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 OF THE BRONX DEFENDERS, NEIGHBORHOOD DEFENDER SERVICE OF HARLEM, BROOKLYN DEFENDER SERVICES, QUEENS DEFENDERS, AND NEW YORK COUNTY DEFENDER SERVICE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE* [1]

Amicus The Bronx Defenders ("BxD") is a non-profit provider of innovative, holistic, client-centered criminal defense, family defense, civil legal services, and social work support to indigent people in the Bronx. Each year, BxD's advocates defend thousands of low-income Bronx residents in criminal, civil, family, and immigration cases and reach hundreds more through outreach programs and community legal education.

Amicus Neighborhood Defender Service of Harlem ("NDS") is a community-based public defender office. Since 1990, NDS has sought to improve the quality and depth of criminal, family, and civil defense for those in Harlem and Northern Manhattan who cannot afford an attorney. NDS accomplishes this by providing holistic, cross-practice representation to our clients.

Amicus Brooklyn Defender Services ("BDS") is a full-service public defender organization that provides multi-disciplinary and client-centered criminal defense, family defense, immigration, and civil legal

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[1] Pursuant to this Court's Rule 37.6, *amici* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici*, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of our *amici curiae* brief in accord with Supreme Court Rule 37.3.

services for nearly 30,000 people in Brooklyn every year. In addition to zealous legal defense, BDS provides a wide range of additional services to meet peoples' unique needs, including social work support, help with housing, benefits, education and employment, and advocacy targeting systems and laws that implicate their rights. BDS's Criminal Defense Practice of approximately 140 criminal defense attorneys and 120 social workers, investigators, paralegals, and other non-attorney staff currently represents over 20,000 people facing criminal prosecution in the criminal courts in Brooklyn.

Amicus Queens Defenders represents low-income people accused of crimes in Queens, New York who cannot otherwise afford an attorney. Since 1996, Queens Defenders has represented over 450,000 individuals accused of crimes, including serious offenses such as homicides, youths charged with crimes, and individuals facing collateral consequences throughout the borough of Queens. Queens Defenders provides client-centered services that include and exceed direct representation in the criminal case, such as advising clients regarding program-based support, treatment courts, and other alternatives to incarceration, as well as educating adults and youths throughout the Queens community regarding their rights in criminal, civil, immigration, and other proceedings. Queens Defenders also aims to reduce

the numbers of people entangled in the criminal legal system and reduce the impact of the system on the Queens community by providing those in Queens with additional support regarding public housing, employment, education, and public benefit resources.

Amicus New York County Defender Services is a trial-level public defender office in New York City. Since 1997, the office has conducted thousands of criminal jury trials in State court.

Amici submit this brief because the issue presented in the case—whether, and under what circumstances, "opening the door" to responsive evidence also forfeits an accused's right to exclude evidence otherwise barred by the Confrontation Clause—significant affects *Amici*'s representation and other advocacy on behalf of indigent individuals.

SUMMARY OF ARGUMENT

This Court has held that "[c]ross-examination is the principal means by which the believability of a witness and the truthfulness of his testimony are tested" and "reveal[s] possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand." *Davis v. Alaska*, 415 U.S. 308, 316 (1974). New York's forfeiture-by-opening-the-door rule violates the Confrontation Clause because it precludes this testing, through cross-examination, of vital testimonial statements. It also undermines, in

multiple ways, the accused's ability to present a valid defense. This includes forcing the accused to decide whether to forego even suggesting a basis for acquittal lest it lead to the prosecution putting forward testimonial statements from persons who will not be witnesses at the trial.

Co-defendant and accomplice statements are fraught with indicia of unreliability, yet New York's forfeiture-by-opening-the-door rule permits prosecutors to introduce those statements without giving the accused the opportunity to subject them to adversarial examination. As a result, New York's rule deprives juries of sufficient means to assess the credibility of evidence on material issues, and it allows prosecutors to present the exact type of proof the Confrontation Clause was designed to prevent: testimonial witness statements that have not been tested by cross-examination.

