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Paul F. Rothstein

Georgetown University Law Center, rothstei@law.georgetown.edu

Ronald J. Coleman

Georgetown University Law Center, rjc75@law.georgetown.edu


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CONFRONTING MEMORY LOSS

Paul F. Rothstein & Ronald J. Coleman

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.”¹ The Supreme Court’s landmark decision in *Crawford v. Washington* governs modern Confrontation Clause analysis.² 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.³ These “testimonial” statements cannot be entered against a criminal defendant unless the hearsay declarant either (i) appears as a witness for cross-examination, or (ii) is unavailable in a situation where there has been a prior sufficient opportunity for cross-examination of such declarant.⁴ While the *Crawford* opinion failed to fully define the class of testimonial statements, such class would seem to include out-of-court statements which are meant or understood to offer some type of evidence at trial, in particular if such statements were made formally and directed to a state actor or agent.⁵

One item which *Crawford* and its progeny have left unclear is whether a memory-impaired witness can afford a criminal defendant her right to confront. For instance, suppose a witness is testifying at trial, and the prosecution seeks to enter a prior testimonial statement that witness made to law enforcement. Insofar as mere rules of evidence are concerned, aside from the Confrontation Clause, this might be admissible.⁶ Normally the fact that the witness is actually testifying at trial might be sufficient to meet the Confrontation Clause requirements for introduction of the prior statement. However, now suppose that the testifying witness has suffered from some degree of memory loss since having made the prior statement, such that she cannot recall the prior statement and/or the

¹ U.S. Const. amend. VI. The Fourteenth Amendment ensures that the Confrontation Clause also applies at the state level. *Pointer v. Texas*, 380 U.S. 400, 403 (1965).

² See generally *Crawford v. Washington*, 541 U.S. 36 (2004).

³ *Id.* at 42-68. Not all out-of-court statements are testimonial. For instance, a statement which 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 *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 (2020) [hereinafter *A Game of Katso and Mouse*].

⁴ See generally *Crawford*, 541 U.S. 36.

⁵ *Id.*

⁶ This might be attempted, for instance, using Federal Rule of Evidence 801(d)(1) or a state equivalent. That rule also has a requirement 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, but jurisdictions do on occasion hold that it does.

incident described in it.⁷ In determining whether such a witness could afford the defendant her confrontation rights, questions arise, such as 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 any such questions? Would a witness only meet the requirements of confrontation if she had capacity to answer all substantive questions posed? Or, should the degree of the declarant’s memory impairment make a difference?⁸

In this regard, two petitions denied certiorari by the U.S. Supreme Court 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.⁹ In each, the prosecution sought to introduce a prior statement by a witness, the relevant witness appeared to testify at trial, but such witness suffered from memory loss.¹⁰ According to the petitioners in each case, the relevant memory-impaired witnesses were insufficient for purposes of the Confrontation Clause.¹¹

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 Confrontation Clause; Part III will present the recent certiorari petitions; Part IV will identify and discuss our eight key memory impairment issues; and Part V will conclude.

II. CONFRONTATION CLAUSE BACKGROUND

Prior to *Crawford*, the courts had been guided in Confrontation Clause cases by *Ohio v. Roberts*,¹² pursuant to which admission of hearsay statements consistent with the Clause required the declarant’s unavailability coupled with sufficient “indicia of reliability.”¹³ *Crawford* and its progeny altered the paradigm, finding that only so-called “testimonial” statements would trigger the protections of the Confrontation Clause.¹⁴

⁷ A similar issue could arise, for instance, where an individual lost their memory after direct examination at trial but before cross-examination. This Article generally utilizes hypotheticals focused on 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.

⁸ Some degree of guidance may be drawn from a pre-*Crawford* line of cases on this issue culminating in *U.S. v. Owens*. See *U.S. v. Owens*, 484 U.S. 554 (1988). However, as will be discussed in more detail below, such line of cases did not answer all relevant questions and it is unclear the extent to which such precedent maintains vitality after *Crawford*.

⁹ Petition for Writ of Certiorari, *White v. Louisiana*, No. 18-8862 (Apr. 11, 2019); Petition for Writ of Certiorari, *Tapia v. New York*, No. 19-159 (July 31, 2019); *White v. Louisiana*, No. 18-8862, ___ S. Ct. ___, 2019 WL 6689875 (2019) (Mem); *Tapia v. New York*, No. 19-159, ___ S. Ct. ___, 2019 WL 6689666 (2019) (Mem).

¹⁰ Petition for Writ of Certiorari, *White*, *supra* note 9; Petition for Writ of Certiorari, *Tapia*, *supra* note 9. There are, of course, distinctions between the situations in these two petitions and the facts of each will be discussed in more detail below. See *infra*, Part III.

¹¹ Petition for Writ of Certiorari, *White*, *supra* note 9; Petition for Writ of Certiorari, *Tapia*, *supra* note 9.

¹² 448 U.S. 56 (1980).

¹³ *Roberts*, 448 U.S. at 66. Where evidence fell within a “firmly rooted hearsay exception [,]” reliability could be inferred. *Id.*

¹⁴ *Crawford*, 541 U.S. 36.

A. *Crawford* & Testimonial Statements

In *Crawford*, the prosecution sought to offer tape-recorded statements of the defendant's wife against the defendant.¹⁵ The wife's statements had been made to the police, but the defendant was not afforded an opportunity for cross-examination.¹⁶ Notwithstanding the defendant's argument that admitting the statements would violate his confrontation rights, the prosecution was permitted to play the statements for the jury.¹⁷ The defendant was convicted and the Supreme Court ultimately granted certiorari.¹⁸

In an opinion authored by Justice Scalia, the Supreme Court found that admission of the taped testimony violated the defendant's Confrontation Clause rights.¹⁹ 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."²⁰ An accuser who made a formal statement to a government officer would "bear testimony" in a way that an individual making a casual remark to one of her acquaintances would not.²¹ Accordingly, there existed a core class of out-of-court "testimonial" statements with which the Clause was concerned, and admission of these testimonial statements against a criminal defendant without the opportunity for cross-examination at trial would violate the Confrontation Clause (absent the declarant's unavailability and a prior opportunity to cross-examine the declarant).²² The Court did not comprehensively define testimonial, but noted that the term at least applied to prior testimony at a former trial, before a grand jury, or at a preliminary hearing, as well as to police interrogations.²³

Chief Justice Rehnquist, joined by Justice O'Connor, wrote a concurring opinion to denounce the Court's overruling of *Roberts*,²⁴ even though he believed the Court's result was supported by *Roberts* and its progeny.²⁵ According to the Chief Justice, the Courts new interpretation of the Clause was unnecessary, not supported by sufficiently persuasive reasoning, and would "cast[] a mantle of uncertainty over future criminal trials [.]"²⁶ He argued that neither the Supreme Court—nor any other court of which he was aware—had

¹⁵ *Id.* at 38.

¹⁶ *Id.* at 38-40. The wife was not able to testify at trial due to state marital privilege. *Id.*

¹⁷ *Id.* at 38-41.

¹⁸ *Id.*

¹⁹ *Id.* at 68-69.

²⁰ *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.

²¹ *Id.* at 51.

²² *Id.* at 42-68.

²³ *Id.* at 68. In coming to its conclusion, the Court also discussed various formulations of the class of testimonial statements that had existed: (i) "*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," (ii) "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," and (iii) "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.

²⁴ *Id.* at 69.

²⁵ *Id.* at 76.

