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The Constitutional Multiverse: A Retroactive Analysis of *Hemphill v. New York*

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In 2022, the Supreme Court was asked the question: May a criminal defendant "open the door" to evidence that it is otherwise inadmissible because of their Sixth Amendment right to confront adversarial witnesses? It is not unheard of that, at trial, a defendant's attorney makes arguments that prosecutors and judges think will mislead the jury. Many times, these arguments reference evidence that—by evidentiary rule, pretrial ruling, or otherwise—is inadmissible. Trial courts have long been afforded the discretion to measure how much evidence can come through the door a defendant opens by raising these arguments to cure any false impression that may be left in the mind of the fact finder. When that door is open to evidence barred by the defendant's confrontation rights, misleading arguments are met with testimonial hearsay, which, by definition, cannot have its reliability measured by the right of cross-examination.

Although the Court, in an eight-to-one opinion, answered that question in the negative, it overturned a two-decade-old majority rule that said otherwise. Consequently, a number of individuals were incarcerated and had their criminal convictions based on a rule that the Supreme Court later deemed unconstitutional. Thus a new question arises: Will all of those persons reap the benefit of the new rule? This Article explores the rule in Hemphill v. New York *and whether it qualifies as a rule for retroactivity. This Article argues that under a well-established framework, courts should consider whether it is not only a new rule but a watershed rule of criminal procedure that is essential to the fundamental fairness of a criminal trial for three reasons. First, the confrontation right is a bedrock rule akin to the right to counsel. Second, a person's right to cross-examination is critical to the truth-seeking function of trials. Third, convictions based on uncontroverted testimonial hearsay diminish their accuracy.*

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INTRODUCTION

Imagine that, in addition to you, there is another person reading this Article right now. A person living on planet Earth who has lived the same as you, made the same choices as you, and has had the same experiences as you in all but one critical area—you are in prison. In this multiverse, imagine that you were accused of a crime, and at your trial, evidence is admitted against you in violation of your constitutional rights—but no court of any authority has yet to say so. Eventually, you are convicted of this crime. You are reading this Article in a prison cell. You are doing so while another copy of you, simply existing at a different time, living on the same planet Earth, is living elsewhere, having just been subjected to a legally identical prosecution, but is freed from restraint by the protections of law that evolved after you. And there is nothing that you can do to alter the past.

One of the most fundamental guarantees of the criminal trial process is the right of the accused to confront the witnesses that the prosecution has against him.[1] In abandoning the question of whether evidence bears a "particularized guarantee of trustworthiness,"[2] the Supreme Court has drawn a line in the sand between testimonial evidence, which must allow an accused some opportunity to examine or challenge the witness, and nontestimonial evidence, for which no such procedure is triggered.[3] In what has devolved from a "sensible procedural protection" to "a distortion of the criminal justice system,"[4] the rule is still as vague as it is controlling.

1. The text of the Sixth Amendment reads, "In all criminal prosecutions, the accused shall enjoy the right . . . *to be confronted with the witnesses against him* . . . ." U.S. CONST. amend. VI (emphasis added). The Sixth Amendment's Confrontation Clause is binding on the States through the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 403 (1965).

2. *See* Ohio v. Roberts, 448 U.S. 56, 66 (1980) ("Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness."), *abrogated by* Crawford v. Washington, 541 U.S. 36 (2004).

3. *See Crawford*, 541 U.S. at 68 (explaining that States have flexibility in developing hearsay law relating to nontestimonial hearsay, but testimonial evidence requires "unavailability and a prior opportunity for cross-examination" in accordance with the Sixth Amendment).

4. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 338 (2009) (Kennedy, J., dissenting).

From time to time, the Supreme Court confronts a case where the right is clarified[5] or even curtailed.[6] The evolving interpretations of the Court's Confrontation Clause have a frustrating effect on those accused who came before; that is, those who were part of the same system and convicted of crimes on what would later be deemed—in the legal battles of more successful offenders—to be unconstitutional decisions by trial judges. This beckons the question: Do retroactive rules of constitutional criminal procedure manifest a legal multiverse, with each interpretation creating distinct and coexisting legal realities?[7] Drawing parallels from theoretical physics, the conceptualization of a legal multiverse poses many challenges. It raises questions of the nature of justice, the essence of constitutionalism, and the linearity of evolving legal doctrine.[8] Reconciling parallel legal realities—where there is the same error but two

5. *See, e.g.*, Davis v. Washington, 547 U.S. 813, 822 (2006) ("Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency."); Giles v. California, 554 U.S. 353, 358 (2008) ("[T]he Confrontation Clause . . . 'admit[s] only those exceptions established at the time of the founding.'" (quoting *Crawford*, 541 U.S. at 54)). The Court in *Giles* "acknowledged" dying declarations and the "forfeiture by wrongdoing" exception as "two forms of testimonial statements" that are permissible "at common law" despite being "unconfronted." *Id.* at 358–59; *Id.* at 359 ("The terms used to define the scope of the forfeiture rule suggest that the exception applied only when the defendant engaged in conduct *designed* to prevent the witness from testifying."). *See also Melendez-Diaz*, 557 U.S. at 311 ("[T]he [forensic] analysts' affidavits were testimonial statements, and the analysts were 'witnesses' for purposes of the Sixth Amendment."); Bullcoming v. New Mexico, 564 U.S. 647, 652 (2011) (clarifying that "surrogate testimony" introduced by the prosecution of "a forensic laboratory report containing a testimonial certification—made for the purpose of proving a particular fact—through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification" violates the Confrontation Clause).

6. *See, e.g.*, Michigan v. Bryant, 562 U.S. 344, 358–59 (2011) ("In making the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will be relevant."); Hardy v. Cross, 565 U.S. 65, 71–72 (2011) ("[T]he Sixth Amendment does not require the prosecution to exhaust every avenue of inquiry, no matter how unpromising."); Ohio v. Clark, 576 U.S. 237, 251 (2015) (finding that the introduction of a child's testimony at a criminal trial through a teacher facilitator did not violate the right of confrontation); Williams v. Illinois, 567 U.S. 50, 64–65 (2012); Samia v. United States, 143 S. Ct. 2004, 2018 (2023) (admitting a redacted version of a non-testifying codefendant's out-of-court confession did not violate the Confrontation Clause).

7. *See* Yasunori Nomura, *The Quantum Multiverse*, SCI. AM., June 2017, at 28. The multiverse is a concept in physics that there exists an infinite number of universes, each differing from the other based on varying permutations and combinations of events and decisions. *Id.* at 30–32. Under this notion, the universe expanded exponentially "like bubbles in boiling water" into much smaller multiple-verses, hence its name. *Id.*

8. Robin West, *Law's Emotions*, 19 RICH. J.L. & PUB. INT. 339, 345–46 (2016) ("Some of us criticize particular interpretive approaches as wrongheaded or untrue to the spirit of constitutionalism. But for the most part we simply assume the justness of our constitutional baselines—that a law might be unconstitutional weighs in our assessment of whether it is unjust or immoral or unwise, and that a law is just, moral or wise, weighs heavily as well in our assessment of its constitutionality.").

different outcomes—can be challenging when they come into conflict.[9] In part, defined by a relationship to evidence law, confrontation questions almost always arise when a non-testifying hearsay declarant inculpates a criminal defendant, and some applicable hearsay exceptions pave the way for admissibility.[10]

In June 2012, the New York State Court of Appeals (the highest court of the state) affirmed the conviction in *People v. Lamarr Reid*.[11] Reid had been convicted in 2001 for his role in the shooting-death of a man in Albany, New York, where he was aided by a codefendant who, in an interview, made statements that incriminated Reid.[12] The codefendant never testified, but the prosecution used those statements anyway, successfully arguing to the trial and appellate courts of New York that some of Reid's trial arguments "opened the door" to that hearsay evidence.[13]

As discussed in Part I, almost ten years later, in January 2022, the Supreme Court decided *Hemphill v. New York* which slammed shut the "open door" rule in New York's evidence law.[14] The concept of "opening the door" permits the introduction of otherwise inadmissible evidence in response to an earlier use of related evidence or a misleading argument.[15] *Hemphill* announced that testimonial hearsay, which was reasonably necessary to correct a misleading defense argument in that case, violated the defendant's constitutional rights.[16] In so doing, the Court overturned two leading state court of appeals decisions, *Reid* and *People*

9. *See, e.g.*, Kenneth J. Kress, Comment, *Legal Reasoning and Coherence Theories: Dworkin's Rights Thesis, Retroactivity, and the Linear Order of Decisions*, 72 CALIF. L. REV. 369, 398–99 (1984) (explaining that utilitarian legal theorists have long advocated for the retroactive application of new rules whenever the overall utility of that application is greater than the utility of applying the old law). These traditional arguments consider, among other things, the disutility of upsetting settled and justified expectations and reliance on future holdings. *Id.* at 399. In essence, under utilitarian legal theory, retroactivity is justified whenever its overall outcome is better than the outcome of avoiding retroactivity altogether. *Id.*

10. *See Clark*, 576 U.S. at 250 (explaining that an unavailable witness's statements were not testimonial because they were created as part of an ongoing emergency).

11. People v. Reid, 971 N.E.2d 353, 358 (N.Y. 2012); *see also* Press Release, Office of the District Attorney, Albany, New York, Ct. of Appeals Reinstates Murder Conviction (June 5, 2012), http://albanycountyda.com/media/news/12-06-05/Making_Law_Court_of_Appeals_Reinstates_Murder_Conviction.aspx [https://perma.cc/UTN4-DVYW].

12. Robert Gavin, *Court Reinstates Murder Conviction*, ALBANY TIMES UNION (June 5, 2012, 10:47 PM), https://www.timesunion.com/local/article/Court-reinstates-murder-conviction-3610785.php [https://perma.cc/8CCC-6WP9].

13. *Id.*

14. *See* Hemphill v. New York, 142 S. Ct. 681, 693 (2022).

15. RICHARD T. FARRELL ET AL., PRINCE, RICHARDSON ON EVIDENCE § 6-501, at 435–37 (11th ed. 1995); 2 CLIFFORD S. FISHMAN, JONES ON EVIDENCE § 11:41, at 374–75 (7th ed. 1994) ("The doctrine of curative admissibility is invoked with some frequency in an attempt to secure admissibility of otherwise inadmissible hearsay.").

16. *Hemphill*, 142 S. Ct. at 692.

v. Jamal Massie.[17] Nevertheless, the problem is that criminal cases in New York resolved "opening the door" questions by following the *Reid* and *Massie* rationale.[18] In fact, the *Reid* rule was adopted by federal district courts and the trial and appellate courts of sister states.[19] This creates a parallel legal dimension for accused persons like Reid and Massie. In their universe, the evidence stands valid, while in others—essentially the entire United States post-*Hemphill*—the evidence is nullified, inadmissible, or no longer used to secure a conviction.

When the Supreme Court announces a rule of constitutional criminal procedure, criminal defendants whose cases are pending prosecution are decided in accordance with the law as it exists at the time their cases are heard.[20] This is true for the time when the appellate decision is made too, in the event there is a trial conviction.[21] For those convicted of a crime who have exhausted all of the direct appellate avenues (i.e., whose

17. *Id.* at 691–92; *see* 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."); People v. Massie, 809 N.E.2d 1102, 1102 (N.Y. 2004) ("[O]therwise inadmissible evidence may become admissible where the adverse party has 'opened the door' to it by offering evidence, or making an argument based on the evidence, which might otherwise mislead the factfinder.").

18. *See, e.g.*, People v. Ott, 159 N.Y.S.3d 295, 298 (App. Div. 2021) ("[B]ecause defense counsel's cross-examination of the investigator may have created a misimpression . . . the People were entitled to correct that misimpression on redirect examination."); People v. George, 156 N.Y.S.3d 549, 551–52 (App. Div. 2021) ("A trial court has the discretion to decide 'door opening' issues by considering whether, and to what extent, the evidence or argument said to open the door is incomplete and misleading, and what if any otherwise inadmissible evidence is reasonably necessary to correct the misleading impression." (internal quotation marks omitted) (quoting *Massie*, 809 N.E.2d at 1105)); People v. Plowden, 132 NY.S.3d 833, 833 (App. Div. 2020) (mem.); People v. Grace, 114 N.Y.S.3d 668, 669 (App. Div. 2020) (mem.); People v. Paul, 99 N.Y.S.3d 529, 533 (App. Div. 2019); People v. Lowe, 88 N.Y.S.3d 214, 217 (App. Div. 2018); People v. Santos, 52 NY.S.3d 885 (App. Div. 2017) (mem.); People v. Pokuwaah, 980 N.Y.S.2d 819 (App. Div. 2014) (mem.); People v. Santana, 978 NY.S.2d 225, 226 (App. Div. 2014); People v. Rogers, 958 N.Y.S.2d 835, 838 (App. Div. 2013).

19. *See infra* notes 240–42 and accompanying text (noting precedent); *see, e.g.*, Yanni v. Warden, Ohio Dep't of Rehabilitation & Corr., No. 2:21-CV-4172, 2023 WL 2043216, at *3 (S.D. Ohio Feb. 16, 2023) ("[T]he cross-examination testimony cannot be introduced to contradict his direct examination testimony; and [ ] Petitioner's trial counsel should have been allowed to invoke his Fifth Amendment right on his behalf on the basis that multiple jurisdictions allow it.").

20. *See* Griffith v. Kentucky, 479 U.S. 314, 328 (1987) ("[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases . . . pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past."); Schriro v. Summerlin, 542 U.S. 348, 351 (2004) ("As to convictions that are already final, however, the rule applies only in limited circumstances. New *substantive* rules generally apply retroactively."); O'Dell v. Netherland, 521 U.S. 151, 167 (1997) ("[T]he second exception to *Teague*, which permits retroactive application of 'watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.'" (quoting Graham v. Collins, 506 U.S. 461, 478 (1993))).

21. *Griffith*, 479 U.S. at 328.

convictions are otherwise final) to benefit from a recent Court rule, their only hope for relief is on collateral review; available in both state and federal law.[22]

Ordinarily, defendants convicted in state court will opt for their state procedures before invoking federal procedures, and under some circumstances, defendants must do so before seeking relief in federal court.[23] Using the framework laid out in the 1989 Supreme Court case, *Teague v. Lane* and its progeny, determining whether a ruling in a recent Supreme Court case is retroactive depends on whether it is an old rule or a new rule; old rules are applied retroactively, new rules are not—absent a couple of exceptions.[24]

One exception, the so-called "watershed rules of criminal procedure," are rules that implicate the fundamental fairness and accuracy of the criminal proceeding.[25] However, the Supreme Court disfavors applying constitutional rules of criminal procedure retroactively, and in fact, no "new" rule, including the one announced in *Crawford v. Washington*, has ever been applied retroactively.[26] The Supreme Court described the

22. *Compare* 28 U.S.C. § 2254(a) ("[C]ourt[s] shall entertain an application for a writ of habeas corpus in behalf of a person in custody . . . on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."), *and* 28 U.S.C. § 2255 ("A prisoner in custody . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence."), *with* N.Y. CRIM. PROC. LAW § 440.10(2)(a) (McKinney 2022) ("Notwithstanding the provisions of subdivision one, the court must deny a motion to vacate a judgment when: (a) [t]he ground or issue raised upon the motion was previously determined on the merits upon an appeal from the judgment, unless since the time of such appellate determination there has been a retroactively effective change in the law controlling such issue . . . ."). *See also* Brian Spitser, Comment, *The Case for the Retroactive Application of* Crawford v. Washington, 71 BROOK. L. REV. 1631, 1632–33 n.9 (2006) ("A § 2255 Motion involves virtually the same issues and procedures as federal habeas corpus." (quoting NEIL P. COHEN & DONALD J. HALL, CRIMINAL PROCEDURE: THE POST-INVESTIGATIVE PROCESS, CASES AND MATERIALS 848 (2d ed. 2000))).

