TO BE ARGUED BY:
DANIELLE WELCH
(20 MINUTES)

COURT OF APPEALS

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK *EX REL*. DANIELLE WELCH ON BEHALF OF CHRISTOPHER ORTIZ,

Appellant,

- against -

LYNELLE MAGINLEY-LIDDIE, Commissioner, New York City Department of Correction,

Respondent.

REPLY BRIEF FOR APPELLANT
APL-2024-00079

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PRELIMINARY STATEMENT

Appellant submits this brief in reply to the Brief for Respondent ("Respondent's Brief" or "RB") dated February 5, 2025. This reply incorporates all factual and legal contentions from the Brief for Appellant ("Appellant's Brief" or "AB"), and supplements them with the herein arguments.

REPLY ARGUMENT

POINT ONE: SECTION 510.10(4)(t) DID NOT PERMIT BAIL IN MR. ORTIZ'S CASE (ADDRESSING RESPONDENT'S BRIEF, POINT ONE)

A. Respondent's Statutory Analysis of C.P.L. § 510.10(4)(t) is Flawed

At the heart of this Appeal is a straightforward question that Respondent fails to answer: if the Legislature wanted *any* case where a defendant was at liberty to be

considered under C.P.L. § 510.10(4)(t), why didn't they just say so? The Legislature knows how to draft language accomplishing that goal—they did so in C.P.L. § 530.60 long before enacting this amendment. All *three* types of securing orders—recognizance, conditions, or bail—are explicitly listed in C.P.L. §§ 530.60(1) and 530.60(2)(a). In C.P.L. § 530.60(2)(b), the Legislature indicated that all three types of orders are relevant by using the phrase "at liberty as a result of a securing order." Rather than using either of these existing unambiguous phrases, however, the Legislature drafted entirely new language for C.P.L. § 510.10(4)(t) that captures two distinct securing orders, neither of which reflect the posting of bail.[1] Respondent's argument that this Court should nevertheless treat the relevant provisions of C.P.L. §§ 530.60 and 510.10(4)(t) as having identical meanings despite their substantially different language is unpersuasive. RB at 24.

"Conditions" Do Not Include Bail

Rather than attempting to explain why the Legislature omitted the word "bail" from C.P.L. § 510.10(4)(t), Respondent endeavors to obfuscate the meaning of "conditions." Contrary to the Appellate Division's ruling, "conditions" is frequently and consistently used throughout the bail law as shorthand for "non-monetary

[1] Specifically, the text of C.P.L. § 510.10(4)(t) states, in relevant part, that bail is available for "any felony or class A misdemeanor involving harm to an identifiable person or property…where such charge arose from conduct occurring while the defendant was released on his or her own recognizance, released under conditions, or had yet to be arraigned after the appearance of a desk ticket."

conditions." *See* AB at 18, note 6. Nevertheless, Respondent argues that the Legislature used "conditions" as a new way of saying, in effect, "released under *any* securing order," without pointing to any other examples of such usage in the statute. RB at 20-21.

In support of this expansive reading of "conditions," Respondent argues that the use of the term "non-monetary conditions" necessarily implies other "monetary conditions," and that bail would necessarily fall within that category. RB at 4-5, 20. Apparently failing to appreciate that bail would be the *only* securing order in the non-existent category of "monetary conditions," Respondent asserts that "defendant points to no provision for any other form of 'monetary' condition." RB at 5.

It is true—if actively detrimental to Respondent's argument—that the term "monetary conditions" appears nowhere in the statute. Appellant cannot point to provisions that do not exist. However, Appellant did anticipate and counter this argument by explicitly arguing that the Legislature knows how to draft language encompassing out-on-bail, or, as People would phrase it, "monetary conditions." AB at 21-22; *see also* C.P.L. § 530.60(1)("release under non-monetary conditions or bail"); C.P.L. § 530.60(2)(a)("release under non-monetary conditions or bail"); C.P.L. § 530.60(2)(b)(using language that captures both monetary and nonmonetary conditions: "at liberty as a result of a securing order.") These examples clearly illustrate that when the Legislature has chosen to include "monetary conditions,"

they have done so unambiguously, using either explicit or else clearly universal language to describe relevant securing orders. This strengthens Appellant's argument that the only rational explanation for the omission of the word "bail" in C.P.L. § 510.10(4)(t) is that the Legislature did not intend its inclusion.

