No. 20-637

IN THE

Supreme Court of the United States

DARRELL HEMPHILL,

Petitioner,

v.

STATE OF NEW YORK,

Respondent.

On Writ of Certiorari
to the Court of Appeals of New York

BRIEF FOR PETITIONER

Claudia Trupp
Matthew Bova
CENTER FOR
APPELLATE LITIGATION
120 Wall Street,
28th Floor
New York, NY 10005

Yaira Dubin
O'MELVENY & MYERS LLP
7 Times Square Tower
New York, NY 10036

Jeffrey L. Fisher
Counsel of Record
Edward C. DuMont
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081
jlfisher@stanford.edu

Kendall Turner
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, DC 20006

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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Rules and Regulations

Other Authorities

BRIEF FOR PETITIONER

Petitioner Darrell Hemphill respectfully requests that this Court reverse the judgment of the Court of Appeals of New York.[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 The relevant order of the New York Supreme Court is unpublished.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 extended the time within which to file a petition for a writ of certiorari in this case to November 22, 2020. The petition was filed on November 6, 2020 and granted on April 19, 2021. 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."

---

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

INTRODUCTION

After unsuccessfully prosecuting another man for a murder, the State of New York tried and convicted petitioner Darrell Hemphill for the same crime. This case concerns whether Mr. Hemphill lost his Sixth Amendment right to be confronted with the witnesses against him when he argued at trial that the first suspect actually committed the crime. Invoking a state-law doctrine known as "opening the door," the New York Court of Appeals held that Mr. Hemphill's defense enabled the State to introduce an out-of-court statement by the initial suspect that would otherwise have been barred by the Confrontation Clause. According to the Court of Appeals, suspending the constitutional confrontation guarantee under such circumstances is necessary "[t]o avoid . . . unfairness" and to "prevent the jury from reaching [a] false conclusion." *People v. Reid*, 971 N.E.2d 353, 357 (N.Y. 2012).

If this analysis were right, then the very abuses that led the Framers to include the Confrontation Clause in the Bill of Rights would have been perfectly legitimate all along. And over two centuries of criminal trials in this country would have looked fundamentally different. The very act of disputing the prosecution's allegations at trial would risk forfeiting the right to insist that the prosecution prove its case through live testimony subject to cross-examination.

That has never been—and should not now be—the law. The Confrontation Clause enshrines in our Constitution a judgment about the proper way to seek the truth at trial. This fundamental procedural right is not subject to state rules of evidence or ad hoc notions of fairness. That is especially so where, as

here, the defendant did not do anything wrong during the adversarial process or take any action inconsistent with invoking his right.

STATEMENT OF THE CASE

A. Legal background

Under New York law, a party can "open the door" at trial to "otherwise inadmissible evidence." *People v. Massie*, 809 N.E.2d 1102, 1104-05 (N.Y. 2004). The "leading case" in this regard, *id.* at 1104, is *People v. Melendez*, 434 N.E.2d 1324 (N.Y. 1982). In that decision, the New York Court of Appeals explained that "[t]he 'opening the door' theory . . . is not readily amenable to any prescribed set of rules." *Id.* at 1328. But in general, trial courts should decide "whether, and to what extent, the evidence or argument said to open the door is incomplete or misleading, and what if any otherwise inadmissible evidence is reasonably necessary to correct the misleading impression." *Massie*, 809 N.E.2d at 1105.

As this explanation indicates, the phrase "opening the door" is "notoriously imprecise." 21 Charles Alan Wright et al., *Federal Practice and Procedure* § 5039 (2d ed. 2020) ("Wright & Miller"). Courts sometimes confuse the concept with the doctrine of "curative admissibility" or the evidentiary rule of completeness. *See id.* The New York Court of Appeals itself has sometimes intermingled citations to those principles. *See, e.g.*, *Melendez*, 434 N.E.2d at 1328. But, as New York and most other jurisdictions use the term, "opening the door" is distinct from those other principles. Curative admissibility permits the introduction of evidence in response to the erroneous admission of *inadmissible* evidence, while the

opening-the-door concept allows the introduction of evidence in response to proper uses of *admissible* evidence. *See* Wright & Miller § 5039.3; 1 Kenneth S. Broun et al., McCormick on Evidence § 57 (8th ed., 2020). The rule of completeness—presently codified in Federal Rule of Evidence 106 and state counterparts—can be triggered only when a party introduces a fragment of a statement or writing. Fed. R. Evid. 106; *see also, e.g.*, *Johnson v. O'Farrell*, 787 N.W.2d 307, 312 (S.D. 2010). In contrast, the opening-the-door concept can be triggered by *any* evidentiary submission—or "even argument"—that renders additional evidence material. Wright & Miller § 5039.1; *see also Massie*, 809 N.E.2d at 1105 ("evidence or argument" can open the door).

In short, the opening-the-door concept operates simply to "expand the realm of relevance" and (at least in New York) to overcome any other competing evidentiary bars. 21 Wright & Miller § 5039.1. "[A]s the parties offer relevant evidence to prove their cases, each bit of evidence opens up new avenues of refutation or confirmation . . . beyond those consequential facts expressed in the pleadings." *Id.* The same is true with respect to each argument parties make at trial. *Id.* Under the opening-the-door concept, parties may introduce responsive evidence to "meet" or "contradict[]" the other party's evidence or argument—even if that responsive evidence would otherwise have been inadmissible. *Massie*, 809 N.E.2d at 1106.

New York's foundational opening-the-door cases all involved responsive evidence that was otherwise inadmissible on state-evidence-law grounds—for example, because it was hearsay. *Melendez*, 434

N.E.2d at 1328; *see also, e.g.*, *People v. Rojas*, 760 N.E.2d 1265 (N.Y. 2001) (propensity evidence). But in *People v. Reid*, 971 N.E.2d 353 (N.Y. 2012), the New York Court of Appeals extended the opening-the-door concept to allow the introduction of "testimony that would otherwise violate [a criminal defendant's] Confrontation Clause rights." *Id.* at 356. Rejecting the argument that state evidence law could not supersede this constitutional basis for excluding evidence, the Court of Appeals held that the prosecution may introduce evidence otherwise "barred by the Confrontation Clause" under the same circumstances as when defendants open the door to other responsive evidence. *Id.* at 356-57.

B. Factual background

Here, the New York courts applied *Reid* to enable the conviction of Mr. Hemphill for 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, inadvertently killing a young 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). And one of the witnesses told the police that Gilliam's best friend, Nicholas Morris, "had been at the scene" with him. *Id.* 3a.

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

cartridge. Pet. App. 9a; Morris Tr. 210.[2] They also found .357-caliber ammunition, an 8-millimeter starter pistol, a .22-caliber rifle missing its magazine, as well as two photographs of Morris with guns. Morris Tr. 210. The police arrested Morris the next day. They observed bruises on his knuckles consistent with fist-fighting. Pet. App. 9a. Around the same time, three witnesses independently identified Morris from a lineup as the shooter, and a fourth identified him in a photo array as "look[ing] like the shooter." Morris Tr. 209; Tr. 781.

