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

REPLY BRIEF FOR PETITIONER

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

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

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

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Other Authorities

REPLY BRIEF FOR PETITIONER

Try as it may, the State is unable to defend the decision below. The procedural objections the State raises were thoroughly aired at the certiorari stage and have no more purchase now. The State's merits arguments, in turn, ignore the real reason why the trial court admitted Morris's allocution—not because defense counsel engaged in any impropriety, but because petitioner contended (quite plausibly) that Morris "was, in fact, the actual shooter." J.A. 184 (trial court ruling). Simply put, the "opening the door" principle the State invoked is a state evidentiary rule of "expanded relevance." 21 Charles Alan Wright et al., *Federal Practice and Procedure* § 5039.1 & n.2 (2d ed. 2021). Whatever the merit of that principle in other contexts, it cannot override the Confrontation Clause's bar against introducing testimonial hearsay.

Indeed, arguing that someone else did it is as old as criminal law itself. Yet the State freely admits that the rule the state courts applied "falls completely outside any discussion of historical exceptions, or treatises relating to the Confrontation Clause's evidentiary scope as understood by the Framers." Resp. Br. 32. This is a telling admission. The Confrontation Clause establishes indispensable requirements for admitting testimonial evidence against the accused: the declarant's presence and an opportunity for cross-examination. Neither the State nor New York courts may second-guess the Clause's rule of exclusion when those requirements are not met—least of all on the ground that "the adversarial factfinding process," *id.* 31, would supposedly be better served by suspending the rule.

I. The State's arguments for avoiding the question presented lack merit.

The State makes two attempts to divert the Court's attention from the question it granted certiorari to resolve. Neither attempt succeeded at the certiorari stage, and neither succeeds now.

A. Petitioner's federal claim is properly presented.

The State first reprises its contention that petitioner's Sixth Amendment claim is not properly presented. *Compare* Resp. Br. 17-23 *with* BIO 8-15. This contention fails for two independent reasons: Petitioner clearly argued throughout the state courts that admitting Morris's allocution would violate the Confrontation Clause, and the state courts indisputably considered and rejected the claim.

1. In the trial court, petitioner objected that the introduction of Morris's allocution would be a "*Crawford* violation" because petitioner would be "deprived of the opportunity to examine Mr. Morris." J.A. 160. The court, however, "granted the People's application" to admit the statement, reasoning that petitioner "had opened the door to the otherwise inadmissible *Crawford* evidence by implicating Morris as the shooter through his opening statement and cross-examinations." BIO 4; *see* J.A. 182-86.

At both stages of appeal, petitioner dedicated large sections of his briefs to reprising his argument that admitting Morris's allocution violated the Confrontation Clause. *See* BIO App. 107-13, 360-64 (Appellate Division briefing); J.A. 382-89, 403-06 (Court of Appeals briefing). Echoing the trial court's ruling, the State responded that "this case invites the

same result as [*People v.*] *Reid*, [971 N.E.2d 353 (N.Y. 2012)]," in which the New York Court of Appeals held that the accused "opens the door" to the admission of testimonial hearsay when he advances a defense at trial that the hearsay would purportedly rebut. BIO App. 427; *see also id.* 218-30, 422-30. Petitioner had no obligation to preserve any particular *reply* to the State's *response* to his federal claim. Regardless, petitioner directly disputed that a defendant, under the circumstances here, can open the door to evidence that is otherwise inadmissible under the Confrontation Clause. Specifically, petitioner argued that a defendant cannot lose his right under *Crawford* to exclude testimonial hearsay simply by "advancing an argument that makes otherwise inadmissible evidence relevant." J.A. 386-88. That is precisely the argument he makes now.

Nothing about New York procedure complicates this straightforward analysis. The State suggests the Court of Appeals lacked the power to consider in this case whether it correctly held in *Reid* that defendants may open the door to evidence otherwise barred by the Confrontation Clause. Resp. Br. 22. But in the only case the State cites for this procedural proposition, the defendant never advanced *any federal basis at all* for excluding the evidence at issue before the case reached the New York Court of Appeals. *See People v. Massie*, 809 N.E.2d 1102, 1105 n.3 (N.Y. 2004). Here, petitioner argued all along that admitting Morris's allocution violated the Confrontation Clause, and he directly urged the New York Court of Appeals to refrain from applying *Reid*. J.A. 385-88.

