SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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DARRELL HEMPHILL,)

Petitioner,)

v.) No. 20-637

NEW YORK,)

Respondent.)

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Pages: 1 through 80

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3 DARRELL HEMPHILL,)
4 Petitioner,)
5 v.) No. 20-637
6 NEW YORK,)
7 Respondent.)
8 - - - - - - - - - - - - - - - - - -
9
10 Washington, D.C.
11 Tuesday, October 5, 2021
12
13 The above-entitled matter came on for
14 oral argument before the Supreme Court of the
15 United States at 10:55 a.m.
16
17 APPEARANCES:
18 JEFFREY L. FISHER, ESQUIRE, Stanford, California; on
19 behalf of the Petitioner.
20 GINA MIGNOLA, Assistant District Attorney, Bronx, New
21 York; on behalf of the Respondent.
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23
24
25

1 C O N T E N T S

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1 P R O C E E D I N G S
2 (10:55 a.m.)
3 CHIEF JUSTICE ROBERTS: We'll hear
4 argument next in Hemphill versus New York.
5 Mr. Fisher.
6 ORAL ARGUMENT OF JEFFREY L. FISHER
7 ON BEHALF OF THE PETITIONER
8 MR. FISHER: Mr. Chief Justice, and
9 may it please the Court:
10 A defendant cannot lose his right
11 under the Confrontation Clause to exclude
12 testimonial hearsay simply by making a
13 legitimate defense based on admissible evidence,
14 and that is true even if the hearsay the
15 prosecution would like to introduce would
16 supposedly contradict that defense. To the
17 contrary, history and experience tell us that is
18 when the clause's guarantee of cross-examination
19 is at its most urgent.
20 The state never directly disputes the
21 legal propositions I just advanced. Instead, in
22 the state's red brief, it advances for the first
23 time a new argument never before made in this
24 case. According to the state's new theory, Mr.
25 Hemphill forfeited his confrontation rights

1 because he made supposedly improper arguments at
2 trial.
3 And apart from this new theory's
4 eleventh-hour appearance, there are two major
5 problems. First, it finds no support in the
6 record. The Joint Appendix is crystal-clear
7 that the reason why the trial court admitted
8 Morris's allocution was because Mr. Hemphill
9 claimed Mr. Morris was the shooter. He advanced
10 a third-party defense. And the state again and
11 again asked to introduce Mr. Morris's allocution
12 to refute that defense.
13 And I'll turn the Court to Joint
14 Appendix page 185, which is where, at the top of
15 that page, the trial court summarizes its
16 ruling. It says the defense's argument is in --
17 "in all respects is appropriate and, under the
18 circumstances of this case, probably a necessary
19 argument to make." But then the trial court
20 says, "Nonetheless, that argument opens the door
21 to evidence offered by the state refuting the
22 claim that Morris was, in fact, the shooter."
23 The second problem with the state's
24 new theory is that it finds no support in New
25 York law either. New York's "opening the door"

1 theory has no impropriety requirement. Instead,
2 all it requires is the evidence the prosecution
3 seeks to introduce to be in conflict or
4 contradiction to the defense -- defense's own
5 evidence or the defense's arguments.
6 And that's why the state itself
7 admitted at pages 4 and 5 of its brief in
8 opposition -- I'm sorry, of its brief in
9 opposition in this Court, just like throughout
10 the state courts, that the reason why Morris's
11 allocution was admitted was because it
12 contradicted the defense, not because of any
13 supposed impropriety.
14 So, at bottom, what you have in front
15 of you today is a state law rule in a holding
16 under Reid, the New York court of appeals
17 decision, that says that a legitimate defense
18 based on admissible evidence can forfeit the
19 Confrontation Clause.
20 That rule flouts the history, purpose,
21 and experience of the Confrontation Clause. I'm
22 happy to entertain the Court's questions, but I
23 will -- otherwise I turn first to history.
24 JUSTICE THOMAS: A couple of quick
25 questions, Mr. Fisher.

1 The -- I mean, you point to the
2 state's eleventh-hour change in arguments, but I
3 think we -- you have some eleventh-hour changes
4 too, it appears.
5 Did you focus on the constitutionality
6 of Reid? Below, it seemed as though you were
7 challenging the application of Reid and did not
8 assume that even if Reid were properly applied
9 that you would have a Confrontation Clause
10 problem.
11 MR. FISHER: Justice Thomas, we made
12 -- we made a Sixth Amendment argument all the
13 way through the case, including challenging the
14 state's argument that Reid dictated a forfeiture
15 of the right here. And the place that it's most
16 directly made is at pages 386 and 388 of the
17 Joint Appendix. That's our brief to the New
18 York court of appeals.
19 And, there, we said -- and this is on
20 page 388. We said that if Reid is construed to
21 mean that simply rendering testimonial evidence
22 relevant because it would dispute the defense
23 case, then Reid cannot be squared with the Sixth
24 Amendment and it has to be wrong.
25 And so we said quite directly to the

1 New York court of appeals exactly what we're
2 saying here, is that a -- a rule of opening the
3 door that depends on expanded relevance cannot
4 be squared with the Confrontation Clause.
5 That's the core of the argument we're making
6 with -- in front of you here today. I think --
7 JUSTICE SOTOMAYOR: Mr. Fisher, under
8 what theory would Reid be constitutional? I
9 thought Reid basically said you can open the
10 door to testimonial hearsay. So isn't your --
11 why was your argument as applied? When would it
12 ever work --
13 MR. FISHER: Well, I -- I --
14 JUSTICE SOTOMAYOR: -- under your
15 theory?
16 MR. FISHER: -- I don't think it would
17 ever work, Justice Sotomayor. And we've made
18 that clear --
19 JUSTICE SOTOMAYOR: So answer ---
20 MR. FISHER: -- in our briefing too,
21 but --
22 JUSTICE SOTOMAYOR: -- Justice
23 Thomas's question. Why didn't you just say Reid
24 is unconstitutional?
25 MR. FISHER: Well, because, remember,

1 we were in the New York court of appeals facing
2 Reid, and I think what we said to the New York
3 court of appeals was, if there's any chance that
4 Reid has any legitimacy to it, it would have to
5 be limited to something like the rule of
6 completeness.
7 There's a New York appellate division
8 case called Ko, and that's what the New York
9 court of appeals had relied on in Reid. And we
10 said, at the very least, you have to limit Reid
11 to the situation of a rule-of-completeness
12 scenario. And I think that would be the only
13 arguable situation.
14 Now, as we explained in our briefs, we
15 think even in a rule-of-completeness situation,
16 there would be no legitimate "open the door"
17 theory that would forfeit constitutional rights.
18 But we also admit, Justice Sotomayor, that's not
19 a question this Court would have to decide in
20 this case.
21 JUSTICE BREYER: We wouldn't, but I'm
22 curious, in your view, the -- the defendant's
23 argument is that he had on such and such a day a
24 fever of 103 and in the hospital. And the --
25 the petitioner says, I would like to introduce

1 the records that are kept, the medical records,
2 which are, of course, hearsay, that shows he had
3 a temperature of 101.
4 Are you saying he can't do that? I
5 mean, he can't -- doesn't cross-examine the
6 people who -- who kept the medical records.
7 There were, like, you know, a lot of them in the
8 hospital.
9 MR. FISHER: Well, Justice Breyer, we
10 have no problem with the "opening the door"
11 theory as a matter of ordinary evidence law.
12 JUSTICE BREYER: No, it's not --
13 MR. FISHER: But we're asking --
14 JUSTICE BREYER: -- ordinary evidence
15 law, as you know perfectly well and I do, that
16 the problem with Crawford is that there are all
17 kinds of hearsay exceptions which do involve a
18 -- a failure to cross-examine. You don't
19 cross-examine a hearsay exception. The person
20 isn't there. And which ones does Crawford keep
21 out and which ones doesn't? And is it just
22 historical or not?
23 Now I don't want to lead you down that
24 path where you need not go, but just in case you
25 have something that will be enlightening, I

1 wanted to give you a chance.
2 MR. FISHER: Well -- I -- if I think I
3 understand your question, you're right that our
4 theory is limited to testimonial statements and
5 that the Court has had a series of cases where
6 it's delineated that line.
7 As this case comes to this Court right
8 now, Morris's allocution is unquestionably
9 testimonial because it was made in formal ex
10 parte proceedings in front of a judge. And the
11 state, I don't think, disputes that proposition.
12 So what you have with you -- in front
13 of you is a classic case under Crawford where,
14 in Part III B of the opinion, the Court
15 painstakingly went through the historical
16 evidence and other sources of constitutional law
17 and held that if the witness is unavailable
18 through no fault of the defense or the
19 prosecution, but the statement is testimonial,
20 it has to be kept out.
21 And the weird thing about Reid is that
22 would, in effect, create an exception to that
23 rule in the most damaging of all circumstances
24 when the testimonial evidence is directly
25 contrary to the defense --

1 JUSTICE ALITO: Well, let me --
2 MR. FISHER: -- as I just said --
3 JUSTICE ALITO: -- give you another
4 example that's along the same lines as Justice
5 Breyer's. Let's say that Morris gave a
6 videotaped statement to the police and at the
7 beginning of the statement he said your client,
8 Mr. Hemphill, had nothing whatsoever to do with
9 this shooting, but then later, after being
10 confronted with evidence that undermines some of
11 the things he said, he said: Okay, fine, I
12 wasn't telling the truth before, he actually was
13 involved in this.
14 And then your client introduces the
15 first part of the statement, which is
16 exculpatory, somehow gets that in under state
17 habeas -- state hearsay law. Would you say that
18 the Confrontation Clause would bar the
19 prosecution from introducing the rest of the
20 statement where -- where Morris contradicted
21 what he said earlier?
22 MR. FISHER: Well, Justice Alito,
23 you're -- you're obviously asking about the
24 rule-of-completeness scenario that's not present
25 in this case. So our first answer would be,

