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# Court of Appeals

STATE OF NEW YORK

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**THE PEOPLE OF THE STATE OF NEW YORK,**

*Respondent,*

*- against -*

**CHRISTOPHER PORCO,**

*Defendant-Appellant.*

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**BRIEF FOR THE DISTRICT  
ATTORNEYS ASSOCIATION OF THE STATE OF  
NEW YORK AS *AMICUS CURIAE***

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COURT OF APPEALS  
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-against-

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Defendant-Appellant.

**BRIEF FOR AMICUS CURIAE  
DISTRICT ATTORNEYS ASSOCIATION OF THE STATE OF NEW YORK**

PRELIMINARY STATEMENT

The District Attorneys Association of the State of New York ("DAASNY") submits this brief as amicus curiae in the above captioned appeal. By permission of the Honorable Judge Robert S. Smith, Christopher Porco appeals from an order of the Appellate Division, Second Department, entered March 9, 2010. That order affirmed a judgment of the County Court, Orange County (Berry, J.), rendered December 12, 2006, convicting him of Murder in the Second Degree and Attempted Murder in the Second Degree upon a jury verdict, and sentencing him to an indeterminate prison term of twenty-five years to life on the murder count to run

consecutively to a determinate prison term of twenty-five years for the attempted murder conviction.<sup>1</sup>

## INTRODUCTION

Defendant was convicted of murdering his father Peter Porco, confidential clerk to Justice Anthony V. Cardona, Presiding Justice of the Appellate Division, Third Department, and attempting to kill his mother Joan Porco by hitting each repeatedly with an axe. At trial, the People introduced, over defendant's objection, evidence of non-verbal assertive conduct of Joan in response to detectives' questions whether defendant had been the one who had attacked her and her husband. This conduct, a nod and a hand gesture, identified defendant as the killer. In addition, Joan testified that she had no memory of the events of the evening or of identifying defendant as the assailant.

On appeal from the judgment of conviction, defendant claimed that admission of this assertive conduct violated the rule precluding hearsay and his right to confrontation. The Appellate Division, Second Department<sup>2</sup> rejected the latter argument, but did hold that the non-verbal assertion was inadmissible hearsay. Nevertheless, that Court affirmed, concluding that the non-constitutional error was

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<sup>1</sup> Although geographic jurisdiction was in Albany County, the trial was held in Orange County after the Appellate Division, Second Department granted defendant's motion for a change of venue. See People v Porco, 30 A.D.3d 543 (2d Dept. 2006).

<sup>2</sup> The appeal was transferred to that court by order of the Appellate Division, Third Department, entered May 10, 2007.

harmless under the standard for such error outlined in People v Crimmins, 36 N.Y.2d 230, 242 (1975).

Before this Court, defendant contends, inter alia, that the Second Department correctly ruled that Joan Porco's nonverbal assertion did not constitute an excited utterance. Defendant argues that the court erred when it held that, as Joan was available for cross-examination, the improper admission of that assertion did not constitute a Sixth Amendment violation but was, instead, a state evidentiary error. Respondent's view is, of course, that the Second Department erred in its ruling on the admissibility of the statement as an excited utterance and properly concluded that there was no Sixth Amendment violation. Amicus will address only this constitutional question, which is one of significance for prosecutions in New York State: whether the availability of a witness will render admissible, over a Confrontation Clause objection, her testimonial, extrajudicial statement when the declarant/witness has no recollection of the events described in that statement.

#### STATEMENT OF AMICUS CURIAE

The District Attorneys Association of the State of New York (DAASNY) is a state-wide organization composed of elected District Attorneys from throughout New York State, the Special Narcotics Prosecutor of the City of New York, and their over 2900 assistants. Members of the Association are responsible for the investigation and prosecution of violent crimes including homicides, attempted murders and assaults. DAASNY's experience on issues relating to the criminal law and criminal procedure

applicable to the prosecution of such crimes places it in a position to assist the Court's resolution of the specific issue of statewide concern raised by this appeal: whether the Sixth Amendment's requirement that a witness testify and subject herself to cross-examination before her out-of-court statements may be introduced for their truth mandates that the witness possess a certain level of recollection about the subject matter of those out-of-court statements.

### THE RELEVANT FACTUAL BACKGROUND

On the morning of November 15, 2004, Peter and Joan Porco were found in their home, having been savagely beaten. Peter was discovered by a colleague who had come to the Porco's home to check on them after Peter had failed to arrive for work. He was lying at the foot of the staircase, dead, having been struck anywhere from 10 to 30 times with an axe. The colleague called the police and then waited outside of the house for their arrival.