²⁶ *Id.* at 69.

ever drawn a distinction between nontestimonial and testimonial statements, and he saw “little value in trading our precedent for an imprecise approximation at this late date.”²⁷

It is worth noting that, in footnote 9, Justice Scalia reiterated the following in 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.²⁸

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

B. Objective Primary Purpose

The 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 statement would be deemed non-testimonial if made for some other purpose.²⁹ The Court developed and refined its analysis in *Davis v. Washington*³⁰ and *Michigan v. Bryant*.³¹

Davis required 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.³² *Davis* was actually a consolidated appeal of the lower court domestic disturbance cases *State v. Davis*³³ and *Hammon v. State*.³⁴ In the former, the state sought to enter statements made by an alleged victim to a 911 operator prior to police reaching the scene,³⁵ and in the latter, the state 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.³⁶ Neither alleged victim testified at trial.³⁷ In rendering its decision, the Court carved out an

²⁷ *Id.* at 72.

²⁸ *Id.* at 59 n. 9 (citations and internal quotation marks omitted).

²⁹ 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 356-75.

³⁰ 547 U.S. 813 (2006).

³¹ 562 U.S. 344.

³² *Davis*, 547 U.S. at 817.

³³ 111 P.3d 844 (Wash. 2005).

³⁴ 829 N.E.2d 444 (Ind. 2005).

³⁵ 547 U.S. at 817-18.

³⁶ *Id.* at 818-21. 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.

³⁷ *Id.* at 819-20.

“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 interrogation is to establish or prove past events potentially relevant to later criminal prosecution.³⁸

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.³⁹

In *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.⁴⁰ The alleged victim died within hours after leaving the gas station, and the police left the gas station to search for the accused.⁴¹ *Bryant* was different than *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 not known at the time when the police found the alleged victim.⁴² Clarifying and refining its opinion in *Davis*, the 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 and federal rules of evidence, not the Confrontation Clause.⁴³

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

³⁸ *Id.* at 822.

³⁹ *Id.* at 827-31. Justice Thomas filed an opinion concurring in part and dissenting in part to register his disapproval of the Court’s primary purpose test, noting it was both difficult 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.

⁴⁰ 562 U.S. at 348.

⁴¹ *Id.* at 349-50.

⁴² *Id.* at 359.

⁴³ *Id.* at 358-59.

it” provided the best assessment.⁴⁴ Applying the primary purpose analysis to the facts, the Court determined that the statements in *Bryant* were nontestimonial.⁴⁵

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*⁴⁶ *Delaware v. Fensterer*,⁴⁷ and *U.S. v. Owens*⁴⁸ may also prove instructive. It is important to note that these cases were decided before *Crawford*, and so there is a question as to whether their logic would still govern the Court’s analysis.⁴⁹

Green concerned a charge of “furnishing marijuana to a minor” against John Anthony Green.⁵⁰ The alleged minor, Melvin Porter, had been arrested in connection with selling drugs and had named Green as his supplier.⁵¹ As recounted later by Officer Wade, Porter had said that Green had phoned him earlier in the month “asked him to sell some ‘stuff’ or ‘grass,’” and “personally delivered a shopping bag containing 29 ‘baggies’ of marihuana.”⁵² Porter made a sale to an undercover officer from this supply.⁵³ One week later, Porter gave testimony at Green’s preliminary hearing, naming Green as his supplier, but now asserting that Green showed Porter where he could pick up the bag of drugs at Green’s parents’ house.⁵⁴ Porter’s preliminary hearing testimony was subject to “extensive cross-examination” by Green’s counsel.⁵⁵

Approximately two months later, at trial, Porter took the stand and was “uncooperative” and “markedly evasive [.]”⁵⁶ In particular, Porter claimed he was not certain how he had obtained the drugs, primarily due to the LSD he had taken twenty minutes prior to Green calling.⁵⁷ He claimed he was not able to recall events following the call, and that the LSD prevented him from distinguishing fantasy from fact.⁵⁸ Parts of Porter’s preliminary hearing testimony were read by the prosecutor, and such evidence was admitted for its truth.⁵⁹ With Porter’s recollection “refreshed” due to the preliminary

⁴⁴ *Id.* at 360.

⁴⁵ *Id.* at 375-78. Justice Thomas again criticized the Court’s primary purpose analysis in a concurring opinion in *Bryant*. *Id.* at 378-379. 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 379-96.

⁴⁶ 399 U.S. 149 (1970).

⁴⁷ 474 U.S. 15 (1985).

⁴⁸ 484 U.S. 554.

⁴⁹ It is noteworthy that Justice Scalia, who authored the Court’s opinion in *Crawford* and is perhaps its fiercest defender, also authored the Court’s opinions in *Owens*. See generally *Owens*, 484 U.S. 554. The *Owens* Court relied upon *Fensterer*, and *Green* was cited by Justice Scalia in *Crawford*. See *Owens*, 484 U.S. at 558-60; *Crawford*, 541 U.S. at 57, 59 n. 9.

⁵⁰ *Green*, 399 U.S. at 151.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 151-52.

⁵⁷ *Id.* at 152.

⁵⁸ *Id.*

⁵⁹ *Id.*

hearing testimony, Porter “guessed” he obtained the drugs from behind Green’s parents’ home and had given Green the money from the sale.⁶⁰ On cross, Porter indicated it was his recollection of the preliminary hearing testimony which was “mostly” refreshed, rather than of the events themselves.⁶¹ Officer Wade later took the stand, and recounted Porter’s earlier statement that Green delivered him the drugs, and such statement was admitted as substantive evidence.⁶² Porter stated he had told the truth, as he then believed it to be, both at the preliminary hearing and to Officer Wade.⁶³ Porter also insisted he was telling the truth at the trial in respect of his inability to recall the actual events.⁶⁴ Green was convicted, and the U.S. Supreme Court eventually agreed to hear the case.⁶⁵

Justice White, writing for the Court, first focused on admission of the preliminary hearing testimony.⁶⁶ The Court found 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.⁶⁷ The Court then turned to admission of Porter’s statements to Officer Wade.⁶⁸ Justice White noted that, in the typical case to which the lower court had addressed itself, the trial witness offers a different version of events from that given on the prior occasion.⁶⁹ In such instance, 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.”⁷⁰ However, the Court noted that in the present case, Porter claimed he could not recall the events occurring after Green telephoned him and so Porter failed to provide any current version of more important events set out in the earlier statement.⁷¹ Justice White did not reach the question of whether Porter’s purported loss of memory so affected Green’s cross-examination right as to make a Confrontation Clause difference, since that issue was not yet ripe.⁷²

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 153.

⁶⁶ *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.

⁶⁷ *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 164. The Court also argued that it believed admission of Porter’s preliminary hearing testimony would not have violated the Confrontation Clause had Porter been unavailable, and so a different result should not be reached when Porter was actually produced. *Id.* at 165.