1 yes, we think the Confrontation Clause would
2 prohibit the prosecution even then.
3 But I would hasten to add, Justice
4 Alito, I don't think Mr. Hemphill in your
5 hypothetical would be allowed to introduce that
6 first part of the statement in the first place.
7 JUSTICE ALITO: Well, I don't know how
8 he could, but I'm not sure how some of the
9 evidence that was -- some of what was introduced
10 here by the prosecution was admissible, but
11 that's a matter of state hearsay law.
12 But, seriously, you -- you -- you
13 think that the -- a trial could -- could
14 entertain that travesty where the exculpatory
15 part of a statement is introduced, that's
16 permitted, but the inculpatory part is not
17 introduced?
18 MR. FISHER: Again, I think you
19 wouldn't ever have that scenario because it
20 would be inadmissible in the first instance
21 under Rule 403, which under Crane and Holmes the
22 Court has said can be enforced. So the state --
23 if the state were to object, Justice Alito, that
24 objection should be sustained.
25 But I don't want to be fighting your

1 hypothetical too hard. I do understand you're
2 asking me a question about the rule of
3 completeness, and I think what the Court said in
4 Crawford and Giles is that only historically
5 grounded exceptions to the Confrontation Clause
6 are permitted.
7 And we don't see any evidence --
8 JUSTICE KAGAN: But that goes beyond
9 this case, doesn't it --
10 MR. FISHER: It goes well --
11 JUSTICE KAGAN: -- Mr. Fisher?
12 MR. FISHER: -- far beyond that case.
13 JUSTICE KAGAN: I mean, we don't have
14 to touch that, do we? Why should we touch it, I
15 suppose? Why are you even arguing it?
16 MR. FISHER: I'm just answering
17 Justice Alito's question.
18 JUSTICE KAGAN: Okay.
19 MR. FISHER: I don't think you do have
20 to go anywhere near that in this case, Justice
21 Kagan, and I think I would readily admit that's
22 a much harder question for you to have --
23 JUSTICE ALITO: Well, we --
24 JUSTICE KAVANAUGH: Mister --
25 JUSTICE ALITO: -- we --

1 JUSTICE BARRETT: Mr. Fisher?
2 JUSTICE ALITO: -- we take cases for
3 the most part -- excuse me.
4 JUSTICE BARRETT: Go ahead.
5 JUSTICE ALITO: We take cases for the
6 most part to decide important legal questions
7 and not just to determine whether there was an
8 error in a particular criminal trial in the
9 Supreme Court of New York for the County of the
10 Bronx, right?
11 So the important legal question here
12 is whether there can be a waiver of the
13 Confrontation Clause right either expressly or
14 implicitly. That's the underlying -- that's
15 what's important about this case.
16 And it may well be that the -- the New
17 York "open the door" rule goes too far, and you
18 just want a ruling on the -- the app -- on this
19 particular case, but isn't that the underlying
20 question --
21 MR. FISHER: Well --
22 JUSTICE ALITO: -- that is important
23 here?
24 MR. FISHER: -- I think that is a
25 broader framing of the question than the Court

1 needs to resolve in this case. There is a very
2 important legal question that arises under the
3 New York court of appeals decision in Reid and
4 which also has been adopted, as we noted in our
5 cert petition, by a Fifth Circuit decision, a
6 New Hampshire Supreme Court decision.
7 And that position is, leaving entirely
8 aside the rule of completeness, you have three
9 -- two states -- two state courts of last resort
10 and one federal court of appeals that have said
11 that merely introducing a defense or evidence
12 that could be contradicted by an out-of-court
13 testimonial statement is enough to forfeit the
14 Confrontation Clause right.
15 And that is a very important rule that
16 if it were adopted, as we said in our cert
17 petition and again in our merits brief, would
18 effectively wipe out the Confrontation Clause or
19 at least render it toothless in all the
20 situations where it matters the very most.
21 CHIEF JUSTICE ROBERTS: But is there
22 --
23 MR. FISHER: You can go all the way --
24 CHIEF JUSTICE ROBERTS: -- is there a
25 difference in -- in -- maybe it's a variation on

1 Justice Alito's question, but it may be an
2 important one.
3 It's one thing to say if the import of
4 the testimony that's introduced is, you know, I
5 wasn't there and the testimony that cannot be
6 confronted is he was there.
7 But it's another thing if what's being
8 admitted is nobody has said that I was there
9 and, in fact, the witness who can't be
10 confronted said he was there. It's sort of not
11 for the truth of the matter asserted, whether he
12 was there or not, but a very specific
13 incontrovertible statement, the person said he
14 was there, and he says --
15 MR. FISHER: Yeah.
16 CHIEF JUSTICE ROBERTS: -- nobody said
17 I was there. Is that a violation of the
18 Confrontation Clause?
19 MR. FISHER: So, Mr. Chief Justice,
20 I'm going to answer your question, but I first
21 want to say I agree, that's also a hard
22 hypothetical. I have not found a single case in
23 over 400 years of common law jurisprudence with
24 the rule we pronounced where that has ever come
25 up. And I think the reason why it never --

1 CHIEF JUSTICE ROBERTS: Well, there's
2 always a first time.
3 (Laughter.)
4 MR. FISHER: I mean, the reason why it
5 never comes up -- just to finish that -- my
6 preface, if you'll forgive me -- is because that
7 statement that you're imagining would be barred
8 itself by the hearsay rule. He couldn't comment
9 as to what somebody else out of court said or
10 didn't say.
11 But, if you had a hypothetical like
12 that, notwithstanding the Rules of Evidence and
13 over 400 years since King v. Payne for the rule
14 that we're propounding here, I think then I
15 would still say that the Confrontation Clause
16 would bar that remedy.
17 I think there would be other remedies
18 that the trial court could resort to, starting
19 with striking the defendant's testimony,
20 instructing the jury to disregard it, maybe even
21 informing the jury of -- of some other
22 background fact, not for a -- not for the truth
23 of the matter asserted to solve the problem.
24 And I think, Mr. Chief Justice, you've
25 given a much more extreme version of --

1 CHIEF JUSTICE ROBERTS: Well, what if
2 the witness --
3 MR. FISHER: -- what the state's --
4 CHIEF JUSTICE ROBERTS: -- what if the
5 witness is not there because the defendant
6 murdered him?
7 MR. FISHER: Well, that would raise a
8 Giles question. And if the reason for murdering
9 the witness was to keep the witness from
10 testifying, the Court's holding in Giles
11 would -- would -- would have a forfeiture there.
12 CHIEF JUSTICE ROBERTS: You mean, if
13 he murdered him --
14 MR. FISHER: If --
15 CHIEF JUSTICE ROBERTS: -- for some
16 other reason, it doesn't make a difference?
17 MR. FISHER: That's the holding of
18 Giles, Mr. Chief Justice. And I think what
19 Giles said is that it has to be an intentional
20 act on the defendant's part to keep the witness
21 from testifying. And I think that just
22 highlights -- even if you think Giles is a harsh
23 rule, it highlights how strict forfeiture is in
24 the Confrontation Clause context --
25 JUSTICE BARRETT: Mister --

1 MR. FISHER: -- and, indeed, across
2 all constitutional doctrine.
3 The defendant has to do something
4 inconsistent with asserting the right. I think
5 that's the easiest way to put it at the very
6 least. And Mr. Hemphill has done nothing in --
7 inconsistent with asserting his right to
8 cross-examine Morris.
9 He didn't introduce any statements
10 Morris made out of court, nor did he comment at
11 all on anything Morris said or didn't say. He's
12 just simply said, I have a right to
13 cross-examine the person whose testimony is
14 being used against me --
15 JUSTICE BARRETT: Mister --
16 MR. FISHER: -- which is the most
17 fundamental of all objections.
18 JUSTICE BARRETT: Mr. Fisher, let me
19 put it to you this way. Let's say that we
20 disagree with you that the rule of completeness
21 violates the Confrontation Clause, but we're
22 inclined to agree with you that the door-opening
23 rule does.
24 How do we describe the rule? Because,
25 I mean, I -- I think kind of what all these

1 questions are getting at is that the rule of
2 completeness seems like the same thing but at a
3 more precise level of generality than the
4 door-opening rule.
5 So, I mean, Justice Alito is right, we
6 don't want to write an opinion just to address
7 the facts of this case, but we would have to be
8 careful, right, if we agreed with you, to write
9 the opinion in a way that didn't close the door,
10 so to speak, on the rule-of-completeness
11 problem.
12 MR. FISHER: Right. So there would be
13 two ways that the Court could in a future case
14 distinguish the rule of completeness, neither of
15 which would undercut a ruling in my favor here.
16 One is the Court could say what the
17 Court said in Beech Aircraft, which is, when the
18 rule of completeness is invoked, the statement
19 is invoked for -- the statement is later
20 introduced for a non-hearsay purpose to give a
21 broader context for the original statement.
22 Here, by contrast, there's no doubt
23 and the state openly admits that Morris's
24 allocution was introduced for the truth of the
25 matter asserted, to prove what gun he had at the

1 scene of the crime supposedly.
2 The second way you could distinguish
3 rule of completeness would be that under a
4 theory where if the defendant put in part of an
5 out-of-court statement, for example, here, if
6 Mr. Hemphill had put in part of Morris's
7 allocution, you could think in that context that
8 the defendant has made Mr. Morris, in effect,
9 his witness. He is the one who has invoked his
10 testimony. And so it's not a witness against
11 him because the prosecution is now simply, in
12 effect, filling out the testimony of the defense
13 witness.
14 Again, neither of those theories would
15 get you in any trouble to write an opinion that
16 we're asking you to write today and with a
17 footnote that reserves the rule of completeness
18 simply saying that if the prosecution comes to
19 court and all they say is this testimonial
20 statement contradicts what the defense theory
21 is, that that cannot be enough to forfeit
22 Confrontation Clause rights.
23 JUSTICE KAVANAUGH: Mr. Fisher?
24 MR. FISHER: Yes?
25 JUSTICE KAVANAUGH: Mr. Fisher, isn't

