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

REPLY BRIEF FOR PETITIONER

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The State does not contest the substantial importance of the question presented: 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. Nor does the State seriously deny that state and lower federal courts have diverged over the question. The State nevertheless urges this Court to deny review, principally because of purported vehicle problems.

The State's arguments are unpersuasive. State and lower federal courts are deeply fractured over the constitutional question presented. There is no procedural impediment to review: Petitioner has argued throughout that the admission of Morris's allocution violated the Confrontation Clause, and the State has defended against that claim by arguing that petitioner opened the door to the allocution's admission. Having persuaded the state courts to apply *People v. Reid*, 971 N.E.2d 353 (N.Y. 2012), to reject petitioner's constitutional claim, the State cannot now shield the federal rule established in that case from review. Finally, the New York Court of Appeals' construction of the Confrontation Clause is deeply flawed—so flawed, in fact, that it threatens to swallow the confrontation right itself.

1. *Conflict.* The petition demonstrated that courts have broken into three camps over the opening-the-door doctrine. The State does not dispel that reality.

a. The New York Court of Appeals acknowledged in *Reid* that it was rejecting the Sixth Circuit's position on the question presented. Pet. App. 34a. Yet the State claims that it might be possible to reconcile

the jurisdictions' two positions. BIO 16-17. The State is wrong. In *United States v. Cromer*, 389 F.3d 662 (6th Cir. 2004), the Sixth Circuit squarely rejected the existence of any "opening the door" exception to the Confrontation Clause. The Eighth Circuit and Georgia state courts have done the same. *See* Pet. 10-13.

It is true that the Eighth Circuit and Georgia courts have also recognized that defendants can *waive* the confrontation right—in other words, that they can intentionally and expressly relinquish the right. But, contrary to the State's suggestion (BIO 17), the courts' recognition of that uncontroversial principle is of no moment. As the petition explained, waiver is distinct from forfeiture, and this case concerns the latter. Pet. 2-3. The State offers no response to this explanation. Nor could it, for petitioner expressly *objected* to the introduction of the testimonial statement at issue here. *Id.* 7. That is exactly what the defendants in the Eighth Circuit and Georgia cases did—and is the very opposite of waiving the confrontation right. *See United States v. Holmes*, 620 F.3d 836, 840, 844 (8th Cir. 2010); *State v. Freeman*, 765 S.E.2d 631, 638 (Ga. Ct. App. 2014).

The State also suggests that "every case" from the Sixth and Eighth Circuits and Georgia courts is distinguishable because each involved a statement of a confidential informant, whereas this case involves a statement of an eyewitness and possible perpetrator of the crime. BIO 18. Again, the State is off base. The legal rule those three courts have adopted is that a defendant can never "open the door" to the admission of *any* hearsay statement that is "testimonial in nature." *Cromer*, 389 F.3d at 678; *see also Holmes*, 620 F.3d at 843; *Freeman*, 765 S.E.2d at 638. And it is well

established that persons other than confidential informants can make testimonial statements. *See, e.g.*, *Davis v. Washington*, 547 U.S. 813, 828-32 (2006) (victim speaking to responding police officers); *Crawford v. Washington*, 541 U.S. 36, 68 (2004) ("prior testimony" and statements made during "police interrogations"). Indeed, the Sixth Circuit itself has applied its rule to a statement of an ordinary witness given in response to police questioning. *See United States v. Pugh*, 405 F.3d 390, 399-400 (6th Cir. 2005). The petition cited *Pugh* (at 11), but the State ignores the case.

