

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.)
- - - - -

Pages: 1 through 80
Place: Washington, D.C.
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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

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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 a 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 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 explain 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 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, 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 a trial could -- could entertain that
14 travesty where the exculpatory part of a
15 statement is introduced, that's permitted, but
16 the inculpatory part is not introduced?

17 MR. FISHER: Again, I think you
18 wouldn't ever have that scenario because it
19 would be inadmissible in the first instance
20 under Rule 403, which under Crane and Holmes the
21 Court has said can be enforced. So the state --
22 if the state were to object, Justice Alito, that
23 objection should be sustained.

24 But I don't want to be fighting your
25 hypothetical too hard. I do understand you're

1 asking me a question about the rule of
2 completeness, and I think what the Court said in
3 Crawford and Giles is that only historically
4 grounded exceptions to the Confrontation Clause
5 are permitted.

6 And we don't see any evidence --

7 JUSTICE KAGAN: But that goes beyond
8 this case, doesn't it --

9 MR. FISHER: It goes well --

10 JUSTICE KAGAN: -- Mr. Fisher?

11 MR. FISHER: -- far beyond that case.

12 JUSTICE KAGAN: I mean, we don't have
13 to touch that, do we? Why should we touch it, I
14 suppose? Why are you even arguing it?

15 MR. FISHER: I'm just answering
16 Justice Alito's question.

17 JUSTICE KAGAN: Okay.

18 MR. FISHER: I don't think you do have
19 to go anywhere near that in this case, Justice
20 Kagan, and I think I would readily admit that's
21 a much harder question for you to have --

22 JUSTICE ALITO: Well, we --

23 JUSTICE KAVANAUGH: Mister --

24 JUSTICE ALITO: -- we --

25 JUSTICE BARRETT: Mr. Fisher?

1 JUSTICE ALITO: -- we take cases for
2 the most part -- excuse me.

3 JUSTICE BARRETT: Go ahead.

4 JUSTICE ALITO: We take cases for the
5 most part to decide important legal questions
6 and not just to determine whether there was an
7 error in a particular criminal trial in the
8 Supreme Court of New York for the County of the
9 Bronx, right?

10 So the important legal question here
11 is whether there can be a waiver of the
12 Confrontation Clause right either expressly or
13 implicitly. That's the underlying -- that's
14 what's important about this case.

15 And it may well be that the -- the New
16 York "open the door" rule goes too far, and you
17 just want a ruling on the -- the app -- on this
18 particular case, but isn't that the underlying
19 question --

20 MR. FISHER: Well --

21 JUSTICE ALITO: -- that is important
22 here?

23 MR. FISHER: -- I think that is a
24 broader framing of the question than the Court
25 needs to resolve in this case. There is a very

1 important legal question that arises under the
2 New York court of appeals decision in Reid and
3 which also has been adopted, as we noted in our
4 cert petition, by a Fifth Circuit decision, a
5 New Hampshire Supreme Court decision.

6 And that position is, leaving entirely
7 aside the rule of completeness, you have three
8 -- two states -- two state courts of last resort
9 and one federal court of appeals that have said
10 that merely introducing a defense or evidence
11 that could be contradicted by an out-of-court
12 testimonial statement is enough to forfeit the
13 Confrontation Clause right.

14 And that is a very important rule that
15 if it were adopted, as we said in our cert
16 petition and again in our merits brief, would
17 effectively wipe out the Confrontation Clause or
18 at least render it toothless in all the
19 situations where it matters the very most.

20 CHIEF JUSTICE ROBERTS: But is there
21 --

22 MR. FISHER: You can go all the way --

23 CHIEF JUSTICE ROBERTS: -- is there a
24 difference in -- in -- maybe it's a variation on
25 Justice Alito's question, but it may be an

1 important one.

2 It's one thing to say if the import of
3 the testimony that's introduced is, you know, I
4 wasn't there and the testimony that cannot be
5 confronted is he was there.

6 But it's another thing if what's being
7 admitted is nobody has said that I was there
8 and, in fact, the witness who can't be
9 confronted said he was there. It's sort of not
10 for the truth of the matter asserted, whether he
11 was there or not, but a very specific
12 incontrovertible statement, the person said he
13 was there, and he says --

14 MR. FISHER: Yeah.

15 CHIEF JUSTICE ROBERTS: -- nobody said
16 I was there. Is that a violation of the
17 Confrontation Clause?

18 MR. FISHER: So, Mr. Chief Justice,
19 I'm going to answer your question, but I first
20 want to say I agree, that's also a hard
21 hypothetical. I have not found a single case in
22 over 400 years of common law jurisprudence with
23 the rule we pronounced where that has ever come
24 up. And I think the reason why it never --

25 CHIEF JUSTICE ROBERTS: Well, there's

1 always a first time.

2 (Laughter.)

3 MR. FISHER: I mean, the reason why it
4 never comes up -- just to finish that -- my
5 preface, if you'll forgive me -- is because that
6 statement that you're imagining would be barred
7 itself by the hearsay rule. He couldn't comment
8 as to what somebody else out of court said or
9 didn't say.

10 But, if you had a hypothetical like
11 that, notwithstanding the Rules of Evidence and
12 over 400 years since King v. Payne for the rule
13 that we're propounding here, I think then I
14 would still say that the Confrontation Clause
15 would bar that remedy.

16 I think there would be other remedies
17 that the trial court could resort to, starting
18 with striking the defendant's testimony,
19 instructing the jury to disregard it, maybe even
20 informing the jury of -- of some other
21 background fact, not for a -- not for the truth
22 of the matter asserted to solve the problem.

23 And I think, Mr. Chief Justice, you've
24 given a much more extreme version of --

25 CHIEF JUSTICE ROBERTS: Well, what if

1 the witness --

2 MR. FISHER: -- what the state's --

3 CHIEF JUSTICE ROBERTS: -- what if the
4 witness is not there because the defendant
5 murdered him?

6 MR. FISHER: Well, that would raise a
7 Giles question. And if the reason for murdering
8 the witness was to keep the witness from
9 testifying, the Court's holding in Giles
10 would -- would -- would have a forfeiture there.

11 CHIEF JUSTICE ROBERTS: You mean, if
12 he murdered him --

13 MR. FISHER: If --

14 CHIEF JUSTICE ROBERTS: -- for some
15 other reason, it doesn't make a difference?

16 MR. FISHER: That's the holding of
17 Giles, Mr. Chief Justice. And I think what
18 Giles said is that it has to be an intentional
19 act on the defendant's part to keep the witness
20 from testifying. And I think that just
21 highlights -- even if you think Giles is a harsh
22 rule, it highlights how strict forfeiture is in
23 the Confrontation Clause context --

24 JUSTICE BARRETT: Mister --

25 MR. FISHER: -- and, indeed, across

1 all constitutional doctrine.

2 The defendant has to do something
3 inconsistent with asserting the right. I think
4 that's the easiest way to put it at the very
5 least. And Mr. Hemphill has done nothing in --
6 inconsistent with asserting his right to
7 cross-examine Morris.

8 He didn't introduce any statements
9 Morris made out of court, nor did he comment at
10 all on anything Morris said or didn't say. He's
11 just simply said, I have a right to
12 cross-examine the person whose testimony is
13 being used against me --

14 JUSTICE BARRETT: Mister --

15 MR. FISHER: -- which is the most
16 fundamental of all objections.

17 JUSTICE BARRETT: Mr. Fisher, let me
18 put it to you this way. Let's say that we
19 disagree with you that the rule of completeness
20 violates the Confrontation Clause, but we're
21 inclined to agree with you that the door-opening
22 rule does.

23 How do we describe the rule? Because,
24 I mean, I -- I think kind of what all these
25 questions are getting at is that the rule of

1 completeness seems like the same thing but at a
2 more precise level of generality than the
3 door-opening rule.

4 So, I mean, Justice Alito is right, we
5 don't want to write an opinion just to address
6 the facts of this case, but we would have to be
7 careful, right, if we agreed with you, to write
8 the opinion in a way that didn't close the door,
9 so to speak, on the rule-of-completeness
10 problem.

11 MR. FISHER: Right. So there would be
12 two ways that the Court could in a future case
13 distinguish the rule of completeness, neither of
14 which would undercut a ruling in my favor here.

15 One is the Court could say what the
16 Court said in Beech Aircraft, which is, when the
17 rule of completeness is invoked, the statement
18 is invoked for -- the statement is later
19 introduced for a non-hearsay purpose to give a
20 broader context for the original statement.

