No. 20-637

IN THE

Supreme Court of the United States

DARRELL HEMPHILL,

Petitioner,

v.

THE STATE OF NEW YORK,

Respondent.

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

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether, or under what circumstances, a criminal defendant can, by his conduct at trial, open the door and relinquish the right to object to an out-of-court statement that would otherwise be barred by the Confrontation Clause.

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JURISDICTION

The petition was filed on November 6, 2020, and granted on April 19, 2021. This Court lacks jurisdiction over petitioner's claim that New York's opening-the-door rule violates the Confrontation Clause because petitioner failed to present it to the New York State Court of Appeals. *See infra* Point I.

INTRODUCTION

Petitioner was tried and convicted of murder for having fired the 9-millimeter bullet that killed two-year-old David Pacheco, Jr. on Easter Sunday 2006. At trial, the court permitted the People to elicit a redacted and very brief plea allocution by a non-testifying third party—Nicholas Morris. In his allocution, Morris mentioned only his own conduct—that he had possessed a .357 magnum. The allocution did not mention the shooting, nor anyone else's conduct. Moreover, the allocution was entirely cumulative to the trial testimony of petitioner's accomplice who, at trial, was fully cross-examined. Nevertheless, because the plea allocution was a formal declaration to the authorities and was offered to prove the truth of the matter asserted, it constituted testimonial hearsay that ordinarily is barred by the Confrontation Clause. *Crawford v. Washington*, 541 U.S. 36, 64-65 (2004).

New York allows the admission of an out-of-court statement that is otherwise inadmissible under the Confrontation Clause if a defendant, by his actions at trial, opens the door to that statement. *People v. Reid*, 971 N.E.2d 353, 356 (N.Y. 2012). The trial court admitted the plea allocution under this theory. Before this Court,

petitioner claims for the first time that the *Reid* opening-the-door rule is unconstitutional.

Petitioner never presented his claim about the constitutionality of New York's rule to the state court and, therefore, it is not appropriate for review by this Court now. Moreover, this claim lacks merit. States are permitted to craft procedural rules governing a criminal defendant's ability to protect his rights under the Confrontation Clause. *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 313 n.3 (2009). In New York, door-opening is a procedural rule that requires a twofold inquiry: "whether, and to what extent, the evidence or argument said to open the door is incomplete and misleading, and what if any otherwise inadmissible evidence is reasonably necessary to correct the misleading impression." *Reid*, 971 N.E.2d at 357 (quoting *People v. Massie*, 809 N.E.2d 1102, 1105 (N.Y. 2004)). Here, rather than relying only on proper evidence and arguments relating to a third-party culprit, at trial, defense counsel pursued a persistent course of conduct that the trial court had previously ruled was misleading and improper. Under the unique circumstances of this case, the court was right to conclude that counsel, by his intentional conduct at trial, had opened the door and relinquished the right to object to the admission of the allocution on Confrontation Clause grounds.

STATEMENT OF THE CASE

I. Petitioner Shoots and Kills David Pacheco, Jr.

On April 16, 2006, petitioner, clad in a light-blue sweater, shot a 9-millimeter semi-automatic pistol at least five times at a Hispanic man across Tremont Avenue in

The Bronx. An errant 9-millimeter bullet struck and killed two-year-old David Pacheco, Jr., as Pacheco rode in the back seat of his mother's minivan. Pet. Cert. App. 8a-9a.[1] Minutes earlier, petitioner and his cousin (and longtime associate) Ronnell "Burger" Gilliam had been on the losing end of a street fight at that location against members of a Hispanic family of five.[2] After the fisticuffs, petitioner fled briefly, then returned to the scene and opened fire, aiming towards one of the men from the altercation. Petitioner's bullet struck young David instead. Tr.56,978-79,992-93,996-99.

At trial, nine years later, petitioner presented a third-party culpability defense. Although petitioner did not testify, counsel argued that there was evidence to suggest that Gilliam's best friend Nicholas Morris was the man who had fired the fatal shot. Tr.32-36. Refuting that defense, Gilliam testified that his cousin, petitioner, and not Morris, was the shooter. Tr.979-80. Gilliam was uniquely positioned to know the true identity of the shooter because Gilliam was a key figure in both the altercation and the shooting, and he had longstanding relationships with both petitioner and Morris. Tr.350,987-88.

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1. Unless otherwise indicated, citations to the record are as follows: Joint Appendix by "JA.__," trial transcripts by "Tr.__," Petitioner's Appendix for his Petition for a Writ of Certiorari by "Pet. Cert. App.__a," and Respondent's Opposition to the Petition for a Writ of Certiorari Supplemental Appendix by "Res. Cert. Supp. App. __a." Occasionally, a citation is to a transcript other than the jury trial, which is identified by date or other identifying information. Petitioner's Merits Brief is cited by "Pet. Brief __.

2. Denise Marisol Santiago; Juan Carlos Garcia, the father of her soon-to-be-child; Brenda Gonzalez, her mother; Jose Castro, Brenda's husband; and Jon-Erik Vargas, Juan Carlos' cousin. Tr.257,441,803-04,839,876.

At trial, Gilliam explained that after the fight, and with his newfound adversaries in pursuit, he called Morris for help. Gilliam also called petitioner and asked him to return. Tr.978,988. Within minutes, petitioner returned to the scene, exited his girlfriend's car, and, over Gilliam's protest to "hold up," opened fire. Tr.979,997-1000,1157-58. Morris was just arriving when the shooting began. Tr.1001. After they fled and retreated to Gilliam's apartment, Morris handed Gilliam a .357 magnum. Petitioner handed over a 9-millimeter and the sweater he had been wearing that day with instructions for Gilliam to discard all three items. Tr.980. Gilliam disposed of the two firearms but forgot to dispose of the sweater. Tr.981.

Notably, there was never any reason to think that Gilliam was shifting responsibility for the shooting from himself by pointing the finger at petitioner. There were several eyewitnesses to the shooting and based on their descriptions of the participants it was undisputed that Gilliam was one of the combatants in the initial altercation, but not the shooter. Additionally, Morris—who weighed almost 240 pounds, had a prominent scar down the right side of his face, and no tattoo on either arm—also did not fit the description of the shooter. Petitioner, on the other hand, matched the description of the shooter that had been provided by the eyewitnesses: a tall, thin African American man with a tattoo. Tr.704,705,720,752,1629.

Many of the eyewitnesses had to deal with the challenges of a cross-racial/stranger identification. What made it even more difficult for them to accurately identify the shooter was the fact that, at the moment of the shooting, the stranger with the gun was across the street from them, his face was partially obscured by a

brimmed hat, and the shooting was fast-paced, chaotic, and harrowing. Tr.445-48,1028,1094-95.

The one consistency among all the witnesses related to an item of clothing that the shooter was wearing: a light-blue sweater. Eight witnesses testified that the assailant wore a light-blue sweater. Tr.260,267; Tr.350-51; Tr.442,447-48,451; Tr.840,862-63; Tr.877; Tr.1081; Tr.1092-93; Tr.1160,1172.[3] Only one described the garment as a blue golf shirt, adding that it had an "alligator" logo. Tr.809.

At trial, Gilliam testified that petitioner was wearing a blue sweater when he shot Pacheco, Tr.998, while Morris was wearing a black t-shirt. Tr.1051. Gilliam's account on this critical point was fully corroborated. First, petitioner's grandmother confirmed that petitioner was wearing a light blue sweater on the day in question. Tr.602-03. Additionally, a disinterested witness, Michelle Gist, who had seen the initial altercation and the shooting's aftermath independently confirmed that fact. Gist knew petitioner, Morris and Gilliam, and identified petitioner as the combatant who wore a light blue sweater and fitted hat. Tr.351-52. She placed "Nick" at the scene after the shooting. Tr.354.

Notably, although the police never recovered the guns because Gilliam had discarded them, the police recovered a light blue sweater from Gilliam's apartment within hours

3. The witnesses otherwise only differed as to minute details in the description, like whether it was vertically-embroidered or knitted, and whether the sleeves were short or merely rolled up. *Compare* Pet. Brief 8, *with* Tr.267,284,295-96,317,349,351-52,379,445-48,862,863,877,987,1088,1092,1096-98,1160,1171.

of the shooting. Having forgotten to discard the sweater, Gilliam called his apartment and asked his brother to get rid of it. Tr.984. Police were at the apartment at the time and overheard the call. Tr.667,1494. Directed to a closet, Detective Ronald Jimick found a light-blue sweater that smelled of burnt gunpowder. Tr.663-64,667,741.[4] The sweater matched the description that the witnesses had provided, right down to the alligator logo and vertical cable pattern. Exhibit 84 (photograph of sweater): Tr.163-64. Subsequent testing revealed that DNA material on inside of the collar matched petitioner's DNA. Tr.524,567.

