No. 20-637

IN THE

Supreme Court of the United States

DARRELL HEMPHILL,

Petitioner,

v.

NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

BRIEF OF ASSOCIATION OF CRIMINAL DEFENSE LAWYERS OF NEW JERSEY AS *AMICUS CURIAE* FOR THE PETITIONER

GARY S. STEIN
Counsel of Record
LISA M. BUCKLEY
PASHMAN STEIN WALDER HAYDEN P.C.
Court Plaza South, East Wing
21 Main Street, Suite 200
Hackensack, NJ 07601
(201) 488-8200
gstein@pashmanstein.com

Attorneys for Amicus Curiae

305593

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

Cases

Cited Authorities

Page

Statutes and Other Authorities

Cited Authorities

INTEREST OF AMICUS CURIAE

Proposed *amicus curiae* Association of Criminal Defense Lawyers of New Jersey (ACDL-NJ) is a non-profit corporation organized under the laws of New Jersey to, among other purposes, "protect and insure by rule of law, those individual rights guaranteed by the New Jersey and United States Constitutions; to encourage cooperation among lawyers engaged in the furtherance of such objectives through educational programs and other assistance; and through such cooperation, education and assistance, to promote justice and the common good."[1] Founded in 1985, ACDL-NJ has more than 500 members across New Jersey.

ACDL-NJ files numerous amicus briefs each year in the 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. New Jersey's Supreme Court has found that ACDL-NJ has the special interest and expertise to serve as an *amicus curiae* in numerous cases throughout the years.

ACDL-NJ submits this brief in support of Petitioner because the issue presented in this case—whether a criminal defendant "opens the door" to the admission of testimonial hearsay by allegedly creating a misleading

1. Petitioner filed a blanket consent to the filing of amicus briefs and Respondent consented to ACDL-NJ's filing of an amicus 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.

impression-- is of critical importance to criminal defense attorneys and their clients.

Thus, ACDL-NJ has the requisite interest to participate as *amicus curiae* and believes that its participation will be helpful to the Court.

SUMMARY OF ARGUMENT

The New York Court of Appeals' decision that Petitioner opened the door to the admission of testimonial hearsay to correct a misleading impression he created violates this Court's edict in *Crawford v. Washington*: "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is confrontation." 541 U.S. 36, 68-69 (2004). Petitioner had no opportunity to cross examine his accuser, and the trial court's admission of the accuser's plea allocution at trial robbed Petitioner of his fundamental constitutional right under the Confrontation Clause of the Sixth Amendment.

The Sixth Amendment right of a defendant to confront witnesses against her is not absolute. A defendant may waive her constitutional rights, but "opening the door" by creating a misleading impression does not constitute a waiver. It is not based upon knowing and intentional conduct by the defendant, but upon the perception of a trial court.

Moreover, the dual inquiries whether a defendant created a misleading impression, and what testimonial hearsay is necessary to correct it, are intolerably subjective, and therefore unpredictable. The "unpardonable vice" of New York's test, however, is "its demonstrated capacity to

admit core testimonial statements that the Confrontation Clause plainly meant to exclude." *Id.* at 63. The truth-finding function of the Confrontation Clause "is uniquely threatened when an accomplice's confession is sought to be introduced against a criminal defendant without the benefit of cross-examination." *Lee v. Illinois*, 476 U.S. 530, 530 (1986).

To resolve the split in the Federal Circuit Courts,[2] amicus respectfully urges this Court to adopt a rule that, under the Sixth Amendment, testimonial hearsay is admissible only where defendant waives her constitutional right by introducing a portion of a testimonial hearsay statement as a strategy or tactic. The prosecutor then may admit the full statement of the same declarant on the same topic.

In that context, the waiver analysis is not subjective. The court need not determine whether a defendant created a misleading impression, or what testimonial hearsay is necessary to correct it. The waiver of a constitutional right must be intentional and knowing, yet a defendant can create a "misleading impression" without intending to. Further, one court may conclude that the defendant created a misleading impression, while another court may not. To avoid the unpredictability inherent in a subjective analysis, a waiver should require an intentional act by the defendant based upon a strategic trial decision to introduce only part of a testimonial hearsay statement. In response, the prosecution may admit the rest of the declarant's statement on the same topic.