ARGUMENT

I. New York's Forfeiture Rule Undermines The Confrontation Clause.

This Court has made clear that the Confrontation clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Crawford v. Washington*, 541 U.S. 36, 61 (2004). New York's forfeiture-by-opening-the-door rule guts that

promise. It lets in testimonial evidence that would otherwise be inadmissible when, in a judge's estimation, its exclusion is "unfair[]" to the prosecution. *People v. Reid*, 971 N.E.2d 353, 357 (NY 2012). That overly broad formulation forces the accused to choose between presenting an effective defense and ensuring that the prosecution presents only testimonial statements that have been tested by cross-examination. In doing so, New York's rule imposes an unjustified risk of significant harm to the accused's ability to present a compelling defense and opens the floodgates to precisely the types of unreliable evidence the Confrontation Clause was designed to exclude.

New York's forfeiture-by-opening-the-door rule, with its assumption that the prosecution's evidence is reliable, flips the principles undergirding the Confrontation Clause on their head. Under New York's rule, judges ask (1) "whether, and to what extent, the evidence or argument said to open the door is incomplete and misleading," and (2) "what if any otherwise inadmissible evidence is reasonably necessary to correct the misleading impression." *Reid*, 971 N.E.2d at 356 (citation omitted). The baseline assumption of this inquiry is that an underlying "truth" has been obscured or undermined, and the inquiry's very formulation has the prosecution on the side of presenting the truth while casting the defense as an enemy of the truth. This

ignores an animating principle underlying the Confrontation Clause—deep-seated mistrust of government—and the core premise that testimonial statements are not reliable if untested through cross-examination.

This case illustrates the problems that flow from New York's distortion of the Confrontation Clause. Petitioner introduced at trial government-procured evidence: shortly after the shooting, the police recovered a 9 millimeter cartridge on Nicholas Morris's nightstand. Yet the court viewed Petitioner's presentation of this evidence as "misleading" because it contradicted the prosecution's chosen narrative at Petitioner's trial that Morris was not the shooter. Even though it was unquestionably accurate that police found a 9 millimeter cartridge on the nightstand in Morris's room, the court held that the defense's decision to share the police's discovery with the jury opened the door to the introduction of Morris's plea allocution "to correct th[e] misleading impression." *People v. Hemphill*, 103 N.Y.S.3d 64, 71 (N.Y. App. Div. 2019). What supposedly made the presentation of this evidence misleading was that Morris had been unwilling to admit he possessed a weapon that could fire the ammunition. But the evidence is only misleading if one starts, as the court erroneously did, with the assumption that Petitioner is guilty and Morris is not.

What is more, Morris's plea allocution—which the court had to assume was accurate, complete, and truthful if the idea was to "correct" a "misleading impression" by introducing it—is precisely the kind of evidence the Confrontation Clause was designed to exclude *because* its reliability is untested. *See Kirby v. United States*, 174 U.S. 47, 54–56 (1899) (Confrontation Clause bars admission of accomplices' guilty pleas); *cf. Roberts v. Russell*, 392 U.S. 293, 293–95 (1968) (codefendant's confession); *Brookhart v. Janis*, 384 U.S. 1, 4 (1966) (same). A plea allocution, especially (as here) on a detail that does not qualify as a statement against interest, is an extrajudicial testimonial statement with none of the traditional hallmarks of reliability.

Endorsing New York's rule would have far-reaching implications. Under this rule, any attempt to demonstrate one's innocence, including by simply holding the prosecution to its burden of proving guilt beyond a reasonable doubt, could be seen as "contrary" to the evidence of guilt that a prosecutor seeks to admit. To take a famous example from the 1603 trial of Sir Walter Raleigh, New York would view Raleigh's protestations of innocence as "contrary" to Lord Cobham's extrajudicial confession thereby allowing for the admission of Lord Cobham's statements. *See Crawford*, 541 U.S. at 44–45 (detailing the events of Raleigh's trial).

Three hypotheticals, based upon the experience of amici, illustrate the breadth and unfairness of New York's rule.