Respondent seeks to wave away this flaw in their statutory analysis by noting that the language in C.P.L. § 530.60—which clearly and unambiguously includes bail as a relevant securing order—was enacted at a different time than C.P.L. § 510.10(4)(t). RB at 24. Respondent is correct that C.P.L. § 530.60 was enacted *before* C.P.L. § 510.10(4)(t). From this fact, however, Respondent reaches the counter-intuitive conclusion that despite the Legislature having this unambiguous language at their fingertips, they chose "at a different time, to achieve the same effect through different language." RB at 24. In Respondent's view, the use of different language *"does not make* [C.P.L. § 510.10(4)(t)] *any less plain* or any less valid." RB at 24 (emphasis added).

However, the language of C.P.L. § 510.10(4)(t)—if intended to reach individuals who have posted cash bail—is objectively *less plain*. If C.P.L. § 510.10(4)(t) applied whenever an individual was released "under non-monetary conditions or bail," or "at liberty as a result of a securing order"—mirroring the language in C.P.L. § 530.60 that the Legislature chose not to adopt here—the Court of Appeals would not have been called on to interpret this provision.

There is simply no reason to credit Respondent's claim that the Legislature chose to achieve the same effect through radically different language—language that the Appellate Division, Second Department was only able to twist into the Respondent's preferred, significantly more carceral interpretation by relying on the incorrect assertion[2] that C.P.L. § 510.10(4)(t) is the only statute within article 510 to use the term "conditions" without the use of the modifier "non-monetary." AA at 2, AB at 18, note 6.

If the Legislature truly wanted to capture defendants at liberty under *any* securing order, they certainly could have saved the litigants and this Court a great deal of time by using the unambiguous language that already existed elsewhere in the bail law. Instead, they intentionally chose *not* to use that language, and instead drafted new language that references two discrete release statuses, neither of which reflect the posting of bail.

While there were admittedly clearer ways to indicate that bail was not an eligible securing order—most obviously the inclusion of "non-monetary"—Appellant's interpretation should nevertheless prevail. Looking at the plain language of the statute, the Legislature omitted the word "bail" where relevant statutes pre-

[2] Respondent concedes this error. RB at 27. In fact, both the existing bail modification provisions in C.P.L. § 530.60 and the actual definition of "release under non-monetary conditions" repeatedly uses "conditions" without the modifier of "non-monetary." *See* C.P.L. §§ 530.60, 500.10(3-a); AB at 22-23.

dating C.P.L. § 510.10(4)(t) explicitly included it. Appellant's reading is also more consistent when construing the statute as a whole: the Appellate Division's erroneous claim that C.P.L. § 510.10(4)(t) is the only statute within article 510 to use the term "conditions" without the use of the modifier "non-monetary" obscures the extremely consistent use of "conditions" throughout article 510. Contrary to the ruling below, "conditions" is repeatedly used without a modifier, including in statutory provisions that can *only* be understood to apply to non-monetary conditions.[3]

Respondent does not address these numerous examples, except to note that this use elsewhere "does not imply any technical meaning for 'conditions' apart from its common definition," without specifying which common definition they mean.

[3] For example, in C.P.L. § 510.45(5)(f), the Legislature mandates that pretrial services agencies specify, among other things, "the number of persons supervised for whom *release under conditions* was revoked by the court[.]" C.P.L. § 510.45(5)(f)(emphasis added). Importantly, C.P.L. § 510.45, which explicitly deals with agencies who "monitor principals released under non-monetary conditions." C.P.L. § 510.45(1). Thus, this instance of "conditions" is plainly referring to non-monetary conditions, despite the absence of that modifier. Additionally, in C.P.L. § 500.10(3-a), which defines "Release under non-monetary conditions," the word "conditions" appears multiple times without the modifier of "non-monetary." *See also* C.P.L. § 510.40(3)("At future court appearances, the court shall consider a *lessening of conditions* or *modification of conditions* to a less burdensome form")(emphasis added); C.P.L. § 510.40(5)(requiring the court to notify the principal released under non-monetary conditions "of *any conditions* to which the principal is subject, to serve as a guide for the principal's conduct" and that "the possible consequences for violation of such a *condition* may include revocation of a the securing order.")(emphasis added).

RB at 27-28. Ignoring that C.P.L. § 510.40(5)(a)[4] literally requires the court to notify the principle in plain, clear, and specific language "of any *conditions* to which the principle is subject, *to serve as a guide for the principal's* conduct," Respondent attempts to characterize non-monetary conditions such as attending classes or therapy as "contingencies" rather than "attendant conditions" simply because securing orders may be revoked for noncompliance. RB at 27. This argument improperly conflates the two separate meanings of "condition" discussed in Appellant's Brief— "condition" as a prerequisite and "conditions" as "attendant circumstances." *See* AB at 25. This conflation also dooms Respondent's attempts to characterize posting bail as an ongoing "condition" for the purposes of C.P.L. § 510.10(4)(t).

