No. 20-637

In The

Supreme Court of the United States

DARRELL HEMPHILL,

Petitioner,

v.

STATE OF NEW YORK,

Respondent.

On Writ of Certiorari to the Court of Appeals of New York

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

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. It has a nationwide membership of many thousands of direct members, and up to 40,000 with 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 the United States 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.

NACDL submits this brief in support of the petitioner because the issue presented in this case—whether a criminal defendant who "opens the door" to responsive evidence also forfeits the right to exclude

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[1] Pursuant to Supreme Court Rule 37.3(a), counsel of record for each party has provided written consent to the filing of this brief. No counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amicus* and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

evidence otherwise barred by the Confrontation Clause—is of paramount importance to criminal defense attorneys throughout the country and the clients they represent.

SUMMARY OF ARGUMENT

For a defense attorney, the risk of opening the door to evidence that could harm her client is an ever-present Sword of Damocles at trial. No matter how careful or well-prepared the attorney is, one unexpected statement by a trial witness could swing open the door to evidence that would particularly prejudice her client—even if she had previously secured a ruling from the court excluding that very evidence. The opening-the-door doctrine is, of course, grounded in equitable principles and common law. But when it collides with and limits the fundamental right guaranteed by the Confrontation Clause, as happened here, it has particularly pernicious consequences for defendants, their attorneys, and the integrity of the criminal trial.

At his trial, Petitioner advanced one of the most fundamental and persuasive arguments a criminal defendant can make: someone else did it. But when his attorney pursued this defense, eliciting testimony about the murder weapon, the trial court held that he had opened the door to a plea allocution in which the alternative suspect admitted having a *different* weapon at the scene of the crime. In its closing argument, the prosecution relied on the allocution to argue that the alternative suspect could not have committed the murder because he had possessed a different gun.

Any competent defense attorney could have poked holes in this narrative by asking the alternative suspect whether he had also possessed the murder weapon or by exploring the motivations behind his plea. But Petitioner's attorney had no such

opportunity because the trial court held that, by opening the door to the plea allocution, Petitioner had forfeited his Sixth Amendment right to confront the declarant.

This rule has grave implications for defendants and their attorneys. If a defendant can forfeit his Confrontation Clause right by stumbling through an often-unmarked door, he will be deterred from making his best arguments, including those about third-party guilt. He will face a Hobson's choice between his right to confront witnesses and his right to present a complete defense—or even to go to trial at all.

Furthermore, the rule in this case undermines the institutional roles of jury, judge, and prosecutor. It strips the jury of its core responsibility for making credibility determinations, erodes predictability in the judge's evidentiary rulings, and creates perverse incentives for prosecutors to elicit testimony outside of the courtroom that might later be used at trial.

ARGUMENT

I. The New York Rule[2] Chills Vital Defense Arguments

"Whether rooted directly in the Due Process

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[2] This brief uses "the New York rule" to refer to the holding in *People v. Reid*, 971 N.E.2d 353, 357 (N.Y. 2012), applied by the lower court in this case, that "the admission of testimony that violates the Confrontation Clause may be proper if the defendant opened the door to its admission."

Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)). Empirical studies have demonstrated that "jurors process the information they receive at trial by shaping it into a story format, and thus, that a defendant's ability to tell a plausible and complete story of his own innocence determines the jury's verdict." John H. Blume, Sheri L. Johnson & Emily C. Paavola, *Every Juror Wants a Story: Narrative Relevance, Third Party Guilt and the Right to Present a Defense*, 44 Am. Crim. L. Rev. 1069, 1100 (2007); *cf. Old Chief v. United States*, 519 U.S. 172, 187 (1997) ("Evidence thus has force beyond any linear scheme of reasoning, and as its pieces come together a narrative gains momentum, with power not only to support conclusions but to sustain the willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest verdict.").