Meanwhile, Gilliam traveled to North Carolina with Mr. Hemphill (his cousin). 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," J.A. 175, Gilliam changed his story. Reversing his claim that Morris was the gunman, Gilliam asserted for the first time that Mr. Hemphill was the gunman. Pet App. 24a & n.3 (Manzanet-Daniels, J., dissenting).

Investigators did not act on Gilliam's revised allegation. Instead, on the strength of the eyewitness identifications and the physical evidence recovered from Morris's apartment (as well as other evidence), the State indicted Morris for the child's murder and

---

[2] Citations to "Morris Tr." refer to the trial of Nicholas Morris. Citations to "Tr." refer to Mr. Hemphill's trial.

for possession of the 9-millimeter handgun. J.A. 5-17. Morris tried to point the finger at Mr. Hemphill. But when trial began, the State stressed in its opening statement that eyewitnesses "saw only one man with a gun, the defendant," Nicholas Morris. *Id.* 12-13.

Before the parties submitted any evidence, they agreed to a mistrial. Morris Tr. 241-42. The State explained that, in response to requests from the defense, it intended to "reinvestigate" certain aspects of the case. *Id.* The State would then either "go forward" against Morris or "proceed against other individuals." *Id.*

By this time, Morris had spent over two years in jail. Pet. App. 9a. In lieu of trying him again, the State offered Morris a deal: If he pleaded guilty to possessing a firearm at the scene of the shooting, the State would request that the murder charge be dismissed with prejudice. J.A. 35-38. Upon confirming that the plea agreement would result in his immediate release, Morris agreed. *Id.* 33-34, 38.

To effectuate this plea bargain, the State could have had Morris plead guilty simply to possessing the 9-millimeter gun, as charged in the indictment—or to possessing a gun without specifying the particular type at all.[3] But the State did not take either of these routes. 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. J.A. 22.

---

[3] The caliber of firearm illegally possessed is immaterial under the relevant state statute; the statute speaks only of possessing a "loaded firearm." N.Y. Penal Law § 265.02(4) (repealed 2006) (codified as amended at § 265.03(3) (2021))

Morris's attorney and the prosecutor agreed that the evidence that Morris actually possessed a .357 at the scene was "not sufficient . . . to obtain an indictment." J.A. 30. In fact, the State never recovered any .357 firearm from Morris. *Id.* 102-03. Morris supplied "[t]he sole basis for proving the .357" charge through his own uncorroborated statement that he possessed such a firearm, which he offered in court through an allocution. *Id.* 141-42; *see also id.* 35-36. His "primary motivation" for offering this statement was to get "released today now from this courthouse." *Id.* 23-24; *see also id.* 30.

2. Three years later, police determined that DNA on a blue sweater recovered during their original search of Gilliam's apartment matched Mr. Hemphill. Pet. App. 9a-10a. No one ever identified the sweater as the particular blue 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.* 24a n.4. Furthermore, a forensic examination of the sweater the day it had been found had detected no trace of gunpowder or other residue consistent with the discharge of a firearm. *Id.* 24a-25a; J.A. 126.

Nevertheless, in 2013, after two more years had passed, the State charged Mr. Hemphill with the 2006 shooting.

C. Procedural history

1. At Mr. Hemphill's trial, the State abandoned the theory it had espoused at Morris's trial. The State now maintained that Gilliam had acted with *two* companions, and that Mr. Hemphill was the gunman in the shooting. J.A. 356.

To support this new theory, the State presented testimony from Gilliam, who agreed to testify at Mr. Hemphill'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. J.A. 165. Gilliam had previously mentioned only a single weapon in his accounts of the shooting. But Gilliam now claimed that there were two guns at the scene of the shooting. *Id.* 178-79. He claimed that Morris carried a .357 on the day of the shooting, and that the 9-millimeter belonged to Mr. Hemphill. Tr. 980-81.

One of the original police investigators also provided new testimony that when he found the blue sweater in Gilliam's apartment, he sensed "an overwhelming smell of gunpowder." Tr. 667. The detective ackowledged that he would normally have recorded such a "significant" observation in his written report; yet no such observation appeared in any contemporaneous paperwork. J.A. 125-26. And, as noted above, laboratory tests had not detected any gunpowder on the sweater. The detective nonetheless insisted he had "smell[ed] burnt gunpowder." Tr. 741.

Mr. Hemphill contended that the State had been right the first time—that Morris was Gilliam's sole companion and the gunman. Pet. App. 16a-17a. In support of that defense, Mr. Hemphill's attorney noted in his opening statement that, hours after the shooting, the police had recovered a 9-millimeter bullet—"exactly the same kind of bullet as the one that killed the child"—on Morris's nightstand. J.A. 90. Shortly thereafter, the State elicited testimony from one of the investigating officers that he had indeed found the 9-millimeter cartridge, along with three .357

cartridges. *Id.* at 123-24. When Mr. Hemphill cross-examined the officer, the officer again stated that he had found the 9-millimeter cartridge. *Id.* at 132-34.

In response to Mr. Hemphill's third-party guilt defense, the State moved to introduce Morris's "certified" plea allocution. J.A. 105, 138. The State argued that the allocution was now "relevant" evidence to "establish a fact"—namely, that the "weapon Nicholas Morris possess[ed]" at the scene of the killing was a .357. *Id.* 139-41. The State also disclaimed any intention to call Morris to the stand. Morris had been denied re-entry to this country following a trip to Barbados. *Id.* 139, 144. The State could have sought a "special visa" from federal authorities to procure his testimony, but it declined to do so because Morris told the prosecutor he was "not willing" to testify. *Id.* at 142-43.

Mr. Hemphill countered, as relevant here, that admitting Morris's allocution without putting him on the stand would violate Mr. Hemphill's Sixth Amendment right to be confronted with the witnesses against him. J.S. 160. 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). And a plea allocution is "plainly testimonial." *Crawford*, 541 U.S. at 64-65. It is "a solemn declaration or affirmation made for the purpose of establishing or proving" facts in a criminal prosecution. *Ohio v. Clark*, 576 U.S. 237, 243 (2015) (quoting *Crawford*, 541 U.S. at 51) (internal quotation

marks and other citation omitted); *see also Kirby v. United States*, 174 U.S. 47, 54-56 (1899) (admission of nontestifying witnesses' guilty pleas violated the Confrontation Clause).