Police personnel entered the house and found Joan, upstairs, on her bed in a pool of blood. She was still alive. She, too, had been hit on the head, and had suffered a shattered jaw as well as severe head trauma. An ambulance was called and while the emergency medical team was treating her, one of the detectives asked her if defendant, her son Christopher, had committed the attack. Joan responded affirmatively by both nodding her head up and down and moving her finger in the same manner. At trial, Joan testified that she had no memory either of the attack itself or of her identification of defendant as her attacker. Evidence of her

demonstrative answer to the detective's question was admitted as an excited utterance over Confrontation Clause and hearsay objections.

On defendant's appeal renewing these claims, the Appellate Division, Second Department rejected the constitutional claim as Joan had taken the witness stand and had therefore been available for cross-examination, a circumstance that eliminates the Confrontation Clause concerns expressed in Crawford v Washington, 541 U.S. 36 (2004). It did, however, reject the notion that Joan's non-verbal assertive head nod constituted an excited utterance. The court applied the non-constitutional harmless error standard enunciated in People v Crimmins, 36 N.Y.2d 230, 242 (1975), and concluded that "any error in admitting that evidence was harmless in light of the overwhelming evidence of the defendant's guilt without reference to the error and the absence of any substantial probability that the error might have contributed to his conviction." People v Porco, 71 A.D.3d 791 (2d Dept. 2010). That court then affirmed the judgment of conviction.

The case is now before this Court on a grant of leave by Judge Smith.

## POINT

PURSUANT TO THE CONFRONTATION CLAUSE,  
A DECLARANT/WITNESS'S OUT-OF-COURT  
STATEMENT IS ADMISSIBLE FOR ITS TRUTH SO  
LONG AS THE WITNESS TAKES THE STAND AND  
IS SUBJECT TO CROSS-EXAMINATION, WHETHER  
OR NOT THE DECLARANT/WITNESS CAN  
REMEMBER THE EVENTS DESCRIBED IN THAT  
STATEMENT.

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The Sixth Amendment's Confrontation Clause states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." Prior to 2004, the United States Supreme Court interpreted the Sixth Amendment to admit out-of-court statements for their truth so long as those statements bore adequate indicia of reliability. Reliability could be inferred when the statements satisfied a firmly rooted exception to the hearsay rule, such as when they constituted excited utterances. Otherwise, hearsay statements were admissible upon a demonstration that the statements bore particularized guarantees of trustworthiness. Ohio v Roberts, 448 U.S. 56 (1980). Under the Ohio v Roberts framework, the prosecution could satisfy that requirement by establishing that the circumstances surrounding the making of the statement rendered the statement worthy of belief. Idaho v Wright, 497 U.S. 805 (1990).

In 2004, the United States Supreme Court decided Crawford v Washington, 541 U.S. 36 (2004), a case that worked a sea change in this area. In Crawford, the Court ruled that the Sixth Amendment barred the introduction of "testimonial"

hearsay unless the declarant was unavailable to testify and the defendant had had a prior opportunity to cross-examine the declarant. In other words, the Roberts reliability test no longer governed; rather the issue was whether the statement was "testimonial." See also Michigan v Bryant, \_\_\_ U.S. \_\_\_, 131 S.Ct. 1143 (2011). Although the Court declined, in Crawford, to define fully what the term "testimonial" meant, it provided a more complete definition in Davis v Washington, and Hammon v Indiana, 547 U.S. 813 (2006). The Court explained that

"[s]tatements 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."

Id. at 823.

At the same time, the Crawford Court also made clear that so long as the declarant is available to testify, the Sixth Amendment does not bar the introduction of his or her out-of-court statement. Its admissibility is, instead, governed by state rules of evidence. 541 U.S. at 59, n. 9 ("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[]"). The Court clarified that the Confrontation Clause provides a "procedural rather than a substantive guarantee. It commands, not that evidence be

reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." 541 U.S. at 61.

Thus, the admissibility of an out-of-court testimonial statement over Confrontation Clause objection turns on the declarant's availability to testify. If the witness is able to take the stand, then the Sixth Amendment does not bar the admission of her out-of-court statement. If the witness cannot take the stand, then that out-of-court statement is inadmissible unless the defendant had a prior opportunity to cross-examine the declarant. Indeed, the trend of Supreme Court decisions both preceding and following Crawford makes clear that that test does not change, even if the witness's testimony reveals that she cannot remember either making the out-of-court statement or the facts contained in that statement.

