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

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND AMICUS BRIEF OF ADAM OUSTATCHER IN SUPPORT OF RESPONDENT

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Date: August 16, 2021

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2(b), Adam Oustatcher, the former prosecutor who tried petitioner for the murder of David Pacheco, Jr., respectfully moves the Court for leave to file the accompanying brief as amicus curiae at the request of Joanna Sanabria, the mother of David Pacheco, Jr.

The consent of petitioner has been obtained. Respondent withheld consent by email dated June 24, 2021, which stated: "On behalf of this Office, I write to inform you that we do not consent to your request to submit an amicus brief." Bronx County District Attorney Darcel Clark and her office, who consented to eight amicus briefs submitted on behalf of petitioner, provided no explanation in their email as to why they wish to deny Ms. Sanabria's request that the trial attorney who successfully prosecuted petitioner submit an amicus brief in the instant matter. In a July 6, 2021 teleconference, Assistant District Attorney Gina Mignola indicated that respondent withheld its consent because New York's Rules of Professional Conduct Rule 1.11(a)(2) provides that a former government lawyer may not represent a client in connection with a matter in which the lawyer participated personally and substantially when employed by the government. After amicus informed respondent that Rule 1.11(a)(2) is inapplicable because no attorney-client relationship exists between amicus and Ms. Sanabria, respondent continued to withhold

its consent without further explanation.

As one of the attorneys involved in petitioner's trial and as demonstrated by the accompanying amicus brief, amicus is familiar with evidence not presented to the Court by petitioner or respondent and raises material legal issues the parties failed to address bearing upon the issue at bar. As to the former, the Joint Appendix and briefs submitted by the parties omit extensive and significant portions of petitioner's trial to such a degree as to not provide a fair and accurate record of the underlying proceedings. Regarding the latter, the parties to the appeal do not address the threshold issue of whether the statement at issue constitutes evidence against petitioner within the meaning of the Sixth Amendment, do not apply the primary purpose test, and do not address the doctrine of forfeiture by wrongdoing. Amicus thus submits that the accompanying amicus brief can offer a helpful and valuable perspective distinct from both petitioner and respondent. For these reasons, amicus seeks leave of the Court to file the accompanying brief as amicus curiae.

Respectfully submitted,

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Dated: August 16, 2021

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BRIEF OF ADAM OUSTATCHER AS AMICUS CURIAE IN SUPPORT RESPONDENT

INTEREST OF AMICUS CURIAE[1]

Amicus tried petitioner for the murder of David Pacheco, Jr., on behalf of the State of New York. Amicus' interest is to provide a fair and accurate account of the underlying proceedings to allow a fully informed decision thereon. Joanne Sanabria, the

[1] Pursuant to S. Ct. Rule 37.6, counsel for petitioner consented to the filing of this brief, respondent did not. No counsel for a party authored this brief in whole or in part and no person or entity other than amicus made a monetary contribution to its preparation or submission.

mother of David Pacheco, Jr., requested that amicus submit this brief. No attorney-client relationship exists between amicus and Ms. Sanabria.

Amicus was fourth prosecutor assigned to the investigation into the death of David Pacheco, Jr. The first prosecutor handled the case from the arrest of Morris through the abbreviated trial of Morris, which ended in a mistrial on consent of all parties to allow a reinvestigation of the murder. The second prosecutor, who undertook the start of the reinvestigation, died suddenly and unexpectedly. The third prosecutor was unable to dedicate the time the reinvestigation required. Amicus asked to assume responsibility for the reinvestigation into the death of David Pacheco, Jr., in the winter of 2012 with no prior knowledge of the case, whereupon amicus conducted the reinvestigation, presented evidence to the grand jury, and prosecuted the trial of petitioner.

SUMMARY OF ARGUMENT

The issue presented by the case at bar is whether the introduction into evidence of the plea allocution of an unavailable individual that does not implicate petitioner in the crime with which petitioner was charged to cure the taint of a misleading statement petitioner's counsel made to the jury after petitioner undertook a campaign to frame the unavailable individual for murder and engaged in in a pattern of misconduct meant to undermine the integrity of the subject proceedings violates the Sixth Amendment. Amicus submits that it does not.

Nicholas Morris was initially charged with the

murder of David Pacheco, Jr. DNA evidence exculpated Morris. Morris subsequently pled guilty to possessing a firearm unconnected to the murder. Petitioner was not charged with murder at the time of Morris' plea and Morris did not mention or otherwise implicate petitioner in the commission of a crime in his allocution. Because Morris' allocution did not offer evidence against petitioner and the primary purpose of Morris' allocution did not relate to the prosecution of petitioner, Morris' allocution does not implicate petitioner's Sixth Amendment rights.

Petitioner initiated a conspiracy to frame Morris for the homicide within days of the murder. After Morris was exculpated and petitioner was charged with the murder, petitioner engaged in campaign to undermine the integrity of his trial, inclusive of witness intimidation and attempting to perpetrate a fraud on the court. To mitigate prejudice resulting from one of petitioner's attorney's misleading statements to the jury, Morris' allocution was admitted into evidence.

The issue presented is, first, whether Morris' allocution implicates the Confrontation Clause and, if it does, whether petitioner's misconduct allows the introduction of Morris' allocution into evidence.

STATEMENT OF FACTS

April 16, 2006 was Easter Sunday (55-56)[2]. Denise Santiago, Brenda Gonzalez, Jon Vargas, Jose

[2] Page citations are to petitioner's trial transcript unless otherwise noted.

Castro, and Juan Garcia were walking to Castro's apartment in a building located on the southwest corner of the intersection of Harrison Avenue and Tremont Avenue in the Bronx after doing some early morning shopping (257, 441, 803-04, 875-76). A tall, thin, African American man wearing a blue sweater and a baseball hat pulled low on his forehead - a stranger to the group - was standing in the street on Harrison Avenue talking on a cell phone (443, 839, 874). The sweater stood out: it was a bright shade of blue with a distinctive fabric pattern (442-45, 809-10, 840, 877-80, 1160, 1081, 1092). It is uncertain what sparked the animosity, but a fistfight ensued with another man, Ronell Gilliam, joining in on behalf of the man in the blue sweater (257-60, 441-42, 803-05, 808-10, 839-40, 875, 985-87).