The DNA match took years because, the night of the shooting, petitioner had fled to North Carolina and hid with his girlfriend, only one of his children, and Gilliam. Tr.985,1003. Petitioner made the decision to flee after learning Gilliam had failed to dispose of the sweater. Tr.984. Upon arrival, petitioner moved to a different hotel or home each night, Tr.1004-06, until eventually he leased a residence under the alias "Darrel Davis." Tr.941. Petitioner initially abandoned a daughter who later joined him in North Carolina, permanently abandoned a music studio in New York, and had his girlfriend abandon her twenty-year career as a paramedic. Tr.784-85,984-85,1002-1003. Petitioner was ultimately apprehended in North Carolina after being located through a trap and trace on his girlfriend's phone. Tr.774-75,937. The Appellate Division found that petitioner's efforts to "avoid[] law

4. Due to the smell, Jimick drafted paperwork and sent the sweater to the NYPD ballistics laboratory for gunpowder testing. Tr.667,741. No testing was conducted, however; the lab was not certified to test a suspect's clothing for primer residue. The technician only looked for bullet holes or damage and found none. *Compare* Pet. Brief 9, *with* Tr.1112,1114.

enforcement" was "overwhelming evidence demonstrating [his] consciousness of guilt." Pet. Cert. App. 14a.

II. The Prosecution of Nicholas Morris

Later on the day of the shooting, Gist identified Gilliam as one of the participants in the fracas, giving police their first investigative lead. Tr.661-62. That led them to search for his known associates, including Morris. Tr.668,742. At Morris's apartment hours later, Jimick found one 9-millimeter and three .357 caliber bullets.[5] Tr.669,679,749-51.

That same night, Morris, hearing he was a suspect, gave an interview at News 12 The Bronx and displayed his arms: he had no tattoos. Tr.18-19 [09/21/2015]; Tr.408,411. The police, however, arrested Morris. Tr.683. Jimick observed bruises on Morris's knuckles. Tr.721,752.

Morris's arrest was broadcast on television. T.682. Two witnesses, Santiago and Gonzalez, saw the broadcast and noted that he looked heavier than the shooter. Tr.461,466-67,844. A third, Castro, also saw the broadcast and thought that Morris was not the shooter. Tr.280-83. A fourth, Vargas, saw a photograph of Morris and a newspaper article identifying him as the suspect early the next morning. Tr.885-86.

The morning after the shooting, Santiago, Gonzalez and Vargas selected Morris as the assailant out of a five-

5. Although the police also recovered other contraband from Morris's apartment, the court ruled that the evidence was irrelevant and inadmissible. *Compare* Pet. Brief 6 *with* JA.59-60.

person, seated line-up. Tr.684,695,697.[6] Morris's size and hair were masked by garbage bags and a hat, covering all but his face. Tr.696. The three witnesses felt compelled to identify someone, even though Gonzalez and Vargas were not wearing their glasses either at the time of the shooting or at the lineup, Tr.446,469,496,501,887, and Vargas, who had been struck by two cars during the altercation, felt faint and was unfocused when the shooting occurred. Tr.311; Tr.449-50,455,849,881,885. Garcia did not identify Morris in the lineup; the shooter, he said, was not there. Tr.697,819. Castro was unable to participate. Tr.748.

Having learned of Morris's arrest, petitioner told Gilliam that Morris had identified Gilliam as the shooter. Tr.1008. Petitioner retained an attorney for Gilliam. On April 26, Gilliam went with his attorney to the police. Gilliam admitted he had been present at the scene and named Morris as the shooter. Tr.724,951,953-54,1008-10. On May 9, realizing Morris had not implicated him, Gilliam returned with petitioner's brother and explained that petitioner was the shooter and told police that he had disposed of the murder weapon. Tr.725-27,1013-14. Morris happened to call during Gilliam's recantation and asked to speak with Jimick, but Jimick refused to talk with Morris because Morris was represented by counsel. Tr.726. Gilliam told Morris he would "make it right." Tr.1031. Gilliam was subsequently arrested and prosecuted for hindering prosecution and tampering with physical evidence. Later, he was charged as an accessory to murder. Tr.729-30,1019.

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6. Another witness reviewed a photo array with Morris's picture and while he stated that Morris "looks like the shooter," he did not identify him as the shooter. *Compare* Pet. Brief 6, *with* Tr.781.

As the trial against Morris approached, he consented to a DNA test. Tr.535. Testing established that the DNA material on the sweater collar did not come from Morris. Tr.555-59.

In April 2008, the trial against Morris commenced. After the People's opening, Morris's counsel gave an opening statement emphasizing evidence that tended to exculpate Morris: the sweater DNA did not match Morris; the 9-millimeter cartridge recovered from Morris's apartment did not match the brand of 9-millimeter bullets that were used in the shooting; Morris did not match the shooter's description; the lineup was flawed; and Gilliam had called Morris—who lived half a mile away—at his home phone moments after the initial altercation. Tr.224-26,231 (Morris trial, 4/11/2008: attached as exhibit A in petitioner's 8/31/15 motion). After hearing this opening, the People met with counsel and did not oppose defense's application for a mistrial. JA.21.

The People reinvestigated; Morris voluntarily spoke with prosecutors. JA.19,21,38. On May 29, 2008, the People agreed to permanently dismiss the murder charges against Morris and to accept a guilty plea for gun possession. Since Morris had already been incarcerated for two years, the People agreed not to pursue additional punishment. Morris pleaded guilty to having possessed a .357 caliber firearm the day of the shooting and was released. JA.22,34.

III. The Admission of Morris's Plea Allocution

In 2010, two years after Morris pleaded guilty, Gilliam entered into a cooperation agreement. Tr.969-70,1019-20,1026. Then, following petitioner's extradition in April 2013, petitioner's trial began in September 2015. Tr.737. Acknowledging that petitioner intended to present a third-party culpability defense implicating Morris, the prosecutor offered to call the witnesses who had initially implicated Morris. JA.52. To give the jurors context, the prosecutor also agreed the defense could elicit that Morris had been arrested and charged with murder, notwithstanding that an arrest is proof of nothing. JA.54-55.

Petitioner's counsel sought more. He moved to admit portions of the opening statement that a different prosecutor had made at Morris's trial in 2008. JA.43-44. After the court denied the request, ruling that the reference to the opening by the prior prosecutor would be irrelevant and would tend to mislead the jury (JA.48), counsel next sought to introduce that Morris had been "indicted and brought to trial for this crime" as well as details from law enforcement of "what they [were] crediting and what information they were not crediting." JA.53,55. The court noted that the beliefs of law enforcement, as opposed to the observations of those who witnessed the crime, were not relevant and that Jimick's conclusion about which account to credit was not admissible. JA.54-56.

After extensive colloquy during which the court attempted to reach a resolution suitable to both sides (Tr.103 [10/02/2015], 188-92,198[10/07/2015]; JA.56-57), the case proceeded to jury selection where the court

gave the prospective jury panels an instruction, crafted and approved by petitioner's counsel, that they were "not to speculate about the status of [] Morris. That evidence is only being admitted for your consideration in determining the guilt or non-guilt of this defendant." Tr.198 [10/07/2015]; JA.63.

After a full airing of the subject, the court's ruling was clear: the conclusions the police may have had at one point about Morris's or anyone's guilt were irrelevant and not to be considered by the jurors as proof that Morris was the shooter. Despite that ruling, counsel persistently elicited evidence and made the arguments that the court had said were out of bounds.

In opening, counsel focused on how police initially believed that Morris was the "right guy" based in part on their recovery from his bedroom of an unspent 9-millimeter bullet, the same caliber as the bullet that killed Pacheco. JA.90. He urged the jury to consider what the police believed and how those beliefs resulted in the initial prosecution of Morris. He additionally implied that the prosecution against Morris failed. JA.87-91. Counsel covered the same ground during the cross-examination of Jimick and Gilliam. Tr.767,771-72,1027.

Mid-trial, the prosecutor argued the defense opening had put in issue that Morris had a 9-millimeter gun at the scene—where no evidence actually linked the bullet to the murder weapon—and sought to rebut it with the portion of Morris's plea allocution where he admitted to possessing a .357 caliber firearm the day of the shooting. JA.101-04,117. Later, the court, on the prosecutor's application and over petitioner's objection, admitted evidence that

law enforcement recovered three .357 caliber bullets from Morris's apartment as relevant evidence of Morris's conduct. JA.121; *see also* JA.106,108,110-11,113,116,118,120.

