No. 20-637

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

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Where the "only issue" petitioner asked the New York State Court of Appeals to review was whether he had, by his specific actions at trial, "opened the door" to the admission of testimonial hearsay under that Court's established precedent, was petitioner's federal constitutional challenge to invalidate that established precedent properly raised before that State court for purposes of 28 U.S.C. § 1257?

2. Where few courts have actually ruled on the issue, and the New York State Court of Appeals precedent is not in direct conflict with the holdings of this other precedent, should this Court reject this petition as the vehicle to consider whether the Confrontation Clause functions as an absolute bar to, or otherwise creates limitations on, the introduction of testimonial hearsay by the government to correct a misleading impression created by the defense.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

United States Supreme Court Cases

Federal Cases

State Cases

Federal Statutes

State Statutes

Federal Rules

State Regulations

OPINIONS BELOW

The opinion of the New York Court of Appeals is reported at 35 N.Y.3d 1035, 150 N.E.3d 356. App.1a-7a.[1] The opinion of the Appellate Division of the Supreme Court of the State of New York, First Department, is reported at 173 A.D.3d 471, 103 N.Y.S.3d 64. App.8a-28a. The trial ruling of the Supreme Court of the State of New York, Bronx County, is unreported.

JURISDICTION

The New York Court of Appeals rendered its decision on June 25, 2020. The petition was filed on November 6, 2020, in accordance with the March 22, 2020 standing order of this Court. This Court's jurisdiction is properly invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The Fourteenth Amendment provides, "nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

In April 2006 on Easter Sunday, two-year-old David Pacheco, Jr. was killed by a stray 9-millimeter bullet as he rode in his mother's minivan down Tremont Avenue in the Bronx. App.8a.

The fatal shot had been fired in the aftermath of a nearby street altercation involving a group of five against Ronell Gilliam and a thin Black man in a blue sweater. App.8a-9a. After the initial fight broke up, the thin man in a blue sweater returned with a gun and opened fire toward Tremont Avenue at a member of the earlier group, missing him but killing David (*id.*). Despite

[1] Parenthetical references to "App." and "Supp. App." refer to the Appendix of opinions attached to the Petition, and to the Supplemental Appendix separately filed with this Brief in Opposition, respectively.

early misidentifications, witnesses ultimately identified petitioner as the man wearing the blue sweater that day, and petitioner's grandmother confirmed what he was wearing. App.10a-11a,14a. Some witnesses also identified the shooter as having tattoos on his right forearm, and petitioner had tattoos on his right arm. App.10a.

In the immediate aftermath of the killing, Gilliam returned to his apartment where he met his brother, William, and petitioner. Petitioner gave Gilliam the blue sweater and asked him to hold two guns—Nicholas Morris's .357 caliber and petitioner's 9-millimeter. App.11a-12a. Meanwhile, police at the scene interviewed eyewitnesses, including a bystander, Michelle Gist, who told detectives that she knew Gilliam was involved in the altercation, though she had not seen the shooting, and that Morris was there, but could not remember whether she saw him before or after the shooting. App.10a-11a; Supp.App.192.

Around the same time, Gilliam learned police were looking for him, and petitioner told Gilliam to get rid of the guns and sweater. App.11a-12a. Gilliam left the sweater and took the guns to a nearby crack house, but the police were at his building when he tried to return home. App.12a. Gilliam called his brother, who was at the apartment, and told him to get rid of "the shirt," App.11a; however, police had already begun searching the unit, where they found the sweater in a closet, wrapped in a plastic bag. App.10a-11a. A recovering officer was overwhelmed by the smell of burnt gunpowder on the sweater. App.11a; Tr.667. The investigation then moved to Morris's apartment, where police executed a search warrant and found ammunition, including three .357 caliber bullets and a single 9-millimeter bullet. App.9a; Tr.679.

Later that evening, Gilliam told petitioner that he forgot to hide the sweater, and the two fled to North Carolina along with petitioner's girlfriend and son. App.12a. The next day, Morris went to the Bronx News 12 office, gave a TV interview declaring his innocence and showing he

had no tattoos on his arms; he was arrested at the news station. App.9a,10a. Subsequently, three witnesses, two of whom saw the TV interview, told police that Morris was the shooter, and upon arrest, police noticed that Morris had bruising on his knuckles consistent with having been in a fistfight. App.9a,16a.

Meanwhile, in North Carolina, Gilliam and petitioner stayed in a series of hotels and homes, changing location each night. App.12a. After several days passed, petitioner—who had returned to New York—called Gilliam, alleged that Morris had identified Gilliam as the gunman, and, promising to hire him a lawyer, instructed Gilliam to go back to New York to tell police that Morris was the shooter. With the lawyer at his side, Gilliam did precisely that, but later recanted and identified petitioner as the shooter after learning that Morris had not implicated him. App.12a; Supp.App.197-198.

In 2008, Morris was indicted for the killing and proceeded to trial; however, Morris's DNA did not match the DNA from the blue sweater, and the court declared a mistrial with the People's consent. App.9a. That May, over his counsel's advice, Morris pled guilty to possessing a .357 caliber gun on the day of the shooting in exchange for his immediate release from prison, where he had already served two years. App.9a.

In 2011, the People determined that petitioner's DNA matched the DNA from the blue sweater, which led to his arrest and indictment for David's murder in 2013. App.9a-10a. Petitioner's trial began in 2015. App.10a.