The stranger's blue sweater was pulled down in the tumult, revealing a tattoo on his right arm (270-71, 420-22, 808, 862-63, 988-89). The man in the blue sweater, losing the fistfight, ran away (881). Vargas chased after him (881). The fighting stopped (888, 978). Gilliam, Castro, Garcia, Santiago, and Gonzalez walked in the direction that the man in the blue sweater and Vargas ran, cursing at and threatening each other (888, 977-78, 994-95). Gilliam, outnumbered and feeling that the fistfight might resume, placed a telephone call to his friend Morris requesting help (978, 995).

Vargas returned to his friends having failed to catch the man in the blue sweater and the argument stopped (881). Vargas felt faint and sat on a milk crate near the entrance to Castro's apartment building in the company of Castro, Santiago, and Gonzalez, while

Garcia walked across the intersection to buy Vargas a bottle of water (265-66, 450, 812-13, 843, 882-84, 882). Gilliam stood outside the apartment building where he lived on Harrison Avenue, two buildings north of the intersection (979).

A car pulled up in front of Gilliam and the man in the blue sweater exited the vehicle (267, 272, 292-93, 451, 457-78, 812-15, 843-44, 882-84). The man in the blue sweater asked Gilliam where the other group was situated (978-79, 996-98). Gilliam pointed down Harrison Avenue, adding that the argument was quashed (978-79, 996-98, 1157). The man in the blue sweater pulled out a gun, pointed it in the direction of Garcia, who was crossing the street, and fired multiple gunshots as Garcia ran through the intersection, directly in front of a minivan, in the direction of his friends (978-79, 996-98).

That minivan was driven by Joanne Sanabria. Ms. Sanabria, entirely unaware of the above events, was driving on Tremont Avenue with a car full of children having just visited family (54-55). Her two year-old son David was strapped in his car seat directly behind her (54-57). One of the bullets fired by the man in the blue sweater penetrated the minivan's door, pierced the child's car seat, then tore through David's left lung, spleen and spinal column, killing him (929).

Ballistic evidence recovered from the crime scene and the slug recovered from the blanket in which the toddler was swathed at the hospital revealed that one gun was used in the commission of the murder: a 9mm pistol (101, 156, 182, 220, 1204-05).

The police went to the apartment where Gilliam lived with his grandmother (661-64). Gilliam was not there, but the police recovered the bright blue sweater from a closet, noting the strong odor of gunshot (664-67). The police went to Morris' apartment and recovered three rounds of .357 and one round of 9mm caliber ammunition (669, 679).

The night of the murder, petitioner, Gilliam, and petitioner's girlfriend (and future wife) Aida Llanos rendezvoused at the home of petitioner's friend Vernon Matthews in Brooklyn and, at petitioner's suggestion, fled the Bronx, where petitioner had lived his entire life (984-85, 1002-03). Days later, Matthews spoke to the police and signed a statement indicating that, on the night of the murder, he heard petitioner admit to being the gunman (1243-45).

While Ms. Sanabria and her husband David, having just buried their child, stood in front of reporters' microphones holding David's favorite doll, their faces streaked with tears, begging the public for help in finding their son's killer (Exhibit 101), petitioner and Llanos were making a new start of it in North Carolina, as far away from the police investigation as possible, with petitioner taking a false name ("Darrell Davis") (937-42).

Morris knew the police were looking for him and walked into a local new station to bring himself into custody (Exhibit 101, 332-35). Morris gave an interview proclaiming his innocence and took off his shirt, showing that he did not have any tattoos on his right arm. Morris also had a prominent facial scar (Exhibit 101). No witness described the gunman as

having a facial scar.

Morris was placed in lineups (683). Vargas, Santiago, and Gonzalez identified him as the shooter (684-697). Garcia, who was closest to the gunman at the time of the shooting, viewed the lineup and indicated that the shooter was not in the lineup (819).

Petitioner paid for Gilliam's food and hotel in North Carolina for days and then told Gilliam that Morris informed the police of his role in the shooting (1006-08). This was a lie petitioner voiced after finding out that Matthews revealed to the police that petitioner confessed to being the gunman (1006). Petitioner, Gilliam's older cousin, instructed Gilliam to return to New York to tell the police "Nick is the shooter (1008)."

Gilliam was driven back to the Bronx by petitioner's friend, where he met George Vomvalakis, a lawyer petitioner hired to add credence to petitioner's efforts to falsely implicate Morris, for a few minutes before walking into the district attorney's office to criminate Morris as the gunman (1009-12).

After leaving the district attorney's office, Gilliam found out that Morris did not implicate petitioner or Gilliam (1013). Days later, Gilliam, accompanied by one of petitioner's brothers[3], walked into the 46th precinct station house unannounced, purposefully without Vomvalakis, and told the police

[3] Morris, unaware of what was transpiring, called Hemphill's brother while Gilliam was in the precinct (1015, 1031).

the truth: petitioner, not Morris, was the shooter (1014-15). Vomvalakis found out what Gilliam was doing and called the precinct to stop Gilliam from speaking to the police (958).

The next day, Gilliam and Vomvalakis returned to the district attorney's office and Gilliam again told the police and prosecutor that petitioner was the shooter (1009-12). After identifying petitioner as the murderer, Gilliam was jailed and charged as an accomplice to the murder, even though he had no foreknowledge of petitioner's intent to kill and tried to stop the shooting (724-26).

