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 *AMICI CURIAE* OF EVIDENCE AND CRIMINAL PROCEDURE PROFESSORS JOHN H. BLUME, TAMARA RICE LAVE, ROBERT P. MOSTELLER, ERIN E. MURPHY, ANNA ROBERTS, AND ANDREA ROTH IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST

Amici curiae respectfully submit this brief in support of Petitioner.[1]

Amici are evidence and criminal procedure professors who have studied, taught, and published on the interaction between the Confrontation Clause and the rules of evidence. This case involves a critical issue at

[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than *amici curiae* or its counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties were notified of *amici curiae*'s intent to submit this brief, and all parties have consented to the filing of this brief.

that juncture: Whether a criminal defendant "opens the door" to admission of unconfronted testimonial hearsay merely because such evidence, if true, rebuts the defendant's presentation of his case. *Amici* have a stake in ensuring that Confrontation Clause doctrine is not based on misunderstandings of the history and meaning of the Clause or of long-standing principles of evidence law.

SUMMARY OF ARGUMENT

The New York Court of Appeals' decision is fundamentally inconsistent with the Sixth Amendment. The court below held that under state evidentiary law, where a defendant presents his case through *admissible* evidence, the prosecution is entitled to rebut that case through *otherwise inadmissible* unconfronted, testimonial hearsay, on the theory that the defense case "opens the door" to such inadmissible evidence simply by offering evidence or argument inconsistent with evidence the state seeks to introduce. Such a broad, free-floating forfeiture rule was unknown at common law, is inconsistent with this Court's confrontation cases, and undermines the very nature of an adversarial trial by treating a vigorous defense as forfeiture of the confrontation right. This Court should reverse.

I. *The New York Court of Appeals' rule has no basis in traditional forfeiture principles.* The Sixth Amendment provides a criminal defendant with "the right * * * to be confronted with the witnesses against him." U.S. Const. amend. VI. At common law, unconfronted testimony could be introduced at trial only if the defendant was able to be confronted with the witness at the time the statement was given and the witness was unavailable to testify at trial. The only

exception to this confrontation right was for dying declarations. A defendant could also forfeit the right through wrongdoing, by preventing a witness from testifying with the intent to interfere with the judicial process, or through other misconduct. Those situations are not at issue here.

Instead, the doctrine that comes closest to the fairness-based forfeiture rule created by the New York court is the "rule of completeness." At common law, this evidentiary rule allowed a party to introduce part of a person's statement, even if otherwise inadmissible, but only when the other party first introduced *a part of the same statement that creates a misleading impression about the statement's overall meaning or tenor*. The classic example is where one party introduces the statement "There is no God" as proof that the declarant is an atheist, but the entire statement shows the opposite: "The fool hath said in his heart, 'There is no God.' " 3 John Henry Wigmore, *A Treatise on the System of Evidence in Trials at Common Law* § 2094 (1904) (quoting *Algernon Sidney's Trial* (1683) 9 How. St. Tr. 817, 829, 868).

Amici have found no examples of the rule of completeness applying to allow admission of unconfronted testimony against a criminal defendant at common law. Even if such a rule existed, moreover, it would not have been triggered where a defendant offered a statement *separate and distinct* from the testimonial statement that the prosecution seeks to admit. And it would have no application to the facts of this case: Where Hemphill offered no statement at all, but simply argument and evidence from another witness supporting his theory of the case, the prosecution is not entitled to introduce an otherwise inadmissible

unconfronted testimonial statement to contradict it.

Common-law courts understood that protecting the confrontation right is most critical precisely where a defendant's evidence is "in competition with" adverse out-of-court testimony. 1 Thomas Starkie, *Practical Treatise on the Law of Evidence, and Digest of Proofs, in Civil and Criminal Proceedings* 44 (4th Am. ed. 1832). The right to be physically confronted with a declarant is particularly critical where, as here, the hearsay statement sought to be admitted is a confession from an alternative suspect with every incentive to minimize his own culpability. Defense evidence or argument inconsistent with the state's narrative or potential evidence cannot justify introduction of a testimonial statement in violation of the Confrontation Clause.

II. *The New York rule cannot be reconciled with* Crawford*, nor any conception of the Confrontation Clause's meaning.* Because the New York rule has no basis in the confrontation doctrines that existed at the Founding, it cannot be reconciled with the holding of *Crawford* v. *Washington* that the Confrontation Clause incorporates "the right of confrontation at common law, admitting only those exceptions established at the time of the founding." 541 U.S. 36, 54 (2004).

New York's rule is also inconsistent with any conception of that Clause, under *Crawford* or otherwise. If the prosecution could introduce testimonial hearsay whenever the defense presents evidence or argument that the state, or trial judge, disbelieves, then unconfronted testimonial hearsay would be admissible in a significant number of criminal cases. Not only would such a rule leave the confrontation right subject to the vagaries of individual judges' views of the evidence—

a result *Crawford* sought to avoid—but it would render superfluous or nonsensical a number of this Court's holdings excluding testimonial hearsay in cases where it was offered to rebut defense argument or evidence. Such a rule would also impose an unprecedented and unjustified burden on the constitutional right to present a defense.

