No. 20-637

In the
Supreme Court of the United States

DARRELL HEMPHILL,
Petitioner,

v.

STATE OF NEW YORK,
Respondent.

On Writ of Certiorari
to the Court of Appeals of New York

BRIEF OF UTAH, ARIZONA, ARKANSAS, FLORIDA, HAWAII, KANSAS, LOUISIANA, MINNESOTA, MISSISSIPPI, NEBRASKA, NORTH DAKOTA, SOUTH CAROLINA, and SOUTH DAKOTA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*

Amici states conduct the vast majority of criminal prosecutions in this country and therefore have a substantial interest in the integrity of those prosecutions. The question presented here asks whether a criminal defendant can strategically open the evidentiary curtain only partway, then use the Confrontation Clause to prevent his jury from seeing the additional evidence necessary to avoid creating a misleading impression of the facts, because the evidence that remains behind the curtain is testimonial hearsay. *Amici* states have a compelling interest in seeing that the Confrontation Clause remains a tool for discovering, not obscuring, truth.

SUMMARY OF ARGUMENT

A trial is fundamentally a search for the truth. Criminal defendants should not be able to subvert that search by presenting an incomplete and therefore misleading evidentiary picture, then exclude under the Confrontation Clause testimonial hearsay that is necessary to complete the evidentiary picture and correct the misimpression. The Clause's procedural guarantee of cross-examination is not an end in itself. Rather, it is one of many means for achieving the ultimate end of a reliable result at trial. The framers could not have intended that the requirement for cross-examination be honored at the cost of thwarting a trial's fundamental truth-seeking

purpose. This Court should therefore hold that in an appropriate case, a defendant waives his Confrontation Clause rights to exclude testimonial hearsay whenever (1) he strategically creates a misleadingly incomplete evidentiary picture at his trial, (2) testimonial hearsay is reasonably necessary to correct the defense-created misimpression, and (3) the declarant is unavailable.

Preventing the prosecution from introducing evidence necessary to address a defense-created misimpression gives defendants an unjust windfall. While many courts recognize the need to admit testimonial hearsay to address misimpressions, many do so on grounds that are either too broad or too narrow. A rule that permits a finding of a waiver even when a declarant is available to testify is too broad.

Other jurisdictions have admitted testimonial hearsay only if a defendant expressly waived his confrontation rights. But that standard fosters gamesmanship. All a defendant need do is strategically introduce the misleadingly incomplete evidence, then lodge a Confrontation Clause objection, disclaiming any intent to waive his confrontation rights, when the prosecution seeks to admit the testimonial hearsay necessary to address the misimpression.

Some jurisdictions have admitted testimonial hearsay only under the evidentiary rule of completeness, or equivalent equitable principles. But

those admissibility principles are narrow, and thus inadequate when the corrective testimonial hearsay is not covered by them.

Consequently, the rule that best protects a trial court's ability to preserve the integrity of a trial's truth-finding purpose, is a rule that allows a trial court, when necessary, to find that a defendant has waived his Confrontation Clause rights because he strategically created an incomplete and therefore misleading evidentiary picture that testimonial hearsay from an unavailable witness is reasonably necessary to correct.

ARGUMENT

I.

Constitutional rights can be waived. A criminal defendant waives his Confrontation Clause rights—by words or action—when he strategically distorts the evidentiary picture, undermining the integrity of his trial's truth-seeking function.

"[T]he very nature of a trial [i]s a search for truth." *Nix v. Whiteside*, 475 U.S. 157, 166 (1986). The Confrontation Clause generally furthers this end because "the Clause's ultimate goal is to ensure reliability of evidence." *Crawford v. Washington*, 541 U.S. 36, 61 (2004). And it prescribes that in the usual case, the best way to achieve that reliability is by limiting the testimonial evidence presented at trial to evidence that is tested "in the crucible of cross-examination" conducted by the party against whom it is offered. *See id.*

But a criminal defendant's strategic decisions at trial can put the Confrontation Clause's usual means of testing reliability of specific testimonial evidence in tension with a trial's general truth-finding purpose. This can happen when a criminal defendant chooses to create a misleading evidentiary picture by introducing only part of the evidence on a particular point, and then asserting his Confrontation Clause rights to exclude the testimonial hearsay necessary to complete the picture and avoid the misimpression.

There are various ways to resolve this tension. But one the Court should allow is to permit a trial court, in the appropriate circumstance, to deem a defendant to have waived his Confrontation Clause right to exclude testimonial hearsay. This remedy should be available only when testimonial hearsay from an unavailable witness is reasonably necessary to complete the evidentiary picture and thus avoid a false impression that the defendant strategically created.