Next, the prosecutor again sought to introduce Morris's plea allocution and, at various points during the trial, the court discussed the issue with the parties. JA.101-09,118-122,158-62. After Gilliam testified that petitioner had shot and killed Pacheco with the 9-millimeter pistol and that Morris had a .357 (and after Gilliam was fully cross-examined on that subject), the court granted the State's application to admit a portion of Morris's plea allocution. It cited *People v. Reid* (971 N.E.2d 353, 357 (N.Y. 2012)) for the proposition that a defendant can open the door to testimonial hearsay. The court reasoned, based on the defense opening and "the examination of witnesses thus far," a "significant aspect of the defense" rested on the fact that Morris was originally "prosecuted for this homicide," and in turn, was the "actual shooter." JA.184. The court continued, the arguments petitioner presented and apparently intended to present on summation would open the door to that aspect of Morris's allocution acknowledging his possession of a .357 caliber firearm to rebut the defense impression. JA.185. Separate from its Confrontation Clause analysis, the court also found the allocution met the requirements for a declaration against penal interest. JA.187; *see* JA.155-56.

The parties later agreed upon a redacted portion of the allocution that was read into the record by the court reporter. JA.190-209. In the allocution, Morris admits that he possessed a loaded .357 firearm at the time and place of the shooting. Morris mentions only his own conduct. He does not refer to the shooting or the earlier altercation.

He does not mention anyone else's conduct. He alone possessed the weapon.

The redacted allocution included Morris's counsel's comments that Morris was taking the plea against his "strong advice," that the State's proof was insufficient to indict Morris absent the admissions he was willing to make, at plea, in order to "get out of jail" that day, and that he would receive a conditional discharge. JA.207-09. At the request of petitioner, the allocution did not refer to the dismissal of the murder indictment. JA.196.

As the court anticipated, on summation, petitioner's counsel not only set forth his legitimate third-party defense that Morris was the shooter, but once again repeatedly focused on what law enforcement believed regarding Morris's guilt. JA.214-16.

The prosecutor did not respond to these allegations in summation. Instead, he said that Morris, against his attorney's advice, admitted to possessing the .357 "[b]ecause that's the crime he actually committed on April 16, 2006," rather than the crime petitioner had "framed him for." JA.357. The prosecutor otherwise did not rely on the allocution at all, and the jury did not ask to see it. JA.364-70.

On December 7, 2015, the jury returned a verdict convicting petitioner of Murder in the Second Degree (N.Y. Penal Law § 125.25[1]). Tr.1784-85. On January 6, 2016, the court sentenced petitioner to twenty-five-years-to life in prison.

IV. The Post-Trial Proceedings

In February 2018, petitioner appealed the judgment of conviction to the Appellate Division, First Department. Pertinently, in Point II, petitioner did not challenge the constitutionality of *People v. Reid*. Instead, petitioner argued that he had not opened the door under this standard. Res. Cert. Supp. App.94a-99a.

On June 11, 2019, the Appellate Division affirmed over a sole dissent. The majority found that admission of the plea allocution was proper because petitioner opened the door under *Reid*. A single dissenting Justice found merit in two issues not raised on this petition. On October 1, 2019, the dissent granted leave to appeal to the New York Court of Appeals.

Before the Court of Appeals, petitioner focused the court's attention on six issues, and requested general review of the eight other issues he had raised in the Appellate Division, as provided by the rules of that Court. JA.371-99. As to the admission of Morris's plea allocution, petitioner argued:

> The *only* issue before this Court is whether the defense opened the door to Morris' testimonial hearsay, as both the trial judge and the Appellate Division recognized that these statements would otherwise be barred by the Confrontation Clause. . . .

JA.385 (emphasis added). Petitioner asked the Court of Appeals to conduct the two-fold "opening-the-door inquiry" as set forth in *Reid*. JA.385-86.

Presented with a narrow issue of the proper application of its precedent, the Court of Appeals held:

> [T]rial courts possess broad discretion to make evidentiary rulings and control the course of cross-examination . . .. Here, 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.

Pet. Cert. App. 2a (internal citations omitted). A single Judge dissented on a ground not raised on this petition.

SUMMARY OF ARGUMENT

Consistent with the Constitution, a criminal defendant, through his conduct at trial, can open the door and relinquish the right to object to an out-of-court statement that would otherwise be barred by the Confrontation Clause. New York allows the admission of an out-of-court statement that is otherwise inadmissible under the Confrontation Clause if a defendant or his attorney, by his actions at trial, intentionally elicits evidence or makes specific arguments that are improper and misleading. *People v. Reid*, 971 N.E.2d 353, 356 (N.Y. 2012).

I. Petitioner never presented his current complaint—that *Reid's* opening-the-door rule is unconstitutional—to the state court and, consequently, that claim should not be reviewed by this Court now.

II. New York's rule is constitutional. The rule permits a trial court, and later an appellate court, to find that

a criminal defendant has, through his conduct at trial, relinquished his right to object to the admission an out-of-court statement that would otherwise be barred by the Confrontation Clause. The doctrine is not an exception to the Confrontation Clause; it is a procedural rule that protects the court's legitimate interest in maintaining the integrity of the adversarial trial process.

An examination of this Court's rulings in analogous situations makes it clear that New York's procedural rule comports with the Constitution. Moreover, New York's procedural rule does not permit "the abusive practices that common-law commentators [have] decried." Pet. Brief 13. On the contrary, New York courts have only rarely allowed the introduction of an out-of-court statement based on this theory. That is because the rule is not triggered whenever a defendant presents a defense that may contradict the prosecution's theory of the case. The rule comes into play only when the defense attorney engages in an intentional trial strategy—eliciting evidence and making specific arguments—that are improper and misleading. Moreover, the rule permits only evidence that is reasonably necessary to correct that misleading impression.

Finally, the application of New York's rule to the unique facts presented in this case did not violate petitioner's right of confrontation. Here, petitioner deliberately attempted to mislead the jury by eliciting evidence and making arguments that the trial court had correctly determined were outside of the jury's proper consideration. Under these circumstances, the court was right to determine that petitioner opened the door to an out-of-court statement that would otherwise have been barred by the Confrontation Clause.

III. Any alleged error in the admission of the redacted plea allocution was totally harmless. Not only was there substantial independent evidence of petitioner's guilt, but the plea allocution was cumulative to the testimony of another testifying witness and balanced by out-of-court statements that were made by Morris's attorney regarding his motives to accept the deal. Thus, should this Court find error, the People ask this Court to find that the error was harmless beyond a reasonable doubt or, in the alternative, remand to the New York Court of Appeals for harmless error analysis.

ARGUMENT

I. Defendant Failed to Present his Contention that the New York Door-Opening Doctrine is Constitutionally Infirm.

Petitioner attacks the constitutionality of New York's opening-the-door rule that was articulated in *People v. Reid* (971 N.E.2d 353 (N.Y. 2012)). The question he presents for this Court's review is "whether, or under what circumstances, a criminal defendant who opens the door to responsive evidence also forfeits his right to exclude evidence otherwise barred by the Confrontation Clause." This issue is not properly before this Court because petitioner failed to present it to the state court. Petitioner never suggested to the state's highest court, nor to any New York court, that *Reid's* rule violated the Confrontation Clause. Nor did petitioner posit that a criminal defendant could not lawfully relinquish the right to complain about the admission of an out-of-court statement that would otherwise be barred by the Confrontation Clause.

Rather, petitioner claimed only that, under the standard set by *Reid*, he had not created a misleading impression or otherwise opened the door and, for that reason alone, the admission of Morris's plea allocution violated the Confrontation Clause. If petitioner had presented the broader constitutional claim he raises here—that the *Reid* rule is unconstitutional—to New York's highest court, it would have had no power to reach the claim because petitioner failed to preserve the claim before the trial court. This failure is a jurisdictional defect that precludes this Court's review. Alternatively, principles of comity prohibit reversing a state court on an unpresented claim that the court lacked power to review. For these reasons, the petition should be dismissed as improvidently granted.

This Court may review state court judgments only where a constitutional right is "specially set up or claimed" 28 U.S.C. 1257 (a). Under this limitation, this Court has refused to consider federal-law challenges to state court decisions unless that claim "was either addressed by or properly presented to the state court that rendered the decision [it has] been asked to review." *Howell v. Mississippi*, 543 U.S. 440, 443 (2005) (quoting *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (per curiam)); *see Illinois v. Gates*, 462 U.S. 213, 218 (1983). The appellant bears the burden of demonstrating that the issue was raised and decided below and that both requirements appear on the record. *Street v. New York*, 394 U.S. 576, 583 (1969); *see Gates*, 462 U.S. at 218; *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969).

Here, the state's highest court did not address the constitutional question petitioner presents here. Rather, it held:

> With respect to the other claims raised by defendant, we note that trial courts possess broad discretion to make evidentiary rulings and control the course of cross-examination . . . Here, 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.

Pet. Cert. Appx. 2a (internal citations omitted).

