No. 20-___

IN THE

# Supreme Court of the United States

DARRELL HEMPHILL,

*Petitioner*,

v.

STATE OF NEW YORK,

*Respondent.*

On Petition for a Writ of Certiorari
to the Court of Appeals of New York

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

A litigant's argumentation or introduction of evidence at trial is often deemed to "open the door" to the admission of responsive evidence that would otherwise be barred by the rules of evidence.

The question presented 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.

## RELATED PROCEEDINGS

*People v. Hemphill*, 103 N.Y.S.3d 64 (App. Div. 1st Dep't 2019)

*People v. Hemphill*, 150 N.E.3d 356 (N.Y. 2020)

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Darrell Hemphill respectfully petitions for a writ of certiorari to review the judgment of the New York Court of Appeals.[1]

## OPINIONS BELOW

The opinion of the New York Court of Appeals (Pet. App. 1a-7a) is published at 150 N.E.3d 356. The opinion of the Appellate Division of the New York Supreme Court, First Judicial Department (Pet. App. 8a-28a) is published at 103 N.Y.S.3d 64. The relevant order of the New York Supreme Court is unpublished.

## JURISDICTION

The judgment of the New York Court of Appeals was entered on June 25, 2020. Pet. App. 1a. On March 19, 2020, this Court entered a standing order that has the effect of extending the time within which to file a petition for a writ of certiorari in this case to November 22, 2020. This Court has jurisdiction under 28 U.S.C. § 1257(a).

## RELEVANT CONSTITUTIONAL PROVISION

The Sixth Amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

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[1] The state court opinions and filings incorrectly refer to petitioner as "Darryl Hemphill." His name is Darrell Hemphill.

## STATEMENT OF THE CASE

After unsuccessfully prosecuting another man for a murder, the State of New York tried and convicted petitioner Darrell Hemphill for the same crime. This petition raises the question whether petitioner forfeited his Sixth Amendment right to be confronted with the witnesses against him when his attorney contended at trial that certain physical evidence indicated that the first suspect actually committed the crime.

### A. Legal background

The Sixth Amendment guarantees a criminal defendant's right "to be confronted with the witnesses against him." U.S. Const. amend. VI. In basic terms, the Confrontation Clause requires the prosecution to present its evidence through witnesses who testify in court subject to cross-examination. To enforce that requirement, the Clause generally prohibits the prosecution from introducing "testimonial" evidence at trial unless the declarant takes the stand. *Crawford v. Washington*, 541 U.S. 36, 68 (2004). A testimonial statement is one previously made in a judicial setting or to law enforcement authorities with the primary purpose of "establish[ing] or prov[ing] past events potentially relevant to later criminal prosecution." *Davis v. Washington*, 547 U.S. 813, 822 (2006).

The confrontation right, however, is not absolute. As with other constitutional rights, the accused may "waive" his right to confrontation—that is, he can "intentional[ly] relinquish[]" the right. *Brookhart v. Janis*, 384 U.S. 1, 4 (1966) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)); *see also, e.g.*, *Illinois v. Allen*, 397 U.S. 337, 342-43 (1970) ("[T]he privilege (of

personally confronting witnesses) may be lost by consent.") (citation omitted). In addition, the Court has made clear that a criminal defendant "forfeits" his confrontation right if he intentionally prevents a witness from testifying against him. *Giles v. California*, 554 U.S. 353, 365 (2008).[2]

But the Court has never addressed whether, or under what circumstances, the accused forfeits the confrontation right in another scenario—namely, when he "opens the door" at trial to responsive evidence. All agree that a criminal defendant, like any other litigant, may open the door to the admission of evidence that is otherwise inadmissible under the ordinary rules of evidence when it "clarif[ies], rebut[s], or complete[s] an issue" that the defendant has raised. *United States v. Holmes*, 620 F.3d 836, 843 (8th Cir. 2010) (citation omitted). Where, however, responsive evidence *would otherwise be barred by the Confrontation Clause*, courts have openly split over whether, or under what circumstances, the opening-the-door concept renders the evidence admissible. *See State v. Hull*, 788 N.W.2d 91, 101-02 (Minn. 2010) ("Cases from other jurisdictions have gone both ways on this question."); *Lane v. State*, 997 N.E.2d 83, 92-93 (Ct. App. Ind. 2013) (noting split).

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[2] While courts frequently use the terms "waiver" and "forfeiture" interchangeably, they are conceptually distinct. "Waiver" refers to the *explicit* relinquishment of the confrontation right, whereas "forfeiture" refers to the *implicit* loss of the right by some other means. *See generally Freytag v. Commissioner*, 501 U.S. 868, 894 n.2 (1991) (Scalia, J., concurring in part and concurring in the judgment) (distinguishing between "waiver" and "forfeiture"); *see also United States v. Olano*, 507 U.S. 725, 733 (1993) ("Waiver is different from forfeiture.").

In *People v. Reid*, 971 N.E.2d 353 (N.Y. 2012), New York's highest court sided with jurisdictions that have taken the most expansive approach to forfeiture in this circumstance. Expressly rejecting the position taken by the Sixth Circuit (and, as noted below, by several other courts as well), the New York Court of Appeals held that a criminal defendant "opens the door" to the admission of evidence otherwise barred by the Confrontation Clause whenever the court concludes that he creates a "misleading" impression and the evidence is "reasonably necessary" to correct that impression. Pet. App. 33a-36a.[3]

### B. Factual and procedural history

In this case, the New York courts applied *Reid* to allow the State to use testimonial hearsay to convict petitioner of a tragic crime he has steadfastly denied committing.

1. In April 2006, two men—Ronnell Gilliam and a companion—got into a fight with several other people on a street in the Bronx. Shortly thereafter, someone opened fire with a 9 millimeter handgun, killing a child in a passing car. Pet. App. 8a-9a..