21 Here, by contrast, there's no doubt
22 and the state openly admits that Morris's
23 allocution was introduced for the truth of the
24 matter asserted, to prove what gun he had at the
25 scene of the crime supposedly.

1 The second way you could distinguish
2 rule of completeness would be that under a
3 theory where if the defendant put in part of an
4 out-of-court statement, for example, here, if
5 Mr. Hemphill had put in part of Morris's
6 allocution, you could think in that context that
7 the defendant has made Mr. Morris, in effect,
8 his witness. He is the one who has invoked his
9 testimony. And so it's not a witness against
10 him because the prosecution is now simply, in
11 effect, filling out the testimony of the defense
12 witness.

13 Again, neither of those theories would
14 get you in any trouble to write an opinion that
15 we're asking you to write today and with a
16 footnote that reserves the rule of completeness
17 simply saying that if the prosecution comes to
18 court and all they say is this testimonial
19 statement contradicts what the defense theory
20 is, that that cannot be enough to forfeit
21 Confrontation Clause rights.

22 JUSTICE KAVANAUGH: Mr. Fisher?

23 MR. FISHER: Yes?

24 JUSTICE KAVANAUGH: Mr. Fisher, isn't
25 there another way to write it? I'm not saying

1 that we should do this, but another way, picking
2 up from Professor Friedman's amicus brief, would
3 be that the rule of completeness is a
4 historically grounded rule that has existed for
5 centuries, but what happened here goes beyond
6 the rule of completeness for reasons that
7 Justice Barrett identified, the level of
8 generality.

9 MR. FISHER: Well, I think you're
10 certainly correct, Justice Kavanaugh, that the
11 rule of completeness does have historical roots
12 that are completely absent from the broader
13 "opening a door" theory that's in front of you
14 today.

15 I'm not so sure that those common law
16 roots -- and the state hasn't pointed to any
17 evidence to the contrary -- that those common
18 law roots included using that rule against
19 defendants in criminal cases, and that would be
20 --

21 JUSTICE KAVANAUGH: Well, Professor --

22 MR. FISHER: -- the question under
23 Crawford.

24 JUSTICE KAVANAUGH: Sorry to
25 interrupt. Professor Friedman acknowledges that

1 but says there's no indication that it would be
2 applied only in favor of and not against a
3 criminal defendant as well, but I take your
4 point on that, and -- and he responds to that as
5 well.

6 MR. FISHER: I -- I -- I think --
7 Justice Kavanaugh, maybe the short answer is I
8 think you're right, that would be at least
9 another ground the Court would want to look at
10 carefully. And if the Court wanted to reserve
11 that piece of it as well, you know, sketching
12 out different theories where the rule of
13 completeness may be different, there would be no
14 problem with that here, and you could look at it
15 more closely if that case ever arose.

16 It would certainly, again, not get in
17 the way of this case. My -- and my critical
18 submission to the Court right now would be that
19 this so-called "opening a door" theory based on
20 mere contradiction of the defendant's case is
21 wholly without common law foundation, and that's
22 particularly striking for two reasons.

23 One is even though the Court in
24 Crawford and Giles and other cases has said that
25 the Confrontation Clause codifies the common law

1 right, the state has openly admitted in its
2 brief that it has no historical support for the
3 rule that it's arguing for today.

4 And that -- that -- that's -- that's a
5 big concession given that, for hundreds of
6 years, defendants have gone into court and said,
7 somebody else did it or I wasn't there or I
8 acted in self-defense, as Mr. Crawford himself
9 said, or as Mr. Raleigh said, I didn't
10 participate in this plot, and then the
11 out-of-court statement said, yes, you did.

12 Since the beginning of the criminal
13 law, defendants have defended themselves in ways
14 that out-of-court statements could be introduced
15 to directly contradict their test -- their --
16 their own defense, and the common law up to the
17 founding and 200-plus years since the founding
18 has always kept those statements out absent an
19 opportunity for cross-examination.

20 JUSTICE ALITO: Can I take you back to
21 Justice Thomas's first question about what you
22 did and did not raise in the court of appeals?
23 You pointed to page 388. Maybe I'm missing the
24 most important language on 388, but in the --
25 the final -- the second full paragraph on 388,

1 you -- your brief began, "The Appellate
2 Division's analysis equates presenting a valid,
3 evidence-based third-party defense with
4 misleading the jury."

5 And then the final sentence -- I
6 gather this is -- this is what you're referring
7 to. It's the only one that refers to the
8 Confrontation Clause. "Such an approach is
9 absurd in the context of the Confrontation
10 Clause, the purpose of which is to afford the
11 accused the right to meaningfully test the
12 prosecution's proof." And this is under the
13 section of the brief that is labeled The Defense
14 Did Not Open the Door.

15 I mean, if I were on the New York
16 court of appeals, I would interpret that
17 argument to mean that there was a misapplication
18 of the "opening the door test" and it was this
19 misapplication that violated the Confrontation
20 Clause.

21 I'd be pretty sore, I'll tell you, if
22 I were a judge on the New York court of appeals
23 and I got back from this Court a decision that
24 said you -- you erred in your understanding of
25 the Confrontation Clause when the only thing I

1 had before me was this sentence.

2 MR. FISHER: Justice Alito, you're
3 asking an important question, and I want to give
4 you three answers.

5 JUSTICE ALITO: Yeah.

6 MR. FISHER: So -- so, first, it's not
7 just in that last sentence there; it's also
8 earlier in the paragraph that the Confrontation
9 Clause is mentioned. The Confrontation
10 Clause --

11 JUSTICE ALITO: Yeah, okay.

12 MR. FISHER: -- was also mentioned on
13 page 386, where what -- where what Mr. Hemphill
14 argued was that if relevance is enough to
15 overcome a Confrontation Clause objection, that
16 would violate the Sixth Amendment. So that's
17 the first thing, is that the Confrontation
18 Clause was threaded through this argument.

19 The second thing is it's important to
20 remember the context in which this arose. Mr.
21 Hemphill raised the argument under the Sixth
22 Amendment from the first moment of trial that
23 introducing Morris's allocution would violate
24 Crawford and the Confrontation Clause.

25 That's -- that's his federal claim,

1 that introducing Mr. Morris's allocution would
2 violate the Confrontation Clause. Opening the
3 door is the state's answer to that claim.

4 And so the state is coming to you now
5 saying even though we presented -- prevented --
6 I'm sorry, persuaded the New York courts to
7 adopt our response to his Sixth Amendment
8 argument, the defendant doesn't have the right
9 to keep making his Sixth Amendment argument.

10 And the last thing I would say,
11 Justice Alito, is even if the way you read the
12 arguments we made to the New York courts is to
13 say, look, we understand that Reid holds as a
14 matter of Sixth Amendment law that a defendant
15 can waive or forfeit his confrontation right
16 simply by presenting evidence that could be
17 contradicted by testimonial hearsay, and we
18 pushed back against Reid in the New York court
19 of appeals without directly and explicitly
20 saying we think Reid is entirely wrong anyways,
21 that would just make this case exactly like two
22 of the Court's recent cases where it found no
23 preservation problem.

24 One is Holmes, where the Court wrote
25 the unanimous opinion, I believe that you

1 authored it, and the state made exactly the same
2 argument that the state is making here, where
3 the first six pages of South Carolina's brief in
4 that case, that what the defendant had done
5 there is simply argue for the misapplication of
6 a prior decision of the South Carolina Supreme
7 Court. And this Court didn't even deem that
8 argument in the opinion worthy of comment. In
9 Riley against California, you had the same
10 scenario.

11 Now I don't think we're even as far
12 out on the edge as either of those two cases,
13 but what you have is a common theme where
14 defendants go to a state court of appeals or a
15 state high court, whatever it may be called, and
16 say our -- our constitutional rights were
17 violated, and if that prior opinion is applied
18 in this case to -- to -- against me, that would
19 itself violate the Constitution.

20 And I think the Court has always found
21 that that's enough to preserve a federal
22 constitutional argument for this Court, and
23 that's what we'd rest on if -- if -- if we
24 needed to.

25 The last thing I'd like to say before

1 turning to any of the Court's one-by-one
2 questions or reserving the remainder of my time,
3 Justice Breyer, you asked me a question earlier
4 about the testimonial theory of Crawford. And,
5 obviously, my first answer is that's not in
6 front of you here today.