In his opening statement, defense counsel told the jury, *inter alia*, that a 9-millimeter bullet killed David and that police found a 9-millimeter bullet in Morris's bedroom hours after the shooting. Tr.33-34. Mid-trial, the People argued the defense had created the misleading impression that Morris had a 9-millimeter *gun* at the scene, and sought to rebut it with the portion of Morris's

plea allocution where he admitted to possessing a .357 caliber firearm on the day of the shooting Tr.506-07,509-10. Reserving its ruling until after Gilliam testified, the court noted that while plea allocutions are testimonial, Morris did not appear to implicate petitioner. Tr.916-19.

After Gilliam's testimony, the court granted the People's application, finding that defense counsel had opened the door to otherwise inadmissible *Crawford* evidence by implicating Morris as the shooter through his opening statement and cross-examinations. Tr.1128-31. The parties later agreed upon a redacted portion of the allocution that was read into the record by the court reporter. Tr.1137-1153,1181-86. In addition to Morris's admission that he possessed a loaded .357 outside of his home at the time and place of the shooting, the redacted allocution included Morris' counsel's comments that Morris was taking the plea against his advice, and that the People's proof was insufficient to indict Morris absent the admissions he was willing to make, at plea, in order to get out of prison that day. Tr.1184-85.

On January 6, 2016, a judgment was rendered in the Supreme Court of the State of New York, Bronx County, convicting petitioner, after jury trial, of Murder in the Second Degree (N.Y. Penal Law 125.25[1]), and sentencing him to an indeterminate term of from twenty-five-years-to-life in prison.

In a fourteen-point, one-hundred-sixty-two-page brief filed in February 2018, petitioner appealed his judgment of conviction to the Supreme Court of the State of New York, Appellate Division, First Department. Supp.App.002-173. Pertinently, in Point II, petitioner did not challenge the state standard set forth in *People v. Reid*, 971 N.E.2d 353 (N.Y. 2012) and *People v. Ko*, 789 N.Y.S.2d 43 (N.Y. App. Div. 2005) *lv. denied* 836 N.E.2d 1159 (2005), *cert. denied sub*

nom Ko v. New York, 546 U.S. 1093 (2006),[1] that "[t]he door-opening doctrine recognizes that a defendant can open the door to otherwise inadmissible evidence by presenting potentially incomplete or misleading evidence that makes it necessary to introduce otherwise-inadmissible evidence to correct a misrepresentation." Supp.App.109-110. Instead, petitioner argued that he did not in fact open the door under this standard and that the trial "court's ruling undermined both the trial's fairness and truth-seeking process by placing unreliable evidence before the jury where the defense had adhered to [its] in limine rulings" and the defense had not engaged in misleading conduct. Supp.App.110-111.

On June 11, 2019, the Appellate Division, affirmed over a sole dissent. Pertinently, it reasoned: "[T]he admission of portions of Morris's plea allocution did not violate defendant's right of confrontation because defendant opened the door to this evidence . . .. During the trial, defendant 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." App.16a-17a (internal citation to *People v. Reid* omitted). 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.

In the New York Court of Appeals, petitioner focused the court's attention on six issues, and requested general review of the eight other issues raised in the Appellate Division, as provided by the rules of that Court. Supp.App.385-414; (*see* 22 N.Y.C.R.R. 511, available at http://www.courts. state.ny.us/ctapps/500rules.htm#Alt). Pertinently, petitioner argued:

[1] *People v. Ko* was decided on remand from this Court. *Ko v. New York*, 542 U.S. 901 (2004) (vacating and remanding for further consideration in light of *Crawford v. Washington*).

> 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. . . .

Supp.App.398-399. Petitioner then asked the Court of Appeals to conduct the two-fold "open-the-door inquiry" as set forth in *People v. Reid*, 971 N.E.2d 353, and cited additional federal precedent supporting the correctness of the State standard. Supp.App.399-400, *citing United States v. Sine*, 493 F.3d 1021 [9th Cir. 2007]).

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

App.2a (internal citations omitted).

REASONS FOR DENYING THE WRIT

Petitioner seeks to present the question of "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." Petition at *i. In other words, petitioner asks this Court to overturn the Court of Appeals' "broad forfeiture-by-opening-the-door rule" (*id*., at 9), as set forth in *People v. Reid*, claiming it is incompatible with *Crawford v Washington*, 541 U.S. 36 (2004), and its progeny. Yet, petitioner did not raise this claim in *any* New York State court. Petitioner's Rule 500.11(e) SSM Letter brief to the New York Court of Appeals argued:

> The only issue before this Court is whether the defense opened the door to . . . testimonial hearsay, as both the trial judge and the Appellate Division recognized that these statements would otherwise be barred by the Confrontation Clause. The trial court erroneously applied the governing legal standard in ruling that [petitioner] had opened the door by advancing "appropriate" and "necessary" [] arguments that did not mislead the jury, thus committing error as a matter of law. *People v. Cargill*, 70 N.Y.2d 687, 689 (1987) (the failure to "apply the correct legal standard" constitutes legal error). Further, the Appellate Division's ruling, that the defense created a misleading impression . . . is not supported by the record. Accordingly, the introduction of Morris's guilty plea minutes violated [petitioner's] Sixth Amendment right to confront the witnesses against him.

Supp.App.398-399 (end citations omitted), 399 (discussing *People v. Reid* as the governing standard of the appeal).

Petitioner did not present this challenge to *People v. Reid* to that Court. Had petitioner raised in State court the constitutional question that he now presents, respondent would have argued, and the State appellate courts would have found, that it was not properly preserved by timely and specific objection at trial, an independent and adequate state procedural ground. Regardless, petitioner's request of the State appellate courts that they apply the very standard he now challenges as unconstitutional renders this a particularly inappropriate case on which to consider the question presented. The writ should not issue.