1 there another way to write it? I'm not saying
2 that we should do this, but another way, picking
3 up from Professor Friedman's amicus brief, would
4 be that the rule of completeness is a
5 historically grounded rule that has existed for
6 centuries, but what happened here goes beyond
7 the rule of completeness for reasons that
8 Justice Barrett identified, the level of
9 generality.
10 MR. FISHER: Well, I think you're
11 certainly correct, Justice Kavanaugh, that the
12 rule of completeness does have historical roots
13 that are completely absent from the broader
14 "opening a door" theory that's in front of you
15 today.
16 I'm not so sure that those common law
17 roots -- and the state hasn't pointed to any
18 evidence to the contrary -- that those common
19 law roots included using that rule against
20 defendants in criminal cases, and that would be
21 --
22 JUSTICE KAVANAUGH: Well, Professor --
23 MR. FISHER: -- the question under
24 Crawford.
25 JUSTICE KAVANAUGH: Sorry to

1 interrupt. Professor Friedman acknowledges that
2 but says there's no indication that would be
3 applied only in favor of and not against a
4 criminal defendant as well, but I take your
5 point on that, and -- and he responds to that as
6 well.
7 MR. FISHER: I -- I -- I think --
8 Justice Kavanaugh, maybe the short answer is I
9 think you're right, that would be at least
10 another ground the Court would want to look at
11 carefully. And if the Court wanted to reserve
12 that piece of it as well, you know, sketching
13 out different theories where the rule of
14 completeness may be different, there would be no
15 problem with that here, and you could look at it
16 more closely if that it -- case ever arose.
17 It would certainly, again, not get in
18 the way of this case. My -- and my -- and my
19 critical submission to the Court right now would
20 be that this so-called "opening the door" theory
21 based on mere contradiction of the defendant's
22 case is wholly without common law foundation,
23 and that's particularly striking for two
24 reasons.
25 One is even though the Court in

1 Crawford and Giles and other cases has said that
2 the Confrontation Clause codifies the common law
3 right, the state has openly admitted in its
4 brief that it has no historical support for the
5 rule that it's arguing for today.
6 And that -- that -- that's -- that's a
7 big concession given that, for hundreds of
8 years, defendants have gone into court and said,
9 somebody else did it or I wasn't there or I
10 acted in self-defense, as Mr. Crawford himself
11 said, or as Mr. Raleigh said, I didn't
12 participate in this plot, and then the
13 out-of-court statement said, yes, you did.
14 Since the beginning of the criminal
15 law, defendants have defended themselves in ways
16 that out-of-court statements could be introduced
17 to directly contradict their test -- their --
18 their own defense, and the common law up to the
19 founding and 200-plus years since the founding
20 has always kept those statements out absent an
21 opportunity for cross-examination.
22 JUSTICE ALITO: Can I take you back to
23 Justice Thomas's first question about what you
24 did and did not raise in the court of appeals?
25 You pointed to page 388. Maybe I'm missing the

1 most important language on 388, but in the --
2 the final -- the second full paragraph on 388,
3 you -- the -- your brief began, "The Appellate
4 Division's analysis equates presenting a valid,
5 evidence-based third-party defense with
6 misleading the jury."
7 And then the final sentence -- I
8 gather this is -- this is what you're referring
9 to. It's the only one that refers to the
10 Confrontation Clause. "Such an approach is
11 absurd in the context of the Confrontation
12 Clause, the purpose of which is to afford the
13 accused the right to meaningfully test the
14 prosecution's proof." And this is under the
15 section of the brief that is labeled The Defense
16 Did Not Open the Door.
17 I mean, if I were on the New York
18 court of appeals, I would interpret that
19 argument to mean that there was a misapplication
20 of the "opening the door test" and it was this
21 misapplication that violated the Confrontation
22 Clause.
23 I'd be pretty sore, I'll tell you, if
24 I were a judge on the New York court of appeals
25 and I got back from this Court a decision that

1 said you -- you erred in your understanding of
2 the Confrontation Clause when the only thing I
3 had before me was this sentence.
4 MR. FISHER: Justice Alito, you're
5 asking an important question, and I want to give
6 you three answers.
7 JUSTICE ALITO: Yeah.
8 MR. FISHER: So -- so, first, it's not
9 just in that last sentence there; it's also
10 earlier in the paragraph that the Confrontation
11 Clause is mentioned. The Confrontation
12 Clause --
13 JUSTICE ALITO: Yeah, okay.
14 MR. FISHER: -- was also mentioned on
15 page 386, where what -- where what Mr. Hemphill
16 argued was that if relevance is enough to
17 overcome a Confrontation Clause objection, that
18 would violate the Sixth Amendment. So that's
19 the first thing, is that the Confrontation
20 Clause was threaded through this argument.
21 The second thing is it's important to
22 remember the context in which this arose. Mr.
23 Hemphill raised the argument under the Sixth
24 Amendment from the first moment of trial that
25 introducing Morris's allocution would violate

1 Crawford and the Confrontation Clause.
2 That's -- that's his federal claim,
3 that introducing Mr. Morris's allocution would
4 violate the Confrontation Clause. Opening the
5 door is the state's answer to that claim.
6 And so the state is coming to you now
7 saying even though we presented -- prevented --
8 I'm sorry, persuaded the New York courts to
9 adopt our response to his Sixth Amendment
10 argument, the defendant doesn't have the right
11 to keep making his Sixth Amendment argument.
12 And the last thing I would say,
13 Justice Alito, is even if the way you read the
14 arguments we made to the New York courts to say,
15 look, we understand that Reid holds as a matter
16 of Sixth Amendment law that a defendant can
17 waive or forfeit his confrontation right simply
18 by presenting evidence that could be
19 contradicted by testimonial hearsay, and we
20 pushed back against Reid in the New York court
21 of appeals without directly and explicitly
22 saying we think Reid is entirely wrong anyways,
23 that would just make this case exactly like two
24 of the Court's recent cases where it found no
25 preservation problem.

1 One is Holmes, where the Court wrote
2 the unanimous opinion, I believe that you
3 authored it, and the state made exactly the same
4 argument that the state is making here, where
5 the first six pages of South Carolina's brief in
6 that case, that what the defendant had done
7 there is simply argue for the misapplication of
8 a prior decision of the South Carolina Supreme
9 Court. And this Court didn't even deem that
10 argument in the opinion worthy of comment. In
11 Riley against California, you had the same
12 scenario.
13 Now I don't think we're even as far
14 out on the edge as either of those two cases,
15 but what you have is a common theme where
16 defendants go to a state court of appeals or a
17 state high court, whatever it may be called, and
18 say our -- our constitutional rights were
19 violated, and if that prior opinion is applied
20 in this case to -- to -- against me, that would
21 itself violate the Constitution.
22 And I think the Court has always found
23 that that's enough to preserve a federal
24 constitutional argument for this Court, and
25 that's what we'd rest on if -- if -- if we

1 needed to.

2 The last thing I'd like to say before

3 turning to any of the Court's one-by-one

4 questions or reserving the remainder of my time,

5 Justice Breyer, you asked me a question earlier

6 about the testimonial theory of Crawford. And,

7 obviously, my first answer is that's not in

8 front of you here today.

9 But going back to the New York court

10 of appeals opinion in Reid, it cited the case --

11 this Court's decision in Harris, which involved

12 the Miranda rule and a forfeiture exception to

13 the Miranda rule. And I want to draw out one

14 important difference there.

15 Even if you didn't want to get wrapped

16 up in the testimonial versus non-testimonial

17 line under Crawford, it's important to note that

18 this case is miles away even from Harris.

19 First of all, Harris involves a

20 prophylactic rule, and this involves a rule of

21 exclusion in the Constitution itself.

22 And the other thing in Harris is what

23 the Court said is the truth-seeking process of

24 the courts should not be perverted by allowing

25 the defendant to -- to manipulate evidence and

1 keep out trustworthy evidence.
2 Well, what you have here, even if you
3 leave Crawford entirely aside, is the classic
4 form of presumptively unreliable evidence the
5 Confrontation Clause has always been concerned
6 with.
7 JUSTICE BREYER: Well, that's this
8 case.
9 MR. FISHER: You have -- you have a
10 statement of a third party spreading blame,
11 denying -- denying guilt at least as to the type
12 of gun involved in the homicide, and giving a
13 self-exonerating statement in coordination with
14 the state with contemplation of further
15 prosecution.
16 And so whatever theory of the
17 Confrontation Clause you may have, this is the
18 classic kind of statement that needs to be kept
19 out. And in Kirby in 1899, the Court said that
20 guilty pleas of accomplices are not admissible
21 against criminal defendants. So, again, what
22 you have here, just dressed up in different
23 garb, is a classic Confrontation Clause
24 violation under any theory of the clause.
25 I'm happy to take one-by-one questions

1 if the Court has any.

2 JUSTICE THOMAS: Don't you think it's

3 a bit odd that the court of appeals disposed of

4 this on an abuse-of-discretion standard, that if

5 it had been -- that if it thought it had a

6 constitutional issue before it, it would not

7 have disposed of it on that standard?

8 MR. FISHER: I agree, Justice Thomas,

9 it is odd that it's framed in terms of abuse of

10 discretion. I will tell you, from reading a lot

11 of lower-court Crawford cases, that this happens

12 quite regularly as the courts get -- they sort

13 of mix up evidence and confrontation law.