23. NEIL P. COHEN & DONALD J. HALL, CRIMINAL PROCEDURE: THE POST-INVESTIGATIVE PROCESS, CASES AND MATERIALS 805 (2d ed. 2000) ("After state collateral procedures have been used unsuccessfully, the defendant may try federal collateral remedies . . . ."); *see also* Vasquez v. Hillery, 474 U.S. 254, 257 (1986) ("[A] state prisoner may initiate a federal habeas petition '[o]nly if the state courts have had the first opportunity to hear the claim sought to be vindicated.'" (second alteration in original) (quoting Picard v. Connor, 404 U.S. 270, 276 (1971))).

24. Teague v. Lane, 489 U.S. 288, 310 (1989) (plurality opinion).

25. For a discussion of the interpretation of *Teague*'s second exception, see *infra* Section II.B.

26. The cornerstone decision of *Crawford*, 541 U.S. 36 (2004), revamped pre-existing constitutional framework for the admissibility of hearsay in criminal trials in favor of the two-part test composed of the then-puzzling "testimonial" piece along with the defendant's inability to cross-examine. Whorton v. Bockting, 549 U.S. 406, 409 (2007); *see also* United States v. Mandanici, 205 F.3d 519, 529 (2d Cir. 2000) ("Beginning with the rule at issue in *Teague*, the Court has measured at least eleven new rules, or proposed new rules, of criminal procedure against the criteria for the second exception and, in every case, has refused to apply the rule retroactively."). Further, in *Mandanici*, the Second Circuit listed some of the voluminous caselaw showing this trend. *Id.*

watershed exception as "moribund," having "no vitality,"[27] and ultimately observed its own history and noted that "[n]ew rules of criminal procedure ordinarily do not apply retroactively on federal collateral review."[28] The Court appeared to dispense with the "empty promise" of its own "purported exception."[29] Some scholars, in addition to the Court, posit that the watershed exception does not exist.[30] In the thirty-two years since *Teague*, the Supreme Court has never found any case to be a watershed rule, including *Mapp v. Ohio*, *Miranda v. Arizona*, *Duncan v. Louisiana*, *Batson v. Kentucky*, *Ramons v. Louisiana*—and even *Crawford*.[31]

Nevertheless, if such an exception exists, there is the possibility that a case may fit within it. Part II of this Article discusses the *Teague* classification of the *Hemphill* opinion. In doing so, Part II argues that, based on well-settled state law evidence principles at the time of the trial, the *Hemphill* decision pronounced a new rule. Almost presumptively proactive, the ruling creates a parallel of two legal dimensions.[32] In one reality, Lamarr Reid remains trapped by a conviction; in Darrel Hemphill's parallel reality, Reid's conviction would be unconstitutional.

Part III recognizes the formidable standard established by the existing retroactivity framework and delves further into the second exception to *Teague*'s apparent prohibition of retroactivity. It argues that *Hemphill* offers a fresh set of facts and a new opportunity to invoke *Teague*'s seemingly elusive second exception.

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27. Edwards v. Vannoy, 141 S. Ct. 1547, 1560 (2021) (quoting Herrera v. Wyoming, 139 S. Ct. 1686, 1689 (2019)).

28. *Id.* at 1555.

29. *Id.* at 1560 ("[F]or decades, the Court has rejected watershed status for new procedural rule after new procedural rule, amply demonstrating that the purported exception has become an *empty promise*." (emphasis added)).

30. *See, e.g.*, Ezra D. Landes, *A New Approach to Overcoming the Insurmountable "Watershed Rule" Exception to* Teague*'s Collateral Review Killer*, 74 MO. L. REV. 1, 18 (2009) ("[T]his Court's commitment to narrowness means that we are unlikely to ever see a revolutionary Warren Court style holding like a *Gideon* (or a *Mapp* or a *Miranda*), which in turn augurs ill for the watershed rule exception ever being satisfied under the current regime.").

31. *Id.*; *see, e.g.*, Mapp v. Ohio, 367 U.S. 643, 660 (1961); Miranda v. Arizona, 384 U.S. 436, 499–98 (1966) (setting a prerequisite to admissibility); Duncan v. Louisiana, 391 U.S. 145, 161–62 (1968) (jury trial); Batson v. Kentucky, 476 U.S. 79, 100 (1986); Dov Fox & Alex Stein, *Constitutional Retroactivity in Criminal Procedure*, 91 WASH. L. REV. 463, 478 (2016) ("The Court had already determined that *Batson* marked an unequivocal break from the previous standard in *Swain v. Alabama* that allowed prosecutors to exercise preemptory challenges on the basis of race." (footnote omitted)).

32. WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 28.6(e), at 1359 (4th ed. 2004) ("[T]he second *Teague* exception proved to be quite restrictive."); Peter Bozzo, *What We Talk About when We Talk About Retroactivity*, 46 AM. J. CRIM. L. 13, 17 (2019) ("*Teague*'s ambiguities, its inconsistencies, its incoherence—these are the doctrine's features, not its flaws.").

I. *HEMPHILL V. NEW YORK*

This Part explores the deep issues that predicated the present post-conviction inequity. Beginning with a murder in the Bronx borough of New York City, Sections I.A, I.B, and I.C outlines *Hemphill*'s factual and procedural history with a retrospective reference to those in *Reid*. Sections I.D and I.E then explains the doctrines—curative admissibility and the rule of completeness—that the parties used for and against *Reid* when the Supreme Court scrutinized it.

A. Background and Procedural History

On Easter Sunday 2006, in the Bronx, a two-year-old child was struck and killed by a 9-millimeter caliber bullet.[33] The identity of the shooter was a factual issue after police determined that three men, Nicholas Morris, Ronnell Gilliam, and Darrell Hemphill, were present at the scene of the shooting.[34] Gilliam and Hemphill are cousins who, moments before the shooting, "had been on the losing end of a street fight" with the family located at the scene.[35] There was one shooter, however, who eyewitnesses described as wearing a light blue sweater with an alligator logo and vertical cable pattern.[36]

After the police-arranged a phone call between Gilliam and Morris, wherein Gilliam assured him "he would 'make it right,' Gilliam changed his story."[37] "Reversing his claim that Morris was" the shooter, "Gilliam then asserted for the first time that" it was, in fact, his cousin Hemphill who had fired the fatal round.[38] Dismissing "Gilliam's recantation," police "charged Morris with the child's murder and possession of a 9-millimeter" pistol—the weapon that had killed the victim.[39] In the middle of trial, the parties reached a plea bargain.[40] The prosecution agreed to dismiss the murder charge against Morris if he pleaded guilty to

33. Brief for Respondent at 1, Hemphill v. New York, 142 S. Ct. 681 (2022) (No. 20-637).
34. *Id.* at 3.
35. *Id.*
36. *Id.* at 5.
37. Brief for Petitioner at 6–7, *Hemphill*, 142 S. Ct. 681 (No. 20-637) (citation omitted).
38. *Id.* at 6.
39. *Hemphill*, 142 S. Ct. 681, 687. The prosecution of Morris proceeded to a trial that was wrought with issues. Brief for Respondent, *supra* note 33, at 8–9. The evidence against Morris was attacked on multiple fronts. The 9-millimeter bullets found in his apartment were a different brand than those used in the shooting, the lineup was flawed, and DNA testing of the light blue sweater found in his apartment came back to an unknown male, someone other than Morris. *Id.* at 9. Ultimately, the case was headed toward a mistrial. *Id.*
40. As part of the deal, the prosecution promised to "reinvestigate" certain aspects of the case and then either "go forward" against Morris or "proceed against other individuals." Brief for Petitioner, *supra* note 37, at 7.

possessing a weapon.[41] "To effectuate the plea, the State could have" required "Morris to plead guilty [ ] to possessing the 9-millimeter pistol" (the murder weapon) because it was already charged in the indictment, or required Morris to plead guilty to possessing a firearm "without specifying the particular type at all."[42] But the prosecution did not require either of these conditions.[43] Instead, it filed a superseding charge that accused "Morris of possessing a *.357-caliber revolver* at the scene of the shooting—a different caliber than the murder weapon."[44] Morris pleaded guilty to the charge and, at the time of his plea allocution, admitted that the weapon "he possessed . . . on the date, time, and location" of the murder was a .357-caliber revolver.[45]

Almost a decade after Morris's plea, DNA testing of the light blue sweater was completed.[46] The results revealed it was Hemphill's DNA.[47] Hemphill was subsequently charged with the same murder previously lodged against Morris.[48] The case proceeded to trial in September 2015, where Gilliam remained a cooperating witness.[49] No similar agreement was entered into with Morris.

Hemphill's defense was one of third-party culpability.[50] With the unsuccessful murder prosecution of Morris years prior, Hemphill's attorney argued throughout the trial that Morris was the actual killer.[51] During

41. *Id.*

42. Brief for Petitioner, *supra* note 37, at 7; *see also* N.Y. CRIM. PROC. LAW § 220.10(4) (McKinney 2021) (describing permissible procedure with plea deals); N.Y. CRIM. PROC. LAW § 200.50(6)(b) (McKinney 2019) (explaining requirements of specificity in an indictment for an armed felony).

43. Brief for Petitioner, *supra* note 37, at 7 ("But the State did not take either of these routes.").

44. *Id.*

45. Petition for Writ of Certiorari, at 14, Hemphill v. New York, 142 S. Ct. 681 (2022) (No. 20-637) (citation omitted); *see also* Brief for Petitioner, *supra* note 37, at 8 ("Morris supplied '[t]he sole basis for proving the .357' charge through his own uncorroborated statement that he possessed such a firearm, which he offered in court through an allocution."). As part of the deal, Morris—who had served two years of pre-trial incarceration—would be released. Brief for Respondent, *supra* note 33, at 9.

46. Brief for Respondent, *supra* note 33, at 9 ("As the trial against Morris approached, he consented to a DNA test.").

47. *Id.* at 6. ("The DNA match took years because, the night of the shooting, [Hemphill] had fled to North Carolina and . . . [evaded police until his extradition].").

48. Brief for Petitioner, *supra* note 37, at 8 ("At Mr. Hemphill's trial, the State abandoned the theory it had espoused at Morris's trial. The State now maintained that Gilliam had acted with two companions, and that Mr. Hemphill was the gunman in the shooting.").

49. People v. Hemphill, 103 N.Y.S.3d 64, 74 n.2 (App. Div. 2019) (Manzanet-Daniels, J., dissenting) ("Gilliam was promised a five-year sentence in exchange for his cooperation.").

50. *Id.* at 70 ("The misidentifications by the witnesses were explained by the circumstances, including that they may have seen Morris's name and face through media coverage of the murder before they made their identifications.").

51. *Id.*

opening statements, defense counsel described Morris to the jury and said that police initially believed he "was the 'right guy.'"[52] Counsel highlighted the importance of the bullet's caliber by telling the jury that police even recovered a 9-millimeter bullet from Morris's nightstand and described it as "exactly the same kind of bullet as the one that killed the child."[53] Counsel used this theory throughout other parts of the trial, threading questions with it during the cross-examination of prosecution witnesses, including Gilliam.[54]

"Mid-trial, the prosecution argued" that by suggesting Morris was the shooter, Hemphill introduced the question of what weapon Morris possessed on the date, time, and place of the shooting.[55] To defuse the idea, the prosecutor wanted to admit Morris's plea allocution, where he admitted to possessing a .357-caliber, not a 9-millimeter.[56] The prosecutor urged that counsel's opening and questions on cross-examination brought up the issue "that Morris had a 9-millimeter" pistol at the scene "and sought to rebut it with the portion of Morris's plea allocution where he admitted to possessing a loaded .357-caliber firearm the day of the shooting."[57] The court ultimately agreed and allowed that limited portion of Morris's plea allocution to be read to the jury.[58] According to the trial court, Morris's plea allocution—although hearsay—was his declaration against his self-interest and that Hemphill had otherwise "opened the

52. *See* Brief for Respondent, *supra* note 33, at 11 ("In opening, counsel focused on how police initially believed that Morris was the 'right guy' based in part on their recovery from his bedroom of an unspent 9-millimeter bullet, the same caliber as the bullet that killed Pacheco.").

53. *See* Brief for Petitioner, *supra* note 37, at 9–10 (citation omitted).

54. *See* Brief for Respondent, *supra* note 33, at 11 ("[Mr. Hemphill's attorney] urged the jury to consider what the police believed and how those beliefs resulted in the initial prosecution of Morris. He additionally implied that the prosecution against Morris failed. Counsel covered the same ground during the cross-examination of Jimick and Gilliam.").

55. *Id.* (arguing that "the defense opening had put in issue that Morris had a 9-millimeter gun at the scene" and should, therefore, afford the prosecution the opportunity to cross-examine).

56. *Id.* The plea allocution took the form of a certified transcript. *Id.* at 44–45. The prosecution denied any intention to call Morris as a witness. *Id.* Morris, who had been denied reentry to this United States following a trip to Barbados, was unavailable under New York Evidence law. *See* N.Y. CRIM. PROC. LAW § 670.10 (McKinney 2022) ("[A]n examination of such witness conditionally, conducted pursuant to article six hundred sixty, may, where otherwise admissible, be received into evidence at a subsequent proceeding in or relating to the action involved when at the time of such subsequent proceeding the witness . . . is outside the state or in federal custody and cannot with due diligence be brought before the court.").

57. Brief for Respondent, *supra* note 33, at 11.

58. *Id.* at 12.

door" to this testimonial hearsay, by asserting that Morris was, in fact, the shooter.[59]

Morris never testified at trial. Under the terms of his plea deal, Morris was immediately released from custody.[60] He traveled to Barbados and was denied reentry to the United States.[61] The "jury returned a verdict, convicting [Hemphill] of [m]urder in the [s]econd [d]egree," and the court sentenced him to twenty-five years to life in prison.[62]

B. People v. Lamarr Reid

Since 2012, New York trial courts followed what the Supreme Court would later call the "*Reid* rule"—a carve out in the state's evidence law rooted in a nebulous fusion of the more traditional "opening the door" and rule of completeness principles.[63]

In *People v. Reid*, after "a man was shot dead at the door of an [ ] apartment where marijuana was being sold," police relied on eyewitnesses to identify two suspects.[64] As the investigation evolved, Reid's acquaintance reported to police that Reid admitted to being involved in the shooting and that he was aided by two individuals—his codefendant and an uncharged third party.[65] The defense's theory was that the police investigation was inadequate; it stated as much during opening statements, in their summation, and posed to witnesses many questions designed to advance this theory.[66] Cross-examination of the acquaintance, for example, focused on defense counsel having the witness

59. *Id.* at 9, 11; *see id.* at 11 ("The court continued, the arguments petitioner presented and apparently intended to present on summation would open the door to that aspect of Morris's allocution acknowledging his possession of a .357 caliber firearm to rebut the defense impression. Separate from its Confrontation Clause analysis, the court also found the allocution met the requirements for a declaration against penal interest.").

60. Brief for Petitioner, *supra* note 37, at 7.

61. *Id.* at 10.

62. Brief for Respondent, *supra* note 33, at 13; *see* N.Y. PENAL LAW § 125.25(1) (McKinney 2019) (describing elements of murder in the second degree).

63. *See* People v. Reid, 971 N.E.2d 353, 355–56 (N.Y. 2012), *overruled in part by* Hemphill v. New York, 142 S. Ct. 681, 688 (2022) (explaining the application of the *Reid* rule).

64. *Reid*, 971 N.E.2d at 354–55; *id.* at 356 ("Reid filed a motion . . . seeking to set the verdict aside on several grounds, including the admission of testimony concerning an eyewitness to the crime who did not testify. County Court denied the motion, and Reid, duly convicted, was sentenced to imprisonment for 25 years to life.").