Because the Court of Appeals did not pass on petitioner's current constitutional claim, it should be assumed that it was not properly presented in the state courts, unless the aggrieved party can affirmatively show to the contrary. *Board of Directors of Rotary Intern. v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987); *see Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983) (quoting *Fuller v. Oregon*, 417 U.S. 40, 50 n.11 (1974)). Petitioner cannot meet this burden because he specifically limited the issue so that the Court of Appeals had no cause to consider or address the constitutionality of the *Reid* rule.

Most notably, in his submissions before the state's highest court, petitioner affirmatively narrowed the issue for review, stating that "[t]he only issue before this Court is whether the defense opened the door to Morris's testimonial hearsay …" JA.385. Petitioner faulted the trial court for misapplying *Reid* and argued that the Appellate Division incorrectly found he had created a misleading impression at trial. JA.385-86. Petitioner's submission avoided the larger constitutional issue and cited no case law suggesting that the *Reid* rule was unconstitutional or that an alternative rule should apply, notwithstanding that all relevant cases were available at the time. Notably,

petitioner relied upon *United States v. Sine* (493 F.3d 1021, 1038 (9th Cir. 2007)), a case analyzing the opening-the-door doctrine as a pure evidentiary matter as codified in the Federal Rules of Evidence. In reply, petitioner complained that the trial court "did not invoke the operative aspects of the opening-the-door doctrine" set out in *Reid*, and further pressed that its "ruling reflect[s] a basic misunderstanding of the *Reid* doctrine." JA.406.

By specifically narrowing the issue in the way that he did— claiming only that he had not opened the door under *Reid*—petitioner denied the Court of Appeals the opportunity to reach the broader constitutional question that he presents for this Court's consideration now, namely whether the *Reid* opening-the-door rule is itself constitutional.

In his bid to seek a writ of certiorari, petitioner acknowledged that the holding by the state's highest court did not reference the Confrontation Clause. Petition for a Writ of Certiorari 9; Petitioner's Certiorari Reply 5. Nevertheless, petitioner argued that the court necessarily proceeded from the premise that the *Reid* rule comports with the Confrontation Clause. Pet. Certiorari Reply 5-6. The court, however, had no reason to question the constitutionality of the rule or to consider modifying it because petitioner did nothing to suggest that the *Reid* rule was constitutionally infirm. On the contrary, because petitioner challenged only whether he had opened the door, he signaled that the rule, when properly applied, provided adequate constitutional protection.

It was not enough for petitioner to argue only that his federal right had been violated. As this Court's ruling in

Adams v. Robertson (520 U.S. 83 (1997)) demonstrates, a grant of certiorari is improvident when, because of the way the federal claim was litigated, it was reasonable for the state court to conclude that "the broader federal claim was not before it." *Id.* at 89. That is certainly true here.

Petitioner also asserted that it was not necessary for him to present the claim to the Court of Appeals because the court had only "recently" decided *Reid*. *See* Petitioner's Certiorari Reply 8 n.1. In fact, *Reid* had been decided in 2012, seven years before petitioner presented his claim to the state's highest court. Petitioner had no reason to think that the court would not be willing, in an appropriate case, to consider the constitutionality of the opening-the-door rule. Petitioner likely was aware that the broader Confrontation Clause question—the constitutionality of the *Reid* rule—was not appropriate for review by the state's high court in *his* case because petitioner had failed to preserve the claim before the trial court.[7]

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7. Petitioner suggested that *Riley v. California* (573 U.S. 373 (2014)) warrants a different result. *See* Petitioner's Certiorari Reply 8 n.1. Petitioner argued that, in *Riley*, the petitioner had argued before the state court that the state law rule did not apply to him, not that the leading case had been wrongly decided under the federal constitution *Id.* But, in its Brief in Opposition to the petition for a writ of certiorari, the State did not allege that the petitioner had failed adequately to present the constitutional claim to the state court (Brief in Opposition to Petition, *passim*, *Riley v. California*, 573 U.S. 373 (2014) No. 13-132, 2013 WL 5436662) and so there is no reason now to doubt that in fact the federal claim was adequately presented in that case. Moreover, even assuming that this distinction would have mattered in *Riley*, that case only reached the California intermediate appellate court and the California Supreme Court denied further review.

In fact, the Court of Appeals would have lacked jurisdiction to review Petitioner's current arguments. N.Y. § C.P.L. 470.05 (2). Petitioner now relies extensively upon *People v. Massie* (809 N.E.2d 1102 (N.Y. 2004)), identifying it as the progeny of the "leading case" on the opening-the-door doctrine in New York. Pet. Brief 3. Notably, at trial, Massie, invoking constitutional concerns, argued that he had not opened the door to evidence of an otherwise suppressed identification. Before the Court of Appeals, Massie changed tack, arguing that the controlling state precedent was "unacceptable," insufficiently protected a defendant's constitutional rights, and that a "different and stricter rule should be followed." The Court of Appeals held that because Massie "did not present this argument to [the trial court] . . . [t]he issue is not preserved for our review, and we do not address it." *Massie*, 809 N.E.2d at 1105 n.3.

Thus, as *Massie* teaches, the Court of Appeals would have had no power to reach the constitutional issue petitioner now presents. Petitioner was undoubtedly aware that his claim would have been expressly rejected as unpreserved.[8] Petitioner should not be allowed to sidestep the Court of Appeals' jurisdictional limitations and ask this Court to reverse on a rule that the state court had no power to review. Presentment serves the important policy of allowing a state court the opportunity to address

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Riley likely had no reason to challenge the validity of a recent and binding California Supreme Court ruling in the lower court. Here, petitioner had every opportunity to make his claim before the New York high court and failed to raise it.

8. The same attorney represented both Massie and petitioner before the Court of Appeals.

these questions and "to rest its decision on an adequate and independent state ground." *Gates*, 462 U.S. at 222.

This Court has held that "[n]o particular form of words or phrases is essential" to present a claim. *Street*, 394 U.S. at 584, quoting *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928). Similarly, it has acknowledged that parties are not limited to the specific arguments raised in state court in support of a presented claim. *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 534-35 (1992). Those exceptions to the general rule, however, do not apply to unpreserved and unpresented claims that the state court lacked power to review. Accordingly, the Court should dismiss the petition as improvidently granted.

II. New York's Door-Opening Doctrine is in Full Accord with the Petitioner's Right of Confrontation.

New York allows the admission of an out-of-court statement that is otherwise inadmissible under the Confrontation Clause if a defendant, by his actions at trial, opens the door to that statement. *Reid*, 971 N.E.2d at 356. In *Reid*, out-of-court statements were necessary to correct defense counsel's "misleading questioning and argument." *Id.* at 359. The remedy the court imposed—the admission of the out-of-court statements—was warranted based on defense counsel's persistent course of conduct. *Id.* at 358. Thus, only evidence that is reasonably necessary to correct the misleading impression is permitted. This doctrine, which was correctly applied by the trial court in this case, is a procedural rule that is in full accord with a criminal defendant's right to be confronted with the witnesses against him.

A. A criminal defendant may act in a manner inconsistent with preserving his constitutional rights—the right of confrontation is no different.

The right of confrontation, like any other constitutional guarantee, is not absolute. Wholly apart from any exceptions that may have applied at the time of the founding, a criminal defendant, by his deliberate conduct at trial, may waive the right to confrontation. Furthermore, state rules and procedures properly allow a court to protect the integrity of the adversarial trial process and ensure that jurors are not lied to or otherwise misled by litigants. New York's opening-the-door rule is a valid procedural mechanism that protects the government's legitimate interest in the integrity of the adversarial trial process.

1. A criminal defendant's constitutional rights cannot be used to undercut the integrity of trial process.

The Sixth Amendment's Confrontation Clause provides: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." In *Crawford v. Washington*, (541 U.S. 36 (2004)), this Court concluded that the Confrontation Clause prohibits the introduction of testimonial statements by a non-testifying witness, unless the witness is "unavailable to testify, and the defendant has had a prior opportunity for cross-examination." *Id.* at 54, 68. Moreover, "[t]he 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. Rather, the Confrontation Clause 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.*

The right to be confronted, however, is not without limitation. This Court has long recognized that "general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case." *Mattox v. United States*, 156 U.S. 237, 243 (1895).

The limitations—not exceptions—of constitutional protections may be seen in other contexts, independent of the court-created "prophylactic rules" relied upon by petitioner. Pet. Brief 30-32. The Fifth Amendment provides a ready example. A "pristine" application of the Fifth Amendment privilege against compulsory self-incrimination renders any "balancing of interests" to be "impermissible." *New Jersey v. Portash*, 440 U.S. 450, 459 (1979). And, of course, it is a violation of the Fifth Amendment protection against compulsory self-incrimination for a prosecutor to ask the jury to draw an adverse inference from a defendant's silence. *Griffin v. California*, 380 U.S. 609, 614 (1965).