Any review of the cases relevant to the impact memory loss has on Confrontation Clause analysis with respect to statements made by witnesses who testify at trial must begin with California v Green, 399 U.S. 149 (1970). There, Melvin Porter, who had been arrested for selling marijuana, had told the police that the defendant was his supplier and testified at a preliminary hearing to that effect. Id. at 151. When Porter testified at the defendant's trial, however, he was evasive on some subjects and claimed memory loss about certain other events. As authorized under Section 1235 of the California Code, the prosecutor introduced portions of Porter's hearing testimony as well as the statements that he had made to the police for their

truth. Id. at 152. The California Supreme Court found that Section 1235 violated the Sixth Amendment and reversed the defendant's conviction. Id. at 153.

In reversing the California Supreme Court, the United States Supreme Court reviewed the origins of the Confrontation Clause as well as its own jurisprudence in this area and noted that, "[v]iewed historically . . . there is good reason to conclude that the Confrontation Clause is not violated by admitting a declarant's out-of-court statements, as long as the declarant is testifying as a witness and subject to full and effective cross-examination." Id. at 158. The Court held that because Porter had been called as a witness and was subject to cross-examination, the Sixth Amendment was not violated by the introduction of his out-of-court statements for their truth. Id. at 168.

To be sure, in Green, the Court had no occasion to address the issue of whether Porter's "apparent lapse of memory so affected [the defendant's] right to cross-examine as to make a critical difference in the application of the Confrontation Clause. . . ." because neither side had raised the question. Id. at 168-69. The Court therefore declined to rule on that issue. Nevertheless, Green's significance is that it marks the first time the Court recognized that there might be Confrontation Clause implications for a witness with a memory lapse different than those for a witness whose trial testimony was inconsistent with his out-of-court statements.

The effect of a witness's memory lapse on Confrontation Clause analysis was squarely raised in Delaware v Fensterer, 474 U.S. 15 (1985). There, an expert witness

testified that he had examined certain hairs on a cat leash, which the prosecution contended was the murder weapon, and had come to the conclusion that those hairs were similar to the victim's and that at least one had been forcibly removed. The expert explained that there were three methods by which to determine whether a hair had been forcibly removed, but that he had no recollection as to which method he had used. Id. at 16-17. The defendant complained that he was denied his Sixth Amendment right to cross-examine the witness as a result of the witness's memory loss on this crucial issue. Id. at 17.

In rejecting the defendant's claim, the Supreme Court noted that, to date, its Confrontation Clause cases could be divided into two "broad categories": those involving the admission of out-of-court statements and those concerned with restrictions imposed either by law or by the trial judge on the scope of cross-examination. Id. at 18. The witness's memory loss fell into neither category: the People were not attempting to introduce the witness's out-of-court statements and the trial judge had not limited the defense's cross-examination. The Court recognized that the goals of cross-examination were to test the witness's perception and memory. But, the Court continued, "it does not follow that the right to cross-examine is denied by the State whenever the witness's lapse of memory impedes one method of discrediting him." Id. at 19. Indeed,

"[t]he 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 fact finder the reasons for giving scant weight to the witness' testimony."

Id. at 21-22. The Court reasoned that, even where the witness could not remember, the witness was still required to make an oath and testify in the presence of the accused, and the fact finder was still able to observe the witness's demeanor under cross-examination. Id. at 19-20.

In United States v Owens, 484 U.S. 554 (1987), the issue before the Supreme Court was "the significance of a hearsay declarant's memory loss both with respect to the Confrontation Clause, and with respect to" the federal rules of evidence. Id. at 557 (citations omitted).<sup>3</sup> There, the victim was attacked with a metal pipe and sustained severe memory impairment as a result. In an interview with an FBI agent shortly after the attack, the victim identified the defendant as his attacker from a photo array. At trial, the victim testified that he remembered feeling the blows to his head and seeing blood on the floor. He told the jury that he also remembered identifying the defendant to the agent. On cross-examination, however, he admitted that he did not remember seeing his assailant when attacked and also could not

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<sup>3</sup> The relevant Federal Rules of Evidence were Rule 802, which states that hearsay is not admissible at trial unless provided by other rules, and Rule 801(d)(1)(C), which permits the introduction of a witness's prior statement, if that statement is "a prior identification of a person after perceiving that person." See 484 U.S. at 557, n. 2.

remember whether any of the people who visited him at the hospital might have suggested the defendant to him as his attacker. Id. at 556.