7 But going back to the New York court
8 of appeals opinion in Reid, it cited the case --
9 this Court's decision in Harris, which involved
10 the Miranda rule and a forfeiture exception to
11 the Miranda rule. And I want to draw out one
12 important difference there.

13 Even if you didn't want to get wrapped
14 up in the testimonial versus non-testimonial
15 line under Crawford, it's important to note that
16 this case is miles away even from Harris.

17 First of all, Harris involves a
18 prophylactic rule, and this involves a rule of
19 exclusion in the Constitution itself.

20 And the other thing in Harris is what
21 the Court said is the truth-seeking process of
22 the courts should not be perverted by allowing
23 the defendant to -- to manipulate evidence and
24 keep out trustworthy evidence.

25 Well, what you have here, even if you

1 leave Crawford entirely aside, is the classic
2 form of presumptively unreliable evidence the
3 Confrontation Clause has always been concerned
4 with.

5 JUSTICE BREYER: Well, that's this
6 case.

7 MR. FISHER: You have -- you have a
8 statement of a third party spreading blame,
9 denying -- denying guilt at least as to the type
10 of gun involved in the homicide, and giving a
11 self-exonerating statement in coordination with
12 the state with contemplation of further
13 prosecution.

14 And so whatever theory of the
15 Confrontation Clause you may have, this is the
16 classic kind of statement that needs to be kept
17 out. And in Kirby in 1899, the Court said that
18 guilty pleas of accomplices are not admissible
19 against criminal defendants. So, again, what
20 you have here, just dressed up in different
21 garb, is a classic Confrontation Clause
22 violation under any theory of the clause.

23 I'm happy to take one-by-one questions
24 if the Court has any.

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

1 a bit odd that the court of appeals disposed of
2 this on an abuse-of-discretion standard, that if
3 it had been -- that if it thought it had a
4 constitutional issue before it, it would not
5 have disposed of it on that standard?

6 MR. FISHER: I agree, Justice Thomas,
7 it is odd that it's framed in terms of abuse of
8 discretion. I will tell you, from reading a lot
9 of lower-court Crawford cases, that this happens
10 quite regularly as the courts get -- they sort
11 of mix up evidence and confrontation law.

12 But, Justice Thomas, if you look at
13 the briefs in the New York court of appeals, the
14 only thing we were arguing about was whether or
15 not the Sixth Amendment was violated. The only
16 argument we were making was that the
17 Constitution had been violated.

18 And -- and even when we argued --
19 this goes back to Justice Alito's question --
20 even when we argued that the door was not open,
21 what we were arguing was, under Reid's
22 constitutional holding about opening the door,
23 we didn't satisfy that rule.

24 JUSTICE THOMAS: And a much different
25 question and probably not nearly -- not -- not

1 that important, but I'm not -- I'm a bit
2 confused as to what amounts to a constitution --
3 a Confrontation Clause violation.

4 For example, if I say you were --
5 Hemphill was there and he was the shooter, and
6 that, of course -- that if Morris had done that,
7 I think we'd both agree that's a problem.

8 But the -- in the -- in Morris's
9 allocution, he said, I had a .357 magnum. How
10 is that -- I know its use could be -- that it
11 could be used to confront or to disagree with or
12 contradict Hemphill, but I don't see Morris's
13 statement by itself about himself being a
14 constant -- a Confrontation Clause problem.

15 MR. FISHER: Well, my answer, Justice
16 Thomas, starts with the text of the Sixth
17 Amendment, which, remember, gives the defendant
18 the right to be confronted with the witnesses
19 against him.

20 JUSTICE THOMAS: So how is that
21 against him?

22 MR. FISHER: So you have two
23 questions.

24 JUSTICE THOMAS: That's -- Morris
25 didn't say anything about Hemphill.

1 MR. FISHER: Right. So he's -- so,
2 certainly, Morris is acting as a witness when he
3 gives that statement.

4 JUSTICE THOMAS: But against him.

5 MR. FISHER: And against is answered
6 by the Court's decision in Melendez-Diaz. In
7 Melendez-Diaz, the Court said that if the
8 prosecution enters a testimonial statement from
9 a witness, that itself is what renders it
10 against the defendant. It doesn't have to be
11 directly accusatory.

12 If the rule were otherwise, in every
13 case where the prosecution had a circumstantial
14 case without a direct accusation, it could prove
15 its entire case with affidavits otherwise under
16 the Confrontation Clause.

17 JUSTICE THOMAS: Well, I --

18 MR. FISHER: It's never been limited
19 to --

20 JUSTICE THOMAS: -- I understand if
21 you say it further -- it advances one of the
22 elements of the crime. I get -- I understand
23 that.

24 But, if someone admits something that
25 has nothing to do with the defendant, but it's

1 inconvenient for the defendant or contradicts
2 the defendant, you -- yeah, you say, well, the
3 use of this statement harms the defendant.

4 You could say that about weather. You
5 could say it about, you know, geography. You
6 could say it about lots of things. Someone
7 could say: Oh, North Carolina is south of
8 Georgia, and you could introduce someone saying
9 -- you know, evidence that it's not.

10 I mean -- well, that's evidence
11 against them. I don't see how you do that. I
12 don't see how you could take something that's
13 neutral and just because it's used to contradict
14 the defendant, that is now witness against the
15 defendant.

16 MR. FISHER: Right. So -- so two
17 answers, Justice Thomas. The first is this
18 is -- this is answered by Melendez-Diaz --

19 JUSTICE THOMAS: Yeah.

20 MR. FISHER: -- where the Court said,
21 if a statement is testimonial and the
22 prosecution then introduces it, that's what
23 makes it against the defendant.

24 But, Justice Thomas, even if you had
25 some problem with the Melendez-Diaz holding on

1 that score, I would urge you to focus back on
2 this particular case. Remember that Morris's
3 defense was that Hemphill did it. And the
4 prosecution itself at the time of this plea and
5 allocution told the Court, we're getting this
6 allocution with an eye toward future prosecution
7 of somebody else.

8 So, in context, him saying I had a
9 .357 and not a 9-millimeter is, in effect,
10 pointing the finger at Mr. Hemphill, which was
11 his entire defense all along.

12 JUSTICE THOMAS: Uh-huh.

13 CHIEF JUSTICE ROBERTS: Justice
14 Breyer?

15 JUSTICE BREYER: Now you've thought of
16 this, I bet, but you needn't say it because this
17 is not -- I could think of 15 ways of getting
18 your case out of this question, all right?

19 But there is a general question.
20 Hearsay is statements made out of court for
21 their truth. And we have, I looked up here, 24
22 exceptions, including, for example, baptismal
23 certificates.

24 So, if you were to take Crawford
25 literally and keep out every statement on the

1 constitutional ground made for its truth, well,
2 that's the end of the hearsay exceptions. So
3 that can't be right.

4 Then this Court has said it isn't
5 right. And they said let's look to see if the
6 hearsay exceptions are -- and now they've said
7 justified by history, justified by maybe trying
8 to kill a witness who was going to testify
9 against you, and not gone much further. Okay?

10 I've said, look at the purposes. Look
11 at the consequences. Look at how it fits in.
12 Not everybody agrees with that. What do you
13 think?

14 MR. FISHER: So I -- I think -- what I
15 think is what the Court held in Crawford, which
16 is you don't go straight from -- from is it
17 hearsay to is that hearsay exception firmly
18 grounded. That's more like what the Roberts
19 theory was. What you do under Crawford is you
20 ask an intermediate question in between those
21 two, which is, is the statement testimonial?
22 And for the vast --

23 JUSTICE BREYER: Yes, it's
24 testimonial, of course.

25 MR. FISHER: -- for the -- for the

1 vast majority of hearsay exceptions, the answer
2 is unequivocally no.

3 JUSTICE BREYER: Really?

4 MR. FISHER: Yes.

5 JUSTICE BREYER: A baptismal
6 certificate is a person who at one point in time
7 signed a piece of paper which said Joe Jones was
8 baptized on such and such a date. Now --

9 MR. FISHER: But not with an eye
10 toward future criminal proceedings.

11 JUSTICE BREYER: Ah, there has to be
12 an eye towards future criminal proceedings.
13 Otherwise, Crawford doesn't apply?