A Specific Reference to "Conditions" Cannot Refer to the Universal Obligation to Attend Court

In the context of C.P.L. § 510.10(4)(t), "release under conditions," cannot reasonably be understood to encompass either the obligation to attend court or the possible consequence of bail forfeiture. The obligation to attend court cannot be the type of "condition" the Legislature meant in C.P.L. § 510.10(4)(t), because it is an obligation that is universally applied to every criminal defendant, regardless of

[4] While Respondent cites to C.P.L. § 500.10(3-a)(f) when discussing the possibility of revocations, this section merely defines some of the available "conditions" that may be imposed when releasing a principal under non-monetary conditions. Revocation of a securing order requiring non-monetary conditions is governed by C.P.L. § 510.40.

whether they are released on their own recognizance, released on conditions, or released only after posting bail that has been fixed. AB at 25. By listing specific securing orders, the Legislature signaled that not *every* securing order was reached by the statutory language. If this *universal* "condition" sufficed, then the entire phrase describing the relevant securing orders in C.P.L. § 510.10 would be rendered superfluous.

Equally unpersuasive is Respondent's assertion that posting bail falls within the meaning of "released on conditions" because bail money may be forfeited if a defendant misses court. This argument is inapposite because *every* securing order has potential consequences for not returning to court; what is *different* about "conditions" is that they govern a principal's conduct while at liberty beyond simply ensuring their return to court. AB at 25-26; C.P.L. § 510.40(5)(a).

In the end, Respondent's interpretation must fail because they attempt to read "or bail" into the statute where the Legislature intentionally omitted it. This Court has "eschewed efforts to rewrite the statute to achieve what a court or advocate perceives to be a better outcome." *People v. Weinstein*, 42 N.Y.3d 439, 452 (2024); *see also* RB at 23. Yet Respondent urges the Court to rewrite the language of C.P.L. § 510.10(4)(t) for the purpose of expanding pre-trial detention—an outcome preferred by Respondent, but not by the Legislature. The Legislature knows how to draft language that unambiguously reaches individuals who have posted bail, and

chose not to use that language in C.P.L. § 510.10(4)(t). The Appellate Division erred by judicially amending the statute to include this status when the Legislature plainly omitted it. This Court must not repeat that error.

B. Excluding Underlying Cases Where Cash Bail is Imposed Serves a Clear Legislative Purpose

Respondent asserts that there would be no purpose for limiting the scope of C.P.L. § 510.10(4)(t) to exclude those cases where cash bail has been imposed. RB at 22. As Appellant explained—with ample support in the legislative history—the initial motivation for the amendment was closing a loophole that permitted infinite arrests on non-qualifying offenses *without* the possibility of cash bail being set.[5] AB at 27-29. However, the actual language that the Legislature enacted went further: it returned *more* discretion to judges, while still thoughtfully protecting the overall intent of the landmark reforms. Thus, a judge may consider bail on a new arrest *regardless* of whether the underlying offense is independently bail-eligible. However, a new arrest for an otherwise non-qualifying offense *cannot* be the basis for a *second* securing order fixing bail for an indigent person who has likely already

[5] Respondent claims that no legislative history was cited to suggest that the statute was intended to be so limited. This is not accurate. Appellant respectfully refers Respondent and the Court to AB at 28-29, where the legislative history supporting this reading is discussed, and to the original source material provided in the Compendium for Appellant. AC at 1-10.

exhausted their financial resources by posting bail on the first case.[6] AB at 27-29. Insofar as the amendment balances then-current demands for greater judicial discretion with the Legislature's stated goal of reducing poverty-based pretrial incarceration, this construction was an extremely rational choice.

Conversely, Respondent's interpretation, which creates a radical expansion in the availability of bail, finds no similar support in the legislative history. If the Legislature truly intended for C.P.L. 510.10(4)(t) to essentially make every case bail-eligible if an individual was out, under any circumstances, on an open case, it would have been extraordinarily disingenuous to call such a radical expansion a "clarification." AB at 28-29.