The Supreme Court noted that, in both California v Green, and Delaware v Fensterer, it had left open the question of whether "a Confrontation Clause violation can be founded upon a witness' loss of memory." 484 U.S. at 557-58. The Court now answered it. First, it reiterated that the Confrontation Clause guaranteed the opportunity for cross-examination, not for effective cross-examination. It then turned to its statement in Fensterer that this opportunity was not denied when a witness was unable to recall the basis for his current testimony, as the defendant could still probe the witness's bias, lack of care, eyesight and his memory in general. The Court reasoned that those areas for examination were similarly available where the witness could not explain his past identification. Id. at 559. The Court also said that the fact that the testimony involved an out-of-court identification did not change the analysis. That was because the dangers of admitting hearsay testimony were not present when the declarant was on the witness stand and subject to unrestricted cross-examination. Id. at 560.

The Court then addressed the defendant's alternate argument that the introduction of the witness's out-of-court identification violated Federal Rule of Evidence 801(d)(1)(C), which removed from the definition of hearsay a prior identification statement so long as the declarant testified at the trial and was "subject to cross-examination." The Court rejected the lower court's conclusion that, as a

result of his memory loss, the victim was not subject to cross-examination. The Court ruled that the requirement that the witness be subject to cross-examination was met when the witness took the stand, was placed under oath and responded willingly to questions:

"Just as with the constitutional prohibitions, limitations on the scope of examination by the trial court or assertions of privilege by the witness may undermine the process to such a degree that meaningful cross-examination within the intent of the Rule no longer exists. But that effect is not produced by the witness's 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.

Owens must resolve the question as to whether, for Sixth Amendment purposes, a witness is available to testify even though she has no memory of the crime or making an identification of her attacker. Owens makes clear that a defendant's Sixth Amendment rights are protected so long as the witness is called to the stand and exposes herself to cross-examination, even if her answers are that she cannot recall anything. While the victim/witness in Owens did not have complete amnesia, he had so little memory of the salient events that his testimony hardly provided anything substantive. The victim had no memory of most of the details of his attack, other than being hit; he had no memory of seeing his attacker; he had no memory of who had said what to him before he made his out-of-court identification; and he had no memory of why he thought the defendant was his attacker. His one memory, of

making an identification, was so bereft of substantive details that it cannot be credibly argued that, at the time he took the witness stand, he was in possession of any of the facts that established the defendant's guilt. If, as the Owens Court found, the defendant's right to cross-examine the witness was satisfied there, a defendant's confrontation rights are similarly protected when the witness also does not remember making the identification. The test turns on whether the witness took the stand to answer questions -- not on the answers to those questions.

Crucial to a proper understanding of Owens is its recognition not only that a witness is regarded as subject to cross-examination when he is placed on the stand, under oath, and responds willingly to questions, 484 U.S. at 561, as was the case here, but that the Confrontation Clause's guarantee of an 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's bias, his lack of care and attentiveness, his poor eyesight, and even (what is often a prime objective of cross-examination, see 3A J. Wigmore, Evidence § 995, pp. 931-932 [J. Chadbourn rev. 1970]) the very fact that he has a bad memory. 484 U.S. at 559.

While Owens is a pre-Crawford case, there can be little doubt that its conclusion -- that a declarant's memory loss will not bar use of the declarant's out-of-court statement if he or she is called to the stand -- is the law even post-Crawford. First, Crawford itself iterated that the Confrontation Clause was a procedural, not a

substantive guarantee. 541 U.S. at 61. In other words, as long as the mechanism of cross-examination of the declarant is available to a defendant against whom the testimonial hearsay is being introduced, the Confrontation Clause is not violated. This is necessarily true even if the declarant has no specific recollection about the topic of his statement. The Supreme Court has strongly indicated that this remains true.

In Bullcoming v New Mexico, 2011 U.S. LEXIS 4790, decided June 23, 2011, the Supreme Court was faced with a Confrontation Clause challenge to introduction of a forensic laboratory report of the defendant's blood alcohol level in the absence of the forensic analyst who prepared the report. A divided Supreme Court concluded that there had indeed been a Confrontation Clause violation but significantly, in recognizing that had the analyst testified, the report would have been admissible over the constitutional challenge, it addressed the impact of the forensic analyst's likely inability to "recall a particular test, given the number of tests each analyst conducts and the standard procedure followed in testing." Even with this inability, observed the Court, the analyst's testimony under oath would have enabled the defendant's counsel to raise before a jury questions concerning her proficiency, the care he took in performing his work, and his veracity." 2011 U.S. LEXIS 4790 fn. 7. In other words, inability to recall the circumstances relating to the events in the extrajudicial statement will not create a Confrontation Clause problem for testimonial hearsay when the declarant does testify and offers herself for cross-examination.