Because the decision below is fundamentally at odds with this Court's precedent and the right to present a defense, the Court should reverse.

ARGUMENT

I. NEW YORK'S BROAD "OPEN THE DOOR" RULE HAS NO BASIS IN ANY HISTORICALLY RECOGNIZED DOCTRINE ESTABLISHING AN EXCEPTION TO, OR FORFEITURE OF, THE RIGHT OF CONFRONTATION.

This Court has held that the Sixth Amendment right of confrontation is a categorical right to assess the credibility of witness accounts in a particular way: through the crucible of cross-examination and physical confrontation at trial. *See Crawford*, 541 U.S. at 61, 67 (describing confrontation right as a "categorical constitutional guarantee[]"). The "text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts." *Id.* at 54. Instead, under the *Crawford* Court's conception of the Sixth Amendment, a criminal defendant's "right to be confronted with the witnesses against him" set forth in the Sixth Amendment "is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the

founding." *Id.* (internal quotation marks and ellipses omitted).[2]

The New York Court of Appeals' decision strays far from the common law, which upheld the right of confrontation of testimonial statements in nearly all circumstances—and which would not have permitted the kind of evidence admitted in this case.

A. At The Founding, The Only Exception To The Common-Law Right Of Confrontation Was For Dying Declarations.

The common-law right to confront adverse witnesses was absolute, with a lone exception for dying declarations.

At common law, out-of-court testimony could be introduced against a criminal defendant at trial only if the defendant was confronted with the witness at the time the out-of-court statement was made *and* the witness was unavailable to testify at trial. *See Giles* v. *California*, 554 U.S. 353, 358 (2008); *see also Melendez-Diaz* v. *Massachusetts*, 557 U.S. 305, 309 (2009). As one founding-era treatise explained, ex-parte depositions and affidavits "could not be received as any evidence at all, because there the party would have no opportunity of cross examination." Thomas Peake, *A Compendium of the Law of Evidence* 45 (1804); *see also* S.M. Phillips, *A Treatise on the Law of Evidence* 8 (1816) ("[I]n criminal prosecutions, the demands of

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[2] The *Crawford* Court's conception of the Sixth Amendment as preserving the confrontation right just as it existed in 1791 has been subject to academic debate. *See, e.g.*, David Alan Sklansky, *Hearsay's Last Hurrah*, 2009 Sup. Ct. Rev. 1. The lack of *any* historical basis for New York's rule, however, strongly suggests under any theory of the Clause's meaning that the state's outlier approach should be rejected.

public justice supercede every consideration of private inconvenience, and witnesses are unconditionally bound to appear."). A later commentator similarly explained that out-of-court testimony "must" satisfy four requirements to be received as evidence: (1) "it was taken in the presence of the prisoner, and that he either cross-examined, or had an opportunity of cross-examining, the [witness]"; (2) the witness and magistrate signed the statement; (3) the statement was given under oath; and (4) "the deponent is either dead, or so ill as not to be able to travel." Edmund Powell, *The Practice of the Law of Evidence* 166-168 (1858).

Common-law courts strictly enforced those requirements, "inquir[ing] scrupulously and even suspiciously into all these circumstances." *Id.* at 167. Prosecutors bore the burden to "affirmatively" show that the prisoner or his counsel "had a full opportunity of cross-examining the witness," with "sufficient time to consider what questions he would put." *Id.* Similarly, the absent witness had to prove, typically through a "medical attendant," that his illness was "dangerous or serious enough to excuse" his absence at trial. *Id.*

The common law recognized a *single* exception to these requirements, where a defendant would have no right to confront the witness: dying declarations. "[I]f the [criminal defendant] be not present at the time of the examination, it cannot be read as a deposition taken on oath, though in cases where a party wounded was apprehensive of, or in imminent danger of death, it may be received as his dying declaration." Peake, *supra*, at 43. Such statements could be received only if the witness was about to die and knew it. *See, e.g.*, *Giles*, 554 U.S. at 363 (noting dying declarations were admissible "only if the witness 'apprehended that she

was in such a state of mortality'" (quoting *King* v. *Woodcock* (1789) 168 Eng. Rep. 352, 353-354); *see also King* v. *Commonwealth*, 4 Va. 78, 81 (1817) (inquiring whether the declarant was "conscious he was dying").

There were no other exceptions to a criminal defendant's right to cross-examine adverse witnesses. *King* v. *Dingler* and *King* v. *Woodcock*—two cases this Court relied on in *Giles*—illustrate that point. *See Giles*, 554 U.S. at 362-363. *Dingler* held that apart from dying declarations, "it is utterly impossible, unless the prisoner had been present, that [a] deposition[] * * * can be read" into evidence. (1791) 168 Eng. Rep. 383, 384. *Woodcock* similarly stressed that only two "species" of out-of-court statements could be introduced: dying declarations and "the deposition[] of the witnesses" against the prisoner, if it had been taken in the presence of the prisoner and the prisoner was given the "opportunity of contradicting the facts it contains." 168 Eng. Rep. at 352-353.