This Court should reject Petitioner's attempt to secure a rule that would allow defendants to use the Confrontation Clause to manipulate the evidentiary picture in a way that subverts a trial's truth-finding process. As this Court has recognized, "*Crawford* … did not destroy the ability of courts to protect the integrity of their proceedings." *Davis v. Washington*, 547 U.S. 813, 834 (2006) (declaring that *Crawford* did not abolish common-law forfeiture-by-wrongdoing exception to Confrontation Clause).[1]

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[1] As written, the question presented asks whether a defendant "forfeits," rather than waives, his Confrontation Clause rights. Pet. Br. i. "[F]orfeiture is the failure to make the timely assertion of a right," while "waiver is the intentional relinquishment or abandonment of a known right." *United States v. Olano*, 507 U.S. 725, 733 (1993) (quotation simplified). Because the rule proposed in this brief depends on a defendant's having strategically created an evidentiary misimpression, the *Amici* states believe that waiver is the more fitting label.

A. The Confrontation Clause is a shield, not a sword: it does not give a defendant the right to present a misleadingly incomplete evidentiary picture.

The Confrontation Clause is not an end in itself. Rather, it is one of many means that contribute to achieving the ultimate end of ensuring the integrity of a trial's truth-finding process. But the Clause's "command[]" that reliability be determined through the procedural guarantee of cross-examination, *Crawford*, 541 U.S. at 61, must yield to a waiver of the right if a trial court determines that testimonial hearsay is reasonably necessary to correct a strategically created misimpression. The framers could not have intended that the Clause's procedural guarantee of cross-examination be honored at all costs, especially when the defendant has put the integrity of the trial's truth-finding purpose in peril. As this Court has recognized, "[t]rial judges retain wide latitude" to reasonably limit a defendant's right to cross-examination "based on concerns about, among other things … confusion of the issues." *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986).

"The Confrontation Clause is a shield, not a sword." *United States v. Lopez-Medina*, 596 F.3d 716, 732 (10th Cir. 2010). Thus, when a defendant strategically creates a misimpression by revealing only a partial evidentiary picture, he should not be able to use the Confrontation Clause to exclude

testimonial hearsay that is reasonably necessary to complete the picture. Instead, trial courts should have as one option the ability to rule that the defendant has waived his right to exclude the corrective testimonial hearsay.

Suppose that police find fingerprints in a home where a young girl is murdered. A report from an automated fingerprint identification system identifies five suspects as possible matches. A fingerprint examiner then compares the recovered prints with the possible suspects and determines that the prints match one of those suspects, later discovered to be the only one of the five who is a convicted sex offender and who lives near the victim's home. Police arrest that suspect and additional investigation builds a strong, but circumstantial, case against him.

Two weeks before trial, the fingerprint examiner dies unexpectedly. The prosecution thus expeditiously arranges for a new fingerprint examiner to analyze the prints because the Confrontation Clause bars admitting the original examiner's report. *See Bullcoming v. New Mexico*, 564 U.S. 647, 661 (2011); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311 (2009).

But while cross-examining the new fingerprint examiner at trial, the defendant elicits that the examiner conducted her analysis only two weeks before trial, after defendant's sex-offender status was discovered, and after the State had built the rest of

the case against him. The defendant then uses this fact to bolster his defense that the police targeted him solely because he was the only registered sex offender living near the victim's home, then tailored their investigation to build a case against him.

Under the Petitioner's proposed rule here, if the prosecution sought to counter this misleading version by introducing the first examiner's report, the trial court would have to exclude the corrective evidence in the face of a Confrontation Clause objection. The defendant's false narrative would stand and unfairly strengthen his defense.

But a defendant should not be able to use the Confrontation Clause to strategically mislead his jury. Rather, in this circumstance, a trial court should be allowed, as one potential remedy, to conclude that a defendant waived his Confrontation Clause rights when he strategically created an evidentiary misimpression that testimonial hearsay from an unavailable witness is reasonably necessary to correct.

The Fifth Circuit, New York, and New Hampshire already recognize this. *See United States v. Acosta*, 475 F.3d 677, 684-85 (5th Cir. 2007) (defendant's false "insinuations" opened door to otherwise inadmissible testimonial hearsay); *People v. Reid*, 971 N.E.2d 353, 357 (N.Y. 2012) ("[T]he Confrontation Clause cannot be used to prevent the introduction of testimony that would explain otherwise misleading out-of-court

statements introduced by the defendant."); *State v. White*, 920 A.2d 1216, 1221-22 (N.H. 2007) (recognizing that defendant can open the door to otherwise inadmissible testimonial hearsay by creating "a misleading impression"). These jurisdictions have correctly concluded that a defendant can open the door to otherwise inadmissible testimonial hearsay when he strategically creates a false impression.

In contrast, the Eighth and Sixth Circuits have allowed defendants to taint the integrity of their trial's truth-finding function by strategically creating a false impression and then using their Confrontation Clause rights to exclude the testimonial hearsay necessary to correct that misimpression.