Nevertheless, a defense attorney's conduct at trial may open the door to a remark by the prosecutor that would otherwise be considered an improper comment on a defendant's silence and the exercise of his constitutional right. In *United States v. Robinson*, 485 U.S. 25 (1988), defense counsel repeatedly asserted at trial that the government had unfairly denied defendant the opportunity to explain his actions. In response, the government told

the jurors that defendant "could have taken the stand and explained it to you …. The United States of America has given him, throughout, the opportunity to explain." *Id*. at 27-28. This Court ruled that the prosecutor's comment was a fair response and not a violation of the Fifth Amendment. *But cf.* Pet. Brief 32. In other words, an otherwise offending remark is not a violation of the constitutional privilege when a defendant, through his lawyer's trial conduct, opens the door.

This understanding of the limits of constitutional protections has been applied to the Sixth Amendment in other contexts. In *Taylor v. Illinois* (484 U.S. 400 (1988)), this Court found that Illinois's discovery statute did not violate the right to compulsory process despite the fact that the statute authorized, as a sanction for the failure to comply with state discovery rules, complete exclusion of testimony from a defense witness. This Court reasserted that the Sixth Amendment does not confer upon a defendant a right that is "free from the legitimate demands of the adversarial system; one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half-truth." *Id*. at 412-13 (*quoting United States v. Nobles*, 422 U.S. 225, 241 (1975) (proper to exclude testimony by a defense investigator because the defense did not disclose a "highly relevant" investigator's report in compliance with a discovery rule)). On the contrary, consonant with constitutional guarantees, the state may impose rules that preserve

> [t]he integrity of the adversary process, which depends both on the presentation of reliable evidence and the rejection of unreliable evidence, the interest in the fair and efficient

> administration of justice, and the potential prejudice to the truth-determining function of the trial process ….

Taylor, 484 U.S. at 414-15.

One of the most basic guarantees of the Confrontation Clause is the right to be present in the courtroom at every stage of the trial. *Illinois v. Allen*, 397 U.S. 337, 338 (1970). Nevertheless, a defendant may relinquish the privilege of personally confronting witnesses by consent or by conduct. *Id.* at 342. When a defendant is disruptive, for example, he may lose the right to be present and the court may continue the trial in his absence. *Id.* at 346.

Notably, other remedies may be available to the court to address a defendant's obstreperous conduct, including binding and gagging the defendant or holding him in contempt and discontinuing the proceedings until the defendant is no longer disruptive. *Id.* at 343-44. A court may reasonably conclude these remedies are insufficient under the circumstances. As a "calculated strategy," a defendant may "elect to spend a prolonged period in confinement for contempt in the hope that adverse witnesses might be unavailable after a lapse of time." The court "must guard against allowing a defendant to profit from his own wrong in this way" and, therefore, may choose to remove the defendant from the courtroom. *Id.* at 345. In short, when a defendant, through his own conduct at trial, tries to obtain an undue advantage, the trial court "must be given sufficient discretion to meet the circumstances of each case." *Id.* at 343.

This Court's precedents have "recognize[d] a right to face-to-face confrontation at trial but have never viewed that right as absolute." *Coy v. Iowa*, 487 U.S. 1012, 1025 (1988) (O'Connor, J., concurring). Indeed, it is a trial right that can be waived by a defense attorney when he fails to object to offending evidence. *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 313 n.3 (2009); *Diaz v. United States*, 223 U.S. 442 (1912); *see also* Pamela R. Metzger, *Confrontation Control*, 45 Tex. Tech L. Rev. 83, 86-87 (2012).

Moreover, "the right to confront ... is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973). "This interpretation of the Confrontation Clause is consistent with [this Court's] cases holding that other Sixth Amendment rights must also be interpreted in the context of the necessities of trial and the adversary process." *Maryland v. Craig*, 497 U.S. 836, 850 (1990). In this regard, a defendant's right of confrontation must harmonize with society's interest in accurate fact-finding (*see Bourjaily v. United States*, 483 U.S. 171, 182 (1987)) and the integrity of the adversarial trial process. *Taylor*, 484 U.S. at 414-15.

Accordingly, a trial court must be able to address those instances where a party attempts to press an evidentiary advantage to mislead a jury. Thus, for example, when a defendant "affirmatively resorts to [false] testimony in reliance on the [prosecution's] disability to challenge his credibility," (*Walder v. United States*, 347 U.S. 62, 65 (1954)), "[t]he interests of the other party and regard for the function of courts of justice to ascertain

the truth become relevant, and prevail in the balance of considerations determining the scope [of the constitutional right involved]." *Brown v. United States*, 356 U.S. 148, 156 (1958); *Jenkins v. Anderson*, 447 U.S. 231, 236-238 (1980).

This Court's holding in *James v. Illinois*, 493 U.S. 307 (1990), does not undermine this analysis. *But cf.* Pet. Brief 33-34. In *James*, the key issue was whether a defendant's ability to present a defense would be "chilled" by a fear of what a defense *witness* may accidently testify to. *James*, 493 U.S. at 315. This Court declined to "expand[]" the "impeachment exception" and did not allow the prosecution to impeach a defense *witness* using evidence that had been obtained in violation of a defendant's constitutional rights. *Id.* at 316. By contrast, the issue presented here focuses on the intentional actions and strategy of a defense counsel who seeks to inject a misleading impression and undue speculation into a trial based upon that counsel's awareness of otherwise inadmissible evidence. State courts should not be forced to countenance such behavior and are permitted to craft rules that are neither "arbitrary [n]or disproportionate to the purposes they are designed to serve." *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006).

2. States can develop limited procedural rules to deter misleading impressions.

This Court has stated that defendants need not engage in any specific colloquy to relinquish their Confrontation Clause protection. *Melendez-Diaz*, 557 U.S. at 313 n.3, 325-328. More important, "States [are permitted to] adopt procedural rules governing" these silent relinquishments. *Id.* at 313 n.3, 327. The opening-

the-door rule is not a new "open-ended exception" to the Confrontation Clause. *Crawford*, 541 U.S. at 54. Nor does this Court need to engage in an archival quest to uncover one from the Framer's era—no such exception was used in this case. Pet. Brief 25 (citing *Crawford*, 541 U.S. at 54). New York merely relies upon authorized state procedural mechanisms that protect the equity and integrity of the adversarial process and prevent a defendant from weaponizing the Confrontation Clause as both a sword and a shield.

Courts regularly apply procedural rules to find that a defendant has relinquished his Confrontation rights. The most common pathway involves the specific example referenced by this Court in *Melendez-Diaz*, (557 U.S. at 313 n.3), a failure to object and preserve the issue for appeal. For example, in many states, including New York, a defendant who merely raises a hearsay objection at trial fails to preserve a Confrontation Clause claim against that same evidence. *See People v. Kello*, 746 N.E.2d 166 (N.Y. 2001).[9]

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9. In *Melendez-Diaz*, the Court referred to this as "waiver." In other cases, this concept is described as a forfeiture. *See, e.g.*, *United States v. Jones*, 565 U.S. 400, 413 (2012) ("We consider the argument [that was not raised below] forfeited.") (citing *Sprietsma v. Mercury Marine, a Div. of Brunswick Corp.*, 537 U.S. 51, 56 n.4 (2002) ("Because this argument was not raised below, it is waived.")). Whether this Court chooses to call the concept a waiver, forfeiture, or even "estoppel," is immaterial to respondent's position that New York's opening-the-door rule is a constitutionally proper procedural rule. *See* 21 Charles Alan Wright et al., *Federal Practice and Procedure* § 5039.1 (2d ed. 2021); *see also* 1 Kenneth S. Broun et al., *McCormick on Evidence* § 55 n.1 (8th ed. 2020) (defending the chapter's title "Waiver of objection" as "a convenient label for various doctrines of preclusion.").

Procedural rules that result in the relinquishment of Confrontation Clause rights, such as a defendant's failure to object, are permissible. Determining whether evidence that is excluded by the Constitution is otherwise admissible "depends upon the nature of the constitutional guarantee that is violated." *Kansas v. Ventris*, 556 U.S. 586, 590 (2009). Here, the Confrontation Clause is "a procedural rather than a substantive guarantee." *Crawford*, 541 U.S. at 61. The exercise of this right must be evaluated through this lens. Accordingly, while "the Confrontation Clause imposes a burden on the prosecution to present its witnesses," the defendant "*always* has the burden" of protecting this right. *Melendez-Diaz*, 557 U.S. at 324-27.