In short, the common law is clear: Admission of a dying declaration was the only exception to a criminal defendant's confrontation right at the time of the Founding.

B. At Common Law, A Party Could Forfeit The Right Of Confrontation Only Through Wrongdoing Designed To Subvert Justice.

Common-law courts did recognize one narrow set of circumstances in which a defendant might forfeit the right of confrontation through "wrongdoing," allowing the prosecution to present unconfronted testimonial hearsay. But those circumstances were narrowly defined, involving only conduct *designed* to render a witness unavailable or otherwise subvert the judicial

process.[3] Common-law authorities accepted "the maxim that a defendant should not be permitted to benefit from his own wrong." *Giles*, 554 U.S. at 365 (citing Geoffrey Gilbert, *Law of Evidence* 140-141 (1756)). Thus, where a defendant prevented a witness from testifying at trial with the purpose of rendering the witness unavailable, he could forfeit his right to be confronted with that witness.

But this doctrine was exceedingly narrow, applying only where the defendant *intended* to prevent the testimony. That is, the "wrong" that forfeiture by wrongdoing penalized was "conduct *designed* to prevent a witness from testifying." *Id.*; *see also* Gilbert, *supra*, at 141. Even killing a witness before trial was insufficient in itself to forfeit the right. In *Dingler*, for example, the defendant's wife identified him as her assailant 12 days before she died from stab wounds. *Giles*, 554 U.S. at 363 (citing 168 Eng. Rep. at 383). But the court refused to admit the wife's statement because the defendant did not "have * * * the benefit of cross examination," even though "it was the best evidence that the nature of the case would afford." *Id.* (quoting 168 Eng. Rep. at 383-384). Murder, or any other "wrongful conduct," must have been specifically intended "to prevent a witness's testimony." *Id.* at 366. In *Giles*, this Court held that a defendant must have "in [his] mind the particular purpose of making the witness unavailable." *Id.* at 367 (internal quotation marks omitted).

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[3] Of course, a defendant may also "knowingly and voluntarily waive" the right of confrontation, just like any other right. *United States* v. *Mezzanatto*, 513 U.S. 196, 201 (1995). Waiver, however, is distinct from forfeiture. *See* Pet'r Br. 26 n.5. The facts of this case do not implicate waiver.

This narrow forfeiture-by-wrongdoing doctrine may well extend to other deliberate attempts to subvert the judicial process, such as where the defendant "conduct[s] himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom." *Illinois* v. *Allen*, 397 U.S. 337, 343 (1970). Indeed, this Court has held that criminal defendants who "flagrant[ly] disregard" "elementary standards of proper [courtroom] conduct" risk forfeiting their Sixth Amendment rights. *Id.* at 343-344. That, too, aligns with the common law, which recognized that "if the adverse party had been in Contempt," unconfronted testimony could be introduced against him. Gilbert, *supra*, at 63. But like conduct specifically designed to thwart testimony, this conduct also had to be a deliberate attempt to subvert the judicial process in order to trigger forfeiture.

C. The "Rule of Completeness" Evidentiary Doctrine Was Exceedingly Narrow At Common Law.

Common-law courts also applied a rule of completeness, permitting introduction of out-of-court statements in limited circumstances. Under that rule, where one party puts "part of an utterance" into evidence, the opposing party may "complement it by putting in the remainder, in order to secure for the tribunal a complete understanding of the total tenor and effect of the utterance." 3 Wigmore, *supra*, § 2113. "The single purpose" of this rule is "to avoid the danger of mistaking the effect of a fragment whose meaning is modified by a later or prior part." *Id.*

A famous example from Algernon Sidney's Trial for treason in 1683 illustrates the rule's purpose: There, the defendant objected to the piecemeal introduction

by the Crown of passages from his manuscript, arguing that they left a misleading impression of his manuscript as a whole. As Sidney put it, "if you will take Scripture by pieces, you will make all the penmen of Scripture blasphemous. You may accuse David of saying 'There is no God' . . . ." *Id.* § 2094 (quoting *Algernon Sidney's Trial*, 9 How. St. Tr. at 829, 868). The Court allowed Sidney to introduce additional fragments to fully explain the manuscript's meaning, taking up Sidney's biblical reference: "It is true," Lord Chief Justice Jeffreys acknowledged, "in Scripture it is said, 'There is no God'; and you must not take that alone, but you must say, 'The fool hath said in his heart, There is no God.' " *Id.* (quoting same).