I. Jurisdictional and Prudential Grounds Call for Denial of the Writ.

This Court "adhere[s] to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that [it] will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision [it has] been asked to review." *Adams v. Robertson*, 520 U.S. 83, 86 (1997)(*per curiam*); *see Illinois v. Gates*, 462 U.S. 213, 218 (1983). Petitioner now asks this Court to review the decision of the New York Court of Appeals. But he cannot meet his burden of proving he presented this issue to that Court, or to any lower state courts for that matter. *See Campbell v. Louisiana*, 523 U.S. 392, 394 (1998), *citing Adams*, 520 U.S. at 86. In fact, he does not even try. Petition at 19 (asserting, without citation to state court briefs, that the issue "was raised and addressed at every stage of the proceedings below").

A. An Independent and Adequate State Bar Applies.

Petitioner never raised his current claim—that the "open-the-door" doctrine set forth in *People v Reid* violated *Crawford*—to the Appellate Division or the New York Court of Appeals; but if he *had*, both courts would have rested their respective judgments on an independent and adequate state-law ground, the contemporaneous objection rule. That rule applies because petitioner did not challenge the open-the-door doctrine itself by objection or exception before the trial court.

The contemporaneous objection rule is well-established as an independent state ground. *See generally Wainwright v. Sykes*, 433 U.S. 72, 88 (1977); *Henry v. Mississippi*, 379 U.S. 443, 448 (1954). The application of New York's preservation rule is similarly adequate, in that it is "firmly established and regularly followed." *Ford v. Georgia*, 498 U.S. 11, 423-24 (1991); *see Downs v. Lape*, 657 F.3d 97, 102-04 (2d Cir. 2011); *Richardson v. Greene*, 497 F.3d 212, 219-20 (2d Cir. 2007); *Garvey v. Duncan*, 485 F.3d 709, 718 (2d Cir. 2007); *Garcia v. Lewis*, 188 F.3d

71 (2d Cir. 1999); *Bossett v. Walker*, 41 F.3d 825, 829, n. 2 (2d Cir. 1994); *Fernandez v. Leonardo*, 931 F.2d 214, 216 (2d Cir. 1991).

The Court of Appeals should have had the opportunity to consider whether this "independent and adequate state ground[] . . . would pretermit the federal issue." *Webb v. Webb*, 451 U.S. 493, 500 (1981); *accord Gates*, 462 U.S. at 222. That it did not should result in denial of the writ. Petitioner never raised this claim "at the time and in the manner required by the state law." *Adams*, 520 U.S. at 87, *quoting Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 77-78 (1988). In fact, "the sole federal question argued here has never been raised, preserved, or passed upon in [any of] the state courts below." *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969).

At trial, the prosecution gave advanced notice and later moved to introduce the plea allocution of Morris. Tr.506,511,890-91. After extensive unrelated discussions of state evidentiary law,[2] the court asked defense counsel for his view on whether the plea allocution was admissible under *Crawford*. Defense counsel briefly remarked:

> I think it is [a] *Crawford* violation. I think the evidence is being offered to incriminate [petitioner]. I'm being deprived of the opportunity to examine [] Morris, and I don't see how it would not be a *Crawford* violation.

Tr.916. Petitioner made no further comment. Recognizing the allocution is testimonial. Tr.917-18, the court applied *People v. Reid* to hold that the defense had "open[ed] the door to evidence offered by the state refuting the claim that Morris was, in fact, the shooter" by its opening statement and cross-examination of witnesses. Tr.1130-32. Petitioner did not take exception on the grounds that

[2] When the issue was discussed over the next few days, the defense focused its objections on whether the plea allocution met the requirements for a declaration against the penal interest as an exception to the hearsay rule under New York state evidentiary law. Tr.511,512-13,896-902,904, 907-08,909-10).

the open-the-door doctrine as applied to testimonial evidence was unconstitutional: the very argument he now presents. *But cf.* Petition at 19 (citing to pages of transcript, without quotation, to claim he raised these issues). Consequently, petitioner cannot demonstrate that he complied with the applicable state rules for raising this claim.

By obtaining a ruling on his *Crawford* objection, petitioner preserved, under New York's contemporaneous objection rule, a narrow legal issue for appeal: whether he had opened the door to challenged testimony. Pertinently, in New York:

> [A] question of law . . . is presented when a protest thereto was registered, by the party claiming error, at the time of such ruling or instruction or at any subsequent time when the court had an opportunity of effectively changing the same. Such protest . . . is sufficient if . . . if in re[s]ponse to a protest by a party, the court expressly decided the question raised on appeal.

N.Y. Crim. Pro. L. § 470.05(2). This "rule requiring a [criminal] defendant to preserve his points for appellate review applies generally to claims of error involving Federal constitutional rights." *People v. Iannelli*, 504 N.E.2d 383, 384 (N.Y. 1986), *quoting People v. Thomas*, 407 N.E.2d 430 (N.Y. 1980). And, that provision requires that a party bring the issue to the *nisi prius* court's attention "at a time and in a way that gave the latter the opportunity to remedy the problem," *People v Luperon*, 647 N.E.2d 1243, 1247-48 (N.Y. 1995); in other words, it requires that an objection or exception be made with "sufficient specificity" so the court may deal with the asserted error. *People v. Robinson*, 671 N.E.2d 1266, 1267 (N.Y. 1996); *accord Whitley v. Ercole*, 642 F.3d 278, 286 (2d Cir. 2011). Further, the Court of Appeals can only hear preserved "questions of law." N.Y. Crim. Pro. L. § 470.30(1).