Although petitioner categorizes New York's rule as purely evidentiary, *Reid's* opening-the-door rule is better understood as a broader procedural rule designed to preserve the integrity of the adversarial factfinding process at trial. The rule simply recognizes that a defendant should not be permitted to manipulate a procedural guarantee in a strategically deceptive manner and then be heard to complain that the trial court failed to protect the guarantee for him. Essentially, the rule treats the misleading door-opening actions of counsel as the equivalent of failing to object to the confrontation violation.

This doctrine is not an exception to the right of confrontation because the admissibility of the statement—for constitutional as opposed to evidentiary or merely hearsay purposes—is not based on the trial court's assessment of the statement's reliability or some other mechanism that serves as a supposed substitute for confrontation or an alternate means of determining reliability. The rule does not operate as an "open-ended

balancing test[]" to determine the reliability of the out-of-court statements. *Crawford*, 541 U.S. at 68. Rather, the admissibility of the statement depends on the course of conduct of the defendant or his counsel.

Moreover, this is not about what is fair to the prosecution. It is about the jurors and the integrity of the trial process. "More is at stake than possible prejudice to the prosecution. We are also concerned with the impact of this kind of conduct on the integrity of the judicial process itself." *Taylor*, 484 U.S. at 416.

Unsurprisingly then, this same door-opening concept is applicable to many other constitutional protections that are also procedural in nature. *Ventris*, 556 U.S. at 590 (violation of Sixth Amendment right to counsel); *Harris v. New York*, 401 U.S. 222 (1971) (violations of the Fifth and Sixth Amendment *Miranda* protections); *Walder*, 347 U.S. at 62 (violations of the Fourth Amendment).[10] This case falls completely outside any discussion of historical exceptions, or treatises relating to the Confrontation Clause's evidentiary scope as understood by the Framers. After all, no one has ever alleged an eighteenth-century basis for this Court's approval of procedural notice-and-demand statutes governing forensic science evidence. *Melendez-Diaz* 557 U.S. at 325-27; *see also Briscoe v. Virginia*, 559 U.S. 32 (2010); *see generally* Jennifer B. Sokoler, *Between Substance and Procedure: A Role for States' Interests in the Scope of the Confrontation Clause*, 110 Colum. L. Rev. 161, *passim* (Jan. 2010) (surveying

10. Although *Harris* and *Walder* speak to court-created prophylactic rules (Pet. Brief 31), *Ventris* is addressed to a Sixth Amendment trial right.

notice-and-demand statutes). Again, these "notice-and-demand" statutes treat counsel's failure to "demand" as the equivalent of failing to object to the confrontation violation. 2 J. Wigmore, *Evidence in Trials at Common Law* § 1397, p 1759 n. 9 (1st ed.1904) (gathering cases relating to waiver of the right of confrontation, including those involving the failure to object).

This Court's decision in *Portash* (440 U.S. 450), as evaluated in *Ventris*, strengthens the argument that the confrontation right is subject to procedural limitations. The text of the Sixth Amendment states that "[i]n all criminal prosecutions, the accused shall enjoy the right [] to be confronted with the witnesses against him…" The constitutional text does not outline the contours of that right, nor does it contain an "explicit mandate[]" (*Ventris*, 556 U.S. at 590) that demands exclusion of *all* unconfronted testimony.

By comparison, the text of the Fifth Amendment is much clearer: "[n]o person [] shall be compelled in any criminal case to be a witness against himself." So long as a court makes a finding that a defendant's testimony has been compelled, any balancing of interests is "impermissible" because the application of this *substantive* guarantee is in "its most pristine form." *Portash*, 440 U.S. at 459. No such sweeping, substantive prohibition applies to the Confrontation Clause, and petitioner cannot point to one in the constitutional text.

Another example of the door-opening principle at work is the rule of completeness. In his amicus brief in support of petitioner, Richard D. Friedman explains that the rule, which is partially codified in Rule 106 of the

Federal Rules of Evidence, "has common-law roots going back long before adoption of the Confrontation Clause" and is based on principles of fundamental fairness. Brief of Richard D. Friedman as Amicus Curiae in Support of Petitioner, at 18. The rule recognizes that "[p]resenting one portion of a statement, or set of statements, may give a very misleading sense of the declarant's meaning, which can be corrected by presenting other portions as well." *Id.* at 18-19.

> If evidence barred under the Confrontation Clause were inadmissible irrespective of a defendant's actions at trial, then a defendant could attempt to delude a jury "by selectively revealing only those details of a testimonial statement that are potentially helpful to the defense, while concealing from the jury other details that would tend to explain the portions introduced and place them in context."

Reid, 971 N.E.2d at 353 (quoting *People v. Ko*, 789 N.Y.S.2d 43 (N.Y. App. Div. 2005); *see People v. Taylor*, 20 N.Y.S.3d 708, 712 (N.Y. App. Div. 2015) (applying *Reid* to admit remaining testimonial statements made by a non-testifying witness to contextualize statement elicited by defense counsel). This would be unfair and against the truth-seeking function of the courts. *Reid*, 971 N.E.2d at 353.

The rule of completeness is not an exception to the Confrontation Clause and does not offend this court's decision in *Crawford* because "*Crawford* forbids only the admissibility of evidence under [rules] purporting to

substitute another method for [the] confrontation clause test of reliability." *People v. Vines*, 251 P.3d 943, 968-69 (Cal. 2011), *as modified* Aug. 10, 2011, *overruled on other grounds by People v. Hardy*, 418 P.3d 309 (Cal. 2018).[11] In contrast, the rule of completeness is tethered to the conduct of the litigant. When the proponent of a partial statement uses the right that it

> enjoys under the Rules—not as a shield to prevent the admission of potentially unreliable evidence, but as a sword to manufacture a misleading impression of the evidence—the proponent should forfeit the right to object to a completing remainder. It is hardly radical to conclude that a misleading presentation forfeits the right to object to otherwise inadmissible evidence needed to correct the misimpression.

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, 939 (2020). Clearly then, states are permitted

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11. The rule of completeness is only "partially codified" in Rule 106 of the Federal Rule of Evidence. *See* 1 *McCormick on Evidence*, *supra*, § 56 (citing *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 155 (1988)). This may reflect the fact that Rule 106 addresses evidentiary concerns while the rule of completeness speaks also to broader constitutional concerns. Notably, too, although petitioner suggests that the rule of completeness violates the Confrontation Clause, two of the amici recognize that that assertion is incorrect. *Compare* Pet Brief 36-40, *with* Brief of Richard D. Friedman, *supra*, at 17-21, *and* Brief of Association of Criminal Defense Lawyers of New Jersey in Support of Petitioner, at 20-21.

to craft procedural rules that govern the relinquishment of this right.

Opening the door should be treated no differently. These rules operate as procedural bars for the door-opening party to object to evidence that enters through that door. Some courts even state this explicitly. *See e.g. People v. Cook*, 498 N.Y.S.2d 414, 415 (N.Y. App. Div. 1986) ("defendant waived any objection to the testimony in question when he opened the door"); *State v. Garcia*, 652 P.2d 1045, 1049 (Ariz. 1982) (stating "door opening" is equivalent to failing to object); *People v. Hopson*, 396 P.3d 1054, 1065 (Cal. 2017) ("door opening" forecloses objection); *State v. Payne*, 34 A.3d 370, 384 (Conn. 2012) (same). Others implicitly say so. *See State v. El'Ayache*, 618 P.2d 1142, 1143 (Haw. 1980) ("…where such waiver is considered as a matter of trial tactics and procedure."). Put another way, petitioner cannot find any Framer's-era door-opening exception to the Confrontation Clause, since it is not an exception to the Confrontation Clause at all. It exists as a separate procedural mechanism designed to regulate the recognition of defendants', and even the government's, objections across multiple doctrines that may bar admission of evidence. *See, e.g.*, 1 J. Wigmore, *supra* § 15, p. 43 (describing the rule as "estopping" subsequent objections to inadmissible evidence).

This Court's reasoning in *Giles v. California* (554 U.S. 353, 365 (2008)), narrowly construing the historical exception of forfeiture by wrongdoing, does not affect this analysis. The conduct underlying forfeiture by wrongdoing (with the intent to keep the witness away) occurs outside of the trial process itself; the conduct is extrajudicial. Once court proceedings have been initiated against a defendant, the consequences of his conduct within those

court proceedings are properly regulated by court rules. *Melendez-Diaz*, 557 U.S. at 324-27. Here, the door-opening doctrine addresses a counsel's strategy that involves the trial process, in the same way as failing to timely object or failing to comply with discovery obligations.