As this example illustrates, the rule of completeness was directed at a narrow concern: the "possibilities of error" that "lie in trusting to a fragment of an utterance without knowing what the remainder was." *Id.* That rule allowed admission of the remaining fragment to complete "the whole" of a "distinct thought." *Id.*

In line with the narrowness of this concern, the common-law rule had two significant limitations, as described by Wigmore: First, it would admit only statements from the same utterance—not other evidence that could call the utterance into question. *Id.* § 2113.[4] Even New York courts historically applied

[4] The common-law rule was thus narrower than Federal Rule of Evidence 106, which permits "*other* writing[s] or recorded statement[s]" to be introduced if "fairness" so requires. (emphasis added). *See also* 21A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure Evidence* § 5072.1 (2d ed. 2020

that limitation, observing that where "a statement, forming part of a conversation, is given in evidence, whatever was said by the same person in the same conversation, that would in any way qualify or explain that statement, is also admissible, but detached and independent statements, in no way connected with the statement given in evidence, are not admissible." *Rouse* v. *Whited*, 25 N.Y. 170, 174-175 (1862) (quoting S.M. Phillips, *A Treatise on the Law of Evidence* 416 (10th Eng. ed., 4th Am. ed. 1859)).[5]

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update) (noting that Rule 106 does not "codif[y] the common law completeness doctrine").

Nor does this case involve "the doctrine of curative admissibility." *State* v. *Vance*, 596 S.W.3d 229, 247-248 (Tenn. 2020). "[C]urative admissibility permits the admission of inadmissible evidence by a party in response to the opposing party admitting *inadmissible* evidence." *Id.* at 248 (quoting *State* v. *Gomez*, 367 S.W.3d 237, 248 (Tenn. 2012), in turn citing 21 Wright & Miller, *supra*, § 5039.3); *see also* 1 Wigmore, *supra*, § 15 (explaining that curative admissibility seeks to "counterbalance the prior inadmissible fact"); *State* v. *Gonzales*, 461 P.3d 920, 926 (N.M. Ct. App. 2019) ("[A] party cannot invoke curative admissibility to correct an admissible statement."). Curative admissibility is not at issue where, as here, the defendant relied on *admissible* evidence to make his case. Moreover, *amici* have been unable to locate any case at common law in which a court invoked the curative admissibility doctrine to admit unconfronted testimonial hearsay against a criminal defendant.

[5] Although at common law "a *distinct or separate utterance* is not receivable under this principle," 3 Wigmore, *supra*, § 2119, Wigmore acknowledges that "what is a separate utterance" is not subject to "fixed definition." *Id.* This case, however, is not in a gray area. The plea allocution, *see* Pet'r Br. 10-11, was plainly separate and distinct from any evidence Petitioner introduced. Indeed, Petitioner's evidence was live testimony by an entirely different witness, *see id*.—not an out-of-court statement by the same declarant who made the statement later introduced by the state.

Second, no "*more of the remainder of the utterance than concerns the same subject, and is explanatory of the first part, is receivable*." 3 Wigmore, *supra*, § 2113. That is, courts admitted only those additional parts of the statement necessary to shed light on the subject described in the first part: "[I]t must be taken as settled that proof of a detached statement made by a witness at a former time does not authorize proof by the party calling that witness of all that he said at the same time, but only of so much as can be in some way connected with the statement proved." *Id.* (quoting *Prince* v. *Samo* (1838) 7 A. & E. 627). Thus, "if, during the same interview between the witness and the party, other subjects of conversation or discussion are introduced, remote and distinct from that which is the object of the inquiry or investigation, it is obvious that whatever may be said concerning them can have no tendency to illustrate, vary or explain it." *Id.* (quoting *Com.* v. *Keyes* (1858) 11 Gray 323, 325); *see also* S.M. Phillips, *supra*, at 416 (1859) (describing the rule as permitting only statements that "qualify or explain" the fragment already admitted).[6]

Even in the narrow circumstances in which the rule of completeness applied, common-law courts would likely not have allowed the prosecution to invoke the rule to admit otherwise inadmissible unconfronted testimonial hearsay in a criminal case. Indeed, *amici* were unable to locate *any* Founding-era case where a criminal defendant's introduction of a testimonial

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[6] A minority rule at common law appears to have permitted admission of the entire utterance under the rule of completeness. *See* 3 Wigmore, *supra*, § 2113. But it did not permit admission of *separate and distinct* statements on the same topic, as the New York Court of Appeals allowed in this case. *See id.*

hearsay statement permitted the prosecution to introduce other parts of that same statement, nor any other historical evidence suggesting that the rule of completeness created an exception to, or constituted forfeiture of, the common-law right of confrontation.

To the extent the rule of completeness even applied to criminal cases at common law, however, it would have applied only where a defendant proffered a fragment of a hearsay statement that left a misleading impression about the meaning of the whole statement, thus allowing, at most, introduction of those parts of the same statement necessary to correct the misimpression.

D. The Decision Below Has No Basis In Recognized Common-Law Confrontation Exceptions Or Forfeiture Doctrines.

The decision below has no basis in these doctrines.