Hypothetical 1: A, B, and C are charged with selling drugs. According to the prosecution, a police informant involved in a sting operation (a "buy and bust") approached A and B, who were sitting on a park bench. The informant says he asked where he could find heroin; that A pointed to C, who was standing nearby, and said "he can help you out"; that B walked the informant over to C; and that C sold the informant a packet of heroin. Police officers moved in after seeing C and B exchange money and drugs, and they arrested A, B, and C.

B and C plead guilty to a lesser charge of attempted criminal sale of a controlled substance, admitting in their allocutions that they acted in concert with each other and with A to sell a controlled substance. A goes to trial. The informant testifies, but B and C do not. A's defense is that, although he was sitting on the bench with B when the informant approached, A did not speak with the informant, nor did A point to C. Rather, only B interacted with the informant. After a police officer testifies that he saw A speak with the informant and point to C, defense counsel confronts the officer with his police report, which states that B spoke with the informant and B pointed to C. The officer further admits that his

report makes no mention of A saying or doing anything.

Under the New York rule, a court could permit the prosecution to elicit from the same officer on redirect that B and C, in their later allocutions, both stated that A participated in the sale. The basis for admitting this testimony would be that A opened the door by eliciting from the government's own witness accurate information that was inconsistent with the admissions of B and C that they acted in concert with A. The defense would be deemed "misleading" in that it challenged the government's chosen version of events. Under New York law, B's and C's testimonial statements could be admitted without A being able to confront B and C with their motivations to lie and implicate A. The same result would hold if, instead, A had called to the stand a different witness who testified that he watched the interaction and did not see A say or do anything.

Hypothetical 2: D and E are charged with armed robbery. The prosecution alleges that E pointed a gun at the victim while D forcibly took her purse on the street at night. Police, who were a block away, responded immediately upon hearing the victim yelling for help. The police quickly apprehended E, who was running alone from the scene with a BB gun in his hand. The victim identified E to the police within two minutes of the incident, and the police immediately took E into custody. D, however, was

arrested only several weeks later, after the victim passed him on the street and called the police, saying she recognized him as the person who had taken her purse on the night of the robbery. Nothing else links D to the crime.

E faced a minimum of 5 years in prison if convicted of first degree robbery. One year after E was detained on that charge, the prosecution makes a plea offer of robbery in the third degree with a sentence of one year, but requires that E implicate his claimed accomplice. E remembers having seen D in the neighborhood before the robbery. E also knows that D has been charged based on the victim's identification. E tells the prosecution in his plea allocution that D was the accomplice. E claims, for the first time ever, that they met a month before the robbery and planned it together. By pleading guilty and implicating D, E secures his immediate release from jail.

D goes to trial with a defense of mis-identification, maintaining that he was not the person who participated in the robbery with E. D testifies that he was not present when the victim was robbed and that he does not even know E. Because this was contrary to E's allocution, the court rules that D's testimony was misleading and opened the door to admitting E's allocution stating that E and D knew each other and planned the robbery together. The evidence comes in

without D being able to confront E with his strong motive to falsely implicate D.

<u>Hypothetical 3</u>: The State charges F and G, roommates, with felony murder after G shoots a robbery victim, killing her. The charge carries a minimum sentence of 15 years, and a maximum of life. When the police interrogate F, she admits to participating in the robbery plan but denies knowing that G had a gun and does not know where G got it.

G offers to plead guilty to first degree manslaughter if the sentence will not exceed 12 years. G's lawyer tells the prosecution that F and G had discussed the robbery plan, that F told G he needed to bring a gun, and that F encouraged G to use it after the victim resisted. The prosecution agrees to the manslaughter plea if G will include that version of events in his allocution. G's plea guarantees him three years less than the minimum he faced had he been convicted after trial.

F goes to trial and the prosecution introduces her police statement in evidence against her. Consistent with the statement, A asserts a statutory affirmative defense: F did not aid in the commission of the murder because F did not have a gun; did not know that G was armed or where G got the gun; and the plan was only to rob the victim. The court then allows the prosecution to counter F's defense by admitting G's plea allocution, even though that testimonial

statement is untested through cross-examination. Under New York law, F forfeits her Confrontation Clause rights by adopting the government's evidence to support her affirmative defense.