Of all the defenses a criminal defendant can present, evidence suggesting that someone else committed the crime is perhaps the most powerful. *See* David S. Schwartz & Chelsey B. Metcalf, *Disfavored Treatment of Third-Party Guilt Evidence*, 2016 Wis. L. Rev. 337, 391 (2016) ("Given the jury's natural demand for complete narratives, there is virtually always a significant need for some evidence of an alternative perpetrator."). "Third-party defense is really at the foundation of your right to present a defense," says Earl

Ward, a partner at Emery Celli Brinckerhoff Abady Ward & Maazel LLP.[3]

But the rule at issue here chills the presentation of this most fundamental defense. Even a defendant with strong evidence of another party's guilt would be hesitant to present it when doing so risks opening the door to unconfronted testimonial statements like the plea allocution in this case. According to Colin Reingold, litigation director and senior counsel at Orleans Public Defenders, defense attorneys often want to question an officer about the thoroughness of her investigation to suggest that she failed to follow leads pointing to other suspects. But this line of questioning, Reingold explains, is often deemed to "open the door to other bad acts our client committed that would explain why the officers focused on him." The evidence on the other side of that door, as in this case, may be testimonial. *See People v. Hemphill*, 150 N.E.3d 356, 357 (N.Y. 2020); *People v. Reid*, 971 N.E.2d 353, 355–56 (N.Y. 2012); *People v. Vines*, 251 P.3d 943, 967–69 (Cal. 2011), *overruled on other grounds by People v. Hardy*, 418 P.3d 309 (Cal. 2018); *State v. Brooks*, 264 P.3d 40, 51 (Haw. Ct. App. 2011).

The Court has recognized this danger in the context of the exclusionary rule, rejecting an expansion of the impeachment exception that "would chill some defendants from calling witnesses who would

[3] Many of the arguments in this brief are based on interviews with ten criminal defense attorneys in various jurisdictions. On average, these attorneys have 20 to 30 years' experience trying criminal cases in state and federal court.

otherwise offer probative evidence." *James v. Illinois*, 493 U.S. 307, 316 (1990). The Court has also recognized "the need for evidence in all its particularity to satisfy the jurors' expectations about what proper proof should be." *Old Chief*, 519 U.S. at 188. Where a defense attorney seeks to build a narrative that someone else committed the crime but must gingerly avoid key evidence for fear of opening the door to a wholesale forfeiture of her client's constitutional rights, jurors "may be puzzled at the missing chapters, . . . [and] put upon at being asked to take responsibility knowing that more could be said than they have heard." *Id.* at 189.

This dilemma is especially difficult for defense attorneys because *what* constitutes opening the door is often opaque—and always discretionary. *See People v. Massie*, 809 N.E.2d 1102, 1105 (N.Y. 2004) ("a trial court should decide 'door-opening' issues in its discretion, by considering whether, and to what extent, the evidence or argument said to open the door is incomplete and misleading, and what if any otherwise inadmissible evidence is reasonably necessary to correct the misleading impression"); Anne M. Payne, *Litigation of "Opening the Door" Doctrine, Permitting Opposing Party's Introduction of Otherwise Inadmissible Evidence*, 164 Am. Jur. Trials 479, § 21 (2020) ("Whether a party has 'opened the door' for an opposing party to inquire about otherwise inadmissible evidence lies within the sound discretion of the trial court." (collecting cases)). Even the most careful attorney can cross the threshold without realizing she was even close.

The New York rule—although cabined to situations where the defendant creates a "misleading impression" at trial, *see Reid*, 971 N.E.2d at 357 (quoting *Massie*, 809 N.E.2d at 1105)—still does not place any meaningful limits on the judge's discretion to admit evidence at the expense of the defendant's Confrontation Clause right. Indeed, in *James*, the Court considered a constraint, even narrower than the New York rule's, that would have allowed the prosecution "to impeach witnesses only when their testimony is in 'direct conflict' with the illegally seized evidence." 493 U.S. at 316 n.6. Because "the result of such an inquiry distinguishing between 'direct' and 'indirect' evidentiary conflicts is far from predictable," the Court found that this rule would still "chill defendants' presentation of potential witnesses in many cases." *Id.*