Critically, this Court, too, has recognized that it is the ability to ask questions that is the salient issue when addressing admissibility of hearsay offered as a result of a witness's memory loss. In People v Patterson, 93 N.Y.2d 80, 83 (1999), this Court considered whether Criminal Procedure Law Section 60.25 permitted the introduction of third-party testimony about a prior identification when the identifying witness was deceased. Pursuant to that section, testimony about an out-of-court identification may be introduced where the identifying witness testifies that she has made that prior identification and is "unable at the proceeding to state, on the basis of present recollection, whether or not the defendant is the person in question[.] . . ." CPL 60.25 (1)(iii). The Court rejected the People's argument that, because the eye witness was deceased, he was no longer able to state, on the basis of present recollection, that the defendant was the person who had attacked him and that therefore the statute applied. In making this ruling, this Court explained that:

"the testimony of a third party non-identifying witness is allowed as evidence-in-chief under the statute only when coupled with the real identifying witness's testimony as to the prior identification (CPL 60.25[2]). It is through this coupling that the testimony of both 'witnesses' forms a complimentary, reliable chain of evidence, linking the acceptance of the prior identification. The testimony of the third party, who witnessed the previous identification but not the crime, standing alone cannot provide the indispensable safeguards of affording the defendant the benefit of probing cross-examination and the defensive development of reasonable doubt about the identification."

Id. at 83 (emphasis supplied)(citations omitted). As this highlighted portion makes clear, the Court found that the statute provided sufficient protection of the defendant's rights by mandating that the defendant be permitted to pose questions to the identifying eye witness. As is obvious, those questions would be unlikely to elicit much substantive proof as the witness, by definition, has no present recollection of whether the defendant was, in fact, her attacker. In other words, and in lockstep with Owens, this Court concluded that the critical determination in protecting a defendant's rights was not on the quality of answers to the cross-examination questions, but on the fact that the questions could be posed in the first instance.

This analysis resolves defendant's federal constitutional claim. Defendant also asks this Court to evaluate his claim under Article 1 Section 6 of the New York State Constitution (Reply Brief at 8-10). That claim is not only unpreserved as defendant did not raise it in the trial court, but he has raised it here, improperly, for the first time in his reply brief. People v Ford, 69 N.Y.2d 775, 777 (1987). In any event, this Court has never held that Article 1 Section 6 is to be given a different or more expansive interpretation from the Sixth Amendment. Rather, this Court has consistently looked to the Sixth Amendment in deciding whether a defendant's cross-examination rights have been protected. See People v Montes, 16 N.Y.3d 250 (2011) (relying on federal cases in holding that the defendant's confrontation rights were not violated when a witness could not be recalled to testify about certain information that was not discovered until after her testimony had concluded); see also People v Nieves-Andino,

9 N.Y.3d 12 (2007) (analyzing admissibility of out-of-court statements under Crawford); People v James, 93 N.Y.2d 620 (1999) (looking to federal cases interpreting 6th Amendment to resolve admissibility of certain out-of-court statements).

Moreover, the Owens analysis still suggests nothing untoward with the admission of a testimonial statement under the circumstances presented here. There was a minority view in Owens, espoused by Justices Brennan and Marshall in their dissent in Owens, which would require the courts to examine the witness's answers in order to evaluate whether those answers are sufficiently substantive to "provide the fact-finder" with "an adequate basis upon which to assess the truth of the proffered evidence." Owens, 484 U.S. at 570 (dissent by Justices Brennan and Marshall). We submit that such a test would be unworkable and lead to unfair results.

To begin, that test was proposed prior to the Supreme Court's ruling in Crawford. This timing is critical in assessing the viability of the dissenters' proposed test. When Owens was announced, Confrontation Clause claims were evaluated under the Ohio v Roberts reliability framework. This, as the Crawford court noted, was a substantive guarantee and not the procedural assurance that the Clause actually provided. But, by definition, the proposed test was keyed to the Ohio v Roberts framework.

