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.

BRIEF FOR APPELLANT
APL-2024-00079

TWYLA CARTER
Attorney for Respondent
The Legal Aid Society
120-46 Queens Blvd.
Kew Gardens, NY 11415

DANIELLE WELCH
Of Counsel
October 4, 2024
DWelch@legal-aid.org
P: (646) 430-0699
F: (646) 616-4598

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

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.

APL-2024-00079

BRIEF FOR APPELLANT

PRELIMINARY STATEMENT

By order of this Court dated June 18, 2024, leave to appeal was granted to appeal from a March 11, 2024 decision and order of the Appellate Division, Second Department. By that order, the Appellate Division denied defendant's petition for a writ of *habeas corpus*, ruling that released on bail was a status that could trigger C.P.L. § 510.10(4)(t), and that the bail determination of the Supreme Court, Queens County, did not violate constitutional or statutory standards.

JURISDICTIONAL STATEMENT

This Court has jurisdiction to hear this appeal pursuant to section 5602(a)(2) of the Civil Practice Law and Rules. Although Mr. Ortiz has since posted bail and was released after several months of illegal detention on June 7, 2024, this Court should apply the exception to the mootness doctrine and consider the issue presented by this case because it presents substantial and novel issues that are likely to recur and will typically evade review. *See Gonzalez v. Annucci*, 32 N.Y.3d 461, 470 (2018) (this Court may invoke exception to mootness where the issue is likely to recur, is substantial and novel, and likely to evade review); *see also People ex rel. Molinaro v. Warden, Rikers Island*, 2022 N.Y. Slip Op. 07094 at *2 (December 15, 2022) (invoking mootness exception on appeal from order granting *habeas corpus* petition where defendant was no longer in custody).

QUESTIONS PRESENTED

This appeal presents two questions of law. First, whether the Appellate Division erred by finding that C.P.L. § 510.10(4)(t) applies where a defendant has had bail fixed on the underlying case. Second, whether the Appellate Division erred by deeming the reasonable cause requirements of C.P.L. § 510.10(4)(t) met where the prosecution failed to provide any information about the allegations in the underlying case, purporting instead to rely on the existence of an out-of-county indictment appearing on a RAP sheet to meet their burden of showing reasonable

cause to believe that the defendant committed an offense causing harm to a specific individual or group of individuals.

INTRODUCTION

On the heels of the tragic death of Kalief Browder, the New York State Legislature took up the urgent and lifesaving work of reforming the state's bail laws, colloquially known as the Bail Elimination Act of 2019, with the explicit goal to "end the use of monetary bail, reduce unnecessary pretrial incarceration and improve equity and fairness in the criminal justice system."[1]

Since its original passage, multiple rounds of revisions have passed purportedly to return some discretion to judges. Yet the ultimate goals of reform have withstood each round of amendments: to reduce the number of New Yorkers who are detained pre-trial purely because they are too poor to buy their liberty, and to provide a heightened degree of due process to those at risk of losing their liberty prior to a finding of guilt.

Here, the Appellate Division disregarded that legislative intent, erroneously and dramatically expanding the reach of one such amendment: C.P.L. § 510.10(4)(t)—commonly referred to as the "harm plus harm" provision. Left undisturbed, this misreading of the law will radically expand the number of

[1] https://www.nysenate.gov/legislation/bills/2019/S2101

individuals subjected to pretrial detention and experience the myriad collateral consequences of the same.

Appellant Christopher Ortiz was one such individual. At the time of his arrest, Mr. Ortiz was a thirty-year-old father of two children, aged four and nine, whose wife was carrying his third child in a high-risk pregnancy. Mr. Ortiz was recommended for release on recognizance by the Criminal Justice Agency. He had only one bench warrant in his history, which was more than a decade old and issued when he was just a teenager, for a post-plea compliance matter. Even with working two jobs, Mr. Ortiz had been reliably attending both weekly check-ins with his bondsman and his court dates on his open matter in the Bronx prior to his incarceration on the instant matter. Despite there being absolutely no individualized determination that Mr. Ortiz posed a risk of flight for the purpose of avoiding prosecution, as required by law, the Court below misapplied C.P.L. § 510.10(4)(t) and disregarded the requirements of C.P.L. § 510.10, setting cash bail in the amount of $50,000 cash or a $150,000 partially secured bond or insurance company bond on a non-qualifying offense.

THE STATUTE

Criminal Procedure Law § 510.10(4)(t) states, in relevant part, that a principal stands charged with a qualifying offense when he or she stands charged with "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 issuance of a desk appearance ticket for a separate felony or class A misdemeanor involving harm to an identifiable person or property…provided, however, that the prosecutor must show reasonable cause to believe that the defendant committed the instant crime and any underlying crime. or the purposes of this paragraph, "harm to an identifiable person or property" shall include but not be limited to theft of or damage to property. However, based upon a review of the facts alleged in the accusatory instrument, if the court determines that such theft is negligible and does not appear to be in furtherance of other criminal activity, the principal shall be released on his or her own recognizance or under appropriate non-monetary conditions." C.P.L. § 510.10(4)(t).

