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US SUPREME COURT LIMITS NY "OPENING-THE-DOOR" RULE BY PRECLUDING THE INTRODCUTION OF UNCONFRONTED, TESTIMONIAL HEARSAY THAT VIOLATES THE CONFRONTATION CLAUSE

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INTRODUCTION:

In Hemphill v New York, ___US___, 2020 WL 174223 (1/20/2022), the United States Supreme Court significantly restricted the breadth of New York's "opening-the-door" evidentiary rule (admitting otherwise inadmissible evidence to clarify or correct an incomplete or misleading impression created by defense evidence or argument) by disallowing the prosecution from introducing un-cross examined, testimonial hearsay (regardless of its relevance or reliability) because it violates the defendant's right of confrontation under the Sixth Amendment to the Constitution.

In People v Reid, 19 NY3d 382 (2012), the Court of Appeals held that the defendant had opened the door to hearsay evidence that would otherwise have violated the Confrontation Clause (Crawford v Washington 541 US 36 [2004]) by introducing hearsay evidence that someone other than the defendant was involved in the fatal shooting of the victim. (See monograph: OPENING THE DOOR TO OTHERWISE INADMISSIBLE EVIDENCE, 10/27/20 at acp.org).

Although the Appellate Division (AD) reversed the defendant's conviction based on a violation of the defendant's right of confrontation (because an FBI agent testified to information received from a non-testifying co-defendant implicating the defendant), the Court of Appeals reversed the AD, concluding that the otherwise inadmissible evidence was reasonably necessary to correct a misleading impression created by the defense.

Admission of such testimony (not unlike impeaching a defendant with a prior inconsistent statement obtained in violation of Miranda rights) was also necessary, in the Court's view, to preserve the truth-finding purposes of the trial process and to avoid unfairness by not allowing the defense to elicit only partial information without the benefit of further explanation or clarification. (Citing, inter alia, US v Holmes, 620 F3d 836 [8th Cir 2010] and People v Ko, 15 AD3d 173 [1st Dept 2005]).

In contrast, see People v Melendez, 55 NY2d 445 (1982), where the trial court was found to have abused its discretion in allowing the People to elicit from a detective on redirect examination hearsay information (from a "concerned citizen") which implicated the defendant as the shooter when all that defense counsel asked on cross examination was whether the People's main witness was considered to be a suspect when the police brought him in for questioning.

The Court of Appeals held that there was no basis to elicit hearsay implicating the defendant to explain why the detective considered another person to be a suspect.

But see People v Massie, 2 NY3d 79 (2004) where the Court of Appeals held that the trial court properly denied the defendant's request to introduce evidence of two suggestive identification procedures without also admitting evidence of a subsequent non-suggestive identification of the defendant at a line-up. Otherwise, the Court reasoned, the jury would have been left with the erroneous impression that the in-court identification of the defendant was preceded only by two suggestive procedures. (Citing, inter alia, People v Rojas, 97 NY2d 32 [2001]).

NY ADVISORY EVIDENCE RULE 4.08 (AS AMENDED), OPEN DOOR EVIDENCE:

After Hemphill v NY supra, the New York rule states that:

1. A party may open the door to introduction by the opposing party of evidence OTHER THAN UNCONFRONTED TESTIMONIAL HEARSAY that would otherwise be inadmissible when in the presentation of argument or cross examination of a witness, or other presentation of evidence, the party has given an incomplete or misleading impression on an issue.

WHAT IS TESTIMONIAL HEARSAY?

In Crawford v Washington, 541 US 36 (2004) the US Supreme Court defined testimonial hearsay in light of the Sixth Amendment's guarantee that criminal defendants SHALL ENJOY the right to be confronted with the witness' against them and concluded that the only meaningful way to test the reliability of witness statements is through CROSS EXAMINATION.

TESTIMONIAL HEARSAY, therefore, consists of out-of-court statements that are obtained (and intended) as an out-of-court substitute for trial testimony. (See also, People v John, 27 NY3d 307 [2016]: a statement will be treated as testimonial only if it is procured with a PRIMARY PURPOSE of creating an out-of-court substitute for trial testimony).

In Crawford, the Prosecution introduced at the defendant's trial a recorded statement of the defendant's wife (who was deemed unavailable as a witness based on Washington marital-privilege law) which contradicted his claim of self-defense (in stabbing the man who allegedly raped his wife).