---

2. See, *infra*, note 8.

Moreover, public policy supports the approach advocated by amicus insofar as it balances the sanctity of a defendant's confrontation right against the legitimate concern about the fairness of permitting a defendant to use only that testimonial hearsay she likes, while prohibiting the prosecution from admitting the rest of the declarant's statement. It is also fair to defendants because they cannot fall into the open-the-door trap. A waiver requires intentional conduct by the defendant, and is not based upon a court's impression.

FACTUAL BACKGROUND

On Easter Sunday, in April 2006, Ronnell Gilliam (Gilliam) and a companion were involved in a street fight with a group of several people.[3] Pet. App. 8a-9a. After the fight broke up, a man believed to be associated with Gilliam drove by and opened fire, killing a 2-year old child in a passing minivan. *Ibid.* Eyewitnesses identified Gilliam as one of the men involved in the fight. *Id.* at 9a. Eyewitnesses identified Gilliam's companion as a thin black man wearing a blue shirt or sweater. *Id.* at 3a. The murder weapon was a 9 mm handgun. *Id.* at 23.

The police suspected that it was Gilliam's best friend, Nicholas Morris (Morris), who was the shooter. *Id.* at 3a. Within hours of the shooting, police searched Morris's home and found a 9 mm cartridge, the type of ammunition used in the shooting, and ammunition for a .357 revolver. *Id.* at 9a. Morris was arrested and taken into custody.

---

3. The facts are based upon the parties' filings with this Court because the case file is not available from the New York courts.

Ibid. When police searched Gilliam's apartment that night they found a blue sweater in a plastic bag. *Id.* at 10a-11a. The officer who opened the bag said it smelled of burnt gunpowder residue. *Id.* at 11a.

Gilliam knew that night that the police were looking for him, and not wanting to be found, Gilliam and his cousin, defendant Darrell Hemphill (Hemphill or Petitioner), decided to flee together to North Carolina. *Id.* at 12a. While on the run, Mr. Hemphill told Gilliam that Morris went on television and pointed to Gilliam as the shooter. *Ibid.* Mr. Hemphill urged Gilliam to go back to New York and tell police that Morris was the shooter. *Ibid.* Within days of the murder, Gilliam surrendered to the police in New York, and in an interview with detectives, fingered Morris as the shooter. *Ibid.* Gilliam told detectives that he disposed of the murder weapon, at which point he was arrested and charged with hindering prosecution and tampering with evidence. *Ibid.* Gilliam pled guilty to the charges.

The detectives allowed Gilliam to speak with Morris from jail. Morris denied identifying Gilliam as the shooter. Pet. App. 4a (Fahey, J., dissenting); J.A. 175. Apparently, Gilliam believed Morris because, in a second interview with detectives, Gilliam recanted his statement against Morris and told police that Mr. Hemphill was the shooter. Pet. App. 12a. Gilliam told detectives that after the shooting, he met up with Morris and Mr. Hemphill at his apartment, where Mr. Hemphill took off the blue sweater. *Id.* at 11a. Gilliam said that Mr. Hemphill told him to get rid of the sweater and the guns-- a .357 caliber revolver that Gilliam said belonged to Morris, and a 9 mm handgun that he said belonged to Mr. Hemphill. *Ibid.* Gilliam got

rid of the guns, but he forgot about the blue sweater. *Id.* at 12a.

The investigators did not act on Gilliam's new statement. Relying on what they considered the strength of their evidence against him, the state indicted Morris for the child's murder and possession of a 9 mm handgun. *Id.* at 9a, J.A. 5-17. During Morris's trial, the results of a DNA analysis of the blue sweater came in and Morris was not a match. *Ibid.* The trial judge declared a mistrial. *Ibid.*

Rather than retry him, prosecutors offered Morris a deal: if he agreed to plead guilty to possession of a firearm at the scene of the shooting, the state would request that the murder charge be dropped with prejudice, and that Morris, who by then already had been incarcerated for two years, immediately be released from prison. *Id.* at 9a, 16a. Morris agreed to take the plea. *Id.* at 9a. The prosecutors then filed a new information charging Morris with possession of a .357 revolver at the scene, as opposed to a 9 mm handgun, as originally charged. *Id.* at 9a. In the course of pleading guilty to the revised charge, Morris admitted to possession of a .357 revolver at the scene and was released from jail. *Ibid.*

Several years later in 2011, police determined that the DNA on the blue sweater found in Gilliam's apartment matched Mr. Hemphill. *Id.* at 9a-10a. In 2013, Mr. Hemphill was arrested and indicted. *Id.* at 10a. In 2015, he was tried for second-degree murder. *Ibid.* The prosecution's new theory was that Gilliam had acted with two companions, Morris and Mr. Hemphill, and that Mr. Hemphill was the shooter. J.A. 356. Mr. Hemphill's defense was that Gilliam only had one companion, Morris, and that Morris was the shooter. Pet. App. 16a-17a.

