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 RICHARD D. FRIEDMAN AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Richard D. Friedman is the Alene and Allan F. Smith Professor of Law at the University of Michigan Law School. Much of his academic work has dealt with the right of an accused under the Sixth Amendment "to be confronted with the witnesses against him." He has written many articles and essays on that right, and since 2004 he has maintained The Confrontation Blog, www.confrontationright.blogspot.com, to report and comment on developments related to it. He successfully represented the petitioners in *Hammon v. Indiana* (decided together with *Davis v. Washington*, 547 U.S. 813 (2006)), and *Briscoe v. Virginia,* 559 U.S. 32 (2010). In this case, in accordance with what has been his usual practice in cases before this Court involving the Confrontation Clause, he is submitting a brief as *amicus curiae* on behalf of himself only; he has not sought the participation of any other person. He does this so that he can express his own thoughts, entirely in his own voice. His desire, in accordance with his academic work, is to promote a sound understanding of the

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[1] Petitioner has filed with the Clerk a global consent to the filing of any *amicus* brief on the merits of this case. Respondent has consented in writing to the filing of this brief. Part of the cost of preparing and submitting this brief was paid for by research funds provided by the University of Michigan Law School to *amicus* and under his control. The brief does not necessarily reflect the views of that Law School or of any of its faculty other than *amicus*. Except as just noted, no persons or entities other than *amicus* made any monetary contribution to the preparation or submission of this brief, which was not authored in any part by counsel for either party.

confrontation right, one that recognizes the importance of the right in our system of criminal justice and at the same time is practical in administration and does not unduly hamper prosecution of crime. In this brief, he attempts not only to give reasons why the decision of the New York Court of Appeals in this case was in error but also to show how that result fits within what he considers to be an ideal overall architecture of the confrontation right and doctrines governing how it might be waived or forfeited.

SUMMARY OF THE ARGUMENT

The prohibition of the Confrontation Clause operates in categorical terms: If, as in this case, a statement is testimonial in nature and is offered against an accused to prove the truth of what it asserted, and the accused did not have an opportunity to be confronted by the witness who made the statement, then there is a presumptive violation of the Clause.

The Clause includes no exceptions, and none need be recognized. Jurisdictions may, however, impose certain constraints on exercise of the confrontation right. These are not exceptions to the right. Rather, they are equitably based estoppel principles that depend on the course of the accused's conduct and they are no broader than equity demands. As to one, the doctrine that an accused may forfeit the confrontation right by certain conduct that renders the witness unavailable to testify at trial, *amicus* believes that unduly narrow interpretation has had unfortunate and significant results for the development of the law

of confrontation. Correction of this problem would allow for a simple and coherent structure for the law of confrontation—and account for the dying-declaration cases without the need for an exception that does not fit the overall doctrine at all.

One permissible constraint is an application of the traditional rule of completeness: In some circumstances, if the accused introduced all or part of a statement by a person, then the prosecution should be allowed to introduce another portion of that statement, or another statement, by the same person, even though the statement is testimonial and offered for its truth and the accused has not had an opportunity for confrontation. But that principle has nothing to do with this case, in which the New York courts applied a doctrine that if the accused presents a defense that the trial court characterizes as misleading then the Confrontation Clause does not apply to responsive evidence offered by the prosecution. Such a doctrine is clearly unjustified.

ARGUMENT

I. Morris's allocution falls within the categorical prohibition of the Confrontation Clause because it was testimonial and offered against petitioner for the truth of what it asserted, and petitioner did not have an opportunity for confrontation.

The Confrontation Clause guarantees that in all criminal prosecutions the accused shall have the right to be confronted with the witnesses against him. After

this Court held that the Clause is applicable against the states by virtue of the Fourteenth Amendment, *Pointer v. Texas*, 380 U.S. 400 (1965), it became crucial to distinguish between the role of the Clause and that of ordinary evidentiary law. The Court's first attempt to articulate a theory of the Clause, in *Ohio v. Roberts*, 448 U.S. 56 (1980), was a failure. It essentially constitutionalized the law of hearsay, with all its bizarre complexities and exceptions, and so it failed to enunciate a principle that was comprehensible or persuasive. And as a result, it frequently led to intolerable results. All that changed with *Crawford v. Washington*, 541 U.S. 36 (2004), in which the Court rediscovered the meaning of the confrontation right, not only as it is reflected in the text of the Clause but as it had been recognized in the common law for centuries before: The right is not a substantive one against admission of evidence deemed unreliable, and it does not extend to all hearsay. Rather, it is a procedural right prescribing how witnesses against an accused give testimony—for giving testimony is what witnesses do—and so is limited in scope to statements deemed testimonial. Witnesses must testify not by, say, speaking to the police in the station-house, *Crawford*, or at home, *Davis v. Washington*, 547 U.S. 813, 829-32 (2006), or signing a document, *Melendez-Diaz*, 557 U.S. 305 (2009), but rather by speaking face-to-face with the accused, under oath and subject to cross-examination, and if reasonably possible at trial.