FACTUAL AND LEGAL BACKGROUND

Christopher Ortiz was arraigned in Queens Criminal Court on December 5, 2023, following his arrest for criminal possession of stolen property in the fourth degree (P.L. § 165.45(2)) and related charges. Bail was set at $50,000 cash, a $150,000 partially secured bond with a ten percent deposit, or a $150,000 insurance company bond. Tr. Dec. 5, 2023 at 9, 6-10.

At the arraignment, the prosecution alleged that Mr. Ortiz, acting in concert with an unapprehended other, used the complainant's credit card, and that the

defendant completed two other transactions with the complainant's credit card acting alone.[2] Tr. Dec. 5, 2023 at 2, 16-22. While this non-violent class E felony is not eligible for cash bail under New York State Law, the prosecution nevertheless made a bail application pursuant to C.P.L. § 510.10(4)(t)—what they referred to as a "harm-on-harm." Tr. Dec. 5, 2023 at 4, 15-16.

The prosecution's harm-on-harm application identified the harm in the Queens case as being that Mr. Ortiz allegedly "used the complainant's debit card/credit card," without specifying the amount charged or whether the complainant had suffered permanent loss of the funds. Tr. Dec. 5, 2023 at 4, 15-18. They further noted that "the defendant is seen on video using the complainant's cards," and asserted they had a strong case without further elaboration. Tr. Dec. 5, 2023 at 4, 22-24. No video, stills, or other corroborating evidence was provided to the court.

With respect to the underlying case in the Bronx, the prosecution's application noted that Mr. Ortiz was out on an attempted murder charge in the Bronx that is in trial posture, meaning that he had already been indicted on that case. Tr. Dec. 5, 2023 at 4, 18-21 and at 5, 12-14. They did not provide the name of the alleged victim in the Bronx matter, identify Mr. Ortiz's alleged actions in that case, or specify the

[2] While there was a brief discussion of additional alleged events on the date in question, which began with a car accident involving the complainant's car and another vehicle occupied by a group of individuals that included Mr. Ortiz, the prosecution only charged Mr. Ortiz with using the complainant's credit card. Tr. Dec. 5, 2023, pages 3-4.

injuries to the complainant, if any were sustained. Instead, the prosecution simply stated that "the defendant's out on an attempted murder charge, which is a physical harm to the individual." Tr. Dec. 5, 2023 at 4-5, ln. 25-1.

Without providing any additional information about the underlying case in the Bronx, the prosecution asserted that they believed they had made their 510.10(4)(t) harm on harm showing, and requested that cash bail be set in the amount of $35,000 cash or a $105,000 partially secured bond with a ten percent deposit. Tr. Dec. 5, 2023 at 5, 4-10. In requesting cash bail, the prosecution noted, without providing any context, that Mr. Ortiz had a felony conviction, three misdemeanors, two YOs, and a failure to appear. Tr. Dec. 5, 2023 at 4, 12-14 and at 5, 10-12. The prosecution emphasized that "Most notably, he's out on the attempted murder." *Id.* at 5, 12-14.

Mr. Ortiz had not been released on his underlying Bronx matter either on recognizance or under conditions. Rather, bail had been fixed, and Mr. Ortiz's family had secured his release by posting a private insurance company bond. Tr. Dec. 5, 2023 at 5, 17-18 and at 6, 20-25.

In their bail application, the defense requested that Mr. Ortiz be released to Supervised Release. Counsel highlighted that Mr. Ortiz had made every court date on his open matter in the Bronx, and that the sole failure to appear on his record was more than a decade old. Tr. Dec. 5, 2023 at 6, 6-8. She also explained that he was a

provider for his family, including his two young children, and that he had two jobs: one in events security, and another working with children in a community center in Harlem. Tr. Dec. 5, 2023 at 6, 14-17. She further noted that Mr. Ortiz was attending therapy and anger management three times a week and had been successfully checking in with his bondsman every Monday at 12:00 p.m. *Id*. at 6, 17-23.

Counsel also shared that according to Mr. Ortiz's attorney in the Bronx, Mr. Ortiz had participated in a lineup in which he was *not* identified as the perpetrator, and that the attorney felt they had a strong defense in that matter. *Id.* at 6, 9-13. With respect to the Queens matter, counsel challenged the weight of the identification made based on the video, which had not actually been provided to the defense or the court. Furthermore, the complainant was extremely intoxicated during the alleged events, and had asked Mr. Ortiz not to call the police because of his own intoxication. *Id.* at 7, 1-8.

Judge Battisti agreed that Mr. Ortiz was before the Court on an "otherwise non-bail qualifying offense." Tr. Dec. 5, 2023 at 8, 15-16. He did not explicitly find that C.P.L. § 510.10(4)(t) applied, nor did he find reasonable cause had been established or otherwise reference the requirements of C.P.L. § 510.10(4)(t). In explaining his decision to set bail, Judge Battisti instead noted that this new charge was "alleged to have been committed while at liberty on bail on two prior offenses,

both violent felonies." Tr. Dec. 5, 2023 at 8, 15-20.[3] Judge Battisti explained that he considered the factors in 510.20(10) [sic], including Mr. Ortiz's financial circumstances, contacts with the community, community ties, family ties, and the fact that he is supporting family members and minor children, but that the Court could not ignore the strength of the People's case here, "nor the complexity of [Mr. Ortiz's] current…legal picture." *Id.* at 8-9, 22-5.