The Supreme Court held that admission of the wife's uncontested statement as evidence against the defendant violated his confrontation rights. For such evidence to come in, the Court reasoned, the defendant would have had to have been afforded a prior opportunity at cross examination. (541 US at 68).

The Court in Crawford also held that the old rule espoused in Ohio v Roberts, 448 US 561 (1980), which admitted testimonial hearsay found to possess special indicia of reliability was no longer to be followed. Reliable or not, testimonial hearsay from an unavailable witness against whom there was no prior opportunity for cross examination is INADMISIBLE.

Since Crawford, courts have attempted to clarify the meaning of testimonial hearsay by focusing on the PRIMARY PURPOSE of the questioning that elicited the statement. (See People v John, supra).

For example, in Michigan v Bryant, 562 US 344 (2011), the Court held that where the primary purpose of the inquiry/statement, as objectively indicated by the circumstances, is to MEET AN ONGOING EMERGENCY (rather than to obtain information for eventual use as incriminating evidence at a trial), it will not be considered testimonial. (See also Davis v Washington/Hammon v Indiana, 547 US 813 [2006], and People v Goldstein, 6 NY3d 119 [2005]).)

NY EVIDENCE ADVISORY RULE 8.02, ADMISSIBILITY LIMITED BY CONFRONTATION CLAUSE:

It should be noted that the Sixth Amendment right of confrontation applies to the states via the Fourteenth Amendment. (Pointer v Texas, 80 US 400 [2005]).

1. A testimonial statement of a person who does NOT testify at trial is NOT ADMISSIBLE against a defendant FOR ITS TRUTH unless the witness is UNAVAILABLE to testify and the defendant had a PRIOR OPPORTUNITY for CROSS EXAMINATION, or the defendant ENGAGED OR ACQUIESCED IN WRONGDOING intended to procure the unavailability of the witness.

   In the latter circumstance, the defendant will be deemed to have forfeited his Sixth Amendment protection. (See People v Geraci, 85 NY2d 359 [1999], and NY ADV EV RULE 8.19).

2. A hearsay statement is TESTIMONIAL when it consists of:
   a. PRIOR TESTIMONY at a PRELIMINARY HEARING, before a GRAND JURY or at a FORMER TRIAL.
   b. An out-of-court statement in which:
   (i) STATE ACTORS (e.g., law enforcement) are involved in a FORMAL, out-of-court INTERROGATION of a witness to OBTAIN EVIDENCE FOR TRIAL or
   (ii) absent a formal interrogation, the circumstances demonstrate that the PRIMARY PURPOSE of an exchange was to PROCURE AND OUT-OF-COURT STATEMENT TO PROVE CRIMINAL CONDUCT (OR PAST EVENTS POTENTIALLY RELEVANT TO A LATER CRIMINAL PROSECUTION OR OTHERWISE SUBSTITUTE FOR TRIAL TESTIMONY.

3. Such statement is NOT TESTIMONIAL 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.

   The statement to the police IS TESTIMONIAL when the circumstances objectively indicate that there is NO ONGOING EMERGENCY and that the PRIMARY PURPOSE of the interrogation is to ESTABLISH OR PROVE PAST EVENTS POTENTIALLY RELEVANT TO A LATER CRIMINAL PROSECUTION.

4. A defendant's GUILTY PLEA ALLOCUTION that IMPLICATES a co-defendant IS A TESTIMONIAL STATEMENT and MAY NOT, therefore, be admitted at the trial of the co-defendant in the

absence of an opportunity of the co-defendant to CROSS EXAMINE the defendant (who plead guilty).

EVIDENCE ADVISORY RULE 4.08 “OPEN DOOR” EVIDENCE (CONT’D):

2. A trial court must exercise its discretion to decide whether a party has opened the door to otherwise inadmissible evidence. In so doing, the trial court should consider whether, and to what extent, the evidence/argument claimed to open the door is INCOMPLETE OR MISLEADING, and what if any otherwise inadmissible evidence is REASONABLY NECESSARY to EXPLAIN, CLARIFY OR OTHERWISE CORRECT AN INCOMPLETE OR MISLEADING IMPRESSION.

