3-24-2017

Motion for Leave to File Amicus Curiae Brief and Brief for the National Association for Public Defense and Kentucky Association of Criminal Defense Lawyers as Amici Curiae in Support of Petitioner, Sneed v. Burress (U.S. March 24, 2017) (No. 16-8047).

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No. 16-8047

In The Supreme Court of the United States

JAMES L. SNEED, JR.,

Petitioner,

v.

HON. RODNEY BURRESS, JUDGE, CIRCUIT COURT OF KENTUCKY, BULLITT COUNTY, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Kentucky

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF FOR THE NATIONAL ASSOCIATION FOR PUBLIC DEFENSE AND KENTUCKY ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to Rule 37 of the Rules of this Court, *Amici* National Association for Public Defense and Kentucky Association of Criminal Defense Lawyers respectfully request leave to file the accompanying *Amicus Curiae* brief in support of the petition for writ of certiorari in the above-referenced case.

All parties were timely notified of the intent of these *Amici* to file the attached brief as required by Rule 37.2(a). Respondents declined to give consent.

In this case, the Kentucky Supreme Court incorrectly held that a state evidentiary rule should totally foreclose a criminal defendant's opportunity to present his best case in opening argument. This holding is of critical interest to *Amici*, organizations that represent criminal defense counsel who regularly practice in the state of Kentucky. *Amici* have a particular and substantial interest in ensuring that the Sixth and Fourteenth Amendment rights of all criminal defendants are protected.

Accordingly, *Amici* respectfully request that the Court grant the motion for leave to file an *Amicus Curiae* brief.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Whether Kentucky's rule prohibiting counsel from characterizing the credibility of the complaining witness violates a criminal defendant's constitutional right to present a complete defense grounded in the Due Process, Confrontation, and Compulsory Process Clauses.

2. Whether a manifest necessity for a mistrial existed when the basis for the mistrial was counsel's attempts to describe the defense, i.e., that the complaining witness was lying when she accused the defendant of sexual abuse.

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INTEREST OF *AMICI CURIAE*[1]

The National Association for Public Defense (NAPD) is an association of more than 14,000 professionals who deliver the right to counsel throughout all U.S. states and territories. NAPD members include attorneys, investigators, social workers, administrators, and other support staff who strive to fulfill the constitutional right to counsel through zealous, client-centered representation. NAPD members are advocates in jails, in courtrooms, and in communities and understand both theoretical best practices and how to apply them in the day-to-day delivery of defense services. Their collective knowledge and skill is at work in state, county, and local systems through full-time, contract, and assigned counsel delivery mechanisms, through dedicated juvenile, capital and appellate offices, and through a diversity of traditional and holistic practice models. NAPD provides webinar-based and live training programs that emphasize the utmost importance of providing vigorous defense advocacy across all phases of representation as contemplated by fundamental constitutional due process and Sixth Amendment guarantees. Those phases include opening statements that forecast the centrality of witness credibility to the defense theory of a case. Accordingly,

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[1] No counsel for a party authored this brief in whole or in part. No one other than *Amici Curiae*, its members or *Amici*'s counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for all parties received notice at least ten days prior to the due date of *Amici*'s intention to file this brief. A Motion for Leave to File Brief for *Amicus Curiae* is attached.

NAPD has a strong interest in the issue raised in this case.

The Kentucky Association of Criminal Defense Lawyers (KACDL) is a non-profit organization composed of attorneys who practice criminal law in the Kentucky Court of Justice. The attorney members and their clients are directly affected by the Kentucky Supreme Court's decision to categorically prohibit a direct statement of the defense during opening statement where the defense to criminal charges is that a witness is lying. The Association views the opinion of the Supreme Court of Kentucky as a serious infringement on the federal constitutional right to present a complete defense and foresees the disastrous effect the opinion will have on members' obligation to provide effective representation in criminal prosecutions conducted in Kentucky.

SUMMARY OF THE ARGUMENT

By silencing criminal defense lawyers during opening statement – the crucial first opportunity to present the defense theory of the case – the Kentucky Supreme Court has imposed dangerous limitations on rights guaranteed under the Sixth and Fourteenth Amendments. More specifically, by misapplying an evidentiary rule designed to check prosecutorial misconduct, those courts have eliminated the crucial first opportunity of criminal defendants to alert jurors that

the sole issue in a case is the credibility of the complaining witness. This radical restriction on defense advocacy does not merely fly in the face of broad consensus among courts and commentators on the crucial role of the opening statement in setting a framework for juror comprehension of what they are about to see and hear during trial. The decisions of the Kentucky courts strike a harsh and fundamentally unfair blow against defendants' due process rights to be heard as well as their rights to confront the witnesses against them and to present a defense. Denying defendants the opportunity to highlight the single factual question upon which their liberty turns is antithetical to our system of adversarial fact finding. For the foregoing reasons, this Court should grant certiorari and reverse.

