No. 18-8862

IN THE

Supreme Court of the United States

RODERICK WHITE,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF LOUISIANA, FIRST CIRCUIT

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2(b), the National Association of Criminal Defense Lawyers (NACDL) respectfully requests leave to file the attached amicus curiae brief in support of certiorari. Petitioner has consented to the filing of this brief; a blanket letter of consent from petitioner is on file with this Court. Amicus is filing this motion because respondent has declined to consent.

NACDL is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. It has a nationwide membership of thousands of direct members, and up to 40,000 affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice.

NACDL files numerous amicus briefs each year in this Court and other federal and state courts, seeking to provide assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. This case presents a question of great importance to NACDL and the clients its attorneys represent: Whether under the Confrontation Clause a State may introduce an out-of-court testimonial

accusation made by a declarant who has suffered total memory loss and thus cannot be subject to meaningful cross-examination. This question implicates both significant constitutional concerns as well as, more generally, the fundamental fairness of criminal proceedings. NACDL is well suited to provide additional insight into the implications of the decision below for criminal defendants and the criminal process.

NACDL's participation is especially important here, given that petitioner has specifically noted that his status as a prisoner limited his ability to conduct relevant legal research. Pet. 14-15; *see also id.* at 8 n.5, 11 n.6. The attached brief helps to fill that void.

For these reasons, NACDL respectfully requests that the Court grant leave to file this amicus curiae brief in support of certiorari.

Respectfully submitted,

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Authorities

Other Authorities

INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

The State of Louisiana sentenced Roderick White to die in prison on the basis of an out-of-court

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[1] Counsel of record received timely notice of the intent to file this brief, and petitioner's counsel filed a blanket letter of consent. Respondent's counsel withheld consent and, accordingly, amicus has submitted a motion for leave to file. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than amicus and its counsel made a monetary contribution intended to fund the preparation or submission of the brief.

statement that another suspect, Brian Coleman, gave to the police when they brought him in for questioning. That statement was the only testimony that White was involved in the crime at all: At least two other witnesses failed to identify White as the perpetrator. And the forensic evidence—biological material taken from the victim's clothing and fingernails, which did not match White's DNA—similarly confirmed White's lack of involvement.

Perhaps unsurprisingly in light of the inconsistencies between his testimony and the other evidence in the case, Coleman recanted. He executed an affidavit renouncing his inculpation of White, explaining that his statement was made while intoxicated and under extreme pressure from the police. Indeed, Coleman's father was a police officer who was present in the interrogation room while Coleman was being questioned. The trial court, however, prohibited White from introducing that (sworn) affidavit—even as it allowed Louisiana to admit Coleman's (unsworn) statements to the police.

Worse still—and of particular relevance here—White was unable to cross-examine Coleman about his now-recanted statement. Sometime after he executed his affidavit (which, of course, the jury was never able to see) renouncing the very testimony that Louisiana made the centerpiece of its case, a medical condition caused Coleman to experience a severe memory loss. As a result, he was (all agree) unable to recall either the details of the crime he claims to have witnessed or the circumstances under which he gave his statement implicating White (and exonerating himself). Thus, although Coleman was available to—

and indeed did—appear on the witness stand at trial, he was unable to either defend or explain his crucial statement when asked about it by defense counsel. "After September [the year before the crime]," Coleman said, "I don't remember nothing." Pet. App. 4.

Because White had no meaningful opportunity to cross-examine Coleman about his prior testimony, introduction of that out-of-court statement violated the Sixth Amendment. The Confrontation Clause permits the State to offer an out-of-court testimonial statement against a criminal defendant only if the defendant has (or previously had) an "adequate" opportunity to cross-examine the declarant about it. And as this Court has explained, the physical act of appearing on the witness stand is, alone, insufficient to provide that "adequate" opportunity. If a witness appears at trial, but is unable or unwilling to answer the defense's questions about his prior statement, the defendant has not had an adequate opportunity to cross examine him. *Douglas v. Alabama*, 380 U.S. 415 (1965) (no adequate opportunity for cross examination where declarant responded to defense counsel's questions by invoking privilege).

The Louisiana Court of Appeal, however, held—directly contrary to that rule—that as long as "the declarant [is] available" to appear on the stand that is enough. Pet. App. 6. Because it found that "Coleman was available," it thought White was guaranteed nothing further. Pet. App. 6. That conclusion is profoundly wrong and merits this Court's review.

ARGUMENT

The Decision Below Contradicts This Court's Holdings That The Sixth Amendment Guarantees An "Adequate Opportunity To Cross-Examine" The Declarant With Respect To Out-Of-Court Testimony.