3. To assure the proper exercise of discretion and avoid the introduction of otherwise inadmissible evidence, the RECOMMENDED PRACTICE is for a party to APPLY TO THE TRIAL COURT FOR A RULING on whether the door has been opened before proceeding forward, and the court should so advise the parties before taking evidence.

HEMPHILL V NEW YORK:

As noted at the outset, the New York rule has been amended by Hemphill v NY, supra, to exclude unconfronted testimonial hearsay from the array of otherwise inadmissible evidence that may be admitted as reasonably necessary to fill in an otherwise incomplete evidentiary picture or clarify one that has been muddled by misleading evidence introduced by the other party.

The facts of Hemphill reveal a slow-moving and shifting prosecutorial landscape that began with the indictment of one person (Morris) for the fatal shooting of a two-year-old child (who was struck while seated in a minivan by a .9 mm bullet fired during a Bronx street-fight), followed by an eventual dismissal of charges (Murder 2d degree and Criminal Possession of a Weapon 2d degree) upon a guilty plea (against counsel’s advice) to an unrelated (and otherwise unprovable) weapons charge (.357) in exchange for a sentence of time-served.

Eight years later, after the defendant (Hemphill)’s DNA was identified on a blue sweater (found at the defendant’s cousin’s apartment), which matched the description (of a sweater) provided by witnesses to the shooting, and after the cousin (who initially implicated Morris along with other eyewitnesses) recanted and implicated the defendant as the shooter, the People obtained an indictment against the defendant charging him with the crimes formerly attributed to Morris. (Police had found a .9mm bullet and .357 cartridges on Morris’ nightstand).

At Hemphill’s trial, the defense, not surprisingly, was that the Morris was the shooter of the .9mm bullet that struck and killed the child victim. Toward that end, the defense, (with no objection from the People), elicited testimony on cross examination of a detective that a .9mm bullet had been recovered from Morris’ apartment.

Over defense objection, the court allowed the People to introduce evidence of the .357 cartridges also found as well as a transcript of Morris' guilty plea to possession of a weapon (different from the one used in the fatal shooting). Their argument on summation was that Morris was guilty of possessing a .357, (which he pled guilty to) but not murder or possession of a .9mm handgun. The jury convicted the defendant after which the court sentenced him to 25-years to life in prison.

TRIAL COURT CONCLUDES THAT THE DOOR HAD BEEN OPENED:

The trial court admitted (over the defendant's Confrontation Clause objection) evidence of Morris' guilty plea under People v Reid, supra, reasoning that the defendant had opened the door to it by creating a misleading picture that only .9mm ammo was found at Morris' place. (Also citing People v Massie, supra). Such otherwise inadmissible evidence, in the court's estimation, was reasonably necessary to refute the defendant's claim that Morris was the shooter.

THE APPELLATE DIVISION AFFIRMS:

On appeal, the defendant argued that the trial court had denied him his Sixth Amendment right to confront witnesses (i.e., Morris) and that such conduct represented the kind of prosecutorial overreach that the Confrontation Clause was designed to prevent (to wit: the introduction of evidence without the ability to challenge its reliability through cross examination).

The AD rejected his argument, finding that the defendant had created a misleading impression that Morris had possessed a .9 mm handgun which was consistent with the type of gun used in the shooting. Consequently, in the court's view introduction of Morris' plea allocution was admissible to correct that false impression. (173 AD3d 471, 477 [1st Dept 2019]).

THE COURT OF APPEALS FOLLOWS SUIT:

The defendant argued that that the AD's analysis erroneously equated the presentation of a valid, evidence-based, third-party culpability defense with misleading the jury, thus somehow opening the door to testimonial hearsay in violation of his Sixth Amendment right of confrontation. Such an approach, the defendant argued, was absurd in the context of the Confrontation Clause's assurance of the right to test the People's proof by cross examination.

The Court held that the trial court the trial court did not abuse its discretion by admitting evidence that the allegedly culpable third party (Morris) pled guilty to possessing a firearm other than the alleged murder weapon. (35 NY3d 1035 [2020]). The US Supreme Court granted certiorari in 2021. (593 US___[2021]).

WAS MORRIS' PLEA COLLOQUY REALLY TESTIMONIAL?