2. Even if there had been deficiencies in petitioner's argumentation below, it would not matter.

"There can be no question as to the proper presentation of a federal claim when the highest state court passes on it." *Raley v. Ohio*, 360 U.S. 423, 436 (1959); *see also, e.g.*, *Cohen v. Cowles Media Co.*, 501 U.S. 663, 666-67 (1991); *Payton v. New York*, 445 U.S. 573, 582 n.19 (1980). Such is the case here.

As part of its terse decision, the New York Court of Appeals held that the trial court did not err in "admitting evidence that [Morris] pled guilty to possessing a firearm other than the murder weapon." Pet. App. 2a. While this holding does not directly reference the Sixth Amendment, petitioner's only argument for excluding the allocation was that its introduction violated the Confrontation Clause. Accordingly, there can be no doubt that the Court of Appeals concluded—consistent with the Appellate Division's decision, *see* Pet. App. 16a-17a—that admitting Morris's testimonial plea allocution did not violate the Confrontation Clause because petitioner opened the door under *Reid*.

The State tries to distinguish the question whether *Reid* controlled the outcome below from the question whether *Reid* was correctly decided, insisting that the state courts never considered the latter question. Resp. Br. 17-18. This contention misses the mark too. The state courts were able to reject petitioner's federal claim only by applying *Reid* to the facts of this case. The decision below thus necessarily rests on the premise that defendants can open the door to the introduction of evidence that is otherwise barred by the Confrontation Clause. It is *that* necessary legal premise, as applied to this case, that petitioner challenges here. There is no doubt, therefore, that the New York Court of Appeals passed on the claim

petitioner advances here. *See, e.g.*, *Holmes v. South Carolina*, 547 U.S. 319 (2006); Resp. Br. 18-24, *Holmes v. South Carolina*, 547 U.S. 319 (2006) (No. 04-1327) (resolving question presented even though respondent faulted petitioner for failing to challenge precedent the state high court had applied); *First Eng. Evangelical Lutheran Church v. Los Angeles Cnty.*, 482 U.S. 304, 313 n.8 (1987) (resolving question presented in parallel situation because the state court "considered and decided the constitutional claim").[1]

The State's citation to *Adams v. Robertson*, 520 U.S. 83 (1997), does not suggest otherwise. In that case, the state high court "did *not* expressly address the question on which the Court granted certiorari." *Id.* at 86 (emphasis added). As just explained, the converse is true here; the New York appellate courts expressly rejected petitioner's claim, grounded in the Confrontation Clause, that the trial court erred in admitting Morris's allocution. The state courts thus plainly had "occasion to consider" the federal question presented here—which is the whole point of the "pressed or passed upon" requirement. *Id.* at 90; *see also Webb v. Webb*, 451 U.S. 493, 501 (1981).

---

[1] Contrary to the State's argument (Resp. Br. 21 n.7), *Riley v. California*, 573 U.S. 373 (2014), is another case comparable to this one. The defendant in that case argued in the California Supreme Court only that that court's recent decision allowing warrantless searches of cell phones incident to arrest did not apply—not that the recent decision itself was erroneous. *See* Pet. for Rev. 19, *People v. Riley*, No. S209350 (Mar. 13, 2013). That California in that case did not challenge the propriety of this Court's resolving the question presented, *see* Resp. Br. 21 n.7, only underscores the weakness of the State's argument here.

B. The introduction of Morris's allocution was not harmless.

The State also contends that "any error" in the admission of Morris's allocution was harmless. Resp. Br. 49. Although this Court's "general custom" is to leave harmless-error analyses for lower courts to conduct on remand, *Lilly v. Virginia*, 527 U.S. 116, 139 (1999), it has sometimes addressed such issues in the first instance. *See, e.g.*, *McDonnell v. United States*, 136 S. Ct. 2355, 2375 (2016). If the Court were to do so here, it would readily find that Morris's allocution so obviously played a role in securing petitioner's conviction that it cannot have been harmless.