Even if it were relevant under the Confrontation Clause whether a particular sort of statement raised special "red flags" in terms of reliability, BIO 18-19; *but see Crawford*, 541 U.S. at 61-62, the Court has long emphasized that there is no category of statements more inherently unreliable than those that—as here—"shift or spread blame" for criminal conduct. *Lilly v. Virginia*, 527 U.S. 116, 133 (1999) (plurality opinion) (collecting cases); *see also* Pet. 5-6. So the fact that some other cases involved statements by confidential informants would provide no basis for distinguishing this case.

b. The State fares no better trying to harmonize New York's rule with the rule in the jurisdictions following the intermediate approach—namely, that defendants open the door to evidence otherwise barred by the Confrontation Clause when they introduce other testimonial hearsay by the same witness on the same subject. The State is correct that these jurisdictions, like New York, assess whether the defendant created some sort of "misleading impression." But the rule in these juridictions, unlike

New York's, is grounded in the "rule of completeness" or comparable equitable principles. *See* Pet. 13-15. And the State does not dispute that the common-law rule of completeness applies only to statements by the *same* witness on the *same* subject. *Id.* 14; *see also* Amicus Br. of Evid. & Crim. Pro. Profs. 9-13.

The State's only retort is that the modern version of Federal Rule of Evidence 106 and some state analogues also allow parties to introduce "any other writing or recorded statement" necessary to cure a misimpression. BIO 20 (quoting Fed. R. Evid. 106). But none of the jurisdictions in the intermediate category has ever said its constitutional opening-the-door doctrine extends this far. For good reason: The very core of this Court's holding in *Crawford* is that the right to confrontation does not depend on whatever "the law of Evidence" may provide "for the time being." 541 U.S. at 50-51 (citation omitted). That is, "[w]here 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. Accordingly, the "opening the door" doctrine in these jurisdictions must necessarily be limited to situations—unlike this case—in which defendants introduce misleading portions of an unavailable witness's testimonial hearsay.

What is more, the dearth of cases in these jurisdictions (as well as in others across the country) admitting statements like the one here speaks volumes. If New York were correct that a defendant forfeits his right to confrontation whenever a judge determines that he has created a "misleading impression" at trial, prosecutors would no doubt regularly deploy that devastating weapon, as the State

did here. In nearly every case in which a defendant mounts a vigorous defense, he disputes the prosecution's version of events, which is enough under New York's rule for the prosecution to claim that the defendant is creating a misleading impression. *See* Pet. 26-27, 29-31; Amicus Br. of NACDL 5-6, 15-16. That only a few jurisdictions have sanctioned the evidentiary tactic the State used here indicates that others (including the courts in the intermediate category) prohibit it—and perhaps that even prosecutors in jurisdictions that have not rendered any decision on the issue believe that the ploy would be illegitimate.

2. *Vehicle*. Both of the State's vehicle arguments betray a misunderstanding of this Court's procedures and practices.

a. The State first maintains that petitioner did not adequately preserve his federal claim in the state courts. BIO 8-15. This contention is incorrect for two independent reasons.

i. "There can be no question as to the proper presentation of a federal claim when the highest state court passes on it." *Raley v. Ohio*, 360 U.S. 423, 436-37 (1959); *see also, e.g.*, *Cohen v. Cowles Media Co.*, 501 U.S. 663, 666-67 (1991); *Payton v. New York*, 445 U.S. 573, 582 n.19 (1980). And here, the New York Court of Appeals held that the trial court did not err in "admitting evidence that the allegedly culpable third party [Morris] pled guilty to possessing a firearm other than the murder weapon." Pet. App. 2a. Granted, this holding does not explicitly reference the Confrontation Clause. But that was the only basis for petitioner's challenge to the admission of Morris's allocution, BIO App. 55-56, 107-13, and the State's

response in the briefing was that "this case invite[d] the same result as *Reid*." BIO App. 427. Consequently, the only way to understand the Court of Appeals' opinion is that the court concluded—consistent with the Appellate Division, *see* Pet. App. 16a-17a—that the admission of Morris's testimonial plea allocution did not violate the Confrontation Clause because petitioner opened the door under *Reid*.