⁶⁸ *Id.* at 168.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at 168-69. The Court noted that the state court had not focused on that issue, nor did either party address itself to such 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

Chief Justice Burger wrote a concurring opinion to emphasize the value of state-level experimentation, and Justice Harlan also authored a concurring opinion to discuss, among other things, the need to take a “fresh look” at the concept of confrontation.⁷³ 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.⁷⁴

Justice Brennan dissented, arguing that the case raised two issues: (i) 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 her statement dealt; and (ii) whether the Confrontation Clause allowed the prior hearing statement of a witness—made subject to cross-examination and under oath—to be used as substantive evidence where the witness claimed the inability to recall the events with which her statement dealt.⁷⁵ Justice Brennan’s view was that neither statement could be introduced without unconstitutionally restricting the accused’s right to challenge incriminating evidence before the factfinder.⁷⁶

Fifteen years after *Green*, in *Fensterer*, the Court had the opportunity to consider whether admitting opinion testimony from the prosecution’s expert—who could not recall the basis for the opinion—violated the Confrontation Clause.⁷⁷ William Fensterer had been convicted for murdering his fiancée.⁷⁸ In order to prove that two hairs found on the alleged murder weapon were the victim’s, and that one of such hairs had been removed forcibly, the state relied upon testimony from an FBI Special Agent.⁷⁹ At trial, the Special Agent testified to one of the hairs having been forcibly removed, and explained there were three theories for determining this.⁸⁰ However, he testified that, after having reviewed 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.”⁸¹ On cross-examination, the Special Agent was again unable to remember which method he

pose a harmless-error question which is more appropriately resolved by the California courts in the first instance.” *Id.* at 170.

⁷³ *Id.* at 171-73.

⁷⁴ *Id.* at 188-89.

⁷⁵ *Id.* at 189-91.

⁷⁶ *Id.* at 191.

⁷⁷ *Fensterer*, 474 U.S. at 16.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at 17.

used.⁸² The trial court overruled Fensterer's objection that the Special Agent's testimony precluded sufficient cross-examination, explaining that such objection went to weight rather than admissibility.⁸³ 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."⁸⁴

The U.S. Supreme Court reversed the Delaware Supreme Court, finding no Confrontation Clause violation.⁸⁵ 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."⁸⁶ 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.⁸⁷

The Court pointed out 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 unreliable.⁸⁸ According to the Court, the Confrontation Clause required no more than that.⁸⁹ However, the Court did not foreclose the possibility that memory loss could theoretically form the basis of a Confrontation Clause violation:

We need not decide whether there are circumstances in which a witness' lapse of memory may so frustrate any opportunity for cross-examination

⁸² *Id.* The defense's expert also attacked the Special Agent's theory on forcible removal as the defense expert understood it to be. *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 18.

⁸⁵ *Id.* 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 pointed out that he thought *Fensterer* should not have been decided without full argument. *Id.* at 23-24.

⁸⁶ *Id.* at 20. 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.*

⁸⁷ *Id.* at 21-22.

⁸⁸ *Id.* at 20.

⁸⁹ *Id.*

that admission of the witness' direct testimony violates the Confrontation Clause.⁹⁰

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 witness making the identification could not explain the basis for such identification due to memory loss.⁹¹ A correctional counselor at a prison, John Foster, had been beaten and he suffered a skull fracture and was hospitalized for nearly a month.⁹² When interviewed by an FBI Agent approximately a week after the incident, Foster seemed lethargic and was unable to remember the name of his attacker.⁹³ A little over two weeks later, on May 5, the FBI Agent again spoke with Foster, and this time Foster seemed much improved.⁹⁴ He was able to describe the attack, name the accused as his attacker, and identify the accused from a set of photographs.⁹⁵

At trial, Foster testified to his activities just prior to the attack, recounted seeing blood on the floor and feeling blows to his head, and that he remembered identifying the accused as his attacker during his FBI interview on May 5, 1982.⁹⁶ On cross-examination, Foster conceded that he could not remember: (i) seeing his attacker; (ii) any visitors he received in the hospital aside from the FBI Agent, even though evidence suggested there were numerous such visitors; and (iii) whether any of the visitors he received had suggested the accused was the attacker.⁹⁷ The defense unsuccessfully attempted to refresh Foster's recollection using hospital records, including one record which indicated Foster had attributed the attack to someone other than the accused.⁹⁸ The accused was convicted and the Supreme Court eventually granted certiorari.⁹⁹

Justice Scalia, writing for the Court, found that the Confrontation Clause was not violated.¹⁰⁰ He began by recognizing that the Court had never determined that a violation of the Confrontation Clause could be founded upon the memory loss of a witness.¹⁰¹ After considering past precedent, Justice Scalia stated 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."¹⁰² He argued

⁹⁰ *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.

⁹¹ *Owens*, 484 U.S. at 555-56.

⁹² *Id.* at 556. Justice Kennedy did not take part in the decision or in consideration of the case. *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 556-557.

¹⁰⁰ *Id.* at 564.

¹⁰¹ *Id.* at 557.

¹⁰² *Id.* at 558-59 (emphasis in original and internal quotation marks omitted). It is also noteworthy that, 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

that this “opportunity” was not denied where a witness testified to a current belief but was not able to recall the reason for such belief.¹⁰³ It would be sufficient, the Court found, that a defendant was entitled to make the jury aware through cross-examination of witness bias, lack of attentiveness or care, poor eyesight, and poor memory.¹⁰⁴ Justice Scalia argued that if the ability to inquire about these matters was a sufficient cross-examination opportunity as to a current belief (the basis for which the witness could not recall), the Court saw no reason why it should be an insufficient opportunity in connection with a past belief (the basis of which the witness could not recall).¹⁰⁵ In either case, the belief’s foundation could not effectively be elicited, but there were other means of impugning the belief.¹⁰⁶ Justice Scalia found that “memory-testing” was not required in the latter case, as the Court had previously found in connection with the former case.¹⁰⁷ Although the means of impugning a witness who asserted memory loss would not always be effective, the Constitution did not guarantee success.¹⁰⁸

Justice Brennan, joined by Justice Marshall, dissented from the Court’s opinion.¹⁰⁹ 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 of the accused, and Foster’s profound memory loss rendered him no less a conduit for inscrutable and stale evidence than the FBI Agent would have been.¹¹⁰ In Justice Brennan’s view, the Court’s opinion reduced the confrontation right to a “markedly hollow” purely procedural protection, and 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 [.]”¹¹¹ According to Justice Brennan, the accused’s real “accuser” was the Foster from May 5, not the Foster on the stand.¹¹² He pointed to past Court precedent suggesting that the right to confront ensures “an opportunity for *effective* cross-examination [.]”¹¹³ Justice Brennan believed the Confrontation Clause guaranteed “more than the right to ask questions of a live witness, no matter how dead 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.

¹⁰³ *Id.* at 559.

¹⁰⁴ *Id.* Justice Scalia suggested that showing that a witness has a bad memory “is often a prime objective of cross-examination [.]” *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* Justice Scalia continued: “if 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.*

¹⁰⁷ *Id.* at 559-60.

¹⁰⁸ *Id.* at 560. Justice Scalia also pointed out that the defense does have realistic weapons, as demonstrated by defense counsel’s *Owens* summation, in which defense counsel emphasized Foster’s memory loss and argued that Foster’s identification of the accused resulted from suggestions provided by hospital visitors Foster received. *Id.*

¹⁰⁹ *Id.* at 564.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 565 (internal quotation marks and brackets removed).

¹¹² *Id.* at 566.

¹¹³ *Id.* at 565-67 (emphasis in original).

witness' memory proves to be [,]" and he would have found a Confrontation Clause violation.¹¹⁴

Owens remains the leading Supreme Court case on memory impairment in the context of the Confrontation Clause, but *Owens* 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*.¹¹⁵ It is this issue which was raised by two recent certiorari petitions, and we turn to these petitions in the next Part.