Petitioner's objection, alone, was insufficient to call his present challenge to the trial court's attention. He did not address the issue of whether he had opened the door at all. Yet, the

trial court, in response to petitioner's *Crawford* protest, "expressly decided the question raised on appeal" by petitioner. N.Y. Crim. Pro. L. § 470.05(2). That is, it decided the question of whether petitioner had opened the door to the admission of the challenged evidence under *People v. Reid*, and it found that he had. Petitioner then presented that question, and "only" that question, to the Appellate Division and Court of Appeals. Supp.App.398. Petitioner failed to comply with state procedural rules, creating a jurisdictional impediment to consideration of this claim.

B. Neither State Appellate Court Reviewed the Present Claim

Petitioner also cannot "demonstrate that [he] presented the particular claim at issue here with 'fair precision and in due time'" to the appellate courts. *Adams*, 520 U.S. at 87*, quoting New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928). After failing to object at the trial court level, petitioner also failed to argue this point before the Appellate Division. There he argued the trial court ruling violated his right to confront Morris, pertinently, because under the "door opening doctrine" of *People v. Reid* and *People v. Ko*, "there was nothing misleading or improper with [his] evidence-based argument that Morris possessed .9mm ammunition on the day of the shooting," and a "party cannot open the door to inadmissible evidence by making proper arguments based on the court's rulings." Supp.App.108-111; *see* Supp.App.362-63 (quoting and applying *People v. Reid* on reply). Then, before the Court of Appeals, petitioner was even more explicit; he argued, "The only issue before this Court is whether the defense opened the door" under *People v. Reid.* Supp.App.398-99. In his reply to that Court, petitioner complained that the trial court, while citing *People v. Reid*, "did not invoke the operative aspects of the opening-the-door doctrine" and its "ruling reflect[s] a basic misunderstanding of the *Reid* doctrine." Supp.App.449.

Nor can petitioner claim that he did not have the opportunity to present this specific challenge to the validity of the state's "open-the-door" doctrine of *People v. Reid* in the state courts. At trial, he received notice of the application days in advance. Tr.506. On appeal, the Appellate Division granted him permission to file an oversized brief, resulting in his filing of a one-hundred-sixty-two-page, fourteen point brief. Then, he obtained leave from a dissenting Justice in the Appellate Division to appeal to the Court of Appeals, itself a rare opportunity. In each appellate court, he likewise filed a reply. Yet, in none of these filings did petitioner present this argument.

Aside from generic references to *Crawford*, petitioner also did not rely upon federal authority that would call this issue to the attention of the State courts. In the intermediate appellate court, petitioner cited to exclusively State court opinions. Before the Court of Appeals, petitioner cited to a single federal authority for its consideration. Supp.App.400. Petitioner quoted *United States v. Sine*, for the proposition that using "only partial, misleading evidence can" open the door to rebuttal with otherwise "inadmissible evidence." Supp.App.400 (quoting *United States v. Sine*, 493 F.3d 1021, 1038 [9th Cir. 2007]). In other words, petitioner only relied on Federal case law that, like his arguments under State law, contravene his current claim.

The Court of Appeals reviewed the "only issue before" it, Supp.App.398, as quoted above. The question before the Court of Appeals called on it to decide, exclusively, whether the trial court abused its discretion in its application of what petitioner called the "correct legal standard," *People v. Reid*, when it ruled "the defense opened the door" to otherwise inadmissible, testimonial hearsay, Supp.App.398-99; *ipso facto*, petitioner conceded in the State courts that if he had opened the door under that precedent, then no constitutional violation occurred. There simply was never "any real contest at any stage of this case upon the point" now raised; and, "without such a contest,

the routine restatement and application of settled law by an appellate court [does] not satisfy" this Court's prudential and jurisdictional standards for granting the writ. *Gates*, 462 U.S. at 222-23, *quoting Morrison v. Watson*, 154 U.S. 111, 115 (1894).

The Court of Appeals fairly read the question as petitioner intended—that is, it considered the claim to relate solely to the application of its established precedent rather than as a challenge to it—and this Court, as a matter of comity, should not declare its analysis to be error. As this Court has said, "[W]e should hold ourselves free to set aside or revise their determinations only so far as they are erroneous and error is not to be predicated upon their failure to decide questions not presented." *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 435 (1940). In answering the question before it, the State court held in a single sentence: "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." App.2a; *cf. People v. Garvin*, 88 N.E.3d 319, 327 (N.Y. 2017) (addressing, as a point of comparison, a constitutional challenge to its precedent), *cert. denied Garvin v. New York*, 139 S.Ct. 57 (2018). Given that the State court was not asked to and did not address the constitutional question now at issue, "'it would be unseemly . . . to disturb the finality of [that] judgment[] on a federal ground that the state court did not have occasion to consider." *Adams*, 520 U.S. at 87, *quoting Webb*, 451 U.S. at 500.

C. Petitioner Asked the State Appellate Courts to Apply the Standard He Now Seeks to Invalidate

Perhaps the most important reason for this Court to deny the writ rests on the fact that petitioner, as mentioned, affirmatively asked the State courts to apply the very standard he now challenges as unconstitutional. Petitioner has deliberately changed his position for purposes of this application, both as to the validity of *People v. Reid*, and also as to whether he, in fact, opened the door under that precedent. He does so in order to make this petition an "excellent vehicle" to hear this claim. Petition at 19.[3] Yet, these positions are "clearly inconsistent," and given the one-sentence decision of the Court of Appeals, it "would create 'the perception that [that] court was misled'" if this Court were to hear and rule upon petitioner's amended claim. *See New Hampshire v. Maine,* 532 U.S. 742, 750-752 (2001)(discussing related doctrine of judicial estoppel); *cf. Bankers Tr. Co. v. Mallis*, 435 U.S. 381, 388 (1978)(mere "change in the posture of the case between the time of the decision of the Court of Appeals and its presentation" to this Court due to a party's concession is sufficient to warrant denial of a writ).