The key issue in petitioner's trial was who fired the shot that killed the victim. Several eyewitnesses identified Morris ("who does not resemble [petitioner]") as the shooter, and certain physical evidence supported that conclusion. Pet. App. 23a (Manzanet-Daniels, J., dissenting); *see also* Petr. Br. 5-6; Resp. Br. 4-6. The accomplice, Ronnell Gilliam, claimed at trial that petitioner was the shooter. But this testimony constituted a change from his initial account *agreeing* with the other eyewitnesses that the perpetrator was actually Morris. Pet. App. 4a (Fahey, J., dissenting). And even apart from that about-face, the jury was required to consider his accomplice testimony with a "suspicious eye"—all the more so because it was given to "receive lenient treatment" from the State. *People v. Moses*, 472 N.E.2d 4, 7 (N.Y. 1984); *see also* Tr. 1695-97 (jury instruction); Amicus Br. of Innocence Project & Innocence Network 3-14.

Against this backdrop, the notion that Morris's allocution was "harmless beyond a reasonable doubt," *Chapman v. California*, 386 U.S. 18, 24 (1967), is

fanciful. The allocution was an ex parte statement from the alternative suspect of the shooting purporting to exonerate himself. Worse yet, it was presented with a formalized imprimatur of truth, even though there were very serious reasons to doubt its veracity. *See* Petr. Br. 22-24. It is undoubtedly possible—indeed, highly probable—that the jury relied on the allocution to reach its verdict.

The State insists that there was "substantial independent evidence of petitioner's guilt." Resp. Br. 49. Of course, that is not the standard for upholding a conviction in the face of constitutional error. Even so, the State's contention is incorrect on its own terms. The State focuses on the fact that a blue sweater found in Gilliam's apartment contained petitioner's DNA. *Id.* 5-6. But Gilliam was petitioner's cousin; there was nothing inherently suspicious about the presence of the sweater in his apartment. Nor did a single eyewitness identify the sweater as the garment the shooter wore. Pet. App. 24a & n.4 (Manzanet-Daniels, J., dissenting). Neither did any forensic testing link the sweater to the crime.[2]

Indeed, the State's own theory of the sweater's centrality does not add up. The State points to

---

[2] The State says that "[n]o testing [for gunpowder] was conducted." Resp. Br. 6 n.4. But the state laboratory performed forensic tests of fibers and metal particles on the sweater to see if it could be linked to a gun and found "no residue consistent with the discharge of a firearm." Tr. 1113; *see also id.* 1107, 1110-12. Nor did an analyst's "visual examination" of the sweater find any gunpowder. *Id.* 1119-20. And if the reason for sending the sweater for testing was really that the detective thought from the beginning that it "smelled of burnt gunpowder," Resp. Br. 6 & n.4, the State never explains why it did not use, or later send the sweater to, a lab that could perform all of the right tests.

eyewitness claims that the shooter had "a tattoo" on his "forearm." Resp. Br. 4; BIO 2. Yet petitioner's only tattoo is on his "upper right shoulder." Tr. 988-89. And if petitioner had been wearing the blue sweater, its long sleeves would have covered up his tattoo, even if they were rolled up around his elbows.

If ever the improper introduction of testimonial hearsay might have affected a verdict, the admission of Morris's allocution did. The confrontation error here entitles petitioner to a new trial.

II. The admission of Morris's allocution violated the Confrontation Clause.

The State's arguments on the merits are no more persuasive. The New York courts held that Morris's allocution was admissible because petitioner "opened the door" to its introduction. Pet. App. 16a; *see also* J.A. 184-85. As the opening brief noted (at 3), the phrase "opening the door" is "notoriously imprecise"—so much so that learned commentators have remarked that "it would be no great loss if the phrase 'opening the door' disappeared from the lexicon of evidence law." 21 Charles Alan Wright et al., *Federal Practice and Procedure* §§ 5039, 5039.1 (2d ed. 2021); *see also* Resp. Br. 37 (using the phrase indistinctly). Despite this imprecision, it is clear that "opening the door," as employed in this case, is an evidentiary rule of expanded relevance. That is, the rule allows a party to introduce evidence, even if otherwise inadmissible, to contradict a submission or argument the opponent has advanced. Whatever the merit of applying that principle to allow the introduction of evidence otherwise inadmissible on hearsay or other evidentiary grounds, it is not a legitimate basis for superseding the constitutional right to confrontation.

A. Morris's allocution was admitted simply because petitioner's defense rendered it relevant.

According to the State, New York's "opening the door" rule is not necessarily an "evidentiary" rule at all. Resp. Br. 31. As the State now puts it, the concept is "better understood" in a case like this as a "procedural rule" that provides a remedy for presenting "inadmissible" evidence or for other "improper" conduct at trial. *Id.* 15, 31, 46, 48. The State's argument mangles New York law and bears no relation to what transpired below.