Some commentators have become bogged down with labels and parsing out fine distinctions between "invited error," "curative admissibility," or "specific contradiction doctrine," as each jurisdiction chooses its own way to craft the rule. *See* Francis A. Gilligan & Edward J. Imwinkelried, *Bringing the "Opening the Door" Theory to A Close: The Tendency to Overlook the Specific Contradiction Doctrine in Evidence Law*, 41 Santa Clara L Rev 807, 822 (2001); 21 Charles Alan Wright et al., *Federal Practice and Procedure* § 5039.1 (2d ed. 2012); *see State v. Groce*, 111 A.3d 1273, 1277 (Vt. 2014) (combining three of the terms into the same concept). These distinctions are beside the point, as is the observation that one state's opening-the-door rule may operate differently than another. What is important is that the New York rule is grounded in the court's core responsibility to maintain the integrity and truth-seeking function of the adversarial process. *See e.g. Kansas v. Cheever*, 571 U.S. 87, 94-95 (2013) (not allowing the prosecution in rebuttal to present psychiatric evidence obtained from a court-ordered evaluation would undermine "the core truth-seeking function of the trial").

B. New York's door-opening rule is constitutional and was properly applied.

New York's rule is straightforward and requires trial courts to engage in a thoughtful, "case-by-case," "twofold" inquiry: "whether, and to what extent, the

evidence or argument said to open the door is incomplete and misleading, and what if any otherwise inadmissible evidence is reasonably necessary to correct the misleading impression." *Reid*, 971 N.E.2d at 357 (quoting *Massie*, 809 N.E.2d at 1105). Under the unique circumstances of this case, the court was right to conclude that a very circumscribed portion of Morris's plea allocution was necessary to correct a misleading impression that defense counsel had created through his persistent defense strategy.

At trial, petitioner presented a third-party culpability defense implicating Morris as the one who fired the fatal shot. Aspects of this defense were perfectly "appropriate" (JA.185) and, without any additional misleading or calls for speculation on the part of defense counsel, would not have justified the admission of Morris's plea allocution. For example, counsel highlighted evidence that eyewitnesses had initially identified Morris in a lineup, that the police had found a 9-millimeter bullet in Morris's apartment, as well as testimony that when police arrested Morris the day after the shooting, he had bruises on his hands. Eliciting this evidence, making reasonable arguments based on this evidence and asking the jurors to make reasonable inferences based on this evidence was fair and proper. Even though the lineup evidence, the bullet, and Morris's bruises may have contradicted the People's theory that petitioner was the shooter, the evidence and the reasonable inferences that flowed from it were not misleading. They were fair game and did not open the door to testimonial hearsay.

The court understood this distinction perfectly. When the prosecutor initially argued that counsel's

opening remarks about the 9-millimeter bullet in Morris's apartment opened the door to Morris's plea allocution, the court noted that Morris's allocution statement that he had possessed a .357 magnum at the time of the shooting was certainly relevant. The defense had put the issue squarely in play, and if Morris had testified against petitioner, it would have been proper for Morris to tell the jurors that he had possessed a .357 magnum. However, as the court explained, the fact that the evidence was relevant "doesn't mean you can prove it any way possible" or that it is admissible under the constitution. JA.106-09.

Defense counsel, however, was not content to rely on the factual evidence that implicated Morris and make appropriate arguments based on that evidence. Rather, counsel advocated that the jurors should reach their conclusions about Morris's involvement based, in part, on what the police and government officials believed at the point when they were still pressing charges and pursuing a prosecution against Morris for murder. Counsel focused not merely on facts and eyewitness observations, but on the beliefs and opinions of government actors, and invited speculation about what had happened to Morris's case.

Counsel's effort in this regard was neither inadvertent, nor a momentary lapse. It was a persistent part of his strategy. Before the trial, defense counsel moved—in writing (Defense Motion dated 8/31/15) and orally (JA.43-44)—to admit at petitioner's trial portions of the opening statement that the prosecutor had made at the Morris trial in 2008. The court denied the request. Notably, the court observed that counsel's effort to use the prosecutor's previous opening as though it were "factual evidence that should be considered for its truth is an unacceptable

argument on your part." JA.51. Accordingly, the court ruled that

> [t]o allow this to be presented is, in my judgment, to elevate legal argument to the category of factual evidence and will mislead the jury terribly and have no proper relevance, and for that reason I am quite confident that this is not something that should be presented to the jury in any fashion whatsoever, particularly as an admission of a party which is, in effect, an invitation to the jury to consider it for the truth of the content. That is an exception to hearsay. I will not allow that be presented to the jury in this case.

JA.48.

Then, defense counsel argued that the jurors were entitled to know that Morris had been "indicted and brought to trial for this crime." JA.53. The court noted that whether "the district attorney's bureau or anybody else evaluated that evidence in a particular way is not … relevant." "It is "almost vouching." "[W]hether the district attorney's office believes that there was any merit to [Morris's] case … they could be right, they could be wrong, but their judgment is sort of not the point." JA.54. "[I]t doesn't matter what the police believed here. What matters is what this jury believes on the basis of what people with firsthand knowledge of the events … have presented." JA.55. Jimick's "conclusion as to who to believe" or "which account to believe is not evidence that which should come in." JA.56.

At another proceeding, defense counsel expressed his concern that when jurors learned that Morris had been arrested, they might speculate that he had been acquitted. Tr.189-91[10/07/2015]. Counsel did not want the jurors to assume that Morris was "not the guy." Tr.190. The court cautioned that if it granted the defense request to illicit "all the history" including

> the indictment, the trial [of Morris], then it's sort of a slippery slope because it also invites evidence about what happened to the case, why it happened. You know, who screwed up, who didn't screw up. It really does invade, I think, the realm that is between the court and counsel but not the jury. The jury really shouldn't be speculating.

Counsel agreed. *Id.*

Prior to this discussion, counsel had requested that the court instruct the jurors that they were not to speculate about what happened to Morris. JA.103. During jury selection, the court instructed the jurors accordingly. JA.165-66. Nevertheless, throughout the trial, defense counsel improperly suggested that the police and the government had believed that Morris was the shooter and invited irrelevant speculation as to what happened in Morris's prosecution.

In his opening statement, counsel told the jurors that the police found a 9-millimeter bullet in Morris's bedroom, which was the same caliber of ammunition that was used to kill the child. JA.90-91. Counsel argued that, in part because of the discovery of the bullet, the police "think

we got the right guy." JA.90. When Gilliam subsequently reported to the police that petitioner was the shooter, "nobody believes him. Jimick doesn't believe him. The DA doesn't believe him." JA.89. "[T]hey arrest Morris. They charge Morris. They believe Gilliam's first statement [that Morris was the shooter]. They don't believe his later statements when he changes his mind, and they believe his first statement …" *Id.* Counsel stated that despite the lineup evidence, the 9-millimeter bullet, and the bruises on Morris's hands, "[s]ome cases *never* get proven and that's very frustrating, and it's awful for the [p]eople involved, for the family, but it's no reason to convict an innocent person." JA.98 (emphasis added). In this way, counsel suggested that Morris had not been held accountable, left the jurors to speculate that Morris's prosecution failed, and that the People were wrongly prosecuting his client to make up for their failure.

In response, mid-trial, the prosecutor moved to admit Morris's plea allocution, evidencing that Morris was carrying a .357 gun on the day Pacheco was shot, to rebut counsel's argument that Morris was carrying a 9-millimeter gun. JA.101-05. The court acknowledged the allocution's relevance but recognized the Confrontation Clause issue and deferred decision until the prosecutor could provide him with applicable caselaw. JA.107-09. Later, the court acknowledged it had yet to render a decision regarding the allocution's "formal" admissibility. JA.120.

Meanwhile, during the cross-examination of Jimick and Gilliam, counsel continued to focus on the conclusions that the police and prosecutors had reached about Morris's involvement, while leaving jurors to speculate about what had happened to Morris's case. Counsel elicited that, after

the lineups were conducted on April 18, Jimick arrested Morris. At that point, Jimick asked for the case to be closed, and it was closed. Tr.767,771-72. The case against Morris proceeded and petitioner was not arrested until 2013. JA.171; Tr.772. After Gilliam made statements to the police on April 26, May 9, and May 10, 2006, including statements identifying petitioner as the shooter, Morris stayed in jail. *Id.*

Outside the jury's presence (and between Jimick and Gilliam's testimonies), the issue of Morris's allocution was again discussed. Contrary to petitioner's contention, both parties conceded that Morris was unavailable; he had left for Barbados, was denied reentry due to this conviction, and federal authorities were generally unwilling to grant a special visa for his testimony. Pet. Brief 10; JA.139,142-44. After a lengthy discussion about whether the plea allocution satisfied the statement against penal interest exception to the rule against hearsay (JA.144-56,158-162), the court deferred arguments relating to the separate Confrontation Clause issue. JA.162.