The outcome in each hypothetical inverts both the presumption of innocence that undergirds our judicial system and the presumption of unreliability of untested testimonial statements that animates the Confrontation Clause.

To make matters worse, New York's forfeiture-by-opening-the-door rule stamps the imprimatur of the judiciary on this topsy-turvy state of affairs, compounding the very mistrust of government that the Confrontation Clause was designed to combat. And this rule asks judges to make not one, but two fact-laden decisions. The first is to referee whether a valid defense is somehow misleading, and the second is to assess the "reasonabl[e] necess[ity]" of introducing otherwise inadmissible evidence to combat that "misleading impression." *Hemphill*, 103 N.Y.S. 3d at 71. As this case illustrates, in making this assessment, judges will often query mid-trial whether an accused's challenging of the prosecution's case is "unfair" to the prosecution. Each step of this analysis, and any ultimate assessment of fairness, is ripe for reasonable disagreement (at best) and infiltration of more pernicious biases (at worst). These value-steeped decisions tend to erode both predictability and the public's trust in the judiciary

because of the inconsistencies that flow from application of a test that lacks clear guideposts. New York's forfeiture-by-opening-the-door rule distorts the fundamental precepts of the criminal trial by allowing the prosecution to design the universe of facts and then present that selectively chosen narrative to the jury. The judiciary then holds this version of events to be presumptively true and protects the government when the defense attempts to challenge this narrative.

This distortion of the fundamental precepts of the criminal trial is laid bare by *People v. Reid*, 971 N.E.2d 353 (NY 2012), the case relied upon by the lower court in finding that Petitioner had forfeited his right of confrontation because his defense created a "misleading impression." *Reid* makes clear that to find a "misleading impression" the court accepts, in the midst of a trial, that the prosecution's narrative is accurate and finds any evidence that contradicts that narrative misleading. The result is that the prosecution may put forward its own unreliable evidence, without subjecting the correction of the supposedly misleading impression to cross-examination.

In *Reid*, a murder case, defense counsel sought to show that the police investigation had been inadequate and that another individual (McFarland) had actually committed the murder. 971 N.E.2d at 356. Reid's counsel elicited testimony from a witness

for the prosecution who stated Reid had told the witness that McFarland and another individual (Joseph) were with him at the time of the murder. *Id.* at 354. This witness also testified that he had told the police about McFarland but McFarland had not been arrested. *Id.* at 355. Reid's counsel then called a federal agent to the stand who had been involved in the investigation, yet whom the prosecution declined to call as its own witness. The federal agent testified that during the course of his investigation he learned that McFarland was involved in the shooting. *Id.* Reid's counsel questioned the federal agent about the source of that information, including whether there had been multiple sources. *Id.*

During cross-examination by the prosecution, the federal agent testified that the source was the first witness for the prosecution who had heard about the shooting second-hand but had not witnessed it. *Id.* The federal agent then testified that he had also received direct eyewitness testimony about the shooting from someone who stated McFarland was *not* there. *Id.* The eyewitness in question was Joseph—who was unavailable and was therefore not cross-examined. Reid's counsel objected to the admission of Joseph's testimonial statement through the federal agent, but the County Court overruled the objection, noting that the door had been opened. *Id.*

The Court of Appeals affirmed, reasoning that "by eliciting . . . information that McFarland was involved

in the shooting, by suggesting that more than one source indicated that McFarland was at the scene, and by persistently presenting the argument that the police investigation was incompetent," the accused "opened the door to the admission of the testimonial evidence, from his nontestifying codefendant" in order to "correct defense counsel's misleading questioning and argument." *Id*. at 357.

The problem is that both courts relied on nothing other than an unspoken and unwavering belief in the prosecution's unproven narrative to conclude that defense counsel misled the jury. There was no inherent reason to credit Joseph's statement as true. Yet the court did so, emphasizing that "an eyewitness to the shooting, who knew exactly who was there, had told the police that McFarland was not present" and that the prosecution had to "prevent the jury from reaching the false conclusion that McFarland had been present at the murder," because "a person with immediate knowledge of the situation—an eyewitness" had told the police a different version of the facts. 971 N.E.2d at 357.