65. *Id.* at 355 ("The jury also heard that the day after the murder Reid told another acquaintance that '[h]e had caught a body' the previous night, i.e., that he had killed someone. Reid told this acquaintance that he had intended to carry out a robbery but met with resistance, that he had shot through the door or through the crack of the door . . . .").

66. *Id.* ("During direct examination of the detective, defense counsel asked questions designed to suggest that the investigation had been inadequate, a theme first outlined in counsel's opening statement.").

confirm that the third party had never been arrested, and that only Reid and his cohort were charged.[67] During the defense's case-in-chief, counsel called as a witness a federal agent who testified that, during the course of the investigation, police learned that the third party was involved in the shooting.[68] It was on the agent's cross-examination when the prosecutor elicited testimonial hearsay to confirm that eyewitnesses identified Reid as the gunman.[69] Defense counsel objected on these obvious grounds, and the trial court overruled the objection, reasoning that defense counsel had "opened the door" to the third-party's involvement.[70] Like Hemphill, Reid was ultimately convicted of murder in the second degree and sentenced to twenty-five years to life in prison.[71]

The New York Court of Appeals upheld the trial court's ruling, citing existing state and circuit precedent.[72] Historically, courts were worried about arguments that created a "misleading impression" on the fact finder[73] or provided the jury with "incomplete information."[74] The concern led to rules that afforded trial courts with discretion to decide "door-opening" issues and consider whether—and to what extent—the otherwise inadmissible evidence is reasonably necessary to correct the

67. *Id.* ("Defense counsel elicited that the witness had told the police about McFarland, and then asked him, 'But you are aware that [ ] McFarland has never been arrested for this, right? . . . Only Lamarr Reid and [ ] Joseph, right?' . . . . ").

68. *Id.* The prosecutor elicited that the information of the third-party's involvement came solely from the acquaintance who had testified earlier at the trial, "saying what he had heard, not what he had seen or anything." *Id.*

69. *Id.* at 355–56. The problematic testimony was when the prosecutor asked, "But in fact, you also received eyewitness testimony about who exactly was at the murder didn't you?" *Id.* at 355. When the witness assented, "the prosecutor then added, 'And that eye witness testimony was that [the third party] certainly wasn't there; isn't that true?'" *Id.* at 356. Again, the witness agreed. *Id.*

70. *Id.* at 356.

71. *Id.*

72. *Id.* at 356–57 ("Several United States Courts of Appeals have held that 'a defendant can open the door to the admission of evidence otherwise barred by the Confrontation Clause.'" (first quoting United States v. Lopez-Medina, 596 F.3d 716, 733 (10th Cir. 2010); then citing United States v. Holmes, 620 F.3d 836, 843–44 (8th Cir. 2010); then citing United States v. Cruz-Diaz, 550 F.3d 169, 178 (1st Cir. 2008); and then citing United States v. Acosta, 475 F.3d 677, 683–84 (5th Cir. 2007))).

73. People v. Rosario, 958 N.E.2d 93, 101 (N.Y. 2011) ("But we cannot say that any remarks made by defense counsel in her opening statement created a misleading impression that opened the door for the People to elicit evidence of the note in their direct case.").

74. People v. Massie, 809 N.E.2d 1102, 1103 (N.Y. 2004), *overruled in part by* Hemphill v. New York, 142 S. Ct. 681 (2022). In *People v. Massie*, the Court of Appeals upheld a trial court's ruling cautioning a defense attorney regarding two tainted eyewitness identification procedures that the prosecution was barred from introducing: inquiry into one would allow inquiry into the other. *Id.* at 1106.

false impression.[75] One of the most respected state jurists even suggested unfettered corrective action to misleading arguments.[76]

Related to *Hemphill* and its rationale, the New York Court of Appeals announced New York's long-held concerns of misdirection trumping a defendant's right of confrontation—upending the constitutional confrontation guarantee under such circumstances is necessary "[t]o avoid [ ] unfairness" and to "prevent the jury from reaching [a] false conclusion."[77] This long-standing rationale relied on the traditional "opening the door" doctrine of evidence policy.[78]

C. Appellate Review of Hemphill

Following his conviction, Hemphill appealed to New York's Supreme Court Appellate Division and challenged, among other things, the admission of portions of Morris's plea allocution.[79] In one paragraph, the appellate division rejected Hemphill's claim, citing *Reid*.[80] There was one dissent, Justice Manzanet-Daniels, who expressed no opinion on the admissibility of Morris's plea allocution.[81] Hemphill then sought

75. *Massie*, 809 N.E.2d at 1105 ("These cases establish that a trial court should decide 'door-opening' issues in its discretion, by considering whether, and to what extent, the evidence or argument said to open the door is incomplete and misleading, and what if any otherwise inadmissible evidence is reasonably necessary to correct the misleading impression.").

76. *Rosario*, 958 N.E.2d at 103 (Smith, J., concurring) ("The critical question in these cases is whether the victims were telling the truth or lying—and it is simply unfair, to the People and to the victims, to conceal from the jury powerful evidence that shows they were telling the truth. I would therefore adopt a broader version of the prompt outcry rule, permitting the jury to know of any disclosure made by the victim about the crime before the crime was reported to the authorities.").

77. *See* People v. Reid, 971 N.E.2d 353, 357 (N.Y. 2012), *overruled in part by* Hemphill v. New York, 142 S. Ct. 681 (2022).

78. *See generally* Phillip W. Broadhead, *Why Bias is Never Collateral II: Necessary Limitations on Attempts to Rehabilitate Impeached Witnesses in Criminal Cases*, 34 AM. J. TRIAL ADVOC. 239, 240 (2010); Francis A. Gilligan & Edward J. Imwinkelried, *Bringing the "Opening the Door" Theory to a Close: The Tendency to Overlook the Specific Contradiction Doctrine in Evidence Law*, 41 SANTA CLARA L. REV. 807, 822–23 (2011).

79. People v. Hemphill, 103 N.Y.S.3d 64, 70–71 (App. Div. 2019).

80. The Appellate Division's complete analysis of Hemphill's constitutional claim was:

> The court properly permitted the People to introduce portions of Morris's plea allocution, in which he pleaded guilty to weapon possession and admitted that at the time and place of the murder, he possessed a .357 caliber handgun. Morris did not testify at defendant's trial and his plea allocution would normally be inadmissible as testimonial hearsay. However, the admission of portions of Morris's plea allocution did not violate defendant's right of confrontation because defendant opened the door to this evidence. During the trial, defendant created a misleading impression that Morris possessed a 9 millimeter handgun, which was consistent with the type used in the murder, and introduction of the plea allocution was reasonably necessary to correct that misleading impression.

Id. at 70–71 (citation omitted).

81. *Id.* at 73 (Manzanet-Daniels, J., dissenting).

leave to the New York Court of Appeals.[82] Affirming the conviction, the court of appeals' decision rested on the discretion of trial courts "to make evidentiary rulings and control the course of cross-examination."[83]

On April 19, 2021, following the New York Court of Appeals' ruling, *Hemphill* gained the attention of the United States Supreme Court when it granted certiorari.[84] The back-and-forth around Morris's plea allocution had squarely framed the issue: Was New York's "opening the door" policy of evidence law an exception to a criminal defendant's Sixth Amendment right of confrontation? Of course, depending on whom you asked, that was not the issue. If you asked the defendant, the question presented was "[w]hether, or under what circumstances, a criminal defendant who opens the door to responsive evidence also forfeits his right to exclude evidence otherwise barred by the Confrontation Clause."[85] The prosecution did not contend that New York's "opening the door" policy was an exception to constitutional protection—instead, the policy was a "procedural rule" equivalent to "failing to object to the confrontation violation."[86]

D. The Doctrine of Curative Admissibility

Although both sides framed the issue differently, each integrated principles of the overarching doctrine of curative admissibility.[87] This doctrine serves, in part, to provide immediate relief in the context of litigation.[88] It is termed "curative" because it is designed to allow a party, on the receiving end of some inadmissible evidence, to cure the wrong caused by its adversary.[89] If one attorney introduces evidence that is

82. People v. Hemphill, 150 N.E.3d 356 (N.Y. 2020).

83. *Id.* at 358.

84. *See* Hemphill v. New York, 141 S. Ct. 2510 (2021) (mem.).

85. Brief for Petitioner, *supra* note 37, at 1. The question presented is also described by the defendant as, "[W]hether Mr. Hemphill lost his Sixth Amendment right to be confronted with the witnesses against him when he argued at trial that the first suspect actually committed the crime." *Id.* at 2.

86. *See* Brief for Respondent, *supra* note 33, at 32 ("Although petitioner categorizes New York's rule as purely evidentiary, *Reid*'s opening-the-door rule is better understood as a broader procedural rule designed to preserve the integrity of the adversarial factfinding process at trial. . . . Essentially, the rule treats the misleading door-opening actions of counsel as the equivalent of failing to object to the confrontation violation.").

87. *See* Brief for Petitioner, *supra* note 37, at 3–4; Brief for Respondent, *supra* note 33, at 38.

88. *See* Gilligan & Imwinkelried, *supra* note 78, at 816–35 (outlining multiple ways in which the judiciary has blurred the "contradiction doctrine" since the enactment of the Federal Rules of Evidence).

89. 1 KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 57, at 288–89 (6th ed. 2006); ("[T]he evidence might come in because the adversary fails to object, he has no opportunity to do so, or the judge erroneously overrules an objection."); *see generally* Gilligan & Imwinkelried, *supra* note 78, at 816–35.

known to be inadmissible—either from a motion in limine or a basic understanding of the rules of evidence—the presiding judge may permit their adversary to introduce comparable evidence to rectify the harm caused, particularly in cases where the problematic evidence creates a false narrative for the jury.[90] This mechanism offers an immediate remedy and can even deter litigants from offering unreliable evidence that has a tendency to taint the jury.[91] Moreover, the remedy has a corrective action rooted in fundamental fairness.[92] Should the judge allow the introduction of retaliatory evidence, it possesses the potential to counteract impermissibly introduced evidence, possibly avoiding a judicial misstep on appeal. However, an inherent ambiguity exists in delineating the parameters of the curative admissibility doctrine.[93] Trial courts often resort to the well-known but less understood nebulous terminology of "open[ing] the door,"[94] which consequently obscures the boundary between curative admissibility and other doctrines, like the rule related to impeachment by a prior inconsistent statement.[95] Nevertheless, trial judges (and attorneys) know to exercise caution in relying on this doctrine.[96]

90. *See* Henderson v. George Washington Univ., 449 F.3d 127, 140 (D.C. Cir. 2006) (defining the curative admissibility doctrine).

91. *Id.* at 140–41 ("As one of our sister circuits has noted, not only is the trial court granted discretion to permit a party to introduce otherwise inadmissible evidence on an issue 'when the opposing party has introduced inadmissible evidence on the same issue,' but it may also do so 'when it is needed to rebut a false impression that may have resulted from the opposing party's evidence.'" (quoting United States v. Rosa, 11 F.3d 315, 335 (2d Cir. 1993))); *see* John Leubsdorf, *Fringes: Evidence Law Beyond the Federal Rules*, 51 IND. L. REV. 613, 633 (2018) (describing some of the ways in which the curative admissibility doctrine permits the admission of otherwise inadmissible evidence by the opposing party).

92. *See* Broadhead, *supra* note 78, at 246 (describing the rationale behind the "fairness" of the corrective admission).

93. *See generally* Gilligan & Imwinkelried, *supra* note 78, at 816–35.

94. *Cf. Henderson*, 449 F.3d at 140 (using the "open[ing] the door" terminology to describe the curative admissibility doctrine); United States v. Beason, 220 F.3d 964, 967 (8th Cir. 2000) (using the same terminology); Jackson v. State, 728 N.E.2d 147, 152 (Ind. 2000) (using the same terminology). *See* Gilligan & Imwinkelried, *supra* note 78, at 821–23 (describing the usage of the "opening the door" theory as a synonym for curative admissibility).

95. *See generally* Gilligan & Imwinkelried, *supra* note 78, at 816–23.

96. BROUN ET AL., *supra* note 89, § 57, at 290–91 ("If the inadmissible evidence sought to be answered is irrelevant and not prejudice-arousing, the judge, to save time and to avoid distraction from the issues, should refuse to hear answering evidence; but if he does hear it, under the prevailing view the party opening the door has no standing to complain. Consider, for example, a case in which one party improperly injects evidence of the good character of one of his distant relatives who played a minor role in the litigated event. That type of evidence is unlikely to change the outcome of the trial; and it would hardly be an abuse of discretion for the judge to exclude the opponent's evidence attacking the relative's character." (footnotes omitted)).

New York's "leading case" on "opening the door" to otherwise inadmissible admissible is *People v. Melendez*.[97] In its opinion, the Court of Appeals explained that "[t]he 'opening the door' theory . . . is not readily amenable to any prescribed set of rules."[98] Generally, trial courts must first determine whether—and to what extent—proffered evidence is incomplete or potentially deceptive before considering the appropriateness—and the extent—of introducing inadmissible evidence necessary to rectify a false impression created.[99]

A phrase that is as "notoriously imprecise" in terms as it is in practice, courts sometimes confuse arguments that "open the door" to inadmissible evidence with the doctrine of curative admissibility and its evidentiary brother, the rule of completeness.[100] Curative admissibility is a discretionary rule of evidence based on principles of fairness, rooted in the idea that if one party is permitted to breach the rules, the other party may do the same.[101] This two-wrongs-make-a-right approach prevents one side from having an unfair advantage.[102] The doctrine is not limited to evidence; even improper comment by counsel—through witness examinations or opening statements—may lay the way for an adversary to seek to

97. People v. Massie, 809 N.E.2d 1102, 1104 (N.Y. 2004). In *People v. Melendez*, the New York Court of Appeals encouraged caution in invoking the doctrine. 434 N.E.2d 1324, 1328 (N.Y. 1982). Warning that, in essence, a party's mere "broaching a new issue" with problematic evidence does not create a full-fledged right in the opponent to introduce all counter evidence, "no matter how remote or tangential to the subject matter" it may be. *Id.* Instead, "the trial court must limit inquiry . . . 'to the subject-matter [which] bear[s]'" on the problematic evidence and should allow "only so much additional evidence to be introduced . . . as is necessary to 'meet what has been brought out'" already. *Id.* (alterations in original) (first quoting People v. Buchanan, 39 N.E. 846, 853 (1895); and then quoting 6 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1896, at 737 (Chadbourn rev. 1976)).

98. *Melendez*, 434 N.E.2d at 1328.

99. *See Massie*, 809 N.E.2d at 1105 ("These cases establish that a trial court should decide 'door-opening' issues in its discretion, by considering whether, and to what extent, the evidence or argument said to open the door is incomplete and misleading, and what if any otherwise inadmissible evidence is reasonably necessary to correct the misleading impressions.").

100. 21 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 5039 (2d ed. 2020) [hereinafter WRIGHT & MILLER] ("Even after the adoption of the Evidence Rules, courts continue to throw around such 'notoriously imprecise' terms as 'opening the door', 'invited error', 'curative admissibility', 'fighting fire with fire'—and, yes, 'waiver.'"); *accord* Brief for Petitioner, *supra* note 37, at 3.

101. 2 CLIFFORD S. FISHMAN ET AL., JONES ON EVIDENCE § 11:41 (7th ed. 2023) [hereinafter JONES ON EVIDENCE] ("If one party has gotten away with a breach of the rules, sometimes the only practical way to undo the unfair advantage (other than a mistrial) is to allow the other party a compensatory breach.").