Moreover, Respondent's assertion that "Section 510.10(4)(t) was enacted later to address public safety concerns" not only cites to dicta from a non-binding Orange County Court decision for authority and fails to provide any specific support from the legislative history, but also suggests that the Legislature was amending a law to achieve an unlawful purpose: using bail for preventative detention to address public safety concerns. It is perhaps time for the Queens County District Attorney's

[6] If the Court presiding over the matter on which bail has been posted finds that the new arrest increases the individual's risk of flight to avoid prosecution such that additional bail is necessary and appropriate, the underlying securing order may be modified using C.P.L. § 530.60.

Office to accept that C.P.L. § 510.10 only permits bail to be set in an amount that will reasonably ensure return to court—no higher, and not for any other purpose.

C. Respondent's Analysis Disregards the Lawful Purpose of Bail

Appellant's Brief looked to numerous sections within the bail laws (C.P.L. §§ 500, 510, 530) in support of the reading that "conditions" in C.P.L. § 510.10(4)(t) applies only to non-monetary conditions, rather than to bail. In their response, Respondent argues that the language of "release under conditions" in the bail statute reflects the concept of "conditional release" in the post-conviction context, pointing to P.L. § 70.40 and the Black's Law definition relating to "early discharge of a prison inmate, who is then subject to the rules and regulations of parole." *See* RB at 19.

Respondent offers no explanation for reading a statute that applies to the pretrial conditions placed on legally innocent people in the context of a post-conviction statute.

Indeed, taken as a whole, Respondent's entire first point disregards that the entire purpose of bail reform was to *reduce* pretrial detention, and later amendments—explicitly described by the bill's sponsors as "clarifications"—did not abandon that goal. AB at 28-29. It is clear that the protections from the original reform were largely undisturbed, and that later additions—including C.P.L. § 510.10(4)(t)—were not intended to radically expand the use of pretrial detention.

If the Legislature had intended for C.P.L. § 510.10(4)(t) to reach every single individual with an open case, they certainly could have done so, either by adopting the language of C.P.L. § 530.60, or by using simpler language, such as "at liberty on an open case." Instead, they carved out an extremely specific exception that lists two discrete release statuses and includes important due process protections even for that limited carveout. Moreover, the Legislature rejected—as it has done time and time again—the idea that judges should be able to consider perceived dangerousness when setting securing orders, or that bail was intended to be a tool for public safety. The only lawful purpose of bail in New York State is to ensure return to court. *See* C.P.L. § 510.10(1). Yet Respondent puzzlingly asserts that "the law was passed in an obvious nod to public safety concerns to give courts the discretion to impose bail on repeat offenders who are charged with new crimes after being released on a prior crime." RB at 5.

Troublingly, Respondent further asserts that failing to grant courts the power to set bail would "deprive the courts of the discretion *to detain*…an *offender*." RB at 5-6 (emphasis added). They further caution "those who had previously *committed* more serious bail eligible offenses" present a "far greater risk" than those who "previously *committed* lesser, non-bail-eligible offenses or offenses for which the prior arraigning court thought that bail was unnecessary." RB at 6 (emphasis added). While Respondent does not specify what "greater risk" they are referencing, in the

context of their argument, it is clear that they mean the risk of reoffending or related public safety concerns—risks the Court is unequivocally prohibited from considering at arraignment.

Indeed, Respondent literally describes bail as *punishment* in their discussion of legislative intent. Respondent argues that "Bail eligible crimes are generally more serious crimes, at least in the eyes of the Legislature. There is simply no reason why the Legislature would exclude those charged with more serious crimes, who have been released on bail, from the provisions of (4)(t) while *punishing* those who previously committed lesser, non-bail eligible crimes." RB at 22 (emphasis added). The Queens County District Attorney's admission that pretrial detention constitutes *punishment* is both surprising and welcome, yet that remains an unlawful goal under both state and federal law. *See* C.P.L. § 510.10(1); *Bell v. Wolfish*, 441 U.S. 520, 535 (1979)("[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.")

This framing—which presumes and centers guilt, rather than risk of flight to avoid prosecution—is at the heart of the fatal flaw of Respondent's entire argument: they seem to be operating under the misconception that bail is a tool to detain those who are guilty, or worse still, to ensure preventative detention. Yet the law only permits bail to be used as a mechanism to ensure return to court based on an

individualized determination that an individual poses a risk of flight to avoid prosecution. C.P.L. § 510.10(1).

The many protections enshrined in C.P.L. §§ 510.10, 510.20, 510.40, and 530.60 exist for a reason: individuals who are presumed innocent may not be subjected to pretrial punishment, even if they have the misfortune of being arrested more than once. In light of that reality, Respondent's arguments—largely based on unlawful uses of bail—must fail.