14 MR. FISHER: I think that's the
15 holding in Crawford and subsequent cases.

16 JUSTICE BREYER: Okay, okay, okay.
17 Eye towards future criminal proceedings.

18 MR. FISHER: Yes.

19 JUSTICE BREYER: So, therefore, crime
20 labs are in, but hospitals are out?

21 MR. FISHER: For the most part,
22 hospitals are out. I don't -- I wouldn't
23 venture every possible hypothetical.

24 JUSTICE BREYER: No, no, no. Criminal
25 hospitals are in or excepted.

1 MR. FISHER: I think there can be, you
2 know, forensic examination --

3 JUSTICE BREYER: With an eye toward --

4 MR. FISHER: -- of hospitals that are
5 a borderline case.

6 JUSTICE BREYER: Okay. Thank you,
7 thank you, thank you.

8 MR. FISHER: And, you know, you may
9 see that in the future.

10 JUSTICE BREYER: All right.

11 MR. FISHER: Yeah.

12 CHIEF JUSTICE ROBERTS: Justice Alito,
13 do you have any further?

14 Justice Kagan?

15 JUSTICE KAGAN: Mr. Fisher, the -- New
16 York argues that the Reid rule ought to be
17 viewed as essentially a procedural device along
18 the lines of other procedural devices which
19 we've said fall outside the ambit of the
20 Confrontation Clause. I believe it -- it -- it
21 references Illinois v. Allen, it rep -- it
22 references Melendez-Diaz.

23 Why -- why is that wrong?

24 MR. FISHER: So for two reasons. One
25 is the New York Guide to Evidence itself calls

1 the rule of completeness and the more broader
2 "opening the door" theory rules of evidence, so
3 just as a matter of nomenclature and
4 characterization under New York law, the state
5 is wrong.

6 But just leaving labels aside, the
7 reason why the state is wrong is because the
8 admissibility of a statement under the "opening
9 the door" theory turns on the contents of the
10 statement. And that's to be -- that's to be
11 contrasted with situations like notice and
12 demand under Melendez-Diaz or Illinois versus
13 Allen or things that depend on things having to
14 do not with the content of the defendant's case
15 but, rather, about his timeliness of an
16 objection or his other -- you know, other
17 procedural actions he might take.

18 So we distinguish substance of the
19 statement rules, which are evidence rules and
20 which run into the Confrontation Clause, from
21 just procedural devices to manage the trial with
22 defendants have to meet under the Confrontation
23 Clause and any other constitutional right.

24 CHIEF JUSTICE ROBERTS: Justice
25 Gorsuch?

1 JUSTICE GORSUCH: Good morning, Mr.
2 Fisher. So I -- I suppose the state may try and
3 come back and suggest that its rule is actually
4 pretty close to and not much of an outgrowth of
5 the rule of completeness.

6 What -- what are the distinguishing
7 features in your mind that make this radically
8 different?

9 MR. FISHER: The core distinguishing
10 feature is that in a rule-of-completeness
11 situation, the defendant has put in part of the
12 absent witness's statement into play, whereas,
13 here, Mr. Hemphill did not put Mr. Morris's
14 testimony or anything else he said into play.

15 JUSTICE GORSUCH: Why not? With the
16 statement about the 9-millimeter casing found,
17 where else would it have come from?

18 MR. FISHER: Well, that's just a true
19 fact about evidence found in Mr. Morris's
20 apartment. And that's far different than what
21 he said. And, again, Justice Gorsuch, I just
22 return to the text and purpose of the
23 Confrontation Clause, which doesn't have to do
24 with the substance of defenses. It has to do
25 with witness testimony. And so --

1 JUSTICE GORSUCH: I understand that.
2 But just in terms of drawing a line between this
3 and a rule of completeness argument, if we were
4 concerned of not doing that, how would you go
5 about writing that?

6 MR. FISHER: I would write it to say
7 that -- that we leave for another day any
8 question about forfeiture where the defendant
9 himself introduces part of the absent witness's
10 statement or -- or any statement by that absent
11 witness. That would present a different
12 question from one where the defendant simply
13 presents a substantive defense through evidence
14 and argumentation that -- that can be
15 contradicted by the state.

16 JUSTICE GORSUCH: A fact in the world?

17 MR. FISHER: Yes.

18 JUSTICE GORSUCH: Okay. Thank you.

19 CHIEF JUSTICE ROBERTS: Justice
20 Kavanaugh, anything further?

21 JUSTICE KAVANAUGH: No further
22 questions.

23 CHIEF JUSTICE ROBERTS: Justice
24 Barrett?

25 JUSTICE BARRETT: No.

1 CHIEF JUSTICE ROBERTS: Thank you,
2 counsel.

3 Ms. Mignola.

4 ORAL ARGUMENT OF GINA MIGNOLA
5 ON BEHALF OF THE RESPONDENT

6 MS. MIGNOLA: Mr. Chief Justice, and
7 may it please the Court:

8 Now you have recognized, I think, that
9 the Petitioner is asking for a broad and
10 sweeping rule. He's essentially claiming that a
11 defendant can never open the door to the
12 admission of evidence that would otherwise be
13 barred by the Confrontation Clause. It doesn't
14 matter if a defendant has misled the jury, and,
15 really, if his approach is taken to its extreme,
16 even the traditional rule of completeness would
17 fall.

18 He surely is wrong about that, but I
19 want to call your attention to the fact at New
20 York State's highest court, he did not present
21 that broad claim that New York's "opening the
22 door" rule was unconstitutional on its face. He
23 presented only an unconstitutional as applied to
24 him challenge. New York's court had no occasion
25 to consider whether the rule is unconstitutional

1 on its face.

2 Because he bypassed New York's high
3 court, review of this claim should be outside of
4 this Court's jurisdiction. Even if this Court
5 could review the claim, it should certainly
6 reject it.

7 New York's rule, a trial court may
8 provide a limited but necessary remedy when the
9 defendant creates a misleading impression. The
10 rule is constitutional. As this Court has
11 recognized, like any other constitutional right,
12 the right to be confronted with witnesses is not
13 absolute. There are limitations.

14 And limitations are appropriate if
15 they have a legitimate purpose, and New York's
16 rule does. It allows the state court to protect
17 the vital interests that it has in the integrity
18 and truth-seeking function of the trial process.

19 This is not about being fair to the
20 prosecution. It's about the jurors and the
21 Court's duty to make sure that jurors are not
22 unfairly misled.

23 Moreover, a state may impose rules
24 that govern the manner in which a defendant may
25 assert or forfeit, even by his silence, his

1 right of confrontation. New York's rule is an
2 appropriate limitation in this regard.

3 It's not an exception to the
4 Confrontation Clause because it is not a
5 substitute means for the prosecution to
6 establish the reliability of evidence. It's a
7 remedy, a remedy that is triggered when the
8 defendant or his lawyers' intentional trial
9 conduct violates the state's prohibition against
10 misleading the jury.

11 I do welcome the Court's questions.

12 JUSTICE THOMAS: Mr. Fisher gave some
13 examples in the record as to why he raised --
14 Petitioner raised the Confrontation Clause issue
15 below. Would you address those specifics that
16 he raised?

17 MS. MIGNOLA: Well, Your Honor, I
18 think, if you look at the Joint Appendix
19 starting at page 385, this is what he told the
20 New York Court of Appeals: "The only issue
21 before this Court is whether the defense opened
22 the door to Morris's testimonial hearsay."

23 Now that is simply not a challenge to
24 the constitutionality of New York's rule on its
25 face. He did raise a Sixth Amendment challenge.

1 He did invoke the Confrontation Clause. But
2 that is not the same thing as saying the rule on
3 its face is unconstitutional.

4 I believe that's the question that
5 this Court has been asked to review, and it
6 simply was not presented to New York's highest
7 court. He should not be allowed to bypass the
8 state court in that way.

9 And that's particularly true in this
10 case, where the state's high court had an
11 adequate and independent basis to reject the
12 claim. Petitioner failed to preserve the broad
13 constitutional claim and, therefore, by state
14 statute, the New York Court of Appeals lacked
15 the jurisdiction to review it. By bypassing the
16 state high court, he's avoided -- he avoided an
17 explicit ruling --

18 JUSTICE KAGAN: Ms. Mignola?

19 MS. MIGNOLA: Yes?

20 JUSTICE KAGAN: I'm sorry.

21 MS. MIGNOLA: Yes, Your Honor?

22 JUSTICE KAGAN: Complete your
23 sentence. I'm sorry.

24 MS. MIGNOLA: He avoided an explicit
25 ruling that the -- from that court denying the

1 claim on adequate and independent state law
2 grounds. So to review that claim now will
3 encourage litigants in the future to withhold
4 from a state court a claim challenging the --
5 the constitutionality of a state rule so that
6 the state cannot have the opportunity to reject
7 it on adequate and independent state law
8 grounds.

