No. 20-637

IN THE

Supreme Court of the United States

DARRELL HEMPHILL,

Petitioner,

v.

NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

BRIEF *AMICUS CURIAE* OF THE DISTRICT ATTORNEYS ASSOCIATION OF THE STATE OF NEW YORK AND THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION IN SUPPORT OF RESPONDENT

J. ANTHONY JORDAN
President
DISTRICT ATTORNEYS ASSOCIATION OF THE STATE OF NEW YORK
Three Columbia Place
Albany, New York 12210
(518) 598-8968

Counsel for Amicus Curiae District Attorneys Association of the State of New York

CYRUS R. VANCE, JR.
District Attorney
New York County
HILARY HASSLER
Chief of Appeals
DAVID M. COHN*
DIANA WANG
Assistant District Attorneys
One Hogan Place
New York, NY 10013
(212) 335-4098
cohnd@dany.nyc.gov

Counsel for Amici Curiae

(For Continuation of Appearances See Inside Cover)

* Counsel of Record

306644

Billy West
President
National District Attorneys Association
1400 Crystal Drive, Suite 330
Arlington, VA 22202
(703) 549-9222

Counsel for Amicus Curiae
National District Attorneys Association

TABLE OF CONTENTS

Page

TABLE OF CITED AUTHORITIES

Page(s)

CASES:

STATUTES AND OTHER AUTHORITIES:

Interest of the *Amici Curiae*[1]

The District Attorneys Association of the State of New York ("DAASNY") was formed in 1909 as a voluntary professional organization for New York state prosecutors. Its members include the Attorney General, all 62 elected District Attorneys in the state, and the New York City Special Narcotics Prosecutor. Membership is also open to assistants on the legal staffs of those offices. DAASNY fosters relationships among New York prosecutors and works on behalf of its members to promote fairness and transparency in the criminal justice system.

The National District Attorneys Association ("NDAA") is the oldest and largest nonprofit association of prosecutors in the country, representing more than 5,000 members nationwide. NDAA provides professional guidance, support, and training to prosecutors, drawing on its national expertise in criminal justice matters.

DAASNY and NDAA members regularly litigate issues regarding the admissibility of evidence in criminal trials, including evidentiary issues that implicate the United States Constitution. *Amici* submit this brief in support of respondent, because the issue presented here -- whether and how a defendant may open the door to the introduction of

---

[1] Pursuant to Supreme Court Rule 37.3(a), counsel for all parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

otherwise inadmissible evidence -- is important to the fair and just resolution of criminal trials in New York and nationwide. *Amici* believe that the expertise of their members in litigating similar cases will provide helpful background to this Court.

Summary of Argument

A party that presents false or misleading evidence at trial opens the door to the admission of any evidence necessary to correct the misimpression, even if that evidence would otherwise be inadmissible. This rule applies in criminal cases, and it may be enforced against either the prosecution or the defense. In fact, to remedy a misimpression created by the defense, the prosecution may introduce evidence that was seized illegally or a statement that was obtained in violation of the *Miranda* rule. *See Harris v. New York*, 401 U.S. 222 (1971); *Walder v. United States*, 347 U.S. 62 (1954). As this Court explained, the Constitution may not be used as "a shield against contradiction" of a defendant's "untruths." *Walder*, 347 U.S. at 65.

Nevertheless, petitioner argues that the "door opening" principle may not be applied to permit the introduction of a hearsay statement that would otherwise be barred by the Sixth Amendment Confrontation Clause. He asserts that the confrontation right is so "fundamental" that it can bear no exceptions (Pet. Br. 2). But contrary to petitioner's argument, the "door opening" principle applies equally to the rules of evidence grounded in the Fourth, Fifth, and Sixth Amendments. Indeed,

the "fundamental" principle at work here is that a party may not benefit from misleading the trier of fact.