102. *Id.*

offer evidence that would otherwise be inadmissible.[103] It is a doctrine frequently invoked to skirt the rule against hearsay.[104]

Thus, curative admissibility allows for the introduction of evidence as a retort to the erroneous admission of inadmissible evidence, while "opening the door" traditionally refers to introducing new evidence in response to misleading arguments, regardless of whether inadmissible evidence is used to advance them.[105] The rule of completeness looms around both. Although the goal is the same, the completeness rule contrasts "opening the door" evidence, which any kind of evidence or argument can trigger.[106]

The rule is derived from long-standing precedent that when evidence has been admitted, an adverse party may offer evidence to "complete" what has already been introduced.[107] It is codified, in a broader sense,[108] in Federal Rule of Evidence 106 and state counterparts.[109] The rule is motivated by a desire to correct decontextualized or misleading representations and to ensure the timely incorporation of contextual evidence.[110]

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103. *Id.*

104. *See id.* ("The doctrine of curative admissibility is invoked with some frequency in an attempt to secure admissibility of otherwise inadmissible hearsay.").

105. WRIGHT & MILLER, *supra* note 100, § 5039.3 ("Those devices deal with admissible evidence and the prejudice that arises from what the opponent has not introduced but 'curative admissibility' requires that the prejudice arise from inadmissible evidence."); *see generally* BROUN ET AL., *supra* note 89, § 57, at 290–91.

106. WRIGHT & MILLER, *supra* note 100, § 5039.1 ("Unlike 'curative admissibility', true 'opening the door' does not require the prior admission of inadmissible evidence."); *see also* People v. Massie, 809 N.E.2d 1102, 1105 (N.Y. 2004) ("[A] trial court should decide 'door-opening' issues in its discretion . . . .").

107. N.Y. STATE UNIFIED CT. SYS., GUIDE TO NEW YORK EVIDENCE 4.03 (2023), https://www.nycourts.gov/judges/evidence/4-RELEVANCE/4.03_Completing_and_Explaining_Relevant_Evidence.pdf [https://perma.cc/V8J7-X278]; Rouse v. Whited, 25 N.Y. 170, 174–75 (1862) ("Where a statement, forming part of a conversation, is given in evidence, whatever was said by the same person in the same conversation, that would in any way qualify or explain that statement, is also admissible . . . ." (quoting 1 S. MARCH PHILLIPS ET AL., A TREATISE ON THE LAW OF EVIDENCE 416 (10th Eng. ed., 1859))); Grattan v. Metropolitan Life Ins. Co., 92 N.Y. 274, 284 (1883) ("The rule appears to be firmly settled . . . .").

108. Some codifications of the rule of completeness allows for the use of other writings or recordings for explanatory and clarification purposes, the New York Court of Appeals has been silent on the use of other writings or recordings. *See, e.g.*, FED. R. EVID. 106.

109. The Rule states: "If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part—or any other writing or recorded statement—that in fairness ought to be considered at the same time." FED. R. EVID. 106. The adverse party may do so over a hearsay objection. *See* N.Y. C.P.L.R. § 3117(b) (CONSOL. 2014) ("Use of part of deposition. If only part of a deposition is read at the trial by a party, any other party may read any other part of the deposition which ought in fairness to be considered in connection with the part read."); N.Y. C.P.L.R. § 4517(b) (CONSOL. 2014) (same).

110. *See* FED. R. EVID. 106 advisory committee's note to 1972 proposed rules ("The rule is based on two considerations. The first is the misleading impression created by taking matters out of context. The second is the inadequacy of repair work when delayed to a point later in the trial.").

Despite its ostensibly unambiguous wording, courts routinely grapple with the issue of whether evidence deemed admissible under Rule 106—merely to offer a comprehensive context or rectify a distorted declaration—should be precluded if, in the absence of its Rule 106, other rules would render it inadmissible, as the issue predominantly arises in statements commonly barred under the rule against hearsay.[111] Additionally, courts have found scant clarity from the advisory committee's annotations when interpreting and implementing the rule of completeness.[112] As would be the case for the trial court in *Hemphill*, this predicament is perhaps best illustrated when a court allows for hearsay evidence under a completeness rationale, coupled with the trial court's broad discretion.[113] However, at least in a court that follows the federal rules, the incorporation of oral assertions is discouraged by the advisory committee's stipulation that the rule predominantly pertains to written and recorded assertions, excluding verbal conversations.[114]

While courts have admitted both verbal and written or recorded assertions, the specific content within these declarations deemed admissible remains ambiguous. Prior to *Hemphill*, there was a circuit split on how to handle these arguments; in fact, there were three different interpretations.[115] Beyond the immediate quandary of determining the

111. *See* FED. R. EVID. 802 ("Hearsay is not admissible unless any of the following provides otherwise: a federal statute; these rules; or other rules prescribed by the Supreme Court.").

112. United States v. Ramos-Caraballo, 375 F.3d 797, 802–03 (8th Cir. 2004); United States v. Walker, 652 F.2d 708, 713 (7th Cir. 1981).

113. *See* United States v. Verdugo, 617 F.3d 565, 579 (1st Cir. 2010) ("[T]he district court retained substantial discretion under Fed. R. Evid. 611(a) to apply the rule of completeness to oral statements . . . ."); United States v. Haddad, 10 F.3d 1252, 1258 (7th Cir. 1993) ("[B]y its terms [ ] rule [106] refers to written or recorded statements. However, Rule 611(a) gives the district courts the same authority with respect to oral statements and testimonial proof. And the Seventh Circuit has applied a Rule 106 analysis with respect to oral statements and testimonial proof." (citations omitted)).

114. *See* FED. R. EVID. 106 advisory committee's notes on proposed rules ("For practical reasons, the rule is limited to writings and recorded statements and does not apply to conversations.").

115. United States v. Shaver, 89 F. App'x 529, 533 (6th Cir. 2004) ("Completeness, a common-law doctrine, does not outweigh the hearsay rules, because '[h]earsay is not admissible except as provided *by these rules* or other rules prescribed by the Supreme Court pursuant to statutory authority.'" (quoting FED. R. EVID. 802)); United States v. Gravely, 840 F.2d 1156, 1163 (4th Cir. 1988) ("The cross-designated portions, while perhaps not admissible standing alone, are admissible as a remainder of a recorded statement. Fed. R. Evid. 106 allows an adverse party to introduce any other part of a writing or recorded statement which ought in fairness to be considered contemporaneously. The rule simply speaks the obvious notion that parties should not be able to lift selected portions out of context."); United States v. LeFevour, 798 F.2d 977, 981 (7th Cir. 1986) ("If otherwise inadmissible evidence is necessary to correct a misleading impression, then either it is admissible for this limited purpose by force of Rule 106 . . . or, if it is inadmissible (maybe because of privilege), the misleading evidence must be excluded too. The party against whom that evidence is

admissibility spectrum lies the more profound debate concerning the optimal boundaries of admissibility. Restrictive interpretations could potentially compromise trial integrity, or even obligate a criminal accused to testify to furnish necessary evidence for contextualizing or rectifying a misleading assertion. Consequently, a prevailing question loomed: When evidence doctrines are pitted against constitutional rights, should the former yield to the latter?

In delivering the eight-to-one majority opinion, Justice Sotomayor answered that question. An opening line addressing the merits, the Court described the confrontation right as "[o]ne of the bedrock constitutional protections afforded to criminal defendants."[116] The Court chronicled its confrontation jurisprudence, particularly *Crawford*, and how it previously rejected the "reliability-based" interpretive framework in *Ohio v. Roberts*.[117] Expanding upon this, the Court reiterated that *Crawford* advanced a doctrinal shift by endorsing the Framers' original intent, which eschews the admissibility of testimonial statements unless the witness is either present at trial or, in cases of unavailability, the defendant has been afforded "a prior opportunity for cross-examination."[118] The Court further underscored that the textual construction of "the Sixth Amendment does not" provide for any exceptions, let alone those that may be found in procedural state evidence law.[119] Instead, the Court noted that constitutional confrontation questions are optimally interpreted with only those exceptions contemporaneously recognized at the time of the Constitution's framing.[120]

The prosecution did not challenge the doctrinal principles or "dispute that Morris's plea [transcript] was testimonial" in character and

offered can hardly care which route is taken, provided he honestly wanted the otherwise inadmissible evidence admitted only for the purpose of pulling the sting from evidence his opponent wanted to use against him." (citation omitted)). Judge Posner's holding in *LeFevour* can be viewed as a binary interpretation of Rule 106. *Id.*

116. Hemphill v. New York, 142 S. Ct. 681, 690 (2022).

117. *Id.*

118. *Id.* (quoting Crawford v. Washington, 541 U.S. 36, 54 (2004)); *Id.* at 691 ("If *Crawford* stands for anything, it is that the history, text, and purpose of the Confrontation Clause bar judges from substituting their own determinations of reliability for the method the Constitution guarantees.").

119. *Id.* at 690 (quoting *Crawford*, 541 U.S. at 54); *Id.* at 692 ("Nor, under the Clause, was it the judge's role to decide that this evidence was reasonably necessary to correct that misleading impression. Such inquiries are antithetical to the Confrontation Clause.").

120. *Id.* at 690–91 (noting how states have the "flexibility to adopt reasonable procedural rules," including "contemporaneous objection requirements," in a defendant's right to confrontation).

consequently implicated Hemphill's rights under the Confrontation Clause.[121] Nor did the prosecution assert that the "opening the door" policy constituted a common-law exception to a defendant's right to confrontation.[122] Rather, the prosecution couched the propriety of the admission of the transcript by framing the "opening the door" rule of evidence law as a procedural rule tantamount to a counsel's failure to lodge a timely objection to a confrontation violation.[123]

The Court dismissed both arguments, holding that the "opening the door" framework was different from other procedural regulations, such as preservation requirements, in that it was a substantive principle of evidence law that dictated admissibility.[124] The Court also rejected the prosecution's argument that the "opening the door" doctrine was indispensable for safeguarding the court's truth-ascertainment function.[125] The Confrontation Clause, the Court clarified, mandates not mere evidentiary reliability but prescribes that such reliability be ascertained through the specific mechanism of cross-examination.[126]

Accordingly, the Court reversed the judgment and remanded the case for a new trial.[127]

E. The Rule of Completeness

The tangential doctrine not implicated, but discussed in *Hemphill*, is the rule of completeness.[128] In some evidentiary contexts, when a defendant elects to introduce a portion or the entirety of a third-party's statement, certain rules may allow the prosecution to offer the remaining part of that statement or another statement by the same individual. This is permissible even if the statement in question is testimonial in nature, and the defendant has not been granted an opportunity for confrontation with the declarant.[129] The practice stems from the well-established

121. *Id.* at 692 ("For Confrontation Clause purposes, it was not for the judge to determine whether Hemphill's theory that Morris was the shooter was unreliable, incredible, or otherwise misleading in light of the State's proffered, unconfronted plea evidence.").

122. *Id.*

123. *Id.* at 691.

124. *Id.*

125. *Id.* at 692.

126. *Hemphill*, 142 S. Ct. at 693–94.

127. *Id.* at 694.

128. *Id.* at 693 ("[T]he Court does not decide today the validity of the common-law rule of completeness as applied to testimonial hearsay. . . . Whether and under what circumstances that rule might allow the admission of testimonial hearsay against a criminal defendant presents different issues that are not before this Court.").

129. *See, e.g.*, United States v. Moussaoui, 382 F.3d 453, 481–82 (4th Cir. 2004), *cert. denied*, 544 U.S. 931 (2005); United States v. Lopez-Medina, 596 F.3d 716, 730–33 (10th Cir. 2010)

common-law doctrine known as the rule of completeness, a principle predating the adoption of the Sixth Amendment and the Confrontation Clause.[130] This rule applies to both criminal and civil cases.[131]

The rule of completeness is founded upon notions of fairness and principles of protecting the jury from being misled.[132] It is invoked when one party presents only one portion of a statement, or even a series of statements, in a way that may distort the speaker's intended message.[133] The remedy is to allow the aggrieved party to admit the remainder of the statement.[134] This legal maxim finds partial codification in Federal Rule of Evidence 106.[135] More specifically, Federal Rule of Evidence 410(b)(1) encapsulates the principle in the specialized context of statements made during plea negotiations, stipulating that associated utterances "in fairness . . . ought to be considered together."[136]

Turning to *Hemphill*, for example, the rule of completeness could present the same issue, albeit with a potentially different outcome.[137] If

(distinguishing the facts with *United States v. Cromer*, 389 F.3d 662, 679 (6th Cir. 2004), and ruling that "a defendant can open the door to the admission of evidence otherwise barred by the Confrontation Clause," contrary to *Cromer*'s rule); State v. Prasertphong, 114 P.3d 828, 833 (Ariz. 2005), *cert. denied*, 546 U.S. 1098 (2006).

130. 7 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2094, at 595 (James H. Chadbourn ed., 1978).

131. FED. R. EVID. 1101(b).

132. United States v. Shaver, 89 F. App'x 529, 532 (6th Cir. 2004).

133. *See* People v. Reid, 971 N.E.2d 353, 357 (N.Y. 2012) ("If evidence barred under the Confrontation Clause were inadmissible irrespective of a defendant's actions at trial, then a defendant could attempt to delude a jury 'by selectively revealing only those details of a testimonial statement that are potentially helpful to the defense, while concealing from the jury other details that would tend to explain the portions introduced and place them in context.'" (quoting People v. Ko, 789 N.Y.S.2d 43 (App. Div. 2005))); People v. Taylor, 20 N.Y.S.3d 708, 712 (App. Div. 2015) (applying *Reid* under the guise of the rule of completeness to admit the remainder of testimonial statements by a non-testifying declarant so as not to undermine the truth-seeking function of the trial).

134. WIGMORE, *supra* note 130, § 2094, at 595 ("One part cannot be separated and taken by itself without doing injustice, by producing misrepresentation.").

135. *See* Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 171–72 (1988) ("When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." (quoting FED. R. EVID. 106)).

136. FED. R. EVID. 410(b)(1) ("The court may admit a statement . . . in any proceeding in which another statement made during the same plea or plea discussions has been introduced, if in fairness the statements ought to be considered together.").

137. *See* Hemphill v. New York, 142 S. Ct. 681, 695 (2022) (Alito, J., dissenting) ("There are other circumstances, however, under which a defendant's introduction of evidence may be regarded as an implicit waiver of the right to object to the prosecution's use of evidence that might otherwise be barred by the Confrontation Clause. Under the traditional rule of completeness, if a party introduces all or part of a declarant's statement, the opposing party is entitled to introduce the remainder of that statement or another related statement by the same declarant, regardless of whether the statement is testimonial or there was a prior opportunity to confront the declarant." (citing 1 B.

defendant-Hemphill were to introduce a fragment of Morris's plea allocution concerning a 9-millimeter handgun, the rule of completeness may have authorized the prosecution to also introduce Morris's related testimonial declaration regarding a .357-caliber handgun at the incident scene.[138]

Precluding the defendant from protesting the statement's admissibility on Confrontation Clause grounds in this hypothetical is logically justifiable, especially if the prosecution could not compel Morris's live testimony.[139] The defendant's act of initially introducing part of the statement creates the need for its fuller exposition.[140] In this manner, the defendant implicitly signals a willingness to rely on an extrajudicial statement from this particular witness on the subject matter at issue; thus, the defendant lacks a sound basis for contesting the prosecution's insistence that the jury be privy to the related segment of the statement from the same declarant.[141] The scope of this borderline estoppel is limited, at most, to utterances originating from that specific witness.[142] Finally, the trial court, in determining the applicability of the rule of completeness, need not conclusively ascertain that the defendant-introduced fragment would be misleading; it suffices for the doctrine's invocation if there exists a plausible risk of misinterpretation, thereby warranting, in the interest of fairness, that the jury should also be exposed to the subsequent segment of the statement.[143]

II. CREATING THE MULTIVERSE: RETROACTIVITY UNDER *TEAGUE V. LANE*

A. The Teague *Framework*

When a recent court case of constitutional dimension may impact a preceding conviction, questions of retroactive application inevitably follow. Can a convicted criminal defendant take advantage of the new case retroactively? The answer to this question depends on the old case's status and the new rule's classification.[144] The controlling rule was

BERGMAN, N. HOLLANDER, & T. DUNCAN, WHARTON'S CRIMINAL EVIDENCE § 4:10 (15th ed. 1997))).