The Court of Appeal's stated reasoning ignored the fact that the prosecution did not present all of its own evidence for strategic reasons: it was internally inconsistent and inconsistent with the prosecution's chosen theory of the case. Nevertheless, the defense could not rely on government-sourced evidence without running the risk of "misleading" the jury. The

court reasoned that, by challenging the government's theory, the defense "misled[]" the jury, even though the validity of that theory was the precise question the jury was supposed to answer. *Id.* The court then compounded its error by allowing the government to "correct" this alleged misimpression with evidence that was never tested via the "principal means" our system recognizes for assessing truth: cross-examination. *Id.*

This is backwards. By the plain terms of the Confrontation Clause, it was Joseph's statement—untested by cross-examination—that was unreliable. Yet under New York's rule defense counsel must weigh the value of their own admissible evidence against the risk of opening the door to the government's inadmissible evidence.

The resulting paradox under New York's rule is that it is easier for the government to introduce *un*reliable statements than for the defense to introduce reliable evidence—even when the reliable evidence originated with the government.

The "open the door" doctrine, a familiar fixture of evidence law, *see* 21A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure Evidence* § 5072.1 (2d ed. 2020), has its place in other situations, such as where a party introduces only the helpful parts of a single statement. But its application in this context introduces the very types of evidence

the Confrontation Clause was created to exclude in that the evidence's reliability is untested. This Court should reject New York's version of the doctrine.

II. New York's Forfeiture Rule Prevents The Accused From Presenting A Valid Defense.

New York's forfeiture-by-opening-the-door rule limits the presentation of a valid defense in multiple specific and overlapping ways. At its core, it forces the accused to choose between (a) putting forward a valid defense—oftentimes the *sole* available defense—only to have the prosecution respond with testimonial statements that cannot be confronted, or (b) forfeiting that defense.

First, the forfeiture-by-opening-the-door rule deters defense counsel from eliciting helpful, probative testimony for fear that doing so will unintentionally open the door. That is because defense counsel, by presenting relevant evidence, could invite a ruling allowing the government to present an accomplice's statement without the opportunity to fully explore the accomplice's bias and motivation in making it or to test that person's memory or observations. New York's forfeiture-by-opening-the-door rule forces the accused to choose between the right to present a defense and the right to subject adversarial testimonial statements to cross-examination. And, as here, that means potentially

foregoing the right to present the government's *own* evidence, evidence that could exculpate the accused. As a practical matter, New York's approach creates a minefield for counsel in which the only way for the accused safely to vindicate Confrontation Clause rights is to remain mute and forego those rights entirely, nearly ensuring a conviction.

Second, in cases where the defense takes its chances and opens the door under New York's version of that doctrine, the inability to cross-examine those individuals whose statements are introduced against the accused prevents juries from assessing the credibility of important sources of evidence. As this Court has recognized, many times, the ability to confront a witness with the witness's own biases is the difference between conviction and acquittal. *See e.g.*, *Napue v. People of State of Ill.,* 360 U.S. 264, 269 (1959) ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.").

For example, cross-examination can establish that a witness is lying, is mistaken, is making unacknowledged assumptions, neglected to consider something crucial, is biased, has an ulterior motive for providing their testimony, or is otherwise unreliable. Without cross-examination, juries are deprived of the

information they need to accurately weigh and assess the credibility of witnesses, especially those who have made statements pursuant to plea agreements that provide significant benefits, including dismissed charges and reduced sentences. In not giving defense counsel an opportunity to cross-examine persons who made testimonial statements of this nature, the New York rule prevents challenges to their reliability, which itself presents the jury with a highly "misleading impression" of the relevant facts. The lack of effective cross-examination under New York's forfeiture-by-opening-the-door rule exposes the jury to testimony that is often "impure, dubious and tainted beyond redemption." Yvette A. Beeman, *Accomplice Testimony Under Contingent Plea Agreements*, 72 Cornell L. Rev. 800, 822 (1987) (quotation marks and citation omitted).