Ultimately, Judge Battisti did not explicitly find that Mr. Ortiz posed a risk of flight to avoid prosecution necessitating cash bail, but asserted that the appropriate securing order under the circumstances was $50,000 cash, a $150,000 partially secured bond with a ten percent deposit, or a $150,000 insurance company bond. Tr. Dec. 5, 2023 at 9, 6-10. These amounts represented $15,000 more cash and a $45,000 higher bond than the prosecution requested. Tr. Dec. 5, 2023 at 8, 1-3.

Defense counsel proceeded to make multiple bail applications in the following weeks, each alleging both that C.P.L. § 510.10(4)(t) had been used improperly, such that there was no lawful basis for bail, and that the bail as set was excessive.[4]

[3] This appears to have been an error; according to the RAP sheet provided at arraignment, the attempted murder case in the Bronx was Mr. Ortiz's only open matter at the time of his Queens arraignment.

[4] On December 8, 2023, Judge Santacroce declined to alter bail set by a judge of concurrent jurisdiction and summarily denied the application without making any findings regarding either C.P.L. § 510.10(4)(t). Tr. Dec. 8, 2023 at 8, 7-18.

On December 12, 2023, defense counsel requested an advancement to make a bail application,

Specifically, counsel repeatedly argued that C.P.L. § 510.10(4)(t), by its plain language and using common canons of statutory interpretation, only applied where an individual was released on recognizance or released under conditions—not where an individual has had bail fixed and subsequently posted. *See* Tr. Dec. 8, 2023 at 5, 1-21; Tr. Dec. 21, 2023 at 4-5, 16-8; Tr. Dec. 22, 2023 at pages 3-7.

On January 2, 2024, Mr. Ortiz was arraigned on Indictment 74782-2023, charging him with Criminal Possession of Stolen Property in the Fourth Degree and related charges. This was the second bail application before Judge Cimino,[5] who confirmed she deemed the case to be bail eligible pursuant to C.P.L. § 510.10(4)(t) "pursuant to the ruling that was made at the criminal court arraignment." Tr. Jan. 2, 2024 at 5, 3-7.

At this *de novo* bail argument, the prosecution made no effort to demonstrate bail eligibility pursuant to C.P.L. § 510.10(4)(t), nor did they assert that Mr. Ortiz

---

explaining the C.P.L. § 510.10(4)(t) issue. Judge Cimino declined to advance, stating that bail is a "condition" as contemplated by the statute. *See* Appendix at A68 through A73. On December 21, 2023, defense renewed their argument that 510.10(4)(t) did not apply, but Judge Cimino found the bail "appropriate under all of [the] circumstances." Tr. Dec. 21, 2023 at 1-2.

On December 22, 2023, a bail review was brought before the Honorable Judge Marcia Hirsch, and defense renewed their arguments regarding the inapplicability of C.P.L. § 510.10(4)(t). That application was denied.

[5] The first was on December 21, 2023, where defense counsel made an extensive application before the same judge arguing that C.P.L. § 510.10(4)(t) does not apply. Tr. Dec. 21, 2023 at 4-5, 16-5. Defense counsel had also previously submitted a memo of law to Judge Cimino detailing this argument in advance of that court date. *See* Appendix at A74 through A76.

posed a risk of flight such that cash bail was necessary. Instead, they maintained "that the current bail is appropriate, and that's based on the harm to the complainants" in this nonviolent E felony. Tr. Jan. 2, 2024 at 8, 8-14.

The Court stated that her reasoning remained the same [as it was on the prior date] and declined to change the securing order. Tr. Jan. 2, 2024 at 8, 17-25.

The final bail application, which formed the basis for the writ brought in the Appellate Division, Second Department, was made on January 30, 2024 before Judge Cimino. Defense counsel incorporated her earlier arguments that the matter was not eligible for cash bail pursuant to C.P.L. § 510.10(4)(t). Tr. Jan. 30, 2024 at 3, 15-20. She additionally argued that even if the case was eligible for cash bail, bail as set was excessive. In support of this contention, she again detailed the numerous reasons Mr. Ortiz did not pose a risk of flight. She was also able to provide the new information that Mr. Ortiz had begun taking college classes at Columbia University, and that he had begun experiencing significant medical conditions following a bus crash on his way from Rikers to court in Queens in January. Tr. Jan. 30, 2024 at 3, 20-25 and 4, 1-24.

The prosecution did not respond in any way to the bail application on January 30, 2024. There was no analysis conducted under 510.10(4)(t), nor was Mr. Ortiz's actual risk of flight to avoid prosecution addressed by either the prosecution or the

court. Without even requiring the prosecution to respond, Judge Cimino began her bail decision by noting that Mr. Ortiz was out on a pending attempted murder case in the Bronx when he was rearrested. Tr. Jan. 30, 2024 at 5, 4-7. Without reviewing minutes from the Bronx to ascertain what admonitions Mr. Ortiz had been given or referencing anything in support of the assertion, Judge Cimino noted that he was arrested "in [her] opinion, in violation of the terms and conditions of his bail in that matter," and noted he had since been indicted. Tr. Jan. 30, 2024.

Judge Cimino went on to recite Mr. Ortiz's criminal record, repeat the unproven allegations in the Queens matter—of which Mr. Ortiz is presumed innocent—and note that he had been indicted. Tr. Jan 30, 2024 at 5, 9-24. She gave no similar recitation of the alleged facts in the underlying Bronx matter, presumably because the prosecution had not provided this information to the Court—either at the Criminal Court arraignment on December 5, 2023 or at any subsequent appearance.