The trial court overruled Mr. Hemphill's objection. It reasoned that he had "open[ed] the door" to Morris's allocution by suggesting during opening argument and cross-examination that "Morris was, in fact, the shooter." J.A. 184-86; *see also id.* at 105, 120. The court acknowledged that Mr. Hemphill's third-party defense was "appropriate," "fair," and even a "necessary argument to make." *Id.* 120, 185; *see also* J.A. 60 (motion in limine ruling that the defense could "elicit from an appropriate witness that a search of Morris' [sic] premises yielded a nine-millimeter bullet"). But, citing the New York Court of Appeals' decision in *Reid*, the trial court deemed the allocution admissible because it was "evidence contrary to the argument presented by the defense." *Id.* 184; *see also id.* 120.

In closing, the State again relied on Morris's allocution. In the State's telling, Morris "took responsibility for the crime he committed." J.A. 356. And because Morris claimed to have "possess[ed a] 357" at the scene of the killing (a gun other than the "murder weapon"), Morris's statement showed that he could not have been the shooter. *Id.* 355-56.

The jury found Mr. Hemphill guilty of second-degree murder. The court sentenced him to prison for a term of twenty-five years to life. Pet. App. 1a.

2. On appeal, Mr. Hemphill renewed his confrontation claim. BIO App. SA107-13. The State responded that Morris's allocution was admissible under *Reid*. BIO App. SA224-27.

The Appellate Division agreed with the State. The panel recognized that a nontestifying witness's plea allocution "would normally be inadmissible" under the Confrontation Clause. Pet. App. 16a. But, applying *Reid*, a majority of the panel held that Mr. Hemphill had "opened the door" to Morris's otherwise inadmissible testimony. *Id.* 16a-17a. The majority reasoned that Mr. Hemphill 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—including the allocution—was legally insufficient to support Mr. Hemphill's conviction. Pet. App. 22a. Justice Manzanet-Daniels stressed that, within two days of the shooting, three of the four eyewitnesses had identified Morris ("who does not resemble [Mr. Hemphill]") as the gunman. *Id.* 23a. She emphasized that the only witness to claim Mr. Hemphill 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 Mr. Hemphill "to avoid a murder sentence" of his own. *Id.* 23a-24a, 24a n.2.

3. On review in the New York Court of Appeals, Mr. Hemphill again pressed his Confrontation Clause claim. J.A. 382-89. 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 Mr.

Hemphill'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.

SUMMARY OF THE ARGUMENT

A defendant who opens the door to responsive evidence does not lose his right to exclude evidence otherwise barred by the Confrontation Clause. The New York courts thus erred by allowing Morris's allocution to be introduced against Mr. Hemphill.

I. The Confrontation Clause forbids the introduction of testimonial hearsay, such as an allocution, absent an opportunity to cross-examine the declarant. This constitutional rule cannot be overcome by state evidentiary principles. The fact, therefore, that a defendant has opened the door *under state law* to the introduction of otherwise inadmissible evidence cannot supersede the confrontation right. This is particularly so because a defendant opens the door simply by rendering the hearsay at issue relevant. If relevance allowed courts to disregard the Confrontation Clause, the constitutional right would hardly be worth the parchment on which it is written.

New York's opening-the-door rule also flouts the historical development and purposes of the right to confrontation. The rule would have permitted the abusive practices that common-law commentators decried and would have required different outcomes in many of this Court's cases. New York's rule would also thwart the Confrontation Clause's ultimate goal of ensuring the reliability of prosecutorial testimony. This case is a perfect example: The critical component

of Morris's allocution was self-serving and subject to challenge on a number of levels, yet Mr. Hemphill was never able to test Morris's veracity before the jury.

II. None of the justifications the New York Court of Appeals has offered for applying its opening-the-door rule to allow the introduction of testimonial hearsay withstands scrutiny.

Opening the door cannot be classified as a form of equitable forfeiture. The only recognized circumstance under which defendants forfeit the confrontation right is when they kill (or otherwise keep away) witnesses to prevent them from testifying. Where, by contrast, a defendant opens the door to responsive evidence, he does nothing wrong or inconsistent with asserting the right to confrontation. To the contrary, the Constitution gives the accused right to contest the prosecution's allegations before the jury and to put on a meaningful defense. That being so, a trial judge may not allow the introduction of testimonial hearsay based on an assumption that the prosecution's theory is correct and a defendant's legitimate argument based on evidentiary submissions is "misleading."

Nor do limitations on the ability of defendants to enforce prophylactic exclusionary rules support the decision below here. The Confrontation Clause is not a prophylactic rule. It directly mandates the exclusion of evidence that fails to satisfy its strictures. At any rate, New York's opening-the-door rule is triggered far more indiscriminately than even the exceptions the Court has recognized to prophylactic rules.

Finally, the "rule of completeness" offers no useful analogy here. The rule of completeness applies only where a party introduces a fragment of an out-of-court statement. Yet Mr. Hemphill never introduced any

statement by Morris. In any event, the rule of completeness is just another rule of evidence. As such, it could not supersede the constitutional right to confrontation either.

ARGUMENT

I. The evidentiary "opening the door" rule does not supersede the constitutional right to be confronted with adverse witnesses.

A criminal defendant who "opens the door" to responsive evidence does not lose his right to exclude statements whose introduction would violate the Confrontation Clause. The rules of evidence do not supersede defendants' Sixth Amendment right to confront the witnesses against them, and New York's opening-the-door rule is nothing more than that—an evidentiary doctrine. Indeed, applying the opening-the-door rule in this context would strike at the very heart of the confrontation right and threaten to swallow the right itself.

A. The Confrontation Clause bars the admission of testimonial hearsay without regard to rules of evidence.

1. The Sixth Amendment's Confrontation Clause provides that in "all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. Codifying the common-law right to confrontation, this provision contemplates that the prosecution will present its witnesses to testify in court, subject to cross-examination and in view of the defendant and the jury. *See Giles v. California*, 554 U.S. 353, 358 (2008); *Crawford v. Washington*, 541 U.S. 36, 43-50 (2004). To that end, the Clause generally prohibits the

prosecution from introducing "testimonial" evidence unless the declarant takes the stand or is unavailable and the defendant had a prior opportunity for cross-examination. *Crawford*, 541 U.S. at 68.

It is a basic maxim of our legal system that federal constitutional rights prevail over state 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*, 541 U.S. at 51 (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.

2. The New York Court of Appeals' decision in this case contravenes these basic principles. Applying its previous holding in *People v. Reid*, 971 N.E.2d 353 (N.Y. 2012), the Court of Appeals held that when a criminal defendant "opens the door" under New York law to responsive evidence, he loses his right to exclude out-of-court statements otherwise barred by the Confrontation Clause. Pet. App. 2a; *see also id.* 16a-17a.

Whatever might be said of invoking the opening-the-door rule to admit evidence that is otherwise inadmissible on state-law grounds, applying it, as here, to admit *testimonial hearsay* defies the Sixth Amendment. The core holding of *Crawford* is that a testimonial statement does *not* become admissible under the Confrontation Clause simply because it falls within some evidence-law doctrine. That is especially so where, as here, the trigger for the doctrine is nothing more than legitimately "expand[ing] the realm of relevance." 21 Charles Alan Wright et al.,

Federal Practice and Procedure § 5039.1 (2d ed. 2020); *see also supra* at 4; J.A. 105, 120, 139-41. If mere relevance were enough to overcome a Confrontation Clause objection, then this "bedrock procedural guarantee," *Crawford*, 541 U.S. at 42, would scarcely be worth the parchment on which it is written.