The facts of Petitioner's case, which involved a shooting with a 9-millimeter handgun, are instructive. In arguing that Nicholas Morris, who was previously tried for the murder, was the real perpetrator, Petitioner's attorney explained that, hours after the shooting, the police had recovered "'a 9-millimeter bullet'—'exactly the same kind of bullet as the one that killed the child'—on Morris's nightstand." Pet. Br. at 9. To support that argument, Petitioner's attorney later elicited testimony during his cross-examination of the officer who found the cartridge. *Id.* at 10. But the trial judge ruled that, because this line of questioning had "created a misleading impression that Morris possessed a 9 millimeter handgun," Petitioner had opened the door to Morris's plea allocution,

in which Morris admitted that he had a different, *.357 caliber* handgun at the scene of the shooting. *People v. Hemphill*, 103 N.Y.S.3d 64, 70–71 (N.Y. App. Div. 2019). That result was unpredictable even to seasoned trial lawyers. "I couldn't fathom how the door to the declarant's admitting to possession of a *different* firearm was opened by the fact that a cartridge was found at his bedside," says Shaun Clarke, a Texas-based criminal defense attorney with more than thirty years of experience.

Because it is so often unclear what evidence or even argument will open the door, a forfeiture rule like New York's means that defendants can easily and unintentionally forfeit their Confrontation Clause rights. This flies in the face of the principle that forfeiture of the confrontation right requires an intentional, affirmative step. *See Giles v. California*, 554 U.S. 353, 361 (2008) (forfeiture-by-wrongdoing exception to the Confrontation Clause requires "a showing that the defendant intended to prevent a witness from testifying"); *Carlson v. Att'y Gen. of Cal.*, 791 F.3d 1003, 1010 (9th Cir. 2015) ("the forfeiture-by-wrongdoing doctrine applies where there has been affirmative action on the part of the defendant that produces the desired result"). Rather than lead her client into an unintentional forfeiture, a strategic defense attorney will often do anything she can to avoid a potential "door"—even if that means forgoing her client's most compelling defense.

II. The New York Rule Forces Defendants Into a Hobson's Choice Between Constitutional Rights

The New York rule also has the effect of putting defendants to an impossible choice between fundamental constitutional rights. As discussed above, a defendant who might forfeit his right to confront witnesses against him may well choose to avoid presenting certain testimony or taking the stand, thereby forgoing his right to present a complete defense. *See Holmes*, 547 U.S. at 324; *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) ("Few rights are more fundamental than that of an accused to present witnesses in his own defense.").

In *Vines*, 251 P.3d at 966–67, the defendant sought to introduce part of a statement by his co-defendant that suggested a third party had played a key role in the crime. The trial court ruled that, if the defendant introduced a *portion* of that statement, he would open the door to the prosecution's use of other, more incriminating portions, even though the co-defendant had invoked his Fifth Amendment right not to testify. *Id.* at 967. Put to that choice, the defendant decided not to introduce the statement at all. *Id.* He was convicted and sentenced to death. *Id.* at 953, 967. "The court put Vines to an unconstitutional Hobson's choice—he could exercise his due process right to present a third-party defense, but if he did, he would have to waive his Confrontation Clause right," says Gilbert Gaynor, who represented Vines on appeal. "This defense went to the heart of his innocence claim."

Ilona Coleman, legal director for the Bronx Defenders' criminal defense practice, says that the risk of opening the door is one reason she and her colleagues will counsel their clients not to take the stand. "As a lay person, you don't testify," says Coleman. "Even with the best preparation, it's possible that your client will make a mistake in saying something that could open the door." If the risk is too great for a particular defendant, or if it attaches to critical defense evidence, the defendant might even choose to take a plea and forgo his right to a trial. *See* U.S. Const. amend. VI.

"The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process." *Chambers*, 410 U.S. at 294. While "established rules of procedure and evidence" are also essential to ensuring "both fairness and reliability in the ascertainment of guilt and innocence," these rules "may not be applied mechanistically to defeat the ends of justice" where "constitutional rights directly affecting the ascertainment of guilt are implicated." *Id.* at 302. The Confrontation Clause—whose "very mission" is "to advance 'the accuracy of the truth-determining process in criminal trials,'" *Tennessee v. Street*, 471 U.S. 409, 415 (1985) (quoting *Dutton v. Evans*, 400 U.S. 74, 89 (1970))—guarantees one such right.