Without any further analysis of the requirements of the "harm plus harm" basis for cash bail under C.P.L. § 510.10(4)(t), any reference to Mr. Ortiz's demonstrated history of returning to court or clear ties to New York, or even a finding that cash bail was required to reasonably assure Mr. Ortiz's appearance in court, Judge Cimino declared that the bail is "appropriate in this matter." Tr. Jan. 30, 2024 at 5, 25 and 6, 1.

On February 23, 2024, a writ was brought in the Appellate Division, Second Department challenging the January 30, 2024 decision. That writ argued three separate grounds for *habeas* relief: 1) that C.P.L. § 510.10(4)(t) does not apply to cases where an individual is released after posting cash bail, rather than being released on recognizance or non-monetary conditions; 2) that even if the Court disagreed with the first contention, the requirements of C.P.L. § 510.10(4)(t) were not met with respect to Mr. Ortiz at any juncture; and 3) that the securing order violated C.P.L. § 510.10(1) and amounted to excessive bail.

On March 8, 2024, oral arguments were heard in the Appellate Division, Second Department. On March 11, 2024, a decision was rendered denying the writ.

The Appellate Division Decision

Noting that this issue was a question of "pure statutory interpretation," the Appellate Division concluded that the charged crimes in this case were qualifying offenses under C.P.L. § 510.10(4)(t) because Mr. Ortiz was charged with felony offenses that "arose from conduct occurring" while he was "released under conditions" of monetary bail on separate felony charges.

There were two primary reasons articulated for finding that bail counted as a condition within the meaning of the statute. First, the Appellate Division asserted that "CPL § 510.10(4)(t) is the only statute within CPL article 510 to use the term

"conditions" without the use of the modifier "non-monetary."[6] From this incorrect assertion, the Court concluded that the intent of the Legislature was to apply that statute to all conditions of release rather than only non-monetary conditions.

Second, the Appellate Division relied on the language of CPL § 500.10(10) defining "cash bail" as being posted "upon the condition that such money will become forfeit to the people of the state of New York if the principal does not comply with the directions of a court requiring his attendance at the criminal action or proceeding involved or does not otherwise render himself amenable to the orders and processes of the court."

Without engaging in any analysis related to C.P.L. § 510.10(4)(t), the Court issued a conclusory rejection of the remaining arguments, finding that the bail

[6] There are, in fact, numerous instances of "conditions" without the modifier "non-monetary" found throughout the statute, including in provisions that can only be understood to apply to non-monetary conditions. 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*"); C.P.L. § 510.40(5)(requiring the court to notify the principal "*of any conditions* to which the principal is subject, to serve as a guide for the principal's conduct" and that "violation of such *a condition* may include revocation of a the securing order.")

determination of the Supreme Court, Queens County, did not violate "constitutional or statutory standards."

SUMMARY OF ARGUMENT

The Appellate Division's decision represents a departure from long-standing canons of statutory interpretation and was at least partially based on the incorrect belief that this was the only statute in Article 500 where "conditions" appeared without the modifier of "non-monetary." *See* discussion, *supra* note 6. This decision, if allowed to stand, exposes a larger-than-intended population to pretrial incarceration without the due process protections enshrined by the legislature within C.P.L. § 510.10(4)(t).

By its plain language, C.P.L. § 510.10(4)(t) only applies to those individuals who have been released on recognizance or under conditions—not to those whom have had bail fixed. Crafting C.P.L. § 510.10(4)(t) in this limited manner served to close a gap in the bail statute, returning discretion to judges to set cash bail on those individuals with multiple open non-qualifying offenses, which was not possible prior to the passage of C.P.L. § 510.10(4)(t).

Still, consistent with the unchanged goal of limiting wealth-based pre-trial detention, the legislature included important due process protections around this provision. As discussed below, it is not enough to show that an individual has

multiple open cases. Instead, the legislature placed a burden on the prosecution to establish identifiable harm to an individual in both cases, as well as show reasonable cause to believe that the principal actually committed both the underlying and new offenses before cash bail is authorized.

In Mr. Ortiz's case, C.P.L. § 510.10(4)(t) was applied in two ways that are inconsistent with both the plain language and legislative history of that section. Accordingly, this Court should reverse the holding of the Appellate Division, which improperly concluded (1) that C.P.L. § 510.10(4)(t) applies where bail has been fixed on the underlying case, and (2) that the requirements of C.P.L. § 510.10(4)(t) were met despite the prosecution failing to provide any detailed information about the underlying case.

ARGUMENT

I. THE LOWER COURT IMPROPERLY FOUND THAT C.P.L. § 510.10(4)(t) APPLIES WHERE BAIL HAS BEEN FIXED ON THE UNDERLYING CASE.

A. "Under Conditions" Means Under Non-Monetary Conditions

"The clearest indicator of legislative intent is the statutory text." *People v. Economakis*, 10 N.Y.3d 542 (2008). And by its plain language, C.P.L. § 510.10(4)(t) applies to people "released on [their] own recognizance or released

under conditions," not to those upon whom bail has been fixed and posted. Where a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded (i.e., the "expressio unius est exclusio alterius" maxim). *See People v. Reed*, 265 A.D.2d 56 (2d Dept. 2000).

