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Defendants' right to confrontation appears to be inviolable

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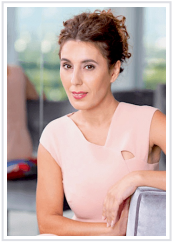

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On October 5, the U.S. Supreme Court heard oral arguments in *Hemphill v. New York* (20-637), a New York case that implicates the right of a criminal defendant under the Sixth Amendment "to be confronted with the witnesses against him."

The case stems from a 2006 street fight that ended with the killing of a 2-year-old child by someone wielding a 9mm firearm. Witnesses identified Nicholas Morris as the shooter, and a police search of Morris' apartment turned up a 9mm cartridge, as well as .357 ammunition. After a mistrial was declared in the state's action against Morris, he pleaded guilty to possession of a .357 firearm.

Thereafter, Darrell Hemphill was arrested and charged with the murder on the basis of DNA taken from a blue sweater found at Morris' apartment. During his murder trial, a witness testified that the 9mm firearm belonged to Hemphill, but his counsel sought to contradict this testimony with evidence of the 9mm cartridge found on Morris' nightstand.

The prosecution then moved to introduce Morris' plea allocution, including his assertion that he had a .357 revolver at the scene of the shooting. The allocution was admitted, but the defense was denied any opportunity to question Morris, whose unchallenged statement provided sufficient basis for a jury to find Hemphill guilty.

The New York Court of Appeals upheld the verdict, ruling that the defendant had "opened the door" to otherwise inadmissible, unconfronted, testimonial hearsay by presenting his case through admissible evidence contrary to the prosecution's theory. In doing so, the court highlighted a divide among circuits regarding the sanctity or forfeitability of the Sixth Amendment right to confrontation.

Now the Supreme Court has been asked to resolve the divide, and it appears ready to uphold the inviolability of the Sixth Amendment confrontation right. During oral arguments, the justices dissected at length New York's position that a legitimate defense based on admissible evidence can forfeit the confrontation clause, The court focused specifically on *People v. Reid*, 97 A.D.3d 1037 (N.Y. App. Div. 2012), a New York case that established a two-part inquiry for determining when the door "opens" to testimonial evidence: (1) "whether and to what extent the evidence or argument said to open the door is incomplete or misleading" and (2) "what if any otherwise admissible evidence is reasonably necessary to correct the misleading impression."

Opening the Door

According to the trial court, Hemphill had relinquished his right to cross-examine when his defense counsel elicited evidence or made improper and misleading arguments about the 9mm weapon. In oral argument before the Supreme Court, the state's attorney doubled down on this position, stating that under New York's

standard, "There has to be something, some way in which the defense has misled the jury." But when asked by the justices to identify the misleading defense statement, counsel was notably circumspect.

The appellant's attorney reminded the court that constitutional rules generally prevail over state rules. He argued that if *Reid* were to be construed to mean that "simply rendering testimonial evidence relevant because it would dispute the defense case," it "cannot be squared with the Sixth Amendment and has to be wrong." Even if *Reid* was limited to a "rule-of-completeness" scenario, outside the scope of the current petition, he said there would still be "no legitimate 'open the door' theory that would forfeit constitutional rights."

Need for Consistent Approach

Citing decisions by the 5th U.S. Circuit Court of Appeals and the New Hampshire Supreme Court, Hemphill's attorney noted that two state courts of last resort and one federal court of appeals "have said that merely introducing a defense or evidence that could be contradicted by an out-of-court testimonial statement is enough to forfeit the Confrontation Clause right." If such a position were to be expanded to all circuits, it "would effectively wipe out the Confrontation Clause or at least render it toothless in all the situations where it matters the very most."

This argument appeared to resonate with the court. Justice Sonia Sotomayor, in response to the state's argument, put it bluntly: "So now the question is ... can I mislead the jury simply by making legitimate arguments based on legitimate evidence and open the door." Her skepticism was echoed in questions from the other justices, who appeared to be unconvinced by the state's arguments.

They also rejected the state's position that because Hemphill sought relief solely for his own matter, a broader constitutional decision was inappropriate. Justice Samuel Alito stated the matter simply: "We take cases for the most part to decide important legal questions and not just to determine whether there was an error in a particular criminal trial in the Supreme Court of New York for the County of the Bronx, right? So the important legal question here is whether there can be a waiver of the Confrontation Clause right either expressly or implicitly. That's ... what's important about this case."

He directly questioned the state's assertion that this was simply a procedural issue, a way to respond to an improper strategy. "Was this done the right way?" he asked New York's attorney. "[I]s this being used as a sort of a corrective that wasn't really necessary if it was attacked more directly?"

Right to Confront

The justices overwhelmingly spurned New York's position that simply by introducing evidence at odds with the prosecution's position, the defense had relinquished its right to confront witnesses. Their questions clearly underscore the potential vulnerability of a constitutional right that could evaporate whenever a jury is confused or misled by contradictory testimony.

Chief Justice John Roberts appeared to put the nail in the coffin of the state's case: "I'm sorry. Haven't we said, though, in a situation that the Constitution has already made the decision about the way in which the evidence could be made more reliable? In other words, you have to have the confrontation?"

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