III. THE RECENT SUPREME COURT PETITIONS

The certiorari petitions in *White v. Louisiana* and *Tapia v. New York* were considered by the Supreme Court in December 2019. Both afforded the Court an opportunity to clarify confrontation rights in memory loss cases.

In *White*, a defendant, Roderick White, had been convicted of second degree murder.¹¹⁶ Brandon Coleman was driving around with three passengers, one of whom was White.¹¹⁷ Nearby, Gregory Spears was selling compact disks out of his car, and NaQuian Robinson drove by, got out, and purchased some disks from Spears.¹¹⁸ As Spears and Robinson stood talking, Coleman stopped at a carwash nearby.¹¹⁹ White exited the car, walked over to Spears and Robinson, and asked Spears about some disks.¹²⁰ Spears turned to look in the trunk, and White pulled out a gun and attempted to rob Robinson.¹²¹ Robinson and White wrestled over the gun and Robinson was shot several times.¹²² White ran down the road and was eventually picked up and driven away by Coleman.¹²³

After getting into his car and driving a short distance, Robinson crashed into a fence.¹²⁴ Robinson's family brought him to the hospital, where he died the same day from his wounds.¹²⁵ Spears was not able to identify the shooter.¹²⁶ The police brought Coleman in for questioning, and Coleman implicated White in the shooting.¹²⁷

¹¹⁴ *Id.* at 565-67, 572.

¹¹⁵ 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 it. We will discuss this issue further in Part IV.

¹¹⁶ Petition for Writ of Certiorari, Appendix at 2, *White v. Louisiana*, No. 18-8862 (Apr. 11, 2019). In the absence of full 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.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

White did not testify at the trial,¹²⁸ but Coleman did.¹²⁹ The prosecutor noted that Coleman had “had a fall” and “may or may not have some issues with memory.”¹³⁰ During the direct examination, Coleman knew his birth date and age, but testified to having had some memory issues which began around September of the prior year.¹³¹ He testified that he could not recall anything about the incident in which Robinson was shot, nor could he recall talking to the police regarding the shooting.¹³² Coleman was able to identify himself when the prosecutor played a snippet of his videotaped statement.¹³³ Over defense counsel’s Confrontation Clause objection, Coleman’s videotaped statement was played.¹³⁴ On cross-examination, Coleman testified that he could not recall speaking with his father (who was in the videotaped statement), could not recall any event on the day of the shooting, and stated “[a]fter September, I don’t remember nothing.”¹³⁵

White argued on appeal, that the trial court had erred in permitting the jury to hear Coleman’s videotaped statement to the police.¹³⁶ 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, since Coleman could not be effectively or meaningfully cross-examined about the statement.¹³⁷

The Louisiana Court of Appeal, First Circuit considered, among other things, *Owens* and footnote 9 in *Crawford*, and determined that the trial court had not erred in entering Coleman’s statement into evidence.¹³⁸ 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.”¹³⁹

On January 14, 2019, the Louisiana Supreme Court denied certiorari.¹⁴⁰ On April 11, 2019, White filed a certiorari petition to the U.S. Supreme Court, arguing among other things, that: (i) the Louisiana Supreme Court had wrongly decided the case; (ii) lower courts were in conflict as to the application of *Owens* to cases of “complete” memory loss¹⁴¹ and as to whether *Owens* could be reconciled with *Crawford* in “genuine” memory

¹²⁸ *Id.*

¹²⁹ *Id.* at 3.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 3-4.

¹³³ *Id.* at 4.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 2.

¹³⁷ *Id.*

¹³⁸ *Id.* 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.’”) (citations omitted).

¹³⁹ *Id.* at 5-6.

¹⁴⁰ *Id.* at 8. There was an opinion dissenting from denial of certiorari, but it was primarily targeted at considerations in the Louisiana Constitution, specifically “whether the Louisiana Constitution requires greater safeguards than the Sixth Amendment.” *Id.* at 9-11.

¹⁴¹ The petition argues that “[t]hree 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,

loss cases; and (iii) federal and state courts were opposed in result in genuine memory loss cases.¹⁴²

In particular, the White certiorari petition sought to draw a distinction between three categories of memory loss: (i) the witness recalled the incident but not the statement about it; (ii) the witness recalled the statement but not the incident; and (iii) the witness recalled neither the statement nor the incident.¹⁴³ The petition termed the third type of memory loss “complete” memory loss and the first two types “partial” memory loss.¹⁴⁴ White asserted that *Owens* only concerned partial memory loss—in that the relevant witness recalled the statement but not the incident.¹⁴⁵ The petition then argued that, prior to *White*, the Court had never squarely faced a case of complete memory loss.¹⁴⁶

In *Tapia*, filed some months after *White*, a 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.¹⁴⁷ Bello testified that after separating the victim from the defendant, he noticed that the victim was “bleeding profusely from his face and neck.”¹⁴⁸ He observed a shattered beer bottle, and the victim had sustained several injuries consistent with having been cut with a dangerous instrument.¹⁴⁹ The victim also testified to having been attacked from behind and identified the defendant as one of the attackers.¹⁵⁰

The prosecution produced Cosgrove to testify, but he could not independently recall the incident.¹⁵¹ When the prosecution sought to introduce Cosgrove’s prior grand jury testimony as a “past recollection recorded [.]” the defense objected on the basis of the Confrontation Clause, arguing that Cosgrove’s memory loss meant he could not be cross-examined.¹⁵²

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.¹⁵³ He was unable to recall the circumstances which led to the defendant’s arrest.¹⁵⁴ Cosgrove also provided testimony to support admission of his prior grand jury testimony, including that the prior testimony failed to refresh his current recollection of events.¹⁵⁵

while the third constitutes complete or total memory loss.” Petition for Writ of Certiorari, *White, supra* note 9, 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.* (citation omitted).

¹⁴² See generally Petition for Writ of Certiorari, *White, supra* note 9.

¹⁴³ *Id.* at 7.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 2-3, 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 the state had failed to challenge the completeness or genuineness of Coleman’s memory loss. *Id.*

¹⁴⁷ Petition for Writ of Certiorari, Appendix at 2, *Tapia v. New York*, No. 19-159.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 3.

¹⁵² *Id.*

¹⁵³ *Id.* at 4.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

Cosgrove’s prior grand jury testimony—which was not particularly detailed and which contradicted Bello’s trial testimony—was read into the record.¹⁵⁶ The grand jury testimony added that Cosgrove witnessed the defendant kick the victim.¹⁵⁷ 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, could not recall details of such altercations, and could not swear the court reporter’s transcript of his grand jury testimony was accurate due to his lack of independent recollection.¹⁵⁸ The jury found the defendant guilty, and the Appellate Division affirmed, based in part on their finding no Confrontation Clause violation.¹⁵⁹

The New York Court of Appeals also affirmed the conviction.¹⁶⁰ The New York Court of Appeals 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.¹⁶¹ It stated that the right to confront includes both the right to cross-examine witnesses and to confront the accuser in a “face-to-face encounter before the trier of fact [.]”¹⁶² 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,¹⁶³ and stated that *Crawford* maintained the “fundamental importance of a witness’s presence at trial” even though it changed the landscape.¹⁶⁴ 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.¹⁶⁵

On July 31, 2019, the defendant (then petitioner), filed a certiorari petition to the U.S. Supreme Court.¹⁶⁶ The petition argued, among other things, that the decision below was incorrect and that lower courts disagreed as to how the Confrontation Clause applied to prior testimonial statements where memory loss was involved.¹⁶⁷ 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 in *Owens* “could at least use the witness’s impaired memory to cast doubt on the reliability of his prior identification.”¹⁶⁸

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 5.