"[T]his is a court of final review and not first view." *Matsushita Elec. Industrial Co. v. Epstein,* 516 U.S. 367, 399 (1996)(Ginsburg, J., concurring in part and dissenting in part). Petitioner argues that the question presented is of "manifest" importance in that it "regularly arises in criminal trials" in jurisdictions in and beyond New York; and, he argues it affects the strategic decisions of the defense and prosecutors, especially in cases where the defense seeks to interpose defenses of actual innocence or third-party culpability. Petition at 17-19. Assuming *arguendo* that

[3] The question petitioner presents—it is framed in terms of "a criminal defendant who opens the door to responsive evidence"—arguably would not prevent petitioner, upon merits briefing, from contesting factually whether he did, in fact, open the door as an ancillary question. That, of course, would require this Court to engage in extensive factual, rather than legal analysis. The existence of that possibility, however, further supports the denial of the writ.

his position is correct, the issue will undoubtedly arise again; and the next time it does, the defense can rely upon the arguments presented in this petition to interpose a proper and timely objection, and to seek review on direct appeal. Ultimately, "the importance of an issue should not distort the principles that control the exercise of [this Court's] jurisdiction. To the contrary, 'by adhering scrupulously to the customary limitations on [this Court's] discretion regardless of the significance of the underlying issue, [this Court] promote[s] respect ... for the Court's adjudicatory process. *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110–11 (2011), *quoting Adams*, 520 U.S. at 92, n.6; *Gates*, 462 U.S. at 224, *quoting Mapp v. Ohio*, 367 U.S. 643, 677 (1961) (Harlan, J., dissenting).

II. There is No Meaningful Jurisdictional Conflict That Supports Granting The Writ.

Petitioner broadly asserts that "federal and state courts are divided into three very different camps" regarding the issue of "opening the door" to unconfronted testimonial evidence that would otherwise violate the Confrontation Clause. Petition at 9. But this argument misses the mark and amplifies a minor split relating to waiver versus forfeiture of the confrontation right. In reality, the only meaningful "split" among courts regarding the use of testimonial hearsay in this manner is between those that have ruled on the issue, and those that have not.

Jurisdictions that *have* been presented with cases analogous to the one at bar have generated unremarkable and largely consistent holdings. They have recognized that there are limited, fact-specific circumstances in which a defendant can relinquish his Confrontation Clause rights, whether through explicit waiver or implicit forfeiture, when that defendant relies upon evidence and argument to create a misleading impression that can only be resolved by introduction of the testimonial hearsay. Put another way, the Confrontation Clause does not function as an absolute

bar to the admission of testimonial hearsay for the purpose of correcting a defendant's efforts to deceive the finder of fact *absent* that hearsay.

Indeed, each jurisdiction in petitioner's survey has implicitly recognized that defendants cannot weaponize the Confrontation Clause in this manner. Whereas courts in petitioner's first jurisdictional category merely require a record showing of a knowing waiver before admission of the testimonial hearsay, the jurisdictions in petitioner's latter two categories do not require such a strong showing to deem the right relinquished. Moreover, any distinction petitioner draws between categories two and three is immaterial and reflects the paucity of opportunities for courts to address the issue, a strong factor against granting a writ in this case.

A. Jurisdictions where waiver is permitted.

In petitioner's first category, he claims that "three jurisdictions hold that criminal defendants *never* 'open the door' to the admission of evidence that is otherwise barred by the Confrontation Clause." Petition at 10 (emphasis added). He cites to the Sixth Circuit, the Eighth Circuit, and the State of Georgia. Yet, petitioner's general thesis is inaccurate because none of these cases contain such an unconditional holding. A more accurate categorization would be that these jurisdictions require some affirmative action on the part of counsel, or defendant, indicating a knowing waiver of the Confrontation Clause's protections when questioning a witness about what a non-testifying witness said.

The strictest holding is from the Sixth Circuit's decision that failed to mention waiver, at all, and instead relied upon whether defendant *forfeited* his right to confrontation. *See United States v. Cromer*, 389 F.3d 662, 679 (6th Cir. 2004)("A foolish strategic decision does not rise to the level of such misconduct and so will not cause the defendant to forfeit his rights under the Confrontation Clause"). Notably, in the briefing for that case, neither party focused on the

Confrontation Clause, but merely mentioned it in passing while focusing on the hearsay aspect of the testimony. There was no objection to the hearsay, but the court deemed that this did not constitute forfeiture of his Confrontation Clause rights. Insofar as *Cromer* fails to discuss whether a criminal defendant may nevertheless *waive* his confrontation right, petitioner is simply wrong that the Sixth Circuit held that a defendant *never* opens the door to admission of evidence otherwise barred by the Confrontation Clause.

In the remaining two jurisdictions within this category, both the Eighth Circuit and the Georgia Supreme Court found that defendant, through counsel, can *waive* the Confrontation Clause "intentionally and for valid, tactical purposes in order to satisfy the requirement that the waiver of a constitutional right must be clear and intentional." *Freeman v. State*, 765 S.E.2d 631, 638 (Ga Ct.App 2014), *quoting United States v Holmes*, 620 F.3d 836, 843 (8th Cir. 2010). In these cases, because the court found that counsel had objected to the admission of the confrontation clause evidence and objected to the idea that they "opened the door," the record indicated that no such waiver occurred.