ARGUMENT

This Court should grant certiorari and hold that the Supreme Court of Kentucky violated the Sixth and Fourteenth Amendments by misapplying an evidentiary rule to prevent defense counsel from using opening statement to highlight the credibility of the complaining witness as the sole issue in this case.

I. Opening statements are a long-standing, crucial component of the trial process and of a criminal defendant's constitutionally-protected presentation of a complete defense.

This Court has recognized a resolute principle in our constitutional system: "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). Traditionally, that opportunity to defend has included an opening statement. As this case demonstrates, fundamental rights secured under the Sixth and Fourteenth Amendments are implicated where, as here, a criminal defendant seeks to use opening statement to forecast his challenge to the credibility of the complaining witness as the sole issue in the case. This Court should bring much-needed clarity to this area of law by correcting the Kentucky Supreme Court's constitutional error.

Opening statements have been "long accepted as established and traditional in jury trials." *United States v. Stanfield*, 521 F.2d 1122, 1125 (9th Cir. 1975); *Garner v. State*, 374 P.2d 525, 528 (1962) ("After the jury has been selected and sworn, every criminal trial has three phases – the opening statement, the proof and the summation."). The opportunity to make an opening statement is ingrained in our adversarial process because it is the first time that counsel can speak directly to the jury in a way that provides a framework for jurors to consider the evidence and issues that are

about to unfold in the courtroom. The Kentucky Department of Public Advocacy's nationally-renowned trial skills program focuses on the opening as a crucial phase in communicating defense theory. KENTUCKY DEPARTMENT OF PUBLIC ADVOCACY, KY DPA LITIGATION PERSUASION INSTITUTE: NEW AND ADVANCED PERSUASION LABORATORY, KDPA.gov, http://dpa.ky.gov/who_we_are/Education/Documents/LPI%20Schedule%202015.pdf. The American Bar Association recognizes the opening statement as a critical opportunity for counsel to develop a connection with jurors. AMERICAN BAR ASSOCIATION, OPENING STATEMENTS: GENERAL RULES AND GUIDELINES, ABA.org, http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/2012-aviation/2012-aviation-opening-statements-general-rules-guidelines.authcheckdam.pdf.

This Court acknowledged more than eighty years ago that opening statements can make or break a case. *Best v. District of Columbia*, 291 U.S. 411 (1934) (trial court may direct verdict based solely on opening statement). There is truth in the conventional wisdom that one does not get a second chance to make a first impression. "[T]he jury forms its first and often lasting impression of the case" during the opening. *Commonwealth v. Montgomery*, 626 A.2d 109, 113 (1993). *See also Maleh v. Fla. E. Coast Props., Inc*., 491 So. 2d 290, 291 (Fla. Dist. Ct. App. 1986); *Binegar v. Day*, 120 N.W.2d 521, 525 (1963) ("At this stage of the trial, the jury is peculiarly alert and impressionable."). And academics concur: the opening statement is crucial because it establishes the framework through which the

jury will view the evidence as it is revealed throughout the rest of the trial. Ty Alper et al., *Stories Told and Untold: Lawyering Theory Analyses of the First Rodney King Assault Trial*, 12 CLIN. L. REV. 1, 19 (2005).

The theory of primacy proposes that "people best remember things they hear first." John L. Calcagni III, Esq., *Contesting the Constitutionality of Restricting Criminal Defendant Opening Statements*, 53 Feb. R.I.B.J. 5, 8 (January/February 2005). Repeated studies have demonstrated that overwhelming majorities of jurors and jury verdicts are strongly affected by opinions formed during opening statement. *See, e.g.*, S.S. Diamond et al., *Juror Reactions to Attorneys at Trial*, 87 J. CRIM L. & CRIMINOLOGY 17, 27 (1996) (70% of jurors formed opinions on the appropriate verdict following opening statements and retained those opinions through the end of the trial); H.P. Weld & E.R. Danzig, *A Study of the Way in Which a Verdict is Reached by a Jury*, 53 AM. J. PSYCHOLOGY 518, 529, 532 (1940) (70-90% of jurors' final verdicts were consistent with their opinions during opening statements).