1. "Opening the door" is one of New York's "rules of evidence." New York State Unified Court System, *Guide to New York Evidence* 1.01; *see also id.* 4.08.[3] To determine whether a party has opened the door, courts consider: "'whether, and to what extent, the evidence or argument said to open the door is incomplete and misleading, and what if any otherwise inadmissible evidence is reasonably necessary to correct the misleading impression.'" *People v. Reid*, 971 N.E.2d 353, 357 (N.Y. 2012) (quoting *People v. Massie*, 809 N.E.2d 1102, 1105 (N.Y. 2004)).

Nothing about this two-part test turns on introducing *inadmissible* evidence or making an *improper* argument. To be sure, the opening-the-door rule can be triggered by "misleading" evidence. *Massie*, 809 N.E.2d at 1105. But New York courts use the term "misleading" simply to mean that the defendant's evidentiary submission or argumentation is "*in conflict* with the [otherwise] precluded evidence."

---

[3] The Guide is available at https://perma.cc/TJT8-G66H; *see also* Petr. Br. 36 n.6.

People v. Fardan, 628 N.E.2d 41, 45 (N.Y. 1993) (emphasis added); *see also People v. Blakeney*, 671 N.E.2d 1269, 1270 (N.Y. 1996); Petr. Br. 17.[4]

In other words, New York courts—like courts in other jurisdictions—often use the term "opening the door" to denote nothing more than "expanded relevance." 21 Wright, *supra* § 5039.1 & n.2. "[A]s the parties offer relevant evidence to prove their cases, each bit of evidence opens up new avenues of refutation and confirmation . . . beyond those consequential facts expressed in the pleadings." *Id.* The opening-the-door rule allows the introduction of that newly relevant evidence to meet the other side's

---

[4] The State protests that New York courts do not deem evidence "misleading" every time "the defense tries merely to contradict the People's theory of the case." Resp. Br. 47. There are, however, many New York cases where contradiction was enough. *See, e.g.*, *People v. Abrams*, 900 N.Y.S.2d 489, 492-93 (App. Div. 2010) (otherwise inadmissible evidence of defendant's gang affiliation admitted because defendant testified he frequently changed his residence because he was threatened by gang members); *People v. Cole*, 873 N.Y.S.2d 603, 604 (App. Div. 2009) (otherwise inadmissible pretrial identification admitted because defendant introduced evidence that a different eyewitness failed to identify him in photo array); *Fardan*, 628 N.E.2d at 44-45 (otherwise inadmissible prior conviction admitted because defendant's witness testified that he had been "a nonviolent type of individual, by and large . . . throughout his life"); *see also* Amicus Br. of Bronx Defenders et al. 8-12 (describing other scenarios based on experience of public defenders in New York). Insofar as the State offers a couple of counterexamples, Resp. Br. 47, they demonstrate only that the opening-the-door principle is so impressionistic that it can be applied erratically. Where the right to confrontation is at stake, such unpredictability is a vice, not a virtue. *See Crawford v. Washington*, 541 U.S. 36, 63 (2004); Amicus Br. of NACDL 7-9.

arguments, and in New York also cancels out competing evidentiary bars.[5]

2. The New York courts admitted Morris's allocution under this concept of expanded relevance. In its merits brief, the State asserts for the first time that the trial court's application of the opening-the-door rule here was a remedy for introducing "inadmissible" evidence or engaging in "improper" argumentation. Resp. Br. 15, 23, 39-48. But this new theory is belied by the record.

The State moved at trial to introduce Morris's allocution on the ground that petitioner's third-party defense (including his reliance on the 9-millimeter bullet found in Morris's apartment) made the allocution "*relevant* [to] the issues that this jury will confront." J.A. 139 (emphasis added). The State claimed that the allocution would "establish a fact that is an issue before this trial jury, which is what weapon was Nicholas Morris possessing on April 16, 2006 at the time this murder was committed." *Id.* 140-41.