It does not matter whether the *reason* testimonial hearsay becomes relevant is that the trial judge believes it would refute a "misleading impression" that the defendant has purportedly created. *Reid*, 971 N.E.2d at 357. The Confrontation Clause establishes a particular procedure for the prosecution to respond to defense arguments. Insofar as the prosecution introduces testimonial statements, the statements must be given by live witnesses, subject to "testing in the crucible of cross-examination." *Crawford*, 54 U.S. at 61. New York's "misleading impression" standard is at war with that prescription. The standard permits judges to set aside the right to confrontation by assuming the very thing the Sixth Amendment sets the rules for evaluating—namely, whether the prosecution's allegations are accurate.

This case exemplifies the point: Mr. Hemphill's references to the 9-millimeter cartridge created a "misleading impression" *only if* one assumes that Morris did not commit the homicide here. Only by making that assumption could a court declare that allowing the State to introduce Morris's allocution was necessary to "prevent the jury from reaching [a] false conclusion." *Reid*, 971 N.E.2d at 357; *see also* J.A. 120, 184-86. Yet the Confrontation Clause establishes a procedure for assessing who the shooter was here, and that procedure forbids the prosecution from using an allocution as a substitute for live testimony subject to

cross-examination. The New York courts had no warrant to deviate from that prescription.

B. Applying the "opening the door" rule to testimonial hearsay would flout the historical development and purposes of the Confrontation Clause.

Not surprisingly, New York's opening-the-door rule also is impossible to square with more general confrontation precedent or the broader objectives of the Confrontation Clause.

1. To begin, under New York's rule, the 16th and 17th century political trials that the Court has described as "notorious instances of civil-law examination," *Crawford*, 541 U.S. at 43-44, would have presented no confrontation problem at all.

The trial of Sir Walter Raleigh has "long been thought a paradigmatic confrontation violation." *See Crawford*, 541 U.S. at 52; *see also White v. Illinois*, 502 U.S. 346, 361 (1992) (Thomas, J., concurring in part) (describing Raleigh's trial as "infamous"). Raleigh was charged with treason for plotting to overthrow the king. But he denied the charge at trial, saying "I am no traitor." 1 Jardine, *Criminal Trials* 389, 410-11 (Knight 1832). The Crown, in turn, introduced an ex parte examination of Lord Cobham, Raleigh's alleged accomplice, in which Cobham asserted that, in fact, Raleigh planned and "spoke of plots and invasions." *Id.* at 411. "One of Raleigh's trial judges later lamented that 'the justice of England has never been so degraded and injured as by the condemnation of Sir Walter Raleigh.'" *Crawford*, 541 U.S. at 44 (quoting 1 Jardine at 487). Yet New York's rule would have permitted the introduction of Lord Cobham's accomplice statement to correct the "misleading

impression"—from the standpoint of the prosecution's allegations—that Raleigh was not a traitor. *See People v. Massie*, 809 N.E.2d 1102, 1106 (N.Y. 2004) (defendant opened the door to evidence that "directly contradicted" his contention at trial); J.A. 184-85 (trial court ruling that Mr. Hemphill opened the door to Morris's allocution because it was "evidence contrary to the argument presented by the defense").

Raleigh's trial is far from the only "notorious instance[] of civil-law examination" that New York's rule would have admitted as evidence against a defendant. *See Crawford*, 541 U.S. at 43-44. At his 1554 trial for treason, Nicholas Throckmorton denied that he took part in planning a rebellion against the queen because of her intention to marry a Spanish prince. He testified that, "concerning any stir or uproar against the Spaniards, [he] never made any, neither procured any to be made." *Throckmorton's Case*, 1 How. St. Tr. 869, 875 (1554). To blunt that defense, the prosecution introduced co-conspirator James Croft's confession—which stated that Throckmorton "did many times devise about the whole matters"—as well as other out-of-court accusatory testimonial statements. *Id.* Under New York's rule, Throckmorton's testimony would have opened the door to admitting Croft's statements.

Likewise, in a 1637 trial before the Star Chamber, John Lilburn was accused of printing and distributing seditious books. *See Crawford*, 541 U.S. at 43. Lilburn testified that he "d[id] not know" who printed the books and that he "sent not any of" the books from Holland to England. *Lilburn's Case*, 3 How. St. Tr. 1315, 1317 (Star Chamber 1637). Although Lilburn demanded that his "accusers ought to be brought face

to face, to justify what they accuse me of," *id.* at 1318, the Star Chamber instead considered the affidavit of a button-seller accusing Lilburn of printing the books "at Rotterdam, in Holland," *id.* at 1321. This too would have been permissible under New York's opening-the-door rule, on the theory that Lilburn created a misleading impression about whether he had printed and distributed the books.

2. New York's "opening the door" rule is likewise incompatible with the outcomes of many of this Court's Confrontation Clause cases. In *Lee v. Illinois*, 476 U.S. 530 (1986), for instance, the defendant argued that she committed the homicide at issue in self-defense or with "sudden and intense passion." *Id.* at 537. 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 opening-the-door rule, the codefendant's statement would have been admissible precisely because it purported to "rebut" Lee's "theories of self-defense and sudden and intense passion." *Id.* at 537.

In *Crawford*, the prosecution likewise sought to introduce a testimonial statement to "refute[] [the defendant's] claim of self-defense." *Crawford*, 541 U.S. at 40-41. This Court unanimously agreed that introducing the statement violated the Confrontation Clause. But a New York court could have admitted the testimonial statement, crediting the prosecution's claim that it "directly contradicted" Crawford's self-defense theory, *Massie*, 809 N.E.2d at 1106.

Numerous other cases in which this Court found violations of the Confrontation Clause involved similar fact patterns. *See, e.g.*, *Gray v. Maryland*, 523 U.S. 185, 188-89 (1998) (finding Confrontation Clause violation where the 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 the defendant advanced an alibi and the prosecution introduced a nontestifying witness's prior testimony indicating defendant was at the crime scene).[4] It seems highly unlikely that, in all of these cases, invoking the opening-the-door principle stood ready to excuse the constitutional violation.