The legislature knows how to draft language encompassing out-on-bail as an eligible release status—they did so in C.P.L. § 530.60, which predates C.P.L. §510.10(4)(t) and was available as a frame of reference at the time the provision was drafted. When intending to encompass all people with an open matter who are not incarcerated, the legislature has consistently employed the phrase "at liberty." *See, e.g.* C.P.L. § 530.60(1)("Whenever in the course of a criminal action or proceeding a defendant is at liberty as a result of an order of recognizance, release under non-monetary conditions or bail…"); *see also* C.P.L. § 530.60(2)(a)("Whenever in the course of a criminal action or proceeding a defendant charged with…a felony is at liberty as a result of an order of recognizance, release under non-monetary conditions or bail…"); *and* C.P.L. § 530.60(2)(b)("[W]henever…a defendant charged with the commission of an offense is at liberty as a result of a securing order…").

Put more plainly, "at liberty" is the term of art for anyone who has been released pending the resolution of their case, whether on their own recognizance,

with conditions, or upon posting bail. Rather than employ this catchall phrase in C.P.L. § 510.10(4)(t) as it did in the sections governing securing order modifications, the legislature instead referenced two discrete release statuses, neither of which reflect the posting of bail. This choice confirms that this specific provision was not intended to encompass release after posting bail. *See People v. Finnegan*, 85 N.Y.2d 53, 58 (1995) ("the failure of the Legislature to include a substantive, significant prescription in a statute is a strong indication that its exclusion was intended").

Similarly, throughout the statute, "conditions" is used as a specific term of art relating to restrictions imposed upon a person as an alternative to—or in addition to—cash bail. This statute-specific meaning of "conditions" is evident from the definitions provided in C.P.L § 500.10. There, the word "conditions" appears in the definitions of release on recognizance and non-monetary conditions, but not in the definition of fixing bail. *See* C.P.L. § 500.10(3-a)(" A court releases a principal under non-monetary conditions when, having acquired control over a person, it authorizes the person to be at liberty during the pendency of the criminal action or proceeding involved *under conditions* ordered by the court. *The conditions ordered shall reflect the findings of the individualized determination warranting such imposition of non-monetary conditions* to reasonably assure the principal's return to court and reasonably assure the principal's compliance with court conditions. A principal shall not be required to pay for any part of the cost of release on non-

monetary conditions. *Such conditions may include, among other conditions reasonable under the circumstances: (a)…(j)*")(emphasis added); *but compare* C.P.L. § 500.10(3)("A court fixes bail when, having acquired control over the person of a principal, it designates a sum of money and stipulates that, if bail in such amount is posted on behalf of the principal and approved, it will permit him to be at liberty during the pendency of the criminal action or proceeding involved.") It is notable that in the actual definition of "Release under non-monetary conditions," the legislature repeatedly uses "conditions" without the modifier of "non-monetary." *See* C.P.L. § 500.10(3-a).

The language of C.P.L. § 500.10(3-b) similarly illustrates that when the legislature is discussing "conditions" it is *not* talking about bail. ("Subdivision three-a of this section presents *a non-exclusive list of conditions* that may be considered and imposed by law, singularly or in combination, when reasonable under the circumstances of the defendant, the case, and the situation of the defendant. The court need not necessarily order one or more specific conditions first before ordering one or more or additional conditions.")(emphasis added). *See also* discussion *supra* note 6.

Additionally, C.P.L. § 510.10(4) plainly describes setting conditions and fixing bail as two separate and distinct types of securing orders. The court is explicitly given the choice on a qualifying offense to "release the principal pending

trial on the principal's own recognizance or under non-monetary conditions, fix bail, order non-monetary conditions in conjunction with fixing bail, or, where the defendant is charged with a qualifying offense which is a felony, the court may commit the principal to the custody of the sheriff."

Nevertheless, in support of its contrary determination that "conditions" includes bail, the Appellate Division cited C.P.L. § 500.10(10), which defines cash bail as "a sum of money …posted by a principal or by another person on his behalf…upon the condition that such money will become forfeit…if the principal does not comply with the directions of a court requiring his attendance at the criminal action[.]."

This reliance is misplaced for two reasons. First, because the more relevant definition is that of "fix bail," defined in C.P.L. § 500.10(3), which does not contain the word "condition." This definition is more relevant because C.P.L. § 510.10(4)(t) puts the focus on what action the court (or, in the case of a desk appearance ticket, the arresting officer) takes: specifically, whether they released the principal (either on recognizance, under conditions, or with a desk appearance ticket in lieu of a full custodial arrest.) Thus the definition of the court's actual action—fixing bail—is the better guide.

Second, the appearance of "on condition" in C.P.L. § 500.10(10) is used in the colloquial, if-then sense of the term. The Merriam-Webster Dictionary distinguishes between "condition" as a prerequisite and "conditions" as "attendant circumstances." *See* Merriam-Webster Dictionary, "Condition," *available at* https://www.merriam-webster.com/dictionary/condition (Oct. 3, 2024, 11:01 a.m.). As used in C.P.L. § 500.10(10), "condition" takes the first meaning—it describes a contingency, or a prerequisite: if a defendant fails to appear in court as required, then the bail money may be forfeited. Where "conditions" appears as a term of art throughout the bail statute and specifically in C.P.L. § 510.10(4)(t), however, it describes "attendant circumstances," namely the myriad non-monetary conditions that may explicitly be imposed as conditions of release. *See* C.P.L. § 500.10(3-a)(a)-(j).