The State tries to distinguish the question whether *Reid* dictated the outcome below from the question whether *Reid* was correctly decided, insisting that the state courts never considered the latter question. BIO 11-13. This contention misses the mark too. The state courts were able to reject petitioner's federal claim only by proceeding from the premise that *Reid* correctly determined that defendants can open the door to the introduction of evidence that is otherwise barred by the Confrontation Clause. It is *that* necessary legal premise of the holding below—that interpretation of the Confrontation Clause—that petitioner challenges here.

ii. Even if the particulars of the state court briefing mattered, they would still readily establish that petitioner may raise the question presented in this Court. He objected in the trial court that the introduction of Morris's allocution violated the Confrontation Clause. *See* Tr. 916 (arguing that admission of the statement would be "a *Crawford* violation"). But the trial court "granted the People's application" to override that objection and admit the statement, reasoning that petitioner "had opened the door to the otherwise inadmissible *Crawford* evidence." BIO 4.

At both stages of his appeal, petitioner renewed this federal claim. In fact, he dedicated large sections of each of his briefs to arguing that the admission of Morris's allocution violated the Confrontation Clause. *See* BIO App. 55-56, 107-13, 360-64, 396-403, 446-49. Accordingly, there can be no doubt that petitioner pressed his federal claim all the way through the state courts.

The State, of course, argued in the New York appellate courts (as it does here) that petitioner opened the door to the evidence he says violated the Confrontation Clause. BIO App. 218-30, 422-30. And the State now criticizes petitioner for pushing back against its opening-the-door argument only on the ground that *Reid*'s "misleading impression" test was not satisfied (not also that *Reid* itself was wrongly decided). BIO 11-15. But petitioner had no obligation below to preserve any particular reply to *the State's response* to his federal claim. The State persuaded the New York courts to reject petitioner's federal claim on the basis of *Reid*, *see* Pet. 8-9, so the State cannot now claim that the legitimacy of that decision is not fairly presented. *See Cohen*, 501 U.S. at 668.

At any rate, there is no need for a party to argue in a state court that a recent decision from the state's highest court, unaffected by any intervening authority from this Court, is wrong in order to preserve the ability to challenge the decision in this Court. All the party must do is argue that his federal right was

violated for reasons that implicate that decision. *See, e.g.*, *Riley v. California*, 573 U.S. 373 (2014).[1]

The reason is simple: Parties "are not confined here to the same arguments which were advanced in the [state] courts below upon a Federal question there discussed." *Dewey v. City of Des Moines*, 173 U.S. 193, 198 (1899); *see also, e.g.*, *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992) (provided federal claims were raised in the state courts, "parties are not limited to the precise arguments they made below"). Never is that commonplace principle more applicable than when the state high court has recently considered and rejected a given argument. In that circumstance, there can be no doubt that the state high court has already had "a fair opportunity to address the federal question that is sought to be presented here"—which is the whole point of the "pressed or passed upon" requirement. *Webb v. Webb*, 451 U.S. 493, 501 (1981).

Nothing about New York law complicates this straightforward analysis. The State suggests that

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[1] In *Riley*, the California Supreme Court had issued a decision several years prior holding that the Fourth Amendment permitted police officers to conduct warrantless searches of cell phones immediately associated with persons who are arrested. *See People v. Diaz*, 244 P.3d 501, 505-06 (Cal. 2011). Accordingly, Riley argued in the state courts only that "*Diaz* [was] not controlling . . . because [his] phone was not 'immediately associated' with his 'person' when he was arrested." *People v. Riley*, 2013 WL 475242, at *6 (Cal. Ct. App. 2013). He did not argue that *Diaz* was wrongly decided. This Court, however, granted certiorari to decide the more basic question *Diaz* had resolved: "whether the police may, without a warrant, search digital information on a cell phone seized from an individual who has been arrested." *Riley*, 573 U.S. at 378.