The Owens dissenters dismissed the concern that their test would cause "countless Confrontation Clause challenges," 484 U.S. at 570, by predicting that it

would be the "rare case" in which a witness suffered from total memory loss and that instead:

[m]ore typically, witnesses asserting a memory loss will either not suffer (or claim) a total inability to recollect, or will do so under circumstances that suggest bias or ulterior motive; in either case, the witness' partial memory or self-interest in claiming a complete memory loss will afford the fact finder an adequate basis upon which to evaluate the reliability and trustworthiness of the out-of-court statement. Even in those relatively few cases where no such basis can be elicited, the prior statement is still admissible if it bears independent "indicia of reliability."

Id. at 571 (emphasis supplied).<sup>4</sup> As this highlighted section makes clear, Justice Brennan was operating under the assumption that prosecutors would be able to satisfy the Ohio v Roberts reliability test and thus would have other means by which

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<sup>4</sup> It is worth noting that, even with the holding in Owens, criminal defendants have repeatedly brought Confrontation Clause challenges, all of which have been unsuccessful, based on the quality of the witness's memory. The respondent cites a number of such cases in his brief and we have included a list of others. See, e.g., Flores v Lund, 52 Fed.Appx. 868 (8th Cir. 2002); United States v Roy Spotted War Bonnet, 933 F.2d 1471 (8th Cir. 1991); United States v Keeter, Park and Ahrens, 130 F.3d 297 (7th Cir. 1997); United States v Valdez-Soto, 31 F.3d 1467 (9th Cir. 1994); United States v Knox, 124 F.3d 1360 (10th Cir. 1997); United States v Milton, 8 F.3d 39 (D.C. 1993); Carter v Werholtz, 2011 U.S. Dist. LEXIS 591 (D. Kansas 2011); Salinas v Johnson, 2010 U.S. Dist. LEXIS 98257 (S.D. Tex. 2010); Park v Yates, 2010 U.S. Dist. LEXIS 140585 (C.D. Cal. 2010); Gutierrez v Yates, 2009 U.S. Dist. LEXIS 64789 (N.D. Cal. 2009); West v Rapeleje, 2009 U.S. Dist. LEXIS 121409 (E.D. Mich. 2009); Del Toro v Martel, 2010 U.S. Dist. LEXIS 120554 (C.D. Cal. 2010); Delao v Kirkland, 2009 U.S. Dist. LEXIS 23054 (C.D. Cal. 2009); West v Rapeleje, 2009 U.S. Dist. LEXIS 121409 (E.D. Mich. 2009); Holliday v Symmes, 2009 U.S. Dist. LEXIS 125652 (D. Minn. 2009); United States v Harty, 476 F.Supp. 2d 17 (D. Mass. 2007); Gorman v Merrill, 2006 U.S. Dist. LEXIS 88774 (D. Maine 2007); King v Schriro, 2006 U.S. Dist. LEXIS 42876 (D. Arizona 2006); Arizona v Real, 214 Ariz. 232 (Arizona Ct. App. 2007); People v Cowan, 236 P.3d 1074 (Cal. 2010); State v Juan V., 109 Conn. App. 431 (2008).

to introduce out-of-court statements. That is no longer the relevant framework and it necessarily follows that any test grounded in judicial determination of reliability will no longer satisfy the demands of the Confrontation Clause.

In fact, as a result of Crawford, utilizing this proposed test would work a significant disadvantage -- and one clearly not anticipated by Justice Brennan -- to prosecutors. Uncooperative witnesses could simply take the stand and insist that they did not remember anything. Prosecutors would be powerless to do as Justice Brennan had suggested and introduce those out-of-court statements that were otherwise admissible under New York's evidentiary rules as proof of the defendant's guilt. As a result, guilty defendants would be able to avoid punishment for their crimes. Simply put, this pre-Crawford test simply should not be applied in a post-Crawford world.

But, even had the law not been changed so significantly, the dissenter's proposed test suffers from several flaws. First, it requires trial judges to separate legitimate amnesia from feigned amnesia. While Justice Brennan appeared to view this determination as simple, such an assumption cannot be sustained. It should be noted that psychiatrists themselves -- experts in the field -- have been grappling with the difficulties in determining whether an individual truly suffers from amnesia or is malingering. They also have noted that, while tests have been developed that assist in that determination, those tests require far more than simply interviewing the subject and making a conclusion. See Bourget, Whitehurst, Amnesia and Crime, 35 J. Am.