United States v. Holmes, 620 F.3d 836, 842-44 (8th Cir. 2010), provides one example. Holmes's counsel argued that Holmes did not live at the house where several guns were found and that was the target of a drug investigation. *See id.* at 840. In support, counsel cross-examined the investigating detective so as to suggest that the detective had relied entirely on an outdated arrest record to connect Holmes to the house in question. *See id.* But a confidential informant had told the detective that Holmes lived at the house and was selling drugs from it, and surveillance had verified that tip at least in part. *See id.* 839-40. Thus, on redirect, and over Holmes's objection, the prosecution asked the

detective to recount the informant's statements about Holmes's residence and activities. *See id.* at 840.

The Eighth Circuit reversed. *See id.* at 843-44. Because Holmes did not expressly waive his confrontation rights, he could rightfully mislead his jury by painting an incomplete picture of the detective's investigation and then use the Confrontation Clause to prevent the prosecution from completing that picture. *Id.* at 844.

Similarly, in *United States v. Cromer*, 389 F.3d 662, 678-79 (6th Cir. 2004), the defendant's cross-examination of the detective suggested that the physical description provided by a confidential informant did not match the defendant. *Id.* at 667-68. On redirect, the prosecution asked the detective for additional details of the informant's description. *Id.* The Sixth Circuit reversed, holding that the defendant's "foolish strategic decision" to open the door to the testimonial hearsay did not amount to a forfeiture of defendant's Confrontation Clause rights. *Id.* at 679. But under *Cromer*, defendant's strategy was anything but foolish. Instead, the defendant could properly mislead the jury with an incomplete version of the facts that the prosecution could not refute.

The facts in Petitioner's case provide yet another example of how defendants can mislead a jury unless a trial court can find a waiver of confrontation rights. Petitioner created the misleading impression that

Morris possessed a 9-millimeter handgun (the murder weapon). But a variation of the facts presents an even more compelling need for such a rule.

Suppose that instead of declaring only that he possessed a .357 handgun at the murder scene, an unavailable Morris had also declared that he never owned or possessed a 9-millimeter handgun and that it was Petitioner who had left the live 9-millimeter round on Morris's nightstand. Suppose further that at this hypothetical trial, Petitioner strategically elicits the same testimony that he did at his actual trial—that police found a live 9-millimeter round on Morris's nightstand. Petitioner then again argues this fact as compelling evidence that Morris, not Petitioner, was the shooter. If the trial court cannot find that Petitioner waived his confrontation rights by strategically creating a misleadingly incomplete narrative about whether Morris possessed a 9-millimeter handgun, then Petitioner is free to mislead his jury by keeping critical evidence from it.

The Constitution was not intended to secure these untrustworthy outcomes. "*Crawford* … did not destroy the ability of courts to protect the integrity of their proceedings." *Davis*, 547 U.S. at 834. Yet Petitioner's rule would encourage such results. Defense counsel are (and should be) motivated to create instances of doubt. But a trial's truth-finding purpose must limit how far they can go. Under Petitioner's rule, defense counsel would seek

opportunities to create misleadingly incomplete narratives that could only be refuted with testimonial hearsay because the Confrontation Clause would block the evidence necessary to complete the story. That rule goes too far.

B. A criminal defendant can be deemed to have waived his Confrontation Clause rights.

The rule the *Amici* states propose is grounded in the well-established principle that a defendant can waive his constitutional rights. "The right to confrontation may, of course, be waived." *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 313 n.3 (2009). And such a waiver need not be express or require an on-the-record colloquy, because whether to waive confrontation rights is a critical component of trial strategy that should be left to the defendant and his counsel.

For example, a defendant's decision whether to waive his Fifth Amendment right against self-incrimination at trial need not be express. Rather, as "federal circuit courts consistently have held," a trial court has no duty to obtain an express waiver of a defendant's right to testify, or his converse right not to testify, at his trial. *United States v. Van De Walker*, 141 F.3d 1451, 1452 (11th Cir. 1998) (collecting cases). *See also United States v. Yono*, 605 F.3d 425, 426 (6th Cir. 2010) ("[A] colloquy into the defendant's waiver of his right not to testify might impede the

defendant's right to testify and, therefore, not only is not required, but is inadvisable.").

Because decisions about the right to testify are of "tremendous strategic importance," *United States v. Teague*, 953 F.2d 1525, 1532 (7th Cir. 1992), those decisions are best left to the defendant and his counsel, *see Yono*, 605 F.3d at 426. A defendant and his counsel must be free to strike the delicate balance between testifying or remaining silent. Is the defendant's story from his own lips so important that the risk of damaging cross-examination is worth it? Or will a defendant be better off holding his tongue to avoid that cross-examination and instead rely on other sources to tell his story, or rely on weakening the state's case by other means?