Lawyers use opening statements to present the evidence in such a way that jurors can easily understand how it is connected and the implications that can be drawn from those connections. *United States v. Dinitz*, 424 U.S. 600, 612 (1976) (Burger, C.J., concurring). A well-executed opening also presents the evidence in the most compelling way possible, that is, through a strong narrative framework to suggest how the evidence leads to a specific result. Weyman I. Lundquist, *Advocacy in Opening Statements*, 8 LITIG. 23 (Spring

1982). A strong narrative structure, consisting of details and coding, paints a vivid picture in the juror's mind. Alper et al., 12 CLIN. L. REV. at 15. Coding is the psychological "process by which words, images, objects, and ideas become associatively linked with others, so that the former bring the latter to mind." *Id*. The goal is to create "strong mental images that will endure throughout the trial." Gerald Reading Powell, *Opening Statements: The Art of Storytelling*, 31 STETSON L. REV. 89, 90 (2001).

These cases, academic studies, and performance guidelines demonstrate that the opening statement is a crucial component of any full and competent defense, a right which the Sixth Amendment protects. Unfortunately, a lack of guidance from this Court made it possible for the Supreme Court of Kentucky to eviscerate that component. The Court should seize this opportunity to clarify the law by vindicating the criminal defendant's right to alert jurors during opening statement that the credibility of the complaining witness is the sole issue upon which the defendant's liberty depends.

II. This Court should resolve conflicts among state and federal courts regarding whether a trial judge can impede the ability of a defendant to assert his only plausible defense during opening statements.

This Court has offered no specific guidance on whether a trial court may limit the scope of an opening

argument so as to effectively bar a criminal defendant's only plausible defense. But this Court has said that, "an essential component of procedural fairness is an opportunity to be heard," and thus, "the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 684, 690 (1986). "A person's right to . . . an opportunity to be heard in his defense – a right to his day in court – are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel." *In re Oliver*, 333 U.S. 257, 268 (1948).

The Constitution explicitly ensures to a person accused of a crime the opportunity to confront the witnesses brought against him. U.S. Const. Amend. VI. In *Olden v. Kentucky*, 488 U.S. 227 (1988), this Court held that a trial court misapplied a state evidentiary rule to violate the Confrontation Clause when the trial judge prevented a defendant from " '[exposing] to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness' " on cross examination. *Id.* at 231 (*quoting Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986)). These fundamental constitutional principles, rooted in the universal promise of fairness for all criminal defendants, are directly contravened by the Kentucky Supreme Court's misapplication of yet another evidentiary rule in the case at bar.

A. State and Federal Courts are in conflict regarding the degree to which a trial judge may regulate the presentation of a defense in opening statements.

Though it is true that "the weight of authority in the federal courts and in the states has either granted or implied that a criminal defendant has a basic right to make an opening statement" under the Sixth Amendment, this Court has yet to explicitly address the issue despite conflicting approaches in state and federal courts over the scope of judicial discretion in regulating the content of defendants' opening statements. Richard W. Lewis, *Comment: Opening Statement: A Constitutional Right*?, 7 AM. J. TRIAL ADVOC. 623 (1984).

In *United States. v. Doyle*, 121 F.3d 1078, 1093 (7th Cir. 1997), the Seventh Circuit held that a district court abused its discretion by preventing a criminal defendant's attorney from referencing prosecutorial misconduct in opening arguments but allowing the defense to argue regarding the reliability of a government witness. The court determined that Doyle was "certainly entitled to present a defense which was based on attacking the credibility" of a government witness. *Id*. at 1094. The court concluded that, though the district court acted within its discretion in limiting the scope of opening arguments regarding a collateral issue of prosecutorial misconduct, the trial judge would have been foreclosed from barring counsel from articulating the primary elements of their defense. *Id.*

Doyle represents the proper exercise of judicial discretion in the regulation of opening statements by honoring the fundamental interests protected by the Sixth and Fourteenth Amendments. Implicit in the Seventh Circuit's *Doyle* decision is the underlying principle that a defendant's sole defense cannot be barred from opening statements, particularly when that defense turns entirely on attacking the credibility of key government witnesses. *Id*. at 1093 ("Doyle was certainly entitled to present a defense which was based on attacking the credibility of the cooperating [prosecution] witnesses and illustrating their bias or motive to fabricate."). While the *Doyle* holding provides some room for judicial discretion in narrowing the parameters of opening statements at trial, it proscribes a trial judge from totally denying a defendant her constitutional rights to be heard and to mount a meaningful challenge to the credibility of prosecution witnesses.