Considering this relevance-based motion, the trial court stressed that petitioner's third-party defense

---

[5] The State notes that the rule of completeness is "[a]nother example" under New York law "of the door-opening principle." Resp. Br. 33; *see also Massie*, 809 N.E.2d at 1105 ("incomplete" evidence can trigger rule). But as petitioner has already explained, the rule of completeness applies only where a party has introduced a fragment of an out-of-court statement. Petr. Br. 35-36. Petitioner never introduced any part of any statement by Morris. Consequently, even if the rule of completeness could sometimes allow the introduction of otherwise inadmissible testimonial hearsay—perhaps on the theory that a defendant who introduces part of a testimonial statement places that witness's testimony at issue, *see* Amicus Br. of Richard D. Friedman 20—that would not matter here.

was "in all respects . . . appropriate" and "probably a necessary argument to make." J.A. 185; *see also id.* 120 (noting that petitioner's defense was "in all respects a[] fair argument"). But the court held that the defense nevertheless opened the door to the admission of the allocution. Here is the trial court's ruling in relevant part:

> It's apparent from the examination of witnesses thus far and from the defense counsel's opening that a significant aspect of the defense in this case is that Morris, who [wa]s originally prosecuted for this homicide, was, in fact, the actual shooter and that as such, the defendant, Hemphill, was excluded as the shooter. There is, however, evidence contrary to the argument presented by the defense in this case that Hemphill may have possessed a different firearm than Morris and that Morris' firearm cannot be connected to this shooting.
>
> Morris' allocution during his plea relates to his possession of a .357. The weapon that caused the death in the case was a nine millimeter.
>
> In my judgment, the defense's argument, *which in all respects is appropriate and under the circumstances of this case probably a necessary argument to make*, nonetheless, opens the door to evidence offered by the state refuting the claim that Morris was, in fact, the shooter.
>
> . . . .
>
> [T]he defense arguments in this case that we heard and arguments I anticipate, open

> the door to the admission of Morris' allocution or, at least a portion of Morris' allocution, to the extent that it acknowledges he was in possession of a weapon but that that weapon was a .357 magnum and not a nine millimeter.
>
> And finally, that under the analysis I have made reference to . . . any *Crawford* considerations would not give rise to error.

J.A. 184-86 (emphasis added); *see also id.* 120 (foreshadowing this ruling with same reasoning).

The proceedings in New York's appellate courts followed the same reasoning. In the Appellate Division, the State explained that the trial court admitted the allocution because petitioner, "through his opening statement and cross-examination so far implicating Morris as the shooter, had opened the door to admitting otherwise inadmissible *Crawford* evidence to refute that claim." BIO App. 219. And the State defended that ruling on grounds having nothing to do with purportedly "improper" conduct. In the State's words:

> During [defense] counsel's opening statement and cross-examination of witnesses, he repeatedly suggested that since Morris had .9mm ammunition on his bedside table, he must have had access to a .9mm firearm, the same type of weapon that killed David Pacheco, Jr., and made it his trial defense that Morris used a .9mm firearm to murder David. This left the jury with "incomplete and misleading" information that Morris possessed the murder weapon on the date and time of the crime (*Reid*, 19 NY3d at

> 388) when the available evidence established that Morris had possessed a .357 firearm on the day in question. Accordingly, admitting this plea allocution was "necessary to correct the misleading impression" (*Reid*, 19 NY3d at 382-83). . . . In sum, when defendant pursued a third-party culpability defense stating Morris possessed the same caliber weapon that killed the victim, he opened the door for the People to admit evidence that Morris possessed a different caliber weapon to avoid misleading the jury.
>
> . . . .
>
> Put another way, simply because an argument is "appropriate" and "necessary" in a particular case, does not mean that it will not open the door to rebuttal evidence.

BIO App. 226-27, 229. The Appellate Division accepted this argument, reasoning, just like the trial court, that the allocution was admissible because petitioner suggested that "Morris possessed a 9 millimeter handgun." Pet. App. 17a.

The State advanced the same argument, almost verbatim in all pertinent respects, in the New York Court of Appeals. *See* BIO App. 427-29. That court agreed with the State and the lower courts that the allocution was admissible to show that Morris "pled guilty to possessing a firearm other than the murder weapon." Pet. App. 2a. This allocution was not admissible because petitioner did anything wrong. It was because petitioner's defense rendered Morris an "allegedly culpable third party." *Id.*

B. The Confrontation Clause does not allow the admission of testimonial hearsay simply because it becomes relevant.

The State never directly argues that the accused can lose his right to confrontation simply by mounting a defense that causes testimonial hearsay to become relevant. Nor could the State sustain any such claim. In most every scenario in which the prosecution would like to introduce testimonial hearsay, the declaration is relevant. Indeed, it is not uncommon for such a declaration to directly contradict the defendant's contentions (particularly where, as here, it comes from an alleged accomplice). Yet for centuries, courts have barred the admission of such out-of-court statements absent an opportunity for cross-examination. *See* Petr. Br. 18-21; Amicus Br. of Evidence & Crim. Proc. Professors 17-18. The State nevertheless references a hodgepodge of doctrines and concepts in defense of the judgment below. Each of these efforts fails.