In opening statements at Morris' trial, Morris' attorney revealed that a single male DNA profile was obtained from the blue sweater (Pet. Cert. Appendix 4A, 9A). A mistrial was declared to allow Morris' DNA profile to be developed and compared to the DNA recovered from the blue sweater. *Id.* Subsequent DNA testing exonerated Morris, revealing that his DNA was not on the blue sweater. *Id.*

Morris pled guilty to possessing a .357 caliber revolver because, after Gilliam called him on April 16, 2006, Morris was en route armed with a .357 revolver (1181-85).

Sometime later, Morris was stopped by customs officials returning to the Bronx after traveling to Barbados to attend to a family matter and was barred from re-entering the United States due to his gun conviction (894-95, Pre-Trial Applications 124, October 2, 2015).

Gilliam entered into a cooperation agreement in November 2010 pursuant to which, if Gilliam testified truthfully at all future proceedings, he would be sentenced to five years' incarceration on his plea to manslaughter in the first degree (969).

On April 26, 2011, law enforcement officials traveled to North Carolina and executed a search warrant, taking a DNA swab from petitioner (524-27). Subsequent DNA testing and analysis revealed that petitioner's DNA matched the DNA profile found on the blue sweater (567, 572-73).

In the late winter of 2012, amicus assumed responsibility for the reinvestigation and began interviewing witnesses who had never been spoken to previously and re-interviewing previously identified witnesses. Based upon newfound evidence, a grand jury charged petitioner with the murder of David Pacheco, Jr.

29 witnesses were called by the prosecution at petitioner's trial.

Michelle Gist, a woman who knew petitioner, Gilliam, and Morris for years prior to the shooting, testified that she was parking her car on Harrison Avenue minutes before the shooting when she saw petitioner, wearing a bright blue sweater, on the hood of her car involved in a fistfight (343, 349-52, 379).[4]

[4] Petitioner's appellate counsel submits to the Court that one witness, that being Gist, said that Morris, "had been at the scene" with Gilliam (Pet. Merit Brief 5). This does not accurately reflect Gist's testimony as she testified that she saw petitioner and Gilliam involved in the fistfight and

In a brazen attempt at witness intimidation, petitioner screamed at Gist in open court to silence her in the middle of her testimony (352).

Ardell Gilliam, petitioner's grandmother, testified against him at trial, recounting for the jury that she saw petitioner wearing a blue sweater earlier on the day of the murder (602-03, 611-12).

While *Brady v. Maryland*, 37 U.S. 83 (1963), solely requires disclosure of the information provided by Santiago, Gonzalez, and Vargas, not that the prosecution call them as trial witnesses, the prosecution called Santiago, Gonzalez, and Vargas at trial to ensure that the jury heard all the evidence against Morris when considering the charges against petitioner even though, by so doing, the prosecution forfeited its right to cross-examine Santiago, Gonzalez, and Vargas.[5]

The unreliability of Vargas', Santiago's, and Gonzalez' identifications of Morris was patently clear without the need for cross-examination. Vargas, Gonzalez, and Santiago each admitted that they never saw the gunman's face. Vargas, who saw a Daily News newspaper article about the shooting with a

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subsequently saw Morris in the area well after the fistfight and shooting (354, 375-76).

[5] It became unlikely that Santiago, Gonzalez, or Vargas would voluntarily testify if asked by petitioner's counsel after petitioner's counsel dispatched an investigator who gained access to Santiago's home without properly identifying himself, riffled through her private belongings, and attempted to take a statement from Santiago after placing his gun on her coffee table with the barrel of his gun pointing at Santiago.

"gentleman on the cover" before viewing the lineup, only saw the back of the gunman's head as he ran away, Santiago's momentary view of the gunman was at a considerable distance and his face was blocked by his hat and the gun, itself, and Gonzalez, who is severely nearsighted, was not wearing her glasses at the time of the shooting or when she viewed the lineup. Santiago further testified that she saw the News 12 broadcast and the man shown in the broadcast (Morris) was not the shooter (467-69, 487-89, 844-49, 885-88).

Garcia testified that he viewed the lineup containing Morris and the gunman was not in the lineup (819).

Castro, who did not view the lineup, testified that he saw Morris on a television news broadcast the morning that lineups were conducted and the man shown in the broadcast (Morris) was not the shooter (280).

Petitioner's trial counsel misrepresented Gonzalez' grand jury testimony to the jury to give the false impression that Gonzalez knew Morris by name at the time of the shooting (479). To correct the taint resulting from this artifice, the prosecution was permitted to introduce a portion of Gonzalez' grand jury testimony reaffirming that Morris was a stranger to her (616-17).

Gilliam provided a full account of the day of the murder, from the fistfight (977-79) to meeting petitioner, Llanos, Morris, and Gilliam's brother William in the lobby of his building before they

proceeded to the apartment Gilliam shared with his grandmother moments after the shooting where it was decided that Gilliam would dispose of petitioner's 9mm pistol and Morris' .357 revolver (980-81), disposing of the murder weapon (981, 1042), and then meeting petitioner and Llanos at Matthews's home in Brooklyn before fleeing to North Carolina (984-85, 1003). Gilliam identified petitioner as the murderer, the man in the blue sweater (979). Gilliam further testified to being put up in a hotel by petitioner, then being told by petitioner that Matthews told the police that petitioner was the shooter and Morris was speaking to the police (1006-08). Petitioner instructed Gilliam that he must therefore return to New York to place blame for the murder on Morris (1008).

Gilliam's testimony was corroborated by independent evidence at every critical juncture: by Gonzalez, Santiago, Castro, Vargas, and Garcia with regards to the fistfight, by Milagros Pagan, Justina Bautista, and Anthony Baez as to the shooting (1079-1080, 1092, 1159), by Gist, Ardell Gilliam and DNA evidence as to petitioner's identity as the man in the blue sweater, and by Vomvalakis, who testified that either petitioner or Llanos paid for his representation of Gilliam, he met Gilliam for mere minutes on the courthouse steps and provided no legal counsel to Gilliam before walking Gilliam into the district attorney's office and, ultimately, a state prison term (952-58). The only affirmative act Vomvalakis undertook during his representation of Gilliam was to attempt to stop Gilliam from revealing petitioner's role

in the murder to the police (960).[6] Moreover, Gilliam's testimony established that Gilliam did not have a motive to falsely identify petitioner as the gunman (987, 1046).