Multiple eyewitnesses said that Gilliam's companion during the fight was wearing a blue top, as was the gunman. Pet. App. 3a-4a (Fahey, J., dissenting). Three eyewitnesses also identified Gilliam's best friend, Nicholas Morris, as the shooter. *Id.*

Within hours of the shooting, police searched Morris's home and recovered a 9 millimeter cartridge.

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[3] *Reid* is reproduced for the Court's convenience at Pet. App. 29a-36a.

Pet. App. 9a. They also found ammunition for a .357 revolver. The police arrested Morris the next day. They observed bruises on his knuckles consistent with fist fighting. Pet. App. 9a.

Meanwhile, Gilliam traveled with petitioner (his cousin) to North Carolina. Several days later, Gilliam returned and surrendered to the police. Confirming the eyewitness accounts, Gilliam said that Morris was his companion at the fight and identified Morris as the gunman. Pet. App. 4a (Fahey, J., dissenting).

During a subsequent interview, police allowed Gilliam to speak on the phone to Morris, who was calling from jail. Assuring Morris that he would "make it right," Tr. 1031, Gilliam changed his story. Reversing his claim that Morris was the gunman, Gilliam asserted for the first time that petitioner was the gunman. Pet App. 24a & n.3 (Manzanet-Daniels, J., dissenting).[4]

Investigators did not act on Gilliam's revised allegation. Instead, on the strength of the eyewitness accounts, the physical evidence recovered from Morris's apartment, and Morris's own inculpatory statements, the State indicted Morris for the child's murder, and for possession of a 9 millimeter handgun. Morris Tr. 208-23 (opening statement).

The prosecution ended in a mistrial. By this time, Morris had spent two years in jail. Pet. App. 9a. In lieu of trying him again, the State offered Morris a deal: If Morris pleaded guilty to possessing a firearm at the scene of the shooting, the State would request that the murder charge be dismissed with prejudice. Morris

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[4] Unless otherwise indicated, "Tr." refers to the transcript from petitioner's trial.

Plea Tr. 21-25. Upon confirming that the plea agreement would result in his immediate release, Morris agreed. *Id.* 19-20, 25.

To effectuate this plea bargain, the State could have had Morris simply plead guilty to possessing the 9 millimeter gun, as charged in the indictment. But it did not. Instead, the State filed a new information, charging Morris with possessing *a .357 revolver* at the scene of the shooting—a different caliber than the murder weapon. Morris Plea Tr. 6. Morris's attorney and the prosecutor agreed that the evidence that Morris actually possessed a .357 at the scene was insufficient to indict. *Id.* 15. So Morris supplied the missing proof through his own statement that he possessed a .357, which he offered in court through an allocution. Morris Plea Tr. 21-22.

2. Several years after Morris's mistrial, police determined that DNA on a blue sweater recovered during their original search of Gilliam's apartment matched petitioner. Pet App. 9a-10a. No eyewitness ever identified the sweater as the particular top worn by the gunman. Pet. App. 24a & n.4 (Manzanet-Daniels, J., dissenting). To the contrary, some eyewitnesses described the gunman's top as a "short-sleeved" shirt, or a "polo shirt"—not a sweater. *Id.* at 24a n.4. Nevertheless, in 2013, after two more years passed, the State charged petitioner with the 2006 shooting.

3. Abandoning its earlier theory and the grand jury testimony that led to Morris's trial, the State maintained at petitioner's trial that Gilliam had acted with *two* companions, and that petitioner was the gunman in the shooting. Tr. 1669. The State pinned its theory largely on testimony from Gilliam, who

agreed to testify at petitioner's trial as part of a plea bargain of his own. Under the deal, Gilliam received a sentence of just five years in prison, avoiding a term of at least twenty-five years for his involvement in the murder. Tr. 969. Gilliam now claimed that he had disposed of two guns (instead of just one) after the shooting. Hemphill's Br. to 1st Dep't 40-41. He also claimed for the first time that Morris had given him a .357 on the day of the shooting, and that the 9 millimeter belonged to petitioner. Tr. 980-81.

Petitioner contended that the State had been right the first time—that is, that Morris was Gilliam's companion and the gunman. *See* Pet. App. 16a-17a. As part of petitioner's defense—which the trial court characterized as "appropriate" and "necessary," Tr. 1131—he elicited testimony explaining that police had recovered the 9 millimeter cartridge on Morris's nightstand hours after the shooting. *Id.* 749-51.

In response, the State moved to introduce Morris's plea allocution, including his assertion that he possessed a .357 revolver at the scene of the shooting. Tr. 890-91. Petitioner objected that admitting Morris's allocution—a classic testimonial statement—without calling him to the stand would violate his Sixth Amendment right to be confronted with the witnesses against him. Tr. 916. The trial court overruled the objection and admitted the allocution. Tr. 1130-33.

In closing, the prosecution relied on Morris's allocution to argue that Morris had possessed a .357, and not a 9 millimeter, at the crime scene. Tr. 1668-70. In the State's telling, because the murder weapon was a 9 millimeter gun, Morris's statement showed that he could not have been the shooter. *Id.*

The jury found petitioner guilty of second-degree murder. The court sentenced him to twenty-five years to life in prison. Pet. App. 1a.

4. The Appellate Division upheld petitioner's conviction. As relevant here, the State maintained that admitting Morris's allocution was permissible under the New York Court of Appeals' decision in *Reid*. A majority of the Appellate Division agreed. It recognized that a nontestifying witness's plea allocution "would normally be inadmissible" under the Confrontation Clause. Pet. App. 16a. But, applying *Reid*, the court held that petitioner had "opened the door" to Morris's otherwise inadmissible testimony. *Id.* 16a-17a. The Appellate Division reasoned that petitioner had "created a misleading impression that Morris possessed a 9 millimeter handgun, which was consistent with the type used in the murder, and introduction of the plea allocution was reasonably necessary to correct that misleading impression." *Id.* 17a.