138. *See id.* at 695 (Alito, J., dissenting).

139. *Id.*

140. *Id*.

141. *Id.*

142. *See id.* ("The remainder of the declarant's statement or statements—and any other statements by the *same* declarant on the same subject—are fair game." (emphasis added)).

143. *Id.*

144. *See* Jasjaap S. Sidhu, *Reviving* Teague*'s Watershed Exception*, 44 HARV. J.L. & PUB. POL'Y 599, 599 (2021) (describing the two exceptions to the bar on retroactivity in collateral review

announced in a plurality opinion by Justice O'Connor in the 1989 case, *Teague v. Lane*.[145] The Court struck a balance between the life and liberty interests of a criminal defendant and the state's interest in the finality of criminal convictions.[146] In ways, the rule was a long time coming. States were "understandably frustrated" when a criminal trial was conducted while complying with the constitutional rules that existed at the time, only to have convictions overturned on collateral review; all because a rule was announced after the trial's completion.[147] But, as the Court reasoned, "[t]he past"—even the unconstitutional past—"cannot always be erased by a new judicial declaration."[148]

With this "commitment to finality," the *Teague* framework delineates "between the" phases "of direct review and collateral review" in the aftermath of criminal adjudications.[149] In the context of cases not yet final on appeal, "[n]ew *substantive* rules [ ] apply retroactively."[150] Traditionally, this status—or those cases referred to when using the term "direct appeal"—generally includes the initial series of appeals taken by defendants as a matter of right and the subsequent discretionary period wherein either state appellate courts or the U.S. Supreme Court may take on review in the exercise of appellate court discretion.[151] Once a defendant has exhausted their direct appellate remedies, both the conviction and

proceedings as being when a new substantive rule brings the conduct in question outside the scope of the court's authority, and when a new rule is a "watershed rule[] of criminal procedure" (quoting Teague v. Lane, 489 U.S. 288, 311 (1989))).

145. *Teague*, 489 U.S. at 310–11 (plurality opinion); *see also* Penry v. Lynaugh, 492 U.S. 302, 313 (1989) ("Under *Teague*, new rules will not be applied or announced in cases on collateral review unless they fall into one of two exceptions.").

146. *Teague*, 489 U.S. at 309 (plurality opinion).

147. *Id.* at 310. Notwithstanding these legitimate concerns, the opinion fails to consider the alternative: that failure to apply a rule retroactively might leave a criminal defendant equally "frustrated" by having had a trial that violated his constitutional rights. *Id.* (quoting Engle v. Isaac, 456 U.S. 107, 128 n.33 (1982)).

148. *Id.* at 308 (quoting Chicot Cnty. Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 374 (1940)).

149. *Id.* at 307–10; *see* Brandon Buskey & Daniel Korobkin, *Elevating Substance over Procedure: The Retroactivity of* Miller v. Alabama *under* Teague v. Lane, 18 CUNY L. REV. 21, 27 (2014).

150. Schriro v. Summerlin, 542 U.S. 348, 351 (2004).

151. *See* M.L.B. v. S.L.J., 519 U.S. 102, 131 (1996) (Thomas, J., dissenting) ("[O]ur oft-affirmed view [is] that due process does not oblige States to provide for any appeal, even from a criminal conviction."); Cobbledick v. United States, 309 U.S. 323, 325 (1940) ("[T]he right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice . . . ."); People v. Bautista, 857 N.E.2d 49, 50 (N.Y. 2006) (mem.); *see also* N.Y. CRIM. PROC. LAW §§ 450.10, 450.15, 450.20 (McKinney 2022).

sentencing of a defendant are deemed final.[152] The defendant retains the option of pursuing "collateral" attacks on his conviction or sentence, including initiating post-conviction remedies in the state's trial courts, and upon exhausting those avenues, advancing to the submission of a habeas corpus application within the federal framework.[153] In accordance with *Teague*, on collateral review, defendants do not reap the benefit of new rules retroactively.[154]

There are two exceptions to the general prohibition against a new rule's retroactivity during collateral proceedings: (1) the "substantive nature" rule, and (2) the exceedingly difficult "watershed rule."[155] Of note for this Article, is the second exception, however, both will be discussed. First, under the "substantive nature," rules are deemed to be substantive and therefore retroactive under *Teague* "if they either prohibit the government from criminalizing private behavior"[156] or carry a significant risk that a person will face a "punishment that the law cannot impose on him."[157] Substantive rules might also unilaterally penalize a person on the basis of class, or a defendant's "status or some characteristic of the offense itself."[158] Such "new rules" are not retroactively available on collateral review unless they place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe"—for example, a new rule interpreting the First Amendment.[159]

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152. Griffith v. Kentucky, 479 U.S. 314, 321 n.6 (1987) ("[A conviction is final when] "a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari [has been] finally denied.").

153. Steven M. Goldstein, *Chipping Away at the Great Writ: Will Death Sentenced Federal Habeas Corpus Petitioners Be Able to Seek and Utilize Changes in the Law?*, 18 N.Y.U. REV. L. & SOC. CHANGE 357, 358 (1991) ("[A] view articulated by the Supreme Court as far back as 1868 . . . stated that the habeas corpus statute 'brings within the habeas corpus jurisdiction of every court and of every judge every possible case of privation of liberty contrary to the National Constitution, treaties or laws. It is impossible to widen this jurisdiction.'" (quoting *Ex Parte* McCardle, 73 U.S. (6 Wall.) 318, 325–26 (1868))).

154. *Teague*, 489 U.S. at 310 (plurality opinion).

155. *Id.* at 311.

156. Buskey & Korobkin, *supra* note 149, at 27.

157. *Teague*, 489 U.S. at 307 (plurality opinion) (citing Mackey v. United States, 401 U.S. 667, 692 (1971) (Harlan, J., concurring in part and dissenting in part)); *see also* Schriro v. Summerlin, 542 U.S. 348, 352 (2004) (stating that rules can apply retroactively if they "necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal' or" if the defendant "faces a punishment that the law cannot impose upon him" (quoting Bousley v. United States, 523 U.S. 614, 620 (1998))).

158. Buskey & Korobkin, *supra* note 149, at 27–28 (citing Penry v. Lynaugh, 492 U.S. 302, 330 (1989), *abrogated by* Atkins v. Virginia, 536 U.S. 304 (2002)).

159. *Teague*, 489 U.S. at 311 (plurality opinion) (quoting *Mackey*, 401 U.S. at 692).

A classic example of a substantive guideline can be traced back to the Court's holding in *Atkins v. Virginia*, which instituted a prohibition on capital punishment for individuals with developmental and intellectual disabilities.[160] Such novel substantive rules in criminal procedure invariably receive a retroactive status.

Conversely, the second exception states new procedural rules regulating the manner of ascertaining a defendant's criminal liability do not enjoy retroactive applicability during "collateral review unless they are" emblematic of pivotal "watershed rules" in "criminal procedure, implicating the fundamental fairness and accuracy of the criminal proceeding."[161] The "new" rule must be one that diminishes an unjustifiable risk of convicting the wrongfully accused.[162]

The *Teague* framework sought to ameliorate inequity left by the Court's prior jurisprudence.[163] This was achieved by the question of retroactivity, a threshold one in cases where a court was asked to apply new rules.[164] Second, the plurality opined that its methodology would align more coherently with the foundational purpose of collateral proceedings.[165] Specifically, the plurality contended that the institution of habeas corpus ought not to be misconstrued as merely another layer of appellate review.[166] Rather, it should be understood as an extraordinary remedy, the more limited purpose of which is to furnish a necessary incentive for urging trial and appellate judges to administer justice in strict accordance with entrenched constitutional norms.[167]

160. *Atkins*, 536 U.S. at 321 (holding that via the Eighth Amendment, "the Constitution 'places a substantive restriction on the State's power to take the life'" of individuals with developmental and intellectual disabilities (quoting Ford v. Wainwright, 477 U.S. 399, 405 (1986))).

161. Buskey & Korobkin, *supra* note 149, at 28 (quoting Schriro v. Summerlin, 542 U.S. 348, 352 (2004)).

162. *Teague*, 489 U.S. at 312 (plurality opinion) (giving an exception to how "new" rules can be retroactively applied, noting that they must be one that diminishes an unjustifiable risk of convicting the wrongfully accused).

163. Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1733, 1747 (1991) (discussing that *Teague* sought to ameliorate inequity by the Court's prior jurisprudence).

164. *Teague*, 489 U.S. at 314–15 (plurality opinion) (discussing the foundational purpose of not only collateral proceedings but criminal law to not just comply with the Constitution but to uphold notions of fairness that allow for faith in the system).

165. *Id.* at 306 (quoting Desist v. United States, 394 U.S. 244, 262–63 (1969) (Harlan, J., dissenting)).

166. Fallon & Meltzer, *supra* note 163, at 1747.

167. *Teague*, 489 U.S. at 301 (plurality opinion).

B. Interpretation of Teague*'s Second Exception*

The second exception—identifying a watershed rule of criminal procedure—outlined by *Teague* has proven difficult for advocates to satisfy. This "exceedingly narrow" exception has been limited to such a degree as to encompass only a small set of rules that demand adherence to procedures "implicit in the concept of ordered liberty."[168] Merely creating a rule to enhance the accuracy of trials or to advance the principles of justice and correctness within our courts is insufficient.[169] A "new" rule should represent a seminal shift, one that is "groundbreaking"[170] and changes our comprehension of the foundational procedural components crucial for ensuring a fair trial.[171] Additionally, such a rule ought to represent a major disruption to a wide variety of cases, rather than a more narrow right that applies only to a select few.[172] Regardless of its seemingly narrow application, the watershed rule must exist for a reason. So, it would seem that some rules, such as ones that encompass cross-examination—our system's best metric at challenging the reliability of evidence—must be able to fit somewhere within its parameters.[173]

Still, in cases following *Teague*, the Court has refused to follow the "process" paradigm of reliability.[174] In *Schriro v. Summerlin*,[175] the

168. United States v. Mandanici, 205 F.3d 519, 528 (2d Cir. 2000) (quoting Graham v. Collins, 506 U.S. 461, 478 (1993)); *see also* Beard v. Banks, 542 U.S. 406, 417 (2004) (explaining that retroactively applying "new" rules are only in cases where the procedures are implicit "in the concept of ordered liberty").

169. *Mandanici*, 205 F.3d at 528.

170. *See* Caspari v. Bohlen, 510 U.S. 383, 396 (1994) ("Applying the Double Jeopardy Clause to successive noncapital sentencing is not such a groundbreaking occurrence.").

171. Sawyer v. Smith, 497 U.S. 227, 241–42 (1990) ("A rule that qualifies under this exception must not only improve accuracy, but also 'alter our understanding of the *bedrock procedural elements*' essential to the fairness of a proceeding." (quoting *Teague*, 489 U.S. at 311 (plurality opinion))).

172. *Mandanici*, 205 F.3d at 528 ("In short, it must be a . . . 'sweeping' change that applies to a large swathe of cases rather than a 'narrow right' that applies only to a 'limited class' of cases, (quoting O'Dell v. Netherland, 521 U.S. 151, 167 (1997))).

173. *See* Josephine Ross, *What's Reliability Got to Do with the Confrontation Clause After* Crawford*?*, 14 WIDENER L. REV. 383, 383 (2009) ("On the most basic level, the right to confront one's accusers encompasses the right to cross-examine them. The Confrontation Clause also relates to the reliability of evidence, because its guarantee embodies the principle that cross-examination is the method for testing the trustworthiness and reliability of the evidence against a criminal defendant.").

174. Christopher N. Lasch, *The Future of* Teague *Retroactivity, or "Redressability," After* Danforth v. Minnesota*: Why Lower Courts Should Give Retroactive Effect to New Constitutional Rules of Criminal Procedure in Postconviction Proceedings*, 46 AM. CRIM. L. REV. 1, 29 (2009).

175. *See* Schriro v. Summerlin, 542 U.S. 348, 354 (2004) (recognizing the majority and dissenting opinions engage in a back-and-forth where the majority could not retroactively apply the "new" rule and the dissent believes this undermines the defendant's interest in innocence and liberty).

majority and dissenting opinions engaged in a back-and-forth, pitting a model of "actual innocence" against the "process" view of reliability.[176] Early on, the Court held that a new rule in *Ring v. Arizona*[177]—where the Sixth Amendment requires a jury, rather than the judge, to determine aggravating circumstances essential for imposing a sentence of capital punishment—lacks retroactive force in federal habeas corpus proceedings.[178] The dissent in *Summerlin* contended that the *Ring* precept was harmonious with the second exception delineated in *Teague*.[179] After all, the second exception existed for rules "central to an accurate determination" and ought to be based on collective societal values.[180]

Summerlin is merely one example, however. Since the *Teague* decision, the Supreme Court has evaluated sixteen "new" rules for their potential retroactivity, deeming all insufficient.[181] This continued a trend the Court had started long before.[182] Furthermore, on multiple occasions, the Supreme Court asserted that for a rule to achieve the watershed treatment, it needs to be analogous in its impact to the rule set forth in *Gideon v. Wainwright* which recognized the right to indigent legal services for people accused of a crime who may not otherwise be able to afford an attorney.[183] Reflecting on post-*Teague* cases, the Court recognized *Gideon*'s unique stature, noting its pivotal role in reshaping the understanding of core procedural foundations integral to ensuring trial fairness.[184] Consequently, this underscores for inmates attempting to leverage new rules in their subsequent appeals that such a rule should

176. *Id.* at 359, 365–66 (Breyer, J., dissenting).

177. Ring v. Arizona, 536 U.S. 584 (2002).

178. *Id.* at 609.

179. *Summerlin*, 542 U.S. at 359 (Breyer, J., dissenting) (citing Teague v. Lane, 489 U.S. 288, 313 (1989) (plurality opinion)).

180. *Id.*

181. *See* Edwards v. Vannoy, 141 S. Ct. 1547 (2021) (holding that in a case where a "new" rule concerning jury-unanimity cannot be applied retroactively on federal collateral review); *see also Summerlin*, 542 U.S. at 355–58 (holding that in a case where Sixth Amendment rights were violated, the "new" rule cannot be applied retroactively to cases already final on direct review); Beard v. Banks, 542 U.S. 406, 419–20 (2004) ("[H]old[ing] that *Mills* announced a new rule of constitutional criminal procedure that falls within neither *Teague* exception. . . . that [ ] cannot be applied retroactively . . . ."); Danforth v. Minnesota, 552 U.S. 264, 276 (2008).

182. *See* Linda Meyer, *"Nothing We Say Matters":* Teague *and New Rules*, 61 U. CHI. L. REV. 423, 427 (1994) ("Before 1965, the Supreme Court assumed all of its decisions should apply retroactively."); Linkletter v. Walker, 381 U.S. 618, 629 (1965) ("[W]e must then weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation."), *criticized by* Teague v. Lane, 489 U.S. 288 (1989) (plurality opinion).

183. Gideon v. Wainwright, 372 U.S. 335, 339–40 (1963); Saffle v. Parks, 494 U.S. 484, 495 (1990); *see Beard*, 542 U.S. at 417 (illustrating that a "new" rule may be retroactively applied if the "new" rule created has an impact that alters the court's understanding of procedures).