D. Appellant's Argument Creates Rational Results, Not Anomalies

Respondent appears to have misapprehended certain points of Appellant's Brief. Those misunderstandings—and not Appellant's argument—lead to the "anomalies" Respondent identifies in their brief. First, Respondent misleadingly asserts that:

> [A] defendant who had bail set would still, *under defendant's reading*, qualify for bail under 510.10(4)(t) as long as the court set some other "non-monetary condition" with bail on the original case. And a defendant, *under defendant's reading*, would qualify for bail under subsection t if the original crime qualified for bail but the court chose to set only non-monetary conditions. *Defendant offers no justification for such differing consequences in closely aligned situations*.

RB at 22-23 (emphasis added). Appellant offers no justification for these differing consequences because this is an inaccurate statement of Appellant's argument. Appellant argues that *any* time cash bail is imposed—regardless of whether non-

monetary conditions are imposed in conjunction with fixing bail—that the case in which bail is imposed *cannot* serve as a basis for a 510.10(4)(t) application on a subsequent matter.[7] *See* AB at 19-29. Appellant agrees that it would be quite absurd if a court could avoid the carefully crafted limitations on C.P.L. § 510.10(4)(t) simply by imposing non-monetary conditions *in conjunction* with fixing cash bail.

Respondent also takes issue with the fact that Appellant's argument requires the use of C.P.L. § 530.60 when an individual who has already posted bail may be required to post *additional* cash to remain at liberty. RB at 30. However, the Legislature's preference for the 530.60 process in this circumstance is logical for two reasons. First, C.P.L. § 530.60 includes even greater due process protections than C.P.L. § 510.10(4)(t), which is harmonious with the underlying goal of preventing poverty-based detention.

Second, this statutory scheme rightfully gives the discretion to impose additional cash bail to the court presiding over the "more serious" case.[8] That

[7] Respondent later offers a second incorrect statement of Appellant's position when they argue that the Legislature did not make the "overly simplistic distinction defendant identifies—limiting the provision to multiple non-eligible offenses." RB at 29. Appellant asserts that C.P.L. § 510.10(4)(t) only applies *where bail is not set*—not that the provision only applies to "non-eligible offenses."

[8] Respondent's related concern that "where … the defendant was arraigned in a different county, the new court would not have authority to alter bail in the original case" is—at best—an unhelpful distraction. *See* RB at 22. While Respondent attempts to differentiate out-of-county cases, 530.60 hearings generally take place in the court where the underlying case is pending rather than being

court—which will inherently have more familiarity with the underlying matter—is in a better position to assess whether the new arrest implicates risk of flight than another court, arraigning a new matter otherwise ineligible for cash bail. Contrary to Respondent's argument, the advantage of utilizing 530.60 instead of 510.10(4)(t) on cases where an individual has already posted cash bail on an open matter is particularly pronounced where the underlying case is pending in another county. Otherwise, as happened here, the prosecutor in arraignments on the new matter may be unable to make more than a barebones application with respect to the underlying out-of-county matter, leaving the judge with insufficient details to guide their decision.

Finally, Respondent objects to Appellant's reading of the statute insofar as it implies that "[w]ithout granting the court the ability to set bail on the new case, the defendant would be released *once the original case was resolved*, despite reasonable cause that he had reoffended while his original case was pending." RB at 21-22 (emphasis added).

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conducted in arraignments. This is true even when the open matter is pending in the same county as the new case.

Further, Respondent fails to cite *anything* to support their claim that obviating the need to return a defendant to a prior court is a "critical feature of the statute." RB at 30. While Respondent complains of the "cumbersome" nature of having to "return the defendant," RB at 30—as if they would need to be extradited—the unavailability of C.P.L. § 510.10(4)(t) would allow defendant to be released on recognizance or under non-monetary conditions and be responsible for their own return on the scheduled date.

Rather than sharing Respondent's apparent fear of this implication, however, the Legislature explicitly codified it in C.P.L. § 510.20(3), which mandates that "where one or more of the charge or charges *on which such securing order was based* have been dismissed and/or reduced such that the securing order is no longer supported by the provisions of section 510.10 of this article, the court *shall* impose a new securing order in accordance with such section." C.P.L. § 510.20(3) (emphasis added). In other words, the court *must* issue a new securing order if the first case resolves in such a way that a subsequent case—if arraigned after that resolution—would not meet C.P.L. § 510.10(4)(t)'s requirements. This requirement applies *regardless* of whether there was, in Respondent's words, "reasonable cause that he had reoffended when his original case was pending." *See* C.P.L. § 510.20(3); RB at 22. That Respondent's argument directs this Court to *yet another* amendment to the bail statute that supports Appellant's reading—and the Legislature's ongoing desire to reduce pretrial detention—is helpful, though presumably not in the manner Respondent envisioned.