*Acad. Psychiatry Law*, 469, 477 (2007) (the important issue is how to determine whether someone is feigning amnesia or is suffering genuine memory loss and despite several attempts, there is still no clear answer as to how to do this); Reid, Malingering, *Journal of Psychiatric Practice*, 226 (July 2000) (noting that a malingerer can continue the deception for an hour and that analyzing malingering requires the use of various tests); Cima, Merckelbach, Nijman, Knauer, Hollnack, I can't remember Your Honor: Offenders Who Claim Amnesia, *German Journal of Psychiatry*, <http://www.gipsy.uni-goettingen.de> (discussing the difficulties experts have in differentiating between organic and feigned memory loss given the ease of simulating memory amnesia). In other words, a trial judge would be poorly suited to make this determination.

Additionally, the difference between total and partial recall is not readily apparent. Indeed, Owens proves that point. There, the victim of the attack did not have complete amnesia: he remembered being attacked, bleeding, and making the out-of-court identification. Nonetheless, the dissenters described him as recalling "virtually nothing" and complaining that his memory loss was so profound that the person assaulted prior to trial was not the person who testified at trial. 484 U.S. at 566. And, they urged the Court to find that the victim had not been available to testify.

Thus, even in Owens, the dissenter's proposed test morphed from an evaluation of whether the witness remembered nothing to whether what the witness remembered was at all useful to the defense. And, that test will open the floodgates.

At the risk of stating the obvious, it must be stressed that any test devised to assess Confrontation Clause claims will necessarily be applied, not just to the introduction of out-of-court statements, but to the admissibility of in-court testimony. Indeed in Fensterer, the defendant's Confrontation Clause attack was not focused on the admission of out-of-court statements as none were admitted. His complaint was that he could not adequately test the truth of the expert's in-court conclusion as a result of the expert's memory loss. Furthermore, all witnesses suffer some memory loss between the time of the crime and the time that they testify. Trials routinely take place months, and in some cases, years after the commission of the crimes. Where defendants have managed to evade arrest for extended periods, trials may well be delayed for more than a decade. See, e.g. People v Vernace, 96 N.Y.2d 886 (2001) (20 year delay); People v Salcedo, 304 A.D.2d 309 (1st Dept. 2005) (16 year delay); People v Tsang, 284 A.D.2d 218 (1st Dept. 2001) (20 year delay). Given the passage of time, the witnesses will have forgotten details, even on key issues. It is also not unusual that they will be unable to refresh their recollections, even by reviewing prior statements. If the Confrontation Clause is interpreted to entitle a defendant to a certain quality of answers, rather than to permit him to pose the questions, then, trial courts will be mired in constant evaluations as to whether the witness's memory lapses were on such significant topics that the defendant's ability to obtain a certain quality of answers was affected. In that case, the court would be asked to rule on requests to strike the entirety of the witness's testimony as a remedy for the Sixth Amendment violation.

Placing the focus of the Sixth Amendment on the quality of answers will affect the viability of several long-standing evidentiary rules. For instance, pursuant to New York's past-recollection-recorded exception to the hearsay rules, a memorandum made of a past fact of which the witness lacks a present recollection may be received in evidence so long as it is established that the witness observed the matter recorded at the time it occurred, can testify that the record correctly represented his knowledge when made and the witness lacks a present recollection of the recorded information. People v Taylor, 80 N.Y.2d 1, 8 (1992); People v Barber, 186 A.D.2d 483 (1st Dept. 1992) (where witness testified that he did not remember observing the defendant pull a gun, his sworn statement made the prosecutor shortly after the crime was admissible). The availability of that exception will be severely curtailed. And, of course, the instances in which a prosecutor may introduce out-of-court identification testimony pursuant to Criminal Procedure Law 60.25 will be similarly limited. Trial judges will now have to assess whether the witness's lack of recollection of the recorded events or of the defendant's identity as the assailant is so encompassing as to render cross-examination "meaningless" under this new test. In those cases, the People will be unable to introduce the previous writing or elicit testimony about the witness's out-of-court identification.

A holding that the defendant's Confrontation rights are protected so long as the witness takes the stand, even if that witness suffers from amnesia about the crime, will not work to tip the scales to the advantage of prosecutors. Again, at the risk of

stating the obvious, a witness's memory loss poses problems for the People in satisfying their burden of proof. Common sense dictates that jurors will be extremely hesitant to convict when the People must rely on testimony from witnesses who, at the time of trial, claim to have little or no memory of the events surrounding the crime. In the absence of substantial corroborative proof, prosecutors will have significant difficulties in obtaining convictions, even when they are permitted to introduce the witness's out-of-court statements.