For reasons that are not clear, the People had abandoned their argument raised in the state court that the evidence of Morris' guilty plea was not testimonial (a fact which the US Supreme Court in its majority opinion, written by Sonia Sotomayor, accepted as uncontested, and the concurring justices, [Samuel Alito and Brett Kavanaugh] assumed for the sake of their concurrence).

Inasmuch as Morris' guilty plea was entered several years before Hemphill's indictment in 2013, it did not directly implicate Hemphill, and its primary purpose was to obtain a conviction (albeit an unrelated one) from Morris rather than to create out-of-court evidence for later use against Hemphill, it is difficult to understand why the People threw in the towel on that argument. Indeed, it only became arguably relevant (as rebuttal evidence rather than evidence-in-chief) when Hemphill pointed the finger at Morris.

If the evidence was not testimonial, then the confrontation issue would not have applied, and the admissibility of Morris' plea colloquy would have been evaluated by traditional evidentiary standards of relevance and reliability. Also, if the plea was offered for some relevant, non-hearsay purpose, then there would not be a confrontation issue which only applies to testimonial hearsay OFFERED FOR ITS TRUTH. (NY ADV EV RULE 8.02[1]).

MAJORITY RULES:

The Court found, as a threshold matter, that Hemphill's federal constitutional claim was adequately presented to the state courts by his repeated objections on Crawford/Confrontation grounds and upon his argument that the AD's affirmance was absurd in the context of the Confrontation Clause. (Citing, inter alia, Howell v Mississippi, 543 US 440 [2005]).

The majority rejected the lone dissenter (Clarence Thomas)'s conclusion that no constitutional claim was preserved for federal review because the petitioner only challenged the alleged misapplication of state law (i.e., the NY Open-Door rule as applied in People v Reid, supra) rather than the constitutionality of the rule vis-a-vis the Confrontation Clause.

In the majority's view, Hemphill had argued to the Court of Appeals that the AD's interpretation of Reid undermined his right of confrontation and, as such, he offered the Court of Appeals an opportunity to interpret Reid in a manner that preserved its constitutionality (i.e., by disallowing unconfronted testimonial hearsay as rebuttal evidence under the open-door rule).

With respect to the merits, the court described the Confrontation Clause as providing a "bedrock constitutional protection," noting that the Framers would not have allowed testimonial statements of a non-appearing witness unless he/she was UNAVAILABLE to testify, and the defendant had a PRIOR OPPORTUNITY FOR CROSS EXAMINATION. (Citing Crawford v Washington, supra at 50).

The Court also noted that while state courts may create procedural rules under which such rights may be exercised (e.g., by timely objection, notice and demand with respect to experts), or even forfeited, (e.g., removal from the courtroom for persistent unruliness despite warnings, or procuring a witness' absence), they may NOT rely on their own assessment of the reliability of evidence (i.e., testimonial hearsay) when the Sixth Amendment proscribes its admission altogether for want of cross examination.

As the Court observed, "the (Confrontation) Clause commands not that evidence be reliable, but that reliability be assessed in a particular manner, by testing in the crucible of cross examination." (Citing Crawford v Washington, supra at 61).

The Court rejected the People's argument that the Open-Door rule was a mere procedural rule and concluded that it was instead a SUBSTANTIVE RULE OF EVIDENCE that determines what information is RELEVANT AND ADMISSIBLE, and in this context, whether one party's evidence is sufficiently misleading

to require evidence from the other side to correct it. (Citing, inter alia, People v Massie, supra, at 182-184). The Court also concluded that the People's position ignored Crawford's rejection of the "evidence-reliability" approach to testimonial hearsay espoused in Ohio v Roberts, supra.

Contrary to evidence rules allowing the People to impeach the defendant with evidence obtained in violation of "prophylactic rules" designed to deter police misconduct (e.g., statements obtained in violation of Miranda v Arizona, 384 US 436 [1966]), the Confrontation Clause, the Court explained, is a CONSTITUTIONAL REQUIREMENT which cannot not be violated by the introduction of contradictory evidence obtained in violation of such rights.

For example, the Court noted, in New Jersey v Portash, 440 US 450 (1979), the Court rebuffed the State's attempt to impeach the defendant by introducing the defendant's prior testimony which had been obtained by coercion in violation of the Fifth Amendment's clear protection against self-incrimination.