Justice Manzanet-Daniels dissented. She expressed no view regarding the admissibility of Morris's allocution. Rather, she concluded that the State's evidence was legally insufficient to support petitioner's conviction. Pet. App. 22a. Justice Manzanet-Daniels stressed that three of the four eyewitnesses had identified Morris ("who does not resemble [petitioner]") as the gunman two days after the shooting. *Id.* 23a. She emphasized that the only witness to claim petitioner was the shooter was Gilliam, who initially said that Morris had committed the crime, admitted to lying at various points during the investigation, and testified against petitioner "to avoid a murder sentence" of his own. *Id.* 23a-24a & n.2.

5. On review in the New York Court of Appeals, petitioner renewed his Confrontation Clause claim. Petr's Rule 500.11 Submission 12-19. Echoing the Appellate Division, the State responded that "this case invite[d] the same result as *Reid*." State's Rule 500.11 Submission 13. The Court of Appeals agreed and affirmed petitioner's conviction. As relevant here, the court ruled that the trial court acted within its discretion by "admitting evidence that the allegedly culpable third party pled guilty to possessing a firearm other than the murder weapon." Pet. App. 2a. One judge dissented on other grounds.

## REASONS FOR GRANTING THE WRIT

The Confrontation Clause is a bedrock constitutional guarantee at the center of most every criminal trial. Yet federal and state courts are divided into three very different camps over whether, or under what circumstances, criminal defendants "open the door" at trial to the admission of evidence otherwise barred by the Clause.

This case provides an excellent opportunity to resolve this entrenched conflict. And it is vital that this Court reject the broad forfeiture-by-opening-the-door rule that New York and some other jurisdictions have adopted. That rule lacks any foundation in this Court's Confrontation Clause jurisprudence or the common law. It also sweeps more broadly than other equitable doctrines this Court has recognized involving other criminal procedure rights—so broadly, in fact, that it threatens to swallow the confrontation right itself.

## I. Federal and state courts are deeply divided over the question presented.

Many courts have addressed the question whether, or under what circumstances, criminal defendants at trial "open the door" to the admission of evidence otherwise barred by the Confrontation Clause. While they have sometimes used different terminology (or used the same words to mean different things), each court has adopted one of three positions. On one end of the spectrum, three jurisdictions hold that a criminal defendant never forfeits the right to confrontation by presenting a defense at trial. Five jurisdictions have adopted an intermediate position, holding that when a defendant introduces testimonial hearsay, he forfeits the right to exclude other testimonial statements by the same declarant on the same subject. On the other end of the split, three jurisdictions (including New York) hold that whenever a defendant creates a "misleading" impression at trial, he forfeits the right to exclude responsive evidence otherwise barred by the Confrontation Clause. This rule applies even when the defendant did not introduce any testimonial hearsay by the declarant whose statement the prosecution seeks to introduce.

### A. Three jurisdictions hold that criminal defendants never "open the door" to the admission of evidence that is otherwise barred by the Confrontation Clause.

In two federal circuits and one state, criminal defendants never enable the prosecution to introduce testimonial hearsay simply by introducing evidence or otherwise disputing the allegations against them.

1. In *United States v. Cromer*, 389 F.3d 662 (6th Cir. 2004), the defendant elicited information about the content of a nontestifying witness's testimonial hearsay statement. In response, the prosecution introduced other parts of the same statement. The Sixth Circuit recognized that as a matter of ordinary evidence law, the defendant had "opened the door" to responsive evidence. *Id.* at 678. But the court held that the defendant did not forfeit his *constitutional* right to prevent the prosecution from introducing the testimonial hearsay at issue. The confrontation right, the court explained, is not "subsumed by [] evidentiary rules." *Id.* at 679. Nor, the Sixth Circuit continued, is the right "forfeited" in this situation for any other reason. *Id.*; *see also United States v. Pugh*, 405 F.3d 390, 400 (6th Cir. 2005) (applying *Cromer* to reject the government's argument that testimonial evidence was admissible because defendant "opened the door").

The Eighth Circuit also holds that a defendant's evidence or questioning at trial cannot "open the door" to the admission of evidence that is otherwise barred by the Confrontation Clause. In *United States v. Holmes*, 620 F.3d 836 (8th Cir. 2010), the defendant implied that a police officer had no information, beyond a criminal history report, linking the defendant to a residence where drugs were sold. *Id.* at 840. Questioning the same police officer, the prosecutor then elicited a confidential informant's testimonial statements tying the defendant to the residence. *Id.* at 840-41. The Eighth Circuit held that admitting the informant's statements "violated [the defendant's] Confrontation Clause rights." *Id.* at 844. As a matter of evidence law, the defendant may have "opened the door" to the admission of evidence responsive to his claim that he had no connection to

the drug house. *Id.* at 844. But this did not effectuate a forfeiture of his "constitutional challenge to the admission of the [confidential informant's testimonial] statements." *Id.* at 843-44.[5]

Likewise, in Georgia, a defendant does not forfeit his right to confrontation when he introduces testimonial hearsay by a nontestifying witness. *Freeman v. State*, 765 S.E.2d 631 (Ga. Ct. App. 2014); *see also* Ga. Const. art. VI § V ¶ III (Georgia Court of Appeals decisions are binding throughout the state unless and until the Supreme Court of Georgia addresses the issue). In *Freeman*, the defendant cross-examined a police officer about a confidential informant's description of the man who sold him drugs. *Freeman*, 765 S.E.2d at 636. The trial court then permitted the prosecution to introduce additional testimonial hearsay by the informant, reasoning that the defendant's questioning "opened the door" to such evidence. *Id.* The court of appeals reversed. Agreeing with *Cromer* and *Holmes*, the court concluded that the prosecution violated the defendant's confrontation right because that constitutional guarantee cannot be superseded by "the vagaries of the rules of evidence."