Gilliam took full responsibility for his conduct and, pursuant to the terms of his cooperation agreement, was subsequently sentenced to five years' incarceration for the murder his cousin committed (969-70).

Baez tried to break up the fistfight in which the man in the blue sweater was involved and was later seated in a car near to and with a clear view of the gunman when he fired the fatal shot. Baez, who identified Gilliam from a photo array, did not pick Morris from a six-pack of photographs when asked to identify the gunman (1161-75).[7]

Petitioner's sister-in-law Elisa Hemphill, after coming down with an apparent case of trial induced amnesia, ultimately admitted that petitioner "might" have had a tattoo on his right arm prior to the shooting (421-22).

The trial judge directed petitioner to bare his

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[6] Vomvalakis claimed to have lost his notes regarding the work petitioner/Llanos paid him to perform (960).

[7] Petitioner's appellate counsel submits that Baez identified Morris in the photo array (Pet. Merit Brief 6), even though Baez testified at trial that he did not: "I was hoping to remember most of the guy's face, but, again, I told the police officer at that moment that I cannot remember his face. I can just remember his physique, his, you know, being tall and the sweater and stuff like that (1163)."

right arm before the jury, revealing a tattoo on his right arm reading "DA 10453" (431-36).

In his opening statement, petitioner's trial attorney attempted to mislead the jury into believing that Morris possessed the murder weapon at the time of the murder (42). To correct the false impression created by petitioner's trial counsel, the trial court allowed the prosecution to introduce Morris' allocution into evidence because Morris was unavailable to testify at trial (506-10).

The last witness called by the prosecution was Matthews, petitioner's longtime friend and the man who owned the home where petitioner, Llanos, and Gilliam regathered after the murder (1252, 1256). Matthews signed a statement four days after the murder indicating that, on the day of the murder, Matthews heard petitioner confess to the shooting, as petitioner said that men attempted to rob him, petitioner fought them, after which petitioner retrieved a gun and shot at the people who tried to rob him (1254, 1313). Matthews was brought to court pursuant to a material witness order after he pulled his child from school and absconded from their home to avoid testifying against petitioner at trial (1292-93). On the witness stand, similar to Elyse Hemphill, Matthews manifested a markedly selective memory, as he repeatedly looked towards petitioner during his examination and had to be directed to look at the written account of the statement he made to the police (1254-59). Even then, Matthews pled a loss of memory regarding petitioner confessing that he was the gunman (1314).

Petitioner called one witness on his own behalf: Nana Owusuafriyie, his lifelong friend. Owusuafriyie was called as a witness by petitioner to implicate Morris as the murderer (1444). Owusuafriyie was quickly exposed as an abject liar and his testimony transparently and unabashedly fraudulent, notwithstanding petitioner's effort to keep Owusuafriyie's criminality concealed from the jury, including Owusuafriyie's history of lying to authorities to cover up his and his associates' criminal conduct (1452-56, 1479-80). Owusuafriyie was not merely an inaccurate witness, but a person of such inherently deceitful character that the trial judge professed, outside the presence of the jury, that Owusuafriyie was the most mendacious witness he had seen in his thirty-three years on the bench (1484). Owusuafriyie's testimony was so manifestly deceitful as to require petitioner's trial counsel to devote the first ten minutes of his closing argument attempting to deodorize the patently fraudulent evidence presented by petitioner, carefully avoiding any reference to Owusuafriyie's duplicitous effort to implicate Morris in the murder (1499-1503).

The jury undertook a thorough and thoughtful review of the trial evidence during its deliberations, asking for significant readback of trial testimony and reviewing the near entirety of the crime scene evidence (1720, 1734, 1748, 1759, 1781, Joint App. 364-70). The jury never asked for readback of Morris' allocution.

After the verdict was announced petitioner launched a violent outburst in an effort to physically prevent the jurors from being individually polled (1785).

It is against this factual backdrop - a carefully orchestrated fraud to frame Morris for murder perpetrated by petitioner and carried out over a period of years that placed an innocent man precariously close to being wrongfully convicted of a heinous crime - that this appeal is brought before the Court.

Petitioner's Statement of Facts is replete with mischaracterizations of evidence and omissions of material facts. As to the former, petitioner misrepresented that the prosecution changed its theory of the case regarding how many people were involved in the fistfight and murder[8], stated that the

[8] While petitioner's representation on this point is untrue, to the extent it is not already made clear, then District Attorney Robert Johnson's prosecution of Morris was horrifically botched, a testament to gross professional incompetence marred by questionable eyewitness identifications not subjected to any scrutiny, critical witnesses not interviewed, and a shocking refusal to test crucial DNA evidence. Moreover, the "statements" that petitioner relies upon (Pet. Cert. Brief 7) were attributed to Morris by a jailhouse informant with a significant criminal history and an expectation of receiving "court consideration" who had access to news reports of the shooting and thereafter claimed that Morris, an admitted stranger to the informant, confided in him that Morris fired the gun before handing the gun to petitioner who fired additional gunshots (Pre-Trial Applications 19-20, 25-26, September 21, 2015). Not only was the jailhouse informant's claim never corroborated, the account the jailhouse informant attributes to Morris is contradicted by every eyewitness to the shooting. Amicus made the jailhouse informant available to petitioner at trial and petitioner chose not to call him as a witness. It is upon this demonstrably untrustworthy and inaccurate speciosity underlying the indefensible prosecution of Morris that