14 But, Justice Thomas, if you look at

15 the briefs in the New York court of appeals, the

16 only thing we were arguing about was whether or

17 not the Sixth Amendment was violated. The only

18 argument we were making was that the

19 Constitution had been violated.

20 And as -- and -- and even when we

21 argued -- this goes back to Justice Alito's

22 question -- even when we argued that the door

23 was not open, what we were arguing was, under

24 Reid's constitutional holding about opening the

25 door, we didn't satisfy that rule.

1 JUSTICE THOMAS: And -- and a much
2 different question and probably not nearly --
3 not in -- not that important, but I'm not -- I'm
4 a bit confused as to what amounts to a
5 constitution -- a Confrontation Clause
6 violation.
7 For example, if I say you were --
8 Hemphill was there and he was the shooter, and
9 that, of course -- that if Morris had done that,
10 I think we'd both agree that's a problem.
11 But the -- in the -- in Morris's
12 allocution, he said, I had a .357 magnum. How
13 is that -- I know its use could be -- that it
14 could be used to confront or to disagree with or
15 contradict Hemphill, but I don't see Morris's
16 statement by itself about himself being a
17 constant -- a Confrontation Clause problem.
18 MR. FISHER: Well, my answer, Justice
19 Thomas, starts with the text of the Sixth
20 Amendment, which, remember, gives the defendant
21 the right to be confronted with the witnesses
22 against him.
23 JUSTICE THOMAS: So how is that
24 against him?
25 MR. FISHER: So you have two

1 questions.

2 JUSTICE THOMAS: That's -- Morris

3 didn't say anything about Hemphill.

4 MR. FISHER: Right. So he's -- so,

5 certainly, Morris is acting as a witness when he

6 gives that statement.

7 JUSTICE THOMAS: But against him.

8 MR. FISHER: And against is answered

9 by the Court's decision in Melendez-Diaz. In

10 Melendez-Diaz, the Court said that if the

11 prosecution enters a testimonial statement from

12 a witness, that itself is what renders it

13 against the defendant. It doesn't have to be

14 directly accusatory.

15 If the rule were otherwise, in every

16 case where the prosecution had a circumstantial

17 case without a direct accusation, it could prove

18 its entire case with affidavits otherwise under

19 the Confrontation Clause.

20 JUSTICE THOMAS: Well, I --

21 MR. FISHER: It's never been limited

22 to --

23 JUSTICE THOMAS: -- I understand if

24 you say it further -- it advances one of the

25 elements of the crime. I get -- I understand

1 that.

2 But, if someone admits something that

3 has nothing to do with the defendant, but it's

4 inconvenient for the defendant or contradicts

5 the defendant, you -- yeah, you say, well, the

6 use of this statement harms the defendant.

7 You could say that about the weather.

8 You could say it about, you know, geography.

9 You could say it about lots of things. Someone

10 could say: Oh, North Carolina is south of

11 Georgia, and you could introduce someone saying

12 -- you know, evidence that it's not.

13 I mean -- well, that's evidence

14 against them. I don't see how you do that. I

15 don't see how you could take something that's

16 neutral and just because it's used to contradict

17 the defendant, that is now witness against the

18 defendant.

19 MR. FISHER: Right. So -- so two

20 answers, Justice Thomas. The first is this

21 is -- this is answered by Melendez-Diaz --

22 JUSTICE THOMAS: Yeah.

23 MR. FISHER: -- where the Court said,

24 if the statement is testimonial and the

25 prosecution then introduces it, that's what

1 makes it against the defendant.
2 But, Justice Thomas, even if you had
3 some problem with the Melendez-Diaz holding on
4 that score, I would urge you to focus back on
5 this particular case. Remember that Morris's
6 defense was that Hemphill did it. And the
7 prosecution itself at the time of this plea and
8 allocution told the Court, we're getting this
9 allocution with an eye toward future prosecution
10 of somebody else.
11 So, in context, him saying I had a
12 .357 and not a 9-millimeter is, in effect,
13 pointing the finger at Mr. Hemphill, which was
14 his entire defense all along.
15 JUSTICE THOMAS: Uh-huh.
16 CHIEF JUSTICE ROBERTS: Justice
17 Breyer?
18 JUSTICE BREYER: Now you've thought of
19 this, I bet, but you needn't say it because this
20 is not -- I could think of 15 ways of getting
21 your case out of this question, all right?
22 But there is a general question.
23 Hearsay is statements made out of court for
24 their truth. And we have, I looked up here, 24
25 exceptions, including, for example, baptismal

1 certificates.
2 So, if you were to take Crawford
3 literally and keep out every statement on the
4 constitutional ground made for its truth, well,
5 that's the end of the hearsay exceptions. So
6 that can't be right.
7 Then this Court has said it isn't
8 right. And they said let's look to see if the
9 hearsay exceptions are -- and now they've said
10 justified by history, justified by maybe trying
11 to kill a witness who was going to testify
12 against you, and not gone much further. Okay?
13 I've said, look at the purposes. Look
14 at the consequences. Look at how it fits in.
15 Not everybody agrees with that. What do you
16 think?
17 MR. FISHER: So I -- I think -- what I
18 think is what the Court held in Crawford, which
19 is you don't go straight from -- from is it
20 hearsay to is that hearsay exception firmly
21 grounded. That's more like what the Roberts
22 theory was. What you do under Crawford is you
23 ask an intermediate question in between those
24 two, which is, is the statement testimonial?
25 And for the vast --

1 JUSTICE BREYER: Yes, it's
2 testimonial, of course.
3 MR. FISHER: -- for the -- for the
4 vast majority of hearsay exceptions, the answer
5 is unequivocally no.
6 JUSTICE BREYER: Really?
7 MR. FISHER: Yes.
8 JUSTICE BREYER: A baptismal
9 certificate is a person who at one point in time
10 signed a piece of paper which said Joe Jones was
11 baptized on such and such a date. Now --
12 MR. FISHER: But not with an eye
13 toward future criminal proceedings.
14 JUSTICE BREYER: Ah, there has to be
15 an eye towards future criminal proceedings.
16 Otherwise, Crawford doesn't apply?
17 MR. FISHER: I think that's the
18 holding in Crawford and subsequent cases.
19 JUSTICE BREYER: Okay, okay, okay.
20 Eye towards future criminal proceedings.
21 MR. FISHER: Yes.
22 JUSTICE BREYER: So, therefore, crime
23 labs are in, but hospitals are out?
24 MR. FISHER: For the most part,
25 hospitals are out. I don't -- I wouldn't

1 venture every possible hypothetical.
2 JUSTICE BREYER: No, no, no. Criminal
3 hospitals are in or excepted.
4 MR. FISHER: I think there can be, you
5 know, forensic examination --
6 JUSTICE BREYER: With an eye toward --
7 MR. FISHER: -- of hospitals that are
8 a borderline case.
9 JUSTICE BREYER: Okay. Thank you,
10 thank you, thank you, thank you.
11 MR. FISHER: And, you know, you may
12 see that in the future.
13 JUSTICE BREYER: All right.
14 MR. FISHER: Yeah.
15 CHIEF JUSTICE ROBERTS: Justice Alito,
16 do you have any further?
17 Justice Kagan?
18 JUSTICE KAGAN: Mr. Fisher, the -- New
19 York argues that the Reid rule ought to be
20 viewed as essentially a procedural device along
21 the lines of other procedural devices which
22 we've said fall outside the ambit of the
23 Confrontation Clause. I believe it -- it -- it
24 references Illinois v. Allen, it rep -- it
25 references Melendez-Diaz.

1 Why -- why is that wrong?
2 MR. FISHER: So for two reasons. One
3 is the New York Guide to Evidence itself calls
4 the rule of completeness and the more broader
5 "opening the door" theory rules of evidence, so
6 just as a matter of nomenclature and
7 characterization under New York law, the state
8 is wrong.
9 But just leaving labels aside, the
10 reason why the state is wrong is because the
11 admissibility of a statement under the "opening
12 the door" theory turns on the contents of the
13 statement. And that's to be -- that's to be
14 contrasted with situations like notice and
15 demand under Melendez-Diaz or Illinois versus
16 Allen or things that depend on things having to
17 do not with the content of the defendant's case
18 but, rather, about his timeliness of an
19 objection or his other -- you know, other
20 procedural actions he might take.
21 So we distinguish substance of the
22 statement rules, which are evidence rules and
23 which run into the Confrontation Clause, from
24 just procedural devices to manage the trial with
25 defendants have to meet under the Confrontation

1 Clause and any other constitutional right.
2 CHIEF JUSTICE ROBERTS: Justice
3 Gorsuch?
4 JUSTICE GORSUCH: Good morning, Mr.
5 Fisher. So I -- I suppose the state may try and
6 come back and suggest that its rule is actually
7 pretty close to and not much of an outgrowth of
8 the rule of completeness.
9 What -- what are the distinguishing
10 features in your mind that make this radically
11 different?
12 MR. FISHER: The core distinguishing
13 feature is that in a rule-of-completeness
14 situation, the defendant has put in part of the
15 absent witness's statement into play, whereas,
16 here, Mr. Hemphill did not put Mr. Morris's
17 testimony or anything else he said into play.
18 JUSTICE GORSUCH: Why not? With the
19 statement about the 9-millimeter casing found,
20 where else would it have come from?
21 MR. FISHER: Well, that's just a true
22 fact about evidence found in Mr. Morris's
23 apartment. And that's far different than what
24 he said. And, again, Justice Gorsuch, I just
25 return to the text and purpose of the

1 Confrontation Clause, which doesn't have to do
2 with the substance of defenses. It has to do
3 with witness testimony. And so --
4 JUSTICE GORSUCH: I understand that.
5 But just in terms of drawing a line between this
6 and a rule of completeness argument, if we were
7 concerned to do -- not doing that, how would you
8 go about writing that?
9 MR. FISHER: I would write it to say
10 that -- that we leave for another day any
11 question about forfeiture where the defendant
12 himself introduces part of the absent witness's
13 statement or -- or any statement by that absent
14 witness. That would present a different
15 question from one where the defendant simply
16 presents a substantive defense through evidence
17 and argumentation that -- that can be
18 contradicted by the state.
19 JUSTICE GORSUCH: A fact in the world?
20 MR. FISHER: Yes.
21 JUSTICE GORSUCH: Okay. Thank you.
22 CHIEF JUSTICE ROBERTS: Justice
23 Kavanaugh, anything further?
24 JUSTICE KAVANAUGH: No further
25 questions.