Essentially, this type of rule mandates that there be record support that waiver was the attorney's intention and defendant did not object to the offending evidence. This rule traces to a Tenth Circuit case, with a very particular fact pattern, in which defense counsel told the trial court at a sidebar:

> I think, Your Honor, [the government is] worried that I am going to bring in the confidential informant information. That's my full intention. I don't care what door we open. If I open up a door, please feel free to drive into it. But I am going to explore the entire case.

United States v. Lopez-Medina, 596 F.3d 716, 731 (10th Cir. 2010).

Of course, such a strict rule undoubtedly invites gamesmanship. All a defense attorney must do is intentionally open the door and later lodge a Confrontation Clause objection as the prosecutor attempts to utilize that door. Anything else would nearly be *per se* ineffective assistance because *no counsel* would ever choose to put a waiver into the record. Perhaps envisioning these drawbacks, the Tenth Circuit split from the Sixth Circuit by rejecting defendant's arguments under the separate doctrine of invited error. *Compare Lopez-Medina*, 596 F.3d at n.10 *with Cromer*, 389 F.3d at n.11 (limiting application of invited error to defense counsel's cross examination referencing the offending hearsay rather than prosecutor's redirect).

It is also worth noting that every case petitioner cites in this category, comprising the strictest rulings on this issue, contemplates the propriety of admitting testimony regarding statements made to government witnesses by non-testifying confidential informants. The fact that jurisdictions where defendants "never" open the door have only evaluated this issue in confidential informant situations weighs heavily against petitioner's argument that the case at bar is "an ideal vehicle" for reviewing *Reid*'s open-the-door rule, or determining whether a strict "never opens the door" rule is even a good idea, especially since it is unclear how those jurisdictions would come out in a wider variety of factual scenarios that do not raise the constitutional red flags that inhere when confidential informants are involved.

Assuming *arguendo* that petitioner is correct that the Sixth Circuit, "categorically reject[s] the notion of *forfeiting* the confrontation right by 'opening the door,'" Petition at 13, *Cromer* still does not exclude the possibility that a defendant may nevertheless *waive* that right "intentionally and for valid, tactical purposes" as the Eighth Circuit and Georgia expressly allow. *See Freeman v. State*, 765 S.E.2d at 638, *quoting United States v. Holmes*, 620 F.3d at 843. As *Cromer* does not address waiver at all, petitioner's assertion that the Sixth Circuit would *not* have admitted Morris's

plea allocution is highly speculative. In any event, it appears that *Cromer*'s primary concern and application, from a factual standpoint, was that "[t]ips provided by confidential informants are knowingly and purposely made to authorities, accuse someone of a crime, and often are used against the accused at trial" and further, that "[t]he very fact that the informant is confidential—*i.e.*, that not even his identity is disclosed to the defendant—heightens the dangers involved in allowing a declarant to bear testimony without confrontation." 389 F.3d at 675. Petitioner's case, by contrast, involves the admission of a limited portion of a sworn plea allocution that was administered by a judge in open court, and therefore does not raise the same concerns about "the potential for abuse" that inheres "when police testify to the out-of-court statements of a confidential informant." *Id.*, *quoting United States v. Silva*, 380 F.3d 1018, 1020 (7th Cir. 2004). As such, *Cromer* does not mandate a finding that the Sixth Circuit would have excluded Morris's plea allocution because the cases are so factually distinguishable.

Meanwhile, both the Eighth Circuit and Georgia found that defendants had not waived their confrontation rights because counsel objected to *both* the admission of the Confrontation Clause evidence *and* the idea that they "opened the door" to that evidence. *See Holmes*, 620 F.3d at 844; *Freeman*, 765 S.E.2d at 638. In petitioner's case, by contrast, counsel merely told the court he "[could]n't see how [the plea allocution] would not be a *Crawford* violation," Tr.916, but did not challenge the court's subsequent determination that petitioner had opened the door to "evidence offered by the state refuting the claim that Morris was, in fact, the shooter." Tr.1131. Notably, counsel ultimately vetted and approved a redacted version of the allocution before it was admitted into evidence. Tr.1134. In light of these circumstances, as well as the fact that the statement at issue in petitioner's case did *not* originate with a confidential informant, petitioner's argument that

neither the Eighth Circuit nor the Georgia courts "would have admitted Morris's plea allocution" is speculative at best. *Compare* Petition at 13.

B. Jurisdictions where defendants open the door to testimonial hearsay by creating a misleading impression.

In setting forth his latter two categories, petitioner creates a two-way split among eight jurisdictions, including New York, where courts have held that a defendant can open the door to uncontested testimonial hearsay by creating a misleading impression. Petition at 13,15. Whereas the cases in petitioner's second category involve the most typical application of the rule—where a defendant introduces a misleading and incomplete portion of a testimonial statement—the cases in the third category apply the same rule but in rare situations. As such, it is important to recognize that the split petitioner alleges between jurisdictions in his latter two categories is, at most, extremely minor.

1. The most typical examples of opening the door to hearsay to remove a misleading impression.

In this category, petitioner evaluates *how* defendants "open the door" to testimonial hearsay under the rule of completeness, or other "equitable principles," and concludes that these courts have purposefully limited the remedy "only" to those situations where a defendant introduces misleading portions of testimonial hearsay. Petition at 13-14.

Initially, the rule of completeness is "partially codified" in FRE 106, which petitioner ignores in his definition in favor of selectively quoting treatises discussing the common law rule. *See Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 154 (1988). Under FRE 106, "If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part—*or any other writing or recorded statement*—that in fairness ought to be considered at the same time." FRE 106 (emphasis added). There is no

limitation that requires it to be from the same "source," or that the additional hearsay be differing "portions" of the same statement. Petition at 14.