Argument

A. As courts have long recognized, a party may, through its litigation strategy, lose the right to assert a legal claim.

Contrary to petitioner's argument, this case is not fundamentally about the Confrontation Clause. Indeed, there is no dispute that, under the circumstances of this case, the absent witness's plea allocution constituted testimonial hearsay. *See Crawford v. Washington*, 541 U.S. 36, 64 (2004) (describing plea allocutions as "plainly testimonial"). Nor does this case concern a defendant's "forfeiture" of the confrontation right by his own, *out-of-court* conduct toward a hearsay declarant. *See Giles v. California*, 554 U.S. 353 (2008). Instead, this is a case about litigation strategy.

When it comes to litigation, the notion of fair play is strongly rooted in our adversarial system. A prosecutor, for instance, may "strike hard blows" but not "foul ones." *Berger v. United States*, 295 U.S. 78, 88 (1935). Similarly, a defense attorney should represent her client with "zeal," but this does not require "press[ing] for every advantage that might be realized for a client" or using "offensive tactics." A.B.A. Model Rule of Prof. Conduct 1.3, cmt. 1.

Likewise, a court need not countenance a party's attempt to gain an undue advantage through litigation tactics. In particular, and pertinent here, a court may hold a party responsible for the choices it makes in litigating a case. For example, New York, like many other jurisdictions, requires a party to make a timely objection to preserve a claim of error for appeal. This rule ensures that a judgment will not be reversed on appeal unless the "claimed error" has been brought "to the attention of the trial court at a time when the court has an opportunity to remedy the objectionable procedure and cure any asserted defect." *People v. Morrison*, 32 N.Y.3d 951, 963 (2018). As this Court has recognized, even a constitutional claim may be relinquished by the lack of a timely objection. *See Coleman v. Thompson*, 501 U.S. 722, 747 (1991) ("Ohio's contemporaneous objection rule" constituted an "independent and adequate state ground" barring federal habeas corpus relief).

Additionally, a court need not permit a party to switch positions in the midst of litigation merely because its interests have changed. In that regard, under the doctrine of judicial estoppel, a party that prevails "in one phase of a case on an argument" may not then rely "on a contradictory argument to prevail in another phase." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (internal quotation marks omitted).

Another pertinent example is the "rule of completeness," which dates back to the sixteenth century. *See Wharton's Criminal Evidence* § 4:10

(15th ed.). The purpose of that rule is "to ensure that a misleading impression created by taking matters out of context is corrected on the spot," and thereby to "'protect[] litigants from the twin pitfalls of creative excerpting and manipulative timing.'" *Id.* (quoting *United States v. Boylan*, 898 F.2d 230, 256 (1st Cir. 1990)).

Under the current, federal rule of completeness, "[i]f a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part -- *or any other writing or recorded statement* -- that in fairness ought to be considered at the same time." Fed. R. Evid. 106 (emphasis added). The plain text of that rule refutes petitioner's contention that it is "triggered only when a party introduces a fragment of a statement or writing" (Pet. Br. 4). After all, Rule 106 permits a party to introduce "any other" written or recorded statement that "in fairness ought to be considered" alongside a statement introduced by the opposing party. Nor is the rule of completeness limited to statements; some states have extended it to cover acts as well. *See, e.g.,* Mont. R. Evid. 106(a); Neb. Rev. Stat. Ann. § 27-106(1).

This Court has never held that the contemporaneous objection rule, the doctrine of judicial estoppel, or the rule of completeness runs afoul of the Due Process Clause. To the contrary, those rules are designed to *ensure* due process, by preventing a party, through its litigation strategy, from gaining an undue advantage or misleading the trier of fact. New York's "opening the door" doctrine

is a similar rule. Moreover, as explained below, it is reasonable and limited in scope.

B. New York's "opening the door" rule promotes fair trials by imposing consequences for sharp practice. Further, the rule is reasonable and limited.

New York courts do not permit a party, through sharp practice or manipulation, to mislead the trier of fact without consequence. In that regard, a party may, by virtue of its litigation strategy, "open the door" to the admission of otherwise inadmissible evidence. New York's "door opening" rule dates back more than a century. For instance, in *People v. Buchanan*, 145 N.Y. 1 (1895), defense counsel opened the door to the admission of the entire contents of two hearsay conversations, by cross-examining the People's witnesses about select portions of those conversations. *See id.* at 23-25.