In sum, Appellant's interpretation leads to reasonable outcomes that are harmonious with the statute construed as a whole. Respondent's arguments about the purported "anomalies" entailed by Appellant's interpretation of C.P.L. § 510.10(4)(t) are predicated on misreadings of Appellant's Brief and an apparent refusal to accept that the Legislature enacted bail reform—and subsequently adopted

minor clarifications—to further the right and reasonable goal of reducing reliance on pretrial incarceration.

POINT TWO: RESPONDENT FAILED TO ESTABLISH REASONABLE CAUSE (ADDRESSING RESPONDENT'S BRIEF, POINT TWO)

Even if this court disagrees that fixing bail is a status distinct from releasing an individual on their own recognizance or on conditions, the Appellate Division erred in finding that the statutory requirements of C.P.L. § 510.10(4)(t) were otherwise met in Mr. Ortiz's case. *See* AB at 30-37.

A. Appellant's Reasonable Cause Arguments Were Preserved For Appeal

First, Respondent's assertion that the arguments relating to reasonable cause are unpreserved is perplexing. At the original arraignment, defense counsel raised numerous issues relating to a finding of reasonable cause. For example, with respect to the Bronx matter, counsel noted that Mr. Ortiz had been placed in a lineup and was *not* identified as the perpetrator, and that his counsel on that matter felt they had a strong defense. AA at 13. Counsel also challenged the strength of the new case in Queens, raising issues involving the identification, as well as the fact that the complainant was extremely intoxicated at the time of the alleged incident that began with a car crash. AA at 14. She further noted that there had not been an opportunity to view the video Respondent referenced in their bail application, and that without the video there was insufficient proof that Mr. Ortiz possessed the complainant's

cards or made purchases with them. AA at 14. All of these arguments go directly to the issue of reasonable cause, and all were rejected based on the mere existence of Mr. Ortiz's open case.

More critically, in the original writ in this matter, an entire section of the petition focused on the fact that Respondent had not demonstrated reasonable cause to believe that Mr. Ortiz committed the crimes alleged in the underlying matter in the Bronx, nor had they demonstrated reasonable cause to believe Mr. Ortiz committed the new offense in Queens. *See* Defendant's Petition for a Writ of *Habeas Corpus*, dated February 23, 2024, at AA-96-100.

As Respondent notes in their reply, a court may review defendant's attack on his securing order under an article 70 motion for a writ of *habeas corpus* "only for an error of law." *People ex rel. McManus v. Horn*, 18 N.Y.3d 660, 663, note 1 (2012). RB at 33. Mr. Ortiz did just that: he raised two[9] separate and distinct arguments alleging that an error of law had been committed: 1) that 510.10(4)(t) did not apply where a defendant has posted bail, and 2) that the requirements of 510.10(4)(t)—including reasonable cause—had not otherwise been met. AA at 92-100. Respondent seems to suggest that—as a universal principle—where the record

[9] In the original writ, Mr. Ortiz also made a third argument that the securing order was excessive and violated C.P.L. § 510.10. That argument is now moot and does not merit an exception to the mootness doctrine.

shows that the bail court properly considered the relevant statutory factors in its bail determination, and that determination is supported by the record, that it is an exercise of discretion resting on a rational basis and thus beyond correction in habeas corpus. However, their citation in support of that claim is to *People ex rel. Parker v. Hasenauer*, 62 N.Y.2d 777, 778–779 (1984)—a writ where the only issue before the court was whether bail was excessive under the statutory bail factors. It does not then follow that whether the factors were applied properly is the *only* legal error that may be corrected in habeas corpus. Indeed, Mr. Ortiz raised two separate and distinct legal errors, both of which were properly raised in the habeas context and which are now preserved in this appeal of the Appellate Division's decision and order dismissing his writ.