184. *See Beard*, 542 U.S. at 417 (2004).

mirror the significance of *Gideon* and be distinct from instances where a retroactive application was denied.[185] When deciding the retroactivity of a new rule, the Court measures its significance against that recognized in *Gideon*.[186]

In fact, the Court has considered the retroactivity of the most landmark rules of criminal procedure including *Miranda*, *Mapp*, *Duncan*, *Batson*, and even *Crawford*.[187]

C. Crawford*'s Treatment Under* Teague

In *Whorton v. Bockting*, the Court considered retroactively applying *Crawford* in a collateral proceeding, specifically its status as a "watershed rul[e] of criminal procedure."[188] In a unanimous decision, the Court concluded that *Crawford* indeed was a "new rule" within the meaning of *Teague* but that it did not meet the criteria for "watershed" status.[189] Consequently, a multiverse was created: in one universe, Michael Crawford and all criminal defendants after him and, in another universe, Marvin Bockting and all criminal defendants who pre-dated *Crawford*.

The facts of *Bockting* involved an alleged sexual assault perpetrated against a child under the age of fourteen, the child of a woman with whom Bockting was living.[190] The child reported the sexual assault to her mother and then to the police.[191] The child had detailed interviews with detectives, who would go on to testify at Bockting's trial.[192] Following the investigation, Bockting was formally charged.[193] Due to the child's

185. *See* Gray v. Netherland, 518 U.S. 152, 170 (1996) (holding that a petitioner's claim to retroactively apply a "new" rule is denied because not a watershed rule); *see also Saffle*, 494 U.S. at 495; United States v. Mandanici, 205 F.3d 519, 528–29 (2d Cir. 2000).

186. *Gray*, 518 U.S. at 170 (1996); *Saffle*, 494 U.S. at 495; *Mandanici*, 205 F.3d at 528–29.

187. Edwards v. Vannoy, 141 S. Ct. 1547, 1559 (2021). *See also* Miranda v. Arizona, 384 U.S. 436, 489–99 (1966) (holding that law enforcement must warn the arrested persons of their constitutional rights before custodial interrogation); Mapp v. Ohio, 367 U.S. 643, 660 (1961) (holding that evidence seized without a warrant is unconstitutional and cannot be used in criminal prosecution); Duncan v. Louisiana, 391 U.S. 145, 171 (1968) (holding that the Fourteenth Amendment provides a right to a jury trial in criminal cases in states that is stemmed from the Sixth Amendment guarantee of trial by jury); Batson v. Kentucky 476 U.S. 80, 99–100 (1986) (holding that a statement is not permitted to use its peremptory challenges to exclude potential jurors based on their race); Crawford v. Washington, 541 U.S. 36, 67–68 (2004) (holding that the Confrontation Clause of the Sixth Amendment requires "testimonial statements by witnesses," who are not "subject to cross-examination," "may not be admitted unless the witness is unavailable and there had been a prior opportunity for cross examination").

188. Whorton v. Bockting, 549 U.S. 406, 417 (2007) (quoting *Saffle*, 494 U.S. at 495).

189. *Id.* at 418 ("The *Crawford* rule does not satisfy the first requirement relating to an impermissibly large risk of an inaccurate conviction.").

190. *Id.* at 409–10.

191. *Id.* at 410.

192. *Id.*

193. *Id.* at 410–11.

young age, however, issues arose.[194] Although the victim testified previously in the case, she became "too distressed to be sworn in" as a witness, so the prosecution moved under a state evidence statute that deemed her unavailable and allowed for recitation of the crime to be admitted through hearsay testimony from another witness.[195] Indeed, the detective who had interviewed the victim recounted her description of the assault for the jury.[196] The prosecution predated *Crawford* by nearly ten years, and on direct appeal, the Sixth Amendment question was resolved in accord with *Ohio v. Roberts*.[197]

On the question of whether *Crawford* was a retroactive new rule and should be applied to *Bockting*, the Court unanimously held "that *Crawford* [was] a 'new rule' of criminal procedure," and it did not satisfy the "*Teague* exception for" being recognized as a "watershed rule[]."[198] The Court's opinion represented a relatively straightforward application of the *Teague* framework. In delivering the opinion of the Court, Justice Alito outlined the three-part inquiry: first, determining whether *Crawford* constituted a new rule or a mere application of an old rule; second, adjudicating the substantive or procedural nature of the rule; and finally, if the rule was a new one, whether it had watershed status.[199]

With respect to the threshold question, the Court explained that a new rule is one that is not "*dictated* by precedent existing at the time the defendant's conviction became final."[200] The Court affirmed that, since the reasoning promulgated by *Crawford* deviated significantly from earlier doctrines, it should be classified as a new rule.[201] Consequently, state court convictions predicated on prior rules would remain final, not receiving the benefit of the new rule unless the rule fell within either the

194. *Id.* at 412.

195. *Id.* at 411–12. The trial court conducted a hearing "outside the presence of the jury to first determine whether [the child] could testify[;]" the hearing served as the basis for the trial court's ruling. *Id.* at 410–11. *See also* NEV. REV. STAT. § 51.385(1) (2003) ("[A] statement made by a child under the age of 10 years describing any act of sexual conduct performed . . . is admissible . . . if [t]he court finds, in a hearing out of the presence of the jury . . . and the child testifies at the proceeding or is unavailable or unable to testify.").

196. *Bockting*, 549 U.S. at 411.

197. *Id.* at 412.

198. *Id.* at 421 ("*Crawford* announced a 'new rule' of criminal procedure and that this rule does not fall within the *Teague* exception for watershed rules.").

199. *Id.* at 416.

200. *Id.* (quoting Saffle v. Parks, 494 U.S. 484, 488 (1990)).

201. *Id.* ("Applying this definition, it is clear that *Crawford* announced a new rule. The *Crawford* rule was not 'dictated' by prior precedent. . . . [but] is flatly inconsistent with the prior governing precedent . . . .").

(1) "substantive" exception or (2) was determined to be a "watershed rul[e] of criminal procedure."[202]

Turning to the first exception under *Teague*, the opinion dismissed the idea that the rule articulated in *Crawford* was substantive rather than procedural in nature.[203] Subsequent to this cursory determination, the Court's analytical focus gravitated predominantly toward determining whether Crawford could satisfy the highly circumscribed exception for watershed rules of criminal procedure.[204] To qualify as a watershed rule, the Court outlined two requisite conditions: (1) the rule must substantially reduce the "impermissibly large risk" of unjust convictions, and (2) it must change our understanding of the fundamental "bedrock" procedural elements integral to the fairness of the proceedings.[205]

"The *Crawford* rule did not satisfy the first requirement."[206] A rule that is merely *aimed* at improving the accuracy of the trial is not the same as one that corrects an impermissibly high risk of inaccurate convictions.[207] Guiding the Court's analysis, the opinion noted, was *Gideon*, positing that denial of legal counsel to a defendant produces an "intolerably high" susceptibility to erroneous conviction.[208] *Crawford*, by contrast, offered a less direct and potent impact on trial accuracy.[209] Moreover, the Court rationalized that the overruling of *Roberts* by *Crawford* was motivated not by an ambition to enhance trial accuracy but rather to realign jurisprudence with the original understanding of the Confrontation Clause.[210]

According to the Court, the impact that *Crawford* had on the truth-seeking purpose of trials is a bit of a mixed bag; prohibiting the use of

202. *Id.*

203. *Id.* at 417–18 ("Because *Crawford* announced a 'new rule' and because it is clear and undisputed that the rule is procedural and not substantive, that rule cannot be applied in this collateral attack on respondent's conviction unless it is a 'watershed rul[e] of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.'" (internal quotation marks omitted) (quoting *Saffle*, 494 U.S. at 495)).

204. *Id.* at 418–21 (discussing whether the *Crawford* rule satisfies the watershed rules).

205. *Id.* at 418 ("In order to qualify as watershed, a new rule must meet two requirements. First, the rule must be necessary to prevent 'an impermissibly large risk' of an inaccurate conviction. Second, the rule must 'alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding.'" (quoting Schriro v. Summerlin, 542 U.S. 348, 356 (2004))).

206. *Id.* ("[R]elating to an impermissibly large risk of an inaccurate conviction.").

207. *Id.* ("It is . . . not enough . . . to say that [the] rule is aimed at improving the accuracy of trial . . . ." (quoting Sawyer v. Smith, 497 U.S. 227, 242 (1990))).

208. *Id.* at 419 ("When a defendant who wishes to be represented by counsel is denied representation, *Gideon* held, the risk of an unreliable verdict is intolerably high.").

209. *Id.* (noting the *Crawford* rule has less of an impact on the fact-finding process).

210. *Id.* at 419–20 (noting that *Roberts*, enhanced trial accuracy by stating that "out-of-court nontestimonial statement not subject to prior cross-examination could not be admitted without a judicial determination regarding reliability"); *see generally*, Ohio v. Roberts, 448 U.S. 56 (1980).

testimonial hearsay without unavailability and an opportunity to cross-examine indeed promotes trial accuracy, but in relation to non-testimonial hearsay, it provides less of a guarantee than cases measured under the *Roberts* reliability framework.[211] Regardless, on the veracity of the criminal fact-finding accuracy, the Court cautioned that its *Teague*-mandated function was not to engage in a utilitarian calculus of net factual accuracy.[212] Instead, the aim was to ascertain whether evidence admissible under *Roberts* was markedly less reliable than that admissible under *Crawford*, to such an extent that the latter must be deemed indispensable for the attainment of accurate convictions.[213]

In *Edwards v. Vannoy*, the Court, in an opinion delivered by Justice Kavanaugh, posed the question that if other momentous cases in criminal procedure fail on a watershed inquiry, "how can any [other] new rule" ever apply retroactively?[214] The Court answered its own question, proclaiming, "[a]t this point, some 32 years after *Teague*, we think the only candid answer is that none can—that is, no new rules of criminal procedure can satisfy the watershed exception."[215]

The apparent abrogation of the watershed exception by *Edwards* fundamentally recalibrated the Supreme Court's approach to the doctrine of retroactivity.[216] This pivot left incarcerated individuals who had exhausted their appellate remedies prior to the Court's decision in *Hemphill* without any relief on the change in evidence law.[217] Individuals like New York's Lamarr Reid, whose convictions have been based on unconstitutional rulings, now encounter an insurmountable barrier to relief via collateral review.[218] In this transformation, the Court effectively constricted the scope of relief on collateral review, thereby precluding

211. *Bockting*, 549 U.S. at. 419–20 ("The *Crawford* rule is much more limited in scope, and the relationship of that rule to the accuracy of the factfinding process is far less direct and profound. *Crawford* overruled *Roberts* because *Roberts* was inconsistent with the original understanding of the meaning of the Confrontation Clause, not because the Court reached the conclusion that the overall effect of the *Crawford* rule would be to improve the accuracy of factfinding in criminal trials.").

212. *Id.*

213. *Id.* at 420.

214. Edwards v. Vannoy, 141 S. Ct. 1547, 1559 (2021).

215. *Id.*

216. Jeffrey G. Ho, *Finality Comity and Retroactivity in Criminal Procedure: Reimagining the* Teague *Doctrine After* Edwards v. Vannoy, 73 STAN. L. REV. 1551, 1570–71 (2021).

217. *Edwards*, 141 S. Ct. at 1574 (Kagan J., dissenting).

218. *Id. See also* Danforth v. Minnesota, 552 U.S. 264, 291 (2008) ("A decision by this Court that a new rule does not apply retroactively under *Teague* does not imply that there was no right and thus no violation of that right at the time of trial—only that no remedy will be provided in federal habeas courts. It is fully consistent with a government of laws to recognize that the finality of a judgment may bar relief.").

convicted defendants from deriving any advantage from emergent procedural rules after the conclusion of their direct appeals.[219] Further exacerbating the doctrinal tension, *Edwards* forecloses the creation of any future rules of criminal procedure, irrespective of such rules' pertinent significance to adjudicative fairness, absent those created on direct appeal.[220] In effect, the Court diluted a foundational principle of assessing a law's retroactivity, something that had existed for more than thirty years.[221]

Contrary to the logic underpinning *Teague*'s need to recognize a watershed exception—that "[t]ime and growth in social capacity . . . will properly alter our understanding of bedrock procedural elements"—*Edwards* resigns itself to the bizarre logic that, if it has not happened yet, it never will.[222] *Teague* envisioned that the progression of time and societal maturing would likely require adjustments to what are considered "bedrock procedural elements" fundamental to the fairness of a conviction.[223] While *Teague* harbored reservations about the prospective emergence of these new rules, it nonetheless preserved the utility of the watershed exception as a doctrinal vehicle for such evolution.[224] Moreover, in other cases, the Court has noted the possibility that certain rules could fulfill objectives that were, at the moment, beyond the Court's comprehensive understanding.[225] Therefore, it stands to reason that the *Edwards* Court's characterization of the watershed exception as "moribund" is inconsistent with its intended purpose.[226] Pursuing objectives framed as "judicial efficiency" and deference to states' reliance interests, the *Edwards* Court appeared to depart from established precedent.[227]

One year after *Edwards*, however, the Court reversed Hemphill's conviction after the "bedrock constitutional protections" afforded in the

219. *See Edwards*, 141 S. Ct. at 1581 (Kagan, J., dissenting) ("[T]he Court curtail[ed] effects by expunging *Teague*'s provision . . . limit[ing] the consequences of any similarly fundamental change in criminal procedure that may emerge in the future.").

220. *Id.* at 1574.

221. *Id.*

222. Teague v. Lane, 489 U.S. 288, 311–12 (1989) (plurality opinion) (quoting Mackey v. United States, 401 U.S. 667, 693–94 (1971)).

223. *See id.* (noting the change in what procedural elements are key to our judicial system over time).

224. *Id.*

225. *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1402 (2020) ("With humility, we must accept that [certain rules] may serve purposes evading our current notice.").

226. *See Edwards*, 141 S. Ct. at 1561 ("The purported watershed exception is moribund.").

227. *Id.*

Confrontation Clause were infringed.[228] To that end, according to the Court, "[i]f *Crawford* stands for anything, it is that the history, text, and purpose of the Confrontation Clause bar judges from substituting their own determinations of reliability for the method the Constitution guarantees."[229]

To date, however, no new rule has met this standard for *Teague*'s second exception.[230] And among those already considered, including *Crawford*'s retroactivity measured in *Whorton v. Bockting*, the gaping hole left in doctrinal rule of evidence is of major constitutional significance.[231] Though the Court had already negated *Crawford*'s compliance with the first watershed criteria, it proceeded to briefly touch upon the second.[232] Using *Gideon* as a benchmark, the Court opined that while undeniably significant, *Crawford* does not engender a seismic shift in our understanding of foundational procedural elements vital to equitable a fair legal process.[233]

D. Hemphill*'s Treatment Under* Teague

The unanswered question of *Hemphill*'s treatment under *Teague* can be answered by following the same framework of Justice Alito in *Bockting*, and notwithstanding the Court's measure of *Crawford*, a retroactive analysis of *Hemphill* should see a different result.

First, whether *Hemphill* constitutes a "new" or "old" rule under *Teague* must be determined. A court opinion overruling established precedent, especially one that represents a dramatic shift away from customary and established precedent, represents a "new rule" of criminal procedure.[234] When a new rule comes into existence, questions of retroactive application always come next.[235] Retroactivity can occur in two contexts: (1) for cases then-pending on direct appeal, and (2) for cases on subsequent

228. For a discussion of the Supreme Court's holding that a New York settled "opening the door" policy was a procedural rule, affirming the New York Court of Appeal's ruling that the rule is within the discretion of the trial courts to make evidentiary rulings regarding cross-examination, see *supra* Section I.C.