This decision will depend on an intricate and imprecise multi-faceted assessment of many factors including the believability of the state's case, gaps in its investigation, how the defendant may present to the jury, and so on. But "a *sua sponte* inquiry from the trial judge regarding the defendant's choice to testify might impede on an appropriate defense strategy, might lead the defendant to believe that defense counsel has been insufficient, or might inappropriately influence the defendant to waive the Fifth Amendment right *not* to testify." *United States v. Webber*, 208 F.3d 545, 551 (6th Cir. 2000).

So too with decisions about whether waiving confrontation rights is worth advancing a superior

defense strategy. Whether to elicit testimony or introduce evidence that opens the door to otherwise inadmissible testimonial hearsay is a decision best left to the defendant and his counsel. As with the decision about whether a defendant should waive his right to silence and testify, requiring an express waiver of the confrontation right would inappropriately interfere with the inherently strategic decision about whether it is worth opening the door to testimonial hearsay. *See id.*

C. Testimonial hearsay is admissible under this rule based on a defendant's strategic waiver, not an exception to the Confrontation Clause.

1. This rule is not an exception to the Confrontation Clause. Rather, it is based on a defendant's decision to waive his confrontation rights. The rule is triggered only by a defendant's intentional strategic decision to elicit testimony or introduce evidence that is incomplete and therefore creates a misimpression about a specific factual point. Thus, as Petitioner observes, "mere relevance" would never be enough "to overcome a Confrontation Clause objection." Pet. Br. at 17. Nor would a defendant's confrontation rights be subject to the "vagaries of the rules of evidence," *Crawford*, 541 U.S. at 61, as Petitioner contends, Pet. Br. 16. Rather, a defendant's intentional decision about the evidence he elicits or argument he makes determines whether he waives his confrontation rights.

Moreover, a defendant would not waive his confrontation rights merely by maintaining his innocence or asserting a general defense theory that contradicted the prosecution's theory or evidence. "Presenting a theory of the case that can be effectively rebutted by otherwise-inadmissible evidence … does not by itself open the door to using such evidence; only partial, misleading use of the evidence itself can do so." *United States v. Sine*, 493 F.3d 1021, 1038 (9th Cir. 2007) (concluding that defendant did not open the door to inadmissible hearsay). Or as the New Hampshire Supreme Court has recognized, a defendant waives his confrontation rights only when he "introduce[s] evidence that provides a justification, beyond mere relevance, for the opponent's introduction of evidence that may not otherwise be admissible." *White*, 920 A.2d at 1221-22.

2. This waiver-based rule is distinct from the common-law forfeiture-by-wrongdoing exception, but shares some of its characteristics. The forfeiture-by-wrongdoing doctrine is a Confrontation Clause exception that existed at the founding. *See Giles v. California*, 554 U.S. 353, 358-59 (2008). It admits testimonial hearsay from an unavailable witness when the defendant made that witness unavailable, but only if the defendant acted with the specific intent to prevent the witness from testifying. *See id.* at 359-61.

The exception operates to prevent the Confrontation Clause from giving a "criminal a windfall." *Davis v. Washington*, 547 U.S. 813, 833 (2006). "[W]hen defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce." *Id.* While not required to help the prosecution prove their guilt, "defendants … *do* have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system." *Id.* This Court therefore recognized in *Davis* that "*Crawford*, in overruling *Roberts*, did not destroy the ability of courts to protect the integrity of their proceedings." *Id.* at 834.

A waiver-based rule triggered by a defendant strategically creating a misleading evidentiary picture serves a similar end. It provides a useful tool for trial courts "to protect the integrity of their proceedings," and thereby denies a windfall to defendants who strategically seek to mislead their jury. *See id.* at 833-34. But as explained, unlike the forfeiture-by-wrongdoing doctrine, this waiver-based rule is not an exception to the Confrontation Clause. It would apply only when a defendant waives his confrontation rights by affirmatively creating the need to avoid a misimpression by completing the evidentiary picture with testimonial hearsay from an unavailable witness. And even then, it would be only one tool the trial court could use to correct the misimpression.

II.

A waiver finding would be permitted only when (1) the defendant strategically creates an evidentiary misimpression by disclosing only a partial evidentiary picture on a particular point, (2) testimonial hearsay is reasonably necessary to complete the picture and thus correct the misimpression, and (3) the hearsay declarant is unavailable.

Contrary to Petitioner's assertion, this waiver rule would not "'chill some defendants from presenting their best defense'—or even 'any defense at all.'" Pet. Br. 33-34 (quoting *James v. Illinois*, 493 U.S. 307, 314-15 (1990)). Rather, this rule would chill only a defendant's ability to paint a misleadingly incomplete evidentiary picture, then excluding the testimonial hearsay reasonably necessary to complete the picture. A waiver finding would be available only in narrow circumstances to address specific evidentiary points and would not be a trial court's only means for addressing an evidentiary misimpression.