Finally, Respondent's position erroneously treats a Writ of *Habeas Corpus*—a civil legal action that is separate from the case below—as a criminal appeal. The arguments with respect to whether the Respondent met the reasonable cause requirements of C.P.L. § 510.10(4)(t), which were promptly raised in the first writ filed, are properly before the court. Further, while the Appellate Division, Second Department did not opine at length on this issue, they did decide that the bail determination did not violate constitutional or statutory standards—a clear, if unsatisfying stamp of approval on the lower court's application of C.P.L. 510.10(4)(t), including the reasonable cause arguments that were squarely before the

court. *See* Appellate Division Decision, March 11, 2024 at AA-2-3. Accordingly, this issue is properly part of the instant appeal. While the barebones record below leaves Respondent in a decidedly unenviable position on this issue, preclusion doctrine cannot serve as their *deus ex machina*.

B. Respondent's Argument that "Any Felony" Suffices for (4)(t) Eligibility is Unpreserved and Unpersuasive

After dedicating several paragraphs to arguing that one of the main issues raised in the original writ that forms the basis of this appeal is unpreserved, Respondent immediately begins to offer—for the very first time—a novel excuse for their failure to meet their burden below: that the statute encompasses all felonies and requires a specific showing of harm only for class A misdemeanors. *See* RB at 39.

This argument—unlike the one it attempts to respond to—*is* unpreserved. In their original response to Mr. Ortiz's writ in the Appellate Division, Second Department, the Respondent argued that the requirements of C.P.L. 510.10(4)(t) were met because Respondent "charged defendant with a felony offense *that alleged harm to an identifiable person*." AA at 140. They further argued that reasonable cause was established because the court had a copy of Mr. Ortiz's RAP sheet, which listed the attempted murder indictment, and the Respondent had confirmed that indictment existed in their bail argument. AA at 141. At no time did the Respondent explicitly assert—as they seek to now—that *any* felony, regardless of whether it

alleges harm to an identifiable person or property—may be the basis for a bail application under C.P.L. § 510.10(4)(t). They may not now rely on an argument that exists nowhere in the record.[10]

C. Respondent Neither Relied Upon Nor Preserved Their P.L. § 265.01-b Argument

Respondent raises a second unpreserved argument: even if they failed to establish a qualifying harm for the attempted murder charge, there was an independent basis to use subsection (4)(t). According to Respondent, because Mr. Ortiz's Bronx indictment included a P.L. § 265.01-b charge—a separately eligible

[10] Even if this Court wishes to entertain it, however, this argument is entirely unpersuasive. The interpretation Respondent now offers as an excuse for their failing is unsupported either by cannons of statutory construction or by basic English grammar. The text of CPL 510.10(4)(t) reads, in relevant part, that bail may be set on "any felony or class A misdemeanor involving harm to an identifiable person or property, or any charge of criminal possession of a firearm as defined in section 265.01-b of the penal law, where such charge arose from conduct occurring while the defendant was released on his or her own recognizance, released under conditions, or had yet to be arraigned after the issuance of a desk appearance ticket for a separate felony or class A misdemeanor involving harm to an identifiable person or property, or any charge of criminal possession of a firearm as defined in section 265.01-b of the penal law." C.P.L. 510.10(4)(t).

First, if the Legislature had intended for the law to reach "any felony" *or* a "class A misdemeanor involving harm to an identifiable person or property," the Legislature understands how to use commas. If the statute read "any felony, any class A misdemeanor involving harm, or any charge of criminal possession of a firearm as defined in section 265.01-b of the penal law," the Respondent would be correct. But as written, with nothing but dicta in a footnote in an Orange County Criminal Case for clear support, this argument fails.

Second, if the Legislature intended for the law to reach "any felony," they certainly would not have bothered to specifically include (separated by a comma) a charge of P.L. 265.01-b—a Class E felony that notably does not involve harm to an identifiable person or property. Respondent's belatedly offered interpretation would render the two separate references to P.L. 265.01-b within the statute superfluous and is impossible to harmonize with the provision as a whole.

offense for (4)(t)—it essentially does not matter if the attempted murder charge "did not qualify for some reason."[11] RB at 41-42.

While it is true that the Respondent *could* have based their application on the P.L. § 265.01-b charge, they did not. Respondent did not make this argument at arraignment, in any subsequent bail application, or—critically—in response to Mr. Ortiz's writ in the Appellate Division.[12] It is equally clear that the judge did not rely on that theory when imposing bail. Because the record does not support a finding that the Respondent or the court relied on any underlying charge except for attempted murder, the argument that an independent basis for a (4)(t) application existed is unpreserved and irrelevant to the issues in this appeal.