1 CHIEF JUSTICE ROBERTS: Justice
2 Barrett?
3 JUSTICE BARRETT: No.
4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.
6 Ms. Mignola.
7 ORAL ARGUMENT OF GINA MIGNOLA
8 ON BEHALF OF THE RESPONDENT
9 MS. MIGNOLA: Mr. Chief Justice, and
10 may it please the Court:
11 Now you have recognized, I think, that
12 the Petitioner is asking for a broad and
13 sweeping rule. He's essentially claiming that a
14 defendant can never open the door to the
15 admission of evidence that would otherwise be
16 barred by the Confrontation Clause. It doesn't
17 matter if a defendant has misled the jury, and,
18 really, if his approach is taken to its extreme,
19 even the traditional rule of completeness would
20 fall.
21 He surely is wrong about that, but I
22 want to call your attention to the fact at New
23 York State's highest court, he did not present
24 that broad claim that New York's "opening the
25 door" rule was unconstitutional on its face. He

1 presented only an unconstitutional as applied to
2 him challenge. New York's court had no occasion
3 to consider whether the rule is unconstitutional
4 on its face.
5 Because he bypassed New York's high
6 court, review of this claim should be outside of
7 this Court's jurisdiction. Even if this Court
8 could review the claim, it should -- should
9 certainly reject it.
10 New York's rule, a trial court may
11 provide a limited but necessary remedy when the
12 defendant creates a misleading impression. The
13 rule is constitutional. As this Court has
14 recognized, like any other constitutional right,
15 the right to be confronted with witnesses is not
16 absolute. There are limitations.
17 And limitations are appropriate if
18 they have a legitimate purpose, and New York's
19 rule does. It allows the state court to protect
20 the vital interests that it has in the integrity
21 and truth-seeking function of the trial process.
22 This is not about being fair to the
23 prosecution. It's about the jurors and the
24 Court's duty to make sure that jurors are not
25 unfairly misled.

1 Moreover, a state may impose rules
2 that govern the manner in which a defendant may
3 assert or forfeit, even by his silence, his
4 right of confrontation. New York's rule is an
5 appropriate limitation in this regard.
6 It's not an exception to the
7 Confrontation Clause because it is not a
8 substitute means for the prosecution to
9 establish the reliability of evidence. It's a
10 remedy, a remedy that is triggered when the
11 defendant or his lawyers' intentional trial
12 conduct violates the state's prohibition against
13 misleading the jury.
14 I do welcome the Court's questions.
15 JUSTICE THOMAS: Mr. Fisher gave some
16 examples in the record as to why he raised --
17 Petitioner raised the Confrontation Clause issue
18 below. Would you address those specifics that
19 he raised?
20 MS. MIGNOLA: Well, Your Honor, I
21 think, if you look at the Joint Appendix
22 starting at page 385, this is what he told the
23 New York Court of Appeals: "The only issue
24 before this Court is whether the defense opened
25 the door to Morris's testimonial hearsay."

1 Now that is simply not a challenge to
2 the constitutionality of New York's rule on its
3 face. He did raise a Sixth Amendment challenge.
4 He did invoke the Confrontation Clause. But
5 that is not the same thing as saying the rule on
6 its face is unconstitutional.
7 I believe that's the question that
8 this Court has been asked to review, and it
9 simply was not presented to New York's highest
10 court. He should not be allowed to bypass the
11 state court in that way.
12 And that's particularly true in this
13 case, where the state's high court had an
14 adequate and independent basis to reject the
15 claim. Petitioner failed to preserve the broad
16 constitutional claim and, therefore, by state
17 statute, the New York Court of Appeals lacked
18 the jurisdiction to review it. By bypassing the
19 state high court, he's avoided -- he avoided an
20 explicit ruling --
21 JUSTICE KAGAN: Ms. Mignola?
22 MS. MIGNOLA: Yes?
23 JUSTICE KAGAN: I'm sorry.
24 MS. MIGNOLA: Yes, Your Honor?
25 JUSTICE KAGAN: Complete your

1 sentence. I'm sorry.

2 MS. MIGNOLA: He avoided an explicit

3 ruling that the court -- from that court denying

4 the claim on adequate and independent state law

5 grounds. So to review that claim now will

6 encourage litigants in the future to withhold

7 from a state court a claim challenging the --

8 the constitutionality of a state rule so that

9 the state cannot have the opportunity to reject

10 it on adequate and independent state law

11 grounds.

12 JUSTICE KAGAN: This -- this was all

13 addressed at the cert petition stage, was it

14 not?

15 MS. MIGNOLA: Yes, I think that it

16 was, but I think it was still perhaps an

17 improvident grant.

18 CHIEF JUSTICE ROBERTS: What about our

19 decision in Riley? Your friend suggests that

20 that's a strong argument against your point.

21 MS. MIGNOLA: You know, I --

22 CHIEF JUSTICE ROBERTS: That we did in

23 Riley exactly what you said we shouldn't do

24 here.

25 MS. MIGNOLA: Well, I would suggest

1 instead that in Riley and -- and Holmes, there
2 were moments where the broader constitutional
3 claim was presented. They may not have done it
4 in -- in the way that we're saying it should
5 have happened, but they did do it at some point.
6 I think that this Court's decision in
7 Illinois v. Gates is actually more informative,
8 more instructive, because, there, the -- the
9 petitioner did raise a Fourth Amendment
10 suppression claim throughout.
11 However, when this Court considered
12 whether it could consider a modification to the
13 exclusionary rule, this Court recognized that
14 that claim had not been presented to the state
15 court and that, therefore, it should not be
16 reviewed.
17 JUSTICE BREYER: What about all the
18 things on 386, 388? I mean, he mentions the
19 Confrontation Clause a bunch of times, and I
20 suppose he'd be satisfied if we just said, well,
21 as applied to his case, the -- it's
22 unconstitutional.
23 MS. MIGNOLA: There is no doubt that
24 he raised a Confrontation Clause claim, but he
25 raised it as applied to him. He said simply --

1 JUSTICE BREYER: Well, what's --
2 MS. MIGNOLA: -- that --
3 JUSTICE BREYER: -- what difference
4 does that make? If we give a reason that he's
5 right and the reason applies to more than his
6 case, that might be perfectly satisfactory to
7 you then, wouldn't it?
8 MS. MIGNOLA: Well, I think it does
9 make a great deal of difference to New York's
10 courts. I think they should have the
11 opportunity to see how -- the -- the broader
12 constitutional question before them.
13 JUSTICE BREYER: Well, that might be
14 true. He's given a bunch of reasons in his
15 briefs about why it's unconstitutional, and,
16 certainly, a large number of those are pretty
17 strong. And -- and suppose we just said, well,
18 those are the reasons. That wouldn't strike
19 down the whole law. It would just say that the
20 door opening is not applicable in those cases.
21 So I'm anxious to hear what your
22 argument is on the merits of that.
23 JUSTICE BARRETT: Ms. Mignola, can I
24 ask -- oh, sorry. Did you have more you wanted
25 to say?

1 Ms. Mignola, can I turn to the merits?
2 On pages 19 to 21 of Mr. Fisher's brief, he
3 points out that under this rule of completeness,
4 some of our cases, even Crawford itself,
5 presumably -- you know, he makes the argument
6 that the -- that evidence that we said was
7 testimonial and barred by the Confrontation
8 Clause could have come in.
9 So, you know, in Crawford, he raises a
10 claim of self-defense. His wife's testimonial
11 statements, we said, had to stay out, but they
12 contradicted his claim of self-defense. What's
13 your answer to that?
14 MS. MIGNOLA: Well, if I understand
15 your question, Your Honor, I think that simply
16 contradicting the defense, simply if the people
17 have evidence that would contradict the defense,
18 that cannot be the basis for opening the door.
19 And that is something that we addressed in our
20 brief.
21 I think the New York standard is
22 different. There has to be something that is
23 truly misleading. And when you look at what is
24 misleading, it is very much like the way that
25 the traditional rule of completeness operates.