A. A waiver finding would not be available merely because a defendant asserted his innocence or argued a defense theory that contradicted the prosecution's evidence either generally or on a specific point. Rather, a waiver finding should be permitted only when (1) the defendant strategically creates an evidentiary misimpression by disclosing only a partial evidentiary picture on a particular point, (2)

testimonial hearsay is reasonably necessary to complete the picture and thus correct the misimpression, and (3) the hearsay declarant is unavailable.

1. A trial court must first find that a defendant strategically created the evidentiary misimpression. A waiver finding should not be based on inadvertently elicited misleading evidence, because the defendant does not intend to mislead his jury in that circumstance. And as explained below, other remedies like striking the misleading evidence and instructing the jury to disregard it should usually suffice to cure any harm from isolated, inadvertent statements or arguments.

Nor, as explained, should testimonial hearsay's mere relevance be sufficient to support a waiver finding. *See Sine*, 493 F.3d at 1038 (holding that misleading use of evidence itself, not mere presentation of defense theory, can open door to testimonial hearsay); *White*, 920 A.2d at 1221-22 (holding that defendant's evidence or argument must provide justification "beyond mere relevance" for admission of testimonial hearsay). Rather, the hearsay must be relevant to completing the jury's view of a specific evidentiary point.

2. The testimonial hearsay must also be reasonably necessary to address the strategically created misimpression. If a trial court could correct a misimpression without admitting testimonial

hearsay, that course would be preferrable. Again, as explained below, striking the misleading evidence and giving a curative instruction may often be an adequate tool to correct a misrepresentation.

3. Finally, for testimonial hearsay to be admissible, the hearsay declarant should also have to be unavailable. A witness is "'unavailable'" for Confrontation Clause purposes if the "'prosecutorial authorities have made a good-faith effort to obtain his presence at trial.'" *Ohio v. Roberts*, 448 U.S. 56, 74 (1980) (quoting *Barber v. Page*, 390 U.S. 719, 724–25 (1968)), *overruled on other grounds by Crawford*, 541 U.S. 36. The prosecution bears the burden of showing unavailability. *See id.* A "'good faith effort' … demands much more than a merely perfunctory effort by the government," but "[t]he inevitable question of precisely how much effort is required" must be resolved on a case-by-case basis. *United States v. Tirado-Tirado*, 563 F.3d 117, 123 (5th Cir. 2009) (quotation simplified).

The rule the *Amici* states propose incorporates but builds on rules from other courts. The New York opening-the-door rule at issue here for admitting testimonial hearsay looks at a two-fold inquiry: (1) "whether, and to what extent, the evidence or argument said to open the door is incomplete and misleading, and [(2)] what if any otherwise inadmissible evidence is reasonably necessary to correct the misleading impression." *See People v.*

Reid, 971 N.E.2d 353, 357 (N.Y. 2012). But this rule does not expressly require that the hearsay declarant be unavailable.

And the Fifth Circuit has held that a defendant can open the door to testimonial hearsay even when the declarant is available. *See United States v. Acosta*, 475 F.3d 677, 679-80, 684-85 (5th Cir. 2007). The trial court in *Acosta* admitted testimonial hearsay even though the declarant had previously testified at the trial. *See id.*

But a defendant should be deemed to waive his confrontation rights only if the hearsay necessary to remedy his strategically created misimpression comes from an unavailable declarant. If the declarant is available to testify, then a defendant should be able to demand that the prosecution call the declarant as a witness. As stated, the founders prescribed how testimonial reliability should generally be tested—through cross-examining the witness. The waiver should not extend to circumstances where the preferred testing procedure is still available.

B. A waiver finding need not be the sole—or even the preferred—tool for addressing a defense-created misimpression. Rather, a trial court should often be able to address a minor or inadvertently created misimpression by striking the misleading evidence or argument and instructing the jury to disregard it. At the other end of the spectrum, a mistrial may be required if a trial court finds that the misimpression

cannot be adequately remedied by a curative instruction, or the potential unfair prejudice from introducing the testimonial hearsay necessary to correct the misimpression would be too great, or because of some combination of these factors.

But these should not be the only remedies available to trial courts faced with defense-created misimpressions. A misimpression may be significant enough that striking the misleading evidence and instructing the jury to disregard it will not be a sufficient cure. Yet the potential impact of the misimpression may not be so great as to require a mistrial. Or a mistrial may be an inadequate remedy for other reasons, like the number and location of witnesses who are difficult to gather for a trial. Choosing the appropriate remedy for issues that arise at trial is precisely the task our justice system has long entrusted to trial judges to manage the many varied situations they face. One available remedy should be that a trial court may find that a defendant waived his confrontation rights and thereby opened the door to the admission of testimonial hearsay from an unavailable witness.