1. Waiver / equitable forfeiture

The State first suggests that opening the door, as applied here, is "the equivalent of failing to object to the confrontation violation." Resp. Br. 31; *see also id.* at 30 (comparing this situation to "a failure to object and preserve the issue for appeal"). This is a puzzling contention. It is true that defendants can forfeit their right to confrontation by failing to object in a timely manner. *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 314 n.3 (2009). But that axiom has no bearing here. As noted above, petitioner expressly objected from the beginning that introducing Morris's allocution would be "a *Crawford* violation." J.A. 160. That is the converse of "failing to object."

Insofar as the State's analogy to "waiver" is really meant to invoke the concept of equitable forfeiture, that contention falls flat as well. The "only" historically recognized way to forfeit the right to confrontation is to "engage[] in conduct *designed* to prevent the witness from testifying." *Giles v. California*, 554 U.S. 353, 359 (2008). Petitioner did nothing of the sort here. Nor did he do anything that had even the *effect* of frustrating the State's ability to put Morris on the stand—or that was otherwise inconsistent with asserting his right to confrontation. Petr. Br. 27-30.[6] And even if some other form of misconduct could also forfeit the right, petitioner's third-party defense was "in all respects [] appropriate." J.A. 185; *see also supra* at 11-14.

The State's argument falters on still another level too. Even if the purpose of admitting Morris's allocution had been to counter an "improper" invitation by petitioner for the jury to "speculat[e] about what had happened to Morris's case," Resp. Br. 39, 42, 46, any "remedy" for improper actions that would otherwise violate a constitutional right must be tailored to the problem it is intended to address, *see Illinois v. Allen*, 397 U.S. 337, 344-46 (1970). That means a court should consider "alternatives" before allowing the introduction of otherwise inadmissible testimonial evidence. *Tennessee v. Street*, 471 U.S. 409, 415-16 (1986).

---

[6] The State contends that Morris was "unavailable" to testify. Resp. Br. 43. The trial court made no such finding for confrontation purposes because New York's opening-the-door rule does not require it. At any rate, petitioner had nothing to do with the State's failure to produce Morris as a witness.

Here, at least two alternatives to admitting Morris's allocution would have been readily available. First, the trial court could have struck the purportedly improper comments by petitioner's counsel and ordered the jury to disregard them. *See, e.g.*, *United States v. Young*, 470 U.S. 1, 13 (1985); *People v. Hodges*, 654 N.Y.S.2d 279, 281 (Sup. Ct. 1997), *aff'd*, 692 N.Y.S.2d 92 (App. Div. 1999). Second, the trial court could have allowed the jury to learn that the State "ultimately dropped th[e murder] charge[]" against Morris. Resp. Br. 45. Accordingly, even under the State's new (baseless) theory of misconduct, the trial court would still have had no legitimate basis for admitting Morris's allocution.

2. Case law regarding prophylactic rules

Under *Kansas v. Ventris*, 556 U.S. 586 (2009), prophylactic rules are subject to judicial balancing, but constitutionally "mandate[d]" exclusionary rules are not. *Id.* at 590-94. The State resists this dichotomy, pointing to *United States v. Robinson*, 485 U.S. 25 (1988). Resp. Br. 25-26. But *Robinson* is fully consistent with *Ventris*. *Robinson* involved the rule—adopted in *Griffin v. California*, 380 U.S. 609 (1965)—that prohibits the prosecution from arguing to the jury that a defendant's refusal to testify is "substantive evidence of guilt." *Robinson*, 485 U.S. at 34. Both supporters and detractors of that rule agree it is a "prophylactic rule" with no historical foundation. *Id.* at 41 (Marshall, J., dissenting); *see also Mitchell v. United States*, 526 U.S. 314, 331-36 (1999) (Scalia, J., dissenting). Thus, the *Griffin* rule, unlike the constitutionally mandated *Crawford* rule, is subject to judicial balancing.