3. New York's rule also invites the very evils the Confrontation Clause was designed to prevent.

First, "the paradigmatic evil the Confrontation Clause was aimed at" was "trial by affidavit." *Dutton v. Evans*, 400 U.S. 74, 94 (1970) (Harlan, J., concurring); *see also Crawford*, 541 U.S. at 52 n.3 (the Clause "condemn[s] trial by sworn *ex parte* affidavit"). Yet under New York's opening-the-door rule, prosecutors could regularly dispense with presenting live testimony. Any time the accused presents a defense of third-party guilt, the prosecution could procure a sworn statement from the alternative suspect denying guilt or disputing some detail of the defendant's argument—just as the State essentially did here. The Confrontation Clause would then

[4] For more detailed discussions of what the defendants in *Gray* and *Pointer* argued at their trials, see *State v. Gray*, 687 A.2d 660, 662 (Md. 1997); *Pointer v. State*, 375 S.W.2d 293, 294 (Tex. Crim. App. 1963).

condone the admission of that testimonial statement without putting the witness on the stand. A rule that would tolerate "the principal evil at which the Confrontation Clause was directed"—namely, "the civil-law mode of criminal procedure," *Crawford*, 541 U.S. at 50—cannot be correct.

Second, New York's rule thwarts the "ultimate goal" of the Confrontation Clause, which is to ensure the reliability of testimony. *Crawford*, 541 U.S. at 61. As leading common-law authorities put it, live testimony subject to cross-examination "beats and bolts out the Truth much better" than ex parte examination. Matthew Hale, *History and Analysis of the Common Law of England* 258 (1713); *see also* 3 William Blackstone, *Commentaries on the Laws of England* *373 (1768) ("This open examination of witnesses . . . is much more conducive to the clearing up of truth."). Ex parte statements pose especially serious reliability concerns when "the government is involved in the statements' production" and when the statements "shift or spread blame" for alleged crimes. *Lilly v. Virginia*, 527 U.S. 116, 131, 133, 137 (1999) (plurality opinion).

Yet that is exactly what happened here. Morris gave his allocution as part of a guilty plea that persuaded the State to drop the murder charge against him and allowed him to walk out of the courthouse a free man. J.A. 35-39. The statement was not backed up by any eyewitness testimony. And when Morris offered that formal statement, the State had a powerful reason to distance Morris from the killing: to preserve its ability later to charge someone else with committing the homicide. *See* Morris Tr. 241-42.

The State maintained below that Morris's statement was trustworthy because it was "against penal interest." J.A. 102. But *Crawford* took such "substantive" reliability arguments off the table. 541 U.S. at 61. Even before *Crawford*, the Court explained that "[t]he fact that a person is making a broadly self-inculpatory confession does not make more credible the confession's non-self-inculpatory parts. One of the most effective ways to lie is to mix falsehood with truth." *Williamson v. United States*, 512 U.S. 594, 599-600 (1994); *see also Lilly*, 527 U.S. at 132-34 (plurality opinion). Indeed, when part of a statement "is actually self-*exculpatory*, the generalization on which [the against-penal-interest exception] is founded becomes even less applicable." *Williamson*, 512 U.S. at 600 (emphasis added). And here, the critical portion of Morris's allocution—the portion specifying the caliber of the gun he purportedly possessed as .357—was, if anything, self-exculpatory. Its only apparent purpose was to suggest that Morris could not have committed the homicide with which he had been charged.

Despite all of these reasons to be skeptical of Morris's allocution, Mr. Hemphill had no opportunity to challenge its accuracy through cross-examination. The jury, for example, could not "observe and evaluate [Morris's] demeanor" while defense counsel asked him about the benefits he received for pleading guilty. *See California v. Green*, 399 U.S. 149, 160 (1970). Nor was Mr. Hemphill able to ask Morris about the source of the bruises the police observed on his knuckles the day after the shooting. *See* Pet. App. 9a. Mr. Hemphill was not even able to inquire whether the prosecution steered Morris towards claiming he possessed a .357 magnum rather than a 9-millimeter. Instead, the State was able to introduce the allocution as a

recitation of unimpeachable fact—one that the jury may very well have relied upon because it bore the imprimatur of a prior judicial proceeding.

Finally, New York's rule is particularly punishing for defendants who are actually innocent and are 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 Mr. Hemphill, 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. Yet the more a defendant does so, the more likely it is he will open the door under New York's rule to the introduction of testimonial hearsay.

This concern is especially pronounced where, as here, the defendant claims someone else was the perpetrator. Although the burden of proof always rests on the prosecution, a defendant who suggests a third party committed the crime must usually do more than simply point the finger elsewhere. He must "mak[e] a case with testimony and tangible things"—that is, with evidence and argumentation—to "tell[] a colorful story with descriptive richness." *Old Chief v. United States*, 519 U.S. 172, 187 (1997); *see also* David S. Schwartz & Chelsey B. Metcalf, *Disfavored Treatment of Third-Party Guilt Evidence*, 2016 Wis. L. Rev. 337, 391 (2016) ("Given the jury's natural demand for complete narratives, there is virtually always a significant need for some evidence of an alternative perpetrator.").

Yet under New York's rule, an innocent defendant with strong evidence of third-party guilt may hesitate to present supportive evidence out of fear it will open

the door to testimonial hearsay. In this case, the consequence of Mr. Hemphill's third-party defense was just that—the admission of an ex parte testimonial statement from the alternative perpetrator himself. That outcome contravened the essence of the confrontation right.

II. The opening-the-door rule is not a valid exception to the Confrontation Clause.

The New York Court of Appeals has gestured at three different theories for treating its opening-the-door concept as an exception to the Confrontation Clause. None has merit. First, New York's rule does not fit within any recognized forfeiture doctrine. Second, case law restricting a defendant's reliance on prophylactic rules does not apply here. Third, the rule of completeness provides no basis for sustaining the decision below.

A. Opening the door is not a legitimate species of equitable forfeiture.

1. The New York Court of Appeals' assertion that its opening-the-door rule is necessary "[t]o avoid . . . unfairness," *People v. Reid*, 971 N.E.2d 353, 357 (N.Y. 2012), might be understood as invoking the notion of equitable forfeiture. If so, the assertion is misguided.

a. The "text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement"—grounded in notions of forfeiture or otherwise—"to be developed by the courts." *Crawford v. Washington*, 541 U.S. 36, 54 (2004). Nor is there any mention in the historical treatises cited in *Crawford* and *Giles v. California*, 554 U.S. 353 (2008), of any forfeiture-by-opening-the-door exception to the right to confrontation. Those realities

alone foreclose condoning New York's opening-the-door rule as a species of equitable forfeiture. The Confrontation Clause would be "no guarantee at all if it [were] subject to whatever exemptions courts from time to time consider 'fair.'" *Giles*, 554 U.S. at 376 n.7 (plurality opinion).[5]

This Court's precedent reinforces this analysis. In *Giles*, the Court considered whether a defendant accused of murder could invoke the Confrontation Clause to exclude testimonial statements made by the victim before he allegedly killed her. The Court had previously recognized that where defendants kill (or otherwise keep away) witnesses *with the intent to prevent them from testifying*, the defendants' "wrongdoing" forfeits the confrontation right on "essentially equitable grounds." *Crawford*, 541 U.S. at 62; *see also Reynolds v. United States*, 98 U.S. 145, 158 (1878). But after conducting an extensive review of common-law authorities, the Court in *Giles* explained that this specific-intent exception was the "only" historically recognized forfeiture exception to the confrontation right. *See* 554 U.S. at 359-62. And the Court saw no justification for approving a new,

---

[5] Defendants can, of course, waive the right to confrontation by "intentional[ly] relinquish[ing]" it. *Brookhart v. Janis*, 384 U.S. 1, 4 (1966) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). But waiver is not the same as equitable forfeiture. "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.").

generalized wrongdoing exception "unheard of at the time of the founding or for 200 years thereafter." *Id.* at 377 (plurality opinion).