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[5] The Eighth Circuit added that it "agree[d] with the Tenth Circuit that . . . a defendant can *waive* his right to confront witnesses by opening the door 'to the admission of evidence otherwise barred by the Confrontation Clause.'" *Holmes*, 620 F.3d at 843 (emphasis added) (quoting *United States v. Lopez-Medina*, 596 F.3d 716, 733 (10th Cir. 2010)). But the Eighth Circuit stressed that such waivers—like any other of the confrontation right—"must be 'clear and intentional.'" *Holmes*, 620 F.3d at 844 (citation omitted). And it explained that simply asking questions on cross-examination does not amount to a "clear and intentional waiver"—particularly where the defendant "object[s]" to the prosecution's introduction of the evidence at issue. *Id.* at 844.

*Freeman*, 765 S.E.2d at 638 & n.38 (quoting *Crawford v. Washington*, 541 U.S. 36, 61 (2004)).

2. Because these three jurisdictions categorically reject the notion of forfeiting the confrontation right by "opening the door," none of them would have admitted Morris's plea allocution against petitioner.

### B. Five jurisdictions hold that defendants "open the door" to testimonial hearsay when they introduce a testimonial statement by the same declarant.

Five jurisdictions hold that the prosecution may introduce unconfronted testimonial hearsay when (but only when) the defendant himself has introduced a testimonial statement by the same witness. These jurisdictions employ two distinct rationales to support this rule: Some ground the position in the evidentiary rule of completeness, while others rely on general equitable principles.

1. The Fourth Circuit and three state courts of last resort hold that defendants who introduce a portion of a testimonial hearsay statement open the door, under the evidentiary rule of completeness, to the admission of the remainder of that statement. *See United States v. Moussaoui*, 382 F.3d 453, 480-82 (4th Cir. 2004), *cert. denied*, 544 U.S. 931 (2005); *State v. Prasertphong*, 114 P.3d 828, 830-35 (Ariz. 2005), *cert. denied*, 546 U.S. 1098 (2006); *People v. Vines*, 251 P.3d 943, 967-69 (Cal. 2011), *cert. denied*, 565 U.S. 1204 (2012), *overruled in part on other grounds by People v. Hardy*, 418 P.3d 309, 345 (Cal. 2018); *State v. Selalla*, 744 N.W.2d 802, 814-18 (S.D. 2008). One state intermediate court has adopted the same position. *State v. Brooks*, 264 P.3d 40, 51 (Haw. Ct. App. 2011).

The rule of completeness is strictly circumscribed. When a party introduces part of a "writing, recording, statement, correspondence, former testimony, or conversation," the rule of completeness gives the adversary the right to introduce other portions "relating to the same subject matter." 1 Kenneth S. Broun et al., *McCormick on Evidence* § 56 (8th ed., 2020); *see also, e.g.*, *Selalla*, 744 N.W.2d at 817-18. But that is as far as the rule goes. The rule of completeness does not allow a party to offer "completing" evidence unless its adversary has partially introduced evidence from the same source first. *See, e.g.*, *Johnson v. O'Farrell*, 787 N.W.2d 307, 312 (S.D. 2010) (holding a police report was inadmissible under the rule of completeness because "no portion of the report had been previously admitted"). And "a *distinct or separate utterance* is not receivable under this principle." 7 John Henry Wigmore, *Evidence in Trials at Common Law* § 2119 (James H. Chadbourn ed., 1978); *see also, e.g.*, *Moussaoui*, 382 F.3d 453, 481 n.39 (rule does not allow a party "to use a statement by one witness to 'complete' a statement by another"); *State v. Champagne*, 447 P.3d 297, 314-15 (Ariz. 2019) (same).

2. Relying on equitable principles rather than the evidentiary rule of completeness, the Kansas Supreme Court has likewise held that when a defendant introduces part of a nontestifying witness's testimonial statement, he forfeits his confrontation right as to the rest of the statement. *See State v. Fisher*, 154 P.3d 455, 481-83 (Kan. 2007). Intermediate courts in Colorado and Texas have reached the same conclusion. *See People v. Merritt*, 411 P.3d 102, 110 (Colo. App. 2014); *People v. Rogers*, 317 P.3d 1280, 1282-84 (Colo. App. 2012); *Wells v. State*, 319 S.W.3d 82, 93-94 (Tex. Ct. App. 2010);

*McClenton v. State*, 167 S.W.3d 86, 93-94 (Tex. Ct. App. 2005).

Like the rule-of-completeness approach, the approach these courts follow is strictly limited: The prosecution may introduce a nontestifying witness's testimonial statement only if the defendant first introduces a testimonial statement from the same witness—not if the defendant merely introduces *other* evidence that might be deemed to open the door under ordinary rules of evidence. *See, e.g.*, *McClenton*, 167 S.W.3d at 94 (holding that when the defendant introduced the statement of one declarant, admitting a *different* declarant's testimonial statement in response violated the Confrontation Clause).

3. Courts in all the jurisdictions following the intermediate position would have excluded Morris's plea allocution. Petitioner did not introduce any part of the allocution (or any other testimonial statement by Morris).

### C. Three jurisdictions hold that defendants "open the door" to testimonial hearsay whenever they create a "misleading" impression at trial.