Most of this Court's Confrontation Clause cases concern the question of whether a given statement was testimonial. This one does not: It is absolutely clear that Morris's testimony at his allocution hearing was testimonial. And it is equally clear that this testimony

was offered against Petitioner,[2] to prove the truth of a matter that it asserted, *compare Tennessee v. Street*, 471 U.S. 409 (1985) (no confrontation violation when statement was not offered for the truth of what it asserted), and that Petitioner never had an opportunity to be confronted with Morris and cross-examine him. It follows that there is a presumptive violation of the Confrontation Clause. Is there nonetheless a reason why a violation should not be recognized?

The Clause does not include any provision for exceptions, and in the view of *amicus* none should be judicially recognized.[3] But jurisdictions may place certain constraints on exercise of the right. *Amicus* believes that no permissible constraint was applicable in this case. Before focusing on the particular constraint applied by the New York courts, this brief will discuss the general nature of permissible restraints.

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[2] Morris's statement did not make any accusation against Petitioner, but that does not matter. The Confrontation Clause applies to all "witnesses against" the accused, not only to accusers. Whether testimony makes a person a witness against an accused must be determined simply by whether the testimonial statement is offered against the accused by the prosecution. For example, suppose a witness makes an out-of-court testimonial statement describing the commission of a crime, or the scene of it, without giving any identifying information about the perpetrator, and before a suspect has been identified. If ultimately that testimony is offered against an accused, the confrontation right would apply.

[3] In the view of *amicus*, there is no need for a dying-declaration exception to the confrontation right, and one is not justified by the structure or theory of the Confrontation Clause. Cases involving dying declarations would be satisfactorily resolved by proper application of forfeiture doctrine. See pp. 12-13 *infra*.

II. In some circumstances, the accused may be estopped on equitable grounds from asserting the confrontation right. Such estoppel doctrines must be narrowly tailored and dependent on the accused's course of conduct.

The Confrontation Clause does not have any exceptions, and *amicus* believes that no exceptions should be read into it. A state (or other jurisdiction) may, however, impose some constraints on the exercise of the right. *Amicus* believes that tolerance of such constraints is an integral part of the doctrine governing the confrontation right, and that the inevitable tendency if such tolerance is insufficient would be—and has been—to limit the right itself unduly. At the same time, it is obviously crucial that such constraints not be so broad or loosely defined as to undercut the right itself.

Courts have recognized several different types of constraints that should be deemed permissible. Some of the situations in which these apply may be characterized as instances of waiver, and some as forfeiture. For present purposes, the difference, which is not always clearcut (thus sometimes leading to the term "implicit [or implied] waiver"), does not matter much. It may be useful to use the umbrella term *estoppel* to cover these constraints, because the thread that runs through all of them is that *an accused's course of conduct* may make it inequitable to require confrontation of the accused by a given witness, *see Crawford*, 541 U.S. at 62 (accepting "the rule of forfeiture by wrongdoing" on the basis that it "extinguishes confrontation claims on essentially equitable grounds"). And, because confrontation is

excused on an equitable basis, the estoppel should be no broader than equity demands.

Timely assertion.

The accused may be required to make a timely assertion of the confrontation right, because it would be highly disruptive to the adjudicative system if convictions were to be routinely reversed on the basis of belated claims of the right. But, if the error was a "plain" one, and it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings, *United States v. Olano*, 507 U.S. 725, 732 (1993), then equity may pull in the other direction, and a conviction may be reversed on the basis of a claim of the right even though it was never asserted at trial. *Accord*, *e.g.*, *Morrow v. State*, 275 So.3d 77, 81 (Miss. 2019) (plain error must have "resulted in a miscarriage of justice" or seriously affected the fairness, integrity, or public reputation of judicial proceedings); *Jones v. Commonwealth*, 319 S.W.3d 295, 297 (Ky. 2010) (review of unpreserved contention for "palpable error," requiring a showing of "manifest injustice").