229. *See* Hemphill v. New York, 142 S. Ct. 683, 691 (2022) (holding that the defendant properly presented their Sixth Amendment right to confrontation claim).

230. *Id.*

231. *See infra* Section III.A (emphasizing the importance of cross-examination to aid truth seeking in three ways: (1) to emphasize often-neglected facts is testimony (2) conveys emphasis of importance to the fact finder and (3) to correct or undermine testifying witnesses).

232. Whorton v. Bockting, 549 U.S. 406, 420 (2007) ("The *Crawford* rule also did not 'alter our understanding of the *bedrock procedural elements* essential to the fairness of a proceeding.'" (quoting Sawyer v. Smith, 497 U.S. 227, 242 (1990))).

233. *Id.* at 419.

234. Edwards v. Vannoy, 141 S. Ct. 1547, 1555 (2021).

235. *Id.* at 1554.

collateral attacks.[236] Whether a new rule will apply retroactively on pending direct appeals is the easy question. The default common-law rule is that "cases on direct appeal are generally decided in accordance with the law as it exists at the time the appellate decision is made" (cases still pending on direct appeal get the benefit of the new rule).[237] Whether a new rule will be retroactive on collateral attack is a different question entirely.[238]

Under the framework laid out in *Teague* (even as modified by *Edwards*), it is clear that the Supreme Court's opinion in *Hemphill* represents a "new" rule and, therefore, should not be given retroactive effect on collateral review.[239] To begin with, *Hemphill* did not merely apply well-established law in an iterative fashion to a new situation.[240] It overruled a well-developed and well-reasoned line of precedent that was not only the majority rule in New York State[241] but was also adopted by

236. *Id.*

237. People v. Jean-Baptiste, 901 N.E.2d 192, 194 (N.Y. 2008) (quoting People v. Vasquez, 88 N.Y.2d 561, 573 (1996)); *see also* Griffith v. Kentucky, 479 U.S. 314, 328 (1987) ("We therefore hold that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past."); Schriro v. Summerlin, 542 U.S. 348, 351–52 (2004) (holding that a "new rule" applies to cases still pending on direct review, but only apply to final convictions in limited circumstances); Penry v. Lynaugh, 492 U.S. 302, 313–14 (1989) (holding that *Teague*'s approach is applicable in the capital sentencing context on a writ of habeas corpus).

238. *Penry*, 492 U.S. at 313–14.

239. *See* Hemphill v. New York, 142 S. Ct. 681, 692–93 (2022) (deciding that it was not the judge's role to decide that the evidence was reasonably necessary to correct the misleading impression was antithetical to the rule that had been followed by the consensus position at the time); People v. Reid, 971 N.E.2d 353, 357 (2012) ("Several United States Courts of Appeals have held that 'a defendant can open the door to the admission of evidence otherwise barred by the Confrontation Clause.'" (quoting United States v. Lopez-Medina, 596 F.3d 716, 733 (10th Cir. 2010))).

240. *Hemphill*, 142 S. Ct. at 692–93; *Reid*, 971 N.E.2d at 357.

241. *See, e.g.*, People v. Gladden, 748 N.Y.S.2d 170, 171 (App. Div. 2002) (holding no Sixth Amendment violation where the defense counsel opened the door); *see also generally* People v. Reynoso, 765 N.Y.S.2d 54 (App. Div. 2003); People v. Bryant, 834 N.Y.S.2d 305 (App. Div. 2007); People v. Rodriguez, 816 N.Y.S.2d 79 (App. Div. 2006); People v. Ko, 789 S.2d 43 (App. Div. 2005).

dozens of sister states[242] and at least four federal circuits.[243] In fact, the "opening the door" doctrine was so well-developed that by the time of the *Reid* decision, on which *Hemphill* was based, the New York Court of Appeals could realistically write that it was joining the consensus position.[244] Many of these cases—including *Reid*—were decided well after the Supreme Court's decision in *Crawford*.[245]

A judicial holding overruling established precedent plainly represents a new rule of criminal procedure.[246] Any other outcome could destabilize public confidence in the system of justice.[247] It appears that until January 20, 2022, when the Supreme Court said otherwise, the outcome urged by Darryl Hemphill was very much the minority rule in most of the federal

242. *See, e.g.*, State v. Johnson, 905 P.2d 94, 100 (Kan. 1995) ("By opening the door to otherwise inadmissible hearsay, a defendant waives the Sixth Amendment right to confrontation."); Tinker v. State, 932 So.2d 168, 187–88 (Ala. Crim. App. 2005); State v. Prasertphong, 114 P.3d 828, 835 (Ariz. 2005); State v. Paulino, 613 A.2d 720, 724–25 (Conn. 1992); State v. Fisher, 154 P.3d 455, 483 (Kan. 2007); Oken v. State, 612 A.2d 258, 278 (Md. 1992); People v. McPherson, 687 N.W.2d 370, 376 (Mich. Ct. App. 2004); Le v. State, 913 So.2d 913, 942 (Miss. 2005); State v. Justice, 165 S.E.2d 47, 51 (N.C. Ct. App. 1969); State v. Branch, 865 A.2d 673, 675 (N.J. 2005); State v. Robinson, 146 S.W.3d 469, 493 (Tenn. 2004); McClenton v. State, 167 S.W.3d 86, 94 (Tex. Ct. App. 2005); State v. Selalla, 744 N.W.2d 802, 818 (S.D. 2008); State v. Averill, No. 99-1-01301-0, 2001 WL 846465, at *4–5 (Wash. Ct. App. 2001).

243. *See, e.g.*, United States v. Acosta, 475 F.3d 677, 683–84 (5th Cir. 2007); *Lopez-Medina*, 596 F.3d at 733 ("[A] defendant can open the door to the admission of evidence otherwise barred by the Confrontation Clause."); United States v. Holmes, 620 F.3d 836, 843–44 (8th Cir. 2010) ("We agree with the Tenth Circuit that *Crawford* did not change the rule that a defendant can waive his right to confront witnesses by opening the door . . . ."); United States v. Cruz-Diaz, 550 F.3d 169, 178 (1st Cir. 2008) ("We do not think the government's failure to present a more sanitized narrative reveals a motive to undercut *Crawford*."); United States v. Whittington, 269 F. App'x 388, 409 (5th Cir. 2008); United States v. Burns, 432 F.3d 856, 859 (8th Cir. 2005).

244. *See* People v. Reid, 971 N.E.2d 353, 357 (N.Y. 2012) ("We agree with this consensus."); *see also supra* notes 217–219 (noting the limits placed on a defendant's right to appeal by barring them from using new procedural law).

245. *See, e.g.*, *Acosta*, 475 F.3d at 684–85 (stating the holding here did not contradict *Crawford* because the witness was still available for cross-examination); *Lopez-Medina*, 596 F.3d at 733; *Holmes*, 620 F.3d at 843; *Cruz-Diaz*, 550 F.3d at 178; *Whittington*, 269 F. App'x at 409; *Tinker*, 932 So.2d at 187–88; *Prasertphong*, 114 P.3d at 835; *Fisher*, 157 P.3d at 483; *Oken*, 612 A.2d at 278; *Le*, 913 So.2d at 942; *Branch*, 865 A.2d at 675; *McClenton*, 167 S.W.3d at 94; *Selalla*, 744 N.W.2d at 818; *but see* United States v. Cromer, 389 F.3d 662, 679 (6th Cir. 2004) (holding a defendant cannot open the door to evidence that would otherwise violation the Confrontation Clause); *see also* State v. Gutierrez, 466 P.3d 75, 81 (Or. Ct. App. 2020) (declining to address whether the curative admissibility doctrine may be used to admit hearsay statements otherwise precluded by the Sixth Amendment).

246. *See* Graham v. Collins, 506 U.S. 461, 477–78 (1993); Chevron Oil Co. v. Huson, 404 U.S. 97, 106 (1971) (noting that a new rule of criminal procedure may be applied on appeal to a case that was decided prior to the new rule).

247. *See generally* Thomas E. Fairchild, *Limitation of New Judge-Made Law to Prospective Effect Only: Prospective Overruling or Sunbursting*, 51 MARQ. L. REV. 254 (1967).

and state courts.[248] The Supreme Court has found analogous facts relevant to retroactivity analysis in the past.[249] In *Chaidez v. United States*, for example, the Court had to decide whether *Padilla v. Kentucky*[250] was a new rule without retroactive effect or merely an old one applied to new facts.[251] In assessing the retroactivity question, the Court wrote that *Padilla* answered a question it had long left open: whether *Strickland v. Washington*[252] required defense counsel to advise defendants about immigration consequences to be constitutionally effective.[253] As lower courts "filled the vacuum" left by the high court's silence, they had almost "uniformly concluded" that the defense counsel did not.[254] By rejecting the "then-dominant view," the Supreme Court proved that the result in *Padilla* "would not have been—in fact, was not—'apparent to all reasonable jurists' prior to [its] decision."[255]

These observations compel the conclusion that the result in *Hemphill* was not "*dictated*" by *Crawford* because it was not "apparent to all reasonable jurists."[256] Indeed, when the cases were at the New York Court of Appeals, *Hemphill* was decided in a six-to-one vote, and *Reid* was unanimous.[257] It follows that the result in *Hemphill* represents a "new rule," not an application of an old rule, and therefore, it is not retroactive under *Teague* unless it qualifies as a watershed rule of criminal procedure.[258]

248. *See supra* notes 241–243 (noting that *Hemphill* overruled precedent in multiple courts and thus cannot be a new procedural rule under *Teague*).

249. Chaidez v. United States, 568 U.S. 342, 352–53 (2013).

250. *See* Padilla v. Kentucky, 559 U.S. 356, 374 (2010) ("It is our responsibility under the Constitution to ensure that no criminal defendant—whether a citizen or not—is left to the 'mercies of incompetent counsel.' . . . [C]ounsel must inform her client whether his plea carries a risk of deportation." (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970))).

251. *Chaidez*, 568 U.S. at 352–53.

252. *See* Strickland v. Washington, 466 U.S. 668, 700 (1984) (establishing the standard for determining when a criminal defendant's Sixth Amendment right to the effective assistance of counsel is violated by counsel's deficiencies).

253. *Chaidez*, 568 U.S. at 352–53.

254. *Id.* at 346.

255. *Id.* at 354.

256. *Id.* at 347 (first quoting Teague v. Lane, 489 U.S. 288, 301 (1989) (plurality opinion); and then quoting Lambrix v. Singletary, 520 U.S. 518, 527–28 (1997)).

257. People v. Hemphill, 150 N.E.3d 356, 358 (N.Y. 2020) (Fahey, J., dissenting on grounds other than the Sixth Amendment right of confrontation); *see generally* People v. Reid, 971 N.E.2d 353, 389 (N.Y. 2012).

258. It is worth noting that under *Danforth v Minnesota*, a state may give broader retroactive effect to a new federal constitutional rule in its own courts on collateral review if it so chooses. 552 U.S. 264, 266 (2018). A state may do that by applying its own rules or simply by interpreting *Teague* more broadly than the Supreme Court does in any individual case. *Id.*

III. *HEMPHILL* HAS EMERGED AS A WATERSHED RULE OF CRIMINAL PROCEDURE ESSENTIAL TO FUNDAMENTAL FAIRNESS

A look at past precedent suggests that the facts of *Hemphill* satisfy *Teague*'s watershed exception. Notwithstanding the abundance of missed opportunities for a watershed rule, *Hemphill* stands above those that came before it. The Court has given retroactive effect to other rules implicating confrontation rights—in both *Barber v. Page* and *Roberts v. Russell*.[259] Although *Page* and *Russell* predated *Teague*, a 1987 case, *Cruz v. New York*, was given the same treatment.[260]

Although *Hemphill* is viewed as a case where evidence procedure goes head-to-head with constitutional rights, the inherent safeguards of each are rooted in every case where a criminal defendant has been alleged to "open the door" to evidence that is otherwise barred by the right of confrontation. After all, the primary purpose of the Confrontation Clause is the same bedrock of our rule against hearsay: to ensure the reliability of evidence. The confrontation right is a special right afforded to criminal defendants—allowing them to measure the reliability of the government's evidence through rigorous testing, questioning, and challenging—all in an adversarial proceeding.[261] Simply put, testimonial hearsay is not admissible against a criminal defendant who has not had the opportunity to cross-examine the declarant.[262] The Clause thus confers the right of cross-examination and applies regardless of whether a trial court deems the hearsay statements independently reliable.[263]

The language used by the Court in *Crawford v. Washington* underscores the indispensability of the right to confrontation as a foundational tenet of justice within the framework of a criminal trial.[264] In its doctrinal shift from *Roberts*, the *Crawford* decision paved the way for a new analytical paradigm in interpreting the Confrontation Clause questions.[265]

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259. *See* Roberts v. Russell, 392 U.S. 293, 294 (1968) (according retroactive effect to *Bruton v. United States*, 391 U.S. 123 (1968), which held that the admission of a codefendant's statements that inculpated a criminal defendant as his joint trial to be in violation of the defendant's confrontation rights); *see generally* Barber v. Page, 390 U.S. 719 (1968).

260. Cruz v. New York, 481 U.S. 186, 193 (1987) (extending *Bruton* to interlocking confessions, prohibiting such use against non-testifying criminal defendants); *see also* Graham v. Hoke, 946 F.2d 982, 993 (1991) (treating *Cruz* as a "new" rule); People v. Eastman, 648 N.E.2d 459, 460 (N.Y. 1995) (deciding, under state law, that *Cruz* should be applied retroactively).

261. *See generally* Nappi v. Yelich, 793 F.3d 246 (2d Cir. 2015).

262. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 311 (2008).

263. *See generally* Crawford v. Washington, 541 U.S. 36 (2004).

264. *Id.* at 42 (citing Pointer v. Texas, 380 U.S. 400, 406 (1965)).

265. *See generally* Alexander J. Wilson, *Defining Interrogation Under the Confrontation Clause After* Crawford v. Washington, 39 COLUM. J.L. & SOC. PROBS. 257, 258 (2005); Robert M. Pitler, Crawford *and Beyond: Exploring the Future of the Confrontation Clause in Light of Its Past*, 71 BROOK. L. REV. 1, 1–2 (2005).

Since then, the Court has repeatedly affirmed the indispensable role of confrontation and cross-examination in ascertaining the veracity and reliability of evidence in criminal trials.[266] Going straight to the source of the recognition of the right, *Crawford*, the Court shifted from its previous approach articulated in *Roberts*, holding that testimonial, out-of-court hearsay statements are inadmissible by the Confrontation Clause, except in instances where the declarant is unavailable, and the defendant has been afforded a prior opportunity for cross-examination.[267] *Crawford* thereby jettisoned the *Roberts* "indicia-of-reliability" standard, which levied the admissibility of hearsay on the basis of a trial court's own measure of their reliability.[268]

In *Crawford*, the Court observed that the Confrontation Clause is not merely a reflection of the desire for reliable evidence, but prescribes a specific methodology for achieving that reliability.[269] It emphasized the danger inherent in applying *Roberts*'s reliability test, cautioning against its application.[270] The Court explained, "[a]dmitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation."[271] This is, thus, entirely inconsistent with the rationale behind admitting evidence under a theory of curative admissibility.[272] To sanction the presentation of evidence deemed reliable by judicial authority—without subjecting it to adversarial scrutiny—is equivalent to waiving the jury trial because a defendant is "obviously guilty."[273]

The Framers were aware of the potential for judicial overreach and were explicitly reluctant to invest an undue degree of discretion in the

266. *See, e.g.*, Pointer v. Texas, 380 U.S. 400, 405 (1965) ("There are few subjects . . . upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal."); Chambers v. Mississippi, 410 U.S. 284, 295 (1973) (holding the defendant could not "test" the witness' testimony); Kentucky v. Stincer, 482 U.S. 730, 737 (1987) ("The right to cross-examination . . . is essentially a 'functional' right designed to promote reliability in the truth-finding functions of a criminal trial."); Dutton v. Evans, 400 U.S. 74, 89 (1970) ("[T]he mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials . . . ."); Lee v. Illinois, 476 U.S. 530, 540 (1986) ("The right to confront and to cross-examine witnesses is primarily a functional right that promotes reliability in criminal trials.").