9 JUSTICE KAGAN: This -- this was all
10 addressed at the cert petition stage, was it
11 not?

12 MS. MIGNOLA: Yes, I think that it
13 was, but I think it was still perhaps an
14 improvident grant.

15 CHIEF JUSTICE ROBERTS: What about our
16 decision in Riley? Your friend suggests that
17 that's a strong argument against your point.

18 MS. MIGNOLA: You know, I --

19 CHIEF JUSTICE ROBERTS: That we did in
20 Riley exactly what you said we shouldn't do
21 here.

22 MS. MIGNOLA: Well, I would suggest
23 instead that in Riley and -- and Holmes, there
24 were moments where the broader constitutional
25 claim was presented. They may not have done it

1 in -- in the way that we're saying it should
2 have happened, but they did do it at some point.

3 I think that this Court's decision in
4 Illinois v. Gates is actually more informative,
5 more instructive, because, there, the -- the
6 petitioner did raise a Fourth Amendment
7 suppression claim throughout.

8 However, when this Court considered
9 whether it could consider a modification to the
10 exclusionary rule, this Court recognized that
11 that claim had not been presented to the state
12 court and that, therefore, it should not be
13 reviewed.

14 JUSTICE BREYER: What about all the
15 things on 386, 388? I mean, he mentions the
16 Confrontation Clause a bunch of times, and I
17 suppose he'd be satisfied if we just said, well,
18 as applied to his case, the -- it's
19 unconstitutional.

20 MS. MIGNOLA: There is no doubt that
21 he raised a Confrontation Clause claim, but he
22 raised it as applied to him. He said simply --

23 JUSTICE BREYER: Well, what's --

24 MS. MIGNOLA: -- that --

25 JUSTICE BREYER: -- what difference

1 does that make? If we give a reason that he's
2 right and the reason applies to more than his
3 case, that might be perfectly satisfactory to
4 you then, wouldn't it?

5 MS. MIGNOLA: Well, I think it does
6 make a great deal of difference to New York's
7 courts. I think they should have the
8 opportunity to see how -- the -- the broader
9 constitutional question before them.

10 JUSTICE BREYER: Well, that might be
11 true. He's given a bunch of reasons in his
12 briefs why about it's unconstitutional, and,
13 certainly, a large number of those are pretty
14 strong. And -- and suppose we just said, well,
15 those are the reasons. That wouldn't strike
16 down the whole law. It would just say that the
17 door opening is not applicable in those cases.

18 So I'm anxious to hear what your
19 argument is on the merits of that.

20 JUSTICE BARRETT: Ms. Mignola, can I
21 ask -- oh, sorry. Did you have more you wanted
22 to say?

23 Ms. Mignola, can I turn to the merits?
24 On pages 19 to 21 of Mr. Fisher's brief, he
25 points out that under this rule of completeness,

1 some of our cases, even Crawford itself,
2 presumably -- you know, he makes the argument
3 that the -- that evidence that we said was
4 testimonial and barred by the Confrontation
5 Clause could have come in.

6 So, you know, in Crawford, he raises a
7 claim of self-defense. His wife's testimonial
8 statements, we said, had to stay out, but they
9 contradicted his claim of self-defense. What's
10 your answer to that?

11 MS. MIGNOLA: Well, if I understand
12 your question, Your Honor, I think that simply
13 contradicting the defense, simply if the people
14 have evidence that would contradict the defense,
15 that cannot be the basis for opening the door.
16 And that is something that we addressed in our
17 brief.

18 I think the New York standard is
19 different. There has to be something that is
20 truly misleading. And when you look at what is
21 misleading, it is very much like the way that
22 the traditional rule of completeness operates.

23 The hypothetical that was posed by the
24 Court, there are two portions of a statement,
25 right? One portion of the statement, the

1 declarant, perhaps a third-party suspect, right,
2 says, for example, yes, I possessed the murder
3 weapon, but a day before the murder I sold it to
4 the defendant. The defendant offers the first
5 part of the statement but not the second.

6 JUSTICE BARRETT: But, in this case --

7 MS. MIGNOLA: Yes.

8 JUSTICE BARRETT: -- this
9 contradiction-type case, to make -- to draw the
10 conclusion -- Mr. Fisher points out that to draw
11 the conclusion that the statement or that the
12 defendant's position is misleading requires a
13 value judgment on the part of the court that the
14 defendant is misleading, in other words, that
15 his rendition isn't true, but the other
16 outside-of-court statement was.

17 MS. MIGNOLA: So I don't think that it
18 is -- it does require that kind of analysis
19 because I do not believe that New York's rule is
20 that broad.

21 It cannot be -- I think Mr. Fisher is
22 right. It can't be that simply if the people
23 have evidence that merely contradicts the
24 defense theory of the case, that that opens the
25 door to evidence that would be -- otherwise be

1 barred by the Confrontation Clause.

2 I think it is a much more narrow rule.
3 There has to be something, some way in which the
4 defense has misled the jury. And in that
5 regard, the judge is not making a decision about
6 what is true. The judge in this case is not
7 making a determination that Morris's guilty plea
8 is true, that those statements are correct.

9 JUSTICE SOTOMAYOR: So isn't there two
10 ways to prevent the jury from being misled --
11 misled? The first is simply to -- to keep out
12 what the defense is proffering. That's what
13 your adversary says. That's what Mr. Fisher
14 says. The trial judge, if he believed any of
15 the testimony or arguments he was making misled
16 the jury, he should have rejected them.

17 But the judge said no, these arguments
18 are legitimate.

19 MS. MIGNOLA: So --

20 JUSTICE SOTOMAYOR: So now the
21 question is -- and this is what he argued from
22 the trial court to the appellate court to the
23 court of appeals -- can I mislead the jury
24 simply by making legitimate arguments based on
25 legitimate evidence and open the door to

1 non-testimonial -- to non- --

2 MS. MIGNOLA: To testimonial hearsay.

3 JUSTICE SOTOMAYOR: To testimonial
4 hearsay, when I didn't present that testimonial
5 hearsay. I didn't present part of it. I didn't
6 do anything with it. Can you, the prosecutor,
7 violate the Confrontation Clause by introducing
8 something?

9 MS. MIGNOLA: So I think that --

10 JUSTICE SOTOMAYOR: Isn't that what
11 his argument was below?

12 MS. MIGNOLA: Yes. Again, it's as
13 applied to him.

14 JUSTICE SOTOMAYOR: Well, what --

15 MS. MIGNOLA: He said he didn't open
16 the door.

17 JUSTICE SOTOMAYOR: I don't understand
18 what "applies" means or not. My Confrontation
19 Clause was violated because the trial court
20 misapplied Reid. To me, that sounds like
21 misapplied Reid because it let in testimonial
22 hearsay when I didn't open the door. And even
23 if I opened the door, they couldn't do it.

24 That's what he argued, correct?

25 MS. MIGNOLA: He argued that the -- he

1 did not open the door.

2 JUSTICE SOTOMAYOR: Right --

3 MS. MIGNOLA: And so, yes.

4 JUSTICE SOTOMAYOR: -- because he
5 can't open the door legally, correct?

6 MS. MIGNOLA: But I think he's asking
7 this Court a broader question, whether a
8 defendant can open the door. That's his
9 question presented. And that question, that
10 broader question, was not presented to New
11 York's state court.

12 But I want to --

13 JUSTICE SOTOMAYOR: Would it have --
14 would -- have you ever known the court of
15 appeals to go back on a decision like Reid that
16 it just decided and there are no material
17 changes between Reid and this case --

18 MS. MIGNOLA: Well, I --

19 JUSTICE SOTOMAYOR: -- and say we're
20 going to revisit Reid and there's no such thing
21 as opening the door? Or do you think it would
22 have said just what they were arguing, Reid
23 didn't open the door this way?

24 That's what he argued, correct?

25 MS. MIGNOLA: Right, but I think Reid

1 was at least seven years earlier. And so it may
2 very well, had Mr. Fisher, with all of his
3 arguments and expertise, explained to the New
4 York court of appeals why he thought that a rule
5 of that nature was unconstitutional broadly
6 speaking, that a defendant could never open the
7 door, I think New York court should have had a
8 chance to review that, consider it, and
9 determine whether there were any modifications,
10 whether, for example, it should have said the
11 judge should have stricken the testimony,
12 stricken the evidence.