The same reasoning applies here. Only those exceptions to the confrontation right that existed at common law are legitimate, and opening the door is not among them.

b. Even if courts had free-floating authority to create new forfeiture-by-wrongdoing exceptions to the Confrontation Clause, it would not matter here. A defendant who opens the door under New York law does nothing wrong. Mr. Hemphill, for instance, triggered New York's opening-the-door rule in part by pointing to admissible evidence to make a true claim—that a 9-millimeter cartridge had been found on Morris's nightstand. Surely referring to properly admitted evidence cannot forfeit a constitutional right to exclude defective evidence.

Mr. Hemphill, of course, also argued in his opening statement that Morris was the true perpetrator here. But there is nothing wrong with that either. Quite the opposite. Our adversary system relies on "partisan advocacy"—particularly from the defense—to achieve its "ultimate objective that the guilty be convicted and the innocent go free." *Herring v. New York*, 422 U.S. 853, 862 (1975). Arguments to juries, based on the evidence properly presented at trial, are an integral feature of that system. *Id.*

Indeed, suggesting that "someone else did it" is one of the most regularly deployed and vital forms of defense advocacy. That is presumably why the trial judge here expressly recognized that Mr. Hemphill's

defense "in all respects [was] appropriate" and "probably a necessary argument to make." J.A. 185. Indeed, Mr. Hemphill's defense was the same theory, supported by substantial evidence, that the State itself had propounded in its first prosecution for this crime. Yet it cost Mr. Hemphill his ability to invoke the Confrontation Clause to exclude evidence that violated this core procedural guarantee. That cannot be right.

2. In other areas of criminal procedure, this Court has sometimes found equitable forfeiture where a defendant has acted in a manner inconsistent with the underlying constitutional right. For example, a defendant who is so "unruly or disruptive" at counsel table that he makes it impossible to conduct his trial forfeits his right to be present. *Illinois v. Allen*, 397 U.S. 337, 342 (1970). But even if courts could find forfeiture of the confrontation right based on conduct that is inconsistent with the right, no such reasoning would apply here.

New York's opening-the-door rule is not triggered by any conduct inconsistent with the right to confrontation. Again, the facts of this case readily demonstrate the point. The Confrontation Clause gave Mr. Hemphill the right to preclude the State from introducing testimonial statements from witnesses, including Morris, without putting them on the stand. Nothing about Mr. Hemphill's third-party defense was inconsistent with asserting that right to confrontation. In contrast to the defendant in *Allen*, whose behavior made it impossible to conduct trial while also honoring the constitutional right at issue, Mr. Hemphill did not in any way frustrate the State's ability to introduce

whatever admissible evidence it had, including by calling Morris to the stand.

3. Invoking equitable principles to find forfeiture here would also undermine other constitutional values. Take the right to trial by jury. Defendants open the door under New York law when trial judges find that they have created a "misleading impression" at trial. *Reid*, 971 N.E.2d at 357. Yet, as explained above, the New York courts were able to conclude that Mr. Hemphill created a "misleading impression," Pet. App. 17a, only by crediting the State's theory that Morris's pleading guilty to possessing a .357 meant that he could not have been the shooter. In other words, Mr. Hemphill's argument at trial was misleading only if the judge correctly decided—in lieu of the jury—that the State was right and Mr. Hemphill was wrong. "Equity demands" more than this sort of "circularity before the right to confrontation is forfeited." *Giles*, 554 U.S. at 379 (Souter, J., concurring in part).

New York's opening-the-door rule is also in tension with the constitutional right "to present a complete defense," *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (quoting *Trombetta v. California*, 467 U.S. 479, 485 (1984)). In *Holmes v. South Carolina*, 547 U.S. 319 (2006), the Court considered a state law barring criminal defendants from introducing evidence suggesting third-party guilt where the prosecution had already introduced forensic evidence that, "*if credited*," would strongly support a guilty verdict. *Id.* at 330. The Court held that the rule violated the right to present a defense, explaining that it improperly depended on assuming the prosecution's

allegations were correct and "making the sort of factual findings that have traditionally been reserved for the trier of fact." *Id.*

New York's opening-the-door rule contains a similar glitch. It pits the right to be confronted with adverse witnesses against the right to defend oneself at trial. Equity should not require defendants like Mr. Hemphill to choose between making legitimate arguments based on admissible evidence and preserving their right to exclude testimonial hearsay.

B. Case law restricting the invocation of prophylactic rules does not apply here.

In the opinion that controlled here, the New York Court of Appeals also analogized its opening-the-door rule to the holding in *Harris v. New York*, 401 U.S. 222 (1971). *See Reid*, 971 N.E.2d at 357. In *Harris*, the Court held that statements taken in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), become admissible for purposes of impeachment if a defendant testifies at trial and contradicts those prior statements. This analogy is defective.

1. As the Court explained in *Kansas v. Ventris*, 556 U.S. 586 (2009), the question whether a defendant loses the right to invoke a constitutional exclusionary rule by presenting certain evidence at trial "depends upon the nature of the constitutional guarantee" involved—namely, whether the guarantee is a "prophylactic" rule or instead a constitutional doctrine "explicitly mandat[ing] exclusion [of evidence] from trial." *Id.* at 590-91. A defendant loses the protection of certain prophylactic rules if he testifies at trial in conflict with otherwise inadmissible evidence at the prosecution's disposal. *Id.* That is so because prophylactic exclusionary rules are not themselves

constitutional guarantees; they are instead designed to prevent police officers from violating substantive constitutional provisions outside of the courtroom. *Id.* at 591. Put another way, "exclusion" in the context of a prophylactic rule functions as a "deterrent sanction"; it does not by itself "avoid [the] violation of the substantive guarantee." *Id.* And because inadmissibility is not constitutionally "automatic," it depends on judicial "balancing" of interests. *Id.*

This rationale explains this Court's decision in *Harris*. The Self-Incrimination Clause does not directly require the exclusion of un-*Mirandized* statements; instead, the *Miranda* rule regulates pretrial police conduct. *See, e.g.*, *Michigan v. Tucker*, 417 U.S. 433, 444 (1974). That being so, courts may withhold the exclusionary remedy for a *Miranda* violation where the need to protect "the 'search for truth in a criminal case' outweighs the 'speculative possibility' that exclusion of evidence might deter future violations" of the Self-Incrimination Clause. *Michigan v. Harvey*, 494 U.S. 344, 351 (1990) (quoting *Oregon v. Hass*, 420 U.S. 714, 722-23 (1975)); *see also Harris*, 401 U.S. at 225. The Court has similarly asserted its power to restrict the reach of other judicially created exclusionary rules. *See Ventris*, 556 U.S. at 593-94 (allowing introduction of evidence obtained in violation of Sixth Amendment rule prohibiting police questioning in the absence of counsel); *Walder v. United States*, 347 U.S. 62 (1954) (same regarding evidence obtained in violation of Fourth Amendment rule prohibiting unreasonable searches and seizures).