A. The Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him." This Court has understood that provision—in accord with its original meaning and common-law tradition—to permit the admission of out-of-court testimony "only if the defendant ha[s] an adequate opportunity to cross-examine" the declarant. *Crawford*, 541 U.S. at 57.

This Court has made clear that an "adequate opportunity to cross-examine" (as the term itself suggests) is not satisfied by merely *any* opportunity to cross-examine. In particular, it guarantees the defendant more than just that the declarant will go through the formal exercise of physically appearing on the witness stand and being asked questions by the defense. As this Court has put it: "Confrontation means more than being allowed to confront the witness physically." *Davis v. Alaska*, 415 U.S. 308, 315 (1974); *see also California v. Green*, 399 U.S. 149, 158 (1970) (Confrontation Clause requires that witness be "subject to full and effective cross-examination"). At the very least, the Confrontation Clause requires that the witness must be willing and able "to defend or explain" his out-of-court statement. *Crawford*, 541 U.S. at 59 n.9.

That rule makes good sense. The "principal evil at which the Confrontation Clause was directed" was the use of an out-of-court testimonial statement against the defendant, without opportunity for cross-examination of the declarant. *Crawford*, 541 U.S. at 50. Crucially, that is true even if the defendant has other means by which he could impeach the statement's reliability—*e.g.*, by introducing other evidence that tends to contradict it, or by arguing to the jurors that they should disbelieve the statement precisely because the declarant has not been subject to sworn cross-examination. *See Crawford*, 541 U.S. at 62. That is because none of those alternatives is an adequate substitute for "testing in the crucible of cross-examination"—which, in the Framers' "judgment" was the means by which a statement's "reliability can best be determined." *Id.* at 61. Said otherwise, confidence in a statement's reliability "cannot be had except by the direct and personal putting of questions and obtaining immediate answers." *Davis*, 415 U.S. at 316 (quoting 5 John Wigmore, Evidence § 1395, at 123 (3d ed. 1940)). A witness who physically takes the stand but is unable or unwilling to provide "immediate answers" to questions about his prior statement, is thus no different in the relevant sense than a witness who declines to take the stand at all. In either case, the defendant's right to "try to expose [the declarant's] accusation as a lie" through questioning is thwarted. *Crawford*, 541 U.S. at 62.

For that reason, this Court had little trouble holding that a defendant does not receive an adequate opportunity for cross-examination when the declarant physically takes the witness stand and is subject to

questioning by the defense, but responds to the defense's inquiries about his out-of-court statement with an assertion of privilege. *Douglas*, 380 U.S. at 420. That is unsurprising. Because the witness would not "defend or explain" his out-of-court statement, it is (for purposes of the Confrontation Clause) as if the witness simply did not appear at all. *Crawford*, 541 U.S. at 59 n.9. Indeed, in *Crawford* this Court described this scenario as tantamount to providing "no opportunity to cross-examine." 541 U.S. at 57 (citing *Douglas*, 380 U.S. at 418-20). That the defendant could have argued to the jury that the declarant's statement was not to be believed, because he would not answer the questions that were put to him about it, was irrelevant. The Sixth Amendment guarantees not just a chance to attack a witness's credibility collaterally, but the opportunity for "effective confrontation"— and that was impossible if the declarant "relied on his privilege" instead of supplying an "answer." *Douglas*, 380 U.S. at 420.

That same rule governs here. Just as in *Douglas*, the declarant here appeared on the witness stand, but did not answer defense counsel's questions about his prior, out-of-court statement. In the words of *Crawford*, he did not "defend or explain" his out-of-court testimony, and thus provided "no opportunity to cross-examine" him about it. 541 U.S. at 57, 59 n.9. That Coleman's inability to answer questions stemmed from his memory loss, rather than an assertion of privilege or refusal to take the stand altogether, is irrelevant. Regardless of the reason, when the declarant cannot or will not answer questions about his prior statement, the defendant is deprived of his ability to "try to expose [the

declarant's] accusation as a lie" through questioning. *Crawford*, 541 U.S. at 62.

It is of no moment that (like the defendant in *Douglas*, or for that matter *Crawford* and indeed every other Confrontation Clause case) White could have used means other than cross-examination to attack the declarant's credibility, for instance by pointing out Coleman's inability to remember either the incident described in his prior statement or the circumstances under which it was made.[2] As this Court has explained, the "cross-examination" protected by the Confrontation Clause involves "not only testing the recollection" of the declarant, but also allowing the jury to "judge by his demeanor upon the stand and the manner in which he gives his testimony" whether his prior statement "is worthy of belief." *Mattox v. United States*, 156 U.S. 237, 242-43 (1895). Here, however, Coleman avoided that scrutiny by responding not with answers, but by acknowledging that he could not recall either the underlying events or his earlier statement.