Further, a jurisdiction may provide that, if given proper notice, the accused must assert the right in advance of the actual offer of the evidence, so that the prosecution knows in advance whether it has to bring in a live witness. Thus, a state may create a simple notice-and-demand procedure, under which if the prosecution gives sufficient notice of intent to offer a lab report, the report may be admitted without the author testifying at trial unless the accused makes a demand by a prescribed pretrial time that she appear as a live witness. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 327 (2009) ("The defendant *always* has

the burden of raising his Confrontation Clause objection; notice-and-demand statutes simply govern the *time* within which he must do so. States are free to adopt procedural rules governing objections. . . . There is no conceivable reason why [a defendant] cannot . . . be compelled to exercise his Confrontation Clause rights before trial."). But a state may not prescribe that the accused must take affirmative action, beyond the simple assertion of the right, to secure the witness's attendance. *Id*. at 324 (holding that "the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court").

Voluntary absence.

An accused may also lose the confrontation right by making confrontation impossible or impractical. This may occur in three basic ways. First, the accused may waive the right by voluntarily absenting himself from trial after it commences. Fed. R. Crim. P. 43(c)(1)(A). But it appears that in a capital case "the awful penalty that would follow conviction" may preclude waiver. *Diaz v. United States*, 223 U.S. 442, 455 (1912) (dictum, based on "substantial accord" of cases); *cf. Drope v. Missouri*, 420 U.S. 162, 182 (1975) (reserving question of whether it was proper to proceed in a capital trial in the accused's "enforced absence from a self-inflicted wound").

Misconduct at trial.

Second, the accused's misconduct at trial may make it necessary that he be excluded from the

courtroom. *Illinois v. Allen*, 397 U.S. 337, 343 (1970), held that " a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom." But here again the loss of the right is only as great as necessary to ensure that the proceedings may continue in an appropriate manner: "Once lost, the right to be present can, of course. be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings." *Id.* What is more, it appears that, even if the trial court concludes that the accused has forfeited the right to be present, it should "mitigate the disadvantages of his expulsion as far as technologically possible in the circumstances," by "mak[ing] reasonable efforts to enable him to communicate with his attorney, and, if possible, to keep apprised of the progress of his trial." *Id.* at 351 (Brennan, J., concurring); *see also* Adv. Comm. Notes to 1974 Amendment, Fed. R. Crim. P. 43 (endorsing this view).

Rendering the witness unavailable.

Third, the accused may forfeit the confrontation right in some cases by preventing the witness from testifying subject to confrontation. *Crawford*, 541 U.S. at 62; *Davis v. Washington*, 547 U.S. 813, 833-34 (2006); *Giles v. California*, 554 U.S. 353, 359 (2008). This brief will now spend considerable space discussing this species of forfeiture, because it is

important to the structure of confrontation doctrine, and as a background condition for decision of this case, and because *amicus* believes that it is in large part responsible for difficulties that have beset the law of confrontation over the last dozen years. *See* Richard D. Friedman, *Come Back to the Boat, Justice Breyer!*, 113 MICH. L. REV. FIRST IMPRESSIONS 1 (2014).

The basic idea behind this species of forfeiture is easy to grasp if one takes a core case: An accused, knowing that a witness is planning on testifying against him at trial, murders her to prevent her from doing so, and then objects, on the ground that he had no opportunity for confrontation, to introduction of a testimonial statement that she made. His serious wrongful conduct foreseeably caused her unavailability at trial, so he should not be heard to complain about it. *See* Richard D. Friedman, *Confrontation and the Definition of Chutzpa*, 31 ISRAEL L. REV. 506 (1997).

Now suppose instead that the crime with which the accused is charged is murdering the witness who made the testimonial statement in question, and that if the issue were presented in a side hearing the trial court would find that the accused did in fact murder her but not that he did so *for the purpose* of rendering her unavailable. In that situation, *Giles* held that there is no forfeiture. *Amicus* believes this was a mistake, and one that has caused serious harm to confrontation doctrine.

Three considerations appear to have led to the result in *Giles*, and *amicus* believes none of them is

persuasive.[4] One was concerns about equity. 554 U.S. at 379 (Souter, J., concurring in part). But what is inequitable about holding that an accused who murders a witness, for whatever reason, cannot complain about lack of confrontation by that witness? Indeed, the claim of the confrontation right in that circumstance is highly *inequitable*.[5] Friedman, *Chutzpa*, *supra*.