Furthermore, defendants are not without recourse. As the Supreme Court has discussed, see Fensterer, 474 U.S. at 21-22, defendants are still permitted to ask all relevant questions and will most assuredly be able to obtain answers on some topics. For instance, they can pose questions highlighting the witness's relationship with the defendant before the crime to establish the witness's bias. They can probe the witness's character in general to establish an overall lack of trustworthiness. And, they can highlight to the jury the witness's memory loss and argue that a conviction should not be based on such a lack of concrete testimony from the witness stand. As noted supra, in many instances, this argument will be persuasive.

Finally, in an effort to find some support of his view of the inadmissibility of testimonial hearsay even when the declarant testifies, defendant turns to this Court's decisions on the missing witness charge. Defendant contends that unavailability in the context of a missing witness charge is logically identical to unavailability for resolution of Crawford claims such as the one made here. Thus, concludes

defendant, since such unavailability includes a witness's assertion of the privilege against self-incrimination or incapacity, a witness's incapacity due to amnesia also renders that witness unavailable and her testimonial hearsay inadmissible even if she takes the stand (Defendant's Brief at 30-31). In pressing this view, defendant attempts to convince this Court to equate the proverbial apples with oranges. As this Court has explained:

"The 'missing witness' instruction allows a jury to draw an unfavorable inference based on a party's failure to call a witness who would normally be expected to support that party's version of events. The instruction rests on the commonsense notion that the nonproduction of evidence that would naturally have been produced by an honest and therefore fearless claimant permits the inference that its tenor is unfavorable to the party's cause. The rule is best understood by recognizing that the inquiry must be undertaken from the standpoint of the honest litigant. Thus, when a party truthfully presents a version of events, a factfinder would expect that party's friend or ally (if knowledgeable) to confirm it. If a witness that valuable does not appear to support the party's side -- and if there is no good reason for the witness's absence -- it is only natural to suppose (or as the law has it, infer) that the witness cannot honestly help the party."

People v Savinon, 100 N.Y.2d 192, 196-197 (2003) (internal quotations and citations omitted). Clearly, the underpinnings of the missing witness charge start with the assumption that the witness actually remembers the subject matter of his testimony. It then focuses on how to direct the jury on what inferences are to be drawn from the fact that those memories are not placed before it. Put differently, in the missing witness context, the question of availability focuses on whether the witness, with a

memory of the events at issue, can reasonably be made to appear at trial. That, of course, is a quite different question from whether the procedural protections of the Confrontation Clause are offended by producing a witness to court whose memory is limited.

Moreover, the section of Savinon which defendant cites lends him no aid. There, the Court stated that it should look to CPL Section 610.70 for guidance in defining availability. Id. at 198, fn. 4. That section of the Criminal Procedure Law is concerned with the circumstances under which a witness's out-of-court testimony from a prior proceeding may be introduced at trial. Section 670.10(c) permits the introduction of that testimony when the witness is "unable to attend" the proceedings for a variety of reasons or "cannot with due diligence be found. . . ." In other words, it deals with the issue of physical unavailability only. Again, that is simply not the case where the issue is the severity of the physically available witness's memory loss.

In Owens, the Supreme Court noted the defendant's argument that the Court's ruling created an inconsistency between Rule 804 of the Federal Rules of Evidence which listed, among the definitions of unavailable witness, a witness who testified to a lack of memory, and Rule 801(d)(1)(C), which removed from the definition of hearsay a witness's out-of-court identification so long as the witness was available to testify. The Court explained that there was no such inconsistency. Rather, the drafters had created a "semantic oddity," 484 U.S. at 563, and that, in fact, as the "two characterizations are made for two entirely different purposes . . . there is no

requirement or expectation that they coincide." Id. at 564. That observation applies with even more force here. After all, defendant suggests that the language in an opinion concerning a New York State jury charge must be read in pari materia with terminology used by the United States Supreme Court in interpreting a constitutional protection. There should certainly be even less expectation that those characterizations coincide.

In sum, the Appellate Division's determination that defendant's Sixth Amendment rights were not violated was consistent with Supreme Court law and wholly correct. This Court should not adopt the test advocated by the dissent in Owens.

CONCLUSION

Defendant's judgment should be affirmed.

Respectfully submitted,

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