In contrast, a defendant cannot lose the right to exclude evidence when the Constitution "explicitly

mandates" its exclusion. *Ventris*, 556 U.S. at 590. That is because introducing the evidence in that situation would itself "constitute the constitutional violation." *Id.* at 594. That is what happened in *New Jersey v. Portash*, 440 U.S. 450 (1979): The Court barred the prosecution from impeaching a testifying defendant with his compelled testimony because the very introduction of the evidence violated his Fifth Amendment right not to be "compelled in any criminal case to be a witness against himself." *Id.* at 458-59. It did not matter whether the trial judge thought the compelled testimony would have aided the truth-seeking process. The evidence was constitutionally defective, and that was that.

This case falls into the same category as *Portash*. The right of confrontation, as it developed at common law and is codified in the Sixth Amendment, regulates trial procedure, not police practices. And the Confrontation Clause directly forecloses the admission of testimonial hearsay. *See Crawford*, 541 U.S. at 50. "[T]he admissibility" of testimonial hearsay at trial thus "implicates the Sixth Amendment's core concerns." *Id.* at 45, 51. Because the very introduction of testimonial hearsay strikes at the heart of a defendant's right "to be confronted with the witnesses against him," U.S. Const. amend. VI, New York's opening-the-door rule cannot stand.

2. Even if the Confrontation Clause were nothing more than a prophylactic rule, New York's opening-the-door doctrine still could not be a valid exception to that rule. The specific "perver[sion]" *Harris* addresses is the prospect of a defendant testifying at trial while blocking any introduction of his own "prior inconsistent utterances." 401 U.S. at 226. *Harris*,

therefore, does not apply where the defendant does not testify—no matter how inconsistent his arguments 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).

The opening-the-door rule has no comparable constraint. That is, the rule is not limited to the potentially parallel situation where a defendant introduces an out-of-court statement that the prosecution seeks to counter with other hearsay from the same declarant. New York's rule can be triggered where, as here, the defendant has introduced *no statement at all* by the witness whose hearsay the prosecution seeks to introduce. That indiscriminate coverage is intolerable. It makes no sense for a defendant to lose the right to confront a witness whose testimony he has never brought into play.

The Court has not allowed even the rule requiring exclusion of physical evidence obtained in violation of the Fourth Amendment to be set aside so easily. The Court has recognized that the prosecution may introduce such evidence to "impeach[] the defendant's credibility"—for example, where a defendant testifies that he never bought, sold or possessed illegal narcotics, but the government has previously seized heroin in an unconstitutional search of his home. *Walder*, 347 U.S. at 64. Yet in *James v. Illinois*, 493 U.S. 307 (1990), the Court refused to allow prosecutors to introduce the fruits of unlawful searches and seizures to impeach defense witnesses other than the defendant himself. *Id.* at 313-14. In short, the prosecution may introduce illegally seized evidence to impeach only *defendants*, not defenses. Allowing the latter would threaten to "chill some defendants from

presenting their best defense"—or even "any defense at all." *Id.* at 314-15.

If anything, the chilling effects of New York's opening-the-door rule are even more pronounced. New York's own high court has admitted its opening-the-door concept is "not readily amenable to any prescribed set of rules." *People v. Melendez*, 434 N.E.2d 1324, 1328 (N.Y. 1982). Instead, the concept is "discretion[ary]," *People v. Massie*, 809 N.E.2d 1102, 1105 (N.Y. 2004), and applied on a "case-by-case" basis. *Reid*, 971 N.E.2d at 357. As a result, defendants must continually worry that a judge will deem one of their arguments or evidentiary submissions to enable the prosecution to introduce otherwise inadmissible testimonial hearsay. Defendants should not have to be on perpetual guard against such discretionary exercises of judicial authority to safeguard their constitutional right to be confronted with the witnesses against them.

C. New York's opening-the-door rule is not justified by the rule of completeness.

A few jurisdictions have held that when a defendant introduces a fragment of a testimonial statement, the "rule of completeness" allows the prosecution to introduce the remainder of that statement, even if the declarant does not testify. *See*, *e.g.*, *State v. Prasertphong*, 114 P.3d 828, 830-35 (Ariz. 2005); *State v. Selalla*, 744 N.W.2d 802, 814-18 (S.D. 2008). New York's Appellate Division issued a similar decision in *People v. Ko*, 789 N.Y.S.2d 43 (App. Div. 2005). In *Reid*, the New York Court of Appeals extended *Ko*'s holding to the opening-the-door situation, treating the two scenarios as equivalent. *See* 971 N.E.2d at 357. But the rule of completeness

does not apply here, and even if it did, it would not support the Sixth Amendment holding in *Reid*.

1. The rule of completeness does not apply here. Under the "common-law 'rule of completeness,' . . . the opponent, against whom a part of an utterance has been put in, may in turn complement it by putting in the remainder." *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 171-72 (1988) (quoting 7 John Henry Wigmore, *Evidence in Trials at Common Law* § 2113 (J. Chadbourn rev. 1978)). But this rule was strictly circumscribed: The "principle of Completeness would only come into application . . . when some part, at least, of the document ha[d] been put in evidence." 3 J. Wigmore, *Evidence in Trials at Common Law* § 2125 (1st ed. 1904). "[A] *distinct or separate utterance* [was] not receivable under this principle." 7 John Henry Wigmore, *Evidence in Trials at Common Law* § 2119 (J. Chadbourn ed., 1978).

These postulates foreclose any invocation here of the common-law rule of completeness. Mr. Hemphill did not introduce any statement by Morris that could have triggered the rule.

Modern rules of completeness offer no foundation for the decision below either. In fact, the State has never argued that Mr. Hemphill opened the door under the modern rule of completeness. Nor could it. New York's rule of completeness permits "any other part" of a "writing, conversation, recorded statement or testimony, or evidence of a part of a transaction" to be admitted "when necessary to complete, explain, or clarify the previously admitted part." New York State Unified Court System, *Guide to New York Evidence*

4.03.[6] This rule reflects its common-law origins: "[N]o more of the remainder of the utterance than concerns the same subject and is explanatory of the first part is receivable." *Id.* (quoting *People v. Schlessel*, 90 N.E. 44, 45 (N.Y. 1909) (citing 3 Wigmore on Evidence § 2113)); *see also People v. Hubrecht*, 769 N.Y.S.2d 36, 37 (App. Div. 2003) (enforcing this limitation). New York's rule, therefore, would not have allowed the admission of Morris's plea allocution here. Mr. Hemphill never introduced any part of that statement (or any other out-of-court statement by Morris).