Equally clear, in the Court's view, is the Sixth Amendment's right of CONFRONTATION which "ADMITS NO EXCEPTIONS for cases in which the trial judge believes that unconfronted testimonial hearsay might be reasonably necessary to correct a misleading impression. COURTS MAY NOT OVERLOOK ITS COMMAND NO MATTER HOW NOBLE THE MOTIVE." (Citing US v Gonzalez-Lopez, 548 US 140 [2008]).

The Court also noted that while the truth-seeking function of trials must be safeguarded, this principle cannot take precedence over the protection of constitutional rights. And in response to the People's expressed concern about abuses of the right of confrontation (i.e., offering misleading evidence without fear of contradiction from out-of-court statements not previously tested on cross examination), the Court expressed confidence that the Rules of Evidence (e.g., Rule Against Hearsay and Rule Excluding Evidence that is Unfairly Prejudicial) were sufficient to address such matters. (Citing Holmes v South Carolina, 547 US 319 [2006]).

In sum, then, the Court held that the trial court violated the Confrontation Clause by admitting unconfronted testimonial hearsay to rebut an allegedly misleading impression created by the defendant's evidence, and that to the extent that it permitted such evidence under the "Open Door Rule," it ran afoul of the Sixth Amendment.

CONCURRING OPINION:

The concurring justices began by noting that the right of confrontation can be waived expressly (Johnson v Zerbst, 304 US 458 [1938] or impliedly by a course of conduct that is inconsistent with the exercise of such right. (Berghuist v Thompkins, 560 US 370 [2010]).

For example, a defendant may fail to object to offending evidence (Melendez-Diaz v Massachusetts, 557 US 304 [2009]) or engage in persistent, disruptive conduct during a trial despite warnings, thus compelling his/her removal from the courtroom. (Illinois v Allen, 397 US 37 [1970]).

A defendant may also give up his/her Sixth Amendment right of confrontation by offering only part of an out-of-court statement of an unavailable declarant, thereby opening the door to the remainder under

the Rule of Completeness. (See FRE 106 and NY ADV EV RULE 4.03 and CPLR 4517[b]). The majority noted that this rule did not apply in this case (nor it did decide whether the Confrontation Clause would bar testimonial hearsay under such circumstances) because the defendant had not offered part of any out-of-court statement that invited completion.

The concurring justices concluded, however, that if a defendant were to elicit a portion of an unconfronted testimonial statement of an unavailable witness, he/she would be hard pressed to object the introduction of the balance of such statement on the subject.

The problem with New York's Open-Door rules, in the view of the concurring justices, was that its application was based on neither conduct manifesting an intent to give up the right of confrontation nor an action inconsistent with its assertion.

As these justices saw it, the introduction of misleading evidence does not, by itself, reflect a decision with respect to whether a given declarant should be subject to cross examination. Nor is doing so necessarily inconsistent with the assertion of the right to confront a declarant whose out-of-court statements could clarify or complete the record.

The Dissent:

As noted above, the dissenting justice believed that the federal challenge to New York's Open-Door rule was not sufficiently presented to the state courts to preserve it for Supreme Court review. (Citing, inter alia, Adams v Robertson, 520 US 83 [1997]).

In the dissenter's view, the petitioner only argued that the trial court misapplied People v Reid, supra, because he did not open the door to evidence of Morris' guilty plea by introducing any misleading evidence. As such, he raised only a question of state evidentiary law which was not subject to federal review. (Citing Moore v Illinois, 408 US 781 [1972]). Put another way, federal law does not govern whether a state court correctly concluded that the defendant's presentation of evidence was misleading.

The dissenter also noted that the defendant did not challenge the constitutionality of the Open-Door rule but rather argued only that the trial court erred in admitting Morris' guilty plea under that rule. And, for its part, the Court of Appeals only went so far as to conclude that the trial court did not abuse its discretion in admitting that evidence.

FINAL THOUGHT:

While the Open-Door rule remains open, it has now been narrowed to the extent that it can no longer be relied upon to admit unconfronted testimonial hearsay to fill in the blanks created by defense evidence or to clarify a misleading impression.

Before deciding upon what evidence to present on a client's behalf, defense counsel should carefully consider what opposing evidence it may invite and whether it consists of hearsay that should not be allowed (because it was obtained with an eye toward future prosecution and without any opportunity for cross examination).