267. *Crawford*, 541 U.S. at 65–66.

268. *Id.* at 42.

269. *Id.* at 61 ("[The Confrontation Clause] reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined.").

270. *Id.* at 63 ("Reliability is an amorphous, if not entirely subjective, concept.").

271. *Id.* at 61.

272. *See supra* Section I.C (discussing the attention *Hemphill* gained on appeal because of the "opening the door" policy).

273. *Crawford*, 541 U.S. at 62.

judiciary.[274] Thus, by overturning *Roberts* and analogous cases, the Court acknowledged the Framers' trepidation toward judicial arbitrariness in gauging evidentiary reliability, endorsing confrontation as the appropriate litmus test for such determinations. Simply put, admitting evidence to rebut a defense argument merely because a judge may think it is misleading is substituting one court's reliability test for another.[275]

A. The Criminal Defendant's Right of Cross-Examination is Critical to the Truth-Seeking Function of Trials

The Sixth Amendment's Confrontation Clause has been described as the "greatest legal engine ever invented for the discovery of truth."[276] It is "essential" to a fair trial.[277] It is one of the "fundamental guarantees of life and liberty."[278]

Cross-examination is not simply another stage of a trial; it is a party's opportunity to confront the witnesses against their case and challenge the veracity of their testimony.[279] From legal scholars to practitioners and the judiciary—our system has consistently understood the critical role of cross-examination in the elicitation of truth.[280] Historically, legal scholars have stressed this too.[281] While it is conceivable that, under ideal conditions where witnesses and counsel possess unimpeachable integrity and unerring acumen, cross-examination might be rendered unnecessary,

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274. *Id.* at 67 ("[J]udges, like other government officers, could not always be trusted to safeguard the rights of the people.").

275. *See generally* BROUN ET AL., *supra* note 89, § 57, at 288–92.

276. California v. Green, 399 U.S. 149, 158 (1970) (quoting WIGMORE, EVIDENCE § 1367 (3d ed. 1940)).

277. Pointer v. Texas, 380 U.S. 400, 404 (1965) (quoting Malloy v. Hogan, 378 U.S. 1, 6 (1964)). In *Pointer*, the Supreme Court observed, "[t]he fact that this right appears in the Sixth Amendment of our Bill of Rights reflects the belief that the Framers of those liberties and safeguards that confrontation was a fundamental right essential to a fair trial in a criminal prosecution." *Id.* The Court furthered noted that, "the decisions of this Court and other courts throughout the years have constantly emphasized the necessity for cross-examination as a protection for defendants in criminal areas." *Id.*

278. Kirby v. United States, 174 U.S. 47, 55 (1899); *accord Pointer*, 380 U.S. at 410 (Stewart, J., concurring).

279. Johnathan Clow, *Throwing a Toy Wrench in the "Greatest Legal Engine": Child Witnesses and the Confrontation Clause*, 92 WASH. U. L. REV. 793, 794 (2015).

280. *Id.* at 796 n.17 ("[T]he principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." (quoting Crawford v. Washington, 541 U.S. 36, 50 (2004))).

281. Brief of Nat'l Assoc. of Crimn. Def. Laws. as Amicus Curiae in Support of Respondent, at 6, Whorton v. Bockting, 549 U.S. 406 (2007) (No. 05-595), 2006 WL 2710732 ("The power and opportunity to cross-examine . . . is one of the principal tests which the law has devised for the ascertainment of truth, and is certainly a most efficacious test." (quoting 1 THOMAS STARKIE, LAW OF EVIDENCE 129 (1824))).

such hypothetical circumstances rarely, if ever, manifest in practice.[282] Moreover, the retroactive application of the *Hemphill* rule harmonizes with the core objectives of collateral proceedings, specifically their role in safeguarding against wrongful convictions.[283]

Cross-examination serves the truth-seeking function of trials in several areas. First, the exercise provides adversaries with the opportunity to elicit from the witness additional facts that may have been omitted or under-emphasized during direct examination.[284] Cross-testimony affords opponents the opportunity to elicit often-neglected facets of testimony, including facts that diminish personal trustworthiness or may tend to discredit the witness.[285] Absent further probing to uncover these additional facts, a witness's testimony might perpetuate partial truths, and it falls upon the opponent to conduct this necessary inquiry.[286] Though alternative witnesses may offer some of these facts, several critical details can only be elicited from the witness under scrutiny, especially those pertaining to their individual conduct and bases of knowledge.[287]

Second, the temporal proximity of cross-examination to direct examination enables the fact finder to more readily appreciate the mitigating or discrediting value of any new facts unearthed.[288]

Third, the potency of cross-examination arises from its ability to elicit corrections or refute testimony directly from the testifying witness, a dynamic that yields an impact unparalleled by contradictory testimony introduced through alternative witnesses.[289]

B. Cross-Examination as a Safeguard to Conviction Integrity

Crawford functions as a safeguard for the originalist intent of the drafters of the Confrontation Clause by protecting against courts receiving testimonial evidence absent an opportunity for the accused to subject

282. *Id.* at 6–7 ("[A]s yet, 'no substitute has ever been found for cross-examination as a means of separating truth from falsehood, and of reducing exaggerated statements to their true dimensions.'" (quoting FRANCIS L. WELLMAN, THE ART OF CROSS-EXAMINATION (1923))).

283. *See* Bousley v. United States, 523 U.S. 614, 620 (1998) (explaining that the *Teague* doctrine seeks to ensure that no person is incarcerated because of a procedure that impermissibly risks wrongly conviction); Teague v. Lane, 489 U.S. 288, 312 (1989) (plurality opinion); *see also* O'Neal v. McAninch, 513 U.S. 432, 442 (1995) (noting the risk of the an innocent person being convicted).

284. 5 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1368, at 37 (James H. Chadbourn ed., 1974).

285. *Id.*

286. *Id.*

287. *Id.* at 36.

288. *Id.* at 38 ("[T]he modification or the discredit produced by the facts extracted is more readily perceived by the [factfinder].").

289. *Id.* at 36.

the declarant to cross-examination.[290] The decision makes it clear that the inherent danger targeted by the Confrontation Clause was the use of ex parte examinations as evidence against a criminal defendant.[291] Moreover, as a seminal procedural rule, the consensus post-*Crawford* has uniformly construed the decision's proscription against testimonial statements without witnesses available for cross-examination.[292] Legal scholars have similarly highlighted the foundational role of the Sixth Amendment in safeguarding innocence and facilitating truth and discovery.[293]

Under the *Teague* framework, a novel procedural rule warrants retroactive application if it qualifies as a watershed rule, implicating the essence of procedural fairness and adjudicative precision.[294] By these metrics, *Crawford* satisfies the requisite conditions. The Confrontation Clause is intrinsically aimed at enhancing trial accuracy through a specific methodological approach—namely, the adversarial task of cross-examination.[295] The testimonial hearsay allowed without cross-examination cuts against the Framers' originalist understanding that cross-examination is an essential procedural mechanism to assess and validate evidentiary integrity.[296] The *Crawford* rule rearticulates the Framers' foundational insight—that judicial determinations of testimonial reliability do not necessarily correlate with evidentiary accuracy.[297] The very reason for the *Crawford* rule is to augment the reliability of the evidentiary through a criminal defendant's efforts, not some arbitrary determination by a judge. To not extend this right to those already convicted would undermine the well-recognized safeguards.[298] Thus, the absence of cross-examination as a tool for evidentiary evaluation incontrovertibly

290. Crawford v. Washington, 541 U.S. 36, 68 (2004).

291. *Id.* at 50.

292. 4 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 8:27, Westlaw (database updated Aug. 2023).

293. *See* Akhil Reed Amar, *Sixth Amendment First Principles*, 84 GEO. L.J. 641, 642–43 (1996) (arguing that the tripartite Sixth Amendment rights—counsel, confrontation, and compulsory process—operate as "great engines" to render the truth of a defendant's innocence transparent to both the jury and the broader public).

294. *See* Saffle v. Parks, 494 U.S. 484, 495 (1990) (stating that an exception to the rule that new rules will not be applied on collateral review is the watershed rule of criminal procedure which implicates "fundamental fairness and accuracy in a criminal proceeding"); Schriro v. Summerlin, 542 U.S. 348, 352 (2004).

295. *Crawford*, 541 U.S. at 61.

296. *Id.*

297. *Id.*

298. *See Summerlin*, 542 U.S. at 352 ("That a new procedural rule is 'fundamental' in some abstract sense is not enough; the rule must be one 'without which the likelihood of an accurate conviction is *seriously* diminished.'" (quoting Teague v. Lane, 489 U.S. 288, 313 (1989))).

erodes the probability of achieving a conviction that can be deemed accurate.

C. A Bedrock Rule of Criminal Procedure: Confrontation is Analogous to Gideon

Going as far back as 1807, Chief Justice Marshall emphasized the historical importance of confrontation in criminal trials writing: "I know of no principl[e] in the preservation of which all are more concerned. I know none, by undermining which, life, liberty and property, might be more endangered. It is therefore incumbent on courts to be watchful of every inroad on a principl[e] so truly important."[299] In fact, a criminal defendant having the right to confront witnesses against him was hardly new during the Constitution's formation; the issue of confrontation can be traced back to Biblical and Roman history.[300]

The language in *Edwards* dismissing watershed rules of criminal procedure is prophetic, at best.[301] That language predated *Hemphill* by a year and did not vitiate the Court's jurisprudence that drew parallels between watershed rules and those recognized in *Gideon*.[302] The second *Teague* exception is made for novel procedural rules that are of foundational import "without which the likelihood of an accurate conviction is *seriously* diminished," and thus, they are applied retroactively during collateral review.[303] Under *Teague*'s second exception, a procedural rule may be granted retroactive application only if it qualifies as a watershed rule that pertains to the "fundamental fairness" and the accuracy of the criminal trial.[304]

The Court has repeatedly reaffirmed the vital role of cross-examination in enhancing the reliability of criminal trial outcomes through the efforts

299. United States v. Burr, 25 F. Cas. 187, 193 (C.C.D. Va. 1807) (No. 14,694) (remarks of Marshall, C.J.).

300. State v. Lanam, 459 N.W.2d 656, 664 (Minn. 1990) (Kelley, J., dissenting) ("[W]hether adopted from the Romans or not, the right to confrontation existed in England even before the right to trial by jury, and was clearly established in England by the year 1200. . . . By the sixteenth century, various statutes required the evidence of at least two witnesses for conviction. Even in cases where there was only one witness, the court gave great weight to the character of the evidence and the character of the witness offering it, a necessary consequence of which was the right to confront and cross-examine the witness to test credibility."); *see also* Daniel Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. PUB. L. 381, 384 (1959) ("There are [ ] instances of the right to confrontation in biblical and Roman history. . . . [And] the right to confrontation existed in England even before trial by jury." (citing *Acts* 25:2 (King James))).

301. *See* Edwards v. Vannoy, 141 S. Ct. 1547, 1559 (2021) ("[N]o new rules of criminal procedure can satisfy the watershed exception.").

302. *Id.* at 1557 ("The Court has identified only one pre-*Teague* procedural rule as watershed: the right to counsel recognized in the Court's landmark decision in *Gideon v. Wainwright*.").

303. *Summerlin*, 542 U.S. at 352 (quoting Teague v. Lane, 489 U.S. 288, 313 (1989)).

304. *Teague*, 489 U.S. at 312–13 (plurality opinion).

of the defendant.[305] Cross-examination facilitates the scrutiny of discrepancies between a witness's account and other evidential material, allows for the exploration of potential witness bias, and permits inquiry into areas that the prosecution may have overlooked.[306] In *Pointer v. Texas*, the Court observed that "[t]here are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal."[307]

Hemphill fits squarely within this exception because it establishes a new watershed rule crucial for safeguarding the Sixth Amendment rights of defendants.[308] The Court in *Hemphill* chronicled its exhaustive *Crawford* analysis of the historical underpinnings of the Confrontation Clause where it deciphered its original intent, including how the Framers intended to restrict testimonial utterances that were either ex parte in-court testimony or the functional equivalent.[309] Using specific language, the Court underscored that the Framers would have barred the admissibility "of testimonial statements by a non-testifying witness unless, the witness is 'unavailable to testify, and the defendant has had a prior opportunity for cross-examination.'"[310]

Further, "[t]he right [to] cross-examination is" not merely "a desirable rule of trial procedure," but an inherent aspect of "the constitutional right of confrontation" that buttresses the veracity of the judicial truth-determination process.[311] The jurisprudential innovation presented in *Hemphill* epitomizes such a watershed rule, elaborating on the indispensable purpose of testing the reliability and veracity of evidence by cross-examination, not a ruling by the trial court.[312] The *Teague* framework, although restrictive, should not be so myopic as to consider only the right to counsel, as encapsulated in *Gideon*, to be the sole watershed rule worthy of retroactive effect. The Sixth Amendment's protections are not monolithic, and their significance extends beyond merely the right to

305. *See* Hemphill v. New York, 142 S. Ct. 681, 692 (2022).

306. *See* Taylor v. Illinois, 484 U.S. 400, 411–12 (1988) (explaining that cross-examination helps to address misleading or fabricated testimony).

307. Pointer v. Texas, 380 U.S. 400, 405 (1965).

308. *See supra* Section II.D (examining *Hemphill*'s treatment under *Teague*).

309. *Hemphill*, 142 S. Ct. at 690–91.

310. *Id.* at 690 (quoting Crawford v. Washington, 541 U.S. 36, 68 (2003)).

311. Chambers v. Mississippi, 410 U.S. 284, 295 (1973).

312. *Hemphill*, 142 S. Ct. at 694; *see also* Davis v. Alaska, 415 U.S. 308, 316 (1974) (describing cross-examination as "the principal means by which the believability of a witness and the truth of his testimony are tested").

counsel. Retroactive treatment is, without any doubt, the proper way to right past wrongs.

CONCLUSION

With *Hemphill*, the Supreme Court limited an age-old doctrine in evidence law and abrogated leading multijurisdictional rules.[313] Notwithstanding the historic and narrow application of *Teague*, including the limiting language in *Edwards*, the *Hemphill* rule should be applied retroactively.

Hemphill's retroactive applicability hinges on whether the question is a watershed rule of criminal procedure essential to the fundamental fairness of the proceedings. While *Teague* promulgated a tough standard for the retroactivity of "new" rules—a standard so restrictive that no rule has yet been deemed retroactively applicable by the Supreme Court—the Court has never been called upon to consider a rule of *Hemphill*'s magnitude. Indeed, *Hemphill* stands apart from other cases and is distinguishable from the other new rules, which have floundered in the *Teague* analysis.

A distinctive feature setting *Hemphill* apart from other "new" rules failing the test of retroactivity is the substantive focus of the rule: testimonial hearsay being wielded like weapons to correct arguments deemed misleading.

In summation, history and the spirit of legal precedent converge to underscore the importance of allowing a criminal defendant convicted of a crime under a bad rule of law to obtain relief.

313. *Hemphill*, 142 S. Ct. at 683; *see supra* notes 217–219 (explaining how the Supreme Court has effectively "constricted the scope of relief on collateral review," giving convicted defendants few advantages from new procedural rules once their direct appeals conclude).

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