1 Your hypothetical that was posed by
2 the Court, there are two portions of a
3 statement, right? One portion of the statement,
4 the declarant, perhaps a third-party suspect,
5 right, says, for example, yes, I possessed the
6 murder weapon, but a day before the murder I
7 sold it to the defendant. The defendant offers
8 the first part of the statement but not the
9 second.
10 JUSTICE BARRETT: But, in this case --
11 MS. MIGNOLA: Yes.
12 JUSTICE BARRETT: -- this
13 contradiction-type case, to make -- to draw the
14 conclusion -- Mr. Fisher points out that to draw
15 the conclusion that the statement or that the
16 defendant's position is misleading requires a
17 value judgment on the part of the court that the
18 defendant is misleading, in other words, that
19 his rendition isn't true, but the other
20 outside-of-court statement was.
21 MS. MIGNOLA: So I don't think that it
22 is -- it does require that kind of analysis
23 because I do not believe that New York's rule is
24 that broad.
25 It cannot be -- I think Mr. Fisher is

1 right. It can't be that simply if the people
2 have evidence that merely contradicts the
3 defense theory of the case, that that opens the
4 door to evidence that would be -- otherwise be
5 barred by the Confrontation Clause.
6 I think it is a much more narrow rule.
7 There has to be something, some way in which the
8 defense has misled the jury. And in that
9 regard, the judge is not making a decision about
10 what is true. The judge in this case is not
11 making a determination that Morris's guilty plea
12 is true, that those statements are correct.
13 JUSTICE SOTOMAYOR: So if -- isn't
14 there two ways to prevent the jury from being
15 misleaded -- misled? The first is simply to --
16 to keep out what the defense is proffering.
17 That's what your adversary says. That's what
18 Mr. Fisher says. The trial judge, if he
19 believed any of the testimony or arguments he
20 was making misled the jury, he should have
21 rejected them.
22 But the judge said no, these arguments
23 are legitimate.
24 MS. MIGNOLA: So --
25 JUSTICE SOTOMAYOR: So now the

1 question is -- and this is what he argued from
2 the trial court to the appellate court to the
3 court of appeals -- can I mislead the jury
4 simply by making legitimate arguments based on
5 legitimate evidence and open the door to
6 non-testimonial -- to non- --
7 MS. MIGNOLA: To testimonial hearsay.
8 JUSTICE SOTOMAYOR: To testimonial
9 hearsay, when I didn't present that testimonial
10 hearsay. I didn't present part of it. I didn't
11 do anything with it. Can you, the prosecutor,
12 violate the Confrontation Clause by introducing
13 something?
14 MS. MIGNOLA: So I think that --
15 JUSTICE SOTOMAYOR: Isn't that what
16 his argument was below?
17 MS. MIGNOLA: Yes. Again, it's as
18 applied to him.
19 JUSTICE SOTOMAYOR: Well, what --
20 MS. MIGNOLA: He said he didn't open
21 the door.
22 JUSTICE SOTOMAYOR: I don't understand
23 what "applies" means or not. My Confrontation
24 Clause was violated because the trial court
25 misapplied Reid. To me, that sounds like

1 misapplied Reid because it let in testimonial
2 hearsay when I didn't open the door. And even
3 if I opened the door, they couldn't do it.
4 That's what he argued, correct?
5 MS. MIGNOLA: He argued that the -- he
6 did not open the door.
7 JUSTICE SOTOMAYOR: Right --
8 MS. MIGNOLA: And so, yes.
9 JUSTICE SOTOMAYOR: -- because he
10 can't open the door legally, correct?
11 MS. MIGNOLA: But I think he's asking
12 this Court a broader question, whether a
13 defendant can open the door. That's his
14 question presented. And that question, that
15 broader question, was not presented to New
16 York's state court.
17 But I want to --
18 JUSTICE SOTOMAYOR: Would it have --
19 would -- have you ever known the court of
20 appeals to go back on a decision like Reid that
21 it just decided and there are no material
22 changes between Reid and this case --
23 MS. MIGNOLA: Well, I --
24 JUSTICE SOTOMAYOR: -- and say we're
25 going to revisit Reid and there's no such thing

1 as opening the door? Or do you think it would
2 have said just what they were arguing, Reid
3 didn't open the door this way?
4 That's what he argued, correct?
5 MS. MIGNOLA: Right, but I think Reid
6 was at least seven years earlier. And so it may
7 very well, had Mr. Fisher, with all of his
8 arguments and expertise, explained to the New
9 York court of appeals why he thought that a rule
10 of that nature was unconstitutional broadly
11 speaking, that a defendant could never open the
12 door, I think New York court should have had a
13 chance to review that, consider it, and
14 determine whether there were any modifications,
15 whether, for example, it should have said the
16 judge should have stricken the testimony,
17 stricken the evidence.
18 But, again, I -- I want to focus a --
19 a little bit on -- it's so important that what
20 was happening here is not simply that the
21 evidence that -- that was -- contradicted the
22 defense theory. That can't be what opens the
23 door. I agree with that. It has to be that
24 there was something misleading about what the
25 defense was doing, something that needs

1 correcting.

2 JUSTICE SOTOMAYOR: So identify that

3 here.

4 MS. MIGNOLA: I'm sorry, Justice --

5 JUSTICE SOTOMAYOR: Identify what was

6 misleading about what he did.

7 MS. MIGNOLA: Well, I think what was

8 misleading is that he was implying to the

9 jurors, first of all, that Mr. Morris's case

10 ended in a manner that was unsatisfactory, and

11 he really led the jurors to speculate about how

12 that prosecution ended.

13 Furthermore, he did something that

14 pretrial the judge had issued a very strong

15 ruling and had made a determination that a

16 theory of the defense was misleading, and that

17 was to ask the jurors to rely on the fact that

18 the prosecutors were charging him and,

19 therefore, they believed that Morris was guilty.

20 It was asking the jurors really for

21 vouching, and that's how the judge framed it,

22 that's how he talked about it, that the -- the

23 defense was -- wanted to rely on vouching, all

24 right?

25 And so, if you look, for example, in

1 the Joint Appendix at pages, I think, 48 through
2 56, there's a tremendous discussion in there
3 about what the judge saw was misleading.
4 Counsel's efforts to use the
5 prosecutor's previous opening or beliefs and
6 conclusions of the government actors as though
7 that were factual evidence that should be
8 considered for its truth --
9 JUSTICE SOTOMAYOR: The judge kept
10 that out. The jury didn't hear that.
11 MS. MIGNOLA: But he continued on that
12 strategy. Even though the jurors did not hear
13 the opening statement from the Morris trial, he
14 nevertheless came in his opening statement at
15 this trial, the defense came in this trial and
16 he made arguments that again picked up that
17 theme.
18 And he did a cross-examination of
19 Detective Jimmick and a cross-examination of
20 Gilliam, again, picked up that theme, and he
21 certainly, you know, brought that theme home
22 just as the judge anticipated, brought it home
23 in his summation.
24 That was a -- you know, a piece of his
25 -- of what he was trying to do, was say: Look,

1 the government believed and relied on the
2 witnesses that identified Morris, and you can
3 too because of the fact that they relied on.
4 And that was improper, and the judge understood
5 that that was misleading.
6 JUSTICE GORSUCH: Do you -- do you
7 agree --
8 MS. MIGNOLA: And the judge understood
9 that they were really drawing -- asking the
10 jurors to draw an inference and to rely on
11 something that was out of bounds and was
12 unlawful, all right, and so that needed to be
13 corrected.
14 In addition, well, talking to the
15 jurors about how the Morris prosecution ended --
16 JUSTICE SOTOMAYOR: Counsel, you've
17 answered my question.
18 MS. MIGNOLA: I'm sorry.
19 JUSTICE SOTOMAYOR: Perhaps you'll let
20 Justice Gorsuch ask his.
21 MS. MIGNOLA: Yes.
22 JUSTICE GORSUCH: Thank you. Do you
23 agree that the rule of completeness
24 traditionally understood doesn't apply here
25 because the defendant didn't introduce any

1 out-of-court statement in evidence?
2 MS. MIGNOLA: Yes, Your Honor.
3 JUSTICE GORSUCH: Okay.
4 MS. MIGNOLA: I agree that this is not
5 a -- a -- a --
6 JUSTICE GORSUCH: This is something
7 beyond that?
8 MS. MIGNOLA: It is something, but it
9 relies so much on exactly that same principle
10 that --
11 JUSTICE GORSUCH: No, I -- I --
12 that -- that --
13 MS. MIGNOLA: Yes, Your Honor.
14 JUSTICE GORSUCH: -- that's the answer
15 to my question. And then you also, as I
16 understood it, with Justice Breyer, I just want
17 to make sure I've got this right, you do not
18 object to this Court deciding the
19 constitutionality of the Reid rule as applied in
20 this case, is that right?
21 MS. MIGNOLA: I think that was
22 presented to the state court, yes, Your Honor.
23 JUSTICE GORSUCH: Okay. Thank you.
24 JUSTICE KAGAN: I mean, if I could
25 just go back to what Justice Barrett and Justice

1 Sotomayor were talking about about what this is
2 a supposed remedy for. You said that this rule
3 comes in as a remedy and you admit that it can't
4 be remedying the fact that the defendant
5 contested the prosecution's factual narrative.
6 But -- but, really, everything that
7 happened here, it -- it was the rule was being
8 used as a remedy for that. I mean, the --
9 the -- the statements that the government wanted
10 to admit are statements about whether the person
11 whom the defendant accused of committing the
12 crime had a particular kind of gun. And --
13 and -- and that was being used to contest the
14 defendant's idea that, yes, this third party
15 committed the crime. He had the right kind of
16 gun.
17 So, I mean, it's -- it's all about the
18 state trying to contest the defendant's
19 narrative, which is contesting the prosecution's
20 narrative.
21 MS. MIGNOLA: Your Honor, I agree that
22 the state was arguing for urging the court to
23 issue a broader ruling, but I think that at the
24 end of the day, I have to believe that the judge
25 didn't agree with that, and I'll tell you why.