¹⁵⁹ *Id.* at 6.

¹⁶⁰ *Id.* at 7.

¹⁶¹ *Id.* at 14.

¹⁶² *Id.* (citations omitted).

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 15. The court also quoted the following text from footnote 9 in *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.*

¹⁶⁵ *Id.* The dissent did not really deal with the Confrontation Clause issue, but 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 generally id.* (Wilson J., dissenting).

¹⁶⁶ Petition for Writ of Certiorari, *Tapia*, *supra* note 9, at 27.

¹⁶⁷ *See generally* Petition for Writ of Certiorari, *Tapia*, *supra* note 9.

¹⁶⁸ *Id.* at 2, 19. Although the *Tapia* petition uses the word “total” to describe the memory loss here, it elsewhere uses the word “complete” and so we assume it intends these terms to be interchangeable. *See id.* at 1.

On December 9, 2019, the U.S. Supreme Court denied certiorari in both *White* and *Tapia*.¹⁶⁹ Although neither *White* nor *Tapia* squarely raised all the issues we believe need resolution in the memory loss area, the Court could arguably have used either petition as a vehicle for clarifying the law.¹⁷⁰ If nothing else, that two such petitions were recently filed reflects the need for greater clarity. In the next Part, 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,¹⁷¹ 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.¹⁷²

Prior to proceeding to our discussion of the issues, there are four assumptions we must set out in advance. First, whatever we may think of *Owens*, we accept it as a given for purposes of our discussion. We assume the Court would still consider *Owens* binding post-*Crawford*, in particular because Justice Scalia authored both opinions and would have likely anticipated that they could be interpreted consistently.¹⁷³ Second, and flowing from our acceptance of *Owens*, we suspect that the logic underpinning any rule the Supreme Court may set on our eight issues would be what minimum opportunity for cross-examination is sufficient under the circumstances to test witness credibility.¹⁷⁴ Third, we

¹⁶⁹ *White v. Louisiana*, No. 18-8862, ___ S. Ct. ___, 2019 WL 6689875 (2019) (Mem); *Tapia v. New York*, No. 19-159, ___ S. Ct. ___, 2019 WL 6689666 (2019) (Mem).

¹⁷⁰ Of the two petitions, we think *White* would have been the better vehicle.

¹⁷¹ For instance, we will assume the prior out-of-court statements are admissible pursuant to Federal Rule of Evidence 801(d) or a state analogue.

¹⁷² In our discussion of each issue, we also seek to focus on only the specific issue we are discussing. 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 or not the memory loss is *genuine*.

¹⁷³ See *supra* note 49. That *Green* was cited in *Crawford* may further suggest that pre-*Crawford* memory loss cases such as *Owens* were intended to survive *Crawford*.

¹⁷⁴ See, e.g., *Owens* 484 U.S. at 559 (“[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 . . . that 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.]” (citations and internal quotation marks omitted). Albeit outside the memory loss context, the Supreme Court has been deeply divided recently on what degree of cross-examination is required to meet the Confrontation Clause. See, e.g., *Williams v. Illinois*, 567 U.S. 50 (2012); see also *Stuart v. Alabama*, 139 S. Ct. 36 (2018) (Mem) (Gorsuch J., dissenting); 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 *Grabbing the Bullcoming*]; 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 (2015); *A Game of Katso and Mouse*, *supra* note 3. We suspect the Court will also be divided in connection with memory loss.

believe that 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. We believe the Court would prefer a bright-line approach due to its statements in *Crawford* attacking the subjectivity of the *Roberts* reliability approach.¹⁷⁵ Finally, because we anticipate that a bright-line approach would be the Court’s preference, we are generally focused in our discussion on witnesses *completely* forgetting the criminal incident and/or their statements to law enforcement, 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 of details—provide 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 states’ 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 can no longer 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-examination is 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 raises an objection pursuant to the Confrontation Clause. Should Alison, Bobby, and 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.¹⁷⁶ It is noteworthy that the witness in *Owens* fell into the former category—in that he could recall making the identification of his assailant

¹⁷⁵ See *Crawford*, 541 U.S. at 61-65 (“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 utilized in the Confrontation Clause context incorporates some degree of subjectivity, but that test has been accordingly criticized. See, e.g., *Davis*, 547 U.S. at 834 (“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.”) (Thomas J., concurring); *Bryant*, 562 U.S. at 378-79 (“I have criticized the primary-purpose test as ‘an exercise in fiction’ that is ‘disconnected from history’ and ‘yields no predictable results.’”) (citation omitted) (Thomas J., concurring); *Id.* at 383 (“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.”) (Scalia J., dissenting). A case-by-case approach could also make it difficult for criminal defendants to prepare their defenses. Specifically, depending on the subjectivity of the approach, defense attorneys may not be able to adequately advise defendants as to which evidence would be deemed admissible in any given case.

¹⁷⁶ We borrow this “partial” and “complete” memory loss terminology from the certiorari petition in *White*. See Petition for Writ of Certiorari, *White*, *supra* note 9, at 7.

but not seeing his assailant—and so *Owens* did not directly speak to complete memory loss.¹⁷⁷

In resolving the Alison-Bobby-Caitlin hypothetical, then, there are several approaches the Court could theoretically take. 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. 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. Under such an approach, the statements of Alison (recalls incident not statements), Bobby (recalls statements not incident), and Caitlin (recalls neither incident nor statements) would all be entered. 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 [.]”¹⁷⁸ *Crawford* recognized that the Confrontation Clause’s “ultimate goal” was to “ensure reliability of evidence,” but stated that it required “that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.”¹⁷⁹ The primacy *Crawford* placed on testing through cross-examination could cause the current Court to no longer feel bound by *Owens*.¹⁸⁰ Under an approach where *Owens* no longer governed, it is at least possible that none of Alison, Bobby, or Caitlin’s statements might 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 were sufficient for Confrontation Clause purposes.¹⁸¹ We will refer to this as the “Middle” approach.¹⁸² Under such an approach the Court might conclude, for instance,

¹⁷⁷ *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 Association of Criminal Defense Lawyers as Amicus Curiae in Support of Petitioner at 9-10, *White v. Louisiana*, No. 18-8862 (May 9, 2019) [hereinafter NACDL Brief]. There is, of course, an important distinction between a witness who recalls only the incident and one who recalls only the statement, and we will address this issue further below.

¹⁷⁸ *Owens*, 484 U.S. 554; *Roberts*, 448 U.S. at 66 (“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.”).

¹⁷⁹ *Crawford*, 541 U.S. at 61 (finding that the Confrontation Clause provided “a procedural rather than a substantive guarantee.”).

¹⁸⁰ Perhaps the Court could feel that, if *Owens* had arisen after *Crawford*, it might have been decided differently.

¹⁸¹ Recall that, because we believe a bright-line approach would be the Court’s preference, we are focused here on a witness completely forgetting the incident or their statements. We do not consider approaches which, 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: (i) the fact making the event criminal and (ii) the identity of the culprit. Accordingly, we suspect that lack of memory regarding other details might be comparatively less relevant.

¹⁸² 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*, No. 18-8862 (Jun. 14,

that witnesses with partial memory loss—or certain types of partial memory loss—can meet the Confrontation Clause, but witnesses with complete memory loss cannot.