Two state high courts and one federal court of appeals hold that a defendant "opens the door" to testimonial hearsay whenever the trial judge believes that the defendant creates a "misleading" impression at trial—even when the defendant himself does not introduce any testimonial statement by the declarant at issue.

1. In *People v. Reid*, 971 N.E.2d 353 (N.Y. 2012)—the decision that controlled this case below—the New York Court of Appeals held that a defendant "open[s]

the door to testimony that would otherwise violate his Confrontation Clause rights" whenever he creates a "misleading impression" at trial and the testimonial hearsay is "reasonably necessary to correct" that impression. Pet. App. 34a-35a (citation omitted). In that case, the defendant contended that "the police investigation was incompetent." *Id.* at 35a. The defendant did not introduce any testimonial hearsay by his nontestifying codefendant. Yet, expressly rejecting the Sixth Circuit's decision in *Cromer*, the New York Court of Appeals held that the defendant's contention "opened the door to the admission of testimonial evidence[] from his nontestifying codefendant" to rebut the contention. *Id.* 34a-36a; *see also id.* 16a-17a (applying *Reid* in this case).

As the New York Court of Appeals noted in *Reid*, *see* Pet. App. 34a, the Fifth Circuit also adopted a similarly broad rule of forfeiture-by-opening-the-door. In *United States v. Acosta*, 475 F.3d 677 (5th Cir. 2007), the defendant suggested at trial that a witness who implicated him was motivated to lie to law enforcement. *Id.* at 679. The Fifth Circuit held that even if the witness's prior out-of-court statements to police officers were "otherwise inadmissible" under the Confrontation Clause, the defendant's "insinuations" at trial "opened the door" to the statements' admission. *Id.* at 684-85.

The New Hampshire Supreme Court has adopted a forfeiture rule that operates the same way: Whenever a defendant creates a "misleading impression" at trial, he "opens the door" to countervailing evidence that would be "otherwise

inadmissible" under the Confrontation Clause. *State v. White*, 920 A.2d 1216, 1221-24 (N.H. 2007).[6]

2. These three jurisdictions' sweeping conceptions of forfeiture-by-opening-the-door go far beyond the intermediate position other courts have adopted, and they are obviously irreconcilable with the view that defendants cannot forfeit the confrontation right by "opening the door." Only this Court is capable of resolving this entrenched disagreement.

## II. The question presented is extremely important.

The importance of this frequently recurring constitutional question is manifest.

1. The Confrontation Clause ranks among our "fundamental guaranties of life and liberty." *Kirby v. United States*, 174 U.S. 47, 55 (1899). The Clause secures a "bedrock procedural guarantee," *Crawford v. Washington*, 541 U.S. 36, 42 (2004), that is "essential

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[6] The New York Court of Appeals also asserted in *Reid* that its holding was consistent with the First Circuit's approach in *United States v. Cruz-Diaz*, 550 F.3d 169 (1st Cir. 2008), the Eighth Circuit's rule in *Holmes*, and the Tenth Circuit's decision in *Lopez-Medina*. *See* Pet. App. 34a. But the New York Court of Appeals was incorrect. In *Cruz-Diaz*, the prosecution introduced the statement for a nonhearsay purpose, so the Confrontation Clause was not implicated. 550 F.3d at 175-80; *see also Crawford*, 541 U.S. at 59 n.9 (citing *Tennessee v. Street*, 471 U.S. 409, 414 (1985)). And as explained above, *Holmes* recognizes only that a defendant can relinquish the right to confrontation through a "clear and intentional" waiver; it *rejected* the argument that a defendant can forfeit the confrontation right by "opening the door" under circumstances similar to this case. *See* 620 F.3d at 844. *Lopez-Medina* likewise holds merely that a defendant can "explicit[ly] waive[]" his confrontation right, 596 F.3d at 732; in fact, the Tenth Circuit in that case expressly reserved the question presented here, *see id.* at 736 n.14.

and fundamental" to "the kind of fair trial which is this country's constitutional goal," *Barber v. Page*, 390 U.S. 719, 721 (1968) (quoting *Pointer v. Texas*, 380 U.S. 400, 405 (1965)).

2. The question whether defendants forfeit the confrontation right when they open the door to responsive evidence regularly arises in criminal trials. Defendants, prosecutors, and courts need to know how the right is supposed to function in this frequently recurring context.

In jurisdictions like New York that have a sweeping approach to forfeiture—as well as in those that have yet to rule on the issue—defendants may hesitate to challenge the prosecution's case for fear of inadvertently "opening the door" to the admission of testimonial hearsay that would otherwise be constitutionally inadmissible. Some defendants may even withhold defenses or forgo introducing exculpatory evidence, rather than risk forfeiting their confrontation right. Others may relinquish their right to jury trial altogether.

Prosecutors also require clarity about the existence and scope of any "opening the door" doctrine. Every day, prosecutors across the country must decide how to respond to defendants' arguments and evidence at trial. These prosecutors need to know when they can introduce responsive evidence without violating defendants' rights or jeopardizing convictions on appeal.

3. The question presented is particularly important in cases in which the defendant is actually innocent and is relying on a trial to demonstrate that reality. A core goal of our criminal justice system is to avoid "wrongful conviction[s]." *Berger v. United*

*States*, 295 U.S. 78, 88 (1935). And a defendant like petitioner, who insists that he is innocent, is likely to offer extensive evidence at trial and otherwise challenge the specific aspects of the prosecution's allegations. All the more so when he claims someone else was the perpetrator. It is essential that clear and uniform constitutional rules govern the consequences of mounting such vigorous defenses.

## III. This case is an ideal vehicle for resolving the split.

The facts and procedural posture of this case make it an excellent vehicle to determine whether, or under what circumstances, a criminal defendant "opens the door" to evidence otherwise barred by the Confrontation Clause.

