8.25. Past Recollection Recorded

A memorandum or record made or adopted by a witness concerning a matter about which that witness had knowledge, but about which the witness lacks sufficient present recollection to enable the witness to testify fully and accurately, even after reading the memorandum or record, is admissible, provided: (a) the memorandum or record was made or adopted by the witness when the matter was fresh in the witness's memory and (b) the witness testifies that the memorandum or record correctly represented the witness's knowledge and recollection when made.

Note

This rule is derived from *People v Taylor* (80 NY2d 1, 8 [1992] ["(A) memorandum made of a fact known or an event observed in the past of which the witness lacks sufficient present recollection may be received in evidence as a supplement to the witness's oral testimony. The requirements for admission of a memorandum of a past recollection are generally stated to be that the witness observed the matter recorded, the recollection was fairly fresh when recorded or adopted, the witness can presently testify that the record correctly represented his knowledge and recollection when made, and the witness lacks sufficient present recollection of the recorded information" (citations omitted)]; *see also People v Tapia*, 33 NY3d 257 [2019] [a witness's prior grand jury testimony was properly admitted as past recollection recorded]; *People v Caprio*, 25 AD2d 145, 150 [2d Dept 1966], *affd* 18 NY2d 617 [1966]; *Halsey v Sinsebaugh*, 15 NY 485 [1857]). Once admitted, the "witness' testimony and the writing's contents are to be taken together and treated in combination as if the witness had testified to the contents of the writing based on present knowledge" (*Taylor* at 9).

Tapia also held that the admission of a past recollection document did not violate the Sixth Amendment's right of confrontation:

> "Significantly, the right to confrontation guarantees not only the right to cross-examine all witnesses, but also the ability to literally confront the witness who is providing testimony against the accused in a face-to-face encounter before the trier of fact . . . . The Confrontation Clause is satisfied when these requirements are fulfilled—even if the witness's memory is faulty. . . . In *[United States v] Owens* [(484 US 554 [1988])], the Court held that '[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' (484 US at 559 [internal quotation marks and citations omitted]). To that end, '[i]t 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' (484 US at 559 . . .). '[T]he Clause's ultimate goal is to ensure reliability of evidence, but it is 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' (*Crawford v Washington*, 541 US 36, 61 [2004])." (*Tapia*, 33 NY3d at 269-270.)