New York's "contemporaneous objection rule" could have provided an independent and adequate state-law ground for rejecting petitioner's claim below. BIO 8. But as detailed above, all agree that petitioner *did* object at trial that the introduction of Morris's allocution violated the Confrontation Clause. *See supra* at 2, 6. And, unlike in the cases the State cites, the New York appellate courts addressed that federal issue without noting any preservation problem, agreeing with the State that petitioner had "opened the door." *See* Pet. App. 2a, 16a-17a.[2]

b. The State also asserts that the introduction of Morris's allocution was "harmless." BIO 26-27. No state court, however, has considered this argument, and the State provides no reason why this Court would depart here from its "general custom of allowing state courts initially to assess the effect of erroneously admitted evidence in light of substantive state criminal law." *Lilly*, 527 U.S. at 139; *see also, e.g.*, *Bullcoming v. New Mexico*, 564 U.S. 647, 668 n.11 (2011).

In any event, the State's harmless-error argument borders on outlandish. Recall that one justice below concluded that the State's case was so weak that there was insufficient evidence to sustain the conviction.

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[2] Even if state law generally required parties to raise specific rejoinders to reponses to the other side's federal claims, petitioner still would not have fallen short in that regard here. The New York Court of Appeals has long held that a party's failure to challenge a practice previously deemed in a binding Court of Appeals decision to be "valid" "cannot deprive him of the right [later] to attack that practice" as inconsistent with this Court's precedent. *People v. Patterson*, 347 N.E.2d 898, 903 (N.Y. 1976) (citing *People v. Baker*, 244 N.E.2d 232, 317 (N.Y. 1968)).

Pet. App. 22a-25a. Against that backdrop, the State asserts that Morris's allocution was so transparently self-serving and unreliable that the jury must not have put much stock in it. Petitioner agrees that Morris's allocution was untrustworthy. But the fact remains that the State pushed to introduce it. It was critical evidence purportedly excluding Morris as the shooter, Pet. 7—and it goes a long ways towards explaining how the jury could have found petitioner guilty.

3. *Merits.* The State offers only a single paragraph in defense of New York's opening-the-door rule and its application below. The State asserts that "*Crawford* did not change the rule that a defendant may open the door to otherwise inadmissible evidence when the evidence is necessary to explain, clarify, or correct misleading impressions created by the defendant himself." BIO 25. There are two problems with this assertion.

First, the State incorrectly assumes that such a constitutional opening-the-door doctrine existed before *Crawford*. This Court certainly has never adopted—or even referenced—any such doctrine. To the contrary, the notion of opening the door to evidence otherwise barred by the Confrontaion Clause cannot be reconciled with this Court's pre-*Crawford* precedent. Pet. 27-31.

Second, New York's opening-the-door rule contravenes *Crawford* too. Most notably, it flouts the historical underpinnings of the Confrontation Clause upon which *Crawford* rests. Pet. 22; Amicus Br. of Evid. & Crim. Pro. Profs. 15-16. That leaves the State to gesture at free-floating notions of "unfairness" and "truth seeking." BIO 25. But those suggestions similarly contradict *Crawford*'s teaching that the

right to confrontation would be "no guarantee at all if it [were] subject to whatever exceptions courts from time to time consider 'fair.'" *Giles v. California*, 554 U.S. 353, 375 (2008) (plurality opinion). In short, the Confrontation Clause prescribes a particular procedure for discovering the truth, and courts are bound to follow it. *Crawford*, 541 U.S. at 61-62.

In any event, the State's fairness concerns are overblown. As the petition explained, other legal tools can be brought to bear when defendants seek to selectively introduce portions of witnesses' out-of-court statements. Pet. 24-25. These tools allow judges to deal with any potential inequities while honoring the confrontation right. *Id.* The State offers no response.

* * *

The time has come for this Court to consider the opening-the-door doctrine that lower courts have created. The Confrontation Clause is too important and too often implicated to allow discord and doubt over this matter to persist any longer. And this case—featuring an expansive application of the opening-the-door concept to undercut a defendant's very serious suggestion of third-party guilt, and of his own actual innocence—is the perfect vehicle to undertake that examination.

CONCLUSION

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

Respectfully submitted,

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March 17, 2021