13 But, again, I -- I want to focus a --
14 a little bit on -- it's so important that what
15 was happening here is not simply that the
16 evidence that was -- contradicted the defense
17 theory. That can't be what opens the door. I
18 agree with that. It has to be that there was
19 something misleading about what the defense was
20 doing, something that needs correcting.

21 JUSTICE SOTOMAYOR: So identify that
22 here.

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

24 JUSTICE SOTOMAYOR: Identify what was
25 misleading about what he did.

1 MS. MIGNOLA: Well, I think what was
2 misleading is that he was implying to the
3 jurors, first of all, that Mr. Morris's case
4 ended in a manner that was unsatisfactory, and
5 he really led the jurors to speculate about how
6 that prosecution ended.

7 Furthermore, he did something that
8 pretrial the judge had issued a very strong
9 ruling and had made a determination that a
10 theory of the defense was misleading, and that
11 was to ask the jurors to rely on the fact that
12 the prosecutors were charging him and,
13 therefore, they believed that Morris was guilty.

14 It was asking the jurors really for
15 vouching, and that's how the judge framed it,
16 that's how he talked about it, that the -- the
17 defense was -- wanted to rely on vouching, all
18 right?

19 And so, if you look, for example, in
20 the Joint Appendix at pages, I think, 48 through
21 56, there's a tremendous discussion in there
22 about what the judge saw was misleading.

23 Counsel's efforts to use the
24 prosecutor's previous opening or beliefs and
25 conclusions of the government actors as though

1 that were factual evidence that should be
2 considered for its truth --

3 JUSTICE SOTOMAYOR: The judge kept
4 that out. The jury didn't hear that.

5 MS. MIGNOLA: But he continued on that
6 strategy. Even though the jurors did not hear
7 the opening statement from the Morris trial, he
8 nevertheless came in his opening statement at
9 this trial, the defense came in this trial and
10 he made arguments that again picked up that
11 theme.

12 And he did a cross-examination of
13 Detective Jimmick and a cross-examination of
14 Gilliam, again, picked up that theme, and he
15 certainly, you know, brought that theme home
16 just as the judge anticipated, brought it home
17 in his summation.

18 That was a -- you know, a piece of his
19 -- of what he was trying to do, was say: Look,
20 the government believed and relied on the
21 witnesses that identified Morris, and you can
22 too because of the fact that they relied on.
23 And that was improper, and the judge understood
24 that that was misleading.

25 JUSTICE GORSUCH: Do you -- do you

1 agree --

2 MS. MIGNOLA: And the judge understood
3 that they were really drawing -- asking the
4 jurors to draw an inference and to rely on
5 something that was out of bounds and was
6 unlawful, all right, and so that needed to be
7 corrected.

8 In addition, well, talking to the
9 jurors about how the Morris prosecution ended --

10 JUSTICE SOTOMAYOR: Counsel, you've
11 answered my question.

12 MS. MIGNOLA: I'm sorry.

13 JUSTICE SOTOMAYOR: Perhaps you'll let
14 Justice Gorsuch ask his.

15 MS. MIGNOLA: Yes.

16 JUSTICE GORSUCH: Thank you. Do you
17 agree that the rule of completeness
18 traditionally understood doesn't apply here
19 because the defendant didn't introduce any
20 out-of-court statement in evidence?

21 MS. MIGNOLA: Yes, Your Honor.

22 JUSTICE GORSUCH: Okay.

23 MS. MIGNOLA: I agree that this is not
24 a -- a -- a --

25 JUSTICE GORSUCH: This is something

1 beyond that?

2 MS. MIGNOLA: It is something, but it
3 relies so much on exactly that same principle
4 that --

5 JUSTICE GORSUCH: No, I -- I --
6 that -- that --

7 MS. MIGNOLA: Yes, Your Honor.

8 JUSTICE GORSUCH: -- that's the answer
9 to my questions. And then you also, as I
10 understood it, with Justice Breyer, I just want
11 to make sure I've got this right, you do not
12 object to this Court deciding the
13 constitutionality of the Reid rule as applied in
14 this case, is that right?

15 MS. MIGNOLA: I think that was
16 presented to the state court, yes, Your Honor.

17 JUSTICE GORSUCH: Okay. Thank you.

18 JUSTICE KAGAN: I mean, if I could
19 just go back to what Justice Barrett and Justice
20 Sotomayor were talking about about what this is
21 a supposed remedy for. You said that this rule
22 comes in as a remedy and you admit that it can't
23 be remedying the fact that the defendant
24 contested the prosecution's factual narrative.

25 But -- but, really, everything that

1 happened here, the rule was being used as a
2 remedy for that. I mean, the -- the -- the
3 statements that the government wanted to admit
4 are statements about whether the person whom the
5 defendant accused of committing the crime had a
6 particular kind of gun. And -- and -- and that
7 was being used to contest the defendant's idea
8 that, yes, this third party committed the crime.
9 He had the right kind of gun.

10 So, I mean, it's -- it's all about the
11 state trying to contest the defendant's
12 narrative, which is contesting the prosecution's
13 narrative.

14 MS. MIGNOLA: Your Honor, I agree that
15 the state was arguing for urging the court to
16 issue a broader ruling, but I think that at the
17 end of the day, I have to believe that the judge
18 didn't agree with that, and I'll tell you why.

19 If you look at the Joint Appendix
20 between pages 106 and 109, the judge draws this
21 important distinction. He accepts that the --
22 the evidence about the plea allocution or the
23 statement made in the plea allocution would most
24 certainly be relevant.

25 He says that Morris's plea allocution

1 is probative, but whether or not it's admissible
2 is a different question, all right? Whether
3 Morris possessed a 9-millimeter is a subject
4 that is in play, but the judge points out "As to
5 the manner in which that subject can be
6 presented, that may be a different question."

7 The judge acknowledges that the
8 statements in Morris's plea allocution would be
9 testimonial in nature under Crawford and would
10 present confrontation problems whether or not
11 they satisfy the hearsay exception.

12 And he continues, "The subject,
13 whether Morris possessed a 9-millimeter gun, is
14 relevant. Should there be a way of proving
15 that, meaning a way that comports with the
16 Confrontation Clause, that Morris was in
17 possession of a .357 and not a 9-millimeter,
18 that issue is relevant. So, for example, if
19 Morris were here and he were able to testify and
20 be called as a witness, his testimony about
21 which gun he possessed would not be immaterial.
22 He'd be allowed to testify, and I would find it
23 to be probative."

24 "The problem," the judge says, "The
25 problem arises because you don't have

1 constitutional language in which to offer that
2 evidence. It's academic as to whether it's
3 relevant."

4 So I really feel that that tells you,
5 and when you read that, you must -- you
6 understand the judge understood this
7 distinction. And so, when he is invoking the
8 Reid decision, what he's saying is that there is
9 something misleading.

10 And he may -- he went -- you know, he
11 did he acknowledge that he thought that the
12 defense was doing something, I forget what the
13 language is, acceptable, but that's -- I don't
14 feel that that's because he thought that the --
15 I think that this -- the thing that he's finding
16 there is that he doesn't necessarily think that
17 the defense is behaving badly, but,
18 nevertheless, the jury is being misled.

19 JUSTICE BREYER: So how does -- how
20 does it work? Simple case, Smith is accused of
21 murder. Just Smith, who testifies, says, I
22 didn't do it, Jones did it. Jones did it. He
23 had the knife, he had the gun, and he had the
24 poison all ready, and I saw him with it.

25 Prosecutor: Well, unfortunately,

1 Jones is in Mongolia, but we would like to
2 introduce Jones' affidavit which he gave in our
3 local office known as the Star Chamber and we --
4 we would like to produce this.

5 Can he do it? New York?

6 MS. MIGNOLA: No. No, I don't think
7 he -- I don't --

8 JUSTICE BREYER: Why not?

9 MS. MIGNOLA: Because --

10 JUSTICE BREYER: And how does it
11 differ?

12 MS. MIGNOLA: -- it's not misleading.
13 There -- I don't think there's anything --

14 JUSTICE BREYER: It's not misleading?
15 The prosecutor said -- I mean, the -- the person
16 said, I didn't do it.

17 MS. MIGNOLA: Yes. But I --

18 JUSTICE BREYER: Jones did it. What
19 could be more misleading?

20 MS. MIGNOLA: But I think -- I think
21 that that's not misleading to the jury, okay? I
22 think you have to understand that when the
23 defense attorney is making inferences, he's
24 relying on something that's out of bounds. And
25 that's what was going on here.