prosecution tried to hide Gonzalez' prior identification of Morris from the jury when, in fact, the prosecution elicited this testimony and put photographs of the lineup into evidence, repeatedly represented that a witness identified Morris as the shooter in a photo array when no witness ever so identified Morris, affirmed that a witness testified that Morris was involved in the fistfight when no witness so testified, submitted that Morris had a temporary tattoo on his right arm, and inexplicably claimed that the blue sweater was moth-eaten (Pet. Merit Brief 6, 8, Pet. Cert. Brief 6, Pet. Appellate Brief 6, 10, 11, 84, 85, 88, 106). Each of these factual representations is simply untrue. As to the latter, unable to explain away the testimony of Gist and petitioner's grandmother, the DNA evidence, the absence of tattoos on Morris' body, the negative identifications of Morris by Garcia, Castro, and Baez, the scar on Morris' face, petitioner's directive to Gilliam to frame Morris, Vomvalakis' testimony and Owusuafriyie's duplicity, petitioner's counsel censored any mention of the evidence establishing petitioner's involvement in the fistfight and the shooting, exculpating Morris as the gunman, and establishing petitioner's effort to frame Morris and perpetrate a fraud on the court from their brief. The cumulative effect of these misrenderings and exclusions is to present a distortive and ultimately inaccurate account of the facts and circumstances attendant to petitioner's trial. While petitioner is, of course, entitled to maintain his interpretation of the underlying record, the fact that petitioner's counsel deemed it necessary to hide wide swaths of facts and

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petitioner endorses and upon which petitioner's claim that Morris is the gunman is premised.

evidence in their submissions to the Court evinces the eristic foundation upon which petitioner's appeal is predicated.

ARGUMENT

I. MORRIS IS NOT A WITNESS AGAINST PETITIONER WITHIN THE MEANING OF THE SIXTH AMENDMENT

The threshold issue attendant to the subject appeal is whether Morris' allocution implicates the Sixth Amendment. If Morris' allocution is not within the purview of the Sixth Amendment, the issue presented is one of evidentiary, not Constitutional, import.

The Sixth Amendment provides, in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right to be. . . confronted with the witnesses against him. . ." The term "witness" is limited to one whose statement is offered at trial against a defendant. *Ohio v. Roberts*, 448 U.S. 56, 63 (1980)("If one were to read this language literally, it would require, on objection, the exclusion of any statement made by a declarant not present at trial. But, if thus applied, the Clause would abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme (internal citation omitted)."). The Sixth Amendment should not serve to exclude out-of-court statements beyond the reach or scope of the Confrontation Clause. *Giles v. California*, 554 U.S. 353, 377-78 (1993)(Thomas, J., concurring); *Giles*, 554 U.S. at 378 (Alito, J., concurring). For a statement to implicate the Confrontation Clause, the witness

uttering the statement must bear testimony against the accused. *Michigan v. Bryant*, 562 U.S. 344, 379 (2011)(Thomas, J. concurring in judgment); *Ohio v. Clark*, 675 U.S. 237, 255 (2015) (Thomas, J., concurring in judgment).

A critical distinction should be drawn between testimonial hearsay evidence that implicates a defendant in a crime and the issue at bar: non-accusatory evidence required to allay the prejudice resulting from an attempt to mislead a jury that does not implicate a defendant in a crime; the former necessarily triggers the Confrontation Clause, whereas the latter, because it is not incriminatory and thus not offered against an accused, does not fall within the ambit of the Sixth Amendment.

Morris did not, by his allocution, bear witness against petitioner. Specifically, Morris did not implicate petitioner in the commission of a crime or establish that a crime with which petitioner was charged was committed. Morris' allocution solely addressed Morris' own criminal conduct - the possession of an illegal firearm - with which petitioner was entirely uninvolved.

The non-accusatory nature of Morris' allocution is borne out by the trial record, as the prosecution did not intend to introduce Morris' allocution at the outset of trial because, at that point in time, Morris' allocution was intrinsically immaterial to the jury's determination of the charges against petitioner. It was only after petitioner's trial counsel sought to mislead the jury that Morris' allocution became material to the trial proceedings and then only to mitigate the

prejudice resulting from petitioner's trial counsel's stratagem, not to bear evidence against petitioner relative to the murder.

The abuses that the Court has identified as prompting the adoption of the Confrontation Clause involved "out-of-court statements having the primary purpose of accusing a targeted individual of engaging in criminal conduct." *Williams v. Illinois*, 567 U.S. 50, 82 (2012). Because Morris' allocution did not accuse petitioner of engaging in criminal conduct, on an elemental level and based upon the plain language of the Confrontation Clause, Morris was not a witness against petitioner within the meaning of the Sixth Amendment and the introduction of Morris' allocution into evidence does not implicate the Sixth Amendment.

II. MORRIS' ALLOCUTION IS NOT TESTIMONIAL WITHIN THE MEANING OF THE CONFRONTATION CLAUSE

Petitioner's appeal is premised on the misconception that *Crawford v. Washington,* 541 U.S. 36 (2003), held all plea allocutions to be "plainly testimonial." Pet. Cert. Brief 19. This is incorrect. Instead, *Crawford* reaffirmed the long-held principle that one specific and discrete type of plea allocution - a plea allocution in which one member of a conspiracy implicates another member of a conspiracy - is testimonial; *Crawford* did not hold that all plea allocutions are categorically testimonial within the meaning of the Sixth Amendment. *Crawford*, 541 U.S. at 64. Each decision cited in the relevant section of *Crawford* - *United States v. Aguilar,* 295 F.3d 1018 (C.A.9 2002), *United States v. Centracchio*, 265 F.3d

518 (C.A.7 2001), *United States v. Dolah,* 245 F.3d 98 (C.A.2 2001), *United States v. Petrillo*, 237 F.3d 119 (C.A.2 2000), and *United States v. Moskowitz,* 215 F.3d 265 (C.A.2 2000) - addresses plea allocutions made by one member of a conspiracy subsequently used to prove the element of an offense, that being the existence of a conspiracy, against another alleged member of that conspiracy. *Crawford,* 541 U.S. at 64. Similarly, *Kirby v. United States*, 174 U.S. 47 (1899), the other decision cited by petitioner in support of his assertion that all plea allocutions are plainly testimonial, held unconstitutional the introduction of plea allocutions made by three embezzlers[9] as conclusive evidence against the trial defendant to establish an element of the offense with which the defendant was charged.