"We want defense attorneys to be able to cross-examine and test the evidence that the state is putting forward," says Coleman. "If we're not permitted to do that, not only are we ineffective, but you also have the situation of this trial right being violated." The consequences for the defendant could be no greater: "their

life and their liberty could be taken away."

III. The New York Rule Undermines the Institution of the Criminal Trial

Hinging a defendant's constitutional right to confront any witnesses who would testify against him on whether he has opened the door also disrupts the design and function of the criminal trial itself. In the courtroom of a criminal trial, the players and procedures are meant to operate together to facilitate due process and a just outcome. When a pillar of this interlocking design is destabilized—for example, when a constitutional right is forfeited—the integrity of the entire structure is put in jeopardy.

The rule in this case disrupts the roles of jury, judge, and prosecutor. First, the purpose of the Confrontation Clause is rooted in the institutional role of the jury, "which the law has designed for [the] protection" of the criminal defendant. *Mattox v. United States*, 156 U.S. 237, 243 (1895); *see also Duncan v. Louisiana*, 391 U.S. 145, 157–58 (1968) ("[A] general grant of jury trial for serious offenses is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants."). Indeed, the Supreme Court has stated that the "primary object" of the Confrontation Clause is to provide the jury with the opportunity to assess the credibility of a witness by observing that witness on the stand. *See Mattox*, 156 U.S. at 242–43 (commenting that the Confrontation Clause bestows on a criminal defendant the right to compel a witness "to stand face to face with the jury in order that they

may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief"). When the judge makes a ruling that the defendant has forfeited his Confrontation Clause right, the jury is deprived of its traditional duty to make credibility determinations, impermissibly "replac[ing] the constitutionally prescribed method of assessing reliability with a wholly foreign one." *Crawford v. Washington*, 541 U.S. 36, 62 (2004). This subversion of the jury's role degrades the institutional protections of the criminal trial.

According to Ellen Leonida, a former federal and state public defender in Northern California, the right of the defendant to confront the witnesses against him "is everything." Leonida explains that without live testimony and cross-examination, the jury hears all statements as if they carry equal value. Unless it can observe the witness on the stand, she says, it is "impossible for the jury to give evidence the weight it deserves."

Additionally, the New York rule—which is triggered when a defendant creates a "misleading impression" and a particular statement proffered by the prosecution would help correct that impression, *see Reid*, 971 N.E.2d at 357 (quoting *Massie*, 809 N.E.2d at 1105)—requires the judge to assume the truth of the prosecution's evidence. In doing so, the judge takes on a role that the Confrontation Clause clearly assigns to juries. *See Giles*, 554 U.S. at 366 ("The notion that judges may strip the defendant of a right that the Constitution deems essential to a fair trial,

on the basis of a prior judicial assessment that the defendant is guilty as charged, does not sit well with the right to trial by jury.").

Second, the New York rule also distorts the frameworks in place for judges to determine admissibility of evidence. The Federal Rules of Evidence are intended to instill predictability at trial. *See, e.g.*, Fed. R. Evid. 102 ("The[] rules [of evidence] should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination."); Fed. R. Evid. 502 explanatory note ("The rule seeks to provide a predictable, uniform set of standards . . . ."). But that goal of predictability is undermined by a rule that could see a defendant unintentionally forfeit his Confrontation Clause right.

Certain procedural mechanisms also advance predictability in a criminal trial. For example, pretrial tools like the motion *in limine* give prosecutors and defense attorneys advance notice of a judge's application of evidentiary standards to the facts at hand, helping them develop strategies for trial. In Leonida's experience trying more than 80 cases in state and federal court, when a judge grants or denies a motion *in limine* in favor of the defendant, the ruling often comes with the abstract caveat that certain evidence that may harm a defendant's case will be excluded *unless* the defendant opens the door to that evidence. Other attorneys describe judges who use the opening-the-door doctrine as a backdoor for evidence that

would otherwise be excluded, even—and sometimes especially—when the defense attorney has obtained an advance ruling excluding it. "If a judge is inclined to let the prosecution do the things that it wants to do," says Clarke, the Texas criminal defense attorney, "'opening the door' is often an easy excuse."