Mr. Hemphill did not testify at his trial. Gilliam testified as part of his plea agreement. *Id*. at 4a. He testified that the 9 mm handgun belonged to Mr. Hemphill. *Id*. at 11a. During the trial, defense counsel elicited testimony that on the night of the shooting, police found a 9 mm cartridge on Morris's nightstand. J.A. 132-34. The prosecution then sought to rebut that testimony by introducing Morris's statement in his plea allocution that he had only a .357 revolver at the scene of the shooting. *Id*. at 138-41.

Morris did not testify at Mr. Hemphill's trial and his plea allocution is testimonial hearsay evidence.[4] The trial

4. In *Crawford v Washington*, the Court discussed when a statement is "testimonial," but did not purport to identify every possible scenario. 541 U.S. 36, 68 (2004). The Court readily concluded, however, that a statement given to police in connection with a criminal case undoubtedly is testimonial. In this case, Morris's statements in his plea allocution are testimonial. *Id.* at 53. A testimonial statement is hearsay only where, as here, it is admitted for the truth of the matter. *See also, Ohio v. Clark*, 567 U.S. 237, 246-49 (2015) (holding that Confrontation Clause did not bar introduction of statements child made to preschool teacher regarding abuse committed by the defendant because it occurred in the context of an ongoing emergency involving suspected child abuse); *Bullcoming v. New Mexico*, 564 U.S. 647, 663 (2011) (concluding that Confrontation Clause did not permit prosecution to introduce forensic laboratory report containing a testimonial certification made to prove a fact at a criminal trial through in-court testimony of analyst who did not sign the certification or personally perform or observe the performance of the test reported in certification); *Michigan v. Bryant*, 562 U.S. 344, 358 (2011) (ruling that, when "the primary purpose of an interrogation is to respond to an 'ongoing emergency,' its purpose is not to create a record for trial and thus is not within the scope of the [Confrontation] Clause."); *Melendez-Diaz v. Massachusetts,* 557 U.S. 305, 311 (2009) (holding that forensic laboratory certificates

court admitted Morris's statement allegedly to correct a misleading impression that defense counsel created by suggesting that Morris was the shooter. *Id*. at 184-85. Mr. Hemphill thus opened the door to the admission of Morris's allocution. The prosecution relied on Morris's allocution to argue that, because the murder weapon was a 9 mm handgun and Morris had the .357 revolver, Morris could not have been the shooter. *Id*. at 355-56.

Mr. Hemphill was convicted of second degree murder. Pet. App. 1a.

PROCEDURAL BACKGROUND

On appeal, Mr. Hemphill argued that the trial court's admission of part of Morris's plea allocution violated his Sixth Amendment right to confront his accuser. *Id*. at 16a-17a. The Appellate Division rejected the argument. It held that by eliciting testimony that on the night of the shooting police found a 9 mm cartridge on Morris's nightstand, defense counsel "created a misleading impression that Morris possessed a 9 millimeter handgun, which was consistent with the type used in the murder, and introduction of the plea allocution was reasonably necessary to correct that misleading impression." [5] *Id*. at 17a.

---

asserting that substance found in defendant›s car was cocaine were testimonial and could be admitted only through preparers to avoid violating defendant›s rights under Confrontation Clause).

5. Justice Manzanet-Daniels dissented, but not on Sixth Amendment grounds. She found the state's evidence to be insufficient to support his conviction.

In a short opinion issued on June 25, 2020, the New York Court of Appeals summarily affirmed the Appellate Division's decision, concluding that the trial court did not abuse its discretion by admitting evidence that the allegedly culpable third party, Morris, pled guilty to possessing a firearm other than the murder weapon. Pet. App. 1a-3a.