1. The question is squarely and cleanly presented. It was raised and addressed at every stage of the proceedings below: at trial, Tr. at 916, 1128-33, before the Appellate Division, Pet. App. 16a-17a, and before the New York Court of Appeals, *id.* 2a; Petr's Rule 500.11 Submission 12-19. It comes before this Court on direct review, without any of the complications that sometimes arise on collateral review.

2. The question presented is also outcome-determinative. The Appellate Division acknowledged that Morris's allocution "would normally be inadmissible as testimonial hearsay." Pet. App. 16a; *see also Crawford v. Washington*, 541 U.S. 36, 64-65 (2004) (calling plea allocutions "plainly testimonial"); *Kirby v. United States*, 174 U.S. 47, 54-56 (1899) (holding that the admission of other individuals' guilty pleas violated the Confrontation Clause). If petitioner did not forfeit his confrontation right, then admitting Morris's allocution violated the Confrontation Clause.

Nor could admitting the allocution plausibly constitute harmless error. A constitutional violation requires a new trial unless the prosecution demonstrates beyond a reasonable doubt that the error "did not contribute to the verdict obtained." *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1907 (2017) (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)). The State could not make that showing here. One reviewing judge concluded that the evidence against petitioner—even with Morris's allocution—was *legally insufficient* to support petitioner's conviction. Pet. App. 22a (Manzanet-Daniels, J., dissenting). And the prosecution maintained that the allocution was powerful evidence that petitioner, not Morris, must have been the real shooter. *See* Tr. 1669-70 (closing argument).

3. The specific facts of this case also place the implications of the question presented into stark relief. In particular, the facts underscore that a broad opening the door exception to the confrontation right would allow prosecutors to procure convictions based on out-of-court statements—such as alleged accomplice statements that "shift or spread blame"—that this Court has long recognized as "inherently unreliable." *Lilly v. Virginia*, 527 U.S. 116, 131, 133 (1999) (plurality opinion) (collecting cases). This concern is especially serious where a prosecutor was "involved in the statements' production, and when the statements describe past events and have not been subjected to adversarial testing." *Id.* at 137 (plurality opinion). That is exactly what happened here.

Blame-shifting statements are all the more problematic where, as here, they bear an imprimatur of truth from a prior judicial proceeding. A judge's

acceptance of a guilty plea may, in the eyes of lay jurors, appear to establish a definitive record of "fact." Yet the New York courts here permitted the introduction of just such a statement: a blame-shifting statement that the State helped generate and that was given in a judicial setting. *See* Morris Plea Tr. at 5-6, 8.

## IV. The decision below is wrong.

The deep fracture among the lower courts would warrant review even if New York's rule were correct. But certiorari is all the more necessary because New York's sweeping approach to forfeiture by "opening the door" contravenes both this Court's Confrontation Clause precedent and its broader criminal procedure jurisprudence. Indeed, any rule as capacious as the one applied in this case threatens to swallow the confrontation right itself.

### A. A criminal defendant does not "open the door" to evidence otherwise barred by the Confrontation Clause by defending himself at trial.

Neither the evidentiary rule of completeness nor general equitable principles justifies an "opening the door" exception to the Confrontation Clause. Insofar as courts are worried about defendants gaining an unfair advantage at trial, they already have other tools to prevent undue gamesmanship without concocting a doctrinally unsound forfeiture rule.

1. The evidentiary rule of completeness does not supersede the constitutional right to be confronted with adverse witnesses. It is a basic maxim of our legal system that constitutional rights prevail over statutory or evidentiary rules. So too in the

confrontation context. This Court has squarely refused to condition the Clause's applicability on whatever the "law of Evidence" may provide "for the time being." *Crawford v. Washington*, 541 U.S. 36, 51 (2004) (citation omitted). "Where testimonial statements are involved," the Constitution does not "leave the Sixth Amendment's protection to the vagaries of the rules of evidence." *Id.* at 61.

To be sure, the Confrontation Clause incorporates certain exceptions that existed at common law and were "established at the time of the founding." *Crawford*, 541 U.S. at 54. And the evidentiary rule of completeness has common-law roots. *See Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 171-72 (1988). But none of the courts that allow forfeiture by opening the door has identified any suggestion that the rule of completeness was thought at common law to allow the admission of "*testimonial* statements against the accused in a criminal case." *Crawford*, 541 U.S. at 56. Nor has petitioner found any indication of such an exception to the confrontation right in the common-law treatises cited in *Crawford* and *Giles v. California*, 554 U.S. 353 (2008).

That is not surprising. Following an extensive review of common law authorities, this Court recently explained that the common law allowed only two narrow exceptions to the confrontation right: (1) dying declarations and (2) the statement of a witness "kept away" by the defendant to prevent the witness from testifying. *See Giles*, 554 U.S. at 358-59. The Court also declined to approve "an exception to the Confrontation Clause unheard of at the time of the founding or for 200 years thereafter." *Id.* at 377. That

reasoning precludes recognition of a new forfeiture doctrine based on the rule of completeness.

2. Nor do general equitable principles support an opening-the-door exception to the confrontation right.

Questions regarding whether a defendant loses the right to invoke a constitutional exclusionary rule by presenting arguments or evidence at trial "depend[] upon the nature of the constitutional guarantee" involved—namely, whether the guarantee is a merely prophylactic rule or constitutes a core constitutional protection. *Kansas v. Ventris*, 556 U.S. 586, 590-91 (2009).