Other federal courts have ruled similarly. The First Circuit robustly affirmed the critical importance of the criminal defendant's opening statement by enshrining it in its own rules and holding that "a defendant in a criminal case has a right to make an opening regardless of whether he intends to call witnesses, and may do so immediately after the prosecutor's opening, absent good cause shown to the contrary." *United States v. Hershenow*, 680 F.2d 847, 858 (1st Cir. 1982). The Ninth Circuit also expressly acknowledged that the opening statement is a "well established and practical custom" in criminal jury trials, which "should be continued in the district courts of this circuit." *United*

States v. Stanfield, 521 F.2d 1122, 1125 (9th Cir. 1975). By contrast, the Second Circuit has held that an opening statement is subject to the court's discretion. *United States v. Salovitz*, 701 F.2d 17, 21 (2d Cir. 1983) ("We believe that an opening statement by the defendant is not such a guaranteed right, and that the making and timing of opening statements can be left constitutionally to the informed discretion of the trial judge.").

Similarly, state courts disagree as to whether opening statements should be guaranteed by right or by custom, or whether they may be circumscribed if criminal defendants seek to challenge witness credibility. Like the Seventh Circuit, the Missouri Supreme Court recently upheld the right to a defense opening statement that questions the credibility of prosecutorial witnesses. *State v. Thompson*, 68 S.W.3d 393, 395 (Mo. 2002). Even though "the scope of opening statements is within the discretion of the trial court," the *Thompson* court held, "an absolute ban on reference to all cross-examination testimony denies the defendant . . . *the right* to an opening statement." *Id.* (emphasis added).

The Idaho Supreme Court, by contrast, has held that "opening remarks should be confined to a brief summary of evidence counsel expects to introduce," and counsel "should not at that time attempt to impeach or otherwise argue the merits of the evidence that the opposing side has or will present." *State v. Griffith*, 97 Idaho 52, 56, 539 P.2d 604, 608 (1975). Here, the Kentucky Supreme Court similarly held that

defense counsel may not use an opening statement to present the theory of the case that the complaining witness is "lying or faking," nor may they even offer a framework for jurors to view the evidence as supporting any "conclusions about the credibility of a witness" in opening statements. *Sneed v. Burress*, 500 S.W.3d 791, 795 (Ky. 2016), *reh'g denied* (Oct. 20, 2016).

These conflicting conceptions of opening statements and their intersections with fundamental constitutional guarantees create gaps in the Sixth Amendment's protection of criminal defendants from jurisdiction to jurisdiction, both state and federal. Those gaps are particularly dangerous where, as here, trial courts accept prosecution arguments that "give no effect to the details" of core rights that the Framers designed to check the concentrated exercise of government power against the individual. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 145 (2006). Prior decisions of this Court have consistently rejected the misapplication of evidentiary rules to truncate core constitutional rights. *See, e.g.*, *Crawford v. Washington*, 541 U.S. 36 (2004); *see also Olden v. Kentucky*, 488 U.S. at 231 (evidentiary rules cannot trump defendants' opportunity to challenge the reliability of witnesses). This Court should grant certiorari and resolve the conflict among state and federal courts over a defendant's right to use the opening statement to present his theory of the case when that theory turns on the reliability of the complaining witness. Any other response from this Court will only compound the inequity in the application of the fundamental principle that every

criminal defendant has a right to present his whole defense and a right to confront his accuser.

B. The unconstitutional denial of a criminal defendant's first, crucial opportunity to frame the issues in his case will increase the risk of false convictions.

The Kentucky Supreme Court's attack on criminal defendants' procedural and constitutional rights creates serious new risks of wrongful conviction, particularly in cases involving rape and sexual assault. The misapplication of evidentiary rules turns regulation of the criminal trial upside down by chilling counsel's attempts to assert a defense in opening statement and impermissibly restricting the opportunity to raise reasonable doubt regarding the central question upon which the defendant's liberty turns.

The subversion of these procedural and constitutional protections heightens the risk of wrongful convictions in rape and sexual assault cases. Only 19% of police investigations in rape and sexual assault cases lead to the collection of physical evidence. Michael Planty et al., FEMALE VICTIMS OF SEXUAL VIOLENCE, 1994-2010, 7 (2016) https://www.bjs.gov/content/pub/pdf/fvsv9410.pdf. Because physical evidence in sex crime cases is rare, prosecutors and defense counsel often rely exclusively on witness testimony. In the vast majority of cases, the only viable path forward for a defendant in a rape or sexual assault case is to draw the

veracity of the accuser and other key witnesses into doubt.

