memory impairment in Confrontation Clause witnesses. Although the Court chose not to put these eight issues to rest in the context of *White* or *Tapia*, we anticipate that federal and state courts will be called upon to answer these issues in the coming years, and we suspect the U.S. Supreme Court will eventually need to answer them.

Assuming that *Owens* continues to be precedent and that the Court prefers a bright-line approach, the *Owens-Plus* approach would have some appeal, i.e., an approach under which complete memory loss witnesses can afford a defendant her confrontation rights. Setting a constitutional line that treats certain categories of memory-impaired witnesses differently from others would be difficult, and it would become infinitely more so if the Court required greater scrutiny of what individual details were and were not recalled. This may be why Justice Scalia in *Owens* appeared unwilling to engage in line-setting,<sup>257</sup> and it could also subtly encourage the Court to adopt an *Owens-Plus* type approach.

However, there might also be instances where the Court feels a memory-impaired witness simply offers the defense an insufficient basis to test credibility. For instance, imagine a witness suffered complete memory loss due to a well-documented, completely understandable medical condition which arose only after she offered her statements to law enforcement. In such an instance, the Court may feel that even the bare opportunity to show the jury that the witness forgets may not afford the defense sufficient opportunity to attack credibility, since there would be a ready explanation for the memory loss (the documented clinical condition) and the memory loss would not necessarily call the prior statements into question (since the memory loss took place after the statements).

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<sup>257</sup> See *United States v. Owens*, 484 U.S. 554, 559–64 (1988).

If the Court chooses to require some greater degree of credibility testing than what an *Owens-Plus* approach would necessitate, we think one rule which has merit is that witnesses who can answer *any non-de minimis* questions about the event or their statement are sufficient for purposes of the Confrontation Clause. Although use of “*de minimis*” still requires some subjective determinations on the part of local courts, it seems much less subjective than other options—such as “substantial” or “substantive”—and should clearly reflect that in all but the most extreme instances, memory impairment will not render a witness insufficient.

Since the U.S. Supreme Court opted not to clarify the law in this area using *White* or *Tapia*,<sup>258</sup> lower courts and local stakeholders must continue to seek guidance from the existing precedent. Our suspicion is that, if nothing else, the Court will at least continue to recognize *Owens* and the notion that only some satisfactory basis to challenge credibility is required. We hope that this Article helps clarify the relevant issues and focuses more academic attention on the area of memory loss and the Confrontation Clause.

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<sup>258</sup> See *supra* note 10 and accompanying text.