1 If you look at the Joint Appendix
2 between pages 106 and 109, the judge draws this
3 important distinction. He accepts that the --
4 the evidence about the plea allocution or the
5 statement made in the plea allocution would most
6 certainly be relevant.
7 He says that Morris's plea allocution
8 is probative, but whether or not it's admissible
9 is a different question, all right? Whether
10 Morris possessed a 9-millimeter is a subject
11 that is in play, but the judge points out "As to
12 the manner in which that subject can be
13 presented, that may be a different question."
14 The judge acknowledges that the
15 statements in Morris's plea allocution would be
16 testimonial in nature under Crawford and would
17 present confrontation problems whether or not
18 they satisfy the hearsay exception.
19 And he continues, "The subject,
20 whether Morris possessed a 9-millimeter gun, is
21 relevant. Should there be a way of proving
22 that, meaning a way that comports with the
23 Confrontation Clause, that Morris was in
24 possession of a .357 and not a 9-millimeter,
25 that issue is relevant. So, for example, if

1 Morris were here and he were able to testify and
2 be called as a witness, his testimony about
3 which gun he possessed would not be immaterial.
4 He'd be allowed to testify, and I would find it
5 to be probative."
6 "The problem," the judge says, "The
7 problem arises because you don't have
8 constitutional language in which to offer that
9 evidence. It's academic as to whether it's
10 relevant."
11 So I really feel that that tells you,
12 and you -- when you read that, you must -- you
13 understand the judge understood this
14 distinction. And so, when he is invoking the
15 Reid decision, what he's saying is that there is
16 something misleading.
17 And he may -- he went -- you know, he
18 did acknowledge that he thought that the defense
19 was doing something, I forget what the language
20 is, acceptable, but that's -- I don't feel that
21 that's because he thought that the -- I think
22 that this -- the thing that he's finding there
23 is that it -- he doesn't necessarily think that
24 the defense is behaving badly, but,
25 nevertheless, the jury is being misled.

1 JUSTICE BREYER: So how does -- how
2 does it work? Simple case, Smith is accused of
3 murder. Just Smith, who testifies, says, I
4 didn't do it, Jones did it. Jones did it. He
5 had the knife, he had the gun, and he had the
6 poison all ready, and I saw him with it.
7 Prosecutor: Well, unfortunately,
8 Jones is in Mongolia, but we would like to
9 introduce Jones' affidavit which he gave in our
10 local office known as the Star Chamber and we --
11 we would like to produce this.
12 Can he do it? New York?
13 MS. MIGNOLA: No. No, I don't think
14 he -- I don't --
15 JUSTICE BREYER: Why not?
16 MS. MIGNOLA: Because --
17 JUSTICE BREYER: And how does it
18 differ?
19 MS. MIGNOLA: -- it's not misleading.
20 There -- I don't think there's anything --
21 JUSTICE BREYER: It's not misleading?
22 The prosecutor said -- I mean, the -- the person
23 said, I didn't do it.
24 MS. MIGNOLA: Yes. But I --
25 JUSTICE BREYER: Jones did it. What

1 could be more misleading?
2 MS. MIGNOLA: But I think -- I think
3 that that's not misleading to the jury, okay? I
4 think you have to understand that when the
5 defense attorney is making inferences, he's
6 relying on something that's out of bounds. And
7 that's what was going on here.
8 If you -- again, if you -- well, I --
9 I see that you -- you doubt what I'm saying
10 there, Justice Breyer.
11 JUSTICE BREYER: No, I'm not doubting
12 it. I just want you to explain it.
13 MS. MIGNOLA: Yes, you're hoping that
14 I'll explain it better.
15 JUSTICE BREYER: Yeah.
16 MS. MIGNOLA: But I think that the
17 part that is out of bounds is, again, this idea
18 that he was asking the jurors to rely on what
19 the government believed. But, at the time that
20 the government prosecuted Mr. Morris, that was,
21 you know, early days.
22 Later on, we believed something else.
23 Mr. Morris pled guilty to the conduct that the
24 government believed he was actually guilty of.
25 Again, in his opening statement, the defense

1 talks about the fact that the -- you know, the
2 Morris case must have been ended in a way that
3 was frustrating for the victims and the
4 families. He's leaving this speculation about
5 how that case ended.
6 JUSTICE ALITO: Was the -- was --
7 MS. MIGNOLA: Again, that was outside
8 the bounds and unfair. Yes, Justice?
9 JUSTICE ALITO: Was the "opening the
10 door" rule used here as a way of counteracting
11 statements and questions by counsel that never
12 should have been allowed?
13 MS. MIGNOLA: Well, that's always a
14 tricky question because I think judges are
15 inclined to give the defense a little elbow room
16 and to give the -- rather than strike something
17 once it's happened, you know, the judge didn't
18 necessarily know how the defense was going to
19 give its opening or that he was going to include
20 these ideas, especially after he'd given such a
21 strong ruling before trial.
22 All right. So, once it happens, do
23 you want to cut his wings? Do you want to tell
24 the jury what happened? Or do you want to say:
25 Look, what we're going to do is we're going to

1 allow these couple of lines of plea allocution
2 and, with it, we're going to introduce the
3 hearsay statements from Mr. Morris's attorney
4 that completely dilute and undercut and,
5 frankly, would have been the sum -- the -- what
6 the cross-examination and so-called
7 confrontation, what that would have really
8 looked like --
9 JUSTICE ALITO: But weren't there --
10 MS. MIGNOLA: -- which is --
11 JUSTICE ALITO: -- weren't there more
12 direct and -- and clearly proper ways of county
13 act -- counteracting these statements and these
14 questions? When the -- the defense suggested
15 that the Morris -- that the outcome of the
16 Morris case was somehow helpful to -- to him,
17 didn't that open the door for testimony about
18 what actually happened in the Morris case?
19 Or when the defense raised --
20 suggested that the police believed that somebody
21 else did the shooting, didn't that open the door
22 to testimony about further investigative steps?
23 Was this done the right way? That's
24 what I'm saying. Is this -- was the "opening
25 the door" rule -- I understand the trial court

1 doesn't want to -- doesn't want to strike
2 statements made in an opening. I understand
3 that. But is this being used as a sort of a
4 corrective that wasn't really necessary if it
5 was attacked more directly?
6 MS. MIGNOLA: So I think that that was
7 part of the New York State standard, is that the
8 court should only admit those statements that
9 are reasonably necessary and that -- that it was
10 part of the judge's determination. So I do feel
11 that, you know, that's the way the judge sized
12 it up. He's using his discretion.
13 Look, in cases, for example, where a
14 defendant is disruptive in the courtroom, there
15 may be lots of alternatives, right? You can gag
16 him and bind him. You could delay the
17 proceedings. Courts have alternatives, but it's
18 really got to be up to the judge to weigh and
19 balance those alternatives to come up with the
20 thing that makes -- is the best fitting.
21 And what he did here, as I said, was
22 he not -- admitted not only the couple of lines
23 from Morris about what he did, but he -- the
24 judge also allowed the jurors to hear the
25 reasons that Morris took that plea. He pled --

1 pled guilty. He got out of jail right that day.
2 He only served a two-year sentence.
3 So, you know, they understood the --
4 the larger context. They understood some of the
5 information that would have been elicited had
6 there been a right -- had there been a
7 confrontation or had there been
8 cross-examination on that point.
9 So he balanced it. So he crafted the
10 remedy that he thought fit the situation. You
11 might have done --
12 CHIEF JUSTICE ROBERTS: Haven't --
13 MS. MIGNOLA: -- something different.
14 CHIEF JUSTICE ROBERTS: I'm sorry.
15 Haven't we said, though, in a situation that the
16 Constitution has already made the decision about
17 the way in which the evidence could be made more
18 reliable? In other words, you have to have the
19 confrontation?
20 MS. MIGNOLA: So, Mr. Chief Justice, I
21 think the critical distinction here is that that
22 is a rule that goes to when you're assessing
23 whether the procedural mechanism is a
24 substitute, a substitute basis for determining
25 reliability of evidence.

1 When the prosecution is saying, well,
2 we'd like to try to get this in through what we
3 all have recognized as hearsay exceptions,
4 right, those are the exceptions when there's
5 another basis or -- there's a dying declaration
6 or any of the other methods we think of when we
7 think of hearsay exceptions, right? Those are
8 the exceptions.
9 This is not an exception. It's a
10 limitation. I think it's conceptually very
11 different, all right? The trial court, like you
12 -- this Court has talked about in Taylor, this
13 -- in the -- it has the -- the discretion to
14 fashion a remedy when the defendant transgresses
15 a state rule.
16 So, for example, in the context of a
17 constitutional provision, the defendant has the
18 right to a compulsory process and to present
19 evidence. But, if the defense transgresses a
20 rule that deals with discovery or notice, the
21 state can limit that right.
22 In Melendez-Diaz, this -- this Court
23 certainly talked about the fact that the state
24 could impose rules. For example, the state
25 could say, well, okay, we have a -- an analyst

1 who was prepared to certify the results of a
2 test. If you want to cross-examine and take
3 advantage -- exercise your right of
4 confrontation, please notify us.
5 If the defendant doesn't meet the
6 deadline, the defendant doesn't follow those
7 rules, he forfeits his right. The state can
8 craft rules that are designed or have a
9 legitimate purpose and that is to uphold the
10 integrity --
11 CHIEF JUSTICE ROBERTS: But those are
12 regular, normal procedural rules; you know, you
13 have to object and all those kind of things.
14 It's different, though, to -- to have procedures
15 that are intended to be substitutes for the
16 Confrontation -- Confrontation Clause. I mean,
17 you appreciate the fact that there are two
18 different, what, equitable exceptions and
19 procedural rules.
20 And what did the defendant do here
21 that was wrong and that could only be considered
22 a forfeiture of his constitutional right? The
23 judge himself said no, this was perfectly
24 appropriate.
25 MS. MIGNOLA: Well, I think that what

1 the judge is saying there is that he's not
2 faulting the lawyer, he understands why the
3 lawyer feels he needs to do -- go down this
4 tack. Nevertheless, he understands that it's
5 misleading to the jury. And that's a
6 distinction.
7 So it -- it doesn't have to be that
8 the lawyer was ineffective or that he needs to
9 be punished in some way. It's that the --
10 still, the court's core duty is to make sure
11 that the jurors are not misled so that they can
12 do their job.
13 And that's part of what Taylor talks
14 about, right, is the duty of the court and the
15 important interests that the court has in
16 maintaining the integrity of its process. And
17 that's why these rules can be appropriate.
18 I -- I would say that the rule of
19 completeness is right along with that. That's
20 where the rule of completeness gets its
21 authority from because the -- the -- otherwise,
22 if you don't have that, the jury can be misled.
23 And it's not that the judge is
24 deciding which portion of the statement is true
25 or if any of it's true. He's just saying that