No party is immune from this rule; it has been applied against the prosecution as well as the defense. In *People v. Carroll,* 95 N.Y.2d 375 (2000), for example, it was the prosecutor who opened the door to the admission of hearsay -- specifically, a tape-recorded conversation, in which the defendant had denied the allegations of sexual assault. The prosecutor did so by presenting testimony that the defendant had "'never denied' the allegations," which "became a major theme in the prosecution's theory of the case." *Id.* at 385.

In applying New York's "opening the door" principle, courts carefully tailor the remedy to the precise nature of the "wrong." For example, in *People v. Rivera*, 96 N.Y.2d 749 (2001), the defense stated its intent to elicit testimony that, when a police officer arrived at the scene of the crime, he initially placed both the defendant and the victim in handcuffs. As a result, the prosecutor was allowed to present evidence -- which otherwise may not have been admissible under New York law -- that the officer had released the victim after speaking to two bystanders. *See id.* at 750-51. In affirming the defendant's conviction, New York's highest court observed:

> Without an explanation, the jury would otherwise be left to speculate as to why the officer uncuffed [the victim] and arrested defendant. In view of defendant's "selective portrayal" of the events leading up to his arrest, the trial court did not abuse its discretion in admitting the testimony for the limited purpose of explaining the officer's actions.

Id. at 751. And in *People v. Rojas*, 97 N.Y.3d 32 (2001), the court permitted the prosecutor to elicit the reason why the defendant, a prison inmate, was being held in segregated custody, after the defense insinuated, in its opening statement and on cross-examination, that the defendant's placement in segregation was "unjustified." *Id.* at 39.

New York courts place strict limits on the "door opening" principle. Contrary to petitioner's implication (Pet. Br. 24-25), it is by no means a *carte blanche* for prosecutors to skirt the normal rules of evidence. In that regard, in *People v. Melendez*, 55 N.Y.2d 445 (1982), the court held that the defense had opened the door to only some, but not all, of the hearsay elicited by the prosecutor. Specifically, by eliciting testimony that the police had initially considered one of the prosecution witnesses to be a suspect in the charged homicide, the defense had opened the door to evidence that the police's suspicions of the witness were based on a case of mistaken identity. The prosecutor, however, should not have been permitted also to elicit that the police had received a tip implicating the defendant in the murder. *See id.* at 452-53. The New York Court of Appeals thus reversed the defendant's conviction, explaining that the "opening the door" principle "merely allows a party to explain or clarify" matters that the opposing party has "put in issue." *See id.* at 452. The court emphasized that, in determining how wide the door has been opened, trial courts should "'exclude *all evidence which has not been made necessary by the opponent's case in reply*.'" *Id.* at 452 (quoting 6 Wigmore, *Evidence* (Chadbourn rev. ed.) § 1873, p. 672) (emphasis in original).

Following *Melendez*, New York appellate courts have routinely found error where trial courts have interpreted the "opening the door" principle too broadly. *See, e.g., People v. Moore*, 92 N.Y.2d 823, 824-25 (1998) (defendant's equivocal testimony did not open the door to otherwise inadmissible evidence

of his prior crimes); *People v. Crandall*, 67 N.Y.2d 111, 117-19 (1986) (defendant's denial that he had sold drugs to an undercover officer did not open the door to evidence of his prior drug sales).[2]

C. The "door opening" principle applies to constitutional rules of evidence.

Like the contemporaneous objection rule and other rules of trial procedure, the "door opening" principle applies to rules of evidence that are grounded in the Constitution. This conclusion is uncontroversial. After all, it is beyond dispute that a criminal defendant may, by his litigation strategy, open the door to evidence of a suppressed confession (so long as it was not involuntary) or to physical evidence that was obtained in an illegal search. *See Harris v. New York*, 401 U.S. 222 (1971); *Walder v. United States*, 347 U.S. 62 (1954).