Or a trial court may require the defense to elect a remedy, including admitting the testimonial hearsay. Counsel may reasonably conclude that presenting evidence that may create a misimpression and risk opening the door to testimonial hearsay will produce a net gain.

This case is a prime example. Counsel could legitimately conclude that introducing evidence that Morris possessed a live 9-millimeter cartridge—the same caliber ammunition that killed the child—had a sufficiently high chance of convincing the jury that he was the shooter, especially considering that another witness had placed him at the murder scene, he had bruises on his knuckles—suggesting that he had participated in the fight that precipitated the shooting—some witnesses identified him as the shooter, and New York originally prosecuted him for the murder. Pet. App. 3a-4a, 9a; Morris Tr. 209. Indeed, defense counsel made all of these points during closing argument. J.A. 2230, 244-50.

In contrast to this evidence, the responsive testimonial hearsay did little to undermine the third-party defense. Testimony that Morris pled guilty to possessing a .357 handgun at the murder scene did little to prove he was not the shooter, because his statement did not foreclose the possibility that he *also* possessed and used a 9-millimeter. J.A. 22, 35-36. The allocution also gave the defense what it needed to show Morris's motive to lie about his involvement—his plea ensured his immediate release from prison. J.A. 23-30, 36-40. Defense counsel also emphasized this fact in his closing argument. J.A. 283-86.

When counsel can reasonably conclude that creating an evidentiary misimpression and thereby opening the door to testimonial hearsay will produce

a net gain for his client, counsel should be allowed to proceed with that course, and it is not unfair to put the defense to that choice.

The above-discussed limits cabin a waiver finding to only those circumstances where testimonial hearsay is necessary to ensure the integrity of the truth-finding process. Defendants could still present their best defense. They would be prevented only from attempting to mislead their jury by revealing only a partial evidentiary picture.

And recognizing that a waiver may be the consequence of putting the missing testimonial hearsay at issue would not unfairly chill presentation of a complete defense. The right to present a defense does not mean that strategic choices must be without consequence—for example, a defendant cannot exercise his right to testify, then invoke his right to remain silent when it's the prosecution's turn to question him. *See Jenkins v. Anderson*, 447 U.S. 231, 238 (1980).

III.

Other jurisdictions' approaches to addressing strategically created evidentiary misimpressions are insufficient to guarantee a court's ability to safeguard the integrity of a trial's truth-finding purpose.

Some jurisdictions have admitted testimonial hearsay under rules that are too narrow to ensure that a trial court can safeguard a trial's integrity.

They have admitted testimonial hearsay only under the rule of completeness or similar equitable principles, or only when a defendant *expressly* waives his Confrontation Clause rights. But the testimonial hearsay necessary to correct the misimpression will often lie outside the narrow confines of the rule of completeness. And requiring a finding of an express waiver fosters gamesmanship and thus ultimately undermines the integrity of the truth-finding process.

A. The Fourth Circuit and seven states allow the prosecution to introduce the remainder of a testimonial hearsay statement when the defendant introduces a portion of that same statement. *See United States v. Moussaoui*, 382 F.3d 453, 480-82 (4th Cir. 2004); *State v. Prasertphong*, 114 P.3d 828, 830-35 (Ariz. 2005), *cert. denied*, 546 U.S. 1098 (2006); *People v. Vines*, 251 P.3d 943, 967-69 (Cal. 2011), *cert. denied*, 565 U.S. 1204 (2012), *overruled in part on other grounds by People v. Hardy*, 418 P.3d 309, 345 (Cal. 2018); *People v. Merritt*, 411 P.3d 102, 110 (Colo. App. 2014); *State v. Brooks*, 264 P.3d 40, 51 (Haw. App. 2011); *State v. Fisher*, 154 P.3d 455, 481-83 (Kan. 2007); *State v. Selalla*, 744 N.W.2d 802, 814-18 (S.D. 2008); *Wells v. State*, 319 S.W.3d 82, 93-94 (Tex. App. 2010). These jurisdictions admit the remainder of the hearsay testimony under the evidentiary rule of completeness or similar equitably-based principles.

Testimonial hearsay should be admissible in these circumstances to remedy the misimpressions

created by taking part of a hearsay statement out of context. But testimonial hearsay can be necessary to remedy misimpressions that go beyond circumstances that would traditionally fall into the rule of completeness, as both this case and the fingerprint hypothetical described above demonstrate. Neither circumstance involves a defendant introducing only part of a hearsay statement. Rather, they both involve admission of non-hearsay evidence. Even when a defendant creates a misimpression by introducing part of a hearsay statement, the corrective testimonial hearsay may not be part of the same statement. And even an entire statement admitted by a defendant may create a misimpression that may only be corrected by a separate statement that the rule of completeness would not allow to be admitted. Thus, the rule of completeness is unjustifiably too narrow to address the issue.