The testimonial out-of-court statement the New York Court of Appeals permitted was not a dying declaration. Nor did the Petitioner waive his right to confrontation, intentionally prevent the witness from testifying, or otherwise engage in misconduct designed to subvert justice. And even assuming (despite the lack of precedent) that the rule of completeness applied in criminal cases at common law to allow admission of some unconfronted testimony against a defendant, this case does not implicate such a rule. Petitioner did not introduce any statement by the unconfronted witness, much less a fragment of a statement that created a misleading impression about the whole statement's meaning. *See* Pet. App. 16a-17a. Thus, admission of the statement cannot be justified by any

recognized exception to, or forfeiture of, the right of confrontation.

Instead, New York has fashioned a different forfeiture-of-confrontation rule, ostensibly based on "[]fairness." *Id.* at 34a. According to the New York Court of Appeals, unconfronted testimonial statements may be admitted under an "opening the door" doctrine, even if those statements are "otherwise barred by the Confrontation Clause." *People* v. *Reid*, 971 N.E.2d 353, 356-357 (N.Y. 2012) (internal quotation marks omitted). As the Court of Appeals conceived it, its "open[ing] the door" doctrine examines "whether, and to what extent, the evidence or argument" of a defendant "is incomplete or misleading," and then determines "what if any otherwise inadmissible evidence is reasonably necessary to correct the misleading impression." *Id.* at 357 (internal quotation marks omitted).

In *Reid*, for example, the defendant called a witness who testified that "the police had information that [another suspect] was involved in the shooting." *Id.* The defendant also made persistent "argument[s] that the police investigation was incompetent." *Id.* The court held that those defense witnesses and arguments alone were sufficient to "open[] the door to the admission of testimonial evidence, from his nontestifying codefendant, that the police had information that [the other suspect] was not at the shooting." *Id.*

This "opening the door" doctrine goes far beyond the limited confines of any exception to the common-law right of confrontation or forfeiture of that right. Nor does it have any basis in the common-law rule of completeness. The New York Court of Appeals merely asks whether a defendant's *evidence or arguments* are

"incomplete and misleading" in the view of the trial judge, and in light of *inadmissible evidence* the state seeks to introduce. *Id.* at 357; *see also People* v. *Massie*, 809 N.E.2d 1102 (N.Y. 2004). But the rule of completeness is a narrow exception that applies not to arguments or evidence in general, but narrowly to fragments of *utterances*—and even then, only if a different fragment of that same utterance was already introduced, and only as much as necessary to cure the misleading impression left by the first fragment. It is not the "rule of anything can come in to 'complete' the prosecution's rebuttal to the defendant's case."

Instead, "[a]bsolutely and universally," a witness's declaration was "inadmissible" at common law when the defendant "has had no opportunity of controlling and explaining the evidence at the time of deposition, by cross-examining the deponent." *Powell*, *supra*, at 165. *See also* Gilbert, *supra,* at 58 ("But the voluntary Affidavit of a Stranger can by no means be given in Evidence, because the opposite Party had not the Liberty to cross-examine * * * ."); Peake, *supra*, at 41 ("[I]n no case where a witness is living and to be found, shall his deposition be read as evidence * * * ." (footnote omitted)). Indeed, the "Rule of the Common Law" was "[s]trict": "no Evidence shall be admitted, but what is or might be under the Examination of both Parties." Gilbert, *supra*, at 64. And "no man" could be "prejudiced by evidence which he had not the liberty to cross examine." *State* v. *Webb*, 2 N.C. (1 Hayw.) 103, 103 (1794) (per curiam). Dying declarations were "the *only* instance in which evidence is admissible against a prisoner who has not had the power to cross-examine." 2 Starkie, *supra*, at 460 (emphasis added). Common-law courts acknowledged that excluding unconfronted testimony was sometimes

"inconvenien[t]," but concluded that "it would be dangerous to liberty to admit such evidence." *State* v. *Atkins*, 1 Tenn. (1 Overt.) 229, 229 (1807) (per curiam).

In adopting this absolute rule, the common law pointedly rejected creating different confrontation standards for rebuttal or responsive evidence. In fact, common-law courts fully expected that a defendant would "contest" a prosecutor's evidence with his own "opposite Proofs." Gilbert, *supra,* at 148; *id.* at 156-157 (noting "contrary Proofs" and "opposite Witness[es]"). If, for example, a "Defendant [were] charged with a Tresspass," he could "prove a Proposition inconsistent with the Charge, and that he was at another Place at the Time when the Fact is supposed to be done, or the like." *Id.* at 148. The prosecution could, in turn, offer "Proof of the same Proposition totally inconsistent with what" the defendant affirmed. *Id.* Within that framework, the litigants would attack the "credibility of the [opposing] witnesses," introduce "contradict[ing]" evidence, and ask the jury to draw "inference[s] * * * from some former fact." Powell, *supra*, at 22 (internal quotation marks omitted). Thus, a defendant's introduction of evidence contradicting the state's proof was fully contemplated by, and incorporated into, the common-law right of confrontation and rules of evidence.