As Justice Frankfurter, writing for the Court, explained in *Walder*:

> It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite

[2] *See also People v. Sylvester,* 188 A.D.3d 1723 (N.Y. App. Div. 4th Dept. 2020); *People v. Watts*, 176 A.D.3d 981 (N.Y. App. Div. 2d Dept. 2019); *People v. Schlesinger Elec. Contractors,* 143 A.D.3d 516, 516-17 (N.Y. App. Div. 1st Dept. 2016); *People v. Richardson*, 95 A.D.3d 1039, 1040 (N.Y. App. Div. 2d Dept. 2012); *People v. Wallace*, 31 A.D.3d 1041 (N.Y. App. Div. 3d Dept. 2006).

> another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths.

Walder, 347 U.S. at 65.

This rule applies equally to testimonial hearsay. Indeed, petitioner can contend otherwise only by describing the *Miranda* rule[3] and the exclusionary rule as something less than constitutional commands (Pet. Br. 30-31). But this Court has already rejected the argument that the *Miranda* rule is not a constitutional mandate. *See Dickerson v. United States*, 530 U.S. 428 (2000). Likewise, without the exclusionary rule, the Fourth Amendment protection against unreasonable searches and seizures would be merely "ephemeral" -- just "a form of words, valueless and undeserving of mention in a perpetual charter of inestimable human liberties." *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (internal quotation marks omitted).

If anything, exceptions to the *Crawford* rule arising from a party's litigation strategy ought to be more readily available than exceptions to the constitutional rules governing police searches, seizures, and interrogations. After all, the police

[3] *Miranda v. Arizona*, 384 U.S. 436 (1966).

wield extraordinary power when interacting with civilians, and rules governing police conduct are essential to ordered liberty.

By contrast, the *Crawford* rule is one of trial procedure. The Confrontation Clause is designed to ensure that a defendant is not subjected to a one-sided trial by affidavit, as occurred in the case of Sir Walter Raleigh. *See Crawford*, 541 U.S. at 44-45, 51-52. That is simply not a concern when, in a modern criminal trial, a defendant represented by able counsel makes a strategic choice to elicit a misleading statement, to introduce evidence of only *part* of an encounter, or to make an argument to the jury that twists the facts. In such a case, the defense should be deemed to have waived any right to invoke the rules of evidence (constitutional or otherwise) to preclude the prosecutor from correcting the misleading impression. As Justice Frankfurter explained in *Walder*, evidentiary rules, including those grounded in the Constitution, should not be used as a sword to confuse or deceive the trier of fact. It has always been, and should continue to be, within the purview of an experienced trial judge to take appropriate action, in order to prevent the trier of fact from being misled or confused.[4]

---

[4] Notably, unlike the state evidentiary rule at issue in *James v. Illinois*, 493 U.S. 307 (1990), New York's "door opening" principle applies only to intentional, strategic conduct undertaken by a defendant or his attorney. Thus, unlike in *James*, the door cannot be opened to inadmissible evidence simply because an insufficiently "attentive" or even "hostile" defense witness makes a stray comment. *Id.* at 315.

It is hardly surprising, therefore, that nearly a decade ago, New York joined a number of federal circuit courts in holding that a defendant, by his litigation strategy, can open the door to the admission of testimonial hearsay. *See People v. Reid*, 19 N.Y.3d 382, 387-88 (2012).[5] Indeed, petitoner cites only one contrary federal circuit court decision. *See United States v. Cromer*, 389 F.3d 662, 678-79 (6th Cir. 2004). New York, therefore, is in accord with the prevailing view.[6]

In short, as a federal district court in New York aptly observed, "there is no basis for concluding that the Confrontation Clause can be used as a shield to allow a jury to be misled, particularly when the Supreme Court has refused to allow other constitutional rights to be used by defendants as a shield for misleading the jury." *Ko v. Burge*, No. 06 Civ. 6826 (JGK), 2008 WL 552629, *13 (S.D.N.Y. Feb. 26, 2008). In fact, the court continued, the notion that the Confrontation Clause is so "fundamental" as to

---

[5] *Accord United States v. Holmes*, 620 F.3d 836, 843-44 (8th Cir. 2010); *United States v. Lopez-Medina*, 596 F.3d 716, 733 (10th Cir. 2010); *United States v. Cruz-Diaz*, 550 F.3d 169, 178 (1st Cir. 2008); *United States v. Acosta,* 475 F.3d 677, 683-684 (5th Cir. 2007).