The Confrontation Clause is one of an accused's most important tools for challenging the government's weighty allegations. It is the primary tool for avoiding prejudicial error by subjecting witnesses to searching cross-examination intended to develop fully any evidence of bias or motive on the witness's part, or improper conduct by the prosecution. Cross-examination allows the accused to lay before the jury every fact that might in some way influence the truthfulness and credibility of the witness's testimony, facts that the government often chooses to hide or minimize because they weaken the

government's narrative. The intent of the Confrontation Clause was to allow the finder of fact to resolve inconsistencies and conflicts in the evidence, as well as to weigh the testimony and determine witness credibility. However, New York's forfeiture-by-opening-the-door rule removes these safeguards by preventing the jury from receiving a complete picture of the credibility and/or bias of the person who made a testimonial statement.

Third, the forfeiture-by-opening-the-door rule limits the accused's ability to challenge perjury by witnesses or deter prosecutorial abuses. This Court in *Lilly v. Virginia* recognized the inherent unreliability of unchallenged witness statements noting that "we have over the years 'spoken with one voice in declaring presumptively unreliable accomplices' confessions that incriminate defendants.'" 527 U.S. 116, 131 (1999) (citation omitted). And it is well known that statements made in connection with entering into plea agreements tend to be unreliable because of the incentive for the pleading party to shift blame to a co-defendant or other alleged co-conspirators. *See Accomplice Testimony Under Contingent Plea Agreements*, 72 Cornell L. Rev. 800; Hakeem Ishola, *Of Confrontation: The Right Not to be Convicted on the Hearsay Declarations of an Accomplice*, 1990 Utah L. Rev. 855, 864 (1990) ("an analysis of Supreme Court precedents on the right to confrontation in cases involving a co-

defendant's or accomplice's confession must begin with the presumption that a hearsay statement is admissible only if its reliability and trustworthiness are demonstrated"); *see also Sinkfield v. Brigano*, 487 F.3d 1013, 1017 (6th Cir. 2007) (many "statements inculpating the declarant and another party are not always truly self-inculpatory because the statements are instead intended to shift blame or curry favor"); *United States v. Taylor*, 848 F.3d 476, 487 (1st Cir. 2017) ("[t]he fear that inculpatory statements are unreliable stems largely from the presumption that such statements are self-serving, offered only to shift the blame from the declarant to another" (alteration in original; citation omitted)); *Carson v. Peters*, 42 F.3d 384, 386 (7th Cir. 1994) ("[p]ortions of inculpatory statements that pose no risk to the declarants are not particularly reliable; they are just garden variety hearsay"). Admitting statements such as Morris's allocution, untested by cross-examination, obscures a witness's strong incentive to lie or embellish.

Fourth, the inherent and unmanageable uncertainty in applying New York's rule produces inconsistent outcomes, which further chills establishment of a valid defense. Whether the presentation of a defense has created a "misleading impression" is a highly subjective inquiry for which courts are afforded substantial discretion. In making that inquiry, courts frequently accept the

government's chosen trial narrative as true, with little probing, even when the defense challenges that narrative with the government's evidence. This gives the prosecution the unfair advantage of responding to admissible evidence—including admissible testimony elicited from the prosecution's own witnesses—with evidence that is *in*admissible under not just rules of evidence but the Constitution as well. Without clear guideposts for what qualifies as a "misleading" line of defense, a vindication of the accused's constitutional rights turns more on the courtroom to which the case is assigned than anything else.

III. New York's Forfeiture Rule Permits Unreliable Statements To Be Admitted Without Cross-Examination.

New York's forfeiture-by-opening-the-door rule allows the admission of untested statements that are often unreliable. The rule frustrates the accused's ability to defend themselves against potentially untruthful or incomplete statements in direct contravention of the Confrontation Clause's purpose of "ensur[ing] the reliability of the evidence against a criminal defendant" and undermines the truth-seeking function of the courts. *Maryland v. Craig*, 497 U.S. 836, 845 (1990).