1 Again, if you -- well, I -- I see that
2 you -- you doubt what I'm saying there, Justice
3 Breyer.

4 JUSTICE BREYER: No, I'm not doubting
5 it. I just want you to explain it.

6 MS. MIGNOLA: Yes, you're hoping that
7 I'll explain it better.

8 JUSTICE BREYER: Yeah.

9 MS. MIGNOLA: But I think that the
10 part that is out of bounds is, again, this idea
11 that he was asking the jurors to rely on what
12 the government believed. But, at the time that
13 the government prosecuted Mr. Morris, that was,
14 you know, early days.

15 Later on, we believed something else.
16 Mr. Morris pled guilty to the conduct that the
17 government believed he was actually guilty of.
18 Again, in his opening statement, the defense
19 talks about the fact that the -- you know, the
20 Morris case must have been ended in a way that
21 was frustrating for the victims and the
22 families. He's leaving this speculation about
23 how that case ended.

24 JUSTICE ALITO: Was the -- was --

25 MS. MIGNOLA: Again, that was outside

1 the bounds and unfair. Yes, Justice?

2 JUSTICE ALITO: Was the "opening the
3 door" rule used here as a way of counteracting
4 statements and questions by counsel that never
5 should have been allowed?

6 MS. MIGNOLA: Well, that's always a
7 tricky question because I think judges are
8 inclined to give the defense a little elbow room
9 and to give the -- rather than strike something
10 once it's happened, you know, the judge didn't
11 necessarily know how the defense was going to
12 give its opening or that he was going to include
13 these ideas, especially after he'd given such a
14 strong ruling before trial.

15 All right. So, once it happens, do
16 you want to cut his wings? Do you want to tell
17 the jury what happened? Or do you want to say:
18 Look, what we're going to do is we're going to
19 allow these couple of lines of plea allocution
20 and, with it, we're going to introduce the
21 hearsay statements from Mr. Morris's attorney
22 that completely dilute and undercut and,
23 frankly, would have been the sum -- the -- what
24 the cross-examination and so-called
25 confrontation, what that would have really

1 looked like --

2 JUSTICE ALITO: But weren't there --

3 MS. MIGNOLA: -- which is --

4 JUSTICE ALITO: -- weren't there more
5 direct and -- and clearly proper ways of county
6 act -- counteracting these statements and these
7 questions? When the -- the defense suggested
8 that the Morris -- that the outcome of the
9 Morris case was somehow helpful to -- to him,
10 didn't that open the door for testimony about
11 what actually happened in the Morris case?

12 Or when the defense raised --
13 suggested that the police believed that somebody
14 else did the shooting, didn't that open the door
15 to testimony about further investigative steps?

16 Was this done the right way? That's
17 what I'm saying. Is this -- was the "opening
18 the door" rule -- I understand the trial court
19 doesn't want to -- doesn't want to strike
20 statements made in an opening. I understand
21 that. But is this being used as a sort of a
22 corrective that wasn't really necessary if it
23 was attacked more directly?

24 MS. MIGNOLA: So I think that that was
25 part of the New York State standard, is that the

1 court should only admit those statements that
2 are reasonably necessary and that -- that it was
3 part of the judge's determination. So I do feel
4 that, you know, that's the way the judge sized
5 it up. He's using his discretion.

6 Look, in cases, for example, where a
7 defendant is disruptive in the courtroom, there
8 may be lots of alternatives, right? You can gag
9 him and bind him. You could delay the
10 proceedings. Courts have alternatives, but it's
11 really got to be up to the judge to weigh and
12 balance those alternatives to come up with the
13 thing that makes -- is the best fitting.

14 And what he did here, as I said, was
15 he not -- admitted not only the couple of lines
16 from Morris about what he did, but he -- the
17 judge also allowed the jurors to hear the
18 reasons that Morris took that plea. He pled --
19 pled guilty. He got out of jail right that day.
20 He only served a two-year sentence.

21 So, you know, they understood the --
22 the larger context. They understood some of the
23 information that would have been elicited had
24 there been a right -- had there been a
25 confrontation or had there been

1 cross-examination on that point.

2 So he balanced it. So he crafted the
3 remedy that he thought fit the situation. You
4 might have done --

5 CHIEF JUSTICE ROBERTS: Haven't --

6 MS. MIGNOLA: -- something different.

7 CHIEF JUSTICE ROBERTS: I'm sorry.

8 Haven't we said, though, in a situation that the
9 Constitution has already made the decision about
10 the way in which the evidence could be made more
11 reliable? In other words, you have to have the
12 confrontation?

13 MS. MIGNOLA: So, Mr. Chief Justice, I
14 think the critical distinction here is that that
15 is a rule that goes to when you're assessing
16 whether the procedural mechanism is a
17 substitute, a substitute basis for determining
18 reliability of evidence.

19 When the prosecution is saying, well,
20 we'd like to try to get this in through what we
21 all have recognized as hearsay exceptions,
22 right, those are the exceptions when there's
23 another basis or -- there's a dying declaration
24 or any of the other methods we think of when we
25 think of hearsay exceptions, right? Those are

1 the exceptions.

2 This is not an exception. It's a
3 limitation. I think it's conceptually very
4 different, all right? The trial court, like you
5 -- this Court has talked about in Taylor, this
6 -- in the -- it has the -- the discretion to
7 fashion a remedy when the defendant transgresses
8 a state rule.

9 So, for example, in the context of a
10 constitutional provision, the defendant has the
11 right to a compulsory process and to present
12 evidence. But, if the defense transgresses a
13 rule that deals with discovery or notice, the
14 state can limit that right.

15 In Melendez-Diaz, this -- this Court
16 certainly talked about the fact that the state
17 could impose rules. For example, the state
18 could say, well, okay, we have a -- an analyst
19 who was prepared to certify the results of a
20 test. If you want to cross-examine and take
21 advantage -- exercise your right of
22 confrontation, please notify us.

23 If the defendant doesn't meet the
24 deadline, the defendant doesn't follow those
25 rules, he forfeits his right. The state can

1 craft rules that are designed or have a
2 legitimate purpose and that is to uphold the
3 integrity --

4 CHIEF JUSTICE ROBERTS: But those are
5 regular, normal procedural rules; you know, you
6 have to object and all those kind of things.
7 It's different, though, to -- to have procedures
8 that are intended to be substitutes for the
9 Confrontation -- Confrontation Clause. I mean,
10 you appreciate the fact that there are two
11 different, what, equitable exceptions and
12 procedural rules.

13 And what did the defendant do here
14 that was wrong and that could only be considered
15 a forfeiture of his constitutional right? The
16 judge himself said no, this was perfectly
17 appropriate.

18 MS. MIGNOLA: Well, I think that what
19 the judge is saying there is that he's not
20 faulting the lawyer, he understands why the
21 lawyer feels he needs to do -- go down this
22 tack. Nevertheless, he understands that it's
23 misleading to the jury. And that's a
24 distinction.

25 So it -- it doesn't have to be that

1 the lawyer was ineffective or that he needs to
2 be punished in some way. It's that the --
3 still, the court's core duty is to make sure
4 that the jurors are not misled so that they can
5 do their job.

6 And that's part of what Taylor talks
7 about, right, is the duty of the court and the
8 important interests that the court has in
9 maintaining the integrity of its process. And
10 that's why these rules can be appropriate.

11 I would say that the rule of
12 completeness is right along with that. That's
13 where the rule of completeness gets its
14 authority from because the -- the -- otherwise,
15 if you don't have that, the jury can be misled.

16 And it's not that the judge is
17 deciding which portion of the statement is true
18 or if any of it's true. He's just saying that
19 the jurors can't be -- can't do their job and --
20 and decide what the statement means if they
21 don't have both portions of it.

22 JUSTICE GORSUCH: If -- if a --

23 MS. MIGNOLA: That's the misleading of
24 it.

25 JUSTICE GORSUCH: -- if a -- if a

1 judge can insist on the introduction of -- of
2 hearsay based on his assessment that, otherwise,
3 the jury would be misled on the truth of the
4 matter at hand, why -- why does it matter
5 whether the defendant opens the door, in your
6 parlance, or not?

7 I mean, if -- if the truth-seeking
8 function is that important and the
9 cross-examination right is that unimportant,
10 what does it matter whether a defendant opens
11 the door or closes the door, whether there's a
12 door at all?