The applicability of these distinct definitions is apparent from the practical realities of posting bail versus being released under non-monetary conditions. Unlike when someone is released under non-monetary conditions, an individual who posts bail has no further conditions placed on them outside of the obligation to attend court, unless such conditions are separately set in conjunction with fixing bail.[7] *See* C.P.L. § 510.10(4). While the forfeiture of bail exists as a potential consequence of

[7] Notably, the obligation to attend court is universally applied to every criminal defendant, regardless of whether they are released on their own recognizance, released on conditions, or released upon payment of bail.

failing to attend court as required, bail itself is not an ongoing condition that must be complied with. Indeed, C.P.L. § 500.10(10) could be written as "a sum of money that will be returned, contingent on the principal's appearance in court" without changing the meaning. Perhaps more crucially, it is a contingency that may not affect the defendant at all. It is highly unusual for bail to be posted by the accused, and the ultimate consequence of failing to appear may ultimately harm a third party who has posted cash or served as an obligor for a bond on their behalf.

In contrast, those released "under conditions" may be required to comply with any number of restrictions on their liberty, or "attendant circumstances," such as reporting to supervised release or being subjected to electronic monitoring. *See* C.P.L. § 500.10(3-a)(a)-(j). These conditions cannot be understood as contingencies, but rather represent ongoing circumstances that restrict an individual's liberty for the pendency of their criminal case.

In sum, "released under conditions" as used in C.P.L. § 510.10(4)(t) must be understood to mean released under non-monetary conditions. Holding that bail is a "condition" within the meaning of this provision materially changes the statute, expanding the power to impose cash bail in a way that is impossible to harmonize with either the purpose or the plain language of the statute taken as a whole.

B. The Court Does Not Release a Principal When It Fixes Bail

Reading the fixing of bail as a mechanism for "release[] under conditions" misapprehends not only the meaning of the word "conditions," but also the meaning of "release[d]." More simply, C.P.L. § 510.10(4)(t) only applies to those who have been "released" by the court. In plain and practical terms, the court does not *release* anyone when it fixes bail. Rather, the individual is taken into custody indefinitely, unless and until such time that they furnish the required financial deposit. Importantly, C.P.L. § 510.10(4), which enumerates a Court's choices of securing orders on qualifying offenses, only describes two of the available options as "releasing" the principal: "release…on the principal's own recognizance or under non-monetary conditions." Conversely, imposing cash bail is not as "releasing" someone on bail, but rather as "fixing bail."

Crafting C.P.L. § 510.10(4)(t) in this limited manner—reaching only those who were initially released on their underlying matter—served a clear legislative purpose. By creating this exception for the narrow group of defendants who had been released without bail and gotten re-arrested on additional bail-ineligible offenses, the legislature closed a gap in the bail statute, returning discretion to judges to set cash bail on those individuals with multiple open non-qualifying cases. This new section was not necessary for individuals who had posted bail, as they necessarily had an open qualifying offense that was subject to modification pursuant to C.P.L.

§ 530.60. Thus, by limiting C.P.L. § 510.10(4)(t)'s reach to those released only on recognizance or under non-monetary conditions, rather than extending it to all of those "at liberty," the legislature was able to provide an avenue for setting bail on this target group without further expanding the exposure of those whose limited financial resources were already tied up by the earlier securing order.

Initially added in the 2020 amendments to the statute, C.P.L. § 510.10(4)(t) was described by Senator Pete Harckham as "tightening some loopholes, [to make sure] that repeat offenders…are not afforded automatic release." *See* Harckham, Pete. "Bail Reform Changes Included in New Budget," April 6, 2020, included in Compendium at AC-1. *See also* Report on the 2020-21 Adopted Budget, included in the Compendium at AC-3 ("Part UU…creates a mechanism for repeat offenders to be assigned bail.").

Importantly, C.P.L. § 510.10(4)(t) was amended once again in 2022 as part of a set of amendments that the legislature repeatedly characterized as "clarifications," *See* Transcript, New York State Senate Session, April 8, 2022 at 2327, 2-16 ("[T]he modifications…were changes that were made to clarify statutes that were existing…we wanted to make sure that we clarified what bail was about."); *See also Id.* at 2330 ("What we did here…was to ensure that there was clarifying language so that judges were able to interpret the statutory construction."); *Id.* at 2359 ("[T]he intent is to ensure that we're clarifying, for the members of the bench, giving them

more discretion.") During the debates around the amendments in the New York State Senate, Senator Palumbo directly raised the concern that an individual could commit a non-qualifying offense "every single day and the court must release you," and Senator Bailey, the Sponsor of the bill, clarified that for repeat offenses, the subsequent charges would become bail-eligible. *See* Transcript, New York State Senate Session, April 8, 2022 at 2350-2351. This supports the idea that both the original addition of C.P.L. § 510.10(4)(t), as well as the subsequent addition of language specifically authorizing its use for cases involving non-negligible theft and property damage, was aiming to ensure judges had discretion to set bail for those repeatedly arrested on non-qualifying offenses who were deemed to be a flight risk.