By precluding criminal defendants from informing jurors in opening statement of the defense theory that a witness is lying, the Kentucky Supreme Court also has ratcheted up the already overwhelming pressures on defendants to plead guilty in cases which should be properly tried before a jury. *See, e.g.*, Marie Gottschalk, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS 266-67 (Princeton Univ. Press 2015); William J. Stuntz, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 58-59 (Belknap Press 2011). In particular, allowing this rule to stand will result in yet more guilty pleas from innocent men and women. *See* Stuntz, *supra*; *see also* Lucian E. Dervan & Vanessa A. Edkins, *Criminal Law: The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1 (2013). The National Registry of Exonerations (NROE), which collects information about all known exonerations of innocent criminal defendants in the United States from 1989 to present, has concluded that in non-drug cases, 10% of exonerations include guilty pleas. *Innocents Who Plead Guilty*, NATIONAL REGISTRY OF EXONERATIONS (Nov. 24, 2015) https://www.law.umich.edu/special/exoneration/Documents/NRE.Guilty.Plea.Article1.pdf (last visited Mar. 7, 2017). The NROE also concludes that 8% (37/466) of all sexual assault exonerations included an innocent person pleading guilty. *Id*. It stands to reason that silencing a defendant who is attempting to use the crucial phase

of opening statement to inform jurors of his only defense – a challenge to the credibility of the complaining witness – will result in an increased incidence of wrongful conviction via both trial and plea agreement.

The Kentucky case of Ben Kiper, which has troubling similarities to the instant case, illustrates the devastating effects of false witness testimony. *Ben Kiper*, NATIONAL REGISTRY OF EXONERATIONS (Nov. 24, 2015), (AUG. 26, 2014), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3353. Like Petitioner Sneed, Kiper had been charged with sexual abuse crimes against his stepdaughter, and was convicted with no accompanying physical evidence or any other evidence besides testimony that the abuse had occurred. *Id*. After alleging sexual abuse at a custody hearing between her mother and father, Kiper's stepdaughter eventually told providers in a children's hospital that her accusations were false. Kiper served six years in prison for a crime he did not commit. *Id*. Kiper's ordeal underscores the tenuous nature of convictions that turn solely on uncorroborated "he-said-she-said" evidence. If defense counsel can challenge the veracity of an accuser from the beginning of a trial, the trier of fact will have a better opportunity to consider all relevant factors prior to conviction. This Court should mitigate the risk of wrongful convictions by granting certiorari and reversing the decision of the Kentucky Supreme Court in this case.

III. This case presents a perfect vehicle to clarify and protect the Sixth and Fourteenth Amendment rights of criminal defendants.

This case presents the Court with an excellent opportunity to resolve an important constitutional issue: whether, under the Sixth and Fourteenth Amendments, criminal defendants have a right to present their best defense in their opening statements. The new legal rule established by the Kentucky Supreme Court has vastly diminished the right to effectively present a defense. When the prosecution relies only on complaining witness testimony, as is often the case, this rule leaves a very large number of criminal defendants with no effective means of defense.

Clarity is needed. This Court has rarely resolved issues arising from opening statements, and none to the extent necessary to provide guidance in cases such as this. In *Taylor v. Kentucky*, 436 U.S. 478 (1978), a robbery case which "essentially was a swearing contest between victim and accused," this Court held that the "refusal to give petitioner's requested instruction on the presumption of innocence resulted in a violation of his right to a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment." *Id.* at 487-88, 490. In that case, the prosecution's opening statement repeatedly suggested that the defendant's status as a defendant tended to establish guilt. *Id*. The Court found that the prosecution's actions in the opening statement led to "possible harmful inferences . . . creat[ing] a genuine danger that the jury would convict

petitioner on the basis of those extraneous considerations, rather than on the evidence introduced at trial." *Id*. at 488. However, the Court never reached any constitutional questions regarding the scope of opening statements or the proper role of opening statements in presenting the defense theory of the case.

In *Arizona v. Washington*, 434 U.S. 497 (1978), this Court found that where defense counsel made an improper comment in opening statement, the trial judge had broad discretion to decide whether to give the jury a curative instruction or ultimately declare a mistrial. However, this Court has not decided whether this same rationale applies when the defendant's only theory of the case is deemed to be improper, or whether the Sixth and Fourteenth Amendments can tolerate a rule foreclosing any reference in opening statement to a defense theory of the case that challenges the credibility of the complaining witness.