B. Nor should testimonial hearsay be admissible only when a defendant expressly waives his confrontation rights, as the Tenth Circuit has held. *See United States v. Lopez-Medina*, 596 F.3d 716, 731-32 (10th Cir. 2010). On the contrary, "[w]aivers can be established even absent formal or express statements of waiver." *Berghuis v. Thompkins*, 560 U.S. 370, 383 (2010). Thus, a defendant who understands that he has a right to remain silent but engages in "a course of conduct indicating waiver" can be found to have implicitly waived his Fifth Amendment right to silence. *Id.* at 384 (quotation

simplified). The same should hold true for waiving the Sixth Amendment right to confrontation.

The Tenth Circuit has held that for a waiver of confrontation rights to be effective, "it must be clearly established that there was an intentional relinquishment or abandonment of a known right." *Lopez-Medina*, 596 F.3d at 731 (quotation simplified). Lopez-Medina made such a waiver and opened the door to testimonial hearsay about a confidential informant's reliability after his counsel's cross-examination of the investigating detective suggested that the informant was unreliable. *See id.* at 730-33. Lopez-Medina's waiver was express because when the government raised a concern that his counsel's cross-examination would potentially open the door to testimonial hearsay, counsel responded, "That's my full intention. I don't care what door we open." *Id.* Those statements, together with the conclusion that counsel's decision was a "legitimate trial tactic" that his client did not oppose, established an "effective waiver" of Lopez-Medina's Confrontation Clause rights. *Id.* Georgia has a similar rule, requiring a waiver of confrontation rights to be "clear and intentional." *See Freeman v.* State,765 S.E.2d 631, 638 (Ga. App. 2014).

But requiring such a demanding standard for waiving confrontation rights invites the kind of gamesmanship previously discussed—gamesmanship that will only further enable manipulation and thus

taint the integrity of the truth-finding process. If an express waiver is required, then a defense attorney can easily create an inaccurate evidentiary picture by intentionally introducing evidence that is misleadingly incomplete, and then, when the prosecution attempts to usher testimonial hearsay through the opened door, object on Confrontation Clause grounds and disclaim any intent to waive his client's confrontation rights.

Again, *United States v. Holmes*, 620 F.3d 836, 842-44 (8th Cir. 2010), is an example. As explained, counsel's cross-examination of the investigating detective there suggested that the detective lacked evidence about Holmes's residence that the detective in fact possessed through a confidential informant's statement. *Id.* at 840. But when the prosecution sought to correct the misimpression, Holmes's counsel objected that admitting the informant's statement would violate the Confrontation Clause, and counsel denied any intent to open the door to testimonial hearsay during his cross-examination. *Id.* at 842, 844.

But counsel's affirmative questioning on cross-examination belied his claim that he did not intend to open the door to evidence on that subject. A defendant who strategically creates a misimpression should not be able to prevent admitting testimonial hearsay necessary to correct that misimpression merely by disclaiming any intent to waive her client's Confrontation Clause rights. Requiring an express

waiver therefore enables gamesmanship and allows defendants to deliberately sabotage the integrity of the truth-finding process.

This case, too, is an example. Hemphill repeatedly asserted that Morris's testimonial hearsay was inadmissible (albeit he apparently argued only that he did not open the door to it, J.A. 385-86, 406). But he pressed forward with presenting the very evidence he was warned would make the hearsay admissible. Tr. 87-91, 767, 771-72, 1027. Knowing where a path will lead and deliberately taking that path anyway is a waiver.

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Allowing trial courts to correct defense-created misimpressions only when the rule of completeness applies, or a defendant *expressly* waives his confrontation rights, would allow many juries to still be misled and would foster gamesmanship. Allowing trial courts to find—within the limits the *Amici* states propose—that a defendant has waived his Confrontation Clause rights when he strategically creates a misimpression is a better-tailored approach because it gives a trial court all of the tools necessary "to protect the integrity of their proceedings." *See Davis v. Washington*, 547 U.S. 813, 834 (2006) (discussing forfeiture by wrongdoing).

IV.

The arguments from Petitioner and his *amici* against a waiver-based rule are unpersuasive.

Petitioner and his *amici* level several criticisms at a waiver-based rule, none of which should dissuade the Court from adopting such a rule.

1. Petitioner argues that a waiver rule would "permit[] judges to set aside the right to confrontation by assuming the very thing the Sixth Amendment sets the rules of evaluating—namely, whether the prosecution's allegations are accurate." Pet. Br. 17. But the waiver rule proposed here does not require a judge to find, or even assume the truth of the responsive hearsay. Nor does the judge have to find or assume that the defendant's evidence is false. Rather, the issue for the trial court is whether the defendant has strategically revealed only a partial evidentiary picture, and whether testimonial hearsay is reasonably necessary to complete the picture in order to avoid misleading the jury. This still leaves the jury to sort out where the truth lies.