In short, reading "released on bail" into 510.10(4)(t) materially changes the statute to capture an entire category of defendants not encompassed by the statute, contradicting both the plain language of what the legislature passed as well the legislative intent, which was explicitly to reduce the number of individuals subjected to pretrial detention on the basis of poverty.

II. THE COURT BELOW ERRED BY FINDING THE STATUTORY REQUIREMENTS OF C.P.L. § 510.10(4)(t) WERE MET IN THE ABSENCE OF ANY SPECIFIC INFORMATION RELATING TO THE UNDERLYING BRONX CASE, AND WITHOUT EVIDENCE SUFFICIENT TO ESTABLISH REASONABLE CAUSE.

Even if this Court disagrees that fixing bail is a status distinct from releasing an individual on their own recognize or on conditions, there are additional statutory requirements that must be met before bail can be set pursuant to C.P.L. § 510.10(4)(t). To sustain its burden under the statute, the prosecution must establish not only that both the underlying case and the new case being arraigned involved harm to an individual or group of individuals, but also that there is reasonable cause to believe the accused committed both offenses. *See* C.P.L.§ 510.10(4)(t). The prosecution failed to meet this burden below.

A. The People Failed to Establish Harm and Failed to Identify the Specific Individual Harmed in the Bronx Case

It is clear that the prosecution failed to establish that the underlying case in the Bronx involved harm to a specific individual because they failed to provide any details whatsoever regarding its attendant circumstances. The Court was not

provided with a complaint, the name of the victim, the actions Mr. Ortiz allegedly undertook, or the injuries sustained. Indeed, the prosecution's closest attempt to make this showing was their conclusory assertion that "the defendant's out on an attempted murder charge, which is a physical harm to the individual." Tr. Dec. 5, 2023 at 4, 25 and 5, 1.

This barebones procedural recitation plainly falls short of establishing a specific harm. Instead, the prosecution implicitly asked the court to assume every attempted murder charge involves physical harm. However, not only is physical harm not a prerequisite for indicting someone on an attempted murder charge, but also, multiple attempted murder *convictions* have been overturned on the basis of insufficient evidence in the absence of physical injury. *See, e.g., People v. Mendez*, 197 A.D.2d 485, *lv. denied* 83 N.Y.2d 807 (1993) (evidence that defendant pointed his revolver at officer's midsection from a distance was insufficient to support attempted murder conviction); *People v. Chandler*, 250 A.D.2d 410 (1998) (attempted murder conviction was against the weight of the evidence where defendant pointed a gun at a police officer from a distance of approximately twenty-five (25) feet). *See also, Holmes v. Ricks*, 378 F. Supp. 2d 171, 178 (W.D.N.Y. 2004) (Noting that "actual injury is not a prerequisite to a conviction on a charge of attempted murder" under New York Law). Accordingly, the prosecution's failure to

identify the actions and injuries alleged in the Bronx matter is fatal to their 510.10(4)(t) application.

B. The People Failed to Establish Reasonable Cause To Believe Mr. Ortiz Committed the Underlying Offense

It is clear from the plain language of C.P.L. § 510.10(4)(t) that the mere filing of an accusatory instrument is insufficient to establish reasonable cause. Because an open criminal case is a threshold requirement for this section to apply, C.P.L. § 510.10(4)(t) already presumes that the accused is charged via an accusatory instrument. Indeed, i 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 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) ("Notably, whereas simply being 'charged' with a 'qualifying offense' is enough for the court to consider bail in all of the other enumerated instances (CPL §§ 510.10 [4] [a]-[s]), subsection (t) is the only

subsection that imposes an additional requirement on the prosecutor to demonstrate 'reasonable cause' for the current crime and any underlying crimes. This deliberate addition by the legislature makes clear that the mere filing of charges involving harm to another person or property is not automatically sufficient to establish reasonable cause.")

"Words which define or delimit the reach of statutory provisions may not be disregarded as superfluous, but must be given meaning and effect." *See People v. Hedgeman*, 70 N.Y.2d 533 (1987). When interpreting a provision "[a]ll parts of a statute must be harmonized with each other . . . and effect and meaning must, if possible, be given to the entire statute and every . . . word thereof." *People v. Pabon*, 28 N.Y.3d 147, 152 (2016) (quoting McKinney's Cons. Laws of N.Y., Book 1, Statutes § 98(a)) (alteration in original).

Here, the words "reasonable cause" cannot be ignored. "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); *see also, People v. Maldonado*, 86 N.Y.2d 631, 635 (1995) ("Reasonable cause means probable cause"); *People v. Vandover*, 20 N.Y.3d 235, 237 (2012) ("In determining probable, the standard to be applied is that it must

appear to be at least more probable than not that a crime has taken place and that the one arrested is its perpetrator, for conduct equally compatible with guilt or innocence will not suffice").

While there is limited caselaw on the question of what reasonable cause requires in the C.P.L. § 510.10(4)(t) context, what is clear is that the mere existence of an arrest and corresponding accusatory instrument does not automatically sustain the burden. In *Franklin*, for instance, the court suggested that the arraigning judge review the amount of detail provided by the People in or outside of the four corners of the accusatory instrument, including the level of specificity in a verified affidavit, the reliability of any hearsay declarants, admissions by the defendant, whether any physical item was recovered, or whether there was an identification procedure, and weigh them against favorable evidence for the defendant including the existence of any Brady disclosures. *Franklin*, 149 N.Y.S.3d at 785.