13 MS. MIGNOLA: Well, I do think that
14 that's where there is a good balance because, if
15 he's not opening the door, then, you know, it
16 shouldn't come in. It just --

17 JUSTICE GORSUCH: Well, but if -- if
18 -- if the government's failed to produce
19 something important that the judge thinks
20 without which, you know, the jury is really not
21 going to understand just how bad a guy this guy
22 really is, you know?

23 MS. MIGNOLA: But I don't --

24 JUSTICE GORSUCH: I mean, why --

25 MS. MIGNOLA: -- again, I feel that

1 that's --

2 JUSTICE GORSUCH: -- why not just --
3 what's -- what does a door have to do with
4 anything if it's all about the misleading of the
5 jury? I guess I'm still -- you could answer
6 that question.

7 MS. MIGNOLA: Right. I -- I -- I
8 appreciate what you're saying. I just think
9 that what is meant by misleading is much
10 narrower. Otherwise, you'd be seeing a
11 proliferation of cases where there would just be
12 no Confrontation Clause and everybody would say
13 it's -- it's contradictory or misleading because
14 we didn't --

15 JUSTICE GORSUCH: Exactly. Yeah.

16 MS. MIGNOLA: But it hasn't happened,
17 Judge -- it has not happened, Justice.

18 JUSTICE GORSUCH: I'm asking for a
19 limiting principle.

20 MS. MIGNOLA: The limiting principle,
21 yes, has to be that the -- what is misleading is
22 really about whether the jurors can fairly
23 evaluate the truth of what's --

24 JUSTICE GORSUCH: And isn't that
25 always in the eye of the beholder?

1 MS. MIGNOLA: Well, I think that
2 that's what the judge is, is the beholder. And
3 he's working on the --

4 JUSTICE GORSUCH: He's certainly a
5 beholder. We're certainly beholders. But
6 doesn't that suggest that it's something more
7 than a -- just a simple procedural rule?

8 MS. MIGNOLA: No, I don't think --

9 JUSTICE GORSUCH: Like you have to
10 file your brief in 30 days?

11 MS. MIGNOLA: I think it -- I think it
12 is a procedural rule. I think that it --

13 JUSTICE GORSUCH: One that depends --

14 MS. MIGNOLA: But I -- but I think
15 that --

16 JUSTICE GORSUCH: -- upon the eye of
17 the beholder?

18 MS. MIGNOLA: But that's what the
19 traditional rule of completeness is. That is
20 exactly the analysis principle --

21 JUSTICE GORSUCH: Well, I thought we
22 agreed the rule of completeness is different
23 because -- than this case because that's just,
24 you know, if you introduce half of a document,
25 the whole thing comes in.

1 MS. MIGNOLA: But then you have to ask
2 what is the conceptual basis for that.

3 JUSTICE GORSUCH: Exactly, and --

4 MS. MIGNOLA: And --

5 JUSTICE GORSUCH: -- and that's what
6 we've been talking about.

7 MS. MIGNOLA: And -- yes.

8 JUSTICE GORSUCH: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice
10 Thomas?

11 Justice Breyer, any further?

12 Justice Kagan?

13 Justice Gorsuch?

14 Justice Kavanaugh, anything further?

15 JUSTICE KAVANAUGH: No further
16 questions.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 Rebuttal?

20 REBUTTAL ARGUMENT OF JEFFREY L. FISHER
21 ON BEHALF OF THE PETITIONER

22 MR. FISHER: Thank you, Mr. Chief
23 Justice. I'd like to make one point on
24 preservation and then two points on the merits.

25 As to preservation, I take the -- the

1 -- the tone of some of the Court's questioning
2 today to be imagining writing a decision that
3 said that it's not enough to simply put on
4 evidence or present a defense that can be
5 contradicted by testimonial hearsay to waive the
6 confrontation right or forfeit it. But we would
7 leave for another day whether the rule of
8 completeness might be different.

9 That is precisely the argument that we
10 made to the New York court of appeals at pages
11 380 -- 386 to 388. We said that if all that
12 triggers the introduction of the evidence is
13 that it's relevant to refute the defense, that
14 would violate the Sixth Amendment. So the exact
15 opinion that some of the justices have imagined
16 writing is exactly what we asked the New York
17 Court of Appeals to write and what it refused to
18 do and why we brought the case to this Court.

19 It's also well within the question
20 presented. Justice Alito, you asked about the
21 question presented, I think, and others have.
22 The question presented is whether or under what
23 circumstances a defendant forfeits the right in
24 the "opening the door" situation.

25 And so, yes, we make two alternative

1 arguments. We say the defendant can never open
2 the door. But, from the beginning of the cert
3 petition on through our merits brief, we have --
4 we have made the narrower argument, that at
5 least when the evidence is merely relevant. And
6 that's the primary argument that we made in our
7 blue brief and that I'm making here today.

8 As to the merits, I want to say two
9 things. First is the state keeps putting gloss
10 on what state law requires as the sort of
11 misleading test. I would direct the Court to
12 New York law as in the Fardan case cited in our
13 blue brief, the -- that is described as saying
14 that the out-of-court evidence the state wishes
15 to introduce would contradict the defense. In
16 Massie in 2004, the New York Appeals said again
17 it would be directly contradictive to the
18 defense. At JA 184 of this case, the trial
19 judge said the prosecution's evidence would be
20 contrary to the defense.

21 Nothing more is required as a matter
22 of state law. The state "opening the door"
23 doctrine never talks about impropriety or
24 defines "misleading" in any other way than being
25 contrary to the defense.

1 And so that leads me to the second
2 point, which is the -- again, the further gloss
3 that co-counsel -- that my opposing counsel
4 wants to put on the New York decision below.

5 And, yes, there was a pretrial
6 colloquy about whether Mr. Hemphill could, as
7 she puts it, invite speculation from the jurors
8 about what happened in the Morris case. The
9 trial judge said, no, you can't. And then that
10 was the end of the matter in our pretrial
11 colloquy.

12 If anything in Mr. Hemphill's opening
13 or cross-examination or closing had been thought
14 by the prosecution to step over that line, the
15 prosecution could have objected and the trial
16 court could have reprimanded the -- the defense
17 counsel if that indeed stepped over the line.

18 The state never even objected to these
19 various statements. And if you look at the
20 Joint Appendix -- and I'd urge the Court to take
21 careful look at the Joint Appendix if you have
22 any questions on this -- that dispute over
23 improper speculation was entirely separate from
24 the decision to introduce Mr. Morris's
25 allocution. And I'll start where my friend

1 started, at JA-106 to 109.

2 The language she's describing about
3 Morris's allocution is rejecting the
4 prosecution's argument that the allocution is
5 not even testimonial. That's what the trial
6 judge is saying, is that, wait a minute,
7 prosecution, this seems to be testimonial,
8 rejecting the prosecutor's argument that it's
9 admissible because it's non-testimonial, so the
10 trial judge is recognizing, we may have a
11 confrontation problem here on our hands.

12 And then, as the colloquy goes forward
13 in further -- in further conversation at JA-117
14 to 120, JA-139 to 141, the trial judge is again
15 saying, I see a possible confrontation problem
16 here. And the state's saying, no, this is
17 relevant evidence to refute the defense, we want
18 to introduce it.

19 And then, at JA-184 to 185, the trial
20 judge says, "Aha! I have a way to let it in."
21 The prosecution didn't even think of this. The
22 trial judge said, I have a way to let it in.
23 Under the Reid decision of the court of appeals,
24 we can say the defendant opened the door.

25 And that's where I started my argument

1 today was reading that ruling. It's at 184,
2 185. The trial judge says, look, I understand
3 this defense. It's in all respects appropriate.
4 But my friend keeps saying that the trial judge
5 was thinking maybe there was something
6 inappropriate. The trial judge expressly says,
7 your defense and arguments are in all respects
8 appropriate.

9 But, nonetheless, under Reid, they
10 opened the door because the testimonial hearsay
11 is contrary to the defense theory that Morris is
12 the shooter.

13 We ask the Court to hold that merely
14 making testimonial evidence relevant to
15 contradict the defense theory is not enough to
16 forfeit the Confrontation Clause rights. That
17 would establish an important principal of the
18 law, reassert the classic understanding of the
19 Confrontation Clause, tell the New York court of
20 appeals that it was wrong at least in this kind
21 of a situation, that the -- that the right can
22 be forfeited and also resolve the circuit split
23 that we brought to the Court in our cert
24 petition.

25 If the Court has no further questions,

1 I'll submit the case.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel. The case is submitted.

4 (Whereupon, at 12:05 p.m., the case
5 was submitted.)

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