After Gilliam testified, the court addressed the issue conclusively and cited to the test outlined in *Reid*. JA.184. The court reasoned, based on the defense opening and "the examination of witnesses thus far," a "significant aspect of the defense" rested on Morris originally being "prosecuted for this homicide," and in turn, being the "actual shooter." JA.184. The court further commented that the actual evidence that led to the district attorney's office in concluding that Morris was not responsible for the shooting had not been published to the jury. JA.185.[12]

12. The court further made a finding of reliability, (JA.185-87), but that was in the context of resolving the outstanding fourth

The court ruled that based on the arguments the defense had already made and the arguments that the court anticipated defense would make, the defense had "open[ed] the door to the admission of [the] portion of Morris' allocution, to the extent that it acknowledges that he was in possession of" a .357 magnum and not a 9-millimeter. JA.185-86. The parties then agreed as to a redacted version of the allocution which was read into evidence. JA.190-209.

As the court anticipated, counsel argued in summation that "[t]his case is a mess. It was a mess before Darrel Hemphill got arrested and it's a mess now." JA.214. "[W]hat we have seen is how evidence over time can be changed and manipulated to try and get a certain verdict …" *Id.* Counsel clarified that he was not talking about the witnesses themselves. "What I mean is the manner in which the evidence was presented to you [by the government] during the trial, not, I would submit to get to the truth, but to get to a certain particular verdict." JA.214-15. Counsel further maintained that the government,

> believed and credited and found [witnesses] to be reliable and truthful back in 2006, 2007 and 2008, when this was a Morris case … and now, because [the government] want[s] some other verdict, now that there is a new person being charged … now they say, hey, those witnesses really aren't believable, those witnesses really didn't see what they said they saw and believed

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factor in New York's statement against penal interest rule. *See People v. Soto*, 44 N.E.3d 930 (N.Y. 2015).

> they saw back then, those witnesses are all making mistakes and that evidence and those identifications that we relied upon, you should ignore those now because it's a new game.

JA.215. Counsel continued, pointing to what the detectives believed, by arguing that after Gilliam told the police that petitioner was the shooter, the detectives "found him … not to be believable." JA.215. The detectives did not go out and arrest petitioner, counsel posited, because they "didn't think he was a reliable witness." *Id.* But once Gilliam "signs a cooperation agreement, and all of a sudden" Gilliam is "trustworthy" and "believable." *Id.*

The consistent, pervasive defense strategy—pointing to what the government had believed about Morris's involvement—was misleading and unfair. The court denied the pretrial request to introduce the prosecution's opening statement at Morris's trial, but the court's ruling and instructions did not dissuade the defense. As detailed, the defense persisted at every turn by eliciting evidence and arguing that the jurors should rely on what the government believed when it charged Morris.

While the government initially charged Morris with murder and related charges, it ultimately dropped those charges. The prosecution of Morris did not fail. The government realized that Morris was innocent of the murder, allowed him to plead guilty to the offense that he was guilty of committing, and did not charge petitioner until five years later.

Here, what any individual government actor believed at the time the charges were pending against Morris was

irrelevant to the jurors' assessment of petitioner's guilt or innocence, exactly as the judge had ruled all along. *See United States v. Morel*, 751 F.Supp.2d 423, 434-35 (E.D.N.Y. 2010) (evidence that the government declined to prosecute co-arrestees risked confusing the jury and the government's explanation of the decision is likely to prompt speculation); *People v. Thompson*, 970 N.Y.S.2d 620, 630 (N.Y. App. Div. 2013) (error for the detective to explain why the charges against the co-defendant were dropped because he "effectively conveyed his opinion that the defendant was guilty of the charges for which he was on trial"). Indeed, "[t]he line is crossed," as it was here, when a witness "conveys—either directly or indirectly—a personal opinion regarding the defendant's criminal guilt." *People v. Kozlowski*, 898 N.E.2d 891, 901 (N.Y. 2008).

When determining whether the jurors, as the triers of fact, believed Gilliam's testimony that petitioner was the shooter, it was improper for the jurors to consider and speculate about whether a particular government actor, like Jimick, or the government as a larger entity, believed at one point that Morris was the shooter or believed that Gilliam was telling the truth. Accordingly, given the unusual nature of this case, as well as the persistence of defense counsel in inviting speculation as to the inner workings of Morris's prosecution, it was proper for the court to find, over the course of more than 50 pages of transcript spread throughout the course of the trial, that petitioner could no longer lodge a Confrontation Clause objection to the admission of the allocution that was required to correct the misleading impression he continued to perpetuate.

Moreover, contrary to petitioner's arguments, New York's rule is not a freewheeling exercise that "threaten[s] to swallow the right [of confrontation] itself." Pet. Brief 15. On the contrary, it has extremely limited applications and the rare instances when it will apply are entirely within defense counsel's control. Furthermore, the rule is not triggered whenever the defense tries merely to contradict the People's theory of the case. New York's bar is high for an impression to be so misleading that unconfronted testimonial hearsay is required to correct it.

There is no reason to think the rule will apply whenever a prosecutor claims that inadmissible evidence conflicts with a third-party defense. Notably, in *People v. Richardson*, (943 N.Y.S.2d 599 (N.Y. App. Div. 2012)), the defendant's conviction was reversed because the trial court erred in determining that Richardson's third-party defense, *standing alone*, created a misleading impression sufficient to constitute a waiver of the Confrontation Clause. In another case, *People v. Schlesinger Elec. Contractors, Inc.*, (39 N.Y.S.3d 135, 137 (N.Y. App. Div. 2016)), the conviction was reversed because the trial court erred in admitting a non-testifying co-defendant's plea allocution. There, the reviewing court found that a witness's answer that he did not know whether anyone at another company had been prosecuted was not misleading, and even if it had been, admission of the allocution was unwarranted. *Id.*

Indeed, as a guiding principle, the door-opening rule in New York is subject to significant limitations that prevent against the "parade of horribles" theorized by petitioner and the amici in support of him. A finding that defendant has opened the door "does not justify

blunderbuss rejoinder." *People v. Bagarozy*, 522 N.Y.S.2d 848, 855 (N.Y. App Div. 1987). No party ever runs the "risk that any evidence relating to it, no matter how remote or tangential, will be brought out." *Id.* (citing *People v. Melendez*, 434 N.E.2d 1324, 1328-29 (N.Y. 1982) (door was not open so wide as to warrant introduction of hearsay evidence); *see also People v. Francis*, 131 N.Y.S.3d 342, 344 (N.Y. App. Div. 2020) ("this was not a sufficiently material issue to warrant introduction of such evidence"). Again, the door is open only to evidence that is "reasonably necessary to correct the misleading impression" (*Reid*, 971 N.E.2d at 357), a limitation with longstanding common-law roots. 1 J. Wigmore, *supra* § 15, p. 46 (describing the "Massachusetts rule" as only permitting the now-admissible evidence "*whenever it is needed for removing an unfair prejudice which might otherwise have ensued from the original evidence*, but in no other case.").

Any fear that a defendant's right to present a defense would be chilled by defense counsel's hesitation in accidently opening a door to testimonial hearsay through an unexpected answer from a witness is unfounded. Pet. Brief 33-34 (citing *James*, 493 U.S. at 313-14). The rule does not operate as a windfall for the prosecution if the defense should accidentally cross the center line. Counsel must be aware of the inadmissible evidence prior to opening the door. *See, e.g.*, *People v. Ames*, 501 N.Y.S.2d 165, 166 (N.Y. App. Div. 1986). The door opening must be done through some affirmative action of defense counsel and counsel's conduct must be deliberate. In any event, diligent trial counsel should *already* be "on perpetual guard" for both constitutional and non-constitutional door opening of evidence, no different than being vigilant in listening for objections. Pet. Brief 34.

In sum, New York did not violate petitioner's Confrontation Clause rights because the right can be regulated through non-arbitrary trial procedures governing objections, including New York's door-opening rule, and the New York rule was properly applied.

III. If the Trial Court Erred in Admitting Morris's Plea Allocution, the Error was Harmless.

Confrontation Clause errors are subject to a harmless error inquiry, *Davis v. Washington*, 547 U.S. 813, 829 (2006), a question raised but not resolved in the state court. Any alleged error in the admission of Morris's redacted plea allocution was totally harmless. Not only was there substantial independent evidence of petitioner's guilt, but the plea allocution was cumulative to Gilliam's testimony, and any prejudice was neutralized because, along with Morris's allocution, the jurors also heard statements by Morris's attorney explaining Morris's motives to accept the deal. Therefore, if any error occurred in admitting Morris's plea allocution, the People ask this Court to find that the error was harmless beyond a reasonable doubt or, in the alternative, to remand to the state court to determine in the first instance. *See Melendez-Diaz*, 557 U.S. at 329 n.14; *see also Bullcoming v. New Mexico*, 564 U.S. 647, 668 n.11 (2011).

CONCLUSION

This Court should dismiss the petition as improvidently granted or, in the alternative, affirm the judgment of the New York Court of Appeals.

Respectfully submitted,

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