Second was what Justice Souter, concurring, called "near-circularity." 554 U.S. at 379 (Souter, J., concurring in part). That is, the determination of forfeiture depends, in the case described, on a finding that the accused committed the very crime with which he is charged. Oddly, though, the purposefulness requirement does not eliminate this supposed problem; it just limits the circumstances in which it will arise to settings in which the required purpose can be proven. Beyond that, whatever the criteria for

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[4] The argument summarized here is presented in greater depth in Richard D. Friedman, Giles v. California*: A Personal Reflection*, 13 LEWIS & CLARK L. REV. 733 (2009).

[5] That does not mean there might not be difficult cases regarding equity in this context. A reckless but unintentional homicide makes an interesting case. And it may be that wrongfulness of the conduct is not necessary for forfeiture, or that wrongfulness should be defined in such a way that it is not a real limitation on the doctrine. For example, perhaps an accused should not be able to claim both the confrontation right and spousal privilege if he marries the witness. *See Commonwealth v. Szerlong*, 933 N.E.2d 633, 638 (Mass. 2010) (holding that accused forfeited confrontation right by marrying witness; "the 'wrongdoing' in forfeiture by wrongdoing is simply the intentional act of making the witness unavailable to testify or helping the witness become unavailable"). And perhaps friendly, non-coercive persuasion of a sibling not to testify should result in forfeiture. *Amicus* takes no position on these issues.

characterizing as near-circular an argument that is not in fact circular, there really is no difficulty here: (1) The two fact-finding processes are held for different purposes, one to determine guilt, the other to determine forfeiture. (2) Presumably they are held before different fact-finders, the jury with respect to guilt, the judge with respect to forfeiture. (3) They are conducted on different bodies of evidence, for the judge is not limited to admissible evidence. Fed. R. Evid. 104(b); *Davis*, 547 U.S. at 833. (4) They are subject to different standards of persuasion, "beyond a reasonable doubt" with respect to guilt and "preponderance of the evidence" with respect to forfeiture. *Id.* In conspiracy cases, it is an everyday matter that a judge is called on to make a predicate finding on the same issue that the jury must determine for purposes of guilt. *E.g.*, *Bourjaily v. United States*, 483 U.S. 171 (1988). This is not different.

The third consideration was history. The argument was based principally on the fact that in dying-declaration cases from the Founding era and before, the courts closely examined whether the dying victim "was aware he was about to die," 554 U.S. at 363. Given that usually proof of the accused's guilt was clear, the court thought this inquiry would have be unnecessary if forfeiture doctrine could have been applied to the cases without a showing of purpose to render the victim unavailable as a witness. But this argument does not recognize that the dying-declaration cases, including their imminence requirement, can easily be explained as applications of sound forfeiture doctrine, bounded by a requirement that the prosecution take reasonable steps to mitigate the problem, without a need for demonstrating

purpose to render the witness unavailable. Suppose that in the Framing era a victim of a grievous assault lingered for a time and subsequently died. It was standard practice to take a formal, testimonial statement from her. If death appeared to be imminent at the time, then the statement could be admitted at the accused's murder trial, even though the accused had not had an opportunity for confrontation. *See*, *e.g.*, *King v. Woodcock*, 1 Leach 500, 168 Eng. Rep. 352, 354 (Old Bailey 1789), *discussed in Giles*, 554 U.S. at 362. But if death did not appear imminent at the time, then the statement was not admissible unless the authorities provided the accused with an opportunity for confrontation. *See*, *e.g.*, *King v. Forbes*, Holt 599, 171 Eng. Rep. 354 (York Spring Assizes 1814); *King v. Smith*, Holt 614, 171 Eng. Rep. 357 (Newcastle Summer Assizes 1817).[6]

Thus, the imminence requirement can be understood as marking the equitably determined boundary of cases in which the prosecution has a duty of mitigation—that is, a duty to try to preserve so much of the confrontation right as reasonably possible given the situation created by the accused's misconduct.

Assuming, in accordance with the arguments presented here, that *Giles* was wrongly decided, does it do much harm? *Amicus* believes the answer is emphatically in the affirmative. *See* Friedman, *Come Back to the Boat*, *supra*, 113 MICH. L. REV. FIRST IMPRESSIONS at 7 ("A crucial first step [in improving confrontation doctrine] would be, one way or another, to render *Giles* a dead letter.")

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[6] For further citations and elaboration, see Friedman, *Personal Reflection*, 13 LEWIS & CLARK L. REV. at 744 n.33.

Most obviously, perhaps, *Giles* leads to inequitable results when an accused murders a witness and it is not possible to prove that he did so for the purpose of rendering the witness unavailable.