There would be some logic to the Court taking the Middle approach and drawing some form of 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 which is “effective in whatever way, and to whatever extent,” the defendant might seek.¹⁸³

For instance, a witness like Alison (recalls statements but not incident) or Bobby (recalls incident but not statements) might offer the defense some opportunity for cross-examination on substantive matters,¹⁸⁴ while the defense retains the ability to highlight the areas Alison and Bobby forget in order to diminish credibility. In contrast, Caitlin (recalls neither incident nor statements) would not really afford the defense almost any substantive opportunity for cross-examination,¹⁸⁵ and would merely permit the defendant to highlight her forgetfulness for the jury.¹⁸⁶ The Court could draw support for such a Middle approach from *Crawford*’s footnote 9, in which the Court made two statements potentially in conflict: (i) “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 (ii) “[t]he Clause does not bar admission of a statement so long as the declarant is *present at trial to defend or explain it*.”¹⁸⁷ 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 incident nor statements) to

2019); *see also* David Crump, *Overruling Crawford v. Washington: Why and How*, 88 Notre Dame L. Rev. 115 (2012).

¹⁸³ *Owens*, 484 U.S. at 558-59 (emphasis in original and internal quotation marks omitted).

¹⁸⁴ For instance, in a case where the witness can at least recall making the statement, 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 177, 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.

¹⁸⁵ *See, e.g.*, Brief of Richard D. Friedman, as Amicus Curiae in Support of Petition For Writ of Certiorari, *White v. Louisiana*, No. 18-8862 (May 8, 2019) [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 177, 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.”).

¹⁸⁶ *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 forge[t]’ or ‘I do not know.’”)

¹⁸⁷ *Crawford*, 541 U.S. at 59 n. 9 (emphasis added and citations omitted); *see also* Friedman Brief, *supra* note 185, at 6-7.

explain or defend her statements, since the most she could do would be to testify that she cannot recall them.¹⁸⁸

As another example, the Court could 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 Bobby could not be questioned 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 of making his statements to the police. For this reason, the Court could determine that a witness like Bobby (recalls statements not incident) would not afford a defendant sufficient cross-examination, but a witness like Alison (recalls incident not statements) would.

Since we take *Owens* as a baseline and assume a bright-line approach, we think it most likely that the Court would support either an *Owens*-Plus approach (memory loss no bar) or an extremely permissive version of the Middle approach (recollection of incident or statements 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. Although use of the term “non-*de minimis*” in particular still introduces some element of subjectivity, we believe it would be much easier for lower courts to consistently apply than using terms such as “substantial” or “substantive.” “Non-*de minimis*” makes clear that nearly *any* recollection is sufficient, and should not require a court 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 statements similarly.¹⁸⁹ 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.¹⁹⁰ Although the witness in *Owens* could

¹⁸⁸ It is, perhaps, noteworthy that 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.”).

¹⁸⁹ There are, however, many fine distinctions which could theoretically offer different degrees of witness credibility testing. For instance, first, a witness could recall the facts 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 the statement. Although each of these situations could permit the defense a slightly different range and degree of cross-examination, we suspect that the Court would not require lower courts to make such fine distinctions.

¹⁹⁰ *Owens*, 484 U.S. at 556.

seemingly recall some aspects relating to the incident,¹⁹¹ and although the Court could theoretically retrench from *Owens*, we think it is most likely that the Court would treat a witness like Alison (recalls incident not statements) and Bobby (recalls statement not 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. Since giving statements to law enforcement immediately after the alleged murders, both have claimed complete memory loss. Larry claims to have lost his memory due to it having been some time since the incident, and Tammy claims to have lost hers due to head trauma suffered in a car 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 question raised by the Larry and Tammy hypothetical is 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. 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. The 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 seek 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 the forgetful witness like Larry meets the Confrontation Clause but the witness suffering from demonstrable-cause memory loss like Tammy does not.

There might also be reason for the Court 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 as a cause. Millions of Americans suffer from Alzheimer’s or other forms of dementia.¹⁹² As the U.S. population age 65-plus continues to increase in size and proportion, the number of Americans suffering from Alzheimer’s or other forms of dementia will only increase.¹⁹³ This number is expected to escalate rapidly in the coming years.¹⁹⁴ Given the scale of Alzheimer’s and dementia in the U.S., it is foreseeable that if individuals with such conditions are precluded from acting as Confrontation Clause witnesses, a great quantum of evidence would be excluded from U.S.

¹⁹¹ 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.*

¹⁹² See Alzheimer’s Association, *2019 Alzheimer’s Disease Facts and Figures*, 15 ALZHEIMER’S & DEMENTIA 321, 330 (2019); 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, 1249 n. 5-9, 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.”).

¹⁹³ Alzheimer’s Association, *supra* note 192, at 330.

¹⁹⁴ *Id.*

trials.¹⁹⁵ Although the Supreme Court may choose to ignore practical considerations—such as how their 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 there might be a tremendous number of largely untested convictions.

Drawing a distinction between memory loss due to simply forgetting and demonstrable-cause memory loss may be a difficult proposition, particularly given that there may not always be a sharp dividing line between the two. Even with input from a trustworthy medical professional, it may not always be clear whether someone has an unusually poor memory, forgets events due to the natural passage of time, or is suffering from a known or unknown demonstrable condition. Since we take *Owens* as a given and since we 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 do 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.

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. Mia testifies to having complete memory loss at trial and her memory loss was triggered by a blow to the head suffered prior to giving statements to law enforcement. Jacklyn suffered complete memory loss due to a blow to the head after giving her statements but prior to trial. Should Mia and Jacklyn be treated 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 the statements to law enforcement or after such statements. Memory loss initiated by a demonstrable cause prior to the statements—as in

¹⁹⁵ 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 *Grabbing the Bullcoming*, *supra* note 174, at 546 (discussing risk of effective statute of limitation on murder in different context); see also Carolyn Zabrycki, Comment, *Toward A Definition of "Testimonial": How Autopsy Reports Do Not Embodify the Qualities of a Testimonial Statement*, 96 Calif. L. Rev. 1093, 1115 (2008) (same). For instance, suppose that an accused had been 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 there is no statute of limitations 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 were insufficient for Confrontation Clause purposes.

Mia’s case—certainly seems to call credibility of the statements into question more than memory loss initiated by a demonstrable cause after 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 even have been credible when made, given that her memory would already have been 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.¹⁹⁶ When the FBI first attempted to interview the *Owens* witness, the FBI Agent found the witness “lethargic and unable to remember his attacker’s name.”¹⁹⁷ It was only in a subsequent interview that the witness named Owens as his attacker.¹⁹⁸ 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 if the memory loss had been initiated by a demonstrable cause after the statements.¹⁹⁹

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 knowing if there was a demonstrable cause (as discussed above), understanding if the demonstrable cause came before the statement (particularly if the alleged cause is a clinical condition), and identifying when the memory loss was actually initiated. In connection with initiation of the memory loss, should it need to be conclusively shown that some memory loss took place prior to the statements? Would medical or other expert testimony be required? Or, would it be sufficient that the defense could show that some memory loss *could* have taken place prior to the statement? And, 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 whether there is a demonstrable cause prior to the statement and when memory loss was initiated. 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.

¹⁹⁶ *Owens*, 484 U.S. at 556.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* (noting the witness identified Owens “from an array of photographs.”).

¹⁹⁹ *Id.*; Friedman Brief, *supra* note 185, 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.”).