Contrary to petitioner's contention, the Court has not enunciated a blanket holding declaring that all plea allocutions are testimonial within the meaning of the Sixth Amendment. *Crawford* deliberately elected not to "spell out a comprehensive definition of 'testimonial'", leaving that to future decisions. *Crawford*, 541 U.S. at 68. *Davis v. Washington*, 547 U.S. 813, 822 (2006), set forth the primary purpose test to determine if out-of-court statements are testimonial within the meaning of the Confrontation Clause, defining testimonial statements as solemn declarations or affirmations made for the purpose of establishing or proving some fact potentially relevant to later criminal prosecution.

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[9] The relationship between Kirby and the three embezzlers fits the classic definition of a hub-and-spoke conspiracy. *See United States v. Newton*, 326 F.3d 253, 255, n.2 (1st Cir. 2003).

Thus, the mere fact that a sworn or affirmed statement may be considered testimonial in a general sense does not mean that such a statement, viewed through the lens of the *Crawford* line of cases and by application of the primary purpose test, fits the strict definition of testimonial within the meaning of the Confrontation Clause.

Davis, 547 U.S. at 820, addressed statements made by domestic violence victims to a 911 operator and in a battery affidavit. *Bryant*, 626 U.S. at 359-379, expounded on the primary purpose test, applying it to police interrogations made in response to on-going emergencies. *Williams,* 567 U.S. at 79, applied the primary purpose test to DNA reports. *Clark*, 675 U.S. at 237, applied the primary purpose test to statements made by children to pre-school teachers.

The Court has not applied the primary purpose test to plea allocutions. More specifically, the primary purpose test has not been applied to plea allocutions not involving the guilty plea of a member of a criminal conspiracy establishing the existence of criminal conspiracy. By application of the primary purpose test, Morris' allocution neither implicates nor violates the Sixth Amendment because it was not made for the purpose of establishing or proving a fact at a later criminal prosecution. *Davis*, 547 U.S. at 822 (2006).[10]

The archetypal instance in which the Confrontation Clause restricts the introduction of out-of-court statements is that in which a state actor is

[10] The New York trial and appellate courts did not apply the primary purpose test to Morris' allocution. Pet. App. 1A - 28A.

involved in a formal, out-of-court interrogation of a witness to obtain evidence for trial. *Bryant*, 626 U.S. at 358. It is this critical factor, or, more accurately, the absence thereof, that renders Morris' allocution non-testimonial: the primary purpose of Morris' allocution was not to develop evidence for trial. Similar to Rule 11(b)(3), New York State requires that a court elicit a recitation of facts from a criminal defendant wishing to enter a guilty plea to ensure that the plea is knowing and voluntary. *People v. Lopez*, 71 N.Y.2d 662, 666 (1988); *People v. Serrano*, 15 N.Y.2d 304, 309-10 (1965). The sole, and thus primary, purpose of Morris' allocution was to ensure that Morris' plea was knowing and voluntary to allow the court determine if it should be accepted.

Morris' allocution occurred on May 29, 2008, at the end of the Morris exoneration stage of the investigation into the death of David Pacheco, Jr., while the case was handled by the second prosecutor and before the November 2010 date on which Gilliam entered into his cooperation agreement, before the April 2011 issuance of the search warrant to compel petitioner to provide a DNA sample, before evidence against petitioner was presented to a grand jury in the winter of 2013, and before the April 24, 2013 arrest of petitioner. Morris' allocution was not undertaken as a means to develop trial evidence against petitioner; had it been so, Morris would have been required to cooperate against petitioner as a condition of his plea. Developing trial evidence as against petitioner was not a nascent thought at the time of Morris' allocution and would not begin until years later.

The transcript to Morris' allocution further

establishes that the primary purpose of Morris' allocution was not to develop trial evidence against petitioner, as neither the court nor the prosecutor asked Morris a single question regarding petitioner or the murder of David Pacheco, Jr., Morris did not mention petitioner by name, Morris did not allude to petitioner or petitioner's conduct, and Morris did not plead guilty to a crime involving petitioner. Morris pled guilty to a crime that he, and he alone, committed, and this crime was separate and distinct from the crimes with which petitioner was ultimately charged.

Lastly on this point, because Morris' allocution had no bearing on petitioner's commission of the crime with which petitioner was charged, amicus did not intend to introduce Morris' allocution into evidence at the outset of petitioner's trial, as demonstrated by the trial record. It was only after petitioner's trial counsel tried to mislead the jury that the prosecution sought to introduce Morris' allocution as a means to mitigate the resultant prejudice. A review of the trial record further reveals that the prosecution never argued or otherwise used Morris' allocution to implicate petitioner in the murder during the entirety of the trial.

It bears noting that petitioner's trial counsel never objected to the introduction of Morris' allocution on the grounds that it was testimonial (his objection was based solely on the argument that Morris' allocution was being used to incriminate his client which, as demonstrated by the trial record, it was not) and abandoned further argument relative to the Sixth Amendment, instead focusing thereafter on whether Morris' allocution met the requirements for a declaration against the penal interest as an exception

to the hearsay rule under New York State evidentiary law (511, 512-13, 896-902, 904, 907-08, 909-10, 916, 917-18).