A defendant loses the protection of certain "prophylactic" rules if his testimony at trial contradicts otherwise inadmissible evidence at the prosecution's disposal. *Ventris*, 556 U.S. at 591, 593-94 (evidence obtained in violation of Sixth Amendment rule prohibiting police questioning in the absence of counsel); *Harris v. New York*, 401 U.S. 222, 224-26 (1971) (evidence obtained in violation of Fifth Amendment rule requiring *Miranda* warnings); *Walder v. United States*, 347 U.S. 62, 65 (1954) (evidence obtained in violation of Fourth Amendment rule prohibiting unreasonable searches and seizures). This is because these judicially crafted prophylactic rules are designed to enforce constitutional provisions regulating police conduct *outside* of the courtroom. Introducing the tainted evidence at trial does not itself violate the defendant's constitutional rights. *Ventris*, 556 U.S. at 593.

In contrast, a defendant cannot open the door to evidence whose exclusion is "explicitly mandate[d]" by a constitutional right. *Ventris*, 556 U.S. at 590. For instance, the Court in *New Jersey v. Portash*, 440 U.S.

450 (1979), barred the prosecution from impeaching a testifying defendant with his compelled testimony because the very introduction of the evidence directly violated his Fifth Amendment right against being "compelled in any criminal case to be a witness against himself." *Id.* at 458-59.

This case falls in the same category as *Portash*. Introducing testimonial hearsay at trial directly "implicates the Sixth Amendment's core concerns." *Crawford*, 541 U.S. at 51. Because the *very introduction* of unconfronted testimonial hearsay strikes at the heart of a defendant's right "to be confronted with the witnesses against him," U.S. Const. amend. VI, an equitable rule of forfeiture-by-opening-the-door cannot stand.

3. The New York Court of Appeals and some other courts nonetheless insist that an "opening the door" exception is necessary to avoid "unfair[]" practical consequences. Pet. App. 34a. They hypothesize that, absent such an exception, a criminal defendant could introduce seemingly exculpatory portions of a testimonial hearsay statement and then invoke the Confrontation Clause to bar the admission of other portions of that statement making clear that the overall statement is actually inculpatory. *Id.*; *see also, e.g.*, *State v. Selalla*, 744 N.W.2d 802, 818 (S.D. 2008). These concerns, however, are both overstated and misplaced.

Federal Rule of Evidence 403 and its state equivalents already afford judges wide latitude to preclude any party, including a criminal defendant, from introducing evidence whose probative value is substantially outweighed by its potential to unfairly prejudice the jury. A statement taken out of context is

a hornbook example of evidence that is substantially more misleading than probative. *See* 22A Charles Alan Wright et al., *Federal Practice and Procedure* § 5217 (2d ed. 2020). So the extreme hypotheticals some lower courts imagine involving a defendant's selective introduction of statements are easily avoided by trial courts exercising their traditional authority to control the admission of evidence. *See, e.g.*, *State v. Brooks*, 264 P.3d 40, 45-46, 48-49 (Haw. Ct. App. 2011); *State v. Champagne*, 447 P.3d 297, 315 (Ariz. 2019).

Even if a trial court were to admit a portion of an out-of-court statement offered by a defendant and the Confrontation Clause barred the prosecution from introducing the remainder of the statement, that alone would be no reason to carve out a new forfeiture exception to a core constitutional right. That situation might be said to favor the defendant. Yet "[t]he asymmetrical nature of the Constitution's criminal-trial guarantees is not an anomaly, but the intentional conferring of privileges designed to prevent criminal conviction of the innocent." *Giles*, 554 U.S. at 376 n.7 (plurality opinion). The guarantee of confrontation—like other constitutional rights—would be "no guarantee at all if it [were] subject to whatever exceptions courts from time to time consider 'fair.'" *Id.* at 375 (plurality opinion).

### B. At a minimum, the accused does not "open the door" to testimonial hearsay when he does not introduce a testimonial statement by the same witness.

Even if there were a basis for establishing an "opening the door" exception to the Confrontation Clause, the decision below would still be incorrect.

First principles, as well as this Court's precedent, foreclose New York's rule that defendants forfeit the confrontation right whenever the court concludes that they have created a "misleading impression" at trial. Pet. App. 17a; *see also id.* 35a.

1. Most courts that have adopted a rule of forfeiture by "opening the door" have taken a strictly limited position: If—and only if—the accused introduces testimonial hearsay, the prosecution may introduce other portions of the same statement dealing with the same subject. *See supra* at 13-15.

Even assuming that limited approach can somehow be squared with the Confrontation Clause, New York's more expansive approach cannot. Under the limited approach, judges need not take sides in any factual disagreements between the parties. Instead, judges simply examine the portion of the statement introduced by the defendant and assess whether the prosecution's supplemental portion is necessary to give the jury a complete depiction of the whole. By contrast, New York's "misleading impression" rule requires judges to assume the very thing the prosecution must establish at trial—namely, that the prosecution's allegations are truthful. Only by making that assumption can a court declare that allowing the prosecution to introduce the testimonial hearsay at issue is necessary to "prevent the jury from reaching [a] false conclusion" based on the defendant's contentions. Pet. App. 36a.

"Equity demands" more than this sort of "question-begging" regarding the prosecution's proffered evidence "before the right to confrontation is forfeited." *Giles*, 554 U.S. at 379 (Souter, J., concurring in part). Indeed, New York's broad rule of

forfeiture by "opening the door" is at war with the jury trial right itself. The question whether the prosecution's evidence is worthy of credence is reserved for the factfinder at the close of trial. *See. e.g.*, *United States v. Gaudin*, 515 U.S. 506, 510-15 (1995). The Confrontation Clause gives trial judges no warrant to usurp of the jury's function in this respect. *See Crawford*, 541 U.S. at 62 ("Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes.").

2. Even if the Confrontation Clause were subject to the sort of equitable exceptions this Court has adopted for prophylactic exclusionary rules, New York's approach to forfeiture by "opening the door" would transgress the limits the Court has imposed on such exceptions.