The unenviable choice Petitioner faced here—abandon a valid and effective defense or risk opening the door to unreliable, untested information—is

common in New York. One way the accused often seeks to establish that the government failed to prove guilt beyond a reasonable doubt is by eliciting evidence that the offense was committed by, or responsibility is otherwise attributable instead to, another person. That other person is often a co-defendant or someone previously accused of involvement in the same crime. When putting forth a defense that the government is trying the wrong person, counsel necessarily elicits evidence, including through questioning of prosecution witnesses, that tends to connect another person to the crime or demonstrate that law enforcement failed to investigate that avenue adequately. Often the prosecution has obtained statements by co-defendants or other individuals who were involved in committing the crime. These persons, who often do not expect to testify at trial, have strong incentives to tell prosecutors what prosecutors want to hear, especially when doing so minimizes their own involvement and the punishment for that involvement. Under New York's forfeiture-by-opening-the-door rule, those who wish to mount an effective defense—or any defense at all—risk exposing the jury to these potentially false statements without the opportunity to test their reliability. *See* Scott C. Pugh, *Checkbook Journalism, Free Speech, and Fair Trials*, 143 U. Pa. L. Rev. 1739, 1770 (1995) (noting that "[c]ross-examination … minimizes the risk that juries will rely on evidence

tainted by the incentives to lie or exaggerate inherent in plea-bargaining.”).

The facts of this case demonstrate the unreliability of such statements and the critical need to exclude them under the Confrontation Clause. Petitioner’s main defense at trial was that another individual, Morris, was responsible for the crime. The undisputed fact that the government itself had previously accused Morris of committing it, and had even tried him for the offense, *see* Pet. App. 16a-17a, made this a compelling defense, one that counsel no doubt would have been second-guessed for passing up. To effectively support this defense, defense counsel elicited testimony that hours after the shooting the police had recovered a live cartridge from Morris’s home that matched the caliber of the purported murder weapon—a 9 millimeter handgun. *See Id*. The government claimed that its own evidence created a misleading impression because Morris had pleaded guilty to possessing a different-caliber handgun. Even though the government did not—and could not—dispute that the police *had* recovered a 9 millimeter cartridge from Morris’s home, the government was allowed to introduce Morris’s plea allocution, in which he admitted to possessing a .357 revolver at the scene of the shooting, and made no mention of a 9 millimeter handgun. *Id.*

New York’s rule stripped Petitioner of his right to confront Morris with a number of facts. It was in

Morris's interest not to be associated with a 9 millimeter handgun—the murder weapon. And by pleading guilty to possessing the .357 revolver, Morris secured his immediate release from prison and a dismissal of murder charges against him.

These problems are common. The facts of this case demonstrate that a person who pleads guilty is highly motivated to say what the government wants to hear in order to secure a good plea deal—whether or not this admission presents the entire picture of the person's involvement. In fact, in plea allocutions for cases in New York City that involve multiple accused individuals, the prosecution not only requires the person pleading guilty to admit to his or her own conduct, but also to admit to acting in concert with others when that is an element of the crime. A person who pleads guilty knows from the charging documents that the government thinks particular persons were also involved. It is all too easy—and sometimes the only viable option—for someone pleading guilty to implicate those other co-defendants consistent with the government's theory. After all, these plea allocutions allow the person entering the guilty plea to avoid conviction on other more serious charges and to receive a reduced sentence.

This allocution requirement, memorialized in a standard manner by many New York criminal courts, generates inculpatory evidence against co-defendants in virtually every multi-defendant case that includes

at least one guilty plea. However, because the allocutions are not subjected to adversarial testing, the underlying motivations and biases behind these testimonial statements remain latent. Denying Confrontation Clause rights in these circumstances motivates prosecutors to require even more specific information during allocutions, safe in the knowledge that the information could be admitted, without being tested through cross-examination, at the trial of a co-defendant who challenges the government's evidence.