More pervasively, *Giles* inevitably has led courts to an unduly narrow conception of what is testimonial. A primary example, in the view of *amicus*, is this Court's decision in *Michigan v. Bryant*, 562 U.S. 344 (2011). There, one Covington—mortally wounded, but not under any current threat—made statements to investigating police officers indicating that Bryant had shot him. There was obviously a strong impetus to hold those statements admissible at Bryant's subsequent murder trial. But they could not be characterized as dying declarations, because though Covington died several hours later, he was apparently unaware when he spoke of how dire his condition was. The best result would have been to hold that, if the trial court made a preliminary determination that Bryant had in fact shot Covington, then Bryant forfeited the confrontation right, given that mitigation by holding a deposition was not practical in the circumstances. That result was foreclosed by *Giles*, however; there was no proof that Bryant had shot Covington *for the purpose* of rendering him unavailable. And so this Court characterized Covington's statements as non-testimonial. Now notice the consequence of that holding: Had Covington survived and been living around the corner from the courthouse, the state would have been under no constitutional obligation to produce him as a witness.

Even more fundamentally, *Giles* undercuts the basic theory of the Confrontation Clause and renders the doctrine complex and less incoherent. *Giles* essentially requires that there be a dying-declaration

exception to the confrontation right; it is virtually unthinkable that classic dying declarations would not be admissible, and forfeiture doctrine cannot ordinarily be used. The exception probably made little sense on its own terms at the time of the Framing; even assuming that no one who is about to die would do so "with a lie upon his lips," *Queen v. Osman,* 15 Cox Crim.Cas. 1, 3 (Eng.N.Wales Cir.1881) (Lush, L.J.), did courts then really believe that the accused had little interest in confrontation? It makes even less sense now, in an age of far less universal religiosity. (Consider this thought experiment: The accused and counsel are given a special one-day visa to travel into the spiritual world to take the deposition of the late witness-victim. Would counsel say, "Never mind. Her accusation is so clearly reliable I couldn't do a thing with her"?) And it does not square at all with the theory of *Crawford*. The rationale offered for the exception is a reliability-based one, and perhaps the clearest aspect of *Crawford* is that the Confrontation Clause does not seek to identify some statements as reliable.

Absent the rule of *Giles*, the doctrine of the Confrontation Clause can be quite simple: (1) Prosecution testimony must be subject to an opportunity for confrontation, at trial if reasonably possible—*and there are no exceptions*. (2) In some circumstances, the accused's own course of conduct might, under the doctrines discussed here, estop him from claiming the confrontation right.

Such estoppel doctrines are not exceptions. *Cf. Giles*, 554 U.S. at 375 ("the guarantee of confrontation is no guarantee at all if it is subject to whatever exceptions courts from time to time consider 'fair'") (plurality opinion). They are not based on the

supposed probative value of the statements in question. Rather, they are equitably based, and historically grounded, doctrines *that depend on the accused's course of conduct*; in effect, they prescribe that because of that course of conduct the accused is estopped from claiming a confrontation right that he otherwise would have had. And they are all narrowly tailored, limited by the equitable considerations that underlie them. Moreover, they are all witness- or statement-specific. That is obviously true with respect to timely-assertion requirements and forfeiture by rendering a witness unavailable. It is also true with respect to voluntary absence and misconduct, in the sense that the right can be "reclaimed" by the accused at any time. *Allen*, 397 U.S. at 343. These factors should dispel concerns that such estoppel doctrines would undercut the confrontation right.

Although the basic principles underlying these doctrines were established by the time the Confrontation Clause was adopted, the Court should not be too demanding in expecting exact precedents for specific aspects. For example, so far as *amicus* is aware, there was nothing like a notice-and-demand statute until modern times. And in particular, the fact that in one respect the rationale presented here differs from that commonly asserted in pre-Framing times should be no concern whatsoever. The evidentiary law of those times was primitive and undeveloped; in 1794, Edmund Burke said that the rules of evidence were "very general, very abstract," and "might be learned by a parrot he had known, in one half hour, and repeated by it in five minutes." 5 JAMES MILL, THE HISTORY OF BRITISH INDIA 206 (2d ed. 1820). The development of estoppel doctrines surrounding the modern law of

confrontation should not be limited by the scope of knowledge of Burke's parrot.

This discussion has not yet addressed one estoppel doctrine in particular, the rule of completeness, because it most closely bears on the issue in this case. This brief will now turn to this doctrine, and show how it differs from the doctrine applied by the New York courts in this case.