The State has noted that the federal rule of completeness is in one sense broader than the common-law rule or New York's rule. BIO 20-21. Federal Rule of Evidence 106 permits the introduction not only of the remainder of a partially introduced statement but also of "any other writing or recorded statement that in fairness ought to be considered at the same time." Fed. R. Evid. 106. But the federal rule still would not have been triggered here. Like the common-law rule, it is triggered only when a party "introduces all or part of a writing or recorded statement." Fed. R. Evid. 106. And Mr. Hemphill introduced no statement by Morris.

2. Even if the rule of completeness were somehow applicable here and generally allowed the admission of otherwise inadmissible evidence, it would not supersede the Confrontation Clause. Like other "laws of Evidence," *Crawford*, 541 U.S. at 51, the rule of completeness does not overcome a criminal

---

[6] Most of New York's evidentiary rules are not codified, but its rules and relevant case law are collected and summarized in the *Guide to New York Evidence*. The *Guide* is available at https://perma.cc/TJT8-G66H. (last visited June 21, 2021)

defendant's constitutional right to be confronted with adverse witnesses. *See United States v. Holmes*, 620 F.3d 836, 843-44 (8th Cir. 2010); *United States v. Cromer*, 389 F.3d 662, 679 (6th Cir. 2004); *Freeman v. State*, 765 S.E.2d 631, 636 (Ga. Ct. App. 2014).

To be sure, the evidentiary rule of completeness has common-law roots. *See supra* at 35. And the Confrontation Clause incorporates one rule of evidence that was "established at the time of the founding"—the dying declaration rule. *Crawford*, 541 U.S. at 54, 56 n.6. But as this Court has explained, "[i]f this exception must be accepted on historical grounds, it is *sui generis*." *Id.* at 56 n.6. Indeed, the New York Court of Appeals has given no indication—nor are we aware of any—that the rule of completeness was thought at common law to allow the admission of "*testimonial* statements against the accused in a criminal case." *Id.* at 56.

This apparent absence of authority is telling. It is not hard to find support in historical treatises or cases for the dying declaration exception. *See, e.g.*, Thomas Peake, *A Compendium of the Law of Evidence* 62 (1804) (explaining unconfronted depositions are inadmissible except "in cases where the party wounded declared himself apprehensive of death, or was in such imminent danger of it as must necessarily raise that apprehension"); 1 T. Starkie, *A Practical Treatise of the Law on Evidence* 95 (4th ed. 1853) (recognizing the "exception" for statements made "under the apprehension of approaching dissolution"); *Rex v. Dingler*, 2 Leach Cr. Ca. 563 (1791) (refusing to admit unconfronted deposition of dead witness because she was not "under apprehension of immediate death"); *Rex v. Paine*, 1 Salk. 281 (1696)

(4th ed. Lintot 1742) (holding dying declaration exception applies only to felony cases); *Crawford*, 541 U.S. at 56 n.6 (collecting other citations). If there were any historical basis for a rule-of-completeness exception to the Confrontation Clause, one would expect to find it in at least one of these sources.

3. Courts that have incorporated the rule of completeness into the Confrontation Clause have insisted that such incorporation is necessary to prevent defendants from "delud[ing]" juries. *Reid*, 971 N.E.2d at 357. They hypothesize that, absent a completeness exception, a criminal defendant could introduce "only those details of a testimonial statement that are potentially helpful to the defense" and then invoke the Confrontation Clause to bar the admission of other, inculpatory portions of the same statement. *Id.*; *see also Selalla*, 744 N.W.2d at 818. This concern is misplaced. Criminal rules of procedure and evidence already prevent a defendant from misleading a jury "with a prejudicial and incomplete portion of a testimonial statement." BIO 25.

To start, hearsay rules normally preclude defendants from introducing out-of-court statements for the truth of the matter asserted. *See, e.g.*, Fed. R. Evid. 802. These rules screen out many attempts to introduce fragments of out-of-court statements. In fact, in Mr. Hemphill's trial, the judge invoked the hearsay rule to bar a defense witness's testimony that Morris had admitted to firing his 9-millimeter gun during the altercation. Tr. 1429-37.

Even when a hearsay exception applies, Federal Rule of Evidence 403 and "well-established" state equivalents afford judges wide latitude to preclude any party, including a criminal defendant, from

introducing evidence whose "probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." *Holmes*, 547 U.S. at 326; *see also Crane*, 476 U.S. at 690 ("[W]e have never questioned the power of States to exclude evidence through the application of evidentiary rules that themselves serve the interests of fairness and reliability—even if the defendant would prefer to see that evidence admitted."); *Guide to New York Evidence* 4.07 ("A court may exclude relevant evidence if its probative value is outweighed by the danger that its admission would . . . *mislead* the jury." (emphasis added)). A statement taken out of context is a hornbook example of evidence that is substantially more misleading than probative. 22A Charles Alan Wright et al., *Federal Practice and Procedure* § 5217 (2d ed. 2020); *see also United States v. Bailey*, 322 F. Supp. 3d 661, 673 (D. Md. 2017) (describing Rule 403 as a tool "to address an abuse of the adversary system" caused by the introduction of a misleading fragment).

Lastly, judges enjoy a range of other tools to cure any prejudice caused by an erroneous introduction of potentially misleading evidence. They can withdraw, strike, or instruct the jury to ignore improper evidence. *See* Fed. R. Evid. 105; *Greer v. Miller*, 483 U.S. 756, 766 (1987) (improper question in presence of the jury was cured, in part, by "two curative instructions"). Indeed, the trial judge below acknowledged his ability to strike hearsay testimony. Tr. 1264 ("Counsel may ask the question. If [the witness] says anything that constitutes hearsay, I'll strike it.").

In sum, the rule of completeness has nothing to add to the equation here. It does not apply in the first place, and, even if it did, it would not be relevant to the constitutional issue at hand. The Confrontation Clause prohibited the introduction of Morris's allocution, and nothing in New York law could alter Mr. Hemphill's right to enforce that prohibition.

CONCLUSION

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

Respectfully submitted,

Claudia Trupp
Matthew Bova
CENTER FOR APPELLATE LITIGATION
120 Wall Street
28th Floor
New York, NY 10005

Yaira Dubin
O'MELVENY & MYERS LLP
7 Times Square Tower
New York, NY 10036

Jeffrey L. Fisher
Counsel of Record
Edward C. DuMont
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 724-7081
jlfisher@stanford.edu

Kendall Turner
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, DC 20006

June 22, 2021