Due to its unreliability, this evidence is exactly what the Confrontation Clause was designed to exclude. This Court has acknowledged the inherent unreliability of co-defendant or co-conspirator statements that shift or spread blame, and the Court has found it "highly unlikely" that the presumption of unreliability can be rebutted for such statements where, as here, "the government is involved in the statements' production, and when the statements describe past events and have not been subjected to adversarial testing." *Lilly*, 527 U.S. at 137.[2] The Court has repeatedly held, in the context of accomplice confessions, that "presumptively suspect"

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[2] *Lilly* involved a co-defendant's statement during interrogation. Statements made in connection with plea allocutions are equally, if not more, problematic because individuals who have chosen to plead guilty often do so with a favorable outcome at their fingertips, one that can be taken away at any moment if they fail to comply with the government's requests.

statements, such as the plea allocution here, "must be subjected to the scrutiny of cross-examination" to comply with the Confrontation Clause's requirements. *Lee v. Illinois*, 476 U.S. 530, 541 (1986); *Douglas v. Alabama*, 380 U.S. 415, 419 (1965). Moreover, this Court has also acknowledged the unreliability of hybrid statements like Morris's plea allocution: partially inculpatory and partially seeking to shift the blame to others. As this Court has explained, "[o]ne of the most effective ways to lie is to mix falsehood with truth, especially truth that seems particularly persuasive because of its self-inculpatory nature." *Williamson v. United States*, 512 U.S. 594, 599–600 (1994) (analyzing reliability of statements to determine admissibility under Federal Rule of Evidence 804(b)(3)).

History further demonstrates that the Confrontation Clause took aim at these very types of statements. The primary evil was ex parte statements "being used against the prisoner in lieu of a personal examination and cross-examination of the witness." *Mattox v. United States*, 156 U.S. 237, 242 (1895); *see also California v. Green*, 399 U.S. 149, 156 (1970) ("It is sufficient to note that the particular vice that gave impetus to the confrontation claim was the practice of trying defendants on 'evidence' which consisted solely of ex parte affidavits or deposition secured by the examining magistrates."). The Confrontation Clause—like the evidentiary hearsay

rules—is grounded in the need for reliability. *Giles v. California*, 554 U.S. 353, 365 (2008) (The "Confrontation Clause and the evidentiary hearsay rule[s] stem from the same roots." (citation omitted)). The primary way to ensure reliability is to have the declarant testify in an adversary proceeding, which is the basis for the Confrontation Clause's requirement that the witness be subjected to cross-examination.

Carveouts to the right of confrontation are narrowly tailored to types of evidence historically admitted at common law, such as dying declarations, *Giles*, 554 U.S. at 358, and statements by children, *see Ohio v. Clark*, 576 U.S. 237, 247–48 (2015). The circumstances surrounding statements that fall within these carveouts make them inherently reliable. *See, e.g.*, *id.* at 247 (finding that "[s]tatements by very young children will rarely, if ever, implicate the Confrontation Clause" because young children "have little understanding of prosecution"). The exact opposite is true for the statements of an alleged co-conspirator: the circumstances surrounding their creation make them inherently *un*reliable.

The constitutional right to confront a co-defendant is especially critical both to presenting a viable defense and demonstrating the unreliability of co-defendant statements to the jury. New York's forfeiture-by-opening-the-door rule frustrates both goals. By allowing these statements to go untested through cross-examination, New York's rule

undermines the accused's ability to present a defense, in violation of the Sixth Amendment. *See, e.g.*, *Lilly*, 527 U.S. at 137 (finding that admission of co-conspirator's confession violated the Confrontation Clause because the statement was not sufficiently reliable without allowing cross-examination). This rule also makes it more likely that juries—left to rely on untested, unreliable statements made by interested parties without hearing the declarant's motive to alter the truth—will get it wrong because they have been misled. This undermines the Confrontation Clause's purpose: "to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *Craig*, 497 U.S. at 845. And it does so by shielding from cross-examination—the "greatest legal engine ever invented for the discovery of truth"—a category of statements whose reliability is heavily tainted by a strong motive to fabricate. *Green*, 399 U.S. at 158 (citation omitted).

CONCLUSION

For the reasons stated above and in Petitioner's brief, the judgment of the Court of Appeals of New York should be reversed.

Respectfully submitted.

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June 29, 2021