The New York rule is also unnecessary given the existence of other longstanding evidentiary guardrails. Under Rule 403, for example, the judge weighs a statement's probative value against its potential to prejudice the defendant unfairly, mislead the jury, or create other issues. *See* Fed. R. Evid. 403. Any concerns about taking a particular statement out of context can be addressed through this well-established framework without degrading defendants' constitutional rights.

What's more, the New York rule invites prosecutorial overreach by empowering the prosecutor to extract testimonial evidence outside of the courtroom that she can later use to convict. In this case, the prosecution negotiated the deal underlying Morris's plea allocution (to which Petitioner was found to have opened the door). Given the frequency of plea bargains,[4] this scenario is likely to recur. *See* Yvette A. Beeman, *Accomplice Testimony Under Contingent*

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[4] *See* National Association of Criminal Defense Lawyers, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It* (July 2018), www.nacdl.org/trialpenaltyreport (noting that, as of 2018, more than 97 percent of federal criminal cases were resolved by plea).

Plea Agreements, 72 Cornell L. Rev. 800 (1987) ("The long history of prosecutorial leniency in return for accomplice testimony has led to its widespread acceptance."). And plea agreements and allocutions are notoriously unreliable. *See, e.g.*, *Poventud v. City of New York*, 750 F.3d 121, 144–45 (2d Cir. 2014) (en banc) (Lynch, J., concurring) (discussing the potential for and danger of false admissions during plea bargaining); Judge Jed S. Rakoff, *Why Innocent People Plead Guilty*, New York Review of Books, Nov. 2014 (arguing that "the current system of prosecutor-determined plea bargaining" is "one-sided" and "the product of largely secret negotiations behind closed doors," and has "led a significant number of defendants to plead guilty to crimes they never actually committed").

Even for defendants who never proceed to trial, a rule like New York's can determine the outcome of their cases. A defense attorney negotiating a plea is on high alert to harmful evidence that might lie just behind the door should her client go to trial. Often, in cases with two co-defendants, one will plead guilty and admit to acting in concert with the other. The second co-defendant, who has not yet entered a plea, knows that any discussion of the other co-defendant's role will risk opening the door to his plea allocution. Even for a defendant with a strong case, this risk is a powerful trial deterrent—especially when, as happened here, the co-defendant's allocution could come in without any cross-examination. *See United States v. Becker*, 502 F.3d 122, 130 (2d. Cir. 2007) ("there can be no doubt after *Crawford* that [the admission of co-

conspirators' plea allocutions without cross-examination] violated the Confrontation Clause"). In this scenario, many, if not most, defense attorneys would advise taking a plea.

Lastly, by stripping an essential protection from the use of already-unreliable, police-generated testimony—such as confessions, informant statements, and eyewitness identifications—the rule in this case creates additional incentives for suggestive or coercive police conduct at the investigation phase. *See* Sandra Guerra Thompson, *Judicial Gatekeeping of Police-Generated Witness Testimony*, 102 J. Crim. L. & Criminology 329, 330-31 (2012). When it comes to statements like these, which rise or fall on credibility, the protections of the Confrontation Clause are indispensable. *See Lilly v. Virginia*, 527 U.S. 116, 137, 139 (1999) (holding that admission of non-testifying accomplice's confession violated the Confrontation Clause and noting, in plurality opinion, the "presumptive unreliability that attaches to accomplices' confessions that shift or spread blame" and where "the government is involved in the statements' production").

CONCLUSION

For the foregoing reasons, NACDL urges this Court to reverse the decision of the New York Court of Appeals and hold that when a defendant opens the door to responsive evidence, he does not also forfeit his right to exclude evidence otherwise barred by the Confrontation Clause.

Respectfully submitted,

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