The Appellate Division's decision, on which the New York Court of Appeals relied, based its ruling primarily on *People v. Reid,* 19 N.Y.3d 382 (2012). Pet. App. 16a-17a. That case held that the defendant opened the door to the admission of testimonial hearsay and that that evidence was reasonably necessary to correct defendant's misleading questioning. *Reid*, 19 N.Y3d at 388. *Reid* involved a deadly shooting that occurred during a botched robbery attempt. *Id.* at 385. The day after the murder, Reid told an acquaintance that he had killed someone the night before. *Ibid.* Reid identified Joseph and McFarland as participating in the shooting. *Ibid.* Some time later, the victim's friend contacted police and identified Joseph as a suspect. *Ibid.* Joseph's confession to police implicated Reid in the murder. *Ibid.*

The defense theory at trial was that the police investigation of the murder was inadequate. *Id.* at 386. Reid's acquaintance, who testified for the state about Reid's confessed involvement, also implicated a third participant, McFarland. *Id.* at 385-86. On cross examination, the acquaintance agreed with defense counsel that, although he had informed police about McFarland, McFarland was never arrested *Ibid.* The defense also called as a witness a federal agent who testified that he, too, had been informed during his investigation that McFarland was involved.

Id. at 386. On cross examination of the federal agent, the prosecutor was permitted to ask, over the defense's objection, if he, in fact, had heard eyewitness testimony confirming that McFarland was not at the murder scene. *Ibid.* The agent agreed. *Ibid.*

Reid was found guilty of second degree murder. *Id*. at 387. On appeal, the Appellate Division reversed, finding that defendant had been denied the right to confront witnesses. *Ibid.* The Court of Appeals reversed the Appellate Division, concluding that the defendant had opened the door to the admission of the co-conspirator's confession by creating a misleading impression that McFarland's involvement was ignored by police. *Id*. at 387-89.

ARGUMENT

The Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. The Court has held that this "bedrock procedural guarantee," *Crawford v. Washington*, *supra*, 541 U.S. at 42, is "to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment." *Pointer v. Texas*, 380 U.S. 400, 406 (1965) (quoting *Malloy v. Hogan*, 378 U.S 1, 10 (1964)).

The Court definitively interpreted the Sixth Amendment right to confrontation in *Crawford*, holding that "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional

demands is the one the Constitution actually prescribes: confrontation." *Id.* at 68-69. The Court's pronouncement is unequivocal. It leaves no room for the admission of testimonial hearsay because a defendant "opened the door" by "creating a misleading impression." Indeed, "[l]eaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices." *Id.* at 51. *Crawford* compels the reversal of the New York Court of Appeals' Decision.

In *Crawford,* defendant was tried for assault and attempted murder. *Id.* at 40. His wife witnessed the attack, but he prevented her from testifying at trial by invoking the marital privilege. *Id.* at 39-40. The prosecution sought to introduce the wife's recorded statement made during police interrogation as evidence that the attack was not in self-defense. *Id.* at 40. Defendant objected on Sixth Amendment grounds. *Ibid.* Relying on *Ohio v. Roberts*, 448 U.S. 56 (1980), the trial court admitted the wife's testimonial statement because it bears "indicia of reliability," a hearsay exception, or bears "particularized guarantees of trustworthiness." *Crawford*, 541 U.S. at 40 (quoting *Roberts*, 448 U.S. at 66). The appellate court ultimately upheld the conviction.

In *Crawford*, the Court examined the founders' intent in constitutionalizing the right to confront one's accusers and concluded that the *Roberts* test departed from centuries-old principles by admitting testimonial hearsay statements "upon a mere finding of reliability." 541 U.S. at 60. The *Crawford* Court reversed the defendant's conviction and overruled *Roberts*, in part, holding that the admission of the wife's testimonial hearsay violated the

Confrontation Clause because there was no opportunity for cross examination. *Id.* at 68-69.

Justice Scalia painstakingly traced the root of the concept of confronting one's accusers back to Roman times, but showed that the founders' source was the English common-law, which had a "tradition . . . of live testimony in court subject to adversarial testing." *Id.* at 43. But England also had a civil-law practice that permitted officials to examine suspects and witnesses before trial and read the statements in court in lieu of live testimony--a practice which "occasioned frequent demands by the prisoner to have his `accusers,' *i.e.* the witnesses against him, brought before him face to face." *Ibid.* (quoting 1 J. Stephen, History of the Criminal Law of England 326 (1883)). "[N]otorious instances of civil-law examination occurred in the great political trials of the 16th and 17th centuries." *Id.* at 44.