In Mr. Ortiz's case, however, the prosecution failed to provide any information that would give rise to a finding of reasonable cause to believe he committed the charged offenses. It is not evident from the record that the People even bothered to provide the arraignment judge with a complaint for the underlying matter to review, let alone any additional information to supplant it.

When challenged on this failure in the proceedings before the Appellate Division, the prosecution contended that the existence of the indictment on Mr. Ortiz's RAP sheet sufficed to meet their burden. (People's Answer, p. 25-26.) Nothing in the language of C.P.L. § 510.10(4)(t) suggests that the existence of an indictment on a RAP sheet would suffice, and indeed, the existence of these detailed due process requirements renders such an interpretation absurd. An entry on a RAP sheet is plainly insufficient, standing alone, to establish reasonable cause, as RAP sheets do not contain any "evidence or information" that "discloses facts or circumstances." C.P.L. § 70.10(2).[8]

Further, an entry on a RAP sheet cannot identify the specific allegations in an open matter, including who, if anyone, was allegedly harmed. Nor does a RAP sheet entry convey the procedural posture of the case, whether any important decisions have been made relating to suppression, whether *Brady* disclosures have been made, or any other number of factors that would be relevant to determining if reasonable cause exists to believe that an individual committed that offense.

Despite the Legislature's deliberate choice to infuse this provision with due process protections, judges—in Mr. Ortiz's case and countless others—have essentially expanded the exception to apply wherever an individual has two open

[8] *See* New York Model Jury Instruction "Indictment Is Not Evidence;" *See also People v. Greaves,* 94 N.Y.2d 775 (1999).

cases, without making any of the statutorily mandated inquiries regarding the nature or strength of those cases. Mr. Ortiz's case represents a particularly egregious example of courts abandoning the requisite due process, as literally no information beyond the charge was presented to the court. Despite multiple bail applications, the prosecution never provided the name of the complainant, the extent of the injuries—if any were actually sustained, or even the acts complained of with respect to the Bronx matter, much less any evidence tending to show reasonable cause to believe that Mr. Ortiz was actually guilty of the offense.

In short, allowing the mere existence of an indictment on a RAP sheet to satisfy the requirements of C.P.L. § 510.10(4)(t) would eviscerate the important due process protections created by the legislature, harming countless individuals and expanding pre-trial incarceration.

* * *

This Court should honor the legislative intent, rule of lenity, and some third thing and find that C.P.L. § 510.10(4)(t) does not apply in cases where bail is fixed and later posted on an underlying case. Doing so will permit judges the discretion to set bail for individuals who pick up multiple non-qualifying offenses, without simultaneously enabling the radical expansion of pretrial detention that has resulted from the frequent, pervasive misapplication of this section.

Failing that, however, this Court should uphold the clear due process protections envisioned by C.P.L. § 510.10(4)(t) and hold that it was an abuse of discretion to set bail pursuant to that section without any specific information about the underlying Bronx matter. Permitting the Appellate Division's ruling to stand will dramatically rewrite C.P.L. § 510.10(4)(t) to permit cash bail whenever an open case appears on a RAP sheet. The Legislature mandated a significantly more protective standard—explicitly placing a burden on the government before an individual could be stripped of their liberty. This Court should honor that law.

CONCLUSION

For the reasons set forth above, this Court should reverse the March 11, 2024 decision and judgment of the Appellate Division, Second Department.

Respectfully Submitted,

TWYLA CARTER
The Legal Aid Society
120-46 Queens Blvd.
Kew Gardens, NY 11415

By: Danielle Welch
Of Counsel

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.

2. The typeface used is Times New Roman.

3. The point size of the text is 14 point.

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

5. The brief contains 7,568 words, exclusive of the Table of Contents, 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
October 4, 2024

Danielle Welch

Of Counsel

COURT OF APPEALS
STATE OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK, EX REL. DANIELLE WELCH, ESQ. on behalf of CHRISTOPHER ORTIZ, Petitioner-Appellant, v. LYNELLE MAGINLEY-LIDDIE, Commissioner, New York City Department of Correction, Respondent.	AFFIRMATION OF SERVICE BY USPS & E-MAIL APL-2024-00079

STATE OF NEW YORK)
) ss.:
COUNTY OF QUEENS)

Danielle Welch, an attorney duly admitted to the practice of law in this State, does hereby affirm and show:

That, on October 4, 2024, three true and correct copies of the within Appellant's Brief were served via United States Postal Service, Express Service upon the respondent at the addresses designated by them for that purpose, and a courtesy electronic copy was sent via electronic mail:

Queens County District Attorney, Attention: ADA Christine Occhiogrosso, 125-01 Queens Boulevard, Kew Gardens, New York 11415;
ceocchiogrosso@queensda.org

Queens County District Attorney, Attention: Appeals Bureau, 125-01 Queens Boulevard, Kew Gardens, New York 11415.
appeals@queensda.org

Dated: Queens, New York
October 4, 2024

Danielle Welch
The Legal Aid Society
120-46 Queens Blvd.
Kew Gardens, NY 11415
646-430-0699
DWelch@legal-aid.org