1 the jurors can't be -- can't do their job and --
2 and decide what the statement means if they
3 don't have both portions of it.
4 JUSTICE GORSUCH: If -- if a --
5 MS. MIGNOLA: That's the misleading of
6 it.
7 JUSTICE GORSUCH: -- if a -- if a
8 judge can insist on the introduction of -- of
9 hearsay based on his assessment that, otherwise,
10 the jury would be misled on the truth of the
11 matter at hand, why -- why does it matter
12 whether the defendant opens the door, in your
13 parlance, or not?
14 I mean, if -- if the truth-seeking
15 function is that important and the
16 cross-examination right is that unimportant,
17 what does it matter whether a defendant opens a
18 door or closes a door, whether there's a door at
19 all?
20 MS. MIGNOLA: Well, I do think that
21 that's where there is a good balance because, if
22 he's not opening the door, then, you know, it
23 shouldn't come in. It just --
24 JUSTICE GORSUCH: Well, but if -- if
25 -- if the government's failed to produce

1 something important that the judge thinks
2 without which, you know, the jury is really not
3 going to understand just how bad a guy this guy
4 really is, you know?
5 MS. MIGNOLA: But I don't --
6 JUSTICE GORSUCH: I mean, why --
7 MS. MIGNOLA: -- again, I feel that
8 that's --
9 JUSTICE GORSUCH: -- why not just --
10 what's -- what does a door have to do with
11 anything if it's all about the misleading of the
12 jury? I -- I guess I'm still -- you could
13 answer that question.
14 MS. MIGNOLA: Right. I -- I -- I
15 appreciate what you're saying. I just think
16 that -- that what is meant by misleading is much
17 narrower. Otherwise, you'd be seeing a
18 proliferation of cases where there would just be
19 no Confrontation Clause and everybody would say
20 it's -- it's contradictory or misleading because
21 we didn't --
22 JUSTICE GORSUCH: Exactly. Yeah.
23 MS. MIGNOLA: But it hasn't happened,
24 Judge -- it has not happened, Justice.
25 JUSTICE GORSUCH: I'm -- I'm asking

1 for a limiting principle.
2 MS. MIGNOLA: The limiting principle,
3 yes, has to be that the -- what is misleading is
4 really about whether the jurors can fairly
5 evaluate the truth of what's --
6 JUSTICE GORSUCH: And isn't that
7 always in the eye of the beholder?
8 MS. MIGNOLA: Well, I think that
9 that's what the judge is, is the beholder. And
10 he's working on the --
11 JUSTICE GORSUCH: He's certainly a
12 beholder. We're certainly beholders. But -- it
13 -- doesn't that suggest that it's something more
14 than a -- just a simple procedural rule?
15 MS. MIGNOLA: No, I don't think --
16 JUSTICE GORSUCH: Like you have to
17 file your brief in 30 days?
18 MS. MIGNOLA: I think it -- I think it
19 is a procedural rule. I think that it --
20 JUSTICE GORSUCH: One that depends --
21 MS. MIGNOLA: But I -- but I think
22 that --
23 JUSTICE GORSUCH: -- upon the eye of
24 the beholder?
25 MS. MIGNOLA: But that's what the

1 traditional rule of completeness is. That is
2 exactly the analysis principle --
3 JUSTICE GORSUCH: Well, I thought we
4 agreed the rule of completeness is different
5 because -- than this case because that's just,
6 you know, if you introduce half of a document,
7 the whole thing comes in.
8 MS. MIGNOLA: But then you have to ask
9 what is the conceptual basis for that.
10 JUSTICE GORSUCH: Exactly, and --
11 MS. MIGNOLA: And --
12 JUSTICE GORSUCH: -- and that's what
13 we've been talking about.
14 MS. MIGNOLA: And -- yes.
15 JUSTICE GORSUCH: Thank you.
16 CHIEF JUSTICE ROBERTS: Justice
17 Thomas?
18 Justice Breyer, any further?
19 Justice Kagan?
20 Justice Gorsuch?
21 Justice Kavanaugh, anything further?
22 JUSTICE KAVANAUGH: No further
23 questions.
24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Rebuttal?
2 REBUTTAL ARGUMENT OF JEFFREY L. FISHER
3 ON BEHALF OF THE PETITIONER
4 MR. FISHER: Thank you, Mr. Chief
5 Justice. I'd like to make one point on
6 preservation and then two points on the merits.
7 As to preservation, I take the -- the
8 -- the tone of some of the Court's questioning
9 today to be imagining writing a decision that
10 said that it's not enough to simply put on
11 evidence or present a defense that can be
12 contradicted by testimonial hearsay to waive the
13 confrontation right or forfeit it. But we would
14 leave for another day whether the rule of
15 completeness might be different.
16 That is precisely the argument that we
17 made to the New York court of appeals at pages
18 380 -- 386 to 388. We said that if all that
19 triggers the introduction of the evidence is
20 that it's relevant to refute the defense, that
21 would violate the Sixth Amendment. So the exact
22 opinion that some of the justices have imagined
23 writing is exactly what we asked the New York
24 Court of Appeals to write and what it refused to
25 do and why we brought the case to this Court.

1 It's also well within the question
2 presented. Justice Alito, you asked about the
3 question presented, I think, and others have.
4 The question presented is whether or under what
5 circumstances a defendant forfeits the right in
6 the "opening the door" situation.
7 And so, yes, we make two alternative
8 arguments. We say the defendant can never open
9 the door. But, from the beginning of the cert
10 petition on through our merits brief, we have --
11 we have made the narrower argument, that at
12 least when the evidence is merely relevant. And
13 that's the primary argument that we made in our
14 blue brief and that I'm making here today.
15 As to the merits, I want to say two
16 things. First is the state keeps putting gloss
17 on what state law requires as the sort of
18 misleading test. I would direct the Court to
19 New York law as in the Fardan case cited in our
20 blue brief, the -- that is described as saying
21 that the out-of-court evidence the state wishes
22 to introduce would contradict the defense. In
23 Massie in 2004, the New York Appeals said again
24 it would be directly contradictive to the
25 defense. At JA 184 of this case, the trial

1 judge said the prosecution's evidence would be
2 contrary to the defense.
3 Nothing more is required as a matter
4 of state law. The state "opening the door"
5 doctrine never talks about impropriety or
6 defines "misleading" in any other way than being
7 contrary to the defense.
8 And so that leads me to the second
9 point, which is the -- again, the further gloss
10 that co-counsel -- that my opposing counsel
11 wants to put on the New York decision below.
12 And, yes, there was a pretrial
13 colloquy about whether Mr. Hemphill could, as
14 she puts it, invite speculation from the jurors
15 about what happened in the Morris case. The
16 trial judge said, no, you can't. And then that
17 was the end of the matter in our pretrial
18 colloquy.
19 If anything in Mr. Hemphill's opening
20 or cross-examination or closing had been thought
21 by the prosecution to step over that line, the
22 prosecution could have objected and the trial
23 court could have reprimanded the -- the -- the
24 defense counsel if that indeed stepped over the
25 line.

1 The state never even objected to these
2 various statements. And if you look at the
3 Joint Appendix -- and I'd urge the Court to take
4 careful look at the Joint Appendix if you have
5 any questions on this -- that dispute over
6 improper speculation was entirely separate from
7 the decision to introduce Mr. Morris's
8 allocution. And I'll start where my friend
9 started, at JA-106 to 109.
10 The language she's describing about
11 Morris's allocution is rejecting the
12 prosecution's argument that the allocution is
13 not even testimonial. That's what the trial
14 judge is saying, is that, wait a minute,
15 prosecution, this seems to be testimonial,
16 rejecting the prosecutor's argument that it's
17 admissible because it's non-testimonial, so the
18 trial judge is recognizing, we may have a
19 confrontation problem here on our hands.
20 And then, as the colloquy goes forward
21 in further -- in further conversation at JA-117
22 to 120, JA-139 to 141, the trial judge is again
23 saying, I see a possible confrontation problem
24 here. And the state's saying, no, this is
25 relevant evidence to refute the defense, we want

1 to introduce it.
2 And then, at JA-184 to 185, the trial
3 judge says, "Aha! I have a way to let it in."
4 The prosecution didn't even think of this. The
5 trial judge said, I have a way to let it in.
6 Under the Reid decision of the court of appeals,
7 we can say the defendant opened the door.
8 And that's where I started my argument
9 today was reading that ruling. It's at 184,
10 185. The trial judge says, look, I understand
11 this defense. It's in all respects appropriate.
12 My friend keeps saying that the trial judge was
13 thinking maybe there was something
14 inappropriate. The trial judge expressly says,
15 your defense and arguments are in all respects
16 appropriate.
17 But, nonetheless, under Reid, they
18 opened the door because the testimonial hearsay
19 is contrary to the defense theory that Morris is
20 the shooter.
21 We ask the Court to hold that merely
22 making testimonial evidence relevant to
23 contradict the defense theory is not enough to
24 forfeit the Confrontation Clause rights. That
25 would establish an important principal of the

1 law, reassert the classic understanding of the
2 Confrontation Clause, tell the New York court of
3 appeals that it was wrong at least in this kind
4 of a situation, that the -- that the right can
5 be forfeited and also resolve the circuit split
6 that we brought to the Court in our cert
7 petition.
8 If the Court has no further questions,
9 I'll submit the case.
10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel. The case is submitted.
12 (Whereupon, at 12:05 p.m., the case
13 was submitted.)
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