D. The Requirements of C.P.L. § 510.10(4)(t) Were Not Met

After rejecting Respondent's unpreserved arguments, the limited record that

[11] While Respondent asserts that Mr. Ortiz had been released on two violent felonies, as did the court at the criminal court arraignment, it is clear from the RAP sheet that Mr. Ortiz only had one open case at the time of his arrest. It is thus incorrect for Respondent to assert that Mr. Ortiz had been released on two violent felonies. RB at 41; AA at 15.

[12] It is clear from the minutes that the Respondent solely relied on Mr. Ortiz's open attempted murder case at the initial arraignment where bail was set. AA at 11. At a later bail appearance, the Respondent did not even know what Mr. Ortiz had been arrested for in Queens, nor did they know what his prior case charged. AA at 33. In the next bail review, the Respondent exclusively cited his attempted murder charge. AA at 47. In the last bail application before the writ was brought—the controlling record for the Appellate Division's *habeas* review—Judge Cimino similarly solely relied on the fact that he had been out on an attempted murder case in the Bronx, and Respondent made no record at all beyond asking that bail be maintained since there has been no change in circumstances beyond the filing of an indictment. AA at 59-61; AB at 15-16.

remains for this Court to consider fails to demonstrate that Respondent met their burden under C.P.L. § 510.10(4)(t). Rather than providing any detail whatsoever about the underlying case in the Bronx, Respondent simply stated that the underlying case was in trial posture and offered their conclusory assertion that "the defendant's out on an attempted murder charge, which is a physical harm to the individual." AA at 11-12.

Respondent would later point to Mr. Ortiz's RAP sheet showing a pending attempted murder indictment—a justification they offered for the first time when responding to a writ in the Appellate Division, Second Department. Yet RAP sheets do not provide detailed allegations such that they could—standing alone—establish reasonable cause to believe an individual was guilty of an offense. Reasonable cause exists "when evidence or information which appears reliable discloses facts or circumstances which are collectively of such weight and persuasiveness as to convince a person of ordinary intelligence, judgment and experience that it is reasonably likely that such offense was committed and that such person committed it." C.P.L. § 70.10(2). A static notation on a RAP sheet indicating that an indictment is pending for a particular charge does not meet that burden. [13]

[13] If the mere filing of an accusatory instrument were sufficient, the Legislature would have simply said that bail may be set on "any felony or class A misdemeanor involving harm that is alleged to have occurred while the defendant was released on her own recognizance, released under

Respondent argues that an indictment signifies that a grand jury has decided reasonable cause exists. RB at 35. However, an indictment is not evidence, and there is no exception to the reasonable cause requirement in C.P.L. § 510.10(4)(t) for indicted cases, as there would be if the Legislature had intended for an indictment to be sufficient. The plain language of the statute anticipates a judge making the reasonable cause determination, rather than deferring to a grand jury's assessment of a one-sided presentation of the prosecution's unchallenged evidence.

If a finding of reasonable cause and subsequent incarceration can be based on nothing more than an indictment appearing on a potentially-inaccurate RAP sheet, without Respondent even bothering to provide a summary of the allegations, complaint, grand jury minutes, or anything else that would allow the court to know what the charged crime entailed, much less that a particular individual actually committed it, New York does not have a Criminal Justice System, it has Kangaroo Courts.

For the remainder of argument on this and all other points, Appellant relies on his primary brief.

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conditions, or had yet to be arraigned…on a separate felony or class A misdemeanor involving harm." Instead, the Legislature went on to add the additional requirement that the prosecutor show reasonable cause to believe the defendant committed both the instant crime and any underlying crime. This language would be superfluous if the mere existence of two open cases were sufficient. *See People v. Franklin,* 149 N.Y.S.3d 778 (N.Y.Crim.Ct. 2021).

CONCLUSION

For the reasons set forth in Appellant's Brief and this Reply, this Court should reverse the March 11, 2024 decision and judgment of the Appellate Division, Second Department.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify the following in compliance with section 500.13(c)(1) of the Rules of this Court:

1. The foregoing brief was prepared on a computer using Microsoft Word.

2. The typeface used is Times New Roman.

3. The point size of the text is 14 point; 12 point footnoes.

4. The brief is double spaced, except for the Table of Contents, point headings, footnotes, and block quotes.

5. The brief contains 6, 353 words, exclusive of the Table of Contents, Table of Authorities, Proof of Service, and the Certificate of Compliance, based on the word count of the word-processing system used to prepare this brief.

Dated: Kew Gardens, New York
March 5, 2025

Danielle Welch

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