Justice Scalia singled out the trial of Sir Walter Raleigh for treason as one such notorious instance that was at the forefront of the founders' mind in ratifying the Confrontation Clause. *Ibid.* Raleigh's alleged accomplice, Lord Cobham, implicated Raleigh in an examination before the Crown's Privy Council and a letter. *Ibid.* At Raleigh's trial, the examination and the letter were read to the jury. *Ibid.* Raleigh demanded that the judges "[c]all my accuser before my face," but the judges refused to call Cobham to appear. *Ibid.* (quoting *Raleigh's Case*, 2 How. St. Tr. 1, 15–16, 24 (1603)). Despite Raleigh's protestations that he was being tried "by the Spanish Inquisition," the jury convicted him, and Raleigh was sentenced to death. *Ibid.* (citing 2 How. St. Tr., at 15). "It was these practices that the Crown deployed in notorious treason

cases like Raleigh's . . . that English law's assertion of a right to confrontation was meant to prohibit; and that the founding-era rhetoric decried." *Id.* at 50. Through a series of statutory and judicial reforms, English law developed "a right of confrontation that limited these abuses." *Id.* at 44.

"Raleigh's trial has long been thought a paradigmatic confrontation violation." *Crawford,* 541 U.S. at 52. In Revolutionary times, a number of state declarations of rights guaranteed a right of confrontation. *Id.* at 48 (citations omitted). The proposed Federal Constitution did not, prompting passionate objections. *Id.* at 48-49. The first Congress' responded by including the Confrontation Clause in the proposal that became the Sixth Amendment. *Id.* at 49; *See Johnson v. Zerbst*, 304 U.S. 458, 462 (1938) ("Omitted from the Constitution as originally adopted, provisions of this and other Amendments were submitted by the first Congress … as essential barriers against arbitrary or unjust deprivation of human rights.").

The Confrontation Clause envisions:

> a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him 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.

Mattox v. United States, 156 U.S. 237, 242 (1895).

Those means of testing the accuracy and credibility of an accuser's testimony are so important that the absence of proper confrontation at trial "calls into question the ultimate 'integrity of the fact-finding process.'" *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) (quoting *Berger v. California*, 393 U.S. 314, 315 (1969)). Thus, "the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford,* 541 U.S. at 53-54.

Criticizing *Roberts*' "reliability" test, the *Crawford* Court noted that "[w]here testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'" *Id.* at 61. The Confrontation 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." *Ibid.*

The *Crawford* Court further found *Roberts*' framework to be unpredictable because "[w]hether a statement is deemed reliable depends heavily on which factors the judge considers and how much weight he accords each of them." *Id.* at 63. Moreover, "[r]eliability is an amorphous, if not entirely subjective, concept." *Ibid.* This "malleable standard often fails to protect against paradigmatic confrontation violations." *Id.* at 60.

"The unpardonable vice of the *Roberts* test, however, is not its unpredictability, but its demonstrated capacity to

admit core testimonial statements that the Confrontation Clause plainly meant to exclude." *Id.* at 63. So too here. As the Court explained in *Lee v. Illinois, supra*, the Court's precedent is "premised on the basic understanding that when one person accuses another of a crime under circumstances in which the declarant stands to gain by inculpating another, the accusation is presumptively suspect and must be subjected to the scrutiny of cross-examination." 476 U.S. at 541. The truth-finding function of the Confrontation Clause "is uniquely threatened when an accomplice's confession is sought to be introduced against a criminal defendant without the benefit of cross-examination." *Ibid.*

The New York Court of Appeals' decision is entirely at odds with the Court's dictate in *Crawford.* Morris's plea allocution admitted against Petitioner was not subject to prior cross examination, and the "text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement" other than "those established at the time of the founding." *Id.* at 54 (citing *Mattox* v. *United States*, 156 U.S. 237, 243 (1895)).[6] Opening the door to the admission of testimonial hearsay to correct a "misleading impression" is a vague, amorphous and unrecognized exception to the confrontation requirement. The New York Court of Appeals' decision undermines the integrity of the fact-finding process and should be reversed.

---

6. The Court previously acknowledged that two forms of testimonial statements were admitted at common law even though they were unconfronted, namely, dying declarations and forfeiture by wrongdoing. *Crawford*, 541 U.S. at 56 n.6 (citing *Mattox, supra,* 156 U.S. at 243–244 (citation omitted).