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 was the direct result of the accused striking her on the head with a crowbar while attempting to flee the scene of the fire, 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, and 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 to officers in connection with their testimony, would the Confrontation Clause prevent admission of the statements?²⁰⁰

An important question raised by this hypothetical is if it should matter whether a witness's memory loss is caused by acts of the accused. 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 should have forfeited her confrontation rights.

In *Crawford*, the Court specifically accepted "forfeiture by wrongdoing" as a continuing "exception[] to the Confrontation Clause [.]"²⁰¹ Currently, the leading case on this forfeiture exception is *Giles v. California*.²⁰² 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.²⁰³ Justice Scalia, for the Court, found that the defendant would only forfeit his or her Confrontation Clause right if the defendant engages in conduct for the purpose, or designed, to prevent the witness's testimony.²⁰⁴ Although *Giles* has been criticized,²⁰⁵ we assume for the purposes of this discussion that it represents the present state of the law on the forfeiture exception.

²⁰⁰ It is noteworthy that, like Mara, the *Owens* witness's memory impairment resulted from injuries inflicted by the accused. See *Owens*, 484 U.S. at 556.

²⁰¹ *Crawford*, 541 U.S. at 62. The *Crawford* Court recognized that the forfeiture exception extinguished confrontation claims based on essentially equitable grounds. *Id.*

²⁰² 554 U.S. 353 (2008).

²⁰³ *Id.* at 355, 359. In *Giles*, the accused had allegedly shot his girlfriend six times, and the state sought to introduce certain of her prior statements against him. *Id.* at 356.

²⁰⁴ *Id.* at 359-68. There is some indication that, in certain circumstances, the requisite "intent" might be more broadly construed. See, e.g., *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).

²⁰⁵ See, e.g., Scallen, *supra* note 204, 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."); Friedman Brief, *supra* note 185, at 2, 14-15.

Applying the *Giles* rule to Mara’s hypothetical situation (memory loss due to defendant striking her with a crowbar during 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, not prevent her from testifying. 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 which might follow. Given that the forfeiture exception is based on equitable principles, it would certainly seem perverse for the accused in Mara’s case to benefit procedurally from having knocked her in the head with a crowbar.²⁰⁶ Although the Court need not revisit its interpretation of the forfeiture exception in clarifying its position in memory loss cases, it may be wise for the Court to at least 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’s memory loss is fabricated.²⁰⁷ In Bella’s case, however, all involved parties agree that Bella’s memory loss is clearly genuine.²⁰⁸ 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 suspect memory loss in the context of confrontation rights. If the Court takes the position that in certain or all instances a memory-impaired witness is sufficient for the Confrontation Clause, courts will ultimately be faced with situations where a witness lies about having suffered memory loss. For instance, in the 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 there could be inconsistencies between his prior statements and his present testimony on the stand, and so he feigns complete memory loss.

Should the Court eventually face this issue, we suspect 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.²⁰⁹

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

²⁰⁶ Friedman Brief, *supra* note 185, at 2, 14-15.

²⁰⁷ Perhaps, for example, James’s behavior and actions suggest he may actually recall his prior statements and the criminal event.

²⁰⁸ Perhaps, for instance, voluminous medical records and the opinions of respected medical personnel would support the genuineness of Bella’s memory loss.

²⁰⁹ *See, e.g., Crawford*, 541 U.S. at 57-69 (“[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.”); *Owens*, 484 U.S. at 557-61; *Bullcoming v. New Mexico*, 564 U.S. 647, 661-62 (2011).

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, due to complete memory loss, he answers “I cannot recall” to all the questions posed to him. If the defense raises a Confrontation Clause objection to admission of Megan and Stewart’s prior statements, should the statements be excluded?

This hypothetical raises the question of whether the Confrontation Clause should apply differently in assertion of privilege cases and complete memory loss cases. The Supreme Court has already had occasion to rule on the assertion of privilege issue in *Douglas v. Alabama*.²¹⁰ In *Douglas*, a witness had asserted the privilege against self-incrimination and “refused to answer any questions concerning the alleged crime.”²¹¹ Nevertheless, the state solicitor had the witness declared a hostile witness and was able to read the witness’s confession at trial as part of cross-examining the witness.²¹² The Supreme Court found that the accused’s inability to cross-examine the witness regarding the alleged confession violated the Confrontation Clause.²¹³

Applying *Douglas* to Megan’s hypothetical case (assertion of privilege), the court would likely exclude Megan’s prior statements.²¹⁴ One might argue, then, that Stewart’s (complete memory loss) prior statements should also be excluded. 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, there are at least two possibly relevant distinctions between memory loss and privilege. First, the assertion of privilege is generally a voluntary decision, whereas genuine memory loss is normally involuntary.²¹⁵ Second, and perhaps more importantly, in a memory loss case, the defense can attack the witness’s credibility by forcing the witness to repeatedly answer “I 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 to police—may raise serious doubts in the jury’s mind as to the accuracy and credibility of his statements.²¹⁶ 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.²¹⁷ Accordingly, we

²¹⁰ 380 U.S. 415 (1965).

²¹¹ *Id.* at 416.

²¹² *Id.* at 416-17. 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.

²¹³ *Id.* at 419. The Court noted that “[a]lthough 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.*

²¹⁴ For purposes of the hypothetical, we will assume that the lower court finds that *Douglas* remains good law.

²¹⁵ However, death is often an involuntary condition 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.

²¹⁶ 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.’” *Owens*, 484 U.S. at 558 (citing *Fensterer*, 474 U.S. at 19).

²¹⁷ Of course, depending on the privilege claimed, in some instances the jury may in fact believe the witness is hiding something.

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, 5 years old, had told police one year ago about an incident of sexual abuse involving her father. Jenny's father has now been charged 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 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 child statements differently. The Court might be sensitive to how interpretations of the Confrontation Clause impact the hearsay statements of children, in particular in cases involving child sexual abuse and domestic violence.²¹⁸ As one commenter notes:

[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 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.²¹⁹

²¹⁸ See, e.g., 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); Robert P. Mosteller, *Crawford's Impact on Hearsay Statements in Domestic Violence and Child Sexual Abuse Cases*, 71 BROOK. L. REV. 411 (2005) [hereinafter *Crawford's Impact*]; Michael H. Graham, *Indicia of Reliability and Face to Face Confrontation: Emerging Issues in Child Sexual Abuse Prosecutions*, 40 U. MIAMI L. REV. 19 (1985); Laurie E. Martin, *Child Abuse Witness Protections Confront Crawford v. Washington*, 39 IND. L. REV. 113 (2005); Scallen, *supra* note 204; Robert P. Mosteller, *Remaking Confrontation Clause and Hearsay Doctrine Under the Challenge of Child Sexual Abuse Prosecutions*, 1993 U. ILL. L. REV. 691 (1993) [*Remaking Confrontation Clause*]; *Ohio v. Clark*, 135 S. Ct. 2173, 2181-83 (2015); Friedman Brief, *supra* note 185, at 7 n. 2. It is noteworthy that use of hearsay may be particularly important in this context. See, e.g., *Crawford's Impact*, *supra* note 218, 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.").

²¹⁹ See, e.g., Martin, *supra* note 218, at 142-143.