[6] Petitioner also cites *Holmes,* 620 F.3d 836, *supra*, as holding that "the rule of completeness does not overcome" a defendant's confrontation rights (Pet. Br. 36-37). In *Holmes*, however, the Eighth Circuit observed that a defendant can, by his conduct at trial, open the door to the admission of testimonial hearsay. The court merely concluded that the defendant had not done so under the factual circumstances at hand. *See id.* at 842-44.

permit no exceptions is "inconsistent" with this Court's conclusion that *Crawford* did not announce "a watershed rule that is necessary to the fundamental fairness of the trial, and the accuracy of criminal proceedings." *Id.* (citing *Whorton v. Bockting*, 549 U.S. 406, 416-21 (2007)).

Significantly, in *Whorton*, this Court observed that it was "unclear whether *Crawford*, on the whole, decreased or increased the number of unreliable out-of-court statements that may be admitted in criminal trials." *Whorton*, 549 U.S. at 420. And, certainly, *Crawford* is not a rule "without which the likelihood of an accurate conviction is seriously diminished." *Id.* (internal quotation marks omitted). Therefore, petitioner is wrong to assert that New York's "door opening" rule is inconsistent with due process, or with the Framers' intent, simply because it may permit the admission of testimonial hearsay to redress misleading litigation tactics.

Nor should it concern this Court that the precise scope of the "opening the door" rule -- or the "rule of completeness," or the "invited error" doctrine -- varies somewhat among jurisdictions.[7] After all, the "opening the door" doctrine is a state procedural rule derived from the salutary principle that parties must "play fair" when selecting their litigation strategies. It is not a rule of evidence that is bounded

[7] *See* 4 *Jones on Evidence* (7th ed.) § 24:26.20 *et seq.* (Dec. 2020).

by the Confrontation Clause. Rather, it is a threshold doctrine -- like judicial estoppel or the contemporaneous objection rule -- that transcends the rules of evidence.

Critically, the federal structure of our Constitution permits each state to adopt its own rules of evidence and procedure. *See Estelle v. McGuire*, 502 U.S. 62, 67-70 (1991). Indeed, "it has never been thought" that this Court was empowered to act "as a rule-making organ for the promulgation of state rules of criminal procedure." *Spencer v. Texas*, 385 U.S. 554, 563-64 (1967). This does not mean, of course, that a state's discretion is limitless. The Due Process Clause of the Fourteenth Amendment will always provide a "backstop," in the event that a state rule renders a criminal proceeding fundamentally unfair. *See Chambers v. Mississippi*, 410 U.S. 284 (1973). But beyond that, this Court should not impose a uniform set of rules governing procedure and trial practice in the state courts.

D. The admission of a limited excerpt from a non-testifying witness's plea allocution was reasonable under the circumstances of this case.

Applying the aforementioned principles to the case at hand, the state court's ruling below was reasonable and comported with due process.

Of course, the testimonial statement of an absent declarant is typically inadmissible at a criminal trial. But there are times when the

admission of such a statement is permissible. In fact, on occasion it is the most appropriate remedy to counter a defendant's sharp litigation tactics.

United States v. Lopez-Medina, 596 F.3d 716 (10th Cir. 2010), is a case in point. There, the court held that the defense opened the door to the admission of two testimonial statements. First, by broaching the subject of a nontestifying informant's statements to the police, defense counsel opened the door to an exploration, by the prosecutor, of the full content of the informant's statements. *See id.* at 730-32. Second, by creating the misimpression that a nontestifying codefendant had "claimed full responsibility for the crime," the defendant opened the door to the admission of the factual portion of the codefendant's plea allocution, in which the codefendant had admitted to joint -- not sole -- possession of the drugs in question. *See id.* at 733-35. In declining to impose a categorical rule that the Sixth Amendment barred admission of those statements, the Tenth Circuit explained, "The Confrontation Clause is a shield, not a sword." *Id.* at 732.