As the Supreme Court of Mississippi has squarely held, where (as here) a declarant both "ha[s] no recollection of the underlying events surrounding his statement" and can "not recall ever having [given it] to [the] police," the Confrontation Clause bars admission of his statement. *Goforth v. State*, 70 So. 3d 174, 186 (Miss. 2011). The Supreme Court of Mississippi reasoned that the Confrontation Clause

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[2] Of course, White's other means of attack on Coleman were limited in a critical way—the trial court forbade him from introducing evidence that Coleman recanted.

requires more than just "that the declarant be physically present and subject to cross-examination." *Id.* at 185. In particular, it relied on *Cookson v. Schwartz*, 556 F.3d 647, 651 (7th Cir. 2009), where the Seventh Circuit rejected the argument "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." *Goforth*, 70 So. 3d at 186 (quoting *Cookson*, 556 F.3d at 651). As the Seventh Circuit explained, the Confrontation Clause requires not just that the declarant be *present* at trial, but that he be willing and able to "*defend or explain*" his prior statement. *Goforth*, 70 So. 3d at 186 (quoting *Cookson*, 556 F.3d at 651) (emphasis in original). Adopting that same rationale, the Supreme Court of Mississippi held that the Sixth Amendment allows admission of a prior testimonial statement only if the declarant has the "ability" to "defend or explain his or her statement." *Goforth*, 70 So. 3d at 186. And a "total lack of memory," that court explained, "deprive[s] [the defendant] any opportunity to inquire about potential bias or the circumstances surrounding [the declarant's] statement," and thus amounts to "no opportunity to cross-examine." *Id.* That analysis should have governed this case too.

B. In the decision below, however, the Louisiana Court of Appeal held directly to the contrary. Indeed, the contrast with the Supreme Court of Mississippi (and the Seventh Circuit decision on which that court relied) was particularly stark. Notably, the Louisiana Court of Appeal did not dispute that White was deprived of an adequate opportunity to cross-examine Coleman. Instead, it rejected the idea that the

Confrontation Clause guarantees an opportunity for "meaningful" or "effective" cross-examination at all. Pet. App. 5. According to the Louisiana Court of Appeal, the Sixth Amendment is satisfied by "physical presence on the stand" alone. Pet. App. 5. In its view, it was thus irrelevant to the constitutional analysis whether "the declarant suffers from memory loss"—even memory loss so severe that it prevents him from defending or explaining both his prior statement and the circumstances under which it was made. Pet. App. 6.

To reach that decision, the Louisiana Court of Appeal purported to rely on this Court's decision in *United States v. Owens*, 484 U.S. 554 (1988), which held that "opportunity for effective cross examination is not denied when a witness testifies as to his current belief but is unable to recollect the reason for that belief." Pet. App. 6. But as is apparent even from the Louisiana Court of Appeal's own description of *Owens*, that case—which involved a witness who had a "current belief" about who perpetrated the crime—does not apply here. In *Owens*, although the defendant suffered a memory loss that meant he "could not remember seeing his assailant" at the time of the crime, he nevertheless "clearly remembered identifying" the defendant "as his assailant" to the police. 484 U.S. at 556. That distinction makes all the difference. A witness who can recall at least the circumstances under which he made his accusatory statement can answer critical questions that allow the defendant to "try to expose [the] accusation as a lie." *Crawford*, 541 U.S. at 62. The defendant can elicit testimony from such a witness about, for instance, 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.

Here, by contrast, Coleman was unable to provide any of that information. In fact, we know (although the jury did not) from Coleman's subsequent affidavit recanting the very statement the State built its case around, just exactly what he would have said on cross-examination had he (like the witness in *Owens*) been able to "clearly remember" the circumstances under which he made his prior statement. Coleman would have testified, for instance, that he was intoxicated when he implicated White. He also would have said that he felt extreme compulsion from the police. And he would have explained that he himself was a suspect in the crime, and that his father (a police officer) was in the room while he was being questioned. But because Coleman—unlike the declarant in *Owens*—could not remember even making his statement to the police, White was deprived of the opportunity to bring any of that information out on cross-examination.

The situation in *Owens* is thus worlds away from the circumstances of this case. 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, like Coleman, 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. The Louisiana Court of Appeal

profoundly erred in treating those two situations as the same. All the more so here, where the extrinsic evidence so strongly suggests that the State of Louisiana has convicted the wrong man. This Court should grant certiorari and reverse.

CONCLUSION

For the reasons above, and those stated in the petition, this Court should grant certiorari and reverse the judgment of the Louisiana Court of Appeal.

Respectfully submitted,

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