Petitioner relies upon the Fourth Circuit, Arizona, California, South Dakota, and Hawaii, but later includes Kansas, Colorado, and Texas to provide an incorrect synthesis of the rule of completeness. He states, "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." Petition at 13. The "but only when" language is troubling because no such limitation has been imposed by *any* of these courts as a matter of law.

The Fourth Circuit briefly noted this issue in passing in a heavily redacted decision emerging from an extraordinary posture: an interlocutory appeal during the prosecution of an accused 9/11 plotter over a dispute about, *inter alia*, defendant's inability to conduct depositions of enemy combatant witnesses for use in his defense at trial and the use of "substitutions" derived by reports instead. *United States v. Moussaoui*, 382 F.3d 453 (4th Cir 2004). The substitutions were permitted as an alternative, and the court merely recited the government's position in a footnote, "The Government acknowledges that, *under the circumstances here*, the rule of completeness would not allow it to use a statement by one witness to 'complete' a statement by another." *Id.* at n.39 (emphasis added). This language reflected *dicta*, but even if not, any holding would be limited to the "circumstances here" rather than an at-large ban. *Id*.

As to defendant's remaining state cases, not one of them contains a fact pattern giving rise to a holding that a prosecutor can *only* introduce testimonial hearsay to complete testimonial hearsay that defendant already elicited from the same non-testifying declarant. All of these cases involve the most typical situation that FRE 106, and its state equivalents, aim to resolve: the introduction of a prejudicial and incomplete portion of a testimonial statement. *See State v.*

Prasertphong, 114 P.3d 828, 831 (Az 2005) (Confrontation rights forfeited by defendant as to inculpatory portions of codefendant's statement when he attempted to introduce only misleading portions of statement); *People v. Vines*, 251 P.3d 943 (Cal 2011), *as mod.* (Aug. 10, 2011)*, overruled by People v. Hardy*, 418 P.3d 309 (Cal 2018) (The Confrontation Clause of the Sixth Amendment to the United States Constitution would not have precluded the admission, under the hearsay exception embodied in the Evidence Code rule of completeness, of the portion of accomplice's statement that implicated capital defendant in a robbery and murder, if the defense had introduced another portion of the same statement describing a third party's participation.); *State v. Selalla*, 744 NW.2d 802, 817 (SD 2008) (introduction of favorable hearsay by defendant properly enabled the State to complete the picture by eliciting other evidence from the rest of declarant's statement to police officer); *State v. Brooks*, 264 P.3d 40, 51 (Haw Ct. App. 2011), *as corrected* (Dec. 2, 2011) ("*Crawford* does not preclude the application of the rule of completeness when a defendant selectively introduces portions of a testimonial hearsay statement.").

Defendant's remaining cases in this category, which he labels as relying upon equitable principles rather than statutory rules of completeness, still do not meet the "but only when" threshold he currently claims within this category. In *State v. Fisher*, the Kansas Supreme Court determined that defendant forfeited his confrontation clause rights by "opening an otherwise inadmissible area of evidence during the examination of witnesses," and permitting the prosecution to "present evidence in that formerly forbidden sphere." *Fisher*, 154 P.3d 455, 483 (Kan 2007). The court did not announce a limiting principle that the "forbidden sphere" shall only include statements by the same declarant. Similarly, no limiting principle was announced in Colorado's *People v. Merritt*, 411 P.3d 102, 110 (Col 2014) or *People v. Rogers*, 317 P.3d 1280, 1284 (Col 2012). Indeed, rather than announcing an intention to restrict the rule to portions of the same

statement, the Colorado court merely limited the admission to "further evidence on that same topic." *Id.*

In the *only* case defendant offers in this category where a court determined that a second declarant's testimonial statements were improper, a Texas *intermediate* appellate court did not recognize a categorical Confrontation Clause bar. It instead determined that, under the facts of that case, the door was not open so wide that testimonial hearsay from two declarants was necessary. Specifically, while the Texas court in *McClenton* found a Confrontation Clause violation when the prosecutor introduced hearsay from a second declarant, in addition to introducing hearsay from the first declarant, this was arguably a door-opening issue, not a complete equitable bar in using a different source of hearsay. *See McClenton v. State*, 167 S.W.3d 86, 94 (Tex App. 2005). There, the door simply was not open wide enough that both statements were necessary. *See id.* ("Otherwise inadmissible evidence may be admitted if the party against whom the evidence is offered 'opens the door,' but the party offering the evidence may not "stray beyond the scope of the invitation."). Further, in an unpublished opinion, the Texas Court of Criminal Appeals noted that there is no such absolute bar, at least as to TRE 107 (the Texas analog to FRE 106), under which "other evidence–even evidence that is not a part of what has already been introduced–may be brought in if it is necessary to explain or help the trier of fact fully understand the part that was introduced. Under this second avenue, there is no requirement that the other part is on the same subject." *Ukwuachu v. State*, PD-0366-17, 2018 WL 2711167, at *2 (Tex Crim App. June 6, 2018) (unpublished); *see also Bunton v. State*, 136 S.W.3d 355, 365 (Tex 2004) (suggesting that a Texas court may permit hearsay from a different declarant than from declarant originally questioned about, but court declined to reach the issue on preservation grounds).

Given that all of these jurisdictions allow defendants to "open the door" to otherwise inadmissible testimonial evidence by creating a misleading impression, but do not expressly require that "correcting" evidence be from the same source as the door opening evidence, and have only analyzed this issue in the most typical application of the "open the door" rule, it appears that petitioner would fare no better in courts that, as he labels them, "follow[] the intermediate position" on this issue. Petition at 15.