III. In some circumstances, a state may apply the rule of completeness to admit a testimonial statement despite the absence of an opportunity for confrontation. But merely raising a defense does not provide a basis for avoiding the confrontation right.

Completeness.

If an accused introduces all or part of a statement by a person, then in some circumstances a prosecution may be allowed to introduce the remainder of that statement, or another statement *by that person*, even though the statement is testimonial and the accused has not had an opportunity to be confronted by the person. *E.g.*, *United States v. Moussaoui*, 382 F.3d 453, 481-82 (4th Cir. 2004), *cert. denied*, 544 U.S. 931 (2005); *United States v. Lopez-Medina*, 596 F.3d 716, 730-33 (10th Cir. 2010) (disagreeing on point with *United States v. Cromer*, 389 F.3d 662, 679 (6th Cir. 2004));[7] *State v. Prasertphong*, 114 P.3d 828 (Ariz.

[7] *Cromer*, in rejecting the principle advocated here, purported to rely on scholarship of *amicus*. 389 F.3d at 679. *Amicus* believes that reliance was mistaken, and (while expressing agreement

2005), *cert. denied*, 546 U.S. 1098 (2006). This is a simple application of the rule of completeness, which has common-law roots going back long before adoption of the Confrontation Clause. 7 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2094 ("It appears clearly conceded and consciously applied as early as the 1600s, and no doubt was implicitly understood long before that period.") (footnote omitted). The rule was applied in criminal as well as civil cases. *E.g., Algernon Sidney's Trial*, 8 How. St. Tr. 818, 868-69 (K.B. 1683).[8]

The rule is based on fundamental principles of fairness: Presenting one portion of a statement, or set of statements, may give a very misleading sense of the

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with other parts of the opinion, which accurately relied on his scholarship) he said so at the time. Richard D. Friedman, *United States v. Cromer—an important case from the 6th Circuit*, confrontationright.blogspot.com (Dec. 9, 2004).

[8] In early times, the issue appears to have arisen, or yielded recorded decisions, principally in civil cases (perhaps because it was most salient with respect to documentary evidence), and *amicus* is unaware of cases before 1833 in which the doctrine was invoked—either successfully or unsuccessfully—against a criminal defendant. *See King v. Walkley & Clifford*, 6 Car. & P. 175, 172 Eng. Rep. 1196 (Exch. 1833) ("We must hear the whole statement, otherwise it becomes mutilated."). Whatever the reason these cases are not apparent in the available materials, *amicus* has not found any indication that the rule would be applied only in favor of and not against a criminal defendant. *See*, *e.g.*, GEOFFREY GILBERT, THE LAW OF EVIDENCE 23 (1756) (prescribing in general: "When a Man gives in Evidence, the sworn copy of a Record, he must give the Whole Copy of the Record in Evidence, for the precedent and subsequent Words and Sentence may vary the whole Sense and Impression of the Thing produced, and give it quite another Face; and so much at least ought to be produced as concerns the Matter in Question.").

declarant's meaning, which can be corrected by presenting other portions as well. 7 WIGMORE, EVIDENCE, § 2094 ("One part cannot be separated and taken by itself without doing injustice, by producing misrepresentation."); Daniel J. Capra & Liesa L. Richter, *Evidentiary Irony and the Incomplete Rule of Completeness: A Proposal to Amend Federal Rule of Evidence 106*, 105 MINN. L. REV. 901, 902 (2020) ("premised on notions of fundamental fairness"). The rule of completeness is "partially codified" as a general matter by Fed. R. Evid. 106. *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 171-72 (1988).[9] Fed. R. Evid. 410(b)(1) codifies the rule in the particular context of a statement made in plea proceedings and discussions that "in fairness . . . ought to be considered together" with another statement made during the same

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[9] That Rule refers only to writings or recorded statements, but it is clear that the common-law rule applied to oral statements as well. 7 WIGMORE, EVIDENCE § 2115. It appears that this limitation resulted from the drafters' focus on what Prof. Nance has called the timing function of the rule, advancing the time at which the completing portion of a statement may be introduced, rather than on its trumping function, by which it may override some objections that otherwise might require that portion to be excluded. Capra & Richter, *Evidentiary Irony*, *supra*, 105 MINN. L. REV. at 903-04; *see* Dale A. Nance, *A Theory of Verbal Completeness*, 80 IOWA L. REV. 825, 837-40 (1995). But an Advisory Committee Note made clear that courts could still apply the completeness principle to oral statements, and some have also done so under Fed. R. Evid. 611(a). Capra & Richter, *Evidentiary Irony*, 105 MINN. L. REV. at 912, 925. The Judicial Conference's Committee on Rules of Practice and Procedure has approved for publication an amendment that would make clear both that Rule 106 applies to oral statements and that it may overcome a hearsay objection. Committee on Rules of Practice and Procedure, *Agenda, June 22, 2021*, tinyurl.com/ pzadsczu, at 818, 827.

