

Pashman Stein Represents Amicus Curiae ACDL-NJ in U.S. Supreme Court Victory Holding Application of New York’s “Opening the Door” Rule Violated Sixth Amendment’s Confrontation Clause

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Pashman Stein Walder Hayden represented amicus curiae ACDL-NJ in a recent U.S. Supreme Court decision, *Hemphill v. New York*, 595 U.S. ___ (2022), which held that the trial court’s admission of the transcript of an accused’s plea allocution over the defendant’s objection violated the defendant’s Sixth Amendment right to confront the witness against him. In *Hemphill*, the defendant was accused of killing a 2-year-old child with a 9mm handgun in a drive-by shooting. During the trial, defense counsel elicited testimony from a prosecution witness that on the night of the shooting, the police found a 9mm cartridge on the nightstand of another individual, Morris, who the defendant alleged was the shooter. The prosecution sought to rebut that testimony by introducing a statement contained in Morris’ plea allocution that he had only a .357 revolver at the scene of the shooting. Although Morris was not at defendant’s trial, the trial court reasoned that Hemphill’s arguments and evidence had “opened the door” under New York law and that the admission of statements in Morris’ plea allocution was reasonably necessary to correct the misleading impression Hemphill created. The New York Appellate Division and the Court of Appeals both affirmed Hemphill’s conviction.

Justice Gary S. Stein (Ret.) and Lisa Buckley filed an *amicus curiae* brief on behalf of ACDL-NJ with the U.S. Supreme Court in *Hemphill*, arguing that where the defendant had no opportunity to cross examine his accuser, the trial court’s admission of the accuser’s plea allocution at trial robbed the defendant of his fundamental constitutional right under the Confrontation Clause of the Sixth Amendment. Our brief argued that testimonial hearsay is only admissible where the defendant knowingly and intentionally waives his

constitutional right by introducing a portion of a testimonial hearsay statement as a strategy or tactic, reasoning that “opening the door” by creating a misleading impression does not constitute a waiver of a defendant’s Sixth Amendment right, as it is not based on knowing and intentional conduct by the defendant, but upon the perception of the trial court.

In reversing and remanding, the majority opinion written by Justice Sonia Sotomayor stated, “The Confrontation Clause requires that the reliability and veracity of the evidence against a criminal defendant be tested by cross-examination, not determined by a trial court. The trial court’s admission of uncontroverted testimonial hearsay over Hemphill’s objection, on the view that it was reasonably necessary to correct Hemphill’s misleading argument, violated that fundamental guarantee “