Similar to the *Roberts* test, the New York Court of Appeals test-- whether, and the extent to which a defendant created a misleading impression, and if so, what testimonial hearsay is necessary to correct it-- is subjective and highly unpredictable. Petitioner's counsel asked a witness at trial whether it was true that, on the night of the murder, police found a 9 mm cartridge on Morris's nightstand. The witness said it was true and in fact it was true. By eliciting testimony that Morris had possession of a 9 mm cartridge, defense counsel was not offering evidence that Morris owned a 9mm handgun. Therefore, Morris's testimonial hearsay that he did not own a 9 mm handgun clearly was inadmissible. There was no "misleading impression" that required clarification.

Similarly, *People v. Reid*, *supra*, exemplifies the subjectivity of the "misleading impression" analysis. 19 N.Y.3d at 388-39. There, defense counsel elicited testimony that investigators "had received information" that a third person was involved in the shooting, and that he was never arrested. *Id.* at 386. The trial court found that defense counsel created a "misleading impression" about the third person's participation, a completely improper and subjective finding of fact encroaching on the jury's prerogative.

Concluding that defense counsel "opened the door about McFarland being there," however, the trial court admitted testimonial hearsay from an eyewitness who allegedly told a federal agent that the third person, McFarland, was not there.[7] *Ibid.* That highly irregular

7. The Court of Appeals' opinion in *Reid* does not reveal what defense counsel asked or said that created a misleading impression.

and standardless determination by the trial court is irreconcilable with the holding and rationale of *Crawford,* which clearly rejected judicial determinations of reliability as a substitute for the constitutional guarantee of confrontation.

Like virtually every other constitutional right, a defendant may waive her Sixth Amendment right to confrontation. Yet, there is "a presumption against the waiver of constitutional rights," and for a waiver to be effective, it must be clearly established that there was "an intentional relinquishment or abandonment of a known right or privilege." *Brookhart v. Janis*, 384 U.S. 1, 4 (1966) (holding that there is no waiver of Sixth Amendment confrontation right where defendant's counsel purported to waive defendant's right without defendant's consent) (quoting in part *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

A defendant does not waive her Sixth Amendment right by opening the door to the admission of testimonial hearsay by creating a "misleading impression" merely because a court subjectively determines that defendant created a misleading impression. *See U.S. v. Holmes*, 620 F.3d 836, 844 (8th Cir. 2010) (holding that defendant can waive his right to confront witnesses if he opens the door, but a waiver must be clear and intentional, and simply asking questions on cross-examination does not constitute a waiver); *U.S. v. Cromer*, 389 F.3d 662, 677-78, (6th Cir. 2004) (finding that defendant opened door by asking detective if an informant told her defendant's nickname, but admission of informant's testimonial hearsay that the man with the nickname had been involved with the illegal drug activity, violated Sixth Amendment); *U.S.*

v. Pugh, 405 F.3d 390, 400 (6th Cir. 2010) (concluding that defendant's questions may have "opened the door," but "government overstepped constitutional bounds" by admitting a witness's positive identification of defendants from crime scene pictures).

A majority of the courts that have considered the issue have held that testimonial hearsay may be admitted only where a defendant questions a witness about a portion of a testimonial hearsay statement, in which case the prosecutor may admit other portions of the statement by the same declarant on the same topic.[8] Although the

8. Petitioner contends that federal and state courts are divided into 3 camps on the issue whether, or under what circumstances, criminal defendants open the door to the admission of evidence at trial that otherwise would be barred by the Confrontation Clause. According to Petitioner, three jurisdictions hold that a defendant never forfeits the right of confrontation by presenting a defense at trial. (Citing *U.S. v. Cromer*, 389 F.3d 662 (6th Cir. 2004); *U.S. v. Holmes*, 620 F.3d 836 (8th Cir. 2010); *Freeman v. State*, 765 S.E.2d 631 (Ga. Ct. App. 2014)). Petitioner identifies five jurisdictions that supposedly have adopted an intermediate position that when a defendant introduces testimonial hearsay, he forfeits the right to exclude other testimonial statements by the same declarant on the same subject. (Citing *U.S. v. Moussaoui,* 382 F.3d 453 (4th 2004); *State v. Prasertphong,* 114 P.3d 828 (Ariz. 2005); *People v. Vines*, 251 P.3d 943 (Cal. 2011), *as modified* (Aug. 10, 2011), *overruled by People v. Hardy*, 418 P.3d 309 (Cal. 2018); *State v. Selalla*, 744 N.W.2d 802 (S.D. 2008)). Petitioner argues that three jurisdictions hold that whenever a defendant creates a misleading impression at trial, he forfeits the right to exclude responsive evidence otherwise barred by the Confrontation Clause even if the defendant did not introduce testimonial hearsay by the declarant whose statement the prosecution seeks to introduce. (Citing *U.S. v. Acosta*, 475 F.3d 677 (5th Cir. 2007); *People v. Reid*, *supra*, 971 N.E.2d at 353; and *State v. White*, 920 A.2d 1216 (N.H. 2007)).