"The basic purpose of the Confrontation Clause was to 'targe[t]' the sort of 'abuses' exemplified at the notorious treason trial of Sir Walter Raleigh," *Bryant,* 562 U.S. at 357-58, specifically the introduction into evidence of Marian depositions that expressly denied defendants' examination of their accusers. *Crawford*, 541 U.S. at 43-44. Morris' allocution bears no similarity to the admission into evidence of civil-law examinations or the type of evidence used against Raleigh as Morris' allocution was not created to disallow petitioner's confrontation of Morris or to incriminate petitioner. To the contrary, the prosecution would have much preferred to call Morris as a witness at petitioner's trial to allow the trial jury to hear the same forthright and compelling statement Morris gave when, of his own volition, he walked into the News 12 station and proclaimed his innocence (332-35, 408, Trial Exhibit 101).

A review of the circumstances under which Morris' allocution was undertaken, the substance of Morris' allocution, and the manner in which Morris' allocution was used by the prosecution at trial, by application of the primary purpose test, establishes that Morris' allocution does not constitute testimonial evidence. *See Davis*, 547 U.S. at 822. As such, the admission of Morris' allocution is of evidentiary, not Constitutional, import, and was altogether just, proper, and compliant with the Sixth Amendment.

III. MORRIS' ALLOCUTION WAS PROPERLY RECEIVED IN EVIDENCE EVEN IF DEEMED TESTIMONIAL

Characterizing the antecedents that precipitated the admission of Morris' allocution into evidence as based solely upon opening the door is reductive, failing to give due weight to the demonstrated and significant misconduct by which petitioner sought to undermine the integrity of both the investigation into the death of David Pacheco, Jr., and petitioner's trial. The propriety of the admission of Morris' allocution into evidence should thus not be considered in a vacuum, divorced from the entirety of the trial record and facts underlying this matter.

Forfeiture by misconduct is a recognized exception to the Confrontation Clause. *Crawford*, 541 U.S. at 54. The doctrine of forfeiture by misconduct is grounded in "the ability of courts to protect the integrity of their proceedings." *Davis,* 547 U.S. at 834. The Court first addressed the forfeiture by wrongdoing doctrine as applicable to the Confrontation Clause in *Reynolds v. United States*, 98 U.S. 145, 155 (1879), referencing *Lord Morley's Case*, (6 State Trials, 770), and stating that:

> "The rule has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong; and, consequently, if there has not been, in legal contemplation, a wrong committed, the way has not been opened for the introduction of testimony. We are content with this long-established usage which, so far as we have been able to tell, has rarely been departed

> from. It is the outgrowth of a maxim based upon the principle of common honesty, and, if properly administered, can harm no one."

Giles, addressing the doctrine of forfeiture by wrongdoing in the fact-specific context of a domestic violence prosecution, held that forfeiture by wrongdoing was a recognized common law exception to the right to confrontation "at the time of the founding." *Giles*, 554 U.S. at 358-60.

The matter at bar presents a scenario different than that presented in *Giles* and to which we are more accustomed seeing the doctrine of forfeiture by wrongdoing applied, as petitioner did not threaten or physically harm Morris; instead, petitioner initiated a conspiracy to falsely accuse Morris of murder.

The foundational ethical stricture against false accusations is found in the Ninth Commandment: "Thou shalt not bear false witness against thy neighbor." Exodus 20:16. Bearing false witness against another person with the intent that the innocent person be found guilty and sentenced to death was punishable by death at English common law. 1 Britton 34-35 (Nichols ed. 1865); John C. Hogan, *Murder by Perjury*, 30 Fordham L. Rev. 285 (1961). In *The King v. Macdaniel and Others*, (1 Leach 44, 168 Eng. Rep. 124 (P.C. 1754)), Mary Jones gave false testimony against an innocent person resulting in his conviction and execution. Jones was tried and convicted for her maliciously false accusation as against Joshua Kidden. *Id.* Notably, it was not just Jones who was found guilty based upon this false accusation; Macdaniel and Berry, who did not give

false testimony, but conspired with Jones in framing Kidden, were also convicted of this crime. *Id*.

The Macdaniel, Berry and Jones trial, widely known during the framers' lifetimes, reflects the state of English common law in the latter half of the 18th century, at the time of the ratification of the Bill of Rights and in the wake of the statutory and judicial reforms that followed the Raleigh trial. *See Crawford*, 541 U.S. at 44-45; Joseph Cox, *A Faithful Narrative of the Most Wicked and Inhuman Transactions of That Bloody-Minded Gang of Thief-Takers, Macdaniel, Berry, Salmon, Eagan, Alias Gahagan: As Also of That Notorious Accomplice of Theirs, Mary Jones* (1756). Kidden's unconfronted hearsay statements were properly received in evidence at the trial of Mcdaniel, Berry, and Jones: Headborough Thomas Cooper testified that, "He (Kidden) said he never committed a robbery in his life, nor never wrong'd man, woman or child in his life. He cried almost all the way he went along to the prison, and spoke very sorrowful," and Clerk James Warriner testified that, "The poor fellow (Kidden) cried terribly, talk'd much of his innocency, and protested to it all along." *Old Bailey Proceedings Online* (www.oldbaileyonline.org, version 8.0, 16 August 2021), June 1756, trial of Stephen Macdaniel John Berry Mary Jones (t17560603-16).[11]

The King v. Macdaniel and Others establishes that petitioner's demonstrated malfeasance falls

[11] Kidden's claims of innocence, voiced as soon as he was charged with robbery and repeatedly thereafter, long before he was sentenced to death, cannot be characterized as dying declarations.

squarely within the doctrine of wrongdoing as an exception to the right to confrontation as it existed in English common law at the time the Bill of Rights was adopted. If, as *Crawford* requires, the rules of evidence at the time of the founding govern the application of the Confrontation Clause, then not only is Morris' allocution properly admissible, but his interview with News 12, in which he proclaimed his innocence with the same sincerity as Kidden, could have been played for the jury, unmuted.