The New York Court of Appeals asserted in its prior decision that governed below that a broad opening the door exception is "consistent" with this Court's Fifth Amendment holding in *Harris*. Pet. App. 34a-35a. That analogy fails. *Harris* functions as nothing more than a rule of completeness: If a testifying defendant contradicts an earlier, un-*Mirandized* statement, *Harris* allows the prosecution to supplement the defendant's trial testimony with his prior statement on the same subject. *See* 401 U.S. at 225-26. But *Harris* does not apply where the defendant does not testify—no matter how inconsistent the defendant's contentions at trial may be with his un-*Mirandized* statement. *See, e.g.*, *United States v. Nussen*, 531 F.2d 15, 18 (2d Cir. 1976); *State v. Davis*, 337 A.2d 33, 36 (N.J. 1975).

New York's conception of forfeiture by "opening the door" also sweeps more broadly than the equitable exception to the Fourth Amendment's exclusionary rule recognized in *Walder v. United States*, 347 U.S. 62 (1954). In *Walder*, the defendant testified that he had never purchased, sold, or possessed illegal narcotics. 347 U.S. at 64. The government then introduced heroin seized in an unconstitutional search of the defendant's home, and this Court upheld the conviction. *Id.* at 65. But the Court later declined to expand that exception to allow prosecutors to introduce the fruits of unlawful searches and seizures to impeach defense witnesses besides the defendant himself. *James v. Illinois*, 493 U.S. 307, 313-14 (1990). In other words, the *Walder* exception permits prosecutors to impeach only *defendants*, not defenses.

New York's rule permits the equivalent of what *James* forecloses, licensing prosecutors to attack virtually any aspect of a defendant's case using otherwise inadmissible evidence. What's more, New York's rule invites the very consequences this Court took pains in *James* to avoid. The Court warned that, absent strict limitations on the *Walder* exception, "[d]efendants might reasonably fear that" a witness "in a position to offer truthful and favorable testimony, would also make some statement in sufficient tension with the [inadmissible] tainted evidence to allow the prosecutor to introduce" that otherwise barred evidence. *James*, 493 U.S. at 315.

These concerns about "chill[ing] some defendants from presenting their best defense"—or even "any defense at all," *James*, 493 U.S. at 314-15—are even more pronounced in the Confrontation Clause context. Under New York's rule, defendants must constantly

worry that a judge will deem one of their arguments or evidentiary submissions to be in sufficient tension with otherwise inadmissible testimonial evidence to trigger the State's forfeiture rule. This is an especially daunting prospect in jurisdictions where defendants have no way of divining the contents of whatever formalized inculpatory statements the prosecution may have obtained in advance of trial.

In short, New York pits the right to be confronted with adverse witnesses against the right to defend oneself. Defendants like petitioner should not have to choose between introducing favorable evidence and preserving their right to exclude testimonial statements from nontestifying witnesses.

3. In even more fundamental terms, New York's "opening the door" rule threatens to swallow the confrontation right itself.

The animating purpose of the Confrontation Clause is to establish and preserve an adversarial system of "live testimony in court" subject to cross-examination. *Crawford*, 541 U.S. at 43. Yet under New York's rule, prosecutors can readily circumvent this system—regardless of witness availability. For example, any time the accused presents a defense of third-party guilt, the prosecution can procure a sworn statement from the alternate suspect denying guilt or disputing some detail of the defendant's case. The prosecution may then introduce that affidavit without putting the witness on the stand. A rule that encourages "[t]he principal evil at which the Confrontation Clause was directed"—namely, "the civil-law mode of criminal procedure," *Id.* at 50—cannot be correct.

Indeed, New York's sweeping "opening the door" exception is incompatible with the outcomes of many of this Court's Confrontation Clause cases. In *Lee v. Illinois*, 476 U.S. 530 (1986), for example, the defendant argued that she committed the homicide at issue in self-defense or with "sudden and intense passion." *Id.* at 537 (1986). In response, the prosecution used Lee's codefendant's confession "[t]o prove Lee's intent to kill and to rebut her theories of self-defense and sudden and intense passion." *Id.* This Court held that the prosecution's use of the codefendant's statement violated Lee's confrontation right because the codefendant did not testify. *Id.* at 546. But under New York's forfeiture-by-opening-the-door rule, the codefendant's statement would have been admissible because Lee's defense would have opened the door to responsive evidence otherwise barred by the Confrontation Clause.

Numerous other cases in which this Court found violations of the Confrontation Clause involved similar scenarios. *See, e.g.*, *Crawford* 541 U.S. at 68 (finding Confrontation Clause violation where defendant claimed self-defense and the prosecution introduced out-of-court statement purportedly casting doubt on that defense); *Gray v. Maryland*, 523 U.S. 185, 188-89 (1998) (finding Confrontation Clause violation where defendant testified at trial that he did not participate in the crime and the prosecution introduced a codefendant's statement suggesting he did participate); *Pointer v. Texas*, 380 U.S. 400, 407-08 (1965) (finding Confrontation Clause violation where defendant advanced an alibi and the prosecution introduced a nontestifying witness's prior

testimony indicating defendant was at the crime scene).[7]

If New York's rule were correct, the defendants in all of these cases would seemingly have forfeited their confrontation right by "opening the door" to the hearsay statements at issue. That neither this Court nor any party in any of these cases suggested ruling on forfeiture grounds strongly suggests that New York's rule is wrong.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[7] For more detailed discussions of what these defendants did at their trials, see *Crawford*, 541 U.S. at 40; *State v. Gray*, 687 A.2d 660, 662 (Md. 1997); *Pointer v. State*, 375 S.W.2d 293, 294 (Tex. Crim. App. 1963).