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.²²⁰

As such, the Court could—at least in theory—seek to interpret confrontation rules differently in connection with memory impairment in children.²²¹

If the Court did choose to set a different confrontation rule in child memory loss cases, the challenge would be how technically and consistently to do so. One option would be for the Court to set a separate bright-line rule for children, the most obvious of which being that the *Owens-Plus* approach²²² 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 some type of 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.²²³ Perhaps this would entail the prosecution making a sufficient showing of necessity²²⁴ 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 recalled, and the defendant's actions. As previously noted, we think the Court might be disinclined to use such a balancing approach where the defendant's confrontation rights are at issue,²²⁵ and Justice Scalia in *Crawford* specifically derided the subjective reliability approach that had existed under the *Roberts* regime.²²⁶

²²⁰ *Remaking Confrontation Clause*, *supra* note 218, at 692.

²²¹ *See, e.g.*, Martin, *supra* note 218, at 114, 121-122; Rothstein, *supra* note 218, at 551-52; Clark, 135 S. Ct. at 2181-83; *Remaking Confrontation Clause*, *supra* note 218, at 692, 805-07; *Maryland v. Craig*, 497 U.S. 836, 851-60 (1990); Friedman Brief, *supra* note 185, at 7 n. 2. Proof and cross-examination in child cases may also be problematic. *See, e.g.*, *Remaking Confrontation Clause*, *supra* note 218, 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.”); *Crawford's Impact*, *supra* note 218, 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.”)

²²² Recall that, by the *Owens-Plus* approach, we mean that even a witness with complete memory loss could afford a defendant her confrontation rights.

²²³ *See, e.g.*, Martin, *supra* note 218, at 122-24; Scallen, *supra* note 204, at 1559-60, 1566; *Craig*, 497 U.S. at 851-60 (“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.”).

²²⁴ *Craig*, 497 U.S. at 855-56.

²²⁵ *See, e.g.*, Martin, *supra* note 218, at 122-24; *Craig*, 497 U.S. at 860-70 (“Seldom has this Court failed so conspicuously to sustain a categorical guarantee of the Constitution against the tide of prevailing current opinion.”) (Scalia J., dissenting).

²²⁶ *Crawford*, 541 U.S. at 62-64 (“Reliability is an amorphous, if not entirely subjective, concept. There are countless factors bearing on whether a statement is reliable [.]”).

We suspect that the Supreme Court would not choose to address memory loss in children unless the issue were directly raised to the Court. However, since lower courts are likely to face the issue prior to it reaching the Supreme Court, we think it is important that the Court 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 least contemplate further developing the concept it raised in *Ohio v. Clark* that, under the primary purpose test, the statements of very young children “will rarely, if ever, implicate the Confrontation Clause.”²²⁷ 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.”²²⁸ 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.²²⁹

H. Expert or Lay Witness

Dr. Marie Planck conducted a forensic analysis which tied an accused to the crime. After having rendered the analysis and authored 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 or whether it was accurate, or any other facts and 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. It is not possible to now retest the samples. Dr. Planck takes the stand at the accused’s trial to support admission of her forensic report, but she is only able to 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?

In recent years, the Confrontation Clause’s application to expert witnesses and forensic reports has been hotly debated.²³⁰ 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

²²⁷ *Clark*, 135 S. Ct. at 2180-82.

²²⁸ *Id.* (“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.”); *see also id.* (noting historical evidence supporting that the statements of the 3-year old witness under the circumstances would have been admissible at common law).

²²⁹ The Court could also consider whether other populations beyond children deserve special protections, such as domestic violence victims.

²³⁰ *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009); *Bullcoming*, 564 U.S. 647; *Williams*, 567 U.S. 50; *see also Stuart*, 139 S. Ct. 36 (Gorsuch J., dissenting); *Grabbing the Bullcoming*, *supra* note 174; Ronald J. Coleman & Paul F. Rothstein, *Williams v. Illinois and the Confrontation Clause* (Dec. 6, 2011), <http://www.publicsquare.net/2011/12/williams-v-illinois-confrontation-clause/>; *A Game of Katso and Mouse*, *supra* note 3.

illustrated to the jury to diminish reliability of the evidence.²³¹ It is noteworthy that 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.²³² The *Fensterer* Court did not foreclose the possibility that more extreme memory loss could lead to a violation of confrontation rights.²³³ A witness like Dr. Planck—who 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 their lay counterparts. For instance, one commenter has argued that, since an expert's testimony consists of such expert's opinion, where 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.²³⁴ 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 as less of an "expert" and the jury may readily discount his opinion.²³⁵ 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 simply forgetful.²³⁶

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 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.²³⁷ The view that analysts and conventional witnesses should be treated similarly is exemplified by the opinion of Justice Scalia, writing for the Court, in *Melendez-Diaz v. Massachusetts*.²³⁸ In contrast, Justice Kennedy's dissenting opinion in *Melendez-Diaz* represents the opposing view.²³⁹ Justice Kennedy chided the Court for not seeking to acknowledge the "real differences" between conventional witnesses on the one hand and laboratory analysts who had performed tests on the other.²⁴⁰ According to Justice Kennedy, the Confrontation Clause's text referred to types of persons, specifically "witnesses against" a defendant.²⁴¹ Laboratory analysts were not "witnesses against" the accused as understood at the framing, and the Clause instead targeted conventional witnesses, i.e. those who perceive an event giving them personal

²³¹ *Fensterer*, 474 U.S. at 20.

²³² *Id.* at 16-17.

²³³ *Id.*

²³⁴ Seltz, *supra* note 186, at 886.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ See *Melendez-Diaz*, 557 U.S. 305; *Bullcoming*, 564 U.S. 647; *Williams*, 567 U.S. 50; see also *A Game of Katso and Mouse*, *supra* note 3.

²³⁸ *Melendez-Diaz*, 557 U.S. at 306-07, 315-17.

²³⁹ *Id.* at 330-57.

²⁴⁰ *Id.* at 330.

²⁴¹ *Id.* at 343.

knowledge of an aspect of a defendant's guilt.²⁴² According to Justice Kennedy, analysts were distinct from conventional witnesses in at least three ways: (i) conventional witnesses recalled past events while analysts' reports contained near-contemporaneous observations; (ii) analysts observed neither the crime itself, nor any human action relating to it; and (iii) conventional witnesses responded to questions under interrogation, while laboratory tests did not.²⁴³ Justice Scalia disagreed, and found Justice Kennedy's three purported distinctions unavailing.²⁴⁴

Even though the issue was divisive and even though Justices Gorsuch and Kavanaugh have now replaced Justices Scalia and Kennedy, it remains unclear that the Court would rethink its position on treating analysts and lay witnesses similarly.²⁴⁵ 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,²⁴⁶ 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, although analysts are only a subset of experts, we would 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 bed in the context of *White* or *Tapia*, these are the issues we anticipate federal and state courts will be called upon to answer in the coming years, and we suspect the Supreme Court will eventually need to answer them.

Assuming that *Owens* continues to be precedent and that the Court prefers a bright-line approach, there would be some appeal to the *Owens-Plus* approach, i.e. an approach under which complete memory loss witnesses can afford a defendant her confrontation rights. Setting a constitutional line which 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,²⁴⁷ 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,

²⁴² *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.

²⁴³ *Id.* at 345-46.

²⁴⁴ Justice Scalia found Justice Kennedy's three purported distinctions unavailing. *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.

²⁴⁵ See *A Game of Katso and Mouse*, *supra* note 3.

²⁴⁶ *Id.*

²⁴⁷ See *Owens*, 484 U.S. at 559-64.

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).

If the Court did choose 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 Supreme Court opted not to clarify the law in this area using *White* or *Tapia*, 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.