If a defendant's mere introduction of evidence conflicting with otherwise inadmissible state witness declarations triggered the state's right to introduce such statements, the common-law right of confrontation would have been stripped of much of its force. Given that defendants at common law were allowed to put on direct evidence linking a third party to a crime, *see generally* 1 Wigmore, *supra*, §§ 139-142, a rule like

New York's would have allowed the state in such a case to introduce an unconfronted, self-serving affidavit from that third party insisting upon his innocence. Not surprisingly, no such practice existed.

In fact, common-law courts also appeared to understand that protecting the confrontation right is *most* critical where, as here, a defendant's evidence was "in competition with" adverse out-of-court testimony. 1 Starkie, *supra*, at 44. When evidence conflicts, a jury is more "apt to forget how little reliance ought to be placed upon" unconfronted testimony, which—without the benefit of cross-examination—"may so easily and securely be fabricated." *Id.* And perhaps nowhere is the right of confrontation stronger than with respect to declarations of unconfronted witnesses who themselves (like Morris, the alternative suspect whose plea allocution was admitted here) are potentially implicated in the charged offense. For example, at common law, a criminal confession "[wa]s only Evidence against the Party himself who made it," *not* "against any others." *Gilbert*, *supra*, at 140; *see also* 2 Starkie, *supra*, at 53 ("It is a general rule * * * that the admission or confession of one defendant is not evidence against any but himself * * * ."). Third-party confessions were inadmissible "upon the ground, that it is hearsay evidence—the words of a stranger to the parties." *State* v. *May*, 15 N.C. (1 Dev.) 328, 332-333 (1833).[7]

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[7] Even as a matter of hearsay law, criminal confessions by third parties were inadmissible; the modern hearsay exception for statements against *penal* interest of a now-unavailable witness was not recognized at common law. Only statements against *pecuniary* interests of unavailable witnesses in non-criminal cases

The concern with unconfronted third-party confessions is not merely that the confessions might be coerced. *See Crawford*, 541 U.S. at 44 (noting the reliability concerns with Lord Cobham's sworn letter accusing Sir Walter Raleigh of conspiring with him to kill King James I). The concern is also that such confessions, though facially inculpatory, may be self-serving when placed in broader context. *Cf. Williamson* v. *United States*, 512 U.S. 594, 603-604 (1994) (noting that inculpatory statements can be self-serving, or exculpatory statements actually against interest, "in light of all the surrounding circumstances"). Here, Morris's plea allocution, though facially a confession to a firearms offense, was self-serving when viewed in its broader context: He was an alternative suspect who could distance himself from the 9mm weapon used in the shooting by claiming ownership of the .357 Magnum instead. *See* Pet'r Br. 7-8. Indeed, that is precisely how the State used his unconfronted declaration at trial. *See id.* at 9.

The decision below departs from these fundamental principles and should be reversed.

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were permitted. *See Donnelly* v. *United States*, 228 U.S. 243, 273 (1913) (explaining the common-law rule borrowed from England).

II. NEW YORK'S RULE IS INCONSISTENT WITH THE CONFRONTATION CLAUSE.

A. The Decision Below Cannot Be Squared With *Crawford* Or Any Other Conception Of The Confrontation Clause.

This Court held in *Crawford* that "[w]here testimonial evidence is at issue," the "Sixth Amendment demands what the common law required: unavailability [of the witness] and a prior opportunity for cross-examination." 541 U.S. at 68. The Court also held that the confrontation right "is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding." *Id.* at 54. Because New York's novel "open the door" forfeiture rule did not exist at common law, the decision below squarely conflicts with *Crawford*.

Nor does the New York Court of Appeals' invocation of "[]fairness" as the rationale for its forfeiture rule bring it in line with *Crawford*. Pet. App. 34a. As this Court held in *Giles*, "the guarantee of confrontation is no guarantee at all if it is subject to whatever exceptions courts from time to time consider 'fair.'" 554 U.S. at 375. The "Sixth Amendment seeks fairness indeed—but seeks it through very specific means (one of which is confrontation) that were the trial rights of Englishmen." *Id.*[8]

[8] New York's "fairness" test echoes the "reliability" test that *Crawford* rejected. 541 U.S. at 67-68. Each is a "[v]ague" and "manipulable" standard that places far too much "discretion in judicial hands." *Id.*

Indeed, if the New York Court of Appeals were correct that the prosecution should be allowed to introduce unconfronted testimonial statements any time those statements rebut the defendant's case, several of this Court's precedents would have come out differently. The prosecution in *Crawford* itself offered unconfronted testimony to rebut the defendant's self-defense theory. 541 U.S. at 40. In the prosecution's own words, its tape-recorded testimony was meant to "completely refute[]" the defendant's "claim of self-defense." *Id.* at 40-41. This Court rejected that outcome: Because "the State admitted [a] testimonial statement against petitioner," with no opportunity for cross examination, "[t]hat alone [was] sufficient to make out a violation of the Sixth Amendment." *Id.* at 68. The New York Court of Appeals would have let that rebuttal testimony in—assuming the trial judge was similarly skeptical of the defense theory.