This Court has denied certiorari when similar questions have arisen but were complicated by other issues, or dealt with prosecutorial (rather than defense) misconduct. *See, e.g*., *United States v. Somers*, 496 F.2d 723, 738 (3d Cir.) (finding the prosecution's use of "overly dramatic" and "unnecessary characterizations" during opening statement with no subsequent supporting evidence should not lead to an automatic finding of misconduct), *cert. denied, Somers v. U.S.*, 419 U.S. 832 (1974); *United States v. Leftwich*, 461 F.2d 586, 590 (3d Cir.) ("[t]rials are rarely, if ever, perfect and improprieties of argument by counsel to the jury do not call for a new trial unless they are so gross as probably

to prejudice the defendant and the prejudice has not been neutralized by the trial judge before submission of the case to the jury."), *cert. denied, Wright v. U.S.*, 409 U.S. 915 (1972); *United States v. De Peri*, 778 F.2d 963, 978-79 (3d Cir. 1985) (finding "[a]s long as the opening statement avoids references to matters that cannot be proved or would be inadmissible, there can be no error, much less prejudicial error."), *cert. denied*, *Pecic v. U.S.*, 475 U.S. 1110 (1986); *United States v. White*, 486 F.2d 204, 206-07 (2d Cir. 1973) (despite prosecutor improperly asserting in closing his own belief in defendant's guilt, twice charging defendant with "lying" and repeatedly indicating the defense was "fabricated," court concludes "reversal is not warranted here if we view his conduct, as we must, in the context of the entire trial"), *cert denied, White v. U.S.*, 415 U.S. 980 (1974); *Morris v. Burnett*, 319 F.3d 1254, 1275 (10th Cir.) (finding that a state evidentiary rule "must sometimes yield to the constitutional right to present a defense"), *cert. denied*, *Morris v. Ortiz*, 540 U.S. 909 (2003).

The Kentucky Supreme Court has broadly held that counsel may not present a full defense if their theory of the case turns entirely on witness credibility. Without clarity from this Court, many defendants will be forced to choose whether to risk a mistrial by opening with their best arguments, or to follow the Kentucky Supreme Court's rule and hope the jury will discern those arguments on their own over the course of the trial, or, worse, be forced to accept a plea agreement despite their innocence.

The fact that the question presented arises in the context of an opening statement means that this issue will only rarely present itself so neatly in the future. This Court will only have another opportunity to review this specific issue in the small percentage of cases in which counsel's opening statement is deemed to violate a rule against witness impeachment and a mistrial results.[2] Because it is more likely that defense counsel will obediently conform to the new rule and thus sacrifice the fullness of their clients' defenses in order to avoid a mistrial, there will be few opportunities to test the rule via appeal. Furthermore, not being able to present a full defense in cases based only on the testimony of an accuser may result in more pre-trial plea agreements, again robbing the appellate system of opportunities to review the rule.

[2] It is possible that opportunities could arise in cases where counsel attempts to refer to an anticipated defense that the prosecution's witnesses are untruthful, objects to the trial court's adverse ruling, and preserves the issue for appeal. However, because the instant petition comes to the Court in the context of a mistrial, it raises the issue with far greater clarity than a case appealed after trial is likely to present to this Court. Myriad questions may arise during trial that could make it unclear whether the court's ruling limiting the opening statement was determinative, and as such, cloud the case as an appropriate vehicle for addressing the issue. *See, e.g.*, *Rogers v. United States*, 522 U.S. 252 (1998) (dismissing writ of certiorari as improvidently granted in case in which instruction given to the jury at trial meant that the case did not squarely present the constitutional issue which the Court had granted for review).

CONCLUSION

This Court should grant review and reverse in order to resolve a jurisdictional conflict that undermines fundamental protections inscribed by the Framers in our Constitution to check the exercise of concentrated government power against individuals, their lives, and their liberty.

Respectfully submitted,

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[3] Abby Braune, Evan Comer, and Taylor Richard, students participating in the University of Louisville Brandeis Impact Litigation Practicum, helped prepare this brief. The views expressed in this brief are solely those of the National Association for Public Defense and the Kentucky Association of Criminal Defense Lawyers, and neither the University of Louisville, the Brandeis School of Law, nor its faculty takes any view of the merits of this case or the positions expressed on their behalf.