Petitioner's conduct was not a quiescent abstraction; petitioner effectuated a fully actualized and operational conspiracy to frame Morris for murder, in furtherance of which petitioner took concrete action immediately after finding out that Matthews revealed petitioner's confession to the police: lying to Gilliam regarding Morris' conduct to impel Gilliam to participate in the conspiracy, giving specific instructions to Gilliam as to how to falsely accuse Morris, arranging for the delivery of Gilliam from North Carolina to the prosecutor's office for the sole purpose of implicating Morris in the murder, and hiring a lawyer to give petitioner's scheme the appearance of creditability. Significantly, the circularity affecting the evidence in *Giles* is not present in the instant matter, as petitioner's attempt to frame Morris for murder is a separate and distinct act from the crime with which petitioner was charged and the prosecution presented independent, foundational evidence establishing the wrongdoing underlying petitioner's forfeiture. Although petitioner's conduct did not, by itself, cause Morris' unavailability at trial, petitioner's misconduct played a significant role in the wrongful prosecution of Morris which ultimately

resulted in Morris' unavailability.[12] Petitioner's malfeasance was a clear scheme to insulate himself from prosecution as it was only after petitioner found out that Matthews disclosed petitioner's role as the gunman to the police ("Darrel woke me up in the middle of the night like you listen Vernon told the police what happened. We got to get out of here (1006)"), that petitioner lied to Gilliam ("Nick is telling the police that you did it, you did the shooting (1008)"), manipulating Gilliam thereby orchestrating his false accusation of Morris ("You go to go there in and tell them that, nah, you ain't do it, Nick is the shooter (1008)") to render Morris unavailable to provide a truthful account of petitioner's role in the murder.

It is in this context - the doctrine of forfeiture by wrongdoing derived from the equitable maxim that no one should be permitted to take advantage of their own wrong as recognized by *Reynolds*, considered in light of *Crawford* and *Giles* - that the issue at bar presents itself to the Court. At a time when the criminal justice system is casting a more critical eye at the integrity of past prosecutions by which post-exoneration cases similar to the instant matter will likely become more common, amicus moves the Court to recalibrate and recognize that the doctrine of forfeiture by wrongdoing still encompasses falsely accusing another of murder. *See Giles*, 554 U.S. at 379 (Souter, J., concurring).

"It was, and is, reasonable to place the risk of

[12] Similarly, the conduct of Mcdaniel, Berry and Jones did not render Kidden unavailable at their trial, but, instead, was a precursor to the government action that ultimately rendered Kidden unavailable.

untruth in an unconfronted, out-of-court-statement on a defendant who meant to preclude the testing that confrontation provides." *Giles*, 554 U.S. at 379 (Souter, J., concurring). Petitioner went to extraordinary lengths to prevent Morris from providing evidence against petitioner that would have revealed petitioner's role in the murder and to undermine the integrity of petitioner's trial. Petitioner engaged in a campaign of wrongful conduct encompassing framing Morris for murder, witness tampering and intimidation, presenting fraudulent evidence at trial, beginning days after the murder and continuing through the end of his trial, meant to undermine the investigation into the death of David Pacheco, Jr., and subvert the integrity of petitioner's trial. As such, even if Morris' allocution is deemed to be testimonial evidence against petitioner within the meaning of the Sixth Amendment, it was eminently reasonable and proper to place Morris' allocution before the trial jury in order to protect the integrity of petitioner's trial from petitioner's demonstrated campaign of malfeasance pursuant to the maxim that no one shall be permitted to take advantage of his own wrong and based upon the doctrine of forfeiture by wrongdoing. *See Davis*, 547 U.S. at 834.

IV. THE ADMISSION OF MORRIS' ALLOCUTION INTO EVIDENCE DID NOT AFFECT PETITIONER'S ABILITY TO PRESENT A DEFENSE OR THE OUTCOME OF THE TRIAL

Petitioner's ability to present a defense predicated on placing blame for the murder on Morris was not diminished or limited by the admission into

evidence of Morris' allocution as petitioner had ample evidence at his disposal by which he was able to pin the murder on Morris, that being the three eyewitness identifications of Morris plus the uncontested fact that the police initially arrested and charged Morris for the murder. Petitioner's trial attorney had every right to make arguments to the jury, even if those arguments are untrue, but an accused's right to confront witnesses should not be transformed into a vehicle that allows parties to mislead juries with impunity vested with the knowledge that otherwise reliable and accurate evidence that would correct such a false statement will be barred from coming before the jury. Petitioner's trial counsel was fully aware that making a false statement implying that Morris possessed a 9mm firearm would open the door to the admission of evidence establishing that Morris did not possess a 9mm firearm and petitioner's trial counsel made the strategic decision to do so nonetheless. The issue before the Court is not one of purported conflict between the Confrontation Clause and the opening the door doctrine; the issue before the Court is the essential objective of a trial: "The basic purpose of a trial is the determination of truth." *Tehan v. U.S. ex rel. Shott*, 382 U.S. 406, 416 (1966). To that end, amicus humbly requests that the decision the Court issues in the case at bar give full force and effect to the Sixth Amendment but not allow a party to benefit from its own wrong by preventing the admission of accurate evidence to mitigate the prejudice resulting from a party's tactical decision to attempt to mislead a jury.

The trial record further establishes that Morris' allocution played no role in the jury's verdict as the jury conducted a thorough and methodical review of

the trial evidence before rendering its verdict and did not request readback of Morris' allocution, as demonstrated by its notes to the court during its deliberations (1720, 1734, 1748, 1759, 1781; Joint App. 364-70). *See Chapman v. California*, 386 U.S. 18, 23 (1967); *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986).

CONCLUSION

Morris' plea allocution, by its non-accusatory and non-testimonial nature, did not implicate or violate petitioner's rights under the Sixth Amendment and its introduction into evidence was entirely lawful and proper. Accordingly, petitioner's appeal should be denied in all respects and the conviction of Darrell Hemphill for the murder of David Pacheco, Jr. should stand.

Respectfully submitted,

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