proceedings or discussions. Thus, suppose—counterfactually—that this Rule applied to the present case, and Petitioner presented a statement from Morris's plea allocution that he owned a 9-millimeter handgun; the Rule would then allow the prosecution to present Morris's testimonial statement from the same allocution that he had a 357-caliber handgun at the scene of the shooting.

Estopping the accused from objecting to introduction of the statement on confrontation grounds in that hypothetical case makes good sense (at least if the prosecution could not, with reasonable effort, secure Morris's live testimony). It was (hypothetically) the accused's course of conduct, presenting part of the statement, that triggered the need for the statement. In doing so, the accused has indicated willingness to rely on an out-of-court statement by this particular witness, on the given subject; he does not have a good basis for complaining about the prosecution's demand that the jury hear an associated portion of the statement by the same witness.[10] The impact of the estoppel is limited to—at most—statements by the same witness.[11] The trial

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[10] The principle is comparable to the one applicable to the Fifth Amendment privilege: An accused who decides to testify "determines the area of disclosure and therefore of inquiry"; "[h]e cannot reasonably claim that the Fifth Amendment gives him . . . an immunity from cross-examination on the matters he has himself put in dispute." *Brown v. United States*, 356 U.S. 148, 155-56 (1958).

[11] The rule of completeness could be limited further when the result is to defeat a claim of the confrontation right. It could be that in that context the rule should only apply: (1) To statements of the same person that are closely associated not only in subject

court, in determining that the completeness principle ought to apply, need not determine that the portion introduced by the accused *would* be misleading; it is enough for the doctrine to apply if it is plausible that the portion alone would be misleading, so that in fairness the jury ought to hear the second part as well.[12]

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matter but in time and context. (*Amicus* does not believe that attempts to determine what should be deemed one statement rather than a series of statements, as in *Williamson v. United States*, 512 U.S. 594 (1994), are likely to be fruitful.) (2) If the portion of the statement that the accused introduced was also testimonial in nature. (2) If the prosecution cannot, with reasonable effort, secure the witness's live testimony. *Amicus* does not take any position as to whether any of these limitations should apply.

[12] Rather than allowing completion evidence, the trial court could simply decide to exclude the defense's evidence, or strike it once the completing evidence became apparent to it. Not only would such a decision often deny the trier of fact of probative evidence, but it would often work to the disadvantage of the accused. *See*, *e.g.*, *Lopez-Medina*, *supra*, 596 F.3d at 731 (defense counsel saying, "I don't care what door we open. . . . I am going to explore the entire case."). In this case, for example, Petitioner presumably was better off with the admission of the evidence concerning the 9-mm cartridge, even given Morris's attempt to explain it away, than he would have been without it. The court might also inform the accused from the beginning that if he does not agree to admission of the completing portion then the court would exclude the portion offered by the accused. If the court is aware of the completing portion at the time of the accused's proffer, that is probably sound practice, but it should not be generally required; it may be, for example, that the prosecution is not aware of the completing portion at that time. If the defense is aware of the completing portion, and knows the prosecution is as well, and (unlike counsel in *Lopez-Medina*) would rather not introduce the initial portion if the completing portion would come in, then it can ask for a ruling before making the proffer.

The New York rule.

The situation in this case is far from the one covered by the rule of completeness. To hold in a case like this that the accused has waived or forfeited the confrontation right, or is estopped from claiming it, would strike close to the core of the right and, to a very large extent, nullify it.