2. Applying the same rule but in rare situations.

New York's rule is straightforward and requires a commonsense, "case-by-case," "twofold" inquiry, asking "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." *People v. Reid*, 971 N.E.2d at 357, quoting *People v Massie*, 809 N.E.2d 1102 [N.Y. 2004]). Importantly, this rule is not inconsistent with *any* jurisdiction where a defendant need not affirmatively waive his confrontation right to relinquish it.

That a defendant opens the door "does not permit all evidence to pass through because the doctrine is intended to prevent prejudice, and is not to be subverted into a rule for the injection of prejudice." *State v. White*, 920 A.2d 1216, 1222 (N.H. 2007); *see also United States v. Acosta*, 475 F.3d 677, 684 (5th Cir. 2007)(recognizing importance of the court's limiting instruction to the prosecutor's redirect); *see also United States v. Whittington*, 269 Fed.Appx. 388, 409 (5th Cir. 2008)("When accusing the detective of having no information of Cardona's connection to the marijuana, Cardona invited the witness to provide testimony regarding the informant's tip. Because Cardona invited the error, he cannot complain of its admission on appeal.").

Petitioner now faults the New York Court of Appeals' own survey of the caselaw by arguing that it erred in relying upon the First, Eighth, and Tenth Circuits as support. Petition at 17, n.6. Petitioner misses the mark. As discussed, these cases demonstrate the general proposition that there is no absolute bar to a defendant relinquishing his Confrontation Clause rights by way of unsuccessful strategy (*see above* discussion of *Holmes* and *Lopez-Medina*).

Additionally, while it is true the prosecution introduced the statement at issue for a non-hearsay purpose in *United States v. Cruz-Diaz*, the court also concluded that defendant had opened the door to this statement when finding that the non-hearsay statement was non-pretextual. *Cruz-Diaz,* 550 F.3d 169 (1st Cir. 2008). In any event, *United States v. Meises*, a case overlooked by petitioner, implicitly recognizes that there may be instances that would "justify rebuttal" that would otherwise violate the Confrontation Clause. *Meises*, 645 F.3d 5 (1st Cir. 2011) (finding defendant did not open the door sufficiently enough in this case for rebuttal evidence).

Put simply, *Crawford* did not change the rule that a defendant may open the door to otherwise inadmissible evidence when that evidence is necessary to explain, clarify, or correct misleading impressions created by the defendant himself. Every jurisdiction in petitioner's survey has, at least, implicitly recognized that defendants cannot weaponize the Confrontation Clause by attempting to delude the jury with a prejudicial and incomplete portion of a testimonial statement, and then employ that same rule to prevent the government from placing it in context or correcting any resultant misimpressions. Put simply, "The Confrontation Clause is a shield, not a sword." *Lopez-Medina*, 596 F.3d at 732. And, as the New York Court of Appeals correctly recognized, these rules are meant to "avoid…unfairness and preserve the truth-seeking goals of our courts." *Reid*, 19 NY.3d at 388, *citing Tennessee v. Street*, 471 U.S. 409, 415 (1985). *Crawford* did nothing

to disturb any of these established principles. *Reid* comports with *Crawford*, and both were correctly applied in petitioner's case.

III. The question presented would not be "outcome determinative."

Petitioner significantly overstates the evidentiary value of Morris' plea allocution at his trial to suggest its admission caused him prejudice. Of course, "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Chapman v. California*, 386 U.S. 18, 23 (1967); *see Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986) (confrontation clause errors subject to harmless error). It did not.

Initially, the Appellate Division did not just find the evidence against petitioner legally sufficient—he was identified by multiple witnesses, and his DNA was recovered from a blue sweater that smelled of gunpowder, where petitioner's accomplice to the crime was overheard by police seeking help in disposing of it—but found, correctly, that "overwhelming evidence" demonstrated petitioner's "consciousness of guilt." App.13A-16. By contrast, the dissent on which petitioner now relies, Petition at 20, misstated facts that connected petitioner to the sweater, and omitted *any* discussion of that consciousness of guilt evidence in finding the evidence insufficient. *Compare* App.13A-16A (majority op.), *with* App.22A-25A (Manzanet-Daniels, J., dissenting).

Further, the hearsay testimony of Morris' plea allocution was of little evidentiary value. The hearsay that came in at petitioner's trial was not just that Morris had admitted that on the date and time in question, Morris had "knowingly possessed a loaded operable" .357 firearm, Tr.1184-85, the fact that forms the basis of petitioner's complaint because the shooter possessed a 9-millimeter firearm. The allocution went further. It established that he accepted the plea in exchange for a promise of "a sentence of time served and a conditional discharge." Tr.1186. And, at the behest of the defense, the following was elicted from the allocution:

> [Defense Counsel]: [Morris] indicates that, over my strong advice, he will take the plea. . . . the nature of the proof that exist with respect to this gun count that my client is about to plead to is not sufficient for [the People] to obtain an indictment. The only way they will be able to make out the limits of this crime is through my client's admissions, which I suppose he will be willing to make, it seems, so that he can get out of jail today.

Tr.1182-83. Based on this testimony, petitioner argued on summation that Morris "just enter[ed] the plea because he want[ed] to go home," Tr.1581, and to "get out of jail," Tr.1583, facts the prosecutor could not and did not rebut, and that significantly weakened the impact of this evidence. By contrast, the prosecutor on summation made a single reference to this evidence, and did so only after admitting Morris possessed .357 and 9-millimeter ammunition that day. Tr.1668-69. Unsurprisingly, the jury did not request a read-back of Morris' plea. In other words, admission of this evidence was harmless beyond a reasonable doubt. *Chapman*, 386 U.S. at 24.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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