Similarly, here, the state court properly ruled that petitioner could not use the Confrontation Clause as a "sword" to mislead the trier of fact. Simply put, in an effort to convince the jury that Nicholas Morris was the true perpetrator of the shooting, petitioner's counsel told the jury that Morris had previously been prosecuted for the homicide. Counsel added that the police had believed that Morris was guilty. And counsel insinuated, by selectively referencing the evidence, that Morris had

possessed the murder weapon (*see* Resp. Br.: 11). As a result, the court permitted the prosecutor to elicit that Morris had pleaded guilty to possessing a different firearm from the one used in the murder of the child bystander (*see* Resp. Br. 12-13).

This was a reasonable remedy. The defense placed the previous prosecution of Morris in issue, insinuated that Morris had possessed the murder weapon, and failed to explain why Morris had ultimately been cleared of the murder charge. Defense counsel's goal was plainly to persuade the jury that the police and prosecutors had it right initially -- that Morris, not petitioner, was the shooter -- and to raise questions in the jury's mind as to why the state had abandoned its prosecution of Morris. Thus, because the defense made an issue of why the murder charge against Morris had been dropped, the state court reasonably permitted the prosecutor to elicit proof that Morris had pleaded guilty to possessing a different gun.

As these facts demonstrate, the case at hand is nothing like the trial of Sir Walter Raleigh. In fact, it is nothing like the trial of Michael Crawford, who was convicted based, in part, on a formal statement that a nontestifying witness gave to the police. *See Crawford*, 541 U.S. at 40-41. Instead, Morris's redacted plea allocution, which did not implicate petitioner in any crime, was admitted for the sole purpose of correcting a misleading impression created by the defense during the trial. The state court's ruling here enhanced, rather than diminished, the

search for impartial justice. It should not be equated with a violation of a defendant's confrontation rights.

Finally, it bears noting that in his state court appeals, petitioner did not argue that a constitutional violation had occurred here. Instead, petitioner raised only the more pedestrian question of whether, under state law, his trial attorney's conduct had opened the door to admission of the plea allocution. The New York Court of Appeals found that issue worthy of only a single sentence: "Here, the trial court did not abuse its discretion by admitting evidence that the allegedly culpable third party pled guilty to possessing a firearm other than the murder weapon." *People v. Hemphill*, 35 N.Y.3d 1035, 1036 (2020).

This case, therefore, is a poor vehicle through which to assess the constitutionality of New York's "door opening" rule, much less to consider whether similar principles, such as the "rule of completeness" or the doctrine of "invited error," should remain viable. As noted, various formulations of those doctrines have long been recognized by state and federal law; in fact, they predate the Founding. Neither history nor precedent suggests that these established rules of trial practice and procedure are inconsistent with the Sixth Amendment.

Conclusion

The judgment against petitioner should be affirmed.

Respectfully submitted,

CYRUS R. VANCE, JR.
District Attorney
New York County
HILARY HASSLER
Chief of Appeals
DAVID M. COHN*
DIANA WANG
Assistant District Attorneys
One Hogan Place
New York, NY 10013
(212) 335-4098
cohnd@dany.nyc.gov
Counsel for Amici Curiae

J. ANTHONY JORDAN
President
District Attorneys Association
of the State of New York
3 Columbia Place
Albany, New York 12210
(518) 598-8968
Counsel for Amicus Curiae
District Attorneys Association
of the State of New York

BILLY WEST
President
National District Attorneys
Association
1400 Crystal Drive, Suite 330
Arlington, VA 22202
(703) 549-9222
Counsel for Amicus Curiae
National District Attorneys
Association

*Counsel of Record

August 17, 2021