"outcomes of the cases have been comparable, the same cannot be said of [their] rationales." *Crawford*, 541 U.S. at 60.

Several of the courts that have addressed the issue used a waiver analysis. *See U.S. v. Holmes*, supra, 620 F.3d at 842. *See also People v. Rogers,* 317 P.3d 1280, 1284 (Colo. App. 2012) (noting that defendant intentionally opened the door to the Confrontation Clause violation by her strategic trial decision to introduce the non-testifying driver's hearsay statement); *See also People v. Fisher*,154 P.3d 455, 482-83 (Kan. 2007) (observing that discussion of defendant's companion was first initiated by defense counsel when questioning police officer permitting prosecutor to introduce statement in its entirety; defendant waives Sixth Amendment right to confrontation when he opens an otherwise inadmissible area of evidence; prosecution may then present evidence in that "formerly forbidden sphere").

Other courts have permitted the admission of testimonial hearsay under the rule of completeness, an evidentiary rule codified in Fed. R. Evid. 106, which provides that "[i]f a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part--or any other writing or recorded statement--that in fairness ought to be considered at the same time." *See State v. Prasertphong*, 114 P.3d 828, 833 (Ariz. 2005) (holding that under rule of completeness defendant had "forfeited his Confrontation Clause right not to have [his codefendant's] entire statement admitted against him when he made the tactical decision to introduce portions of the statement that, standing alone, had the serious potential to mislead

the jury."); *State v. Selalla*, 744 N.W.2d 802, 818 (S.D. 2008) (concluding that defendant's introduction of favorable testimonial hearsay "would properly enable the state to complete the picture by eliciting other evidence from the rest of [the statement].").

The language of Fed. R. Evid. 106 is broad. Where a defendant makes the tactical decision to introduce portions of a testimonial statement, on its face, Rule 106 does not limit an adverse party to introducing the entire testimonial statement, but also permits the admission of "any other writing or recorded statement." What an adverse party may introduce is bounded only by what a court decides "in fairness ought to be considered at the time." Fed. R. Evid. 106. That "fairness" determination is just as subjective as the intolerably subjective "misleading impression" standard and, therefore, it should not apply in the context of the Sixth Amendment. In other words, the waiver standard advocated by amicus is narrower than what Rule 106 may allow.

Amicus respectfully urges that the Court constitutionalize the standard that a defendant shall be deemed to have waived her right to confront her accusers at trial only where she makes the tactical decision to introduce portions of a testimonial statement, but the waiver should be limited to permit the adverse party to admit only other portions, or the entirety, of the same statement of the same declarant that relate to the same topic. That test balances the sanctity of a defendant's confrontation right against the legitimate concern about the fairness of permitting a defendant to use only that testimonial hearsay she likes, while prohibiting the prosecution from admitting the rest of the statement by

the declarant on the same topic. *See Reid*, 971 N.E.2d at 388 (expressing concern that defendants can use the Sixth Amendment as a sword and a shield "revealing only those details of a testimonial statement that are helpful to the defense, while concealing from the jury other details that would tend to explain the portions introduced and place them in context.").

CONCLUSION

Because his Sixth Amendment right of confrontation was violated, Mr. Hemphill's conviction should be reversed and the matter remanded for a new trial.

Respectfully submitted,

Gary S. Stein
Counsel of Record
Lisa M. Buckley
Pashman Stein Walder
Hayden P.C.
Court Plaza South, East Wing
21 Main Street, Suite 200
Hackensack, NJ 07601
(201) 488-8200
gstein@pashmanstein.com

Attorneys for Amicus Curiae

Dated: June 29, 2021