Likewise, in *Giles*, the defendant made a "claim of self-defense." 554 U.S. at 381 (Breyer, J., dissenting). To support that claim, the defendant presented evidence describing "the victim as jealous, vindictive, aggressive, and violent." *Id.* This Court held that the Confrontation Clause barred unconfronted rebuttal testimony from the victim "describing a history of physical abuse" that was inconsistent "with the defendant's claim that he killed her in self-defense." *Id.* at 384. The Court of Appeals, again, would have let that rebuttal testimony in.

And in *Bullcoming*, the defendant, who was charged with drunk driving, testified that he "did not drink anything between six in the morning" and the car accident "in the late afternoon." State's Answer Brief at 8, *State* v. *Bullcoming*, 226 P.3d 1 (N.M. 2010) (No.

31,186), 2009 WL 7040758, at *8. Further, he testified that the "odor of alcohol" that the victim smelled "did not come from him but from others in the truck he was driving." *Id.* The prosecution sought to introduce testimony regarding the defendant's blood-alcohol level, specifically contradicting the defendant's own testimony and arguments. But once again, this Court held that the defendant had a right to be confronted with the "analyst who made" the blood-alcohol certification. *Bullcoming* v. *New Mexico*, 564 U.S. 647, 652 (2011). That testimony, too, would have been admitted in New York.

In yet another example, in *Pointer* v. *State*, the defendant, who was accused of robbing a convenience store, raised a "defense of alibi," asserting that he was with friends on the night of the robbery. 375 S.W.2d 293, 294 (Tex. Crim. App. 1963). The lower court admitted out-of-court testimony to rebut that defense. *Id.* at 295-296. But this Court reversed, holding that "confrontation was a fundamental right essential to a fair trial in a criminal prosecution." *Pointer* v. *Texas*, 380 U.S. 400, 404 (1965).

The list goes on. *See Davis* v. *Washington*, 547 U.S. 813, 819-820, 829-830 (2006) (Confrontation Clause violated by police officer's testimony recounting witness's description of altercation in response to defendant's position that the "argument never became physical" (internal quotation marks omitted)); *Gray* v. *Maryland*, 523 U.S. 185, 188-189 (1998) (petitioner had Sixth Amendment right to be confronted with witnesses contradicting his own testimony that he was uninvolved in the crime); *Cruz* v. *New York*, 481 U.S. 186, 189-190, 193 (1987) (Confrontation Clause violated where prosecutor introduced co-defendant's

videotaped confession to rebut petitioner's argument that he was uninvolved in the murder); *Lee* v. *Illinois*, 476 U.S. 530, 538, 546 (1986) (affirming defendant's Sixth Amendment right to be confronted with witness contradicting defendant's testimony that she acted "either in self-defense or under intense and sudden passion with respect to the stabbing").

As these examples demonstrate, the approach adopted by New York—and those jurisdictions that join it—is directly contrary to this Court's Sixth Amendment precedent.

Moreover, the New York Court of Appeals' view of confrontation is fundamentally inconsistent with another aspect of the Sixth Amendment: the right of criminal defendants to put on a complete defense and present evidence to support that defense. *E.g.*, *Crane* v. *Kentucky*, 476 U.S. 683, 690 (1986). Defendants offer their defense theories and arguments within our fundamentally "adversar[ial]" criminal justice system. *Garner* v. *United States*, 424 U.S. 648, 655 (1976); *Herring* v. *New York*, 422 U.S. 853, 857, 862 (1975) ("[t]he very premise of our adversar[ial] system" rests on "partisan advocacy on both sides"). By exercising their right to present the evidence most strongly in their favor, defendants do not forfeit their separate—and equally important—right to be confronted with the witnesses against them. To the contrary, the two guarantees reinforce one another. The confrontation right ensures a defendant is able to present his "defense theory," while also enabling jurors to "make an informed judgment as to the weight to place on [the opposing] testimony." *Davis* v. *Alaska*, 415 U.S. 308, 317 (1974).

In short, the Confrontation Clause applies equally where the defendant seeks to be confronted with a responsive or rebuttal witness. As this Court has emphasized, the "Confrontation Clause's requirements apply 'in every case, whether or not the defendant seeks to rebut the case against him or to present a case of his own.' " *Bullcoming*, 564 U.S. at 666 (quoting *Taylor* v. *Illinois*, 484 U.S. 400, 410 n.14 (1988)).

B. As A Rule Of Evidence, The "Opening The Door" Doctrine Must Give Way To The Constitution.

The Confrontation Clause does not "[l]eav[e] the regulation of out-of-court statements to the law of evidence." *Crawford*, 541 U.S. at 51. While Morris's undisputedly testimonial plea statement was within the scope of the Confrontation Clause, the New York Court of Appeals nevertheless admitted it under a state *rule of evidence.* This Court should reverse that mistaken ruling.