Here, the prosecution did not seek to present the testimony from Morris's allocution on the basis that the defense had presented another portion of that testimony; the defense had done no such thing. Rather, the only basis for introducing Morris's allocution testimony was that the jury learned that shortly after the shooting police had discovered a 9-millimeter, the same type that had killed the child, in Morris's home, by his bed. Petitioner's counsel referred to this fact briefly in his opening statement, J.A. 90, but the first evidence of it was elicited *by the prosecution* on direct examination of an investigating detective, *id.* 123-24; on cross-examination, Petitioner's counsel explored the matter somewhat further. *Id.* 132-34. Relying on *People v. Reid,* 971 N.E.2d 353 (N.Y. 2012), the trial court held that, by suggesting that Morris was the shooter, Petitioner had "open[ed] the door to evidence offered by the state refuting" that contention. J.A. 184-85. Accordingly, it admitted Morris's statement at the allocution that he had possessed a 357-caliber handgun at the scene of the shooting. *Id.* 208-09. Petitioner was convicted, and the Appellate Division affirmed. That court, too, relied on *Reid* and used the "opening the door"

metaphor,[13] concluding that "introduction of the plea allocution was reasonably necessary to correct [the] misleading impression" that Morris possessed a 9-mm gun at the scene. Pet. App. 16a-17a. And the Court of Appeals, in affirming, said on this issue only that "the trial court did not abuse its discretion by admitting evidence that the allegedly culpable third party pled guilty to possessing a firearm other than the murder weapon." *Id.* 2a.

So the position that the New York courts have taken in this case is that if the accused has the temerity to present and draw attention, in an opening statement and through the testimony of one witness, to an indisputable fact of indisputable materiality, he is subject to a holding that he has forfeited the right to be confronted *by another witness*,[14] on the ground that the trial court deems that fact "misleading" standing by itself. That cannot be the law.

An accused, of course, has a "fundamental constitutional right to a fair opportunity to present a defense." *Crane v. Kentucky*, 476 U.S. 683, 687 (1986). He cannot be placed in a position of having to elect between that right and his equally fundamental right to be confronted with the witnesses against him. Thus, as the Petitioner's Brief has shown amply, pp.

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[13] The metaphor is a frequently used one in contexts such as those discussed in this brief. *Amicus* believes that it is generally unilluminating. It describes a result—that evidence is admissible against a party even though, but for the party's conduct, it would not have been. It does not help understand when that result should occur.

[14] *Cf. Moussaoui, supra*, 382 F.3d at 481 n.39 (noting Government's acknowledgment that "under the circumstances here, the rule of completeness would not allow it to use a statement by one witness to 'complete' a statement by another").

18-21, the mere fact that the defendant has raised a defense does not diminish the confrontation right.

That a court might characterize the defense presented by the accused as misleading cannot alter this conclusion. At least three reasons explain why.

First, there is no equitable basis for forfeiture in such a case. If an accused presents evidence that, taken by itself, is potentially misleading, the prosecution may of course respond *with admissible evidence*. It is possible that the defense's proffer will expand the range of material evidence that the prosecution may offer, but the prosecution would not be relieved of any of the other requirements of admissible evidence. It could not, for example, present an incompetent witness, or testimony not taken under oath. And neither is there any reason, if the defense has not presented a statement by a given person, that the prosecution should be allowed to rebut the defense's contention by presenting testimony from that person without offering an opportunity for confrontation. Confrontation might show that the person was not telling the truth, or that the testimony does not bear the inferences that the prosecution would like to draw from it.

Second, it is too easy to characterize a stance taken by the defense as misleading. It is a routine aspect of litigation that one side presents a contention and the other side responds in effect, "That's misleading taken by itself. You have to consider this additional fact." So that is the other side's contention—which does not mean it is necessarily true. In this case, for example, the defense emphasized that Morris had a 9-mm cartridge shortly after the shooting. That was obviously significant, as

suggesting that Morris likely had a 9-mm handgun and may have been the shooter. The prosecution wanted to respond by demonstrating that Morris claimed that he had a 357-caliber handgun at the scene. That is a fair response, if the prosecution can prove it through admissible evidence. But it does not make the defense's contention misleading. Perhaps Morris was lying; it was in his interest to do so. And perhaps he had *both* guns at the scene. We need not dwell on whether the *prosecution* was misleading in presenting the allocution statement. This kind of dispute over the facts and the inferences that may be drawn from them is the ordinary stuff of litigation, and proof must be made in accordance with constitutional requirements.

And third, an accused's right of presenting a defense would be chilled intolerably by such a doctrine. It would put an accused in the position of having to guess whether the trial court would assess his contentions to be misleading, because that conclusion would result in forfeiture of the confrontation right.

Amicus does not believe this is a close call. Petitioner did not forfeit the confrontation right by emphasizing that Morris had a 9-mm cartridge. An accused does not forfeit the right, and is not estopped from asserting it, merely by making a contention, through evidence or a statement to the jury, regardless of whether the court characterizes that contention as misleading.

CONCLUSION

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

Respectfully submitted,

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