2. Petitioner also argues that a waiver rule "makes no sense" because a defendant should not "lose the right to confront a witness whose testimony he has never brought into play." Pet. Br. 33. But when a defendant strategically reveals only a partial evidentiary picture and that partial picture is misleading because of missing testimonial hearsay, that defendant has directly "brought into play" that

testimonial hearsay, even if his evidence was not a portion of the unavailable declarant's testimony. As explained, any other rule allows defendants to corrupt the integrity of the truth-finding process.

3. Petitioner's *amici* suggest that a defendant would never strategically choose to waive or otherwise forgo an opportunity to cross-examine a witness because cross-examination will undoubtedly strengthen the defense case. National Association of Criminal Defense Lawyers Br. 12-13 (declaring that right to confrontation "'is everything'"). But as explained, this will not always be the case. Counsel often choose to forgo cross-examination for any number of strategic reasons, including that it would unnecessarily highlight damaging facts. *See Moss v. Hofbauer*, 286 F.3d 851, 864 (6th Cir. 2002) (recognizing counsel's strategic choice not to cross-examine eye-witness because doing so would have emphasized defendant's admission to murder). As one commentator warned, "cross-examination is dangerous. It's a minefield planted with evidence traps that release prejudicial information. It's strewn with contradiction bombs that shower you with painful corrections. It's scattered with humiliation grenades that cover your face with egg." James W. McElhaney, *The Cross-Exam Minefield*, ABA J., Dec 2000, at 68.

This case provides several potential reasons counsel could reasonably decide to choose admitting

known testimonial hearsay rather than venturing into the minefield of the unknown with cross-examination. Even if Morris had been available to testify to his plea allocution, counsel could reasonably decide not to cross-examine him. Again, Morris's allocution did not foreclose the possibility that he owned or had used a 9-millimeter. J.A. 22, 35-36. But cross-examining him about that fact may have. Morris may have had additional damaging information about Petitioner's involvement in the murder. He may have also been able to provide exculpatory reasons for his bruised knuckles and he may have accused Petitioner of leaving the live 9-millimeter round in his apartment. And these are only the cold-record reasons for sticking with the testimonial hearsay. Counsel may further conclude that allowing the jury to see Morris's demeanor, as opposed to seeing only his written statement, would make the jury less likely to believe that Morris possessed a 9-millimeter handgun.

4. Petitioner and his *amici* also argue that without confrontation, a defendant cannot test the hearsay declarant's bias. Pet. Br. 22-25; National Association of Criminal Defense Lawyers Br. 12. But that is not always true, as this case shows. Petitioner's counsel highlighted that Morris's counsel had told the judge at Morris's plea hearing that the prosecution had no evidence that Morris possessed a .357 handgun, but pleaded guilty to possessing that gun to secure his immediate release from custody. J.A. 283-86.

Petitioner's counsel thus implied that one of the facts New York relied on to try to exculpate Morris and inculpate Petitioner may have been a falsehood made to secure a benefit.

There will be many other instances where bias can be presented without cross-examination. An alternative suspect will usually have an incentive to implicate someone else. As here, plea statements and colloquies will often reveal a quid pro quo that the defense may exploit to call into question the pleading-defendant's veracity.

And even if the defendant's ability to test bias is impaired, it is not unfair to put him to the choice of foregoing that opportunity wholly or partially as the price of admitting the incomplete evidence he concludes is beneficial.

5. Finally, Petitioner argues that fairness should not allow admitting testimonial hearsay in response to properly admitted defense evidence, even when that evidence is incomplete and therefore misleading. Pet. Br. 25-30. He argues that "referring to properly admitted evidence cannot forfeit a constitutional right to exclude defective evidence." Pet. Br. 27.

But as explained, constitutional rights are intended to further a trial's fundamental truth-seeking function, not undermine it. A defendant cannot choose to exercise his right to testify at his trial without simultaneously waiving his Fifth Amendment privilege against self-incrimination. *See*

Jenkins v. Anderson, 447 U.S. 231, 238 (1980). Due regard for a trial's purpose "to ascertain the truth" demands this result. *See id.* Likewise, a defendant cannot strategically reveal an incomplete and therefore misleading evidentiary picture without, in the appropriate case, waiving his Sixth Amendment right to cross-examine an unavailable witness whose testimony is reasonably necessary to complete the evidentiary picture.

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The Court should hold that when a criminal defendant strategically creates an evidentiary misimpression by revealing only an incomplete evidentiary picture, a trial court may find that he has waived his Confrontation Clause right to exclude any testimonial hearsay that is reasonably necessary to complete the picture and thereby correct the misimpression.

CONCLUSION

The judgment of the Court of Appeals of New York should be affirmed.

Respectfully submitted.

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