To be sure, state rules of evidence routinely anticipate that one party's evidence or arguments will "open the door" to responsive evidence that might otherwise be irrelevant. Wright & Miller, *supra*, § 5039.1; *see also, e.g.*, *State* v. *James*, 677 A.2d 734, 742 (N.J. 1996) ("The 'opening the door' doctrine is essentially a rule of expanded relevancy * * * ."). That is, as "parties offer relevant evidence to prove their cases, each bit of evidence opens up new avenues of refutation and confirmation that expand the realm of relevance beyond those consequential facts expressed in the pleadings." Wright & Miller, *supra*, § 5039.1; *see also People* v. *Betts*, 514 N.E.2d 865, 868 (N.Y. 1987) (referring to "assertions that open the door and render those charges relevant for contradictions and response").

Similarly, one party's evidence can "open the door" in ways that "expand the scope of cross-examination and the range of methods permissible for impeachment of the witness." Wright & Miller, *supra*, § 5039.1.

But some jurisdictions, including New York, take such commonplace rules a step further. They hold that when a party's evidence or argument "opens the door" to responsive evidence, other evidentiary rules are effectively suspended if deemed "reasonably necessary" to correct misimpressions caused by "the evidence or argument said to open the door." *Massie,* 809 N.E.2d at 1105. Thus, over a defendant's objection, a prosecutor may present "otherwise inadmissible" evidence if responsive to misleading evidence or argument. *Id.* This "most often" occurs when "a defendant has been untruthful about a former crime or has brought up" character evidence—permitting the state to offer rebuttal evidence otherwise barred by evidentiary rules. *Larimore* v. *State*, 877 S.W.2d 570, 574 (Ark. 1994); *see also State* v. *Dunlap*, 579 S.E.2d 318, 319-320 (S.C. 2003); *Wales* v. *State*, 768 N.E.2d 513, 519 (Ind. Ct. App. 2002). But other evidentiary rules are also fair game. *E.g.*, *Bowman* v. *State*, 809 S.E.2d 232, 243-244 (S.C. 2018) (defendant "open[ed] the door to otherwise inadmissible prison condition evidence").[9]

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[9] Even as a state rule of evidence, this sort of "opening the door" doctrine is controversial. Indeed, Wright and Miller endorse the opposite approach, explaining that "evidence cannot come through the open door if it is inadmissible even under the expanded realm of relevance opened by the adversary." Wright & Miller, *supra*, § 5039.1 & n.25; *accord Murphy* v. *State*, 453 So.2d 1290, 1294 (Miss. 1984) ("[Y]ou simply cannot 'open the door' to hearsay. Hearsay is incompetent evidence.").

While states are "traditionally accorded" wide latitude in crafting and applying evidentiary rules, *Chambers* v. *Mississippi*, 410 U.S. 284, 302 (1973), that leeway exists only "*so long as their rules are not prohibited by any provision of the United States Constitution*." *Spencer* v. *Texas*, 385 U.S. 554, 568-569 (1967) (emphasis added). In *Washington* v. *Texas*, 388 U.S. 14 (1967), for instance, Texas had enacted a statute that prohibited co-participants in the same alleged crime from testifying for one another, deeming such testimony categorically "unworthy of belief." *Id.* at 22. But because that evidentiary rule conflicted with a criminal defendant's Sixth Amendment right of compulsory process, this Court struck down Texas's law and reversed the defendant's conviction. *Id.* at 22-23.

Likewise, New York's rule must give way to the Confrontation Clause. The "opening the door" doctrine adopted by New York and other jurisdictions holds that a defendant can "open the door" to testimonial evidence "that would otherwise violate his Confrontation Clause rights." *Reid*, 971 N.E.2d at 356. But "[w]here testimonial statements are involved," the Sixth Amendment's protections are not left "to the vagaries of the rules of evidence." *Crawford*, 541 U.S. at 61.

For example, in *Crawford*, this Court vacated a conviction because Washington courts applied a hearsay exception for statements against penal interest in a way that conflicted with the defendant's Sixth Amendment confrontation rights. *Id.* at 40, 68-69. In *Melendez-Diaz*, the Court invalidated a Massachusetts statutory hearsay exception permitting admission of sworn affidavits from nontestifying state

forensic analysts in criminal trials as inconsistent with the Confrontation Clause. 557 U.S. at 308-309, 329. And in *Bullcoming*, the Court upheld a defendant's Sixth Amendment right to be confronted with a forensic analyst who tested the defendant's blood sample and reported his blood alcohol level, even though New Mexico's evidentiary rules permitted the analyst's testimony to be received through a written report and certification. 564 U.S. at 652-653, 665, 668.

The premise of the decision below—that New York's rules of evidence limit a constitutional right—is flatly inconsistent with this Court's precedents, and indeed with the Supremacy Clause itself.

CONCLUSION

For the foregoing reasons, the judgment of the New York Court of Appeals should be reversed.

Respectfully submitted,

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