The State also questions whether the Sixth Amendment truly "demands exclusion of *all* unconfronted [testimonial] hearsay." Resp. Br. 33. This argument, however, runs headlong into history and this Court's precedent, which make clear that "[w]hen testimonial evidence is at issue, . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Crawford*, 541 U.S. at 68; *see also Giles*, 554 U.S. at 376 n.7 (plurality opinion); Petr. Br. 32. Absent such a showing, testimonial hearsay is inadmissible, *Crawford*, 541 U.S. at 61-62—particularly where, as here, the argument for admissibility is nothing more than expanded relevance.

3. "Integrity of the adversarial factfinding process"

Finally, the State makes various appeals to the "integrity of the adversarial factfinding process at trial." Resp. Br. 31; *see also id.* 32, 37. A group of states as amici similarly urge the Court to "reject Petitioner's attempt to secure a rule that would allow defendants to use the Confrontation Clause to manipulate the evidentiary picture in a way that subverts a trial's truth-finding process." Amicus Br. of Utah et al. 5.

These arguments are little more than pleas to erase the right to confrontation from the Sixth Amendment. The Confrontation Clause itself is designed "to advance 'the accuracy of the truth-determining process in criminal trials.'" *Street*, 471 U.S. at 415 (quoting *Dutton v. Evans*, 400 U.S. 74, 89 (1970)). And it does so in a "particular manner"—by insisting that prosecutorial testimony be subject to "testing in the crucible of cross-examination."

Crawford, 541 U.S. at 61. "The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent)," but also that an opportunity to cross-examine the prosecution's witnesses is essential to the "'clearing up of truth.'" *Id.* at 61-62 (quoting 3 William Blackstone, *Commentaries on the Laws of England* *373 (1768)); *see also id.* at 62 ("adversarial testing 'beats and bolts out the Truth much better'" (quoting Matthew Hale, *History and Analysis of the Common Law of England* 258 (1713))); *Mattox v. United States*, 156 U.S. 237, 242-43 (1895) ("The primary object" of the Confrontation Clause is to ensure adequate means to assess whether a witness's testimony "is worthy of belief"); Petr. Br. 22-24.

The State protests that the opening-the-door rule does not depend on judicial assessments of the "reliability" of the testimonial hearsay the prosecution seeks to introduce. Resp. Br. 31-32. It is hard to understand, however, how a trial court could determine that testimonial hearsay is "required to correct" a misimpression, *id.* 47, without first concluding that the hearsay is so reliable that the jury should consider it alongside whatever evidence the defendant has introduced. *See* Amicus Br. of Bronx Defenders et al. 5-7, 13-16. The trial court here, in fact, expressly found that the allocution "reache[d] an appropriate threshold of *reliability*" to justify admission. J.A. 185 (emphasis added).

In any event, the State misses the point. The Framers deemed testimonial hearsay inadmissible unless the accused was previously able to cross-examine the unavailable declarant. That constitutional determination forecloses "any open-

ended exceptions from the confrontation requirement to be developed by the courts." *Crawford*, 541 U.S. at 54. Indeed, the Confrontation Clause would be "no guarantee at all if it [were] subject to whatever exceptions courts from time to time consider 'fair.'" *Giles*, 554 U.S. at 375 (plurality opinion); *see also* Amicus Br. of ACLU et al. 6-11; Amicus Br. of Const. Accountability Ctr. 9-19.

The prosecution, of course, generally may respond to defense submissions and arguments by introducing *admissible* evidence of its own. Here, for instance, the State was allowed to submit evidence that .357 bullets were found in Morris's apartment. *See* J.A. 115, 118-21. The State was also able to present Gillam's (dubious) in-court testimony that Morris possessed a .357 at the scene and that petitioner was the shooter. Tr. 979-80. But what the prosecution may *not* do in response to the accused's reliance on admissible evidence or a legitimate defense theory is introduce *otherwise inadmissible* testimonial hearsay. That is a classic violation of the Sixth Amendment right to confrontation—a guarantee that is "essential and fundamental" to "the kind of fair trial which is this country's constitutional goal," *Pointer v. Texas*, 380 U.S. 400, 405 (1965).

CONCLUSION

